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March 25, 2010

Jose Salcido
Senior Policy Advisor
Office of the Mayor
City of San José
200 East Santa Clara Street
San José, CA 95113

Re: City Attorney's 3/16/10 "No Action" Medical Cannabis Supplemental Memorandum
Dear Lt.. Salcido:

I am a former Oakland Deputy City Attorney where I served as a Code Enforcement prosecutor. For the last five years I have provided policy and legal advice to cities and to medical cannabis dispensing collectives, and have also directed zoning initiative campaigns. Currently, I am a policy consultant to MC3 (an organization consisting of 16 San José collectives) through my consulting firm, CannBe, where I serve as Vice President of Government Affairs.

The City Attorney's "No Action" position is legally flawed and will lead to poor public policy for the following reasons.

I. The City Attorney Mistakenly Assumes that All Commercial Collectives are Illegal under State Law.

II. The City Attorney's Reliance on the San José Municipal Code Provision that Any Federal Law Violation is an Unpermitted Use is Untested, Inconsistent with State Law, and Inconsistent with the City Attorney's Own Analysis.

III. Storefront Medical Cannabis Dispensing Collectives are Legal Under State Law, and Sound Policy Considerations Compel the City Council to Direct Staff to Prepare an Ordinance Regulating Them.

I. The City Attorney Mistakenly Assumes that All Commercial Collectives are Illegal under State Law.

In his 3/16/10 "No Action" memo, the City Attorney asserts, without legal authority, that "commercial dispensaries" are illegal under state law. (Pages 2, 3, and 4 of the memo.) This is apparently in contrast to cultivation

collectives that do not engage in commercial distribution of cannabis, which the City Attorney implies are the only legal collective form under state law. But this over-simplified "distinction" is based on a false assumption that collectives cannot legally operate as "commercial dispensaries."

The exact opposite is true: the California Attorney General has specifically opined that properly organized and operated "storefront dispensaries" are legal under state law, and that only those that "do not substantially comply" with state law are not legal.[1] Therefore, the City Attorney's simplistic position that all storefront dispensing collectives are illegal and can therefore be disregarded is untenable and contrary to California law.

Thus, the policy task before the City is to ensure that storefront collectives are "properly organized and operated." The City Council should therefore direct Staff to draft an ordinance to that end: sensibly regulating storefront collectives to enforce responsible operation in suitable locations, creating a cost-recovery regulatory fee, and possibly proposing a specific tax on storefront collectives for submission to the voters.

II. The City Attorney's Reliance on the San José Municipal Code Provision that Any Federal Law Violation is an Unpermitted Use is Untested, Inconsistent with State Law, and Inconsistent with the City Attorney's Own Analysis.

The City Attorney notes that under Title 1 and Title 20 of the Municipal Code, use of property that violates Federal law is deemed a nuisance and is not allowed. (Pages 2 and 4 of the 3/16/10 "No Action" memo.) Such municipal code provisions that purport to ban medical cannabis dispensing collectives because of Federal law violations have never yet been tested in the courts. When they are so tested, they are likely to fail because the California Court of Appeal has already held that it is not the job of the State, its political subdivisions and its local agencies to enforce Federal law, but that rather they must uphold and implement State law.[2]

The City Attorney specifically recognizes this truth that the City must uphold the State medical cannabis laws over Federal law when he acknowledges that the San José Police Department must returned seized medical cannabis to patients entitled to possess it under State law. (3/16/10

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[1] "It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that dispensaries that do not substantially comply with the guidelines set forth in sections IV(A) and (B), above, are likely operating outside the protections of Proposition 215 and the MMP, and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law." California Department of Justice, Office of the Attorney General, *Guidelines For The Security And Non-Diversion Of Marijuana Grown For Medical Use*, August 2008, p. 11.

[2] *City of Garden Grove v. Superior Court (Kha)* (2007) 157 Cal.App.4th 355, 391-92 ("But it must be remembered it is not the job of the local police to enforce the federal drug laws as such. For reasons we have explained, state courts can only reach conduct subject to federal law if such conduct also transcends state law, which in this case it does not.")

"No Action" memo at p. 3.) He must take this State over Federal law position because of the case cited immediately above, *Garden Grove.* The California Court of Appeals is likewise likely to hold that the City cannot bar the establishment of storefront medical cannabis collectives, legal under State law, merely because they violate Federal law. The State (and the City) "cannot do indirectly what it cannot do directly."[3]

Thus, the City Attorney's position is logically inconsistent: he acknowledges that the City must follow State law, not Federal law, when it comes to returning seized medical cannabis to patients, but illogically he asserts that the City need not follow State law, and can instead follow Federal law, when it comes to allowing legal storefront collectives. That inconsistency is fatally flawed, it cannot be the basis for sound policy, and it is likely to make San José the next test case in the continuing line of cases holding that Cities and other State agencies cannot hide behind Federal law, but must follow State medical cannabis law.[4]

Again, the policy task before the City is to ensure that storefront collectives are "properly organized and operated." The City Council should therefore direct Staff to draft an ordinance to that end. There is no other sound policy direction.

III. Storefront Medical Cannabis Dispensing Collectives are Legal Under State Law, and Sound Policy Considerations Compel the City Council to Direct Staff to Prepare an Ordinance Regulating Them.

As I mentioned in our meeting yesterday, where there have been issues associated with storefront collectives, those issues have arisen from local government's failure to promptly regulate. This is most noticeable in the City of Los Angeles where after almost three years, regulations are yet to be implemented. But where local government has promptly regulated, no such issues exist.[5] This clearly demonstrated in localities as diverse as San Francisco, Oakland, Berkeley, Santa Rosa, Sonoma County, and Sebastopol.

It will be tragic, because so predictable, if San Jose makes the same mistake as Los Angeles and fails to regulate—and then suffers the same unregulated growth of storefront collectives. San Jose is a smart City and it needs to do the smart thing: regulate and control storefront collectives now.

The City Attorney's "No Action" position is fatally flawed—it has no legal basis, but rather is based on the notion that the City can somehow turn back the hands of time and put the genie back in the bottle. That option is not available. The City Attorney's "No Action" position is cruel in its

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[3] *Ibid.* at 379.

[4] See again, *Garden Grove*, and also *People v. Tilehkooh,* cited therein.

[5] See 3/24/10 East Bay Express article:
http://www.eastbayexpress.com/ebx/the-return-of-reefer-madness/Content?oid=1661015
and See SF Chronicle post-regulation article:
http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/14/BAS313G9VL.DTL

assumption that medical cannabis patients can individually (or in small affinity groups) grow their own medicine—like "tomatoes and roses." That is not a compassionate position. Rather it is a position calculated to inflict needless suffering on thousands of San Jose patients.

The only proven effective system of cultivation and distribution is one based on regulated storefront collectives. Despite the City Attorney's baseless assertions, such collectives are legal under State law. All that remains is for San José to craft a workable set of sensible regulations. The City Council should direct staff to draft an ordinance for the Council's action before the summer recess.

In the mean time, the City should reserve Code Enforcement resources for actual complaints of nuisance in fact, blight, or substantive code violations. Expending staff time on attempting to enforce an unenforceable "Federal law" policy is a misuse of a precious resource. As with all the Code Enforcement, inspection and action should be driven by actual complaints and demonstrated public safety concerns.

Thank you for all your good work.

Yours very truly,

James Anthony