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October 23, 2009

VIA EMAIL

Rae Gabelich
8th District Council Member
Economic Development and Finance Committee
Long Beach City Council

Re: Tom Reeves' Comments Regarding the Legality of Medical Marijuana Dispensaries

Dear Councilwoman Gabelich:

This law firm and the undersigned have been retained by long time Long Beach resident and medical marijuana patient David Zink to write to you in response to certain comments made by Long Beach City Prosecutor Tom Reeves to the Long Beach Economic Development and Finance Committee regarding the establishment of local regulations for medical marijuana "dispensaries" in Long Beach. Both partners of this law firm are members of the National Legal Committee of NORML (National Organization for the Reform of Marijuana Law) and one partner is State Bar Certified Criminal Law Specialist. Our firm represents a large number of medical marijuana patients, collectives, and cooperatives throughout California.

According to the Long Beach Press-Telegram article "Council delves into regulations for medical marijuana" by Paul Eakins, dated September 21, 2009:

> "City Prosecutor Tom Reeves told the committee that regulating dispensaries, collectives and cooperatives requires 'really careful study.' 'Assuming they can operate lawfully, regulating them is a significant challenge,' Reeves said. The organizations are considered caregivers for patients, who receive recommendations - not prescriptions - from doctors to use medical marijuana, he said. Doctors and their patients have confidentiality under the law, while the law isn't clear on what kind of confidentiality caregivers have, Reeves said. So, determining if patients are abusing the system would be difficult, he said.
>
> Both he and Meyers said that they attended a summit last week held by District Attorney Steve Cooley, at which the message was that dispensaries are illegal and will be prosecuted.

> Ultimately, he said, that means Long Beach can't or shouldn't try to regulate them.
>
> 'Over-the-counter sales are illegal,' Reeves said.
>
> That didn't put the committee any closer to a solution.
>
> 'So you're not helping us any,' Councilwoman Tonia Reyes Uranga said.
>
> 'I'm helping you a great deal,' Reeves said. 'I just told you that you can't regulate illegal businesses.'"

A copy of the articles is enclosed herewith for your reference. It is the opinion of this law firm and Mr. Zink that Mr. Reeves' comments regarding the legality of medical marijuana "dispensaries" are incorrect and mistaken. Please allow this correspondence to address Mr. Reeves' inaccurate and incorrect statements in the order they appear in the above-referenced newspaper article.

Caregivers

Mr. Reeves is quoted as saying: "The organizations are considered caregivers for patients, who receive recommendations - not prescriptions - from doctors to use medical marijuana, he said." There are two California statutes that enable an individual to possess medical marijuana and give it to another person. Health & Safety Code section 11362.5, subdivision (d) provides as follows:

> "[Health & Safety Code] Section 11357, relating to the possession of marijuana, and [Health & Safety Code] Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

(Health & Saf. Code, §11362.5(d)). Under this statute, a person who qualifies as a medical marijuana patient's "primary caregiver" can grow and possess medical marijuana for their "patient." See *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 ("...the voters could not have intended that a dying cancer patient's 'primary caregiver' could be subject to criminal sanctions for carrying otherwise legally-cultivated and possessed marijuana down a hallway to the patient's room.").

The second statute is Health & Safety Code section 11362.775 which provides in full as follows:

> "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 [Health & Safety Code] Section 11357 [possession], [Health & Safety Code] 11358 [cultivation], [Health & Safety Code] 11359 [sales], [Health & Safety Code] 11360 [transportation], [Health & Safety Code] 11366 [maintaining a location where controlled substances are sold], [Health & Safety Code] 11366.5 [leasing the same], or [Health & Safety Code] 11570 [abatement of nuisance of location where controlled substances are sold]."

(Health & Saf. Code, §11326.775). Under this statute, qualified patients and caregivers may associate "collectively" or "cooperatively" to cultivate medical marijuana. If they are collectively or cooperatively cultivating medical marijuana in California, those qualified patients and caregivers cannot be convicted of the stated marijuana-related offenses. Thus, if a person is either a qualified patient's "primary caregiver" or in an association "cooperatively" or "collectively" cultivating medical marijuana, then that person has the ability to provide medical marijuana to an otherwise qualified patient.

It has long been held that "dispensaries" usually cannot meet the requirements of being a qualified patients' "primary caregiver." See *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, review denied (court rejected the assertion that a cannabis buyer's club could qualify as a primary caregiver). The primary case on the caregiver issue is *People v. Mentch* (2008) 45 Cal.4th 274. "Mentch supplied medical marijuana through his business, the Hemporium." (45 Cal.4th at 279.) "Considering the evidence seized from Mentch's bank and residence, as well as his statement to [the detective, who then] opined [and the jury believed] that while Mentch may have personally consumed some of the marijuana he grew, his operation was primarily a for-profit commercial venture." (45 Cal.4th at 279.) Even recently, in *People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1003, the appellate court concluded that dispensary purporting to act as its patient-members' caregiver did not qualify under the statute.

When Mr. Reeves stated that "the organizations are considered caregivers," he is only partially correct. There are some dispensaries that purport to be the patient-members' primary caregiver. For most of them, they cannot meet the requirements to be a primary caregiver. That is because "...a defendant whose caregiving consisted principally of supplying marijuana and instructing on its use, and who otherwise only sporadically took some patients to medical appointments, cannot qualify as a primary caregiver under the Act...." (*Mentch, supra*, 45 Cal.4th at 277-78). Please recall, however, that there is another circumstance in which one person can supply another with medical marijuana – an association of qualified patients and caregivers under Health & Safety Code section 11362.775. There is no requirement that such an

association also serve as the patient-members' primary caregiver. The association simply needs to be made up of California qualified patients and their actual caregivers.

This is a position supported by State Attorney General Jerry Brown. In August 2008, Mr. Brown issued his *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*. Under California law, the Attorney General's opinions are not binding on any court and thus cannot truly be considered "the law." They are, however, given everything from "great weight" (*Cramer v. Superior Court* (2005) 130 Cal.App.4th 42, 49) to "great respect" (*Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 751-752) from the courts. Thus, while the Guidelines are not the law per se, it is highly likely that a court will look to the Guidelines to determine whether a particular person was complying with California medical marijuana laws.

Mr. Brown stated that these guidelines are "meant to apply to qualified patients and primary caregivers who come together to collectively or cooperatively cultivate physician-recommended marijuana...." Thus, when Mr. Reeves states that the "organizations are considered caregivers," this is a position directly contradicted by statutes enacted in 1996 and 2003, case law that has been on the books since 1997, and our State's own Attorney General. These "organizations" are not all caregivers; some of them are validly formed and organized associations of qualified patients and their caregivers.

Over the Counter Sales/Illegality of Business

Mr. Reeves is also quoted as stating: "[o]ver-the-counter sales are illegal" and that "...you can't regulate illegal businesses." It is unclear where Mr. Reeves draws support for this position as it is contradicted by the aforementioned statutes and the Attorney General's Guidelines. Furthermore, this issue was expressly addressed in the Hochanadel case referenced above. The appellate court stated that: "[w]e also conclude that storefront dispensaries that qualify as 'cooperatives' or 'collectives' under the CUA and MMPA, and otherwise comply with those laws, may operate legally." *Hochanadel, supra*, 176 Cal.App.4th at 1002 (emphasis added). Perhaps Mr. Reeves is being ambiguous with his use of the word "sales." Health & Safety Code section 11362.765, subdivision (a) provides: "nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit." (Health & Saf., Code, §11362.765, subd.(a)). The Attorney General's Guidelines provide:

> "[m]arijuana grown at a collective or cooperative for medical purposes may be:
> a) Provided free to qualified patients and primary caregivers who are members of the collective or cooperative;
> b) Provided in exchange for services rendered to the entity;
> c) Allocated based on fees that are reasonably calculated to cover overhead costs and operating expenses; or
> d) Any combination of the above."

The Guidelines further state that:

> "[a] dispensing collective or cooperative may credit its members for marijuana they provide to the collective, which it may then allocate to other members. (§ 11362.765(c).) Members also may reimburse the collective or cooperative for marijuana that has been allocated to them. Any monetary reimbursement that members provide to the collective or cooperative should only be an amount necessary to cover overhead costs and operating expenses."

Thus, if the "sales" to which Mr. Reeves is refereeing are reflective of something other than reimbursement for overhead costs and operating expenses, then the sales are illegal. However, if the patient is only compensating the collective or cooperative for its overhead and operating expenses, then the "sale" is not illegal under Health & Safety Code section 11362.775, subdivision (a) and the Attorney General Guidelines. Furthermore, cooperative and collectives who are providing qualified patients and caregivers medical marijuana in exchange for overhead and expenses are not engaged in an illegal business under the same authority. If Mr. Reeves is referring to sales to medical marijuana from a "dispensary" to a person who is not a member of the collective or cooperative entity that operates the "dispensary" or is not a qualified patients, then he is correct. However, Mr. Reeves broad statement that over the counter sales are illegal and that the underlying business is illegal is not supported by California law.

It is the hope of Mr. Zink and this law firm that the Long Beach City Council will consider Mr. Reeves' comments with caution in consideration of the foregoing authorities and strongly consider alternative viewpoints from others more familiar with the current state of the law. If there is any further information that either Mr. Zink or this law firm can provide to you, please let us know and we will endeavor to provide it to you as quickly as possible. Thank you for your time.

Sincerely,

LEIDERMAN DEVINE LLP

/s/ James B. Devine

James B. Devine

JBD

Enclosures

Cc: client (w/ encl.)