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November 4, 2007

Honorable Kendall Smith
Mendocino County Board of Supervisors
501 Low Gap Road
Ukiah, CA 95482

RE: Analysis of Proposed Ordinance adding Chapter 9.31 to Title 9 of the Mendocino County Code

Dear Supervisor and Chair Kendall Smith:

Once again, I am writing to the Board, not as an advocate for marijuana or medical marijuana, but as legal counsel for the Mendocino Medical Marijuana Advisory Board [MMMAB] and as an advocate of the law.

On October 15, 2007, I was present with many other concerned citizens, along with District Attorney Lintott and Sheriff Allman at a Criminal Justice Committee (CJC) meeting to discuss with Supervisors Delbar and Wattenburger a draft of a proposed ordinance adding Chapter 9.31 to Title 9 of the Mendocino County Code entitled "Marijuana Cultivation". The meeting was videotaped by Mendocino County residents Jimmy Rickel and Beth Bosk.

Criminal Justice Committee Chair Wattenburger stated at the end of public comment on the proposal that he "would like to next hear public comment on the proposed cultivation ordinance following input from staff on the matter" at the next CJC meeting on November 19, 2007. I was, therefore, surprised to find the matter on the agenda before the full Board for November 6, 2007.

Item Number 8 (e) on the November 6, 2007, Mendocino County Board of Supervisors Agenda is titled "Discussion and Possible Action . . . of the Marijuana Cultivation Ordinance Adding Chapter 9.31 to Title 9 of the Mendocino County Code"; a seven page proposal to add thirteen (13) new statutes to the Mendocino County Code. [Exhibit 1]

SUMMARY:

Many of the proposed findings made by the CJC in Section 9.31.010 are fundamentally and fatally flawed. The subsequent proposed sections that rely on those flawed findings are also fundamentally and fatally flawed.

Even if those proposed findings were not legally flawed, the proposed sections that attempt to require medical marijuana patients and their caregivers to buy "zip-ties", obtain written permission from their landlords, build fences, or limit their statutory right to cultivate their medicine simply because other patients or caregivers who reside on the same "legal parcel" and who exercise their own statutory right to cultivate their medicine are invalid and unenforceable because they are in direct conflict with the United States Constitution, the California Constitution, state law, and the county's own local ordinances.

PROPOSED FINDINGS SECTION:

Section 9.31.010 – Findings:

1. The proposed findings numbered 1 through 8, having been excerpted directly from existing state statutes, are not in dispute.
2. Proposed finding number 9 is simply a conclusionary statement unsupported by any objective empirical data.
3. Proposed finding number 10, although limited to "residential neighborhoods within inland Mendocino County", is also a conclusionary statement unsupported by any objective empirical data.

4. Proposed finding number 11 purports to be based on a DEA report of plant yields. However, neither the report, nor a factual basis to support the DEA claims in the report, such as the year(s) and location(s) of any scientific studies, the scientific validity of any such studies, or any other empirical evidence upon which the DEA conclusion is founded. Even if the report was based on scientifically objective data, the finding is irrelevant to the determination of whether or not a marijuana plant grown for medical purposes is a public nuisance.
5. Proposed finding number 12 is not only unsupported by any current, objective data [The National Drug Intelligence Center [NDIC] is a part of the United States Department of Justice], the proposed finding substantially misquotes the 2001 NDIC report. The NDIC report is based on 1999 data provided by the DEA that did not include Mendocino, Lake, Sonoma, or Humboldt County. The NDIC report claimed the price of a pound of domestic marijuana in San Francisco at \$2500.00. [Exhibit 2] Again, even if true, the finding is irrelevant to the determination of whether or not a marijuana plant grown for medical purposes is a public nuisance.
6. Proposed finding number 13 is only partially correct. Mendocino County Code section 9.36, the codification of Voter Initiative Measure G, permits a qualified patient or caregiver to possess "twenty-five (25) . . . adult flowering female marijuana plants **or the equivalent in dried marijuana**". [Exhibit 3] The Board subsequently passed a conflicting order [not yet codified] that permits a qualified patient or caregiver to cultivate twenty-five (25) . . . adult flowering female marijuana plants and **two pounds of processed marijuana**. It is true that more than one patient and/or caregiver may be in possession of the same legal parcel under state law and county guidelines.
7. Proposed finding number 14 is a conclusionary statement unsupported by any objective empirical data.
8. Proposed finding number 15 is a conclusionary statement unsupported by any objective empirical data.

9. It is true that the statutory “right of qualified patients and their primary caregivers under state law to cultivate marijuana for medical purposes” does not confer upon them a “right to create or maintain a public nuisance”. The drafters’ proposed finding number 16 is simply a straw man fallacy. I am unaware of any medical marijuana patient or caregiver who has made the claim that they have a right to create or maintain a public nuisance. The question is whether or not a public nuisance factually exists when a qualified patient or their primary caregiver exercise their right under state law to cultivate marijuana for medical purposes. No objective empirical data supports the drafters’ fallacious, slippery slope conclusion that “permitting no more than twenty-five (25) marijuana plants on any one legal parcel” will result in a “significant reduction in the complaints of odor and the risks of crime described herein.”
10. Proposed finding number 17 is a true statement of the drafters’ motive and purpose behind the “proposed ordinance adding Chapter 9.31 to Title 9 of the Mendocino County Code entitled “Marijuana Cultivation”. Is it the **County’s intention** that “**nothing in this ordinance shall permit any activity that is prohibited under the federal Controlled Substances Act**”, or the intention of the CJC to deceive and mislead the rest of the Board to ignore state law and the will of the Voters of Mendocino County?
11. Proposed finding number 17 is once again a conclusionary statement unsupported by any objective empirical data.

PROPOSED DEFINITIONS:

Section 9.31.020 – Definitions

The proposed definitions numbered 1 through 8, having been excerpted directly from existing state statutes and county ordinances, are not in dispute.

The following proposed sections are invalid and unenforceable because they are in direct conflict with the United States Constitution, the California Constitution, various state laws, and county ordinances:

PROPOSED PUBLIC NUISANCE SECTIONS:

Constitutional Law:

Under the United States Constitution a governing body may enact laws which it perceives necessary to protect the public health, safety and general welfare so long as the goal of the law enacted "is legitimate and that the means used to achieve that goal are reasonably necessary and not unduly oppressive." In *Commonwealth v. Creighton*, an analogous Pennsylvania public nuisance ordinance that attempted to limit the number of cats a person could possess, was found unconstitutional because the ordinance improperly set arbitrary limits on the number of pets a person can own and creates a presumption of health and safety risk based solely on the number of pets owned. [Exhibit 4]

The court held:

"With regard to legislation enacted pursuant to the municipality's authority to regulate nuisances, we have held that a municipal ordinance which seeks to abate the storage of wrecked, junked, or abandoned vehicles cannot declare the mere presence of such vehicles on any given piece of property to be a nuisance per se. ... Rather, the ordinance must be phrased in such a way as to require the municipality to affirmatively establish that a nuisance in fact existed . . . an ordinance which declared the [number of pets a person may own] to be unlawful as a nuisance per se would not only be beyond the scope of the authority granted by the enabling statute but would also be unconstitutionally unreasonable."

The proposed CJC public nuisance ordinance attempt to limit the number of medical marijuana plants a person could possess would also be "unconstitutionally unreasonable" because the proposed ordinance attempts to improperly set arbitrary limits on the number of plants a person can own and creates a presumption of health and safety risk based solely on the number of plants owned.

California Constitution, Article 2, Section 10:

(a) An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise.

(c) The Legislature may amend or repeal referendum statutes. ***It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors*** unless the initiative statute permits amendment or repeal without their approval.
[Emphasis added]

California Election Law:

Elections Code § 9140 states:

The board of supervisors may submit to the voters, without a petition, an ordinance for the repeal, amendment, or enactment of any ordinance. The ordinance shall be voted upon at any succeeding regular or special election and, if it receives a majority of the votes cast, the ordinance shall be repealed, amended, or enacted accordingly.

Elections Code § 9122 states:

If a majority of the voters voting on a proposed ordinance vote in its favor, the ordinance shall become a valid and binding ordinance of the county. The ordinance shall be considered as adopted upon the date the vote is declared by the board of supervisors, and shall go into effect 10 days after that date.

Elections Code § 9125 states:

No ordinance proposed by initiative petition and adopted either by the board of supervisors without submission to the voters or adopted by the voters shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance. In all other respects, an ordinance proposed by initiative petition and adopted shall have the same force and effect as any ordinance adopted by the board of supervisors.

The above statutes prohibit the Board of Supervisors from enacting a statute that amends an initiative without submission to the voters for approval. The proposed Marijuana Cultivation Ordinance Adding Chapter 9.31 to Title 9 of the Mendocino County Code is an unlawful attempt to amend two initiatives without the voters' approval; California's Proposition 215 and Mendocino County's Measure G. [See Proposition 103 Enforcement Project v. Quackenbush attached as Exhibit 5]

California Civil Law:

Civil Code § 3480 defines a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

Civil Code § 3481 defines a private nuisance as "Every nuisance not included in the definition of the last section is private."

Civil Code § 3482.5 creates a special exception from public and private nuisance actions for agricultural activity:

(a)(1) No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public,

(d) ***This section shall prevail over any contrary provision of any ordinance or regulation of any city, county, city and county,*** or other political subdivision of the state. [Emphasis added]

(e) For purposes of this section, the term "agricultural activity, operation, or facility, or appurtenances thereof" shall include, but not be limited to, ***the cultivation and tillage of the soil,*** dairying, ***the production, cultivation, growing, and harvesting of any agricultural commodity*** . . . and any practices performed by a farmer or on a farm as incident to or in conjunction with those farming operations, including preparation for market,

delivery to storage or to market, or delivery to carriers for transportation to market. [Emphasis added]

Civil Code § 3482.6 expands the agricultural activity nuisance exemption to include “agricultural processing activity”.

(a) No agricultural processing activity, operation, facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, shall be or become a nuisance, private or public,

(d) ***This section prevails over any contrary provision of any ordinance or regulation of any city, county, city and county,*** or other political subdivision of the state. . . [Emphasis added].

Finally, under California Civil Code § 3482, any acts done under statutory authority cannot be a nuisance:

Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. [Emphasis added]

California Criminal Law:

Health and Safety Code §11570 states:

Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor, or analog specified in this division, and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

Health and Safety Code §11362.765 states:

(a) Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or **11570**. . .

(b) Subdivision (a) shall apply to all of the following:

(1) A qualified patient or a person with an identification card who transports or processes marijuana for his or her own personal medical use.

(2) A designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver.

(3) Any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person.

Although Health and Safety Code § 11570 statutorily authorizes both a private or public nuisance action for “every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance”, Health and Safety Code §11362.765 carves out a specific exception for medical marijuana patients and their caregivers.

Cultivation of marijuana by qualified patients and their caregivers for medical purposes is done under the express authority of California statutes; Health and Safety Code §§11362.5 et seq.

Pursuant to California Civil Code § 3482, those lawful acts done under that statutory authority cannot be deemed a nuisance.

County Ordinances:

Mendocino County Code sections 10A.13.010, 10A.13.020, 10A.13.030 mirror California Civil Code §§3482.5 and 3482.6. MCC § 10A.13.060, also called the "Precedence Clause" states:

It is the finding of the Board of Supervisors that this Ordinance is to take precedence over all ordinances or parts of ordinance or resolutions or parts of resolutions in conflict herewith and same are hereby repealed to the extent of such conflict and no further. (Ord. No. 3414, adopted 1983.)
[Exhibit 6]

On November 7, 2000, the Voters of Mendocino County passed Measure G to, among other things, "establish a maximum limit of plants and weight for cultivation and possession of marijuana . . . in Mendocino County . . ." That Voter Initiative has now been codified as Chapter 9.36 of the Mendocino County Code [MCC].

Pursuant to Mendocino County Code §9.36.010, "The People of Mendocino County find . . . (A) Cannabis sativa (marijuana) is a beneficial plant . . . (D) that marijuana has bona fide medical uses. . . ."

Pursuant to Mendocino County Code §9.36.020, "The Ordinance codified in this Chapter will: (C) Establish a maximum limit of plants and weight for cultivation and possession of marijuana . . . and (D) Remove the fear of prosecution and the stigma of criminality from people who harmlessly cultivate and/or use marijuana for personal medical . . . purposes."

Pursuant to Mendocino County Code §§9.36.050 and 9.36.060, the Mendocino County Sheriff's Office shall not arrest or cite any person for, and the Mendocino County District Attorney's Office "shall not prosecute any violation of [Health and Safety Code section 11357 (possession), 11358 (cultivation), and 11360 (transportation)] in any single case involving twenty-five (25) or fewer adult flowering female marijuana plants or the equivalent in dried marijuana."

Mendocino County Voters passed Measure G in November of 2000 with the clear and express intent to "establish a maximum limit of plants and weight for cultivation and possession of marijuana" to "remove the fear of prosecution and

the stigma of criminality from people who harmlessly cultivate and/or use marijuana for personal medical . . . purposes.”

Cultivation of 25 mature female flowering marijuana plants per qualified patients or their caregivers for medical purposes is done under the express authority of California and Mendocino County statutes; Health and Safety Code §§11362.5, 11362.77(c), MCC 9.36 et seq., and MCC§§10A.13.010 et seq.

Pursuant to California Civil Code § 3482, those lawful acts done under the above statutory authority cannot be deemed a nuisance.

All of the following proposed public nuisance sections are, therefore, invalid and unenforceable because they are in direct conflict with the United States Constitution, the California Constitution, state law, and the county’s own local ordinances.

Section 9.31.030 – Cultivation Of Marijuana

Section 9.31.040 – Cultivation Of More Than Twenty-Five (25) Marijuana Plants, Indoors or Outdoors, On One Legal Parcel Is Declared A Public Nuisance.

Section 9.31.050 – “Zip-Tie” Requirement

Section 9.31.060 – Limitation On Number of Plants

Section 9.31.070 – Notice To Legal Owner Of Legal Parcel Where Marijuana Is Grown

Section 9.31.080 – Limitation On Location To Cultivate Marijuana

Section 9.31.090 – Fencing Requirement For All Outdoor Cultivation

Section 9.31.100 – Enforcement

PROPOSED CEQA SECTION:

Section 9.31.110 – Compliance With CEQA

This section is irrelevant.

PROPOSED SEVERABILITY SECTION:

Section 9.31.120 – Severability

Application of this section will require the invalid provisions of the proposed ordinance to be severed. The Severability section will likely be the only remaining section remaining in Chapter 9.31 of Title 9.

PROPOSED EFFECTIVE DATE:

Section 9.31.130 – Effective Date

This section is irrelevant.

Conclusion:

The body of California medical marijuana law is codified in California Health and Safety Code §§11362.5 through 11362.9, and Mendocino County Code §9.36.

The People of California enacted Proposition 215, also known as the Compassionate Use Act of 1996 and Health and Safety Code §11362.5, with the following clearly stated intent:

“To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana. . . . (Health and Safety Code §11362.5(b)(1)(A)), and to “ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction” (Health and Safety Code §11362.5(b)(1)(B)).

Seven years after the enactment of Health and Safety Code §11362.5, the California Legislature passed Senate Bill 420 (now codified as Health and Safety Code §§11362.7 et.seq), with the specifically stated intent to:

- (1) "avoid the unnecessary arrest and prosecution" of patients and their caregivers and "provide needed guidance to law enforcement officers",
- (2) "Promote uniform and consistent application of the act among the counties with the state", and
- (3) "Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects."

Health and Safety Code §11362.77(c) specifically authorizes Mendocino County to "retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a)." Those guidelines were specifically set at "twenty-five (25) or fewer adult flowering female marijuana plants or the equivalent in dried marijuana" when Measure G was passed and then codified as MCC 9.36

"Proposed Ordinance adding Chapter 9.31 to Title 9 of the Mendocino County Code" is clearly contrary to federal, state, and local laws.

1. The proposed findings are not supported by objective, empirical evidence.
2. The proposed ordinance is "unconstitutionally unreasonable" because it attempts to improperly set arbitrary limits on the number of plants a person can own and creates a presumption of health and safety risk based solely on the number of plants owned.
3. The proposed ordinance attempt to amend two initiative statutes without the approval of the electors violates the Article 2, section 10 of the California Constitution and the Elections Code.
4. The proposed ordinance conflicts with Civil Code §§ 3482.5 and 3482.6 special exceptions for agricultural activities.

5. The proposed ordinance conflicts with Mendocino County Code sections 10A.13.010, 10A.13.020, and 10A.13.030 special exceptions for agricultural activities.
6. The proposed ordinance conflicts with the Health and Safety Code §11362.765 specific liability exemption from nuisance.
7. The proposed ordinance conflicts with Health and Safety Code §§11362.5, 11362.77(c), and MCC 9.36 et seq. limiting plant numbers to 25 plants per parcel when a patient's medical need exceeds that limitation.
8. The proposed ordinance conflicts with California Civil Code § 3482 clear proclamation that acts done under the statutory authority of Health and Safety Code §§11362.5, 11362.77(c), and MCC 9.36 et seq. cannot be deemed a nuisance.

I previously provided the other members of the Board and you with those specific code sections so that, collectively, you have a clearer understanding of how the law affects local medical marijuana policy making decisions. I continue to believe that, despite any individual disagreements about medical marijuana, the one subject of common understanding and acceptance is that, regardless of our passionately held individual beliefs, we must follow the law. We have enough laws, more than can be enforced already without adding more law enforcers.

While it is clear that "Proposed Ordinance adding Chapter 9.31 to Title 9 of the Mendocino County Code" is clearly contrary to federal, state, and local laws, it is also contrary to the spirit and intent of all those laws designed to protect medical patients and their caregivers.

Any law that attempts to require sick or dying medical marijuana patients or their caregivers to buy "zip-ties", obtain written permission from their landlords to grow their medicine, to build fences, or limit their statutory right to obtain or cultivate their own medicine simply because other patients or caregivers who reside on the same "legal parcel" exercise their own statutory right to cultivate medicine is not only constitutionally unreasonable and invalid, it is unconscionable.

It is my respectful request, on behalf of medical marijuana patients and their caregivers that, for all of the above reasons, you reject "Proposed Ordinance adding Chapter 9.31 to Title 9 of the Mendocino County Code".

Sincerely,

A handwritten signature in black ink, appearing to read "Keith Faulder". The signature is written in a cursive style with a long horizontal flourish at the end.

Keith Faulder