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City of Nevada City
317 Broad Street (City Hall)
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Via electronic mail to *amy.wolfson@nevadacity.ca.gov*; *cvh@jones-mayer.com*

Re: Comments re Draft Cannabis Dispensary Ordinance (Nov. 17, 2016 draft)

To: Amy Wolfson, City Planner
City of Nevada City

Mark Prestwich, City Manager
City of Nevada City (Via U.S. Mail)

Crystal Hodgson, City Attorney
Jones & Mayer, Law Firm

Esteemed Members of the Nevada City Government:

I and my esteemed colleague, Nevada County attorney Fran Cole, who is cc'd on this communication, together commend Nevada City for its compassion for medical marijuana patients and for moving forward with authorizing medical cannabis dispensaries. In response to the City's outreach strategy for the above-referenced ordinance (the "Ordinance"), we are both pleased to have the opportunity to respectfully submit the following comments:

1. The title of the proposed Ordinance Amending Chapter 9.22 of Title 9 of the Nevada City Municipal Code to rename the chapter "Medical Marijuana Dispensaries and Other Marijuana Businesses and Activity" should substitute the term "marijuana" for "cannabis" wherever reasonably practicable, both in the title and throughout the amended chapter, as well as in the proposed added Chapter 17.142, and amendments to Chapter 17.48. As your office is likely aware, SB 837 was approved by Governor Brown on June 27, 2016, amending the title of the Medical *Marijuana* Regulation and

Safety Act to the Medical *Cannabis* Regulation and Safety Act.¹ We request the Ordinance reflect this far more appropriate nomenclature where possible.

2. Section 9.22.030 B.3.(4), p. 12, requires a listing of prior convictions without explicitly excluding those prior convictions which have been set aside pursuant to *Cal. Penal Code Section 1203.4* (“expungement”), Proposition 47 (“reduction”) and/or Proposition 64 (“redesignation” and/or “legal invalidity”). As such crimes are excluded by MCRSA from consideration in state licensing², there exists no compelling rationale for disclosure of prior convictions where one’s debt has been paid to society, we ask that this section be amended to exclude disclosure of prior convictions that have been set aside/expunged, or declared “legally invalid” pursuant to Proposition 64, and/or that the request for applicant’s criminal history in this Section be amended to also request information regarding any expungement, reduction and/or redesignation pursuant to California law.
3. Section 9.22.030 B.3.(4), p. 12., further presents a problem for potential employers, as the State of California precludes employers from even *asking* applicants about misdemeanor cannabis-related convictions greater than two [2] years old.³ As such, the current requirement places an employer in the undesirable position of not being allowed to *ask* for such criminal history prior to submitting the applicant to the City for a Medical Cannabis Employee Work Permit. This section should accordingly be amended to exclude disclosure of *misdemeanor* cannabis convictions within the State of California that are greater than 2 years since the date of conviction. (Please note that any untruths in reporting would appear on the Live Scan results, sufficiently discouraging potential employees from lying regarding their background, and constituting a distinct and compelling ground for denial in any event.)
4. An application for a medical cannabis employee work permit under Section 9.22.030 B.3.(6), p. 12, currently includes a requirement that the applicant submit fingerprints

¹ See, Assembly Floor Analysis of SB 837, dated June 15, 2016, located online at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB837.

² See, *Business & Professions Code Section 19323(5)(A)-(D)*, SB 643, authorizing the state licensing authority to deny the application for licensure for prior convictions including prior controlled substance felonies, any violent or serious felonies, and/or any prior convictions for fraud, deceit, or embezzlement.

³ See, *Starbucks Corp. v. Superior Court*, 194 Cal.App.4th 820 (2011), discussing *Cal. Health & Safety Code §§ 11361.5 and 11361.7* in the employment application process, noting “[r]ecords of minor marijuana convictions are to be accorded the highest degree of privacy; they must be treated as if they never existed” and thus “publicly disclosing marijuana-related offenses covered by the marijuana reform legislation violates the individual offender's right of privacy.”

to the City Manager, as does Section 9.22.090 F.(13), p. 28. Manual fingerprints have been rendered obsolete in most jurisdictions by “LiveScan” technology, which captures fingerprints in a digitized format that allows for faster, more secure and better quality identification.⁴ We respectfully recommend every reference to “fingerprints” in the Ordinance be replaced in preference of “LiveScan” technology.⁵

5. Section 9.22.050 A.(1), p. 14, authorizes the City Manager to “conduct initial evaluations of the applicants, and to ultimately provide a final recommendation to the City Council.” Section 9.22.070 A.(1) authorizes the City Council to adopt a procedure “by which the top three applicants applying for a medical marijuana business to operate a medical marijuana dispensary in the City will be presented to the City Council for a final determination at a public hearing.” As currently drafted, the manner in which these two requirements operate together are unclear, as one apparently requires the City Manager to provide a single final recommendation, and the other provides for the three top candidates to present at a public hearing. We respectfully recommend that the City Manager’s recommendation as set forth in 9.22.050 A.(1) be amended to note that he or she shall provide a final recommendation of the top three applicants and that the grounds for his or her recommendation be made express in some manner.
6. Similarly, the Ordinance currently does not list the criteria by which applicants will be evaluated, which can present difficulties both for potential applicants seeking to initiate or amend their business formation(s) and/or manner of operation, as well as for the City staff and City Council who would likely benefit from objective criteria in what will surely be a highly competitive application process. The Planning Commission might look to the City of Berkeley, who was faced with a similar situation and developed an objective ranking system which set forth important factors to be considered, assigning each criterion “points” that were then totaled to select the successful license applicants.⁶

We suggest that the City adopt a system similar to Berkeley’s “Ranking and Allocation Criteria and Procedure,” tailored to our City’s own needs and values, as such an express list provides clear guidance to applicants and offers a measurable

⁴ See, for example, “Application Questions” *re* Fingerprint cards v. Livescan for the California Commission on Teacher Credentialing, which is one of many examples where fingerprint cards are considered to be outdated in the professional licensing capacity, located online here: <http://www.ctc.ca.gov/help/application/fingerprint.html>.

⁵ A list of state-approved Live Scan locations available within Nevada County is obtainable online at: <https://oag.ca.gov/fingerprints/locations?county=Nevada>.

⁶ See, City of Berkeley Resolution “Adopting Ranking and Allocation Criteria and Procedure for Medical Cannabis Dispensaries, located online at http://cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Commissions/Commission_for_Medical_Cannabis/Resolution%2066,711-N.S._Ranking%20Allocation%20document.pdf.

standard by which the City may engage in meaningful and *objective* comparison of applicants.

7. Regardless of the mechanics of the selection process, we believe one of the most important standard applicants should meet is a commitment to the unique community that is Nevada City. In particular, an uncontroverted value of living in Nevada City is the spirit of community giving and, in that regard, applicants should demonstrate a process by which charitable contributions will be made to our community. Priority or “points” should be given to applicants whereby local philanthropy is written into their business structure, as opposed to discretionary giving. Moreover, express philanthropic efforts directed to local organizations which are most affected by the growth and use of cannabis, including but not limited to those cherished environmental and other stakeholder organizations who bear the burden of remedying environmental harms associated with *unregulated* cannabis cultivation or those bad actors who do not operate within the scope of the law. We firmly believe an applicant’s express commitment to local philanthropy should be one of the most (if not *the* most) highly-rated factors in the City’s selection process. The written comments submitted at last week’s Planning Commission town hall validate the importance of community giving in this process.
8. Another important community value which should be ranked highly in the selection process is a commitment to “locally grown” cannabis and cannabis products distributed by dispensaries. The “locally grown” initiatives in our region evidence Nevada County’s pride in the high quality of cannabis produced for medical purposes in this region, and also provide significant economic benefit to local cultivators and businesses throughout our area. As many medical cannabis patients and consumers value locally produced cannabis, attention to an applicant’s express policy of working with local producers could be a boon for the City’s taxing structure: the more desirable the cannabis is, the more patients will obtain their cannabis at that dispensary (and thus more tax revenue for Nevada City).
9. When an applicant is selected under the provisions of Section 9.22.070, p. 18, the issuance of the business permit is conditioned upon the receipt of all required land use approvals following the applicant’s selection by the City. What happens if the required land use approvals are not received? Does the process begin again or is another applicant selected? As currently drafted, the process is unclear and perhaps inefficient, in part because the City has limited the number of dispensaries to one. Opening up the process to allow multiple successful applicants would avoid this problem.
10. Section 9.22.080 E., p. 20, requires the successful applicant to take on *unlimited* liability without any “reasonableness” standard. It is not clear such a standard would survive legal challenge in the first place and, perhaps more importantly, it seems excessive to expect a small dispensary to assume all responsibility for the City’s actions *ad infinitum* and with no touchstone of reasonableness. Notably, a dispensary may be unduly burdened in locating an insurance company to cover these

losses, an already difficult and expensive process. This section should be limited to allow indemnity for *reasonable* costs incurred as a result of dispensary's own actions, lest the insurance burden alone preclude a local applicant from obtaining the coveted first dispensary permit.

11. The requirements of Section 9.22.080 B.(1)(d), p. 22, requiring installation of 24-hour surveillance cameras made available to the City Manager upon request should be made subject to restrictions required under the Health Insurance Portability and Accountability Act [HIPPA].
12. Section 9.22.080 B.(1)(k), p. 23, references a "cannabis card," which is an undefined term under the Ordinance. This reference should be amended to reflect the definition for "patient" or "qualified patient" set forth in 9.22.020(w), at p. 10.
13. Section 9.22.080 E., p. 23, references the "Fees, Charges and Taxes" a successful applicant will be responsible for. It is important that applicants have advance knowledge, at least generally, of what these charges will be prospectively.
14. Section 9.22.080 F.(8), p. 26, references an "on-site" employee, but there may be no one "on-site" when the dispensary is closed. The reference to "on-site" should be deleted or amended accordingly.
15. Section 9.22.080 F.(13), p. 28, consists of a separate section relating to background checks that is duplicative, but also different, from the extensive background check requirements set forth earlier in the Ordinance in Section 9.22.030. Can these be streamlined into a single section?
16. Section 9.22.080 G., p. 30, allows the City Manager or his or her designee to develop other regulations "as are determined to be necessary to protect the public health, safety or welfare." This wide latitude should be tethered to the touchstone of reasonableness, and allow such regulations to be promulgated as are "reasonably necessary" to protect the same.
17. Section 9.22.100 B.(3), p. 31, speaks of the "risks of youth addiction to marijuana," which is outdated language that is no longer accepted in current medical literature.⁷ We suggest that "abuse" be substituted for "addiction."
18. Under Section 9.22.110 B., p. 32, the reference to "attorney fees" should be prefaced by a reasonableness requirement, as discussed in ¶ 10, above.

⁷ See, the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), which define cannabis abuse as a "Cannabis Use Disorder" according to objective criteria (which excludes medical or therapeutic uses).

19. We have strong concerns about an application process that allows a single applicant and again beseech the City and Planning Commission refrain from setting a quantifiable number of applicants, particularly only one. While a competitive application process will undoubtedly bring top contenders quickly to the surface, a singular permit may risk tearing apart a fledgling cannabis community only now coming to the foreground. At minimum, perhaps the Planning Commission can insert language allowing for consideration of a second or further dispensaries within one year, or immediately should the first contender fail to obtain local permits, state licensing, etc. It could be a travesty if the singular successful applicant failed to obtain its licensing, and Nevada City was sent back to the drawing board, negating all tax revenue during any interim “down time” and sending patients back to Sacramento to obtain their medicinal cannabis. Please note that City of Berkeley was so impressed with the quality of the top candidates in its dispensary permit application process, it immediately amended its local Code earlier this year to allow for more than one.⁸ We suggest the language of the ordinance not preclude that possibility, as we are sure the City will be mightily impressed with the caliber of potential candidates. Further, considering the space and zoning limitations of our small City, it is highly unlikely that more than 1-3 applicants will obtain proper zoning in any event.

Please feel free to contact either of myself or attorney Fran Cole if there are any questions, or if clarification is needed. We welcome the opportunity to discuss this further, should additional input be of help. Again, on behalf of both myself and Ms. Cole, we are grateful to provide any assistance in this truly historic process.

Sincerely yours,

Heather Burke, Esq.
Fran Cole, Esq.

By: Heather L. Burke

Cc:

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Dan Thiem, Planning Commission Chair, dthiem2002@yahoo.com

⁸ See, <http://www.eastbayexpress.com/LegalizationNation/archives/2016/09/26/amoeba-records-hits-big-with-pot-shop-permit>