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6 **MONTANA DISTRICT COURT CASCADE COUNTY**

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8 Plaintiffs, Cause No. _____
9 vs. **PLAINTIFFS' BRIEF IN SUPPORT**
10 City of Great Falls **OF MOTION FOR TEMPORARY**
11 Defendant. **RESTRAINING ORDER AND**
INJUNCTION AND ORDER TO SHOW
CAUSE

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13 The Plaintiffs, hereby files their brief supporting their Motion for Temporary
14 Restraining Order, Injunction and Order to Show Cause. In support of this motion,
15 the Plaintiffs are filing the Affidavits of _____ in support.

16 A. Notice to Defendant

17 Every effort has been made to provide notice to the Defendant of the pending
18 motions: Summons with Motion for Temporary Restraining Order and Injunctive
19 Relief, Plaintiffs Brief in Support of Motion for Temporary Restraining Order and
20 Injunction. Proposed Order for Temporary Restraining Order and Motion to Show
21 Cause. Plaintiff has every reason to believe that this shall be accomplished without
22 delay. As soon as service is accomplished, the affidavits of service shall be filed with
the Court.

1 B. Summary of Position

2 The City of Great Falls has exercised its power in a manner that is inconsistent
3 with state law when it enacted a citywide ban on medical marijuana on June 1, 2010.
4 The actions of the city directly conflict with the rights of patients to grow their six
5 plants as allowed by law, access marijuana and obtain marijuana from their caregiver
6 as authorized by state law. The City of Great Falls should be prevented from
7 restricting medical marijuana patients from growing their marijuana. The City of Great
8 Falls does not have the authority to ban caregivers from growing or providing
9 medication to their clients, not does the city have the ability to ban commercial
10 caregivers. The plaintiffs request an injunction to prevent the city from engaging in
11 these unlawful restrictions and enjoining them from taking any action against patients
12 and caregivers in the City of Great Falls, because to do so would do irreparable
13 damage to the plaintiffs.

14 C. Factual Background

15 In 2004, the voters of Montana passed the Medical Marijuana Act which is
16 codified in title 50, chapter 46 of the Montana Code.

17 The plaintiff's all suffer from debilitating medical conditions and they use medical
18 marijuana to treat the symptoms. Craig Jackson suffers from joint degeneration that
19 inhibits his mobility. Shannon Agnes has spinal cancer. Laura Cantaloupe has stage
20 four Carcinoma, Al Thain and David Sears suffer from HIV. Each of the Plaintiffs are
21 in possession of a Montana medical marijuana card. Each of the Plaintiffs resides in
22 Great Falls.

23 On January 19, 2010 the city commission passed a temporary moratorium on
24 medical marijuana businesses operating within Great Falls, city ordinance 3049. On
25 February 2, 2010 the city commission passed a ninety day moratorium on medical
marijuana businesses operating with Great Falls. On May 4, 2010 the commission

1 met to discuss three possible alternatives to the zoning of medical marijuana within
2 the city of Great Falls. The three proposals were to allow the commercial sale of
3 marijuana in certain zones, proposed ordinance 3051, a complete ban of medical
4 marijuana within the City, proposed ordinance 3054, or to extend the moratorium for
5 one year. Proposed ordinance 3055. At the May 4, 2010 meeting the proposal to
6 allow commercial businesses to sell marijuana in select zones was defeated and the
7 temporary moratorium was extended until June 1, 2010.

8 On June 1, 2010 meeting the complete ban on any land use for the purposes of
9 medical marijuana was discussed and passed by three fifths of city commission.
(Attached Ordinance 3054, Exhibit A)

10 D. Legal Discussion

11 The plaintiffs assert a claim against the City of Great Falls for violating the
12 Montana Medical Marijuana Act, the city commission has acted beyond the scope of
13 their authority and violated the plaintiff's rights to access to their medical marijuana.
14 The plaintiff's all depend upon marijuana to relieve their suffering, minimize their pain
15 and treat their medical conditions. The plaintiffs seek an immediate restraining order
16 preventing the city of Great Falls from enforcing, prosecuting or otherwise restricting
17 the plaintiffs and caregivers from engaging in the lawful use of medical marijuana
under the State's law.

18 Ordinance 3054 made three changes to Title 17 of the official code of the city of
19 Great Falls. Title 17 is the section of the city code that deals with land use within the
20 boundaries of the city. The purpose of these changes was the ban of medical
21 marijuana within the City of Great Falls and to prevent the cultivation of medical
22 marijuana by both patients and caregivers, directly interfering with the ability of
23 patients to get their medication. This first change was to Great Falls Municipal Code
17.20.1.020 which states the purpose of Title 17.

1 The amended 17.20.1.020 reads:

2 This chapter is established to promote the public health, safety, and welfare and is
3 intended to accomplish the following purposes:

- 4 1. promote a sound development pattern by separating the City into various
- 5 districts where each has uniformly applicable development standards
- 6 2. separate incompatible land uses to the greatest extent possible
- 7 3. encourage the most appropriate use of land throughout the City
- 8 4. regulate and restrict the erection, construction, reconstruction, alteration,
- 9 repair, and use of buildings, structures, and land
- 10 5. provide for a wide range of housing options
- 11 6. allow different, but compatible land uses (i.e., mixed uses) to occur in specified
- 12 areas of the City
- 13 7. avoid, or as a less preferred alternate, minimize congestion
- 14 8. avoid, or as a less preferred alternate, minimize environmental degradation
- 15 9. implement the City's adopted growth policy
- 16 10. prohibit any use of land within the City of Great Falls that is in
- 17 violation of federal, state or local law.

18 The additional language is part 10, which reads: *“prohibit any use of land within the*
19 *City of Great Falls that is in violation of federal, state or local law.”*

20 The second amendment under Ordinance 3054 is to add 17.20.3.070 which
21 reads:

22 **“Prohibited Land Uses**

23 No use of land shall be permitted by right or conditionally permitted within the City of
24 Great Falls that is in violation of federal, state or local law.”

25 The last amendment is section 17.4.070:

Relationship of this Title to other regulations

In addition to meeting the regulations contained in this Title, development shall
comply with all applicable regulations of federal and State agencies. In all cases, the
strictest of the applicable provisions shall apply. No use of land shall be permitted by

1 right or conditionally permitted within the City of Great Falls that is in violation of
2 federal, state or local law.

3 The addition to that code section is the language: “No use of land shall be permitted
4 by right or conditionally permitted within the City of Great Falls that is in violation of
5 federal, state or local law.”

6 The effective date of this new ordinance is July 1, 2010.

7 The purpose of these changes in the city code was to effectuate a complete ban on
8 the cultivation of medical marijuana within the City of Great Falls as well as prohibit
9 the sale of medical marijuana. The intent and purpose of these changes in the city
10 ordinances is in direct conflict with State law that allows the use of marijuana in
11 certain limited situations.

12 Title 7 of the Montana Code Annotated deals with the local governments, such
13 as the city of Great Falls. It specifically limits the power and authority city
14 governments have over the governance of their constituents. M.C.A. 7-1-113
15 prohibits the city of Great Falls from exercising any power inconsistent with state law.

16 M.C.A. 7-1-113 states:

17 **Consistency with state regulation required.** (1) A local government with
18 self-government powers is prohibited the exercise of any power in a manner
19 inconsistent with state law or administrative regulation in any area affirmatively
20 subjected by law to state regulation or control.

21 The right of a citizen with a bona fide medical condition to use medical
22 marijuana is governed by Title 50, chapter 46 of the M.C.A. The plaintiffs are all
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1 qualifying patients pursuant to the Medical Marijuana Act, which entitles them to the
2 use of medical marijuana.

3 Pursuant to M.C.A. 50-46-201(1): “A person who posses a registry
4 identification card issues pursuant to 50-46-103 may not be arrested, prosecuted, or
5 penalized in any manner or be denied any right or privilege, including but not limited
6 to civil penalty , , , if; (a) the qualifying patient or caregiver acquires, possesses,
7 cultivates, manufactures, delivers, transfers, or transports marijuana not in excess of
8 the amounts allowed . . .”

9 The ordinance passed by the City, if enforced would prohibit patients from
10 being able to cultivate marijuana for their personal use and for caregivers to produce
11 marijuana for their patients. The City through this ordinance is exercising, or
12 attempting to exercise, power that they do not have. The city is trying to use their
13 power beyond the scope of their authority in a way that is inconsistent with State law.
14 They are attempting to usurp the power of the State and the power of the people by
15 passing an ordinance that infringes on a privilege under state law.

16 The Montana Supreme Court has held that when a qualifying patient uses
17 medical marijuana in accordance with the Medical Marijuana Act, he is receiving
18 lawful medical treatment. In this context, medical marijuana is most properly viewed
19 as a prescription drug. State v. Nelson, 2008 MT 359, P29. The city of Great Falls is
20 attempting to interfere with the ability of qualifying patients to receive their legal
21 medication.

22 M.C.A. 50-46-201(1) is clearly a prohibition on the powers of the local
23 governments to regulate, penalize or restrict the use of medical marijuana. The local
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1 governments do not have any authority to prohibit the sale of medical marijuana or
2 the use of medical marijuana by qualified patients

3 Even if the local governments have the power to regulate, the power to
4 regulate is not a grant of power to prohibit legal activity. [*DeLong v. Downes* \(1977\),](#)
5 [175 Mont. 152, 573 P.2d 160](#) (a statute authorizing regulation of gambling licenses is
6 not a grant of power to prohibit authorized forms of gambling); [Winther v. Village of](#)
7 [Wieppe \(1967\), 91 Idaho 798, 430 P.2d 689](#) (the power to regulate a business is not
8 a grant of power to prohibit it); and [Combined Communications Corporation v. City](#)
9 [and County of Denver \(1975\), 189 Colo. 462, 542 P.2d 79](#) (the power to regulate
10 does not include the power to prohibit).

11 The city ordinance is intended to be a complete ban of medical marijuana for
12 commercial use, and prohibits a patient and caregiver from even growing his own
13 marijuana as allowed by State statute. The intent of the city goes beyond their
14 authority and power.
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16 The city of Great Falls is improperly enforcing federal law against the plaintiffs
17 by restricting them from the lawful use of medical marijuana under state law. The
18 Montana Supreme Court already looked at whether the District Courts could enforce
19 federal laws contrary to state law. The Court and found “a state court may not, under
20 these circumstances, use violation of the federal law as a justification” for its actions
21 against a qualifying patient in [State v. Nelson](#), 2008 MT 359, P36-3, citing [Printz v.](#)
22 [United States](#), 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 2d 914 (1997) which
23 stated:
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1 Congress cannot compel the States to enact or enforce a federal regulatory
2 program . . . The Federal Government may neither issue directives requiring
3 the States to address particular problems nor command the States' officer, or
4 those of their political subdivisions, to administer or enforce a federal
5 regulatory program. . . .

6 So to is the City of Great Falls attempting to use the federal law as a
7 justification for denying patients access to their medication. The enforcement of
8 these ordinances will do irreparable harm to the plaintiffs, and prevent them from
9 getting access to the medication they are using to treat their symptoms.

10 The plaintiffs seek an injunction to prevent the city from enforcing the
11 ordinances as passed on June 1, 2010 restricting the cultivation or marijuana within
12 the City limits.

13 In relevant part, a preliminary injunction may be granted pursuant to M.C.A.
14 27-29-201 when:

- 15 (1) when it appears that the applicant is entitled to the relief demanded and
16 the relief or any part of the relief consists in restraining the commission or
17 continuance of the act complained of, either for a limited period or perpetually;
- 18 (2) when it appears that the commission or continuance of some act during
19 the litigation would produce a great or irreparable injury to the applicant;
- 20 (3) when it appears during the litigation that the adverse party is doing or
21 threatens or is about to do or is procuring or suffering to be done some act in
22 violation of the applicant's rights, respecting the subject of the action, and
23 tending to render the judgment ineffectual;

24 The party seeking an injunction must show:

- 25 (1) a likelihood that the movant will succeed on the merits of the action;
- (2) a likelihood that the movant will suffer irreparable injury absent the
issuance of a preliminary injunction;

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- (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party (a balancing of the equities); and
- (4) the injunction, if issued would not be adverse to the public interest.

Van Loan v. Van Loan (1995), 272 Mont 176, 181, 895 P.2d 614, 617.

With regards to the Temporary Restraining Order, it is an interlocutory order typically issued on an ex parte basis. Eliason v. Evans (1978), 178 Mont. 212, 216, 583 P.2d 398, 401. The restraining order is intended to preserve the status quo until the Court can conduct a show cause hearing to determine whether an injunction should be issued. Eliason, at 216.

Eliason, at 216.

In the present case, the plaintiff seek an injunction to stop irreparable harm to their rights under the Montana Medical Marijuana Act. The City should not be permitted to prosecute individuals under the changes wrought in Ordinance 3054 during the pendenancy of this suit. The plaintiffs seek a Temporary Restraining Order and injunction for this purpose.

The requisite elements for a Temporary Restraining Order are all in place:

1. The plaintiffs will likely succeed on the merits;
2. The plaintiff will suffer irreparable harm through the enforcement of the ordinance;
3. The balance of the equities favor the plaintiffs and it maintains the current status quo.

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4. The injunction is consistent with the Medical Marijuana Act and thus consistent with public interest.

D. Conclusion

For all the foregoing reasons, the plaintiffs respectfully requests the Court grant the motion for a temporary restraining order, set the matter for a show cause hearing on why an injunction should not be granted.

Dated this _____ day of _____, 2010.

Carl B. Jensen, Jr.
Counsel for the Plaintiffs

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