August 16, 2004

The Honorable Scott Benson
Chair, Intergovernmental Relations Committee
and Members of the Committee

Re: C.O.H.R. Petition for Charter Amendment

Dear Council Member Benson and Members of the Committee;

A petition that has been submitted by Citizens Organized for Harm Reduction (C.O.H.R.) to place on the November ballot a proposal to amend the City Charter as follows:

> To require that the City Council shall authorize, license and regulate a reasonable number of medicinal marijuana distribution centers in the City of Minneapolis as is necessary to provide services to patients who have been recommended medicinal marijuana by a medical or osteopathic doctor licensed to practice in the State of Minnesota to the extent permitted by State and Federal law.

You have asked me to address the following issue: Given the language of the charter amendment petition that has been submitted by Citizens Organized for Harm Reduction (C.O.H.R.), may the Minneapolis City Council refuse to put the petition on the election ballot? Based upon my review of the law, the answer is yes.

DISCUSSION

In 1995, the Minnesota Supreme Court reaffirmed its well-established holding that "when a proposed charter amendment is manifestly unconstitutional, the city council may refuse to place the proposal on the ballot." *Minneapolis Term Limits Coalition v. Keefe*, 535 N.W.2d 306, 308 (Minn. 1995), *citing Davies v. City of Minneapolis*, 316 N.W.2d 498 (Minn. 1982); *Housing and Redevelopment Auth. of Minneapolis v. City of Minneapolis*, 198 N.W.2d 531 (Minn. 1972); *State ex rel. Andrews v. Beach*, 191 N.W. 1012 (Minn. 1923). In the *Minneapolis Term Limits Coalition* case, the City Council rejected a petition and refused to put a proposed charter amendment on the ballot on the ground that the proposed amendment would violate the provision of the Minnesota Constitution relating to eligibility to hold office. The court concurred with the conclusion of the City Council that the proposed amendment was unconstitutional.

Previously in *Housing and Redevelopment Auth. of Minneapolis v. City of Minneapolis*, 198 N.W.2d 531, 536 (Minn. 1972), the Minnesota Supreme Court found the proposed charter amendment at issue in that case to be manifestly unconstitutional. The court further held that it was proper for the trial court "to enjoin the election rather than permit the administration and the voters of the city of Minneapolis to experience the frustration and expense of setting up election machinery and going to the polls in a process with was ultimately destined to be futile." Subsequently, the court sustained the refusal of the Minneapolis City Council to place on the ballet a proposed charter amendment that would have violated state and federal constitutional protections against impairment of contracts. *Davies v. City of Minneapolis*, 316 N.W.2d 498, 503-504 (Minn. 1982). The *Davies* opinion reiterated that "[w]hen a proposed charter amendment appears to be manifestly unconstitutional, the City Council must have the authority to avoid what would amount to a futile election and a total waste of taxpayers' money. *Id.; see also Winget v. Holm*, 244 N.W. 331 (Minn. 1932).

With respect to the subject of the C.O.H.R. petition, it is my opinion that the court would find that any attempt by the City of Minneapolis to authorize, license and regulate medicinal marijuana to be a violation of the supremacy clause of the United States Constitution. Article VI of the Constitution provides that the laws of the United States shall be the supreme law of the land, notwithstanding any state law to the contrary. Where a state or local law conflicts with a federal law, the state or local law is preempted and "without effect." *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

The United States has comprehensively addressed the subject of controlled substances through the United States Code. Federal law defines marijuana (Tetrahydrocannabinols) as a Schedule I controlled substance and generally prohibits its manufacture, distribution or possession. 21 U.S.C §§ 812(a), 841-843 (2004). The Minneapolis City Attorney's Office received a letter dated August 12, 2004 from the United States Attorney for the District of Minnesota Thomas B. Heffelfinger regarding the legality of the proposed charter amendment. Among other things, U.S. Attorney Heffelfinger citing federal laws, states the following:

> "[B]y listing marijuana as a Schedule I controlled substance, Congress has categorically banned the distribution of marijuana for any purpose, including purported medical uses, 21 U.S.C. §841(a)(1), '[e]xcept as authorized' by the Act itself; i.e., unless the distributor is registered with the Drug Enforcement Administration and is conducting research approved by the Food and Drug Administration. . . . The Drug Enforcement Administration and [the U.S. Attorney's Office] vigilantly enforce federal laws prohibiting manufacturing and distribution of marijuana. A city license does not provide an exemption for the prosecution of otherwise illegal acts. Thus, any person that is engaged in the distribution of marijuana, even if licensed, runs the risk of federal prosecution.

Thus, a charter provision directing the City to authorize, license and regulate the distribution of marijuana for medical purposes would be contrary to federal law in violation of the supremacy clause and would, therefore, be preempted. Because it is manifestly unconstitutional, the City Council may refuse to put the proposed charter amendment on the ballot to avoid the frustration and expense of an inevitably futile election proceeding.

It is my further opinion that there is support in case law for the conclusion that the City Council may refuse to place a proposed charter amendment on the ballot where the amendment would conflict with the public policy

of the State of Minnesota. "The general rule is that, in matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld. The adoption of any charter provision contrary to the public policy of the state, as disclosed by general laws or its penal code, is also forbidden." *State ex rel. Town of Lowell v. City of Crookston*, 91 N.W.2d 81, 83 (Minn. 1958). Local laws that conflict with state law are preempted. *Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813 (Minn. 1966). The Minnesota Court of Appeals recently applied these principles of preemption to uphold the decision of the City of Richfield to reject a citizen petition for a referendum on a land use issue. *Nordmarken v. City of Richfield*, 641 N.W.2d 343 (Minn. Ct. App. 2002) *review denied* (June 18, 2002). Although the Richfield city charter authorizes referenda generally, the court concurred with the conclusion of the city council that a referendum on a land use ordinance was in conflict with state land use planning statutes and, therefore, preempted.

The State of Minnesota has comprehensively addressed the subject of controlled substances through statute. Minnesota Statutes Chapter 152 contains strict prohibitions on the sale, distribution, and possession and of marijuana. In *State v. Hanson*, 468 N.W.2d 77, 78-79 (Minn. Ct. App. 1991), *review denied* (June 3, 1991), the Minnesota Court of Appeals held that the Minnesota Legislature considered and rejected a broad exception to these criminal law for medical use of marijuana. The proposal to amend the Minneapolis City Charter to authorize, license and regulate marijuana for medical use clearly conflicts with the public policy of the state. It is consistent with the principles and reasoning relied upon by the court to hold that a city may refuse to hold an election on an unconstitutional charter proposal to conclude that a city may also refuse to put to the ballot a proposal that is in conflict with state law. In both situations, the election would be a waste of time, effort and the taxpayer's money because the amendment, if adopted, would be futile and without effect.

Finally, the City Council may find that the C.O.H.R. proposal is not a proper subject for a charter amendment. The Council may conclude that the C.O.H.R. petition is, in fact, an initiative rather than a valid charter amendment because it attempts to direct and manage specific operations of municipal government rather than addressing the general form and structure of municipal government. A leading municipal law treatise states that, generally, a charter proposal must alter the form and structure of the government and that detailed legislation cannot be implemented through the guise of a charter amendment. 2A McQuillin Mun. Corp. § 9.26 (3rd ed.). Although the C.O.H.R. petition's language is brief, it seeks to implement a large-scale, bureaucratic scheme of municipal authorization, licensure and regulation pertaining to marijuana. Such detailed administration of municipal government is incongruent with the "form and structure" concept of a home rule charter.

In 1979, the Minneapolis City Attorney's Office addressed this question by referring to the case of *Astwood v. Cohen*, 53 N.E.2d 358, 360 (N.Y. 1944) wherein a similarly "administrative" charter amendment was being proposed. The Court in *Astwood* stated that, "the tradition of representative democratic government is too strong to permit an inference that the legislature intended to extend the exceptional process of direct legislation to details of administration unrelated to amendments of the charter, whether regulated by local laws and ordinances or managed by responsible administrative agencies." *Id*. Minnesota law allows for a city to include initiative and referendum powers as part of its home rule charter. *See* Minn. Stat. § 410.20. While some cities in Minnesota have included these powers in their home rule charters, Minneapolis has not. Moreover, the powers of initiative and referendum provided for in Minn. Stat. § 410.20 are limited to ordinances, not to charter amendments. Because the C.O.H.R. petition is in the nature of an initiative and not a proper charter amendment, and because the Minneapolis City Charter does not provide for initiative or

referendum, the C.O.H.R. petition is defective and the Minneapolis City Council may refuse to place the proposal on the ballot.

CONCLUSION

1. The City Council may refuse to place the amendment question on the ballot if it finds that the proposed amendment is manifestly unconstitutional because if conflicts with federal law in violation of the supremacy clause of Article VI of the United States Constitution and is, therefore, preempted by federal law.

2. The City Council may base a refusal upon additional finding that the proposed amendment contravenes state public policy and is preempted by Minnesota law.

3. The City Council may base a refusal upon additional finding that the proposed amendment is an unauthorized, non-legal initiative that addresses the specific operations of municipal government rather than a valid charter amendment that addresses the general form and structure of municipal government.

Very truly yours,

Peter W. Ginder
Acting Deputy City Attorney

cc: Council Members
Mayor R.T. Rybak

04A-01146 IGR letter