

MEMORANDUM OF LAW

DATE: September 19, 2002

TO: David Bejarano, Chief of Police, San Diego Police Department

FROM: City Attorney

SUBJECT: Medicinal Marijuana Task Force Draft Guidelines

INTRODUCTION

.....By letter dated June 25, 2002, you expressed concern about a presentation made by the San Diego Medicinal Marijuana Task Force [task force] to the Public Safety and Neighborhood Committee on June 19, 2002. The task force has written the attached Medicinal Marijuana Task Force Draft Guidelines [draft guidelines] which define “primary caregiver” [caregiver] and establishes “safe harbor” amounts for cultivation and possession by patients and their caregivers. You indicate that the Police Department opposes “safe harbor” amounts and prefers to make enforcement decisions on a case-by-case basis. You attached a copy of a City Attorney legal opinion dated August 31, 1999, to your letter of June 25. In light of recent court rulings concerning medical marijuana, you asked our opinion as to the following questions.

.....

QUESTIONS PRESENTED

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.....1.....Is our August 31, 1999, City Attorney opinion still valid?

.....2.....How should “primary caregiver” be defined?

.....3.....Does the task force’s recommendation for “safe harbor” guidelines conform to state law?

SHORT ANSWERS

.....1.....The City Attorney legal opinion of August 31, 1999, is still valid in its conclusions that there is no way to legally harmonize state and federal laws concerning marijuana and that the San Diego Police Department’s procedures for handling medical marijuana issues do comport with existing statutes and case law.

.....2. Under state law, a caregiver means “the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.” Cal. Health & Safety Code 11362.5(e); San Diego Municipal Code [SDMC] 42.1302 (a). In practical terms, the caregiver is the authorized person who provides marijuana to a qualified patient. It is problematic that California Health and Safety Code section

11362.5 does not specify clear guidelines or limitations governing the permissible actions of a caregiver. The task force's draft guidelines may or may not correctly interpret the definition of caregiver as defined by state law.

.....3.....It is impossible to answer whether the task force's draft guidelines conform to state law and thus create "safe harbors," because there is no clear authority from either the legislature, the courts, or the attorney general.

BACKGROUND

.....In 1996, voters approved Proposition 215, which established the right of Californians to use marijuana if they are seriously ill, or suffering from any other illness for which marijuana provides relief. This led to California Health and Safety Code section 11362.5, entitled "The Compassionate Use Act of 1996." The Act does serve as a general statement of purpose, but it does not address practical questions of how its intent can be carried out.

.....In 1999, California Attorney General Bill Lockyer set up a task force to formulate standards to implement Proposition 215. Currently, according to Deputy Attorney General Peter Siggins, Mr. Lockyer does not endorse the 1997 Attorney General's "Peace Officer Guide" (written when Dan Lungren was Attorney General), which did offer specific guidelines to all Chiefs of Police, Sheriffs, and District Attorneys. One result of Mr. Lockyer's task force has been a proposed law, SB 187. SB 187 would establish a voluntary statewide registry of medical cannabis users, and which would direct the Department of Health Services to adopt regulations on the quantity of cannabis a patient can possess. The bill has not yet passed the California Senate. Thus, as of this date, there are no recognized statewide standards or guidelines.

.....In February 2002, the San Diego City Council adopted SDMC section 42.1301, entitled "San Diego Medical Cannabis Voluntary Verification Card Program." SDMC section 42.1302(a) defined caregiver in identical terms as California Health and Safety Code section 11362.5(e). However, it also created an application process for a caregiver and a medical cannabis user to receive a card that would be recognized by the San Diego Police Department. The card authorizes the bearer to lawfully possess up to one ounce of marijuana. A patient can designate only one caregiver. A caregiver is permitted to have up to twelve patients. If the card bearer meets the criteria, SDMC section 42.1305(b) states that the person is not subject to arrest for possession of marijuana, in effect creating a "safe harbor" from prosecution for possession of up to one ounce of marijuana.

.....In an effort to create even more specific guidelines for law enforcement, the task force has completed draft guidelines. The draft guidelines establish "safe harbor" amounts of processed marijuana and marijuana plants, and delineate permissible growing area size, and procedures involving seizure of marijuana.

.....The federal government continues to maintain that any cultivation, possession, or distribution of marijuana is a violation of federal law. The federal authorities have closed down large scale medical marijuana "cooperatives" in Oakland, Los Angeles and most recently Santa Cruz. The United States Supreme Court has held that there is no "medical exception" defense to a violation of federal drug laws. *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483 (2001). However, the *Oakland* case does not directly "strike down" the California law; it merely holds that there is no "medical exception" defense for a violation of federal law.

.....The California Supreme Court recently upheld Proposition 215, and affirmed the right of medical patients to use marijuana that is prescribed by a physician. *People v. Mower*, 28 Cal. 4th 457 (2002).

DISCUSSION

.....Although California has passed a law permitting the use of marijuana for medical purposes, there are no statewide standards defining how the law will work in practice. How much marijuana can a patient possess at one time? Where does the patient obtain the marijuana? California Health & Safety Code section 11362.5 (d) indicates that existing law prohibiting possession of marijuana and cultivation of marijuana does not apply to a patient or to a patient's caregiver. This code section apparently creates a "safe harbor" relating to possession and cultivation. It follows that a patient can grow his/her own marijuana, or obtain it from a caregiver who is growing it. But, how much can a caregiver cultivate? How many patients can a caregiver supply? How much can a caregiver possess at one time? These are very legitimate questions for law enforcement, without any definitive answers in state law.

.....Absent any uniform state standards, the Attorney General's Office reports that at least fifteen different jurisdictions have developed a patchwork of local standards and approaches. A spokesperson for Bill Lockyer reports that the best the Attorney General can do is "urge local communities to decide what works best." (*Daily Journal Extra*, page 15, August 26, 2002) The District Attorney in San Diego has not proposed any guidelines for interpreting, or applying the intent of California Health & Safety Code section 11362.5.

.....The task force draft guidelines allow possession of up to 90 plants per caregiver for up to 12 patients, and up to 12 pounds of processed marijuana by each caregiver. The cultivation area is limited to 125 square feet indoors, and 100 square feet outdoors per caregiver. By way of comparison, Colusa County allows 4 plants per caregiver. Butte County allows 6 plants. Shasta and Redding County permit 99 plants. Oakland permits 20 plants or 3 pounds per patient, with no limit on the number of patients. In San Francisco and Los Angeles County there are no limitations because each District Attorney will not prosecute regardless of the number of plants being cultivated for medical marijuana.

.....There are no dispositive California cases ruling upon, reconciling, or resolving all the diverse ways local governments are addressing the issue of medical marijuana. The case of *People ex rel. Lungren v Peron* 59 Cal. App. 4th 1383 (1997) does expressly hold that a caregiver can serve more than one patient. *Id.* at 1399. The Court emphasized the consistency of the care giving. Unfortunately, there is no statewide legal authority for how many more than one patient is allowed, or what quantity of marijuana can legally be cultivated and possessed.

CONCLUSION

.....In light of these circumstances, it is unclear whether the draft guidelines are in conformity with state law. This is a very unsettled area of law. State and federal law are in conflict. We cannot be sure what actions the federal government will take.

.....Some local jurisdictions in California are creating guidelines that are more restrictive; some are less restrictive. Two large metropolitan areas, San Francisco and Los Angeles, have no

limitations on the number of patients a caregiver can supply, and as previously mentioned, no limit as to the quantity of marijuana that can be possessed for medical purposes.

.....The San Diego Medical Marijuana draft guidelines may or may not be consistent with state law. Arguably, they comport with state law. There is no state standard to look to for guidance. The City Council will determine from a policy standpoint to adopt, reject, or modify the draft guidelines. Our office will vigorously defend any litigation which may result from such decisions.

CASEY GWINN, City Attorney

By

David R. Sherman
Deputy City Attorney

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Attachment
ML-2002-5