AMENDED MINNEAPOLIS CHARTER COMMISSION RECOMMENDATION

To: Paul Ostrow, President
Minneapolis City Council
Councilmembers for the City of Minneapolis
City Hall
350 South 5th Street, Rm 307
Minneapolis, MN 55415

The Minneapolis Charter Commission has transmitted to you, the Minneapolis City Council, a citizen petition to place on this November's ballot the following:

> 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* (emphasis added).

The Minneapolis Charter Commission letter submitted to you under date of August 11, is hereby amended by reason of additional legal research undertaken by the Commission.

The Commission was compelled to forward this proposed amendment by reason of Minn. Stat. §410.12 -- there was no discretion. However in forwarding this proposed amendment to you, the Commission requests your consideration of the following comments and conclude the Council is not compelled to place this matter on the November ballot.

The Commission asks the Council to consider the following:

- The use of marijuana is strictly regulated under federal law, including a prohibition on distributing, manufacturing and processing with the intent to distribute through the Controlled Substances Act, 21 U.S.C. §841(a). The proposed amendment also violates Minnesota law, specifically Chapter 152 which prohibits the distribution of controlled substances, including marijuana.

- The adoption of a Charter provision which is contrary to public policy of Minnesota is invalid.

- Litigation will result in any event since it is very likely, if the proposed amendment passes, someone will apply for a license to then challenge either the state or federal laws or, conversely, ask a federal or state court for a declaratory judgment declaring the amendment as unconstitutional.

- The Charter is intended as the governing document for the City of Minneapolis. The proposed amendment is inconsistent with the purpose of the Charter. Under current municipal law, the proposed amendment to the Charter is an attempt to use the Charter amendment process as an alternative to initiative or referendum which has not been

adopted. This is also an attempt to bypass the Council for what should properly be an ordinance by reason of the fact that the Council has the wisdom not to pass such an ordinance.

- The FDA does allow use of the active element of marijuana (THC) in synthetic form. This drug, Dronabinol (also known by its brand name, Marinol) is legally available by prescription for two uses: (1) anorexia associated with weight loss in patients with AIDS; and (2) nausea and vomiting associated with cancer chemotherapy in patients who have failed to respond adequately to conventional antiemetic treatments.

The Commission quotes from Acting Deputy City Attorney Peter Ginder's letter dated July 27, 2004. Deputy City Attorney Ginder refers to State v. Beach, 191 N.W.1012 (Minn. 1923) "in which the Minnesota Supreme Court stated that a Charter amendment that is inharmonious with the Constitution and the laws of Minnesota need not be submitted to voters. Citing Beach with approval and as authority, the Minnesota Supreme Court in Hous. and Redevelopment Auth. of Minneapolis v. City of Minneapolis, 198 N.W.2d 531, 536 (Minn. 1972) affirmed the principal that proposed Charter amendments that appear to be inharmonious with the Constitution or the laws of Minnesota need not be submitted to the voters. Moreover, the Court noted that it is proper for a court to enjoin the election of a proposed Charter amendment "'to save the trouble and expense"' of voting on a measure which, if adopted, the courts would be compelled to set aside. Id. at 536. Both cases state that the decision not to submit a Charter amendment that appears inharmonious with the Constitution and the laws of Minnesota to the voters is a decision that is to be made by the City Council, not the Charter Commission."

A.C.E. Equipment Co. v. Erickson, 152 N.W.2d 739 (Minn. 1967) states "The power conferred upon cities to frame and adopt homerule Charters is limited by the provision that 'such Charter shall always be in harmony with and subject to the constitution and laws of the state.'" Minn. Const. Art. 4, Sec. 36. Erickson also notes that the general laws and the penal code evidence the public policy of Minnesota and points out a Charter provision contrary to the public policy of Minnesota is forbidden.

Although Art. 4, Sec. 36 of the Minnesota Constitution was repealed in 1958, and replaced in 1958 by Art. 11, Sec. 3, which in turn became Art. 12, Sec. 4 when the Minnesota Constitution was restructured in 1974, the 1974 restructuring was not intended to make changes of a consequential nature.

The Minnesota Court of Appeals in Nordmarken v. City of Minneapolis, 641 N.W.2d 343, 347 (Minn. App. 2002) quotes with approval Erickson when it states as follows:

> A City governed by a homerule Charter enjoys as to local matters all the powers of the state, except when those powers have been expressly or impliedly withheld. A.C.E. Equiptment Co. v. Erickson (citation omitted). Despite the broad governance authority conferred through a homerule Charter, any Charter provision that conflicts with state public policy is invalid. Id. Futhermore, all Charter provisions remain subject to state law:

> The power conferred upon cities to frame and adopt homerule Charters is limited by the provisions that such Charter shall always be in harmony with and subject to the Constitution and laws of the state.

State ex rel. Town of Lowell v. City of Crookston, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (Minn.1957) (quotations omitted).

Nordmarken in 2002 reaffirmed the holding in Erickson notwithstanding amendments to the applicable section of the Minnesota Constitution.

The Commission believes it is in the best interest of the City of Minneapolis that you find the proposed Charter amendment inharmonious with the Constitution and the laws of Minnesota, and therefore not place the proposed amendment to the Charter on the November ballot.

The Commission also requests the Council petition the Minnesota Legislature to amend Minnesota Statute Section 410.12 in order to allow the Commission concurrent power with the Council to reject ballot measures which are inharmonious with the Constitution and the laws of Minnesota, subject to being overridden by vote of the Council.

Dated: _____, 2004

Respectfully submitted,

Jim Bernstein, Chairperson
Minneapolis Charter Commission

cc: Mayor R. T. Rybak
Commissioners of the Minneapolis
Charter Commission
Suzanne Griffin, Director Elections Department
Burt Osborne, Assistant City Attorney
Jan Hrncir, Chief Council Committee Coordinator

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