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May 8, 2007

Marc Nolan
Deputy Attorney General
Department of Justice
State of California
300 S. Spring Street
Los Angeles, CA 90013

Via electronic and first class mail

Re: *Request for Views for Attorney General Opinion No. 07-306*

Dear Mr. Nolan:

I am Chief Counsel with Americans for Safe Access (“ASA”), which is the nation’s largest organization of patients, medical professionals, scientists and concerned citizens seeking to promote safe and legal access to cannabis for therapeutic use and research. I write in response to your request for views concerning the questions posed regarding the regulation of medical marijuana dispensaries by State Senator Sheila James Kuehl.

1. Storefront Medical Marijuana Dispensaries May Be Legally Operated Under State Law (Question #1)

The first question posed by State Senator Kuehl is whether it is “possible for a store front medical marijuana dispensary to be legally operated under the Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5) and the Medical Marijuana Program Act (Health & Saf. Code, §§ 11362.7-11362.83)?” The starting place for responding to this inquiry is the Compassionate Use Act (Cal. Health & Safety Code § 11362.5) [hereinafter “the CUA”], which was approved by the California electorate on November 4, 1996, “[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would

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benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.” (Cal. Health & Safety Code § 11362.5, subd. (b)(1)(A).) Although the CUA did not expressly provide for a mechanism to provide access to marijuana for the seriously ill, it sought “[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.” (Cal. Health & Safety Code § 11362.5, subd. (b)(1)(C).) To meet the voters’ challenge, on September 10, 2003, the California Legislature passed SB 420, also known as the “Medical Marijuana Program Act” or “the MMPA.” (Cal. Health & Saf. Code § 11362.7 *et seq.*; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785.) This legislation provides that “Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.” (Cal. Health & Safety Code § 11362.775). Thus, as the court recognized in *Urziceanu*, *supra*:

The Legislature . . . exempted those qualifying patients and primary caregivers who collectively or cooperatively cultivate marijuana for medical purposes from criminal sanctions for possession for sale, transportation or furnishing marijuana, maintaining a location for unlawfully selling, giving away, or using controlled substances, managing a location for the storage, distribution of any controlled substance for sale, and the laws declaring the use of property for these purposes [The MMPA’s] *specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana.*

(*Urziceanu*, *supra*, 132 Cal.App.4th at p. 785 [Italics added]; see also Stats. 2003, C. 875, Section 1, subd. (b)(3) [declaring that the purpose of the MMPA is to “[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects”].) In short, under California law, medical marijuana collectives and cooperatives which engage in sales are legal.

The question, then, is whether storefront medical marijuana dispensaries may qualify as “collectives or cooperatives.” The apparent reason the Legislature provided for patient “collectives,” in addition to cooperatives, is that an entity cannot call itself a “cooperative,” unless it incorporated as such under the Corporations Code. (See Corp. Code § 12311, subd. (b).) Notwithstanding this technical difference, the law relating to cooperatives provides guidance in ascertaining the Legislature’s intent in authorizing patient collectives. The Corporations Code authorizes cooperatives to distribute goods or services to their “patrons,” based on their patronage, which may take the form of being purely economic, and may include storefront operations. (See Corp. Code § 12243 [“If the corporation is organized to provide goods or services to its members, the

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corporation's 'patrons' are those who purchase those types of goods from, or use those types of service of, the corporation."]; cf. http://www.rei.com/joinrei?cm_re=lq*lq*joinrei [describing structure and membership provisions of the REI cooperative, which has storefront operations]; <http://www.daviscoop.com/members.htm> [same for Davis Food Co-Op].) Consumer cooperatives, for instance, which are described by Corporations Code Sections 12200-12203, are defined by the Legislature as follows:

Subject to any other provision of law of this state applying to the particular class of corporation or line of activity, a corporation may be formed under this part for any lawful purpose provided that it shall be organized and shall conduct its business primarily for the mutual benefit of its members as patrons of the corporation. The earnings, savings, or benefits of the corporation shall be used for the general welfare of the members or shall be proportionately and equitably distributed to some or all of its members or its patrons, *based upon their patronage (Section 12243) of the corporation, in the form of cash, property, evidences of indebtedness, capital credits, memberships, or services.*

(Corp. Code § 12201 [Italics added].) Thus, so long as a storefront medical marijuana dispensary complies with California law, e.g., by insuring that all members are qualified patients and sales are not made to non-patients, it may legally operate under state law.

2. *Local Officials Who Pass Ordinances Regulating Medical Marijuana Dispensaries Should Not Be Subject to Criminal Prosecution Under State or Federal Law*

For the same reasons that medical marijuana dispensaries may be legally operated under state law, local officials who pass ordinances regulating marijuana pursuant to this law would not be subject to state criminal sanction. As for federal law, the mere act of passing regulations does not amount to aiding and abetting marijuana distribution, or conspiring to do this, and there are immunities.

ASA recognizes that the federal government does not carve out any exception to its blanket prohibitions on the manufacture and distribution of marijuana for medical use and the Supreme Court has determined that this is within its authority to regulate commerce among the states. (See *Gonzales v. Raich* (2005) 545 U.S. 1.) Notwithstanding this authority, the mere passage of regulations pertaining to medical marijuana dispensaries does not amount to a federal crime.

To convict one of aiding and abetting under federal law, the government must demonstrate: "(1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the

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underlying substantive offense, and (4) that someone committed the underlying substantive offense.” (*Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 635 [quoting *United States v. Gaskins* (9th Cir. 1988) 849 F.2d 454, 459].) A conspiracy requires that a defendant make “an agreement to accomplish an illegal objective and [that he] knows of the illegal objective and intends to help accomplish it.” (*Ibid.*; *United States v. Gil* (9th Cir. 1995) 58 F.3d 1414, 1423 & fn.5.) Mere anticipation or knowledge that another intends to commit a crime does not translate into aiding and abetting, or conspiracy. (See *Conant, supra*, 309 F.3d at pp.635-636; *United States v. Dellaro* (2d Cir. 1938) 99 F.2d 781.)

Although not all medical marijuana dispensary ordinances are the same, the great majority contain the express caveat that the issuance of a medical marijuana permit “is not intended to and does not authorize the violation of State or Federal law.”¹ Rather than inducing or encouraging the distribution of marijuana in violation of federal law, the drafters of these regulations seek only to prevent the adverse effects associated with some

¹ San Francisco Planning Code, Sec. 890.133, subd.(j) [available at http://www.safeaccessnow.org/downloads/San_Francisco.pdf]; see City of Atascadero Ordinance No. 494, Sec. E [“nothing in this ordinance shall be deemed to conflict with federal law as contained in the Controlled Substances Act, 21 U.S.C. Section 841, not to otherwise permit any activity that is prohibited under that Act”][available at <http://www.safeaccessnow.org/downloads/Atascadero.pdf>]; City of Angels Camp Ordinance No. 410, Sec. 2.C [same][available at http://www.safeaccessnow.org/downloads/City_of_Angels.pdf]; City of Citrus Heights Ordinance No. 2004-06 [same] [available at http://www.safeaccessnow.org/downloads/Citrus_Heights.pdf]; City of Dixon Ordinance No. 04-009, Sec.2.1.C [same][available at <http://safeaccessnow.org/downloads/Dixon.pdf>]; City of Jackson Ordinance No. 640, Sec. 2.C [same] [available at <http://www.safeaccessnow.org/downloads/Jackson.pdf>]; City of Plymouth Ordinance 2004-02, Sec. 2.C [same][available at <http://www.safeaccessnow.org/downloads/Plymouth.pdf>]; City of Ripon Municipal Code, Sec. 9.10.010.E [same][available at <http://www.safeaccessnow.org/downloads/Ripon.pdf>]; Santa Rosa Municipal Code, Sec. 10-40.010, Sec. E [same][available at http://www.safeaccessnow.org/downloads/Santa_Rosa.pdf]; City of Selma Ordinance No. 2005-6, Sec. 101.D [same][available at <http://www.safeaccessnow.org/downloads/Selma.pdf>]; City of Sutter Creek Ordinance No. 302, Sec. 2.C [same][available at http://www.safeaccessnow.org/downloads/Sutter_Creek.pdf]; see also Berkeley Municipal Code, Sec. 12.26.120 [“Noting in this chapter shall be construed as any person or entity from compliance with all other applicable federal, state and local laws”] [available at <http://www.safeaccessnow.org/downloads/Berkeley.pdf>]; City of Martinez Ordinance No. 1277 C.S. [“it is a violation of federal law to provide another person with [marijuana]”][available at <http://www.safeaccessnow.org/downloads/Martinez.pdf>].

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medical marijuana dispensary activity. (See, e.g., Visalia Ordinance No. 2005-19, Sec. 2.E [“The City of Visalia has identified a number of health, safety, and welfare concerns associated with dispensaries, the cultivation, processing, and public use/consumption of medicinal marijuana. These adverse impacts require careful consideration and regulation of the location and manner in which the uses are to operate so as to prevent impacts on nearby residents, businesses and the community at large.”][available at <http://www.safeaccessnow.org/downloads/Visalia.pdf>]<http://www.safeaccessnow.org/downloads/Visalia.pdf>].) Phrased in this restrictive fashion, rather than an affirmation of marijuana cultivation or distribution, the passage of ordinances regulating medical marijuana dispensaries does not constitute aiding and abetting, or conspiracy, under federal law. (Cf. *Robinson v. United States* (9th Cir. 1959) 262 F.2d 645, 648-649 [holding that evidence that physician gave name and telephone number of person who would sell heroin to patient insufficient to establish aider and abettor liability for transportation of heroin][collecting cases]; see also *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 635-636 [holding that physicians who recommend marijuana to their patients are not guilty, by that fact alone, to aiding and abetting violation of federal marijuana laws].)

If, on the other hand, the federal government were to contend otherwise, local legislators who enacted medical marijuana dispensary ordinances could seek to avail themselves of absolute legislative immunity, as well as other immunities provided to public officials. As for absolute legislative immunity, the Supreme Court has held that it applies generally to local legislators exercising their legislative function. (See *Bogan v. Scott-Harris* (1998) 523 U.S. 44, 49.) Although the Supreme Court distinguishes civil from criminal liability and has held that legislative immunity does not protect local legislators from criminal prosecution under federal law where such immunity provides “only speculative benefit to the state legislative process,” (*United States v. Gillock* (1980) 445 U.S. 360, 383), the question posed here involves far more than a speculative impact on the legislative function. Unlike the legislator in *Gillock, supra*, who was prosecuted for federal bribery charges for casting votes favoring those who paid him bribes (*ibid.* at pp.366-368), local legislators who pass ordinances regulating medical marijuana dispensaries are exercising their core legislative functions. Any criminal prosecution of these legislators for doing this would chill the legislative process at the local level throughout the state. It would also implicate the First Amendment and strike at the heart of our federalist system of government. (Cf. *Gorman Towers, Inc. v. Bogoslavsky* (8th Cir. 1980) 626 F.2d 607, 614 [noting “‘important constitutional questions’ that would arise if it imputed to Congress an intent to regulate activity covered by the First Amendment’s guarantee of the right to petition government for redress of grievances”][quoting *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (1961) 365 U.S. 127, 138].) Because of these major impacts on the legislative process and constitutional rights, courts may well recognize an absolute legislative immunity for local legislators who pass dispensary ordinances.

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Furthermore, there are other immunities for public officials. In *United States v. Lanier* (1997) 520 U.S. 259, the United States Supreme Court held that a public official performing official tasks has “qualified immunity” from suit, which includes criminal actions, unless the law was clearly established that his conduct was illegal. (See *id.* at pp. 270-271.) Here, it is far from clearly established that the actions of local legislators in passing dispensary regulations is illegal, so local legislators could avail themselves of this immunity as well.

To like effect, in *Nardone v. United States* (1937) 302 U.S. 379, the Court established the doctrine of implied “governmental exception” to criminal statutes, which requires courts to construe statutes not expressly including government officials as excluding them, especially where this would avoid absurd results. (*Id.* at p. 384; accord *United States v. Mack* (9th Cir. 1999) 164 F.3d 467, 472.) In this case, it would be quite absurd for the federal government to prosecute local officials simply for passing ordinances that are consistent with state law. The doctrine of implied governmental exception, thus should shield local officials. (See also *Regents of the University of California v. Doe* (1997) 519 U.S. 425, 429 [holding that Eleventh Amendment bars suits against state officials carrying out official responsibilities where “the state is the real, substantial party in interest”]; *Blake v. Kline* (3d Cir. 1979) 612 F.2d 718, 725 [“The primary purpose of the eleventh amendment is to assure that the federal courts do not interfere with a state’s public policy and its administration of internal public affairs”] [citing *In re Ayers* (1887) 123 U.S. 443, 505].) In short, local legislators have little to fear by way of a federal criminal prosecution for passing dispensary ordinances.

3. *Local Officials Would Not Be Criminally Liable for the Unanticipated Actions of Dispensaries Who Violate State Law (Question #3)*

For many of the same reasons that local legislators who enact ordinances regulating medical marijuana dispensaries would not be guilty of aiding and abetting, or conspiracy, they would not be criminally liable for the unintended criminal actions of dispensaries under state law. Accomplice liability requires that the accomplice share the criminal intent of the wrongdoer (see *supra*); however, in enacting dispensary regulations local legislators have expressed their intent that dispensaries comply with state law and do not share the criminal purpose of a dispensary that does not so comply.

4. *The Approval of Medical Marijuana Dispensary Ordinances Does Not Expose Municipalities to Civil or Criminal Liability (Question #4)*

ASA is aware of no legal basis for holding municipalities civilly or criminally liable for enacting regulation of medical marijuana dispensaries. Although the Supreme Court held in *Monell v. New York City Department of Social Services* (1978) 491 U.S. 791, that municipalities could be held civilly liable for a custom or policy of violating federally protected constitutional or statutory rights, no such individual rights are implicated here.

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5. *Localities Do Not Generally Issue Business Licenses as Part of Their Medical Marijuana Dispensary Regulations (Question #5)*

ASA is not aware of municipalities issuing business licenses as part of their regulation of medical marijuana dispensaries. This may well be because localities are concerned that the issuance of business licenses, combined with the collection of taxes for marijuana sales, might expose these localities to a greater risk of federal criminal liability.

If you have any questions, please do not hesitate to call. I thank you for your consideration of ASA's views.

Sincerely,



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