McALLISTER LAW OFFICE, P.C.

36 Steele St. Suite 200
Denver, CO 80206
Phone: 720-722-0048
Fax: 720-542-8391
nadav@mcallisterlawoffice.com
www.mcallisterlawoffice.com

March 23, 2015

Attn: Denver City Council
Denver's City and County Building
1437 Bannock Street #451
Denver, CO 80202

Re: Proposed Denver Caregiver Legislation – CB 15-0109

Dear Members of the Denver City Council:

My name is Nadav Aschner and I am an attorney at the McAllister Law Office in Denver. My firm represents a variety of clientele operating in Colorado's legal marijuana arena, including licensed businesses, land-owners, medical marijuana patients, and caregivers. I am writing to you today in anticipation of this evening's vote on CB 15-0109, a proposed restriction on medical marijuana patient and caregiver rights in the City and County of Denver. Specifically, I am writing to urge you not to pass the ordinance as written, due to the common sense and constitutional problems that I will address in this letter. While I agree that cracking down on illegal diversion of marijuana into the black market should be a priority, this ordinance is not the proper mechanism to bring about the desired changes.

First, the legislature can enact laws that limit the time, place, and manner of the exercise of a constitutional right. For example, we have a constitutional right to assemble and protest, yet we cannot gather in masses and block lanes on I-25. Much like the present case, public safety reasons are often the rationale behind a time, place, or manner restriction. As you are all aware, cultivation of personal medical and/or recreational marijuana is a constitutional right protected under the Colorado Constitution, as is a patient designating a caregiver to cultivate his/her medical marijuana. CB 15-0109 goes well beyond a time, place, and manner restriction and

serves as an outright prohibition on these constitutional rights to cultivate marijuana. Accordingly, this ordinance is likely to be ineffective if enacted anyway. Section 4(b) of Amendment 20 provides an affirmative defense when a patient or a primary caregiver cultivates marijuana in an amount determined to be medically necessary by a licensed physician. Denver cannot legally restrict what the state Constitution has explicitly protected.

Second, Denver already has a 12-plant limit in residential dwellings, which has forced many medical marijuana patients and caregivers to cultivate in commercially zoned facilities in order to grow their recommended plant-count, which can be as high as 99 plants. This bill now seeks to limit the right to cultivate to 36 plants on any zone lot, without removing the 12-plant residential limit. Enacting this bill flat-out denies Denver medical patients their constitutional right to cultivate an amount of marijuana that a licensed physician has determined to be medically necessary. State law prohibits medical marijuana patients from designating more than one caregiver or primary care facility to cultivate their marijuana. A patient with Non-Hodgkin's Lymphoma, for example, who has been allotted 99 plants, will have nowhere to cultivate his or her marijuana. Their only option will be a licensed dispensary. By enacting this bill, you will be denying medical patients and their caregivers a place to grow their marijuana or to oversee the cultivation of plants.

There are a number of reasons why a patient might choose to cultivate her own marijuana or designate a caregiver to do so, as opposed to designating a licensed dispensary. Dispensaries are a new, a fledgling industry. Forcing patients to abandon caregivers causes all sorts of problems, as many patients are physically too weak to get to a dispensary for their daily medicine, or simply choose not to utilize a dispensary. Many caregivers require plants to be grown in clean environments, free from pesticides. Many patients require certain strains that can only be grown by caregivers or the patients themselves. Many caregivers grow strains that are high in CBD, rather than THC, which dispensaries cannot legally produce. Many caregivers provide high quality medicine that a dispensary simply cannot provide. Enacting this bill will almost certainly have an effect opposite to the intention of its drafters-- if each caregiver is limited to 36 plants on a zone-lot, the number of grows will undoubtedly increase, and many caregivers will be forced to grow in residential units while the overall quality of the medicine they provide declines. There are thousands of medical patients in Denver alone, and caregivers help to provide a quality source of medicine that simultaneously keeps licensed businesses from being overwhelmed.

Another reason caregivers are still needed is that they can provide ancillary services in addition to cultivation of marijuana, all at an affordable price for patients and caregivers. During the City Council Committee meeting on Tuesday, March 3 in which this bill was first introduced, Ashley Kilroy suggested that a caregiver should just obtain the requisite license to operate a commercial marijuana grow facility or simply "buy another zone lot." This is unrealistic.

Opening a dispensary or commercial grow is extremely expensive. Licensing fees are large and rent is often inflated. Additionally, state law **requires** a licensed medical marijuana grow licensee **to also obtain** a licensed medical marijuana-infused products manufacturing facility or dispensary license. This is unreasonable and highly expensive for caregivers interested in cultivating only for friends and family. Ms. Kilroy's recommendation that a caregiver simply obtain a license to cultivate is unaffordable and impractical, and imposes extraneous requirements on patients or their caregivers.

Third, and perhaps the most insidious problem with the ordinance as written is its definition of a "marijuana plant," which is so broad that it will be impossible for anyone to know when they have violated the ordinance. The language states that a marijuana plant includes "all parts of the plant genus cannabis, ***whether alive or dead***", and any "seeds, leaves, stalks, and flowers." The ordinance makes it unlawful "to ***allow*** more than 36 marijuana plants…." (e.g a seed, a flower, a leaf, a stalk) ***"to be possessed or cultivated"*** on any zone lot. **This language effectively re-criminalizes possession of marijuana!** If a seed, a leaf, or a flower is a "marijuana plant," then according to this ordinance, you may not possess or *allow* to be possessed more than thirty six of them on any zone lot in the city. State law mandates that any adult can possess up to one ounce of marijuana. Using the definition of a marijuana plant proposed in this ordinance, a person cultivating a single marijuana plant may be violating the law every time he or she trims flowers off their plant, as a single marijuana plant can yield hundreds of flowers and leaves. The definition of a plant in the proposed ordinance will create an undue burden on patients, caregivers, and recreational users, as well as on law enforcement, which will expose Denver to a series of lawsuits. It also will prohibit the cultivation of industrial hemp anywhere in Denver.

Fourth, the evidence presented in support of this ordinance is highly questionable. Supporting language for the ordinance states that Denver is seeing caregiver grows in amounts as great as 2,000 plants. This type of large scale growing is likely already an illegal operation, thus it is a matter of enforcement. Plant counts only go as high as 99 plants for each patient, and state law restricts caregivers to no more than five patients without a special waiver. Therefore, without obtaining a special permit from the state, a caregiver cannot grow more than 495 plants. Caregivers cannot "join together" for the purposes of cultivating under current regulations. While this bill is intended to stop those operating large-scale "caregiver" grows, this ordinance will not stop the bad actors already flouting state and local law. All CB 15-0109 will do is punish the good actors, who respect and actively seek compliance with the law.

Fifth, contrary to what the proposal suggests, limiting the size of grows does nothing to ease the burden on law enforcement. In the ordinance, the drafters cited the lack of permits pulled, lack of Certificates of Occupancy obtained, and general lack of inspections, requiring more work by law enforcement. However, in the initial committee meeting that introduced this

bill, law enforcement agents admitted that they already inspected these facilities at least twice a year. Why would a person who is not pulling permits under the current rules begin pulling permits under more restrictive rules? Limiting the plant count will not cause unlawful actors to suddenly follow the laws. What Denver needs to do is enforce the existing laws, not adopt new ones, especially new ones that punish the individuals already expending significant time and resources to follow the laws.

CB 15-0109, which affects every citizen of Denver, was not afforded a public hearing. It is set for its final reading and vote today, Monday, March 23, only one week after being introduced. The Committee Meeting on March 3 allowed proponents of the bill 45 minutes to introduce the bill. Many of the "statistics" presented to this council are highly inaccurate and meant to instill irrational fears into the minds of this council. A "public comment" period was provided, allowing both proponents and critics of the bill a total of 15 minutes to comment. Eight speakers were allotted up to two minutes each, hardly enough time to educate this council on the pertinent issues and to respond to the misinformation provided to the City Council by Ms. Kilroy. Neither my clients nor I take any issue with reasonably limiting the size of caregiver grows, preventing diversion of marijuana, or creating safe conditions in the Denver community, but this ordinance goes way too far, simply recriminalizing the possession of marijuana under the false pretext of safety.

Ultimately, the intent of the proposed ordinance is noble, but its hastily-drafted, prohibitionist language will only create more problems than it resolves. There are proper channels to limit the black market, but this is not one of them. Legislation can be proposed limiting plant counts through the Colorado Department of Public Health and Environment and the state is already seeking to limit caregiver grows to 99 under proposed state legislation. Legislation can also be proposed to reduce the high taxes on recreational marijuana, thereby driving black market buyers into the legal marketplace. This ordinance must be amended before it can pass. Surely a compromise can be reached. Denver should wait to see what the state of Colorado does before rushing to pass a highly problematic ordinance.

To close, I urge you to reject the current proposed ordinance and to send it back for revisions, so as to avoid creating more problems than those being solved. In addition to the issues I raised in this letter, there are dozens of reasons to vote against this ordinance, not the least of which will be an immediate lawsuit challenging the constitutional validity of this. Please do not hesitate to contact me if you have any questions or comments.

Regards,

Nadav Aschner, Esq.