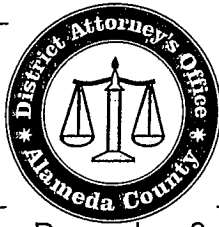

Office of the District Attorney
Alameda County
Nancy E. O'Malley, District Attorney



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, .

A handwritten signature in cursive script that reads "Nancy E. O'Malley". The signature is written in dark ink and is positioned above the typed name.

Nancy E. O'Malley
District Attorney

CC: City Attorney John Russo