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September 22, 2009

HON. ED REYES

Chairman, Planning & Land Use Management Committee (PLUM)
200 N. Spring Street
City Hall, Room 410
Los Angeles, Ca 90012
DELIVERED BY HAND

Date: 9-22-09
Submitted in PLUM Committee
Council File No: 08-0923
Item No.: 3
Deputy: B. GARAYES

RE: CF 08-0923 - City's Proposed Medical Marijuana Ordinance

Dear Chairman Reyes and Members of the PLUM Committee:

I have reviewed the City Attorney's latest incarnation for an ordinance governing the City's medical marijuana dispensaries. As has become unfortunately customary with City Attorney proposals in this area, this proposal has numerous problems, not the least of which is an unconstitutional invasion of medical privacy for the dispensaries' patients.

The problematic sections invade medical and personal privacy in violation of Article 1, Section 1 of the California Constitution.

SEC.46.71. INSPECTION AUTHORITY AND ENFORCEMENT. The Los Angeles Department of Building and Safety and the Los Angeles Police Department shall have the right to enter the Medical Marijuana Cooperative/Collective from time to time unannounced for the purpose of making reasonable inspections to observe and enforce compliance with this Article and all laws of the City and State of California. An outstanding Order to Comply from the Department of Building and Safety shall constitute a violation of this Code.

Physician's Recommendations in California are the equivalent of medical prescriptions. Patients possessing physician recommendations should not be subject to law enforcement officers invading their privacy without seeking permission from a judicial officer, e.g., possessing a court order, a search warrant or a valid subpoena issued subject to a motion to quash on privacy or search and seizure grounds.

This section is in direct conflict with Article 1, Section 1 of the California Constitution. which states:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and

privacy."

This ordinance permits the police at their whim to go through, copy, and/or seize patient records from the medical marijuana collectives without any finding of probable cause to believe that a crime has been committed, or a finding by a judge based on a sworn affidavit by a police officer that a review of a particular record is necessary.

To bring the matter home, assume for the sake of argument that members of the City Council (or significant others) are medical marijuana patients, or members of their staffs, or City employees – including prosecutors – of the City Attorney's Office. Whether any individual has such a "prescription" is the private business of that individual, and he/she certainly would not want this knowledge to be casually available to the police.

People who have Physicians' Recommendations for medical marijuana depend on confidentiality to legally use marijuana when not at work, as their employer may well frown upon marijuana – medical or otherwise – which in turn could affect their promotability, their compensation, and certainly, their job assignments.

To analogize to other prescriptions, what if you went to your local pharmacy and discovered Los Angeles police officers searching through your pharmacy records, or the records of your spouse, or your children?

The officers have no warrant, no probable cause, nor other justification for their actions other than their usual claim of an "ongoing investigation", which the officers *invariable* are either unable or unwilling to articulate or explain.

Put simply, the City of Los Angeles, in enacting this ordinance, and acting through its Police Department and/or Department of Building And Safety have the ability to search for and seize medical records of patients in violation of their rights under the fourth amendment of the Federal Constitution, and article 1 section 1 of the California Constitution.

This situation has been addressed already in *Bearman v. Superior Court (Joseph)*, (2004) 117 Cal. App. 4th 463; 11 Cal. Rptr. 3d 644.

Bearman is a case regarding whether the petitioner doctor indiscriminately recommended the medicinal use of marijuana to one of his patients. The California Medical Board, having obtained an order from the Superior Court of Los Angeles County directed the doctor to comply with the administrative subpoena for the patient's records. The Court of Appeal granted the doctor's petition for a writ of mandate and ordered the trial court to vacate its order enforcing the subpoena for the patient's medical records. The Medical Board had failed to demonstrate sufficient facts to support a finding of good cause to invade the patient's right of privacy in his medical records.

As underscored by Justice Rubin in the Court's Opinion at pp. 474-475:

“By showing the park rangers Dr. Bearman's letter, Nathan attempted to demonstrate that he satisfied the conditions of the statute by "possess[ing] ... marijuana for ... personal medical purposes ... [based] upon the written ... recommendation or approval of a physician." (§ 11362.5, *subd. (d)*.) Nowhere in the provisions of *section 11362.5* is there any indication that, by demonstrating entitlement to the statute's protection, a person forgoes or waives any right, much less the "inalienable" right of privacy expressly guaranteed by the California Constitution (*Cal. Const., art. I, § 1*).

We agree with the CMA's argument that we would be defeating the voters' intent behind *section 11362.5* if we were to adopt the Medical Board's position that a person automatically waives the right of privacy in their medical records by virtue of showing a peace officer a physician's written recommendation for the medicinal use of marijuana. n4 By passing this law, the voters intended to *facilitate* the medical use of marijuana for the seriously ill. This purpose would no doubt be defeated if, as a condition of exercising the right granted by *section 11362.5*, a person waived his or her right of privacy simply by producing a physician's written recommendation. Interpreting *section 11362.5* as necessitating the waiver of a fundamental right in order to enjoy its protection would, we believe, hinder rather facilitate the voters' intent. We decline to interpret *section 11362.5* in such a manner. n5”

In conclusion, random checks by law enforcement violates Article 1, Section 1, as made clear by the holding in *Bearman*.

Unfortunately, this ordinance was submitted to the committee on September 15th, I received it yesterday, and the PLUM Committee is hearing the matter today. This leaves the obvious question, “What were you doing for the last two years?”, as well as whether the PLUM Committee is even thinking in a meaningful fashion about regulation of medical marijuana.

Sincerely,



CHARLES L. LINDNER

CLL/gj