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SACRAMENTO COUNTY DISTRICT ATTORNEY'S REPORT: THE CITY OF ISLETON AND MEDICAL MARIJUANA COMMERCIAL GROW PROJECT

After more than two months of attempts to obtain information from Isleton city officials, the District Attorney's Office [DA] commenced a grand jury investigation of a development agreement between the City of Isleton and Delta Allied Growers [Delta] for a marijuana cultivation farm. At first, requests for public documents were ignored. Later the requests were met with refusals to provide public records, delivery of materials which were incomplete or release of materials which were misleading. Due to the lack of cooperation from city officials, a grand jury investigation became the most viable and expedient method to ascertain if criminal laws had been violated before the cultivation project became operational.

The concern about the cultivation project was that for the first time a jurisdiction within Sacramento County was authorizing the industrial cultivation of marijuana in violation of state and federal laws. Whereas, some local jurisdictions have authorized medical marijuana dispensaries (illegal under federal law and legally uncertain under state law), no jurisdiction within Sacramento County [or the state as far as we know] had authorized the large scale cultivation of marijuana. For that reason, it was important to act as quickly as possible.

The DA has concluded that no criminal charges will be filed against any Isleton city officials or against the developer of the project, Michael Brubeck [Brubeck]. The DA will be referring this report and related documents to the California State Bar Association and will request a review of City Attorney Dave Larsen's [Larsen] conduct pertaining to the development agreement.

The DA has made the following additional conclusions:

- Had the marijuana cultivation farm project become operational it would have been illegal under state and federal laws and not in compliance with the Attorney General Guidelines [AG Guidelines].

- The City Attorney had a conflict of interest in serving as City Attorney and being compensated at $250/hour for work for which he would have billed Isleton $150/hour. He recommended approval of the development agreement which provided for the increased billing rate and he failed to seek waivers of conflicts of interest from the Isleton

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City Council. However, there is insufficient evidence to prosecute him for being financially interested in a contract [Government Code Section 1090].

- The City Attorney provided incorrect information about the California Environmental Quality Act [CEQA] when he advised the City Council that the marijuana cultivation farm was not subject to CEQA and exempt from CEQA. The consequence of the incorrect information was to expedite the adoption and implementation of the development agreement and mislead the City Council.

- Members of the City Council and Planning Commission were not provided with objective and well-researched information by the City Manager, the City Attorney, or the City Police Chief.

- Conflict of Interest – City council members need to be better informed about what constitutes a conflict of interest. It appears that they did not know or at a minimum did not understand the conflict of interest laws. They should participate in conflict of interest training and make appropriate disclosures.

- The City's public records maintenance should be improved.

FACTUAL HISTORY

In June 2010, Brubeck, representing himself as the president of Delta Allied Growers, approached Isleton City Manager Bruce Pope [Pope] about establishing a marijuana cultivation farm [Farm] in Isleton.

On July 21, at a public workshop, Brubeck gave a PowerPoint presentation describing the Farm, economic benefits to Isleton as a result of the project, and diagrams of the structures to be built. The project was to be located at the corner of 6th and Jackson in Isleton. To that presentation, Brubeck brought his attorney Mark Tilton [Tilton], his security consultant John Sullivant, and the person who would be in charge of construction for him, Dan Holland [Holland]. Some members of the City Council and Planning Commission attended the workshop. The workshop was not an official meeting of either the Council or the Commission. The materials presented at that workshop appear to be the only documents ever provided to city officials before work began on a development agreement. At least, no documents were provided by Isleton city officials to the Grand Jury or the DA which would contradict this conclusion.

There were only two City Council meetings in July: July 14, and July 28, but Brubeck's project was not on the agenda for either meeting.

On July 30, Pope, Tilton, and Larsen met to discuss terms of a development agreement between Delta and Isleton for the Farm. Prior to that date, the City Council gave no direction to either Pope or Larsen about proceeding with a development agreement. In fact, no information was ever provided which would indicate Pope or Larsen was authorized to proceed with any action in relation to the Farm.

In a letter dated August 3 to Tilton, with copy to Pope, Larsen wrote:

> "This is intended to constitute the letter agreement [agreement] we talked about with Mr. Pope last Friday. Basically, this agreement will serve as your clients' application to the city for the expedited approval of land use entitlements needed to operate a marijuana cultivation farm at the northwest corner of 6th and School Streets [the project]. This agreement also commemorates other agreed upon terms and conditions."[1]

The letter provided that "[t]he parties have already agreed"[2] to certain terms. Agreed to financial terms were that Brubeck would pay for Larsen's time at the rate of $250 per hour [Larsen's normal rate for Isleton work was $150 per hour], upon execution of the agreement Brubeck would pay $20,000 to Isleton in lieu of permitting and application fees, $80,000 "to be used to advance the general interests of the city," and 3% of the "gross proceeds from" the Farm. The letter also set forth an expedited schedule for approving the development, including scheduling a special planning commission meeting for August 12.

The letter also addressed the issue of a conflict of interest regarding Larsen's status as City Attorney and payment by Brubeck. As to that point, the letter provided:

> "If this arrangement were to be interpreted as the city attorney representing both parties in any fashion, the parties are hereby notified that there are potential conflicts of interest in such an arrangement, and that by signing this agreement, they hereby waive any and all such conflicts to the greatest extent allowed by law. Also, in the event this arrangement is so interpreted, this provision shall serve as the required retainer agreement between the applicant and the city attorney."[3]

It appears that by signing the agreement Pope was waiving the conflict on behalf of Isleton. There was no documentation provided which indicated the agreement was ever presented to the City Council by either Pope or Larsen. No information was presented to the DA that the August 3 letter was ever provided to the City Council, nor was there any documentation that Larsen or Pope presented information regarding a conflict of interest at any time to the City Council.

On August 3, Brubeck paid Isleton $20,000.

On August 11, Larsen sent Brubeck a bill for $1,375 for work related to the Farm performed on July 26 and 30.

On August 12, a special Planning Commission meeting was held for purposes of considering a conditional use permit and zoning changes to permit the farm project to proceed. The staff report by Pope indicated that the conditional use permit was for property located at 6th and Jackson. The zoning change was to change the city zoning ordinance to read:

> "Nothing herein is intended, or shall be interpreted, to allow zoning uses which are illegal

[1] Page 1, August 3, 2010 letter.
[2] Page 3, August 3, 2010 letter.
[3] Page 2, August 3, 2010 letter.

under local or state ~~or federal~~ law, or uses involving the retail sale of marijuana, whether for medicinal purposes or otherwise."

The words "or federal" were struck because it was understood among city officials that the Farm was illegal under federal law.

The staff report noted that the Farm was not subject to CEQA.[4] Pope recommended that the permit be granted and the zoning ordinance amended.

The vote of the members of the Planning Commission who were present was 2 to 1 to grant the permit and approve the zoning change. Three votes in favor of the permit and zoning change were required and therefore, the permit was denied. City officials were unclear if the zoning change occurred. The public records produced were also unclear.

Brubeck filed a timely appeal of the Planning Commission action.

On September 7, the Planning Commission met to consider adopting a resolution approving a development agreement between Isleton and Delta for the Farm. The resolution was approved.

On September 8, the City Council met to consider granting Brubeck's appeal and approving the conditional use permit for the Farm and adopting an ordinance approving the development agreement.

A staff report prepared by Larsen for the meetings on September 7 and 8 recommended that the Planning Commission and the City Council take actions required for the development agreement to be approved. The development agreement included the terms that Larsen would be paid $250 per hour for work related to the development agreement.

On September 14, at a regularly scheduled City Council meeting there was a second reading of the ordinance approving the development agreement for the Farm.

On September 22, Delta's articles of incorporation were filed with the California Secretary of State. Isleton City officials believed that Delta was already a legal entity when the public workshop was held on July 21 and were not aware that it did not become a legal entity until after the agreement was approved.

During October 2010, real estate broker Gene Resler [Resler] began working with Brubeck to purchase property located at 6th and Willoughby in Isleton. At that time, Resler was the Mayor of Isleton.

November 12, 2010 was the effective date of the development agreement between Isleton and Delta.

[4] The significance of a project subject to CEQA is that it could add at least 6 months or more to the approval process for the project.

On November 17, the City Council reviewed and approved a request from Delta to move the location of the marijuana cultivation farm from the 6th Avenue and Jackson location to 6th Avenue and Willoughby, the site of a failed housing development. The actions were recommended in a staff report by Larsen who also noted that the project was not subject to CEQA, and was also subject to exemptions under CEQA.[5] The Council passed an ordinance to amend the development agreement. Brubeck wanted the site moved because the property at 6th and Jackson had drainage problems and was not suitable for building without substantial improvements. City officials believed the location was changed because the site was too close to a school. In any case, Brubeck never acquired any real property interest in that site.

On December 8, the City Council had a second reading of the ordinance approving the amendment of the development agreement. The amended agreement became effective in December. No copy of an amended agreement was provided to the DA and no information or communication about a change of location was provided to the DA prior to such documents being subpoenaed for the grand jury.

On January 31, 2010, the DA contacted Isleton Police Chief Rick Sullivan [Sullivan] requesting information about the marijuana cultivation project in Isleton. Sullivan advised that the project was backed by a Southern California investment group, all marijuana would be shipped to Southern California, and the operation in Isleton would be a marijuana nursery. Per Sullivan, Isleton would receive $25,000 per month or 3% of gross sales, whichever was greater.

On February 1 and 2, the DA had contact with Larsen and Pope and requested all documents and correspondence related to the development project.

On February 4, a representative of the DA picked up copies of the following documents: an unsigned and undated copy of the development agreement [missing p. 7, the page describing financial arrangements between Isleton and Brubeck]; an unsigned and undated copy of the ordinance approving the Farm; Delta's Farm proposal and PowerPoint presentation; the resolution to approve the conditional use permit for the August 12 Planning Commission meeting; an announcement from Delta for public meetings to be held on September 6 and 7; Larsen's staff report for the September 7 and 8 meetings; and the resume of Brubeck's security consultant.

On February 8, 2011, the DA sent a letter to Larsen and Pope [**View Attachment 1**], as representatives of the City and City Council, advising that the development agreement appeared to be in violation of state and federal criminal statutes. The DA requested any additional information which Larsen and Pope believed the DA should consider and asked for the status of the construction of the project. Neither Pope nor Larsen provided the letter to the City Council.

On March 2, 2011, a foreclosure notice was filed against the holder of the note [Del Valle Capital Corporation, Inc.] on the 6th Avenue and Willoughby property, stating that Del Valle owed nearly $23 million on the property. The date of foreclosure was set for three months later, June 2, 2011. Brubeck had no real property interest in this property at this point in time.

[5] See footnote 4.

On March 7, 2011, [**View Attachment 2**], the DA sent another letter to Mayor Mark Bettencourt[6], other council members, Pope, and Larsen noting that no one had responded to the February 8 letter. The letter dated March 7 also provided a copy of a February 1 letter from United States Attorney for the Northern District Melinda Haag to the City Attorney of Oakland in which the U.S. Attorney advised that, "Individuals who elect to operate 'industrial cannabis cultivation and manufacturing facilities' will be doing so in violation of federal law." These letters were not provided to the Mayor or City Council.

On March 9, Pope, Larsen, and Sullivan had a telephone conference call with District Attorney Scully [Scully] and discussed the contents of a letter faxed at the beginning of the call. No other documents were provided by these city officials.

On March 11, Scully sent a letter [**View Attachment 3**] responding to Larsen regarding allegations made during the conference call and letter discussed during the call. Once again the DA requested documents regarding the development agreement. Scully also noted that she would be meeting on March 11 with United States Attorney for the Eastern District Benjamin Wagner to discuss the Isleton project. Larsen did not provide this letter to the City Council.

On March 17, 2011 [**View Attachment 4**], the U.S. Attorney Wagner sent a letter to the DA, with a copy to Pope, thanking the DA for copies of Isleton correspondence and noting that the Farm "is of significant concern to us, and we will carefully monitor the situation as it develops." Pope did not provide the letter to the City Council.

On March 18, 2011, Scully, Chief Deputy Cynthia Besemer, Pope, and Larsen met at the DA's Office. Pope and Larsen provided additional documents [**View Attachment 5**].

On March 23, 2011, Brubeck, with former mayor Gene Resler acting as Brubeck's agent, signed a lease for the property located at 6th and Willoughby, for the period of April 1, 2010, through June 30, 2011, for $30,000 total for the 3 month lease period. Brubeck leased the property in his capacity as Director of Oso Rio LLC from the owner Del Valle Capitol Corporation, Inc. This was the first time that Brubeck acquired a property interest in the location approved by an amendment to the development agreement in December 2010. Brubeck knew at the time he signed the lease that the property was in foreclosure.

On March 31, 2011, the DA requested from Larsen copies of bills Larsen sent to Brubeck for work related to the development agreement and information as to the form of payment from Brubeck.

On April 4, 2011, the DA requested a complete signed and dated copy of the development agreement, noting that only an unsigned, incomplete, and undated copy had previously been provided to the DA.

On April 5, 2011, Larsen refused to provide copies of the bills or information as to payment on the grounds that his bills were "proprietary." Larsen also provided a complete copy of an

[6] By this point, Resler was no longer the mayor, and no longer on the City Council; his term ended December 1, 2010.

unsigned and undated copy of the development agreement. After receiving the same copy from Pope, the DA again requested a completed, dated, and signed copy of the development agreement. No other documents were provided after the March 18 meeting.

On April 13, 2011, grand jury subpoenas were served on Isleton city officials.

On April 15, 2011, copies of Larsen's bills to Brubeck were provided to the DA.

On April 27, 2011, grand jury hearings began.

DISCUSSION

I.

THE PROPOSED MARIJUANA FARM WAS ILLEGAL AND DID NOT COMPLY WITH THE ATTORNEY GENERAL GUIDELINES[7]

Brubeck represented to Isleton city officials that his project to develop an industrial medicinal marijuana cultivation farm in Isleton was fully compliant with state law and the AG Guidelines. Pope and Larsen supported this conclusion and never presented the Council with any materials addressing the legality of the Farm under state law. Just as important, the Council never requested any materials addressing the legality of the Farm.

Given the widespread knowledge that Isleton's financial condition is precarious, perhaps the phrase "desperate times call for desperate measures" most accurately explains why Pope, Larsen, and the City Council approved this development agreement to allow a commercial industrial marijuana cultivation farm in their city.[8] In this case, the desperate measures were illegal under California and federal law[9] and it would have been clear that the Farm also was not compliant with the AG Guidelines had city officials simply taken a closer look at the proposed project and how it would operate.[10] City officials could also have requested an Attorney General Opinion or sought advice from the DA. Instead they chose to do nothing that would prevent the Farm project from moving forward on an expedited basis.

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[7] On August 25, 2008, the California Attorney General issued "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use." Available at http://medicalmarijuana.procon.org/sourcefiles/Brown_Guidelines_Aug08.pdf.

[8] On April 29, 2011, Benjamin Wagner, the United States Attorney for California's Eastern District sent a letter to the City of Isleton and Michael Brubeck stating that the proposed project is illegal under federal law and may be subject to legal proceedings. The marijuana cultivation farm project was shut down shortly after the letter was received.

[9] Under the Controlled Substance Act of Federal law, possession, cultivation, sales and transportation of marijuana are prohibited. *See* 21 U.S.C. § 812 et. seq. In California, Health and Safety Codes Sections 11358, 11359, and 11360 (cultivation, possession for sale, and transportation/sales of marijuana) are felonies.

[10] The city's Development Agreement with Delta stated that the agreement was void if the project did not comply with state law. Most of the city officials knew the project was illegal under federal law and relied upon the City Attorney and City Manager representations that the project was legal under state law and complied with the AG Guidelines.

A. CALIFORNIA'S MEDICAL MARIJUANA STATUTES

In 1996, California voters passed Proposition 215, "The Compassionate Use Act" (CUA), as codified in Health and Safety Code Section 11362.5. Section 11362.5, subdivision (d),[11] provides *limited* affirmative defenses to marijuana patients and their primary caregivers for possession, *individual* cultivation, and transportation (emphasis added).[12]

On January 1, 2004, Senate Bill 420, the Medical Marijuana Program Act (MMP) became law.[13] The legislation established and defined : 1) the ID card program (mandatory in each county); 2) certain terms (such as the parameters of a qualified caregiver); 3) possession guidelines for cardholders (the quantities in the Act have since been found unconstitutional by the California Supreme Court[14]) ; and 4) a qualified right to the collective and cooperative cultivation of medicinal marijuana.

The CUA and MMP make up the entirety of the statutory medical marijuana laws. The intent of these laws was to decriminalize the possession and cultivation of marijuana for persons suffering from serious illnesses for which marijuana provided a level of treatment. Nothing in the MMP or CUA, any statute or any subsequent case opinion, decriminalizes the possession for profitable sale or the profitable sales of marijuana.[15] Sale of marijuana, whether medicinal or recreational, remains a crime under state law.

Reference to marijuana collectives and cooperatives is found in the MMP. Section 11362.775 states: "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 (emphasis added)."

The only medical marijuana statute that specifically mentions *reimbursement for expenses* is Section 11362.765 (c): "A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, shall not, on the sole basis of that fact, be subject to prosecution or punishment under Section 11359 or 11360."

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[11] All further statutory references are to the California Health and Safety Code unless otherwise specified.

[12] The CUA is only a defense to personal possession of marijuana (§ 11357), cultivation (§ 11358), and limited transportation (§ 11360). The Delta's Farm would not have involved personal possession, cultivation, or transportation because the marijuana was going to be sold; therefore, the CUA would not have provided an affirmative defense.

[13] The legislation is found under §§ 11362.7 through 11362.83.

[14] *People v. Kelly* (2010) 47 Cal.4th 1008.

[15] § 11362.765 (a) states in pertinent part: "[N]or shall anything in this Section authorize *any individual or group to cultivate or distribute marijuana for profit* (emphasis added)." *See People ex. rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389.

B. ATTORNEY GENERAL GUIDELINES

Section 11362.81(d) provides: "[T]he Attorney General shall develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical patients qualified under the [CUA]." The Attorney General published these guidelines in August 2008.

The AG Guidelines stated purpose is to "(1) ensure that marijuana grown for medical purposes remains secure and does not find its way to non-patients or illicit markets, (2) help law enforcement agencies perform their duties effectively and in accordance with California law, and (3) help patients and primary caregivers understand how they may cultivate, transport, possess, and use medical marijuana under California law." [16]

Some of the guidelines that apply to qualified patients and primary caregivers who come together to collectively or cooperatively cultivate physician-recommended marijuana are found in "Guidelines Regarding Collectives and Cooperatives." [17]

This section defines "cooperatives" and "collectives" and explains how these groups should operate under the law. A cooperative "must file articles of incorporation with the state and conduct its business for the mutual benefit of its members. No business may call itself a 'cooperative' (or 'co-op') unless it is properly organized and registered as such a corporation under the Corporations or Food and Agriculture Code. Cooperative corporations are 'democratically controlled and are not organized to make a profit for themselves, as such, or for their members, as such, but primarily for their members as patrons.' "[18] "Cooperatives must follow strict rules on organization, articles, elections, and distribution of earnings, and must report individual transactions from individual members each year." [19]

The AG Guidelines provide guidelines for the lawful operation of cooperatives. They must be nonprofit operations.[20] They should "acquire marijuana only from their constituent members, because only marijuana grown by a qualified patient or his or her primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative …. Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its members. Instead, the cycle should be a closed-circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members. To help prevent diversion of medical marijuana to non-medical markets, collectives and cooperatives should document each member's contribution of labor, resources, or money to the enterprise. They should also track and record the source of their marijuana." [21]

Distribution and sales to nonmembers are prohibited: "State law allows primary

[16] AG Guidelines p. 1. These guidelines are divided into four main areas: (1) "Summary of Applicable Law"; (2)" Definitions"; (3) "Guidelines Regarding Individual Qualified Patients and Primary Caregivers"; and (4) "Guidelines Regarding Collectives and Cooperatives."
[17] AG Guidelines p. 8.
[18] AG Guidelines p. 8 (citations omitted).
[19] AG Guidelines p. 8 (citation omitted).
[20] AG Guidelines p. 9.
[21] AG Guidelines p. 10.

caregivers to be reimbursed for certain services (including marijuana cultivation), but nothing allows individuals or groups to sell or distribute marijuana to non-members. Accordingly, a collective or cooperative may not distribute medical marijuana to any person who is not a member in good standing of the organization. A dispensing collective or cooperative may credit its members for marijuana they provide to the collective, which it may then allocate to other members. Members also may reimburse the collective or cooperative for marijuana that has been allocated to them. Any monetary reimbursement that members provide to the collective or cooperative should only be an amount necessary to cover overhead costs and operating expenses." [22]

C. ILLEGALITY UNDER STATE LAW

Delta was incorporated on September 22, 2010, by Brubeck through the California Secretary of State as a nonprofit mutual benefit corporation under the name of Delta Allied Growers.[23] Brubeck represented to city officials that the Farm was fully compliant with state law.

Other individuals involved in implementing this project were Dan Holland [Holland], Reese Robbins [Robbins], and Mark Webster [Webster]. Holland was the construction site manager, Robbins handled finances, Webster was head of security for the project, and outside "investors" provided money for the project.[24] Holland was not a medical marijuana patient or primary caregiver. Robbins had a temporary medicinal marijuana card and was not a primary caregiver. Webster had a medical marijuana recommendation on the belief that it was needed for the business, although he did not use marijuana.

The purpose of the marijuana farm was to grow marijuana to sell to dispensaries in Southern California. Although Delta claimed it was providing medicine to patients, it was going to be a marijuana retail sales operation, period.[25]

The CUA prohibits group marijuana activity and only allows qualified patients and primary caregivers to possess or grow marijuana for their own personal use. Since the marijuana farm was going to sell marijuana to others, it would not fall within the protection of the CUA.

The MMP provides immunity for group marijuana cultivation in Section 11362.775.[26] In order to be protected by Section 11362.775, a person must show that: (1) the person was a member of the collective or cooperative; (2) each member of the collective or cooperative is either a qualified patient, a person with valid identification cards, or a primary caregiver; and (3) the

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[22] AG Guidelines p. 10.

[23] Brubeck had publicly stated on several occasions in July and August 2010 that he represented Delta.

[24] One person said that investors, that he believed were from China, had contributed $1.3 million to the project in either December 2010 or January 2011.

[25] Their business model was strictly as a manufacturer selling to distributors. After the marijuana was sold, it became the responsibility of the distributor.

[26] Section 11362.775 states: "Qualified patients, persons with valid identification cards, and the designated primary caregivers or 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 (emphasis added).

members of the collective or cooperative came together and worked on some aspect of the association that was related to cultivating marijuana.

At the time the marijuana cultivation farm development agreement was approved, the marijuana cultivation farm was not limited to individuals who could legally collectively or cooperatively cultivate marijuana for medical purposes. Specifically, the project was being partially funded by sources outside California and implemented by some individuals who were not primary caregivers or qualified patients.

The second reason the Farm would not fall under the protection of Section 11362.775 is because Delta was going to grow the marijuana in Isleton and sell it to Southern California dispensaries. The dispensaries are not patients or caregivers. If this enterprise had been a true collective or cooperative, its members would have had to work on the activities related to cultivation, or must have made some meaningful contribution to the day-to-day activities of the cooperative. This would not be possible because the individuals that would be claimed as being members of the "cooperative" would not be physically present to assist in the cultivation. The only connection these individuals would have had with the cultivation would occur after the marijuana was cultivated, harvested, processed, and sold. They would buy the marijuana after Delta sold it to a dispensary. That would make them customers and not cooperative members.[27]

These marijuana sales would also be a violation of Section 11360.[28] An examination of the CUA and MMP statutes, case law, and legislative history support this conclusion. The CUA statute drafters and proponents emphasized that except as specifically provided in the proposed statute, the state's marijuana laws were not going to be relaxed or eviscerated.[29] This meant that

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[27] To the extent that *Urziceanu, ibid.*, implies that monetary transactions are immunized based on the statutory construction under Section 11362.775, this analysis was superseded by the California Supreme Court in *People v. Mentch* (2008) 45 Cal.4th 274. The *Mentch* court analyzed Section 11362.765, which uses very similar language to Section 11362.775 and likewise provides immunity to Section 11360. The Court held that the listed statutes do not convey immunity, nor any intention that the individuals "could never be charged" with the listed crimes, but instead: "[The enumerated statutes identify] the statutory provisions against which the specified people and conduct are granted immunity." *Id*. at 291.
Thus, in order for a person to raise a medical marijuana defense pursuant to Section 11362.775, a person must (1) be engaged in the permitted range of conduct; and (2) the range of conduct must be the sole basis for his guilt. The permitted range of conduct would be group cultivation. Common sense tells us that buying marijuana is not the same as cultivating marijuana. Delta was not going to associate with members of a collective or cooperative to cultivate marijuana. It was in business to sell marijuana to unknown individuals that were not associated with Delta. In the cases that discuss monetary compensation by collective and cooperative members there was evidence of group participation in the marijuana cultivation.

[28] Health and Safety Code §11360(a) makes it a felony for any person to sell marijuana in the state.

[29] The court in *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1546 discussed this intent as follows:
" [B]oth the statute's drafters and proponents took pains to emphasize that, except as specifically provided in the proposed statute, neither relaxation much less evisceration of the state's marijuana laws was envisioned. […] And District Attorney Hallinan [a proponent] underlined this point by declaring, in the ballot pamphlet's rebuttal, that the proposition 'only allows marijuana to be grown for a patient's personal use. Police officers can still arrest anyone who grows too much, or tries to sell it. […]' Finally, in his neutral analysis of the proposition presented to the voters via the Ballot Pamphlet, the Legislative Analyst stated that the proposed law 'does not change other legal prohibitions on marijuana'…."

marijuana sales were intended to remain illegal under the CUA.[30]

When the MMP was enacted, it further specified conduct that would be immunized from criminal liability; however, it was designed to implement, not change or amend the CUA.[31] Also, if the Legislature had meant to legalize sales it could have added language that would have immunized sales. Instead, Section 11362.775 immunizes only qualified patients and primary caregivers who associate in order to collectively or cooperatively cultivate marijuana for medical purposes.

Collectives and cooperatives are also barred from transforming medical marijuana projects authorized under the MMP into for-profit enterprises.[32] It was anticipated that this project would be lucrative for Delta and the city. Delta projected revenues for Isleton during years two through five to exceed $600,000.[33] The bottom line is the Farm was going to grow marijuana and sell it to dispensaries for a profit.[34]

D. DELTA'S FARM DID NOT COMPLY WITH THE AG GUIDELINES

The AG Guidelines were developed to ensure the security and non-diversion of marijuana grown for medical use by patients qualified under the CUA.[35] These guidelines acknowledge that the MMP provides a "qualified right to collective and cooperative cultivation of medical marijuana."[36] When qualified patients and primary caregivers come together to collectively cultivate marijuana, the AG Guidelines recommend that cooperatives file articles of incorporation with the state and conduct their business for the mutual benefit of its members.[37] The guidelines specify that the formation and operation of cooperatives must be: democratically controlled, not organized to make a profit for them, require earnings and savings to be used for the general welfare of its members or equitably distributed to members in the form of cash, property, credits, or services. Cooperatives must follow strict rules on organization, articles, elections, and distribution of earnings, and must report individual transactions from individual members each year.[38]

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[30] *People ex. rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 held: "The sale and possession for sale of marijuana continue to be proscribed by Sections 11360(a) and 11359 following enactment of the [CUA]. The lack of profit to the seller or possessor does not exempt such activities from prosecution."

[31] The intent of the MMP was to "Clarify the scope of the application of the act… Promote uniform and consistent application of the act among the counties within the state …. Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects…. To address additional issues that were not included in the act, and that must be resolved in order to promote the fair and orderly implementation of the act." (Senate Bill 420, 2003-2004 Leg. Reg. Sess. (as introduced in the Cal. Senate, February 20, 2003); *See People v. Hochandel* (2009) 176 Cal.App.4th 997, 1013.

[32] *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal. App. 4th734, 746.

[33] The Development Agreement states the City will receive 3% of Delta Allied Grower's gross revenue each year and guarantees $25,000 a month minimum.

[34] Although Delta was set up as a "nonprofit" cooperative, it was in business to make a profit otherwise why would outside investors participate?

[35] Health and Safety § 11362.81(d). Attorney General opinions do not bind courts; however, they are entitled to considerable weight. *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.

[36] AG Guidelines p. 8.

[37] AG Guidelines p. 8.

[38] AG Guidelines p. 8.

Brubeck was in charge of the operation and part of the investment capital came from outside investors. Delta did not have rules on organization, articles, elections, or distribution of earnings.[39] Therefore, it was not democratically controlled and the earnings and savings were not going to be used for the general welfare of the members of the cooperative. At least two members of the project were not members of the cooperative. They received a monthly salary for their work on the project. This made them salaried employees of the corporation and not medicinal marijuana cooperative members.

So who was a member of the Delta cooperative? The only evidence of membership indicates there was only one member – Brubeck. Everyone else was a salaried employee, an investor, or a purchaser. However, Section 11362.775 requires that the group cultivate marijuana for medical purposes. Since the future purchasers would not have anything to do with the cultivation of marijuana in Isleton, the sales of marijuana would not fall under the protection of Section 11362.775.

Another issue the guidelines address is preventing the diversion of medical marijuana to non-medical markets.[40] The AG Guidelines state that collectives[41] and cooperatives may not "purchase marijuana from, or sell to, non-members; instead they should only provide a means for facilitating or coordinating transactions between members."[42] This helps prevent diversion of medical marijuana to non-medical markets and cooperatives should document each member's contribution of labor, resources, and money to the enterprise.[43] Delta's sales to the dispensaries would have involved non-members purchasing the marijuana.

Finally, if Delta was a medicinal marijuana cooperative, it would have been organized to benefit its members and any earnings would be used for the general welfare or distributed to the members.[44] However, it is clear that the only persons or entities who would benefit from the earnings of the Farm were the City of Isleton, Brubeck, Delta employees, and the investors in the Farm.

[39] The Delta Allied Articles of Incorporation is the only document filed by Delta and only lists its name, a purpose to engage in lawful activity, and the name the corporation's initial agent for service. There was no evidence that other documentation existed.
[40] AG Guidelines p. 10.
[41] The AG Guidelines uses the dictionary to define collectives as "a business… jointly owned and operated by the members of the group." A collective should be an organization that merely facilitates the collaborative efforts of patient and caregiver member including the allocation of costs and revenues. *Id*. at p. 8. Delta planned to sell to dispensaries and was not going to be jointly owned and operated by the dispensaries or their members.
[42] AG Guidelines p. 10.
[43] AG Guidelines p. 10.
[44] AG Guidelines p. 8; *See also* California Corp. Code § 12201.

II.

CONFLICT OF INTEREST VIOLATION

A. GOVERNMENT CODE SEC. 1090

Government Code Section 1090 prohibits a government officer or employee from making a contract in which he has a financial interest. For this prohibition to apply, it is not necessary that the official actually be the person who finally approves or signs the contract. Any participation in the process by which the contract is developed, negotiated, or executed is sufficient to fall within the definition of "making" the contract under the statute. Neither does the official need to be an actual employee. Contractors who serve in positions commonly held by officers or employees, including an attorney who by contract serves as the city attorney, is a public official covered under Section 1090. *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533; *People v. Gnass* (2002) 101 Cal.App. 1271.

Under Government Code 1090, it is irrelevant if the contract is fair or equitable. *Thomas v. Call* (1985) 38 Cal.3d 633; *People v. Sobel* (1974) 40 Cal.App.3d 1046. With respect to a contract city attorney, it is also irrelevant whether or not the contract was entered into openly, or secretly. For certain types of interests classified under Section 1090 as remote interests, the contract may be permitted if the interest is disclosed, and the official does not participate in any way in the making of the contract. Government Code Section 1091. However, the remote interest exception applies only to members of multi-person bodies, such as boards or commissions. It has no application to the analysis here, where the city attorney was not acting as a member of a board or commission, and where he did not refrain from participation or advocacy with respect to the contract in question.

There are also certain exceptions to Section 1090 relating to government salary. See Government Code Sections 1091(b)(13), 1091.5(a)(9). Those have no application to our consideration here, because the Isleton city attorney was a contractor, not an employee, and thus his compensation was not salary. In addition, one of those exceptions only applies when the official has refrained from participation or advocacy with respect to the contract (the remote interest exception under 1019(b)(13)), and the other does not apply when the contract is with the same entity that employs the officer (the non-interest exception under 1091.5(a)(9)). Further, as noted above, the remote interest exception only applies to members of boards or commissions, which was not the role of the city attorney here.

One must note that a contract city attorney is permitted to negotiate with the city council concerning the terms of his contract, including compensation. *Campagna v. City of Sanger*, supra.

B. GOVERNMENT CODE SEC. 87100 (POLITICAL REFORM ACT)

The conflict of interest provisions of the Political Reform Act (PRA) also contains a provision relevant here. Government Code Section 87100 prohibits a public official, including a contractor serving in the capacity of a public official, from participating in a government decision in which

he has a financial interest. Government salary is not considered to be a financial interest under the PRA, but as previously noted, the Isleton city attorney was a contractor, and thus did not receive a salary. Similar to the application of Section 1090, an official, including a contractor, may negotiate with respect to the compensation and other conditions of his contract with the government entity. California Code of Regulations, Reg. 18702.4(a)(3).

C. CITY ATTORNEY AND CONFLICT OF INTEREST

Conflict of interest statutes are premised upon "[t]he truism that a person cannot serve two masters simultaneously" (*Thomson v. Call* (1985) 38 Cal.3d 633, 637). "The duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office." (*People v. Honig* (1996) 48 Cal.App.4th 289, 314)

If Larsen's conduct is measured solely by the premise behind conflict of interest statutes, it falls far short of absolute and undivided loyalty to the citizens of Isleton. He negotiated an "agreement"[45] with an increased billing rate for himself without direction from the City Council and started billing Brubeck before the development agreement was even presented to the Council. By any measure, the wording of the August 3 letter does not put city officials on notice as to the conflict of interest [payment to Larsen by Brubeck] nor does it constitute a valid waiver because the issue was never presented to the Council for them to waive. Neither the August 3 letter nor any other material brought to our attention indicate that the City Council was ever given the type of detailed disclosure and notice that would ordinarily be required for a waiver of conflict of interest. Larsen advised the City Council that the project was legal under state law but never contacted any prosecutorial agency or expert in criminal law to determine if that was true. He advised that the project was exempt from CEQA when it was not. [See below.] In fact, everything he did had the effect of moving the project through Isleton's approval process as quickly as he could.

However, for our purposes Larsen's conduct must be measured by whether or not this office can prove beyond a reasonable doubt all the elements of violation of either Section 1090 or Section 87100 for purposes of criminal prosecution. We have concluded that we cannot.

Applying Section 1090 to the facts, some elements can clearly be proved. Larsen, as a contract city attorney, is subject to that law. The development agreement does constitute a contract (agreement between Isleton and Brubeck for Brubeck to be permitted to build the Farm in exchange for payment to Isleton). The making of the contract was influenced by Larsen as indicated by his conduct beginning with the meeting with Pope and Tilton on July 30 through his recommendations to the City Council to approve the development agreement and the amendment of the development agreement. The elements that he acted willfully and knowingly may be fulfilled by the facts that his actions indicate that he purposely took the actions to negotiate the agreement, provided advice that the project was lawful, made recommendations that the City Council and the Planning Commission take the required actions, and negotiated terms that set a higher fee for his services than he would otherwise have received.

[45] August 3, 2010 letter Larsen to Tilton, p. 1.

However, the development agreement, including provisions for Delta's payments for Larsen's additional work, was ultimately approved by the City Council in November. Brubeck/Delta did not remit any payment to Larsen until after that point. Since the city attorney is entitled to negotiate his compensation with the City (see *Campagna v. City of Sanger*, supra), this sequence of events may be interpreted as Larsen having presented his request for additional compensation on the Delta matters to the City, and the City having approved it. Measured against the required standard of knowing willfulness necessary to prove a criminal violation, we believe that a jury likely would not find the necessary element of willfulness, based on these facts.

III.

PROJECT WAS NOT EXEMPT FROM CEQA

Larsen advised the City Council in writing and verbally that the development agreement was exempt from CEQA. More specifically the development agreement, which he drafted, provides:

> "This project is not subject to CEQA pursuant to Title 14, California Code of Regulations, Section 15060(c) (2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and Title 14, California Code of Regulations, Section 15061(b) (3) (there is no possibility the activity in question may have a significant effect on the environment)."

In addition, the development agreement also provides that the project is covered by certain categorical exemptions and it lists those.

The DA consulted an expert who specialized in land and environmental law while working for the State of California and who now teaches it at a University of California law school. In the expert's opinion, the statements in the development agreement regarding CEQA are "implausible" and "impossible." Furthermore, the expert considered that the documents submitted detailing the project were "sketchy and incomplete" and did not contain information which would have been expected for a project of this nature.

Specifically, the expert noted the language quoted above which states "the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment" could not be correct because the project would involve buildings which house 1000 to 1500 marijuana plants. Fences were erected and a water supply was required all of which did have a "direct" physical change in the environment.

The expert also noted that one of the exemptions which purportedly exempted this project was only applicable to public works projects or creation of a wetland facility, not a private development project as described in the development agreement. Therefore, this project was not exempt from CEQA as represented.

In addition, the expert noted that the other exemption cited was "even more implausible" because it only applied to projects for law enforcement purposes. Clearly, an industrial marijuana cultivation farm is not a law enforcement project.

In order to comply with CEQA, it would have first been necessary to conduct an initial study on the project to determine what impact it would have on the local and regional environment. If it was determined that the project would not have a "substantial adverse affect on the environment" or the impacts could be mitigated the next step would have been a notice of determination. However, if the study resulted in a determination that the project would have a significant impact on the environment, a complete Environmental Impact Study would have been necessary and would have taken time and money to complete. The law places the requirement to obtain that study on the city. Had a complete Environmental Impact Study been required, it would have taken at least 6 to 9 months just to obtain the complete study.

Importantly, the property had no source of water and would have required expensive improvements to make water available. The expert noted that one of the most important aspects of CEQA review has to do with the availability of water given the shortage of water in California for residential, commercial, and agricultural uses. The DA could find no documentation or witnesses who could state that the city ever evaluated the need for water or the availability of it or what would be required to obtain it at that location for purposes of the Farm.

On his website, Larsen lists among his areas of expertise land law and environmental law. Per the expert witness, someone who specializes in land law should have known that the statements regarding CEQA in the development agreement were incorrect.

It is not a crime to reach incorrect conclusions about CEQA. However, it is one more example that in moving forward with the illegal industrial marijuana farm project as quickly as possible, Pope, Larsen, and Brubeck were prepared to not only ignore criminal statutes, they were prepared to ignore environmental ones as well.

IV.

CITY COUNCIL WAS NOT PROVIDED INFORMATION

Once Brubeck presented information about his planned project for a marijuana cultivation farm at a public forum, Pope and Larsen adopted a "full steam ahead" approach for the project. No research was initiated, no background checks were conducted, and no questions were asked. More importantly, Pope and Larsen chose to ***only*** present information, in many cases limited information, to the City Council and Planning Commission which would expedite the project. Failures to provide information or actions providing inaccurate information include, *but are not limited to*:

- Pope and Larsen provided information to the Council that the Farm complied with state laws and the Attorney General's Guidelines. However, neither Pope nor Larsen researched nor sought advice from experts in criminal law as to the legality of the project but instead just provided information that it complied with all state laws.

- Larsen presented information that the project was not subject to CEQA which was incorrect.

- Neither Pope nor Larsen provided the City Council with copies of the DA's letters of February 8 or March 7 or the letters from two United States Attorneys.

- Pope and Larsen advised the City Council before grand jury hearings commenced that the DA had been provided with copies of all public documents requested by the DA knowing that was not true.

- Larsen never advised the City Council that he refused to provide to the DA copies of the bills sent to Brubeck until reminded that those documents were public documents.

- Chief Sullivan did not conduct any criminal background checks on Brubeck, did not check with other law enforcement officials to learn if Brubeck was the subject of any investigations, and did not consult or make any law enforcement inquiries about the legality of the Farm.

- Larsen and Pope did not check whether or not Brubeck had a legal interest in either property approved for the Farm nor did they check to determine whether or not Delta was a legal entity with which to do business.

Taking into consideration the information kept from the City Council along with the information provided which was inaccurate, it is clear that the Isleton City Council did not knowingly enter an agreement for an enterprise which is prohibited by state and federal law. Misinforming the City Council about CEQA, state law on medical marijuana, and the AG Guidelines as well as failing to inform the City Council about inquiries from the DA and interest of the United States Attorney make it clear that Pope and Larsen were not interested in providing the Council with an objective analysis of the applicable law nor did they take any steps to learn what the law was before both advised the Council to approve the agreement.

The city council members also had an independent duty to demand that Pope and Larsen, in their roles, provide complete information about the Farm. The mere fact that neither city employee presented any analysis that the Farm complied with state law should have been sufficient to place the council members on notice that legality of the Farm might be in question.

However, the failure to provide accurate legal analysis on the part of Pope and Larsen and the failure of the city council members to seek this information from Pope and Larsen does not make any of them criminally liable. This conclusion could have been reached without the need to hold grand jury proceedings had Pope and Larsen chosen to fully cooperate with the DA when requests were made for public records. Their earlier failures to provide the Council with

information to make an informed decision was further complicated by failing to keep the Council informed of the interest of the DA and United States Attorney.

V.

THE CITY COUNCIL NEEDS TO BE BETTER INFORMED ABOUT CONFLICTS OF INTEREST

During the course of this investigation, the DA discovered two different factual situations that each evidenced a conflict of interest. The first involved the City Attorney and has been discussed earlier in this report.

The second occurred when the Mayor Gene Resler, a real estate broker, began representing Brubeck in real estate transactions during the approval process of the development agreement. Shortly after October 1, 2010, Brubeck asked Resler to represent him in his attempt to lease with an option to buy the property where the greenhouses were eventually constructed. No agreement was reached to either lease or purchase the property while Resler was mayor. Later in January 2011, Resler, by now no longer the mayor or a city councilmember, did sign an agreement to represent Brubeck in the real estate transaction for Brubeck to lease the same property and received a commission for his work as the real estate broker for the transaction.

Arguably Resler's conduct could fall within the prohibitions of Government Code 1090 because the development agreement did not go into effect until November 12 and was later amended in November 2010, both times when Resler was still the Mayor. However, this office chose not to pursue an investigation into Resler's conduct. First, Resler voluntarily disclosed this information after he was asked to review his business files for information about his representation of Brubeck in real estate matters and but for Resler's disclosure this office would not have known of the business relationship which began in October 2010. Second, it is unclear when the real estate relationship ended relative to the end of Resler's term as mayor, when official actions were taken with respect to the development agreement and its amendment, and most importantly whether or not Resler knew he could have a financial interest in the development agreement [Brubeck would earn money from the Farm and thereby pay Resler, his real estate broker]. For all of these reasons we took no steps to investigate this potential conflict.

In case of any actual conflict, council decisions or contracts could be voided or void. Some conflicts could lead to allegations of misfeasance in office which could result in removal from office. It is in the best interest of the city that council members receive training on conflicts of interest and disclose information to the City Manager or City Attorney so that it can be reviewed. After review, a determination can be made whether or not the conflict is one which must be disclosed and/or result in recusal of the council member from voting on a particular agenda item.

VI.

RECORD KEEPING AND PRODUCTION

In considering any matter dealing with the City of Isleton, attention must be paid to the matter of the city's public records. The records, the manner in which they are kept, located and produced in response to legitimate and proper requests, leaves much to be desired.

During the course of our investigation, we requested various city documents, using various modes of request. Several of the documents requested were city enactments passed by the city council. The form for these enactments includes the date of enactment by the city council, the vote at the time of enactment, and a signature line attesting to the enactment. Of all the enactments provided, none was in completed form (i.e. showing the vote on the ordinance, and the signature of the person authorized to authenticate the document).

Other types of documents we sought had the same problem. Neither the city nor the city attorney could produce a copy of the contract for city attorney services with the signature of either or both parties. The only document requiring signatures for which we were able to obtain a copy having the signatures of all parties was the development agreement between the city and Delta, and we only obtained an executed, signed copy of that document after multiple requests and commencement of grand jury proceedings. Earlier copies provided to this office were all various versions without any signatures.

For documents which may have gone through multiple drafts before the final text was reached, receipt of an unsigned copy leaves the inquiring party to question whether the copy received is in fact the final ordinance as enacted, or only a draft.

A similar but different failing was found in other types of records. Minutes of a commission or committee meeting may reflect that a vote has been taken, but do not identify which board members voted for the measure, and which voted against. When issues arise as to conflict of interest, or positions taken, the omission of a record as to which members cast which vote is a critical omission.

Entirely apart from the issue of investigating the conduct of the city and its officers, the failure to maintain proper copies of records draws all manner of city business into question. The city should institute procedures to properly maintain public records.

CONCLUSION

Unlike local governments which have chosen to permit marijuana dispensaries, Isleton entered into a development agreement to permit an industrial marijuana farm. There is no California statute and no published court opinion which exempts the owners and operators and their business partners from criminal liability for cultivation, possession, possession for sale, and transportation of marijuana. All of these activities were contemplated in making this Farm

operational. As the United States Attorneys for the Northern and Eastern Districts in California have made clear, all of these activities also violate federal law.

It is not the duty of the DA to monitor and advise on the wisdom of all types of governmental decision or action. However, when the conduct impacts criminal justice or implicates criminal liability, it is entirely proper for the DA to investigate and examine the matter. Given the nature of this situation, the DA had a duty to investigate and determine the facts. Rather than choose to cooperate, the City Manager and the City Attorney chose to fight the investigation by withholding some public records, disclosing some uncompleted and unsigned documents, and keeping the City Council in the dark about letters from the DA and the United States Attorney. If in fact they believed the project was legal under state law there was no reason to act in this manner.

Both the City Manager and the City Attorney also failed the city in another respect – they failed to adequately investigate criminal law or consult with experts in the area of criminal prosecution before taking action on the development agreement. They failed to provide the City Council with the basis for making an informed decision in an area with serious pitfalls of criminal liability. This is no way for a municipal government to function.

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