11-10-09

R-10

MEMORANDUM

TO: Councilwoman Rae Gabelich
FROM: James B. Devine, Attorney for David Zink
DATE: November 9, 2009
RE: P -10

Please recall that on or about October 23, 2009, I wrote to you a letter on behalf of David Zink responding to comments made by City Attorney Reeves regarding the legality of medical marijuana dispensaries in Long Beach. On November 6, 2009, I was presented with Draft Ordinance R-10 from the Long Beach City Attorney's Office regarding the establishment of a local ordinance to regulate medical cannabis/marijuana collectives in Long Beach. Mr. Zink asked me to provide you with my proposed revisions to the draft ordinance and my reasoning for the proposed revisions.

Proposed revision to 5.87.105, subdivision (I)

"Medical Marijuana Collective" ("Collective") means an incorporated or unincorporated association, composed of four (4) or more Qualified Patients and their designated Primary Caregivers who associate at a particular location or Property to collectively or cooperatively cultivate Marijuana for medical purposes, in accordance with California Health and Safety Code Sections 11362.5, et seq. For purposes of this Chapter, the term Medical Marijuana "cooperative" shall have the same meaning as Medical Marijuana Collective, provided that the collective has incorporated under California law as either a consumer cooperative or agricultural cooperative.

My proposed language is underlined. I suggest adding this language to clarify the corporate structure of the collective. Only corporations that are incorporated as actual cooperatives may use that term in their name. In addition, because consumer cooperatives do not operate to make a profit, the consumer cooperative form is one frequently chosen by dispensary operators.

Proposed revision to 5.87.020

No Medical Marijuana Collective ~~or member~~ shall carry on, maintain or conduct any Medical Marijuana related operations in the City without first obtaining a Medical Marijuana Collective permit from the Department of Financial Management.

My proposal is to delete the words "or member." That is because an entity cannot be responsible for the conduct of each and every one if its members. No other California entity is directly responsible for the conduct of each and every one of its shareholders, members or partners. There is no reason to interpose such liability on medical cannabis patients. In addition, there are numerous "Medical Marijuana related operations" which are personal to the patients and are protected by California state law independent of local Long Beach ordinances. These include possession of their own medicine, cultivation of their own medicine, and transportation thereof. All of these activities would fall under

the broad definition of Medical Marijuana related operations, and they will have occurred even before the ordinance is enacted. A patient can easily be a member of the collective before it is approved, engage in conduct that is Medical Marijuana related, and violate the ordinance. Thus, the words "or member" should be removed.

Proposed revision to 5.87.030, subdivision (A)(5)

The name, address and telephone number, if they have a telephone number, of each Medical Marijuana Collective member at the time of the application, whether the member is a Qualified Patient or designated Primary Caregiver, and the name of the member(s) making the designation(s);

My proposed revisions are underlined. My first proposed revision is to address the fact that some people do not have telephone numbers, even in this day and age. The second proposed revision to address the fact that collective membership is expected to grow after initial formation. A reviewing agency could determine that since the initial membership application only listed four people (the minimum number required), but the actual membership is in the thousands, the applicant misled the City and the permit should be negatively impacted.

Proposed revisions to 5.87.030, subdivisions (A)(9)(c)-(e)

~~c. Written verification of the Collective's California tax exempt status;~~

~~d. Written verification of the Collective's federal tax exempt status; and~~

~~e. Written verification that the Collective is registered with the California Office of the Attorney General as a non profit entity~~;

My proposed revisions are to delete each one of these subdivisions. There is absolutely no requirement under California law that a medical marijuana collective achieve tax exempt status. Please recall that 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 actual text of the statute does not include the words "tax exempt" or "non-profit," which are adjectives used to describe an otherwise profit driven business who achieves certain tax benefits. Rather, the actual text of the statute focuses on the action verbs "cultivate or distribute...for profit." Courts and other administrative bodies are not empowered to insert words into or amend a statute to conform to a presumed intent that is not expressed in the statute. (See, e.g., *American Civil Rights Foundation v. Berkeley Unified School Dist.* (200) 90 Cal.Rptr.3d 789; *Troyk v. Farmers Group, Inc.* (2009) 90 Cal.Rptr.3d 589.) The Attorney General makes no mention of collectives achieving tax-exempt status in his August 2008 *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*. Thus, the current draft imports a requirement of tax-exempt and non-profit status when none is found in the underlying statute. The

importation of the extraneous requirement is unconstitutional and violates California rules of statutory interpretation.

Furthermore, since 1996, the Internal Revenue Service has not granted IRC section 501(c)(3) status to any California entity whose primary business involves medical cannabis due to the fact that the federal government still finds marijuana possession, etc. illegal. With the current draft of the ordinance, the City would merely be setting people up to fail because the federal government will not grant tax exempt status. Frankly, it seems that this is one way that those opposed to medical marijuana (despite its legality and their own employment being a result of California law only) are trying to quash an otherwise valid law. Please also recall that Health & Safety Code section 11362.83 requires cities to enact ordinances "consistent with" the Compassionate Use Act and the Medical Marijuana Program Act. By enacting an ordinance which would require the impossible, the City could hardly be considered to be "consistent with" California medical marijuana laws.

Proposed revisions to 5.87.040, subdivision (I)

The location and property is monitored at all times by web-based closed-circuit television for security purposes. The camera and recording system must be of adequate quality, color rendition and resolution to allow the ready identification of any individual committing a crime anywhere on or adjacent to the property. The recordings shall be maintained for a period of not less than ten (10) ~~thirty (30)~~ days and shall be made available by the Collective to the Long Beach Police ~~Department upon request. Consent is given by the collective under this Chapter to the provision of said recordings to the Police Department without requirement for a~~ upon presentation of a valid, legal, and lawfully obtained search warrant, subpoena or court order;

My proposed revisions include underlined new language and stricken through deleted language. My first revision is to address a technological issue. Please recall that the proposed hours of operation are between 10:00 a.m. and 8:00 p.m. which is 10 hours per day. Some data storage units can hold up to 120 hours of video recording, which is approximately 12 days. To keep 30 days of recording would require the collectives to purchase extremely expensive equipment, which is an unfair burden. Jewelry, convenience, and liquor are just, if not more, ripe for crime than a dispensary. However, they are not required to maintain this level of data storage.

My second revision is to address the Fourth Amendment of the United States Constitution, which protects against unreasonable searches and seizures. There are tomes of legal text on the sanctity of the Fourth Amendment and why it is one of the last bastions of personal freedom and protection. Rather than have me explain why the Police Department should obtain a warrant, I think it would better to ask the City Attorney why the citizens and tax payers of Long Beach should be deprived of their constitutional protections. If these provisions are kept in the ordinance, the City will undoubtedly have groups like the ACLU, NORML, and ASA lining up to file lawsuits the first time a Long Beach Police Officer attempts to enforce this statute.

Proposed revision to 5.87.050

A Medical Marijuana Collective permit issued pursuant to this Chapter shall become null and void upon the cessation of the Collective, upon the relocation of the Collective to a different Property, or upon a violation by the Collective ~~or any of its members~~ of a provision of this Chapter.

As with an earlier revision, this ordinance impermissibly allocates the conduct of a member to an entity. There is only so much control that an entity has over its members. Furthermore, a dispensary could have one rogue member out of hundreds. Why should the rest of the members be punished for the conduct of another member? This is akin to having one member of the City Attorney's office or an officer of the Police Department violating a statute and the rest of the office/department having to resign. I am sure that is not a situation the City Attorney would want for his own office or for the Department.

Proposed revision to 5.87.060, subdivision (A)(4)

~~The full name, address, and telephone number(s) of each member to whom the Collective provides medical marijuana;~~

My proposed revision is to delete this subdivision because it violates the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 USC 1320d and 45 CFR 160-164. Medical information is private. There is no restriction on the use of the information collected under the ordinance. Absent a notice to each member that the City wants their information, a signed waiver of HIPAA rights by the patient, and controls over the City's use of the information, this statute is also grounds for litigation.

Proposed revision to 5.87.060, subdivision (B)(4)

These records shall be maintained by the Medical Marijuana Collective for a period of five (5) years and shall be made available by the Collective to the City upon ~~request. Consent is given by the Medical Marijuana Collective and its members pursuant to this Chapter to provide said records to the City without requirement for a~~ presentation of a valid, legal, and lawfully obtained search warrant, subpoena or court order.

This proposed revision is made for the same reasons as with section 5.87.040, subdivision (I).

Proposed revision to 5.87.090, subdivision (K)

~~No Medical Marijuana Collective shall possess more than five (5) pounds of dried marijuana or more than one hundred (100) plants of any size at the Property.~~

My proposed revision is to delete this subdivision. The case *People v. Kelly* was argued on November 3, 2009. In this case, the constitutionality of the limitations of 8 dry ounces, 6 mature plants, and 12 immature plants found in Health & Safety Code section

1162.77. During oral argument, the Attorney General noted that its position in the case had evolved since the case was filed. Now, the Attorney General agrees that the numerical limitations are unconstitutional. The balance of the statute, i.e., that the patient may "possess an amount of marijuana consistent with the patient's needs" was to remain intact, a position with which the defense agreed. It is expected that within 90 days, the numerical limitations will be deemed unconstitutional. Similarly, here, the imposition of numerical limitations will be unconstitutional. Accordingly, the City should not adopt any limitations and instead rely on the existing state law requiring the amount to be reasonably necessary for the patient's medical needs. This can easily be applied to the collective because the number of patients will be easy to identify and their needs can be extrapolated from there.

Conclusion

If there is any additional information you need or any questions you may have, please do not hesitate to contact me directly at 805-654-0200, extension 23.