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**Delivery via email**

September 10, 21

Mendocino County Board of Supervisors  
501 Low Gap Road  
Room 1010  
Ukiah, CA 95482

Re: Certification and Determination of Board action on Referendum  
Against Ordinance No. 4492 (Cannabis land use and cultivation)

Dear Supervisors:

I am writing to you on behalf of my clients, the proponents of the above-referenced referendum petition, in regard to the scheduled actions on the Board of Supervisors agenda for Tuesday, September 14, 2021: to receive the County Clerk's certification of the above-referenced referendum petition and then take action on that petition pursuant to Elections Code Sections 9145 and 9146. It is my understanding that you have received legal advice on the proper procedures to follow on these matters from the office of the Mendocino County Counsel.

As an attorney who has been involved in California elections law, and specifically the laws applicable to initiatives and referenda, for over thirty years, I have been asked by my clients to provide my comments on the proper legal procedures, as well as certain legal risks associated with some actions you might be considering.

**PARTIAL REPEAL OF THE ORDINANCE**

The question has been raised whether the Board has the ability, in response to the referendum petition, to repeal only part of the ordinance, while leaving other parts in place. The answer to this question is no.

Elections Code Section 9145 provides that, "If the board of supervisors does not entirely repeal the ordinance against which a petition is filed, the board shall submit the ordinance to the voters..." [emphasis added] This indicates that the Board has before it only a binary choice – either entirely repeal the ordinance or place the ordinance before the voters. That interpretation has been confirmed by the courts.

In *County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, The Board of Supervisors of Kern County, in response to a referendum petition challenging a newly enacted ordinance prohibiting marijuana dispensaries, attempted to rescind not only the recently-enacted ordinance, but a prior ordinance that had effectively allowed marijuana dispensaries in commercial zones. The result of the combined rescission was to, in effect, totally prohibit marijuana dispensaries. The county attempted to use this new situation to shut down existing dispensaries in commercial areas, but a dispensary challenged the county's action. The court of appeal held that the county's action in rescinding both the new ordinance *and the prior ordinance* had violated Section 9145 and was therefore void. As it explained:

We interpret the phrase "entirely repeal the ordinance" in section 9145 as synonymous with "wholly revoke the ordinance" and "rescind the ordinance in all its parts," and conclude this meaning limits the additional action a board of supervisors may take to

implement the essential feature of the protested ordinance. Specifically, we conclude the additional action taken by a board may not have the practical effect of implementing the essential feature of the protested ordinance. In other words, additional action by a board of supervisors violates section 9145 *if it fails to return to the status quo ante on the essential feature of the protested ordinance.* (Id. at p. 322 [emphasis added].)

The Court's conclusion could hardly be clearer. The intent of Section 9145 is that the rescission of the referended ordinance must return things to where they were before *that ordinance* was adopted. By going further, and rescinding the prior ordinance, the Supervisors had, in effect, circumvented the referendum and the intent of the voters who had signed it.

## **TIME PERIOD IN WHICH REENACTMENT IS PROHIBITED**

For municipal referenda, Elections Code Section 9241 prohibits re-enactment of an ordinance rescinded in response to a referendum petition, either by the legislative body or the voters, for a period of one year from the rescission. The Elections Code's provisions for county referenda on re-enacting a referended ordinance are silent on the period within which re-enactment is prohibited. Nor have I located any appellate case that discusses the period of prohibition for a county referendum, but there is no obvious reason why it would not be the same – one year – as applies to municipal referenda.

## **RISK IN ENACTING A NEW ORDINANCE**

While it seems clear that an ordinance rescinded in response to a referendum petition cannot be re-enacted verbatim, in all likelihood for a year, the question is what can be done during that year. Attempts to enact essentially the same ordinance with minor alterations have been rejected by the courts. (*Martin v. Smith* (1959) 176 Cal.App.2d 115 [approving a new lease, with only the term of the lease changed].) However, enactment of a new but different ordinance is not necessarily prohibited. As was stated in *In re Stratham* (1920) 45 Cal.App. 436, 439, 440

[O]rdinarily, when an ordinance which has been suspended by a referendum has been repealed by the council, the council cannot enact another ordinance in all essential features like the repealed ordinance; ... The council may, however, deal further with the subject matter of the suspended ordinance, by enacting an ordinance *essentially different* from the ordinance protested against, *avoiding, perhaps, the objections made to the first ordinance.* If this be done, not in bad faith, and not with intent to evade the effect of the referendum petition, the second ordinance should not be held invalid for this cause. [emphasis added] (*Accord, Gilbert v. Ashley* (1949) 93 Cal.App.2d 414.)

Of course any new ordinance would need to go through the normal legislative process, and even if different, it could also be subject to referendum. As to the question of how different a new ordinance would need to be to survive possible legal challenge, that is a grey area. In *Gilbert v. Ashley, supra*, while the new ordinance was also, like the referended ordinance, a business license tax, it was in a different year, the revenue would be applied to different purposes, the tax rate was different, there were different exemptions, etc. The differences were sufficient that it survived court challenge. Clearly, as to the the validity of a replacement ordinance, the devil may be in the details. The closer the replacement ordinance gets to what was referended, the higher the risk of it being overturned by the courts.

My clients hope you will find these comments useful in considering their referendum petition.

Most Sincerely,