OFFICE OF THE DISTRICT ATTORNEY
CONTRA COSTA COUNTY

Mark A. Peterson
DISTRICT ATTORNEY

July 25, 2013

To: City of Richmond Councilmembers

From: District Attorney Mark Peterson

Re: Marijuana Dispensaries

Dear Councilmembers:

I am aware that your city is grappling with the issue of marijuana dispensaries that are interested in operating in your jurisdiction. Several cities in the county have enacted moratoriums prohibiting their operation. You have chosen to enact city ordinances to regulate such dispensaries.

I have attached two letters to this communication. The first is a letter from Alameda County District Attorney Nancy O'Malley to Oakland Mayor Jean Quan regarding a proposed city of Oakland ordinance regulating marijuana dispensaries. The reason I have attached the letter is that I agree completely with District Attorney Nancy O'Malley's analysis of the issue. Therefore, I will be quoting extensively from her letter. Similar to her office, the Contra Costa District Attorney's Office has taken a very reasonable approach to enforcement of the marijuana laws in light of the Compassionate Use Act.

Like Alameda County, the Contra Costa County District Attorney's Office does not issue advisory opinions on city ordinances, in most circumstances. You have a City Attorney for that purpose, who provides you legal advice about your ordinances. However, as the chief law enforcement official in Contra Costa County charged with enforcing state laws regarding criminal activity, I feel compelled to share my own analysis with you regarding these marijuana dispensaries as they are currently operating, or propose to operate, in our county.

First, there are in fact storefronts, or dispensaries which are engaged in the sale of marijuana in your city. These dispensaries are authorized to operate in your city under permits and regulations, enacted by your city council. Whether characterized as a dispensary or a collective, the activity is the same, **the sale and distribution of marijuana.**

District Attorney Administration
900 Ward Street, Fourth Floor
Martinez, California 94553

(925) 957-8604
Fax (925) 646-4683

Through communications with representatives from the San Francisco branch of the United States Attorney's Office, Northern District of California, this office has confirmed that both the US Attorney General and the Department of Justice view the operation of marijuana dispensaries as a violation of federal law regardless of state law to the contrary. The US Department of Justice has repeatedly and publicly asserted that Congress, having determined that marijuana is a Schedule I controlled Substance in the Controlled Substances Act (CSA), has declared the **distribution of marijuana,** (other than as part of a federally authorized research program) a criminal offense irrespective of state law or local ordinances permitting such activity.

Furthermore, the U.S. Department of Justice affirmatively disapproves of proposals that are contrary to federal law such as licensing and permit schemes authorizing the cultivation and/or distribution of marijuana. Potential civil and criminal actions can be initiated against not only licensees, property owners, landlords and financiers who engage and/or aid the cultivation and distribution of marijuana, **but also against those who facilitate the actions of the above individuals, to wit: individuals who under the color of authority issue the licenses and allow the issuance of license that permit the violation of federal law.** (Attached is a letter from United States Attorney Melinda Haag, Northern District of California, setting forth the position of the federal government.)

Moreover, legal research of state law regarding attempts to license marijuana dispensaries similar to the licensing procedures that are currently being utilized in your city, confirms that not only are such schemes impermissible under federal law (as set forth by the U.S. Department of Justice), but have been subjected to criticism from the California Appellate Court as well.

In *Pack v. Superior Court,* (2011) 199 Cal.App. 4th 1070, the City of Long Beach enacted ordinances to "comprehensively regulate marijuana collectives." The ordinances were the exclusive means by which collectives were permitted to operate in the city. Among other things, the ordinances limited the number of collectives allowed to operate in the city and provided for the City of Long Beach to financially benefit through the establishment of authorized "collectives," i.e. dispensaries. Applicants were required to submit a non-refundable application fee of $14,742 and participate in a lottery for a permit. To be eligible, the collective would have to commit to installing sound insulation, odor-absorbing ventilation, close circuit television monitoring and a centrally monitored fire and burglary alarm system. Prior to distribution, the collectives would also be required to submit samples of their medical marijuana to an independent laboratory to ensure the product is free of pesticide and other contaminants. Once a permit was issued, an annual fee starting at $10,000 would be imposed with increases for collectives having more than 500 members.

The City of Long Beach ordinance is very similar to your ordinance and the same criticism outlined by the *Pack* court is equally applicable. The *Pack* court concluded that the City of Long

Beach ordinance regulating marijuana collectives, rather than decriminalizing specific acts, actually authorized the cultivation and distribution of marijuana, and therefore was **preempted by the federal law.** Among the *Pack* court's concerns were the required laboratory analysis of the medical marijuana and the charging of substantial application and renewal fees. The requirement to have an independent analysis of the marijuana would necessitate a transfer of marijuana and thus violate the federal prohibition against distributing marijuana. Additionally, requiring collectives to pay considerable fees created a situation for the city to gain financially by authorizing the operation of collectives. The issuance of permits, the Court reasoned, was nothing less than a **government authorization to cultivate marijuana** and thus a violation of federal statutes.

The strong similarity of the Long Beach marijuana licensing ordinance with your ordinance is inescapable. Consequently, the analysis in *Pack* is equally applicable to your local ordinance that attempts to regulate marijuana distribution. Such ordinances do not merely decriminalize the distribution of medical marijuana in certain circumstances, but in reality **authorize the illegal cultivation and sales of the drug.** The *Pack* case was recently dismissed by the California Supreme Court after the City of Long Beach rescinded the ordinance and enacted a moratorium on dispensaries. The issue regarding city approved regulation of dispensaries had been rendered moot in that city.

Although the *Pack* decision is no longer binding legal authority, the reasoning is sound and should be followed. If only sizeable fees paid to a city government can help secure the viability of a marijuana store, the result would be that the more marijuana dispensaries or collectives approved and in operation within a city, the more the city can profit financially from granting licenses. Inherent in such a system is the fiscal motivation for cities and other local municipalities to defy federal law.

Another California State Appellate Court decision that requires consideration is *City of Lake Forest v Evergreen Holistic Collective* (2012) 203 CalApp.4th 1413. The *Lake Forest* court found that a city could not ban a marijuana dispensary outright if it is located *at the site* where its members collectively and cooperatively cultivate marijuana. Highlighted in the decision was the court's affirmation that neither the Compassionate Use Act (Proposition 215, codified in §11362.5 of the Health and Safety Code) nor the Medical Marijuana Program Act (Health and Safety Code §11362.7, et. seq.) authorize dispensaries to operate independently of a cultivation site.

The information available to this office suggests that marijuana is not being cultivated at the physical sites of the collectives/dispensaries currently operating in Contra Costa County. Sales of cannabis at these locations are out of compliance with the reasoning and decision outlined in the *Lake Forest* opinion. To be forthright, the California Supreme Court just recently granted

review of the *Lake Forest* case and the case cannot be currently cited as legally binding authority. We will not know what specific points the State Supreme Court found necessary to address when granting review in *Lake Forest* until the decision is announced. Nevertheless, it's highly likely that other districts of the Court of Appeal will reach similar conclusions on cases presenting the same or similar related facts. It also does not preclude this office from voicing the opinion that the reasoning of that aspect of the *Lake Forest* decision is correct and logically sound.

The Compassionate Use Act (CUA), Health and Safety Code Section 11362.5, and the Medical Marijuana Program Act (MMPA), define a "primary caregiver" as the individual designated by a qualified patient who has *consistently assumed responsibility for the housing, health, or safety of that person.* A primary caregiver fitting the description would not be subject to criminal sanctions for cultivating for and providing marijuana to a qualified patient. The California Supreme Court in *People v. Mentch*, (2008) 45 Cal. 4th 274 found that **operators of medical marijuana stores did not qualify as primary caregivers,** for providing marijuana to qualified patients, even when so designated by the patient, unless an established relationship as set forth in the above definition existed between them **before** marijuana was first distributed.

The MMPA provided that qualified patients and their primary caregivers who associate to collectively or cooperatively cultivate marijuana for medical purposes, shall not solely on that basis be subject to criminal sanctions. The Attorney General of California in crafting Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, suggests that a collective/cooperative means an entity or business, and contemplated formal organizations that operate according to a business model.

The Contra Costa District Attorney's Office does not subscribe to the definitions of collective/cooperative found in the Attorney General guidelines. The MMPA seems to envision a group of persons uniting to cultivate medical marijuana for their communal benefit or that of patients for which they are primary caregivers who fit the above definition. The MMPA does not suggest that a marijuana store can call itself a collective and then distribute marijuana to persons who merely make a "donation" to it so they can make a purchase. Doing so would allow an entrepreneur to avoid the legal requirements to qualify as a primary caregiver by simply calling his business a collective. The net result would be a distribution of marijuana without any relationship between the patient and the distribution other than the transaction itself.

The Contra Costa County District Attorney's Office would also like to make the point that enactment of a city ordinance does **not** provide a defense over and above that provided by the Compassionate Use Act or the Medical Marijuana Program to any criminal charge. In other words, *notwithstanding* pronouncements by city officials or the enactment of the Ordinances, the prosecuting agency in Contra Costa County is not providing any assurances that activities

authorized by the Ordinances but not authorized under state law or federal law, are permissible. Persons should **not** rely solely upon them as providing any legal or equitable defense to a criminal prosecution. Nor should persons rely on pronouncements of city officials or the ordinances as an accurate **interpretation** of the state laws regarding marijuana cultivation, possession, sale, etc., and/or the defenses available to those charges.

Further, these marijuana dispensaries appear to be operating as "for profit" businesses, once again in violation of the Compassionate Use Act. The law is quite specific in what can and cannot be the basis of exchange of money from the primary caregiver and the patient as it pertains to marijuana. Businesses, such as dispensaries, which are violating statues such as the Compassionate Use Act, are engaging in unfair business practices in violation of section 17200 of the Business and Professions Code. Such violations could subject the business, the owners, and the operators, to civil and criminal penalties.

Additionally, as District Attorney O'Malley pointed out, "It also remains an open question whether public officers or public employees who aid and abet or conspire to violate state or federal laws in furtherance of a city ordinance, are exempt from criminal liability." The Contra Costa District Attorney's Office will uphold and enforce the laws of this State. As is the policy of this Office, alleged violations of the law will be reviewed on a case-by-case basis.

In summary, federal law enforcement officials have indicated that these marijuana dispensaries are unlawful under federal law; state courts have ruled them illegal; and according to the standards set forth in the Compassionate Use Act, the marijuana dispensaries as currently operating in this county, or proposed, appear to be operating illegally. Thank you for your attention to this matter. If you would like to discuss this matter further, please don't hesitate to contact my office.

Sincerely,

Mark A. Peterson
District Attorney

Office of the District Attorney
Alameda County
Nancy E. O'Malley, District Attorney

Rene C. Davidson Courthouse
1225 Fallon Street, Suite 900
Oakland, CA 94612

December 8, 2010

Mayor-Elect Jean Quan
Oakland City Hall
Frank Ogawa Plaza
Oakland, CA 94607

Dear Mayor-Elect Quan:

Congratulations on your election. I hope this letter finds you well. I look forward to joining together in our work towards a safe, healthy and thriving Oakland in the New Year.

I am writing to you regarding Oakland's Ordinance amending Title 5 of the Oakland Municipal Code, Entitled Business Licenses And Regulations, to add Chapter 5.81, pertaining to Medical Cannabis Cultivation Facility Permitting and amending the master fee schedule (Ordinance No. 9336, as Amended) to establish regulatory fees regarding this activity. The Alameda County District Attorney's Office has a long-standing policy of declining to issue advisory opinions as to the legality of any particular conduct. To that end, this letter is not, nor should it be interpreted, as an advisory opinion on the legality of the Ordinance, or any part contained therein.

I make the point that this Office has always taken a very reasonable approach to enforcement of the marijuana laws in light of the Compassionate Use Act and the Medical Marijuana Program. As a cancer survivor myself, I certainly understand the benefits for those in need of the medicinal use of marijuana in various forms. This reasonable policy and approach should not be taken as an endorsement of the Ordinance, or as a declaration that those engaging in conduct outside the parameters of the law as it pertains to marijuana will be ignored.

Earlier this year, my Staff was in discussion with Council staff regarding legal concerns the DA's Office had with the Ordinance, if it passed. At that time, we were told that with respect to the Ordinance, Council would wait until the outcome of Proposition 19. Obviously, Prop 19 failed to pass. It is my understanding that Council is now moving forward with your Ordinance. This letter is being written to alert you to legal concerns still held by the Alameda County District Attorney's Office regarding the Ordinance, particularly in light of recent case law opinions regarding the Compassionate Use Act (CUA) and the Medical Marijuana Program Act (MMP).

The CUA and MMP define "primary caregiver" as the individual designated by the person exempted under this section who has *consistently assumed responsibility for the housing, health, or safety of that person* (emphasis is mine). The definition becomes

very significant in terms of who is allowed by California law to cultivate and provide marijuana to others. I would point out that most recently, the California Court of Appeals, in ***People v. Hochanadel*** (2010) 176 Cal.App.4th 997, relying on the California Supreme Court case of ***People v. Mentch*** (2008) 45 Cal.4th 274, found that operators of storefront medical marijuana dispensary were not "primary caregivers" exempted from liability for certain narcotics offenses under Compassionate Use Act and Medical Marijuana Program Act, despite them being designated as such by medical marijuana patients who purchased medical marijuana from them. The Court found that where there was no evidence of an existing, established relationship providing for housing, health or safety independent of the administration of medical marijuana, the dispensary operators did not qualify as "caregivers" under the legal definition set forth in the law. The MMP set limits on the number of plants that could be possessed or cultivated. The same section of the code, but a different subsection, authorizes possession and/or cultivation in amounts for reasonable use for the patient. In striking down the "limits" language as it pertains to medicinal use or cultivation for medicinal use, the Supreme Court did not extend its ruling to H&S Sections 11359 and 11360 (possession for sale and sale of marijuana) outside the CUA and MMP. See ***People v. Kelly,*** (2010) 24 Cal.4th 1008.

The Alameda County District Attorney's office makes the point that enactment of this Ordinance does **not** provide a defense over and above the defense provided by the Compassionate Use Act (Health and Safety Code section 11362.5 aka Prop 215) or the Medical Marijuana Program (Health and Safety Code sections 11362.7 et seq.) to any criminal charge. In other words, *notwithstanding* pronouncements by city officials or the enactment of the Ordinance, the prosecuting agency in Alameda County is not providing any assurances that activities authorized by the Ordinance, but not authorized under state law or federal law, are permissible. Persons should **not** rely solely upon pronouncements by city officials or enactment of the Ordinance as providing any legal or equitable defense to a criminal prosecution. Nor should persons rely on pronouncements of city officials or the Ordinance as an accurate ***interpretation*** of the state laws regarding marijuana cultivation, possession, sale, etc., and/or the defenses available to those charges.

In California, as you know, cultivation of marijuana for medicinal or compassionate use must be 'not-for-profit'. The law is quite specific in what can and cannot be the basis of exchange of money from the primary caregiver and the patient as it pertains to marijuana. Potential difficulties might arise in assessing the appropriate amount of taxes that can be imposed on transactions undertaken by these large-scale marijuana growing operations. This concern is not only with potential difficulties in cases of tax evasion, but also persons relying on the Ordinance may be placed at risk of prosecution for tax evasion due to the lack of clear guidelines in assessing when and how much tax need be paid.

One important caveat is that notwithstanding the language of Section 5.81.100, it remains an **open** question whether public officers or public employees who aid and abet or conspire to violate state or federal laws in furtherance of a city ordinance, are

exempt from criminal liability.

The District Attorney's Office will uphold and enforce the laws of this State. As is the policy in this Office, alleged violations of the law will be reviewed on a case-by-case basis.

Thank you for your attention to these issues. I am not providing to you an advisory opinion on the legality of your Ordinance, that is the purview of your City Attorney. However, if you would like to discuss this further, please don't hesitate to contact me.

Sincerely yours,

Nancy E. O'Malley
District Attorney

Cc: City Attorney John Russo

U.S. Department of Justice

United States Attorney
Northern District of California

Melinda Haag
United States Attorney

11th Floor, Federal Building
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495

(415) 436-7200
FAX:(415) 436-7234

February 1, 2011

John A. Russo, Esq.
Oakland City Attorney
1 Frank Ogawa Plaza, 6th Floor
Oakland, California 94612

Dear Mr. Russo:

I write in response to your letter dated January 14, 2011 seeking guidance from the Attorney General regarding the City of Oakland Medical Cannabis Cultivation Ordinance. The U.S. Department of Justice is familiar with the City's solicitation of applications for permits to operate "industrial cannabis cultivation and manufacturing facilities" pursuant to Oakland Ordinance No. 13033 (Oakland Ordinance). I have consulted with the Attorney General and the Deputy Attorney General about the Oakland Ordinance. This letter is written to ensure there is no confusion regarding the Department of Justice's view of such facilities.

As the Department has stated on many occasions, Congress has determined that marijuana is a controlled substance. Congress placed marijuana in Schedule I of the Controlled Substances Act (CSA) and, as such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities.

The prosecution of individuals and organizations involved in the trade of any illegal drugs and the disruption of drug trafficking organizations is a core priority of the Department. This core priority includes prosecution of business enterprises that unlawfully market and sell marijuana. Accordingly, while the Department does not focus its limited resources on seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law as stated in the October 2009 Ogden Memorandum, we will enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law. The Department's investigative and prosecutorial resources will continue to be directed toward these objectives.

Consistent with federal law, the Department maintains the authority to pursue criminal or civil actions for any CSA violations whenever the Department determines that such legal action is warranted. This includes, but is not limited to, actions to enforce the criminal provisions of the CSA such as Title 21 Section 841 making it illegal to manufacture, distribute, or possess with intent to distribute any controlled substance including marijuana; Title 21 Section 856 making it

unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances; and Title 21 Section 846 making it illegal to conspire to commit any of the crimes set forth in the CSA. Federal money laundering and related statutes which prohibit a variety of different types of financial activity involving the movement of drug proceeds may likewise be utilized. The government may also pursue civil injunctions, and the forfeiture of drug proceeds, property traceable to such proceeds, and property used to facilitate drug violations.

The Department is concerned about the Oakland Ordinance's creation of a licensing scheme that permits large-scale industrial marijuana cultivation and manufacturing as it authorizes conduct contrary to federal law and threatens the federal government's efforts to regulate the possession, manufacturing, and trafficking of controlled substances. Accordingly, the Department is carefully considering civil and criminal legal remedies regarding those who seek to set up industrial marijuana growing warehouses in Oakland pursuant to licenses issued by the City of Oakland. Individuals who elect to operate "industrial cannabis cultivation and manufacturing facilities" will be doing so in violation of federal law. Others who knowingly facilitate the actions of the licensees, including property owners, landlords, and financiers should also know that their conduct violates federal law. Potential actions the Department is considering include injunctive actions to prevent cultivation and distribution of marijuana and other associated violations of the CSA; civil fines; criminal prosecution; and the forfeiture of any property used to facilitate a violation of the CSA. As the Attorney General has repeatedly stated, the Department of Justice remains firmly committed to enforcing the CSA in all states.

I hope this letter assists the City of Oakland and potential licensees in making informed decisions regarding the cultivation, manufacture, and distribution of marijuana.

Very truly yours,

Melinda Haag
United States Attorney
Northern District of California

cc: Kamala D. Harris, Attorney General of the State of California
Nancy E. O'Malley, Alameda County District Attorney