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and PUBLIC ADMINISTRATOR
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12 January 2011

Mayor Dan Wilson, Portola City Council
Supervisor Lori Simpson, Chair, Plumas County Board of Supervisors

Re: Medicinal Marijuana Dispensaries

Dear Mayor Wilson and Supervisor Simpson:

I am writing to you regarding a contemplated ordinance pertaining to medicinal marijuana dispensaries in the City of Portola and/or unincorporated Plumas County as discussed at a recent Portola City Council meeting and reported in the Feather River Bulletin (January 5, 2011 edition).

At the outset, please understand the Plumas County District Attorney's Office will not issue advisory opinions as to the legality of any particular conduct. This letter, instead, is intended to alert you to concerns the District Attorney's Office holds concerning marijuana dispensaries in Plumas County in light of recent legal opinions stemming from the *Compassionate Use Act* (CUA) and the *Medical Marijuana Program Act* (MMP).

The Plumas County District Attorney's Office will continue to take a reasoned approach to enforcement of marijuana laws in light of the CUA and MMP. In reviewing incidents on a case by case basis we endeavor to follow both the letter and spirit of the law. During the past eight years (the time I served as the felony prosecutor for Plumas County) I do not recall one contested evidentiary hearing where the issue involved the applicability of a medicinal marijuana recommendation. I am particularly proud of our ability to resolve these cases in a just and thoughtful way. Our reasonable response, however, should not be taken as an endorsement for the illegal possession or sale of marijuana and it certainly should not be seen as suggesting any leniency will be taken to those engaged in illegal activities under the guise of operating under the CUA or MMP.

Recent history in Plumas County has demonstrated defendants who are arrested and prosecuted for violating marijuana laws (with or without a medicinal marijuana recommendation) are not "cancer, AIDS and other seriously ill people", but rather persons engaged in the illegal possession and/or sale of marijuana. From an investigative standpoint, abuses of the CUA and MMP by recipients of physician recommendations for

medical marijuana are not uncommon. A current and troubling trend involves the issuance of recommendations for “therapeutic cannabis” to Plumas County minors, at least one as young as fifteen.

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 mine). The definition becomes significant in terms of who is allowed by California law to cultivate and provide marijuana to others. Recently, the California Court of Appeals found operators of storefront medicinal marijuana dispensaries were **not** “primary caregivers” exempted from liability for certain narcotics offenses under the *Compassionate Use Act* and *Medical Marijuana Program Act*, despite them being designated as such by medical marijuana patients who purchased medical marijuana from them (see ***People v. Hochanadel*** (2010) 176 Cal.App.4th 997, relying on ***People v. Mentch*** (2008) 45 Cal.4th 274). The ***Hochanadel*** court found 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 under 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 Sections 11359 and 11360 of the California Health and Safety Code (possession for sale and sale of marijuana) outside the CUA and MMP (see ***People v. Kelly*** (2010) 24 Cal.4th 1008). This omission by the appellate court confirms the position that in California possession for sale and/or sale of marijuana outside the CUA and MMP remains criminal.

Should the City of Portola, or Plumas County, adopt an ordinance concerning the sale of marijuana from a dispensary, such an ordinance does not provide a defense over and above the defense provided by the Compassionate Use Act (Section 11362.5 of the Health and Safety Code as enacted by Proposition 215) or the Medical Marijuana Program (Sections 11362.7 of the Health and Safety Code) to any criminal charge. Put plainly, the Plumas County District Attorney’s Office provides no assurance that activities authorized by a Medicinal Marijuana Dispensary ordinance, but not authorized by state or federal law, are permissible. Persons should not rely upon pronouncements by city or county officials or the enactment of a local ordinance as providing any legal or equitable defense to a criminal prosecution in the face of contrary state and federal laws.

The 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 the exchange of money from the primary caregiver and the patient as it pertains to marijuana. On this point, I was particularly interested to read the statement from the Doyle resident seeking to open a dispensary in Portola who stated “... it planned to donate 10 percent of its profits back to the city...” (Feather River Bulletin, January 5, 2011, Page7A). To reiterate, possessing marijuana for sale or selling marijuana outside the CUA and MMP is illegal (Sections 11359 and 11360 of the Health and Safety Code) and will be prosecuted by this office.

Some prosecutor’s offices have suggested there 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 or immune from criminal liability. I offer no insight on such a position as it is my sincere hope the present discussion does not venture into that realm.

Thank you for allowing me to join this conversation. Please do not accept this letter as an advisory opinion on the legality of a proposed ordinance as such an opinion should be provided by your City Attorney or County Counsel.

The Plumas County District Attorney's Office will uphold and enforce the laws of this State. In reviewing alleged violations of the law we have, are and will analyze each submission on a case by case basis.

Should you have any questions or desire further discussion, please do not hesitate to contact me.

Respectfully yours,

/s/

David Hollister
District Attorney
Plumas County, California

cc: Sheriff Greg Hagwood