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October 16, 2017

Via E-mail

Board of Supervisors
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Re: Agenda Number: D-3
Board Hearing: October 17, 2017
Subject: Amendments to Article X Medical Marijuana Regulations

Dear Chair Hartmann and Honorable Supervisors:

This office represents several cannabis growers in Santa Barbara County. My clients' cultivation operations have been in existence since before January 19, 2016, and have at all times been in compliance with all requirements of California State law and local zoning ordinances.

I am writing to express serious concerns regarding staff's proposed new criteria for making legal nonconforming use determinations pursuant to Article X, Section 35 of the County Code. At least three of the criteria staff is proposing are not consistent with State law requirements applicable to cultivators growing on behalf of legally operating collectives or cooperatives. These new criteria, if adopted and applied by the County, will deprive cultivators who are otherwise compliant with State and local law of their fundamental vested right to continue their lawful nonconforming cultivation operations under existing Article X. We urge the Board to hold off adopting any proposed amendments to Article X until staff is clear on the criteria that can constitutionally be required for purposes of determining legal nonconforming status.

This matter will be heard by your Board during your meeting tomorrow, October 17, 2017.

I.
BACKGROUND

On January 19, 2016, the Board adopted Ordinance No. 4954, adding Article X, Medical Marijuana Regulations, to Chapter 35, Zoning, of the Santa Barbara County Code.

As adopted, Article X prohibits the cultivation and delivery of marijuana except for two very limited exemptions. One exemption is for small, personal medicinal cultivation sites as allowed by State law. The other exemption applies to medical marijuana cultivation locations that were operating in compliance with State and local laws as of January 19, 2016. Article X provides that such operations are considered to be legal, nonconforming uses that can continue to cultivate marijuana.

As originally adopted, Article X did not include a procedure the County could use to determine whether a medical marijuana cultivation location qualified as a legal, nonconforming operation. Nor did Article X contain any time limits regarding when the exemption might expire.

On July 11, 2017, the Board directed staff to prepare amendments to Article X that would:

(1) establish a procedure to determine the nonconforming status of medical marijuana cultivation locations that were operating in compliance with State and local laws as of January 19, 2016; and

(2) terminate within a reasonable period of time the legal nonconforming status of medical marijuana cultivation locations that were operating in compliance with State and local laws as of January 19, 2016.

II.
STAFF'S PROPOSED PROBLEMATIC AMENDMENTS

A new Section 35-1005 titled "Nonconforming Status Determinations" is proposed to be added to Article X which establishes an application and approval process for the County to make nonconforming status determinations. This section requires applicants to submit materials adequate to support a finding that their cultivation operations can be determined to be nonconforming based on certain enumerated criteria. Among the criteria are the following three problematic provisions:

(1) The medical cannabis cultivation location cannot be located within a 600-foot radius of a school [Health and Safety Code § 11362.768(b)];

(2) The owner/operator of the medical cannabis cultivation location must have a caregiver relationship with qualified patients and/or their primary caregivers [Health and Safety Code § 11362.5(d)]; and

(3) The quantity of medical cannabis cultivated must comply with the amounts specified in Health and Safety Code § 11362.77(a) and (b).

Despite the foregoing Health & Safety Code statutory references, none of these three proposed criteria accurately state the legal requirements that apply to cultivators growing on behalf of collectives or cooperatives operating lawfully pursuant to State law.

1. 600-Foot Minimum Distance from Schools

Health and Safety Code § 11362.768 requires certain types of medical marijuana operations to maintain a 600-foot minimum setback from schools. However, the minimum setback requirement applies only to medical marijuana cultivation operations that, as part of their operations, maintain a storefront or mobile retail outlet.

Health and Safety Code § 11362.768, subdivision (b) provides as follows: *"No medical marijuana cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medical marijuana pursuant to this article shall be located within a 600-foot radius of a school."* [1]

Health and Safety Code § 11362.768, subdivision (e) qualifies the minimum setback requirement as follows: "*This section shall apply only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a local business license*." (Emphasis added.)

Pursuant to Health and Safety Code § 11362.768, subdivision (e), the 600-foot minimum setback requirement applies only to medical marijuana cultivation operations that, as part of their operations, maintain *a storefront or mobile retail outlet.*

If, for the purpose of determining legal nonconforming status, the County were to apply a 600-foot minimum distance requirement across the board to all medical marijuana cultivation operations, irrespective of whether these operations involve *a storefront or mobile retail outlet*, the County would be imposing a new local requirement on legal nonconforming status that was not a requirement of State or local law on January 19, 2016 when Article X went into effect.

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[1] The distance is to be measured in a straight line from the property line of the school to the closest property line of lot on which the facility is to be located.

2. Caregiver Relationship With Qualified Patients and/or Their Primary Caregivers

Under California law, medical marijuana patients and primary caregivers may "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes." (Health and Safety Code § 11362.775.) State law does not require that the owner/operator of a medical cannabis cultivation location, growing on behalf of a legally operating collective or cooperative, have a caregiver relationship with the other members of the collective or cooperative.

Two appellate court cases are instructive on this point: *People v. Hochanadel* (2009) 176 Cal App 4th 997 and *People v. Urziceanu* (2005) 132 Cal App 4th 747. Both cases interpreted Health and Safety Code § 11362.775 and the legal requirements applicable to cultivators growing and distributing medical marijuana on behalf of collectives or cooperatives.

The Court of Appeal in *People v. Hochanadel* stated: "[I]n enacting section 11362.775, the Legislature 'exempted those qualifying patients and primary caregivers who collectively or cooperatively cultivate marijuana for medical purposes from criminal sanctions for possession for sale, transportation or furnishing marijuana, maintaining a location for unlawfully selling, giving away, or using controlled substances, managing a location for the storage, distribution of any controlled substance for sale, and the laws declaring the use of property for these purposes a nuisance.'" (*Hochanadel*, supra, 176 Cal App 4th at p. 1016, citing *Urziceanu*.)

The court went on to state "Thus cooperatives and collectives operated by primary caregivers and/or medical marijuana patients may have a defense to certain narcotics offenses, including those charged against defendants in this case." (Id. at p. 1017, emphasis added.)

In *Urziceanu*, the defendant was charged with conspiracy to sell marijuana. The defendant sought to present evidence that he had established a medical marijuana cooperative called "FloraCare" and could legally cultivate and distribute marijuana to individuals who had medical certificates for marijuana. The Court of Appeal upheld the defendants' right to present such evidence. In doing so, the court noted, "defendant produced substantial evidence that suggests he would fall within the purview of section 11362.775. He presented the court with evidence that he was a qualified patient, that is, he had a qualifying medical condition and a recommendation or approval from a physician. His codefendant . . . submitted that same evidence as to herself. Defendant further presented evidence of the policies and procedures FloraCare used in providing marijuana for the people who came to him, including the verification of their prescriptions and identities, the fact that these people paid membership fees and reimbursed the defendant for costs incurred in the cultivation through donations. The collective operated openly with formal, documented practices and procedures for signing up and verifying the eligibility of cooperative members. (*Id.* at p. 786.)

The Court of Appeal in *Urziceanu* concluded these facts presented "substantial evidence that suggests [the defendant] would fall within the protections of Section 11362.775." (Id. at p. 786.) Accordingly, the Court of Appeal reversed the lower court's decision, holding the lower court erred in not allowing the defendant to use Section 11362.775 as a defense to the charge of conspiracy to sell marijuana. (Id. at p. 786.)

The *Hochanadel* and *Urziceanu* cases clarify that an owner/operator of a medical cannabis cultivation location growing on behalf of a legally operating collective or cooperative need not have a caregiver relationship with the other members of the collective or cooperative. In order to be afforded legal protection under Section 11362.775, the owner/operator must be either a "qualified patient" **or** "primary caregiver," and also a member of the collective or cooperative on whose behalf they are cultivating.

The foregoing requirements were confirmed in guidelines published by the California Attorney General in August 2008, entitled "*Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*." ("A.G. Guidelines"). The A.G. Guidelines discuss on pages 9-10 the rules applicable to lawful cultivation on behalf of a collective or cooperative:

> "Collectives and cooperatives should acquire marijuana only from their constituent members, because only marijuana grown by a qualified patient **or** his or her primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative. (Health & Safety Code §§ 11362.765, 11362.775.) The collective or cooperative may then allocate it to other members of the group. Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its members. Instead, the cycle should be a closed circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members. To help prevent diversion of medical marijuana to nonmedical markets, collectives and cooperatives should document each member's contribution of labor, resources, or money to the enterprise. They also should track and record the source of their marijuana." (A.G. Guidelines, pp. 9-10 emphasis added.)

Health and Safety Code § 11362.5(d), referenced by staff in its proposed ordinance amendments, does not require cultivators growing on behalf of a collective or cooperative to have a caregiver relationship with other members. The code section cited is simply a reference to the voter initiative know as the Compassionate Use Act of 1996 ("CUA" or "Proposition 215"), and nothing in it can be read or interpreted as requiring cultivators who are part of a lawfully operating collective or cooperative to have a caregiver relationship with other members. Provided all the marijuana being cultivated and consumed is cultivated and consumed within a closed-circuit cycle, with no purchases or sales to or from non-members, qualified patients and/or primary caregivers who grow on behalf of other members of the collective or cooperative are afforded legal protection under Health & Safety Code § 11362.775.

If, for the purpose of determining legal nonconforming status, the County were to require cultivators growing on behalf of a collective or cooperative to demonstrate a caregiver relationship with all other members of the collective or cooperative, the County would be imposing a new local requirement on legal nonconforming status that was not a requirement of State or local law on January 19, 2016 when Article X went into effect.

3. The Quantity of Medical Cannabis Cultivated Must Comply with the Amounts Specified in H&S Code 11362.77(a) and (b)

Staff's proposed amendments require that the quantity of medical cannabis cultivated must comply with the amounts specified in Health and Safety Code § 11362.77(a) and (b). This is an inaccurate statement of the current law, as well as the law which existed on January 19, 2016 when Article X went into effect.

In 2010, the California Supreme Court in *People v. Kelly* (2010) 47 Cal 4th 1008 invalidated the quantity limitations adopted by the Legislature in Health and Safety Code § 11362.77(a) and (b). The Supreme Court held that the quantity limitations, imposed upon "qualified patients" and "primary caregivers," were inconsistent with the voters' intent when they approved Proposition 215, i.e., the Compassionate Use Act of 1996 (CUA). Under the CUA, "qualified patients" and "primary caregivers" are not subject to any specific limits and do not require a physician's recommendation in order to exceed any such limits; instead they may possess an amount of medical marijuana *reasonably necessary* for their, or their charges', personal medical needs.

On this basis, the Supreme Court ruled that "[S]ection 11362.77's quantity limitations conflict with and thereby substantially restrict the CUA's guarantee that a qualified patient may possess and cultivate *any amount of marijuana reasonably necessary for his or her current medical condition.* In that respect, section 11362.77 improperly amends the CUA in violation of the California Constitution." (*Kelly*, supra, 47 Cal 4th at p. 1043.)

In light of the Supreme Court's ruling in *Kelly*, cultivators growing on behalf of legally operating collectives or cooperatives may cultivate and transport marijuana in aggregate amounts tied to the *current reasonable medical needs of the membership.* They are not limited to the amounts specified in Health and Safety Code § 11362.77(a) and (b). (See A.G. Guidelines, p. 10.)

If, for the purpose of determining legal nonconforming status, the County were to require cultivators growing on behalf of collectives or cooperatives to demonstrate that the quantity of medical cannabis cultivated complies with the quantity limitations specified in Health and Safety Code § 11362.77(a) and (b), the County would be imposing a new local requirement on legal nonconforming status that was not a requirement of State or local law on January 19, 2016 when Article X went into effect.

III.
AN ACCURRATE STATEMENT OF THE RULES APPLICABLE TO CULTIVATORS GROWING ON BEHALF OF COLLECTIVES OR COOPERATIVES

According to the A.G. Guidelines, as well as the case authorities of *Hochanadel*, *Urziceanu*, and *Kelly*, the following is an accurate statement of the State law requirements applicable to cultivators growing on behalf of legally operating collectives and cooperatives:

(1) The cultivators must be either a "qualified patient" **or** "primary caregiver";

(2) They cultivators must be an actual member of the collective or cooperative on whose behalf they are cultivating;

(3) The other members of the collective or cooperative must also be "qualified patients" or "primary caregivers";

(4) The amount of marijuana being cultivated must in the aggregate be proportional to the reasonable medical needs of the membership of the collective or cooperative;

(5) No marijuana cultivated may be sold or distributed to any person, individual, or entity outside the collective or cooperative;

(6) No marijuana may be acquired from outside the collective or cooperative from any non-members of the collective or cooperative;

(7) Neither the collective or cooperative, nor any individual members of the collective or cooperative, may profit from the sale or distribution of marijuana;

(8) If the collective or cooperative operates a storefront dispensary or mobile retail outlet from the same site as its cultivation operation, the operation cannot be located within 600-feet of a school; and

(9) Any members of the collective or cooperative engaging in transactions involving medical marijuana must obtain a Seller's Permit.

IV.
DEPRIVATION OF FUNDAMENTAL VESTED RIGHTS

Cultivation locations operating in Santa Barbara County on January 19, 2016 in compliance with State and local laws have a vested right to continue to operate pursuant to the terms of existing Article X. The County may lawfully impose reasonable time limits intended to eventually terminate and eliminate these nonconforming operations, but the County cannot constitutionally impose new criteria or new requirements on the continued operation of these

cultivation sites which go beyond the requirements of State and local law in effect on January 19, 2016. Imposing new criteria or new requirements now, for the purpose of determining legal nonconforming status, and to compel the immediate discontinuance of cultivation locations which cannot meet the new requirements, would deprive these otherwise lawfully established operations of their legal nonconforming status under existing Article X. (*City of Los Angeles v. Wolfe* (1971) 6 Cal 3d 326, 337; *Livingston Rock & Gravel Co. v. County of Los Angeles* (1954) 43 Cal 2d 121 127.

V.
CONCLUSION

We recognize the challenges facing the County, especially since the State laws and regulations have been dynamic as related to cannabis. However, my clients believe strongly in pursuing a clear compliance pathway that matches State and local requirements which existed on January 19, 2016 when Article X was adopted. Requiring anything more of them, for purposes of determining legal nonconforming status, would infringe upon their constitutionally guaranteed rights. We urge the Board to hold off adopting any proposed amendments to Article X until staff is clear on what can and cannot be constitutionally required.

Respectfully submitted,

HOLLISTER & BRACE

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