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October 16th, 2017

Board of Supervisors
County of Santa Barbara
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Re: Board of Supervisors hearing October 17th, 2017
Agenda Item D3; Amendments to Article X Medical Marijuana Regulations

Dear Chair Hartmann:

Our offices represents several collectives currently cultivating medical cannabis in the unincorporated area of Santa Barbara. Our clients have, and continue to be, operating in compliance with California State law.

The proposed amendments to Article X are in direct conflict with State law as it pertains to collective and cooperative operations. Moreover, in an attempt to circumvent

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CEQA, unreasonably restricts the ability of current operators to qualify for noncnforming use status.

Requiring a caregiver relationship with qualified patients and/or their primary caregivers is an obsolete concept, and inconsistent with State.

In 2003, the Legislature enacted the Medical Marijuana Program Act (§ 11362.7 et seq.) to clarify the CUA and add provisions that were not included in the CUA. Nearly a decade of precedent developed and refined the "Collective Defense": *People v. Urziceanu* (2005) 132 Cal.App.4th 747, *People v. Hochanadel*, 176 Cal. App. 4th 997, 1009 (Cal. App. 4th Dist. 2009), *People v. Colvin* (2012) 203 Cal.App.4th 1029, *People v. Jackson* (2012) 210 Cal.App.4th 525

People v. Urziceanu (2005) 132 Cal.App.4th 747 (*Urziceanu*) provides the backbone of the Collective Defense. There the court held:

> "at trial, 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 Rodger 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. Further, he presented evidence that members volunteered at the cooperative.
>
> *People v. Urziceanu*, 132 Cal. App. 4th 747, 786 (Cal. App. 3d Dist. 2005)

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Urziceanu provided a definition of the term "services" as it applies to "payment[s] for out-of-pocket expenses incurred in providing those services," codified at § 11362.765. There the *Urziceanu* court held:

> "This section thus allows a primary caregiver to receive compensation for actual expenses and reasonable compensation for services rendered to an eligible qualified patient, i.e., conduct that would constitute sale [of marijuana] under other circumstances."

People v. Urziceanu, 132 Cal. App. 4th 747, 784-785 (Cal. App. 3d Dist. 2005) *Emphasis added*

Thereafter, the *Urziceanu* court held that the provisions of **§ 11362.765** allowing compensation for the production and distribution of marijuana also apply to collectives/cooperatives operating under § 11362.775, holding:

> **Its [§ 11362.775's] specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana.**
>
> *People v. Urziceanu*, 132 Cal. App. 4th 747, 785 (Cal. App. 3d Dist. 2005) *Emphasis added*

In *People v. Hochanadel* (2009) 176 Cal. App. 4th 997, the court, following *Urziceanu* noted:

> The MMPA also specifies that collectives, cooperatives or other groups shall not profit from the sale of marijuana. (§ 11362.765, subd. (a) ["nothing in this section shall authorize … any … group to cultivate or distribute marijuana for profit"].)

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People v. Hochanadel, 176 Cal. App. 4th 997, 1009 (Cal. App. 4th Dist. 2009)

However, the *Hochanadel* Court, held that collectives or cooperatives which appear to be a business entity, such as a "storefront dispensary," may be operating in compliance with the MMPA where:

> We find persuasive the A.G. Guidelines' opinion that if a storefront dispensary managed by primary caregivers or medical marijuana patients is truly operating as a cooperative or collective, it and its operators might have a defense to arrest and prosecution under section 11362.775. Nothing in section 11362.775, or any other law, prohibits cooperatives and collectives from maintaining places of business. If defendants can produce facts sufficient to show they were operating a true cooperative or collective, and that they were otherwise in substantial compliance with the CUA and MMPA, they may be able to raise section 11362.775 as a defense at trial.

People v. Hochanadel, 176 Cal. App. 4th 997, 1018 (Cal. App. 4th Dist. 2009)

In *People v. Colvin* (2012) 203 Cal.App.4th 1029, the court held a defendant charged with transporting one pound of marijuana between two dispensaries belonging to the same cooperative was entitled to assert a defense under section 11362.775. In so ruling *Colvin*, rejected arguments that transporting marijuana was unrelated to its cultivation and the MMP defense was limited small scale operations. "[T]o be entitled to a defense under section 11362.775, a defendant must, first, be either a qualified patient, person with a valid identification card or a designated primary caregiver. Second, the defendant must associate with like persons to collectively or cooperatively cultivate marijuana. [Citation.]" (*People v. Colvin*, supra, 203 Cal.App.4th at p. 1037.) *Colvin* found the defendant constituted a qualified patient. And, based on the detailed description of the cooperative, including the size of its membership, new member induction process, plus how and where it obtains the marijuana provided to members (*id.* at pp. 1032-1033),

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the court found the defendant belonged to a dispensary that satisfied the statutory requirements to distribute marijuana for medical purposes. "Colvin/Holistic is a cultivator . . . . All of the marijuana Holistic distributes is from a cooperative member; none of it is acquired from an outside source. Thus, even under a reading of section 11362.775 limiting transportation of marijuana only to cooperatives that cultivate it, then Colvin was entitled to the immunity." (*People v. Colvin*, supra, 203 Cal.App.4th at p. 1037.)

The facts in Colvin also demonstrate that an individual who is associated with a collective involving numerous facilities may still be operating in compliance with the MMPA.

People v. Jackson (2012) 210 Cal.App.4th 525, followed *Colvin*, also rejecting a claim the defense did not apply because of the large size of the collective to which the defendant belonged, holding:

> "The defense the MMPA provides to patients who participate in collectively or cooperatively cultivating marijuana requires that a defendant show that members of the collective or cooperative: (1) are qualified patients who have been prescribed marijuana for medicinal purposes, (2) collectively associate to cultivate marijuana, and (3) are not engaged in a profit-making enterprise. . . . Thus, contrary to the trial court's ruling, the large membership of Jackson's collective, very few of whom participated in the actual cultivation process, did not, as a matter of law, prevent Jackson from presenting an MMPA defense."

(*Id.* at pp. 529-530.)

The *Jackson* Court rejected the Attorney General's contention "that all members of a collective or cooperative must actively participate in cultivation of marijuana to bring the organization within the terms of section 11362.76. [Holding,] [s]uch a strict limitation on the means by which authorized collectives and cooperatives provide medical marijuana to their members is entirely inconsistent with the conduct permitted

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under the Attorney General's Guidelines and expressly contemplated in the Legislature's most recent amendments to the MMPA." *People v. Jackson*, 210 Cal. App. 4th 525, 537-538 (Cal. App. 4th Dist. 2012)

In *People v. Orlosky* (2015) 233 Cal. App. 4th 257, the Court held that a collective need not formally organize, and the absence of formality does not preclude the defense. *People v. Orlosky* (2015) 233 Cal. App. 4th 257, 272

Thus to be operating in compliance with the MMPA requires:

> (1) He was either a medical marijuana patient, holder of an identification card authorizing his use of medical marijuana, or the primary caregiver of such a patient or card holder;
>
> (2) associated with others to collectively or cooperatively cultivate medical marijuana; and
>
> (3) the collective or cooperative itself satisfies the statutory requirements for cultivating and distributing medical marijuana, including operating as a not for profit enterprise.

On January 19th, 2016 the MMPA was, and continues to be, the law governing collective and cooperative operations. Thus, by imposing a caregiver requirement is in direct contradiction with State law as it existed then, and as it exists now.

Use Being Property Specific.

In an effort to circumvent CEQA, the County is requiring that cultivators must have been cultivating at a specific property as of January 19th, 2016, and only that property can qualify as a legal nonconforming use. By making the use property specific, a large majority of applicants currently or planning to operate in the County of Santa

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Barbara that would otherwise qualify for State licensing will be unable to apply in a timley manner.

Many cannabis cultivators located within the County existed prior to January 19th, 2016 and in compliance with the Attorney General Guidelines for the Security and Non Diversion of Marijuana Grown for Medical Use (2008) ("AG Guidelines") and the Medical Marijuana Program Act ("MMPA"), California Health and Safety Code §§ 11362.7 et seq.). We have clients that fall within this category of operator. However, they have moved properties for various reasons. By way of example, we have a client that was cultivating in an area that did not fall within the proposed zoning and moved to a property that does. We have another client that was cultivating within the City of Santa Barbara until it was banned, then immediately shut down operations and moved to an AG property in the unincorporated area of Santa Barbara.

Both clients were cultivating prior to January 19th, 2016, in compliance with the AG Guidelines and MMPA, and now in compliance with the MAUCRSA, yet would be precluded from qualifying as a Legal Non-Conforming Use simply because they moved to new properties in an effort to **be in compliance.** These clients will therefore be unable to apply for State Licensing this fall.

We have other clients that were not in operation in the unincorporated area of Santa Barbara prior to January 19th, 2016, but are now operating, or are planning to operate, within in the proposed zoning areas. Please keep in mind that some of these clients just barely fall outside the cut-off date. Please also understand that these clients have been operating for years in compliance with the AG Guidelines and the MMPA, and are now setting up in the unincorporated areas of Santa Barbara, and in compliance with the proposed MCRSA regulations. These individuals would likewise be precluded from applying for State Licensing this fall because they were not operating in the unincorporated areas of Santa Barbara prior to January 19th, 2016.

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Whether in existence January 19th, 2016, or shortly thereafter, or new to Santa Barbara, these operators share the common goal of operating within State and Local guidelines, and have done everything to demonstrate this intention.

What is critical to understand is that the new State regulations are robust. A majority of the operators that would qualify as a Legal Non-Conforming Use will not be able to timely apply and/or otherwise qualify for State licensing. You have many current operators that have the intention, the resources and ability to qualify for State licensing, and who will be unable to do so timely because of the restrictive parameters for being an "approved" operation.

Other Counties have successfully created programs that were CEQA exempt, but did not preclude newer operators from qualifying as a legal nonconforming use, or the like. The County of Sonoma had a process they called a "Transition Period," where operators in existence on or before January 1, 2016, could continue operations during the transition period of obtaining a use permit. Because so many otherwise qualified operators would have been unable to qualify for the transition period, and therefore timely apply for State Licensing, the County, on May 24th, 2017, passed a resolution expanding the prior existing operations date to July 1, 2017 so long as those operators meet very robust environmental requirements. Thus, the County was able to expand the relief program and remain CEQA exempt by imposing strict environmental requirements on operations in existence after January 1, 2016. The County is still giving certain preferences to those operations in existence on or before January 1, 2016, but has created a program that realistically addresses the competing goals remaining CEQA exempt, of protecting and giving preference to prior existing local operators, while expanding the program enough to include operators that can and should be able to timely apply for State licensing.

Santa Barbara has the opportunity to protect these competing interests by creating a program that is consistent with State law and would pass constitutional muster.

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Yours Truly,

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