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MEMORANDUM

TO: Honorable Board of Supervisors
Peter Kutras, Jr., County Executive

FROM: *Ann Miller Ravel*
Ann Miller Ravel, County Counsel
Martin H. Dodd, Special Assistant County Counsel *MHD*
Jared Goldman, Deputy County Counsel *JG*

RE: Medical Marijuana Dispensaries

DATE: February 11, 2004

This memo is in response to the Board's request for information regarding legislation governing medical marijuana dispensaries.

EXECUTIVE SUMMARY

Proposition 215, adopted by the electorate in 1996, authorizes a seriously ill patient, or the patient's "primary caregiver" on the patient's behalf, to cultivate and possess marijuana for medical purposes. A "primary caregiver" is the person designated by the patient "who has consistently assumed responsibility for the housing, health, or safety of that person." SB 420, enacted by the Legislature in 2003, further authorizes qualified patients and primary caregivers, collectively or cooperatively, to cultivate marijuana for medical purposes, and authorizes primary caregivers to receive compensation for actual expenses incurred. California courts have concluded that Proposition 215 does not extend to persons other than patients and primary caregivers, and that operators of dispensaries do not meet the statutory definition of "primary caregiver" simply by having been designated as such by qualified purchasers. Division B26 of the County of Santa Clara Ordinance Code, adopted in 1997, regulates marijuana dispensaries in the unincorporated area. It authorizes, subject to County approval, the establishment of medical marijuana dispensaries that are based on the cooperative or collective

dispensary model.

Despite Proposition 215, the federal government has raided and prosecuted dispensaries and cultivation collectives under the Controlled Substances Act. A recent Ninth Circuit decision, however, protects the intrastate, noncommercial cultivation, possession, and use of marijuana (not involving sale, exchange or distribution) for personal medical purposes in accordance with Proposition 215. The federal government has petitioned the Ninth Circuit for a rehearing of this case. We anticipate that the non-prevailing party, whichever it may be, will likely ask the Supreme Court to review the case.

DISCUSSION

I. State Legislation

1. Proposition 215

Proposition 215, the “Compassionate Use Act,” was adopted by the electorate in 1996. It authorizes a seriously ill patient, or the patient’s “primary caregiver” on the patient’s behalf, to cultivate and possess marijuana for medical purposes if the patient has a physician’s oral or written approval or recommendation.¹ A “primary caregiver” is defined as the person designated by the patient “who has consistently assumed responsibility for the housing, health, or safety of that person.”²

Proposition 215 does not address the “supply problem” facing many patients. While it authorizes patients and their primary caregivers to cultivate and possess marijuana, Proposition 215 does not establish any distribution system for patients who may be too ill to cultivate marijuana, or for primary caregivers who may not have the skill or resources to cultivate marijuana.

2. SB 420

In 2003, the Legislature adopted SB 420 in an effort to clarify the scope of Proposition 215. Among other provisions, SB 420 provided limited guidance related to medical marijuana dispensaries by:

- Authorizing qualified patients and primary caregivers, collectively or cooperatively, to cultivate

¹Cal. Health & Safety Code § 11362.5(d).

²Cal. Health & Safety Code § 11362.5(e).

- marijuana for medical purposes.³
- Defining the term “primary caregiver” to include: (1) an individual designated as a primary caregiver *by more than one qualified patient*, where every patient who has designated that caregiver resides in the same city or county as the caregiver, and (2) operators of certain licensed health or residential care facilities, who provide medical care or supportive services to a patient and are designated by the patient as their primary caregiver.⁴
 - Authorizing primary caregivers to *transport, process, administer, deliver or give away* marijuana for medical purposes, in the amounts specified by law, to their qualified patients.⁵
 - Authorizing primary caregivers to receive compensation for actual expenses incurred in enabling a qualified patient to use marijuana.⁶
 - Authorizing *any individual* to provide “assistance” to a qualified patient or primary caregiver in “administering medical marijuana to the qualified patient,” or “acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient.”⁷ This authorization does not appear to include the actual cultivation, possession, transportation, processing, or distribution of medical marijuana.

In addition, SB 420 made several other changes to the law particularly relevant to counties. Specifically, SB 420:

- Requires the State Department of Health Services (DHS) to establish a voluntary program for the issuance of ID cards to qualified patients and primary caregivers,⁸ and exempts cardholders from arrest for possession, transportation or cultivation of the approved amount of marijuana. (A qualified patient or primary caregiver need not participate in the identification card program to receive the protections of Proposition 215.⁹)
- Requires DHS to develop protocols, forms and an ID card to be used by counties in

³Cal. Health & Safety Code § 11362.775.

⁴Cal. Health & Safety Code § 11362.7(d).

⁵Cal. Health & Safety Code § 11362.765(b)(2).

⁶Cal. Health & Safety Code § 11362.765(c).

⁷Cal. Health & Safety Code § 11362.765(b)(3).

⁸Cal. Health & Safety Code § 11362.71(a).

⁹Cal. Health & Safety Code § 11362.71(f).

- implementing the program.¹⁰
- Requires county health departments to provide, receive and process applications for the ID card program, issue the ID cards, and maintain related records.¹¹ Counties are authorized to charge a fee to recoup county costs related to the program.¹²
- Limits, with some exceptions, the amount of marijuana that may be possessed per qualified patient, and authorizes a city or county to enact guidelines allowing qualified patients or primary caregivers to exceed the specific quantity limitations set by the State.¹³

II. California Cases Limiting Dispensaries

Whether an association that provides medical marijuana is legal under California law depends upon how it operates. In *People v. Galambos*, a California court concluded that the immunity afforded under Proposition 215 to patients and primary caregivers does not extend to others who supply marijuana to patients or primary caregivers.¹⁴ And in *Lugren v. Peron*, a California court concluded that a operator of a non-profit medical marijuana dispensary did not meet the statutory definition of “primary caregiver” simply by having been designated as such by a qualified purchaser.¹⁵ As explained by the court:

One maintaining a source of marijuana supply, from which all members of the public qualified as permitted medicinal users may or may not discretionarily elect to make purchases, does not thereby become the party ‘who has *consistently* assumed responsibility for the housing, health, or safety’ of that purchaser as [Proposition 215] requires.¹⁶

Both *Galambos* and *Peron* predate SB 420. But SB 420 does not appear to overrule them. The Legislature had the opportunity and apparently declined to do so when, in SB 420, it defined the

¹⁰Cal. Health & Safety Code § 11362.71(d).

¹¹Cal. Health & Safety Code § 11362.71(b).

¹²Cal. Health & Safety Code § 11362.715 & 11362.755.

¹³Cal. Health & Safety Code § 11362.77.

¹⁴*People v. Galambos* (2002) 104 Cal.App.4th 1147.

¹⁵*Lugren v. Peron* (1997) 59 Cal.App.4th 1383, 1390.

¹⁶*Id.*, at 1390.

term “primary caregiver,”¹⁷ and also when it authorized *any individual* merely to “provide assistance” to patients or primary caregivers in “administering” marijuana to patients, or “acquiring the skills necessary to cultivate or administer marijuana.”¹⁸

In light of *Galambos* and *Peron*, certain medical marijuana dispensaries or “buyers clubs” may be operating illegally under California law. But as stated above, SB 420 authorizes qualified patients and primary caretakers to lawfully associate “in order collectively or cooperatively to cultivate marijuana for medical purposes.”¹⁹ It remains to be seen where the line between illegal buyers clubs and lawful cultivation cooperatives will be drawn by the courts.

III. County Ordinance Code

Division B26 of the County Ordinance Code regulates medical marijuana dispensaries in the unincorporated area of the County. It was adopted in 1997, after the passage of Proposition 215, but before the enactment of SB 420. It adopts a “cooperative” or “collective” model for dispensaries, specifying that a dispensary “may be designatd as primary caregiver only when the patient is an active participant in the operation of the facility, or in the cultivation of the on-site medical marijuana.”²⁰ Currently, there are no approved dispensaries in the unincorporated area.

Division B26 specifies the zones in which a dispensary may be established, and prohibits the location of dispensaries within 1000 feet of a school, place or worship, or other dispensary.²¹ It prohibits retail sales of products (other than marijuana, or marijuana food stuffs), on-site smoking or consumption, entry of persons under eighteen years of age unaccompanied by a parent or guardian, hours of operation in excess of 7:00 a.m. to 8:00 p.m, and deliveries of marijuana by dispensary employees.²² In addition, before beginning operations, a dispensary must obtain a use permit and architectural and site approval from the Planning Department, approval from the Public Health

¹⁷See Cal. Health & Safety Code § 11362.7(d).

¹⁸See Cal. Health & Safety Code § 11362.765(b)(3).

¹⁹Cal. Health & Safety Code § 11362.775.

²⁰County of Santa Clara Ordinance Code, § B26-4.

²¹County of Santa Clara Ordinance Code, § B26-3.

²²County of Santa Clara Ordinance Code, § B26-4, B26-5.

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Department and approval from Office of the Sheriff.²³ The cultivation or possession of marijuana for medical use by a single patient or primary caregiver is exempted from the regulations.²⁴

IV. Federal Law

Despite Proposition 215, the federal government has aggressively raided and prosecuted medical marijuana dispensaries and growing collectives under the Controlled Substances Act²⁵ (CSA).²⁶ The CSA, enacted by Congress under its authority to regulate commerce,²⁷ makes it illegal for any person to knowingly or intentionally “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance,” except as provided for in the CSA.²⁸ Mere possession of a controlled substance (i.e., drug), except as authorized by the CSA, is also illegal.²⁹ The CSA establishes five “schedules” of drugs each imposing different restrictions on the use of each drug within the specific schedule.³⁰ Marijuana is assigned to Schedule I, which is the most restrictive schedule.³¹ Under the CSA, “Schedule I drugs may be obtained and used lawfully only by doctors who submit a detailed research protocol for approval by the Food and Drug Administration and who agree to abide by strict recordkeeping and storage rules.”³²

Last December, in *Raich v. Ashcroft*, the Court of Appeal for the Ninth Circuit significantly limited the federal government’s ability to prosecute medical marijuana patients and their caregivers

²³County of Santa Clara Ordinance Code, § B26-6.

²⁴County of Santa Clara Ordinance Code, § B26-2.

²⁵21 U.S.C. §§ 801, *et seq.*

²⁶*See United States v. Oakland Cannabis Buyers Cooperative* (2001) 532 U.S. 483; *Wo/Men’s Alliance for Medical Marijuana v. Ashcroft* (N.D. Cal. 2003) 279 F.Supp.2d 1192; *United States v. Rosenthal* (N.D. Cal. 2003) 266 F.Supp.2d 1068.

²⁷U.S. Const. art. I, § 8, cl.3.

²⁸21 U.S.C. § 841(a)(1).

²⁹21 U.S.C. § 844(a).

³⁰*See* 21 U.S.C. § 812(a).

³¹21 U.S.C. § 812(c).

³²*Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.* (D.C. Cir. 1994) 15 F.3d 1131, 1133.

under the CSA.³³ Specifically, the court enjoined the Drug Enforcement Administration from enforcing the CSA against two seriously ill marijuana users—one who cultivated her own marijuana, and another who received marijuana from two caretakers free of charge.³⁴ The court held that the intrastate, noncommercial cultivation, possession, and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law, did not have an effect on interstate commerce sufficient to make it subject to federal regulation under the Commerce Clause.³⁵

While *Raich* provides some protection for patients and their caregivers, its application to dispensaries authorized under SB 420 is limited. In *Raich*, the court only addressed the circumstances of cultivation and possession by *individual* patients and their caregivers. Furthermore, the court stated that the class of activities outside the reach of the CSA are those that do “not involve sale, exchange, or distribution.”³⁶ Thus, cooperative, noncommercial cultivation may be permissible under *Raich*. But medical marijuana dispensaries, such as buyers clubs, will certainly not be afforded any protection by the decision in *Raich*.

The United States Attorney General has petitioned the Ninth Circuit for a rehearing of the case. It is likely that the non-prevailing party, whichever it may be (whether or not a rehearing is granted by the Ninth Circuit), will ask the United States Supreme Court to review the case.

CONCLUSION

Proposition 215, adopted by the electorate in 1996, authorizes a seriously ill patient, or the patient’s “primary caregiver” on the patient’s behalf, to cultivate and possess marijuana for medical purposes. A “primary caregiver” is the person designated by the patient “who has consistently assumed responsibility for the housing, health, or safety of that person.” SB 420, enacted by the Legislature in 2003, further authorizes qualified patients and primary caregivers, collectively or cooperatively, to cultivate marijuana for medical purposes, and authorizes primary caregivers to receive compensation for actual expenses incurred. California courts have concluded that Proposition 215 does not extend to persons other than patients and primary caregivers, and that operators of dispensaries do not meet the statutory definition of “primary caregiver” simply by having been designated as such by qualified purchasers. Division B26 of the County of Santa Clara Ordinance Code, adopted in 1997, regulates

³³See *Raich v. Ashcroft* (9th Cir. Dec. 16, 2003) No. 03-15481, 2003 U.S.App. LEXIS 25317.

³⁴*Id.*, at pgs. 6-7, 35.

³⁵*Id.*, at 15-31.

³⁶*Id.*, at pg. 17.

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