MEDICAL MARIJUANA CAREGIVERS
ASSOCIATION OF EL DORADO COUNTY
P.O. Box 721
Shingle Springs, CA 95682
530.677.5362
Fax 530.677.5378

November 21, 2011

Board of Supervisors
El Dorado County
330 Fair Lane
Placerville, CA 95667

COPY SENT TO BOARD MEMBERS FOR THEIR INFORMATION
DATE 11-21-11
Dists 1-5, File, CAO, Counsel

2011 NOV 21 AM 11:40
BOARD OF SUPERVISORS
EL DORADO COUNTY

Re: Ordinance 4969

Dear Board Members,

Upon review of Ordinance 4969, there appears to be many factual problems with the findings on which this ordinance was based and each will be addressed in this letter.

Finding D in Section 1of Ordinance 4969 states, "The MMPA allows cities, counties, and other governing bodies to adopt and enforce rules and regulations consistent with the MMPA." The MMPA states in Section 1(b), "It is the intent of the Legislature, therefore, to do all of the following :" which includes Section 1(b)(2), "Promote uniform and consistent application of the act among the counties within the state." And Section 1(b)(3), "Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." In Ordinance 4969 the word "prohibit" in its several forms are used no less than nine times. Prohibition is not regulation and Ordinance 4969 appears to be inconsistent with the intent of the Legislature.

Finding E speaks of "primary caregivers" and that they were extensively defined in the MMPA. In November, 2008, the case *People v. Mentch* separated primary caregivers affirmative defense in criminal court from collective and cooperatives as defined by the MMPA that are organized for the cultivation and distribution of medical marijuana. Collectives and cooperatives are not "primary caregivers".

Finding J describes a shameful event in county governance in which the El Dorado County Planning Commission and the El Dorado County Board of Supervisors conspired, without notice to the principals involved, to use their positions to enact local ordinance with the express purpose of enforcing federal law over state law. Similar actions happened variously around the state and did not go unchallenged, culminating in the ruling found in *Qualified Patients Association v. City of Anaheim*, "The city may not justify its ordinance solely under federal law, nor in doing so invoke federal preemption of state law that may invalidate the city's ordinance."

Finding K states "Between 2005 and 2011, several marijuana distribution facilities began operating in El Dorado County, in violation of the County's prohibition on dispensaries." For the record, Medical Marijuana Caregivers Association of El Dorado County (MMCA) incorporated with the state as a nonprofit in January 2004 shortly after the enactment of the MMPA and predating any attempts by the county to regulate or prohibit the cultivation or distribution of medical marijuana. El Dorado County Ordinance Code 5.08.070 defines exemptions from county business license requirements and includes nonprofit organizations and their officers and members while acting for such organization.

Finding L pulls one sentence out of context from the last page of the Attorney General's Guidelines. Let us look at the complete passage from the "Enforcement Guidelines" titled "Storefront Dispensaries:" – "Although medical marijuana "dispensaries" have been operating in California for years, dispensaries, as such, are not recognized under the law. As noted above, the only recognized group entities are cooperatives and collectives. (H&S Code Sec. 11362.775) 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 section 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." The Attorney General Guidelines goes on to reiterate that dispensaries are not primary caregivers and finishes the Guidelines with a small section titled "Indicia of Unlawful Operation."

Finding M cites AB 1300, allowing regulation that is consistent with this article. Prohibition, as proposed by El Dorado County, is the opposite of regulation and is not consistent with state law.

Finding N correctly quotes Governor Brown with regards to the "cities and counties authority to regulate medical marijuana dispensaries" but, notably absent is any reference to "prohibition".

Finding O points to "widely reported news stories" as evidence of crime and "serious adverse impacts" related to "dispensaries". Missing, here, is any citation of local news stories of crime related to local dispensaries. There are, though, a lot of bank robberies on the front pages of the Mountain Democrat. In our eight years of operation, MMCA has had only one break-in at our storefront facility. Thanks to the El Dorado County Sheriff's swift response to our alarm, nothing was taken, but we then experienced the same frustration that many patients endure when there is a crime that involves medical marijuana – the Sheriff's Department focuses its attention on the victim and the question of whether the victim is a "qualified patient", forgetting about the criminal, and deciding whether the victim deserves equal protection under the law. El Dorado County qualified medical marijuana patients learned quickly that calling the Sheriff's Department and reporting a crime involving medical marijuana was the biggest mistake of their lives.

Finding P is reporting other jurisdictions experience that "most, if not all, medical marijuana distribution facilities do not operate as true cooperatives or collectives in compliance with the MMPA and the Attorney General Guidelines". The operation of MMCA cannot be properly evaluated by taking notice of the experience of other jurisdictions.

Finding Q notes an increase of crimes in the vicinity of dispensaries as reported by citizens and law enforcement officers. Medical marijuana dispensaries share the same problems with liquor stores, bars, and drugs stores, and vigilance is an important factor in the safe and responsible operation of any business.

Finding R reinforces the fact that El Dorado County Ordinance 4683, referred to in Finding J as the basis of the County's prohibition of dispensaries, was seriously flawed and unenforceable.

Finding S has the Board of Supervisor's seeking to clarify the "existing prohibition on medical marijuana dispensaries" and to include a clear prohibition on "collectives and cooperatives' in amendments to the County's Zoning Code. As noted in Finding J and reinforced by Finding R, there has never been a prohibition on medical marijuana distribution facilities. The single word "dispensary" is not enough to describe a medical marijuana distribution facility. California case law has defined collective cultivation of medical marijuana and affords not only the affirmative defense in criminal court, but also a right to seek justice in civil court. In *County of Butte v. David Williams*, published July 1, 2009, a county may not prohibit the collective cultivation of medical marijuana and that a collective can seek damages from the county in civil court.

All of these troubling findings were used to justify Section 2 of Ordinance 4969 – "Imposition of Moratorium on Medical Marijuana Distribution Facilities" and create an untenable breach of inalienable rights. In Section 2 is paragraph (B), which goes about defining a "medical marijuana distribution facility" as a place where three or more patients "meet or congregate collectively or cooperatively to cultivate or distribute marijuana, in any form, for medical purposes under the purported authority of California Health and Safety Code section 11362.5." The "purported" authority? Does County Counsel, Board of Supervisors and the Planning Commission doubt the State's authority with regard to 11362.5 and Proposition 215. Let me pull a couple lines from a Client Alert Memorandum directed to "All Police Chiefs and Sheriffs" dated May 19, 2009. Here's the first sentence, "The United States Supreme Court refused to hear the constitutional challenge lodged by the counties of San Diego and San Bernardino, to Proposition 215." And the conclusion, "By refusing to accept the case, without any comment, it would appear that the U.S Supreme Court does not believe California's law is barred by the supremacy clause." This memorandum is very informative and is included with this letter.

In speaking of the U.S. Constitution, we get now to the extremely serious part of Ordinance 4969 with its Imposition of Moratorium on Medical Marijuana Distribution Facilities in that by prohibiting the ability of three or more patients to "meet or congregate" El Dorado County treads on dangerous grounds. The Board of Supervisors probably took note of the size of the crowd at the November 15th Board meeting. Those were the "first responders" from a tightly knit network who take issue with the restriction of their right to freely associate and the crowd will only snowball from here. And, of course, we are well aware of the successful implementation of the referendum process when bad law is made.

Finally, this ordinance was rushed through without an apparent cause for the "urgency", this lack of guidance having existed unaddressed for over a decade. The urgency was, in the fact, the publishing on November 9, 2011, of the *City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc.* opinion, and the Board of Supervisor's could not wait to apply this new

tool to their agenda of prohibition. On October 4, 2011, the case of *Ryan Pack v. City of Long Beach* was published and County Counsel cites it for its ruling that "permitting" medical marijuana dispensing would constitute an obstacle for the enforcement of federal law. The opinion went on to speak to "Severability" and concluded that the beyond the actual permitting, the rest of the City of Long Beach's regulations with regards to medical marijuana dispensing were not preempted by federal law and therefore severable from the permitting in the city's code. Regulation is neither permitting nor prohibiting, and regulation is still legal with regards to federal law. One last quote, from the *Pack* opinion, "There is a distinction, in law, between not making an activity unlawful and making the activity lawful. An activity may be prohibited, neither prohibited nor authorized, or authorized." This is not a black and white issue and it is not going away by passing bad law.

At the November 15th Board meeting, the Board indicated that they would rethink their strategy of prohibition and include the principals involved with this issue in further discussions. That is commendable and we all hope they follow through this time. We have heard it before, and then we got Ordinance 4683.

Please carefully consider the foregoing and if there are any questions or documentation requests I am always available.

Sincerely,

Matt Vaughn

Vol. 24 No. 14 May 19, 2009

JONES & MAYER
Attorneys at Law
3777 N. Harbor Blvd.
Fullerton, CA 92835
Telephone: (714) 446-1400 ** Fax: (714) 446-1448 ** Website: www.Jones-Mayer.com

CLIENT ALERT MEMORANDUM

To: All Police Chiefs and Sheriffs

From: Martin J. Mayer, Esq.

U. S. SUPREME COURT REJECTS CHALLENGE TO PROP 215

The United States Supreme Court refused to hear the constitutional challenge, lodged by the counties of San Diego and San Bernardino, to Proposition 215. Both counties, in a unified action, sued the state of California claiming that, among other things, the requirement in SB 420 (which codified Prop 215) that counties issue ID cards to persons who had recommendations from doctors to use marijuana as medicine, violated federal law.

After losing in all of the California courts, the counties petitioned the U.S. Supreme Court to accept the cases for review but the Supreme Court said "no." Last July, in *San Diego County vs. San Diego NORML* and *San Bernardino County vs. California*, the Fourth District Court of Appeal held that "*the purpose of the (federal law) is to combat recreational drug use, not to regulate a state's medical practices.*" The Court of Appeal also said California is free to decide whether to punish drug users under its own laws.

Proposition 215 does ***not*** legalize marijuana in California - not even for medical users. What it does is establish a defense against criminal prosecution of those who have met the state requirements to be classified as "qualified patients" who have a doctor's recommendation to use marijuana for medical purposes. The Court of Appeal had said that states are not obligated to enforce federal law and, therefore, they do not have to prosecute cultivation, possession, use, or transportation of marijuana, if they choose to not do so.

In their appeal, San Diego County's lawyers had argued that California's marijuana law was "preempted under the Supremacy Clause" of the Constitution by the federal drug control laws. By refusing to accept the case, without any comment, it would appear that the U.S. Supreme Court does not believe California's law is barred by the supremacy clause.

Second Significant Loss

This is now the second major loss for those challenging the state's medical marijuana law (there are 12 other states which have also adopted laws similar to California's Proposition 215). Last year, after unsuccessfully challenging, in California courts, orders by state court judges for law enforcement officers to return marijuana after cases were dismissed pursuant to Prop 215, the City of Garden Grove petitioned the U.S. Supreme Court for review in the case of *City of Garden Grove v. Superior Court (Kha)*. The Supreme Court rejected that request, as well.

It has always been our position that such a judicial order ***did*** violate federal law. In such a case, a judge was requiring a peace officer to transfer marijuana to a person who was prohibited, under the federal Controlled Substances Act (CSA), from possessing the drug. That required an affirmative act on the part of the officer, in direct violation of the federal prohibition. Proposition 215, however, merely created a defense to prosecution under California law but one could still be prosecuted under federal law.

For more details on the current case, and on the Garden Grove case, please go to our website [www.jones-mayer.com], click on Client Alerts and scroll down to Vol. 23, No. 17, Oct. 22, 2008 and Vol. 23, No. 23, Dec. 4, 2008, respectively.

HOW THIS AFFECTS YOUR AGENCY

Although the firm of Jones & Mayer has been actively representing the interests of law enforcement in addressing the concerns created by California's medical marijuana law, it now appears that at least two of the key issues have been resolved - albeit, not as we had thought. As such, if a judge issues an order to return marijuana, it must be returned and counties must issue ID cards to those who prove they are "qualified patients."

However, the conflicts between state and federal laws regarding marijuana are still present. To add to the confusion, U.S. Attorney General, Eric Holder, recently stated that the federal government would not commit resources to prosecute medical marijuana dispensaries, in states which have decriminalized such use, ***as long as the dispensaries are in compliance with their state laws***. It is important to note that the U.S. Attorney General has also stated that the federal Department of Justice ***will continue*** to pursue and prosecute marijuana use and distribution where it is in violation of the state's laws.

A recent example of that position occurred in Morro Bay where the owner of a dispensary was prosecuted and convicted in federal court for sale of a controlled substance. Because of the statement by Holder, the federal judge delayed sentencing until the Attorney General's position could be clarified. As a result, the Director of the Executive Office for United States Attorneys stated, in a letter dated April 17, 2009, that the case of *United States v. Charles Lynch* was an example of an "investigation, prosecution, and conviction ... entirely consistent with Department policies as well as public statements made by the Attorney General." Ironically, the federal judge has still not sentenced Lynch.

It is also important to note that California law does not permit profit making dispensaries to operate under the protections of Proposition 215 or SB 420. The Guidelines issued by the California Office of the Attorney General makes a very clear distinction between dispensaries and "cooperatives" or "collectives." Cooperatives or collectives ***are*** permitted under California law, but not under federal law.

However, cities may not authorize the operation of dispensaries, or even cooperatives or collectives, for the purpose of cultivating or distributing marijuana for medical purposes. Government Code 37100 states that a city's " ... legislative body may pass ordinances not in conflict with the Constitution and laws of the State or the United States." Since distribution of marijuana violates federal law, whether in a dispensary, cooperative or collective, passing a zoning ordinance which, for example, only allows such operations to be conducted in the industrial or commercial zone of a city, would still be in violation of the laws of the United States and, therefore, prohibited under G.C. 37100.

It is imperative that all of these types of issues be dealt with only after receiving advice and guidance from your agency's legal counsel. As always, if you wish to discuss this matter in greater detail, please don't hesitate to contact me at (714) 446 - 1400 or via e-mail at mjm@jones-mayer.com