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Oakland City Councilmembers  
City Hall, 1 Frank H Ogawa Plaza,  
Oakland, CA 94612

**Re: Amendments to OMC 5.80 and 5.81 Violate the U.S. Constitution and are Counterproductive to the City's Equity Goals**

Dear Councilmember:

Wendel Rosen represents clients seeking Oakland cannabis permits. We are writing to urge you to postpone the March 21 second reading of the City's cannabis ordinances and reconsider your recent approval of two amendments to those ordinances.

Due to the hard work of the Oakland City Council and others, Oakland's cannabis ordinances are greatly improved from where they started nearly a year ago and, in many ways, they are models for the State of California. However, based on widely accepted constitutional principles and U.S. Supreme Court decisions, one amendment violates the U.S. Constitution and would render the ordinances extremely vulnerable to legal challenges. The other amendment also has legal vulnerabilities and limits the tax revenue available to pay for equity programs. In addition, it does nothing to prevent businesses elsewhere in California from outpacing historically marginalized operators in Oakland.

As background, Wendel Rosen advises both equity and general applicants and we helped draft several of the equity amendments you approved on March 7. We believe that many of these amendments will reduce industry entry barriers for those disproportionately impacted by past marijuana law enforcement. However, the amendments we ask you to reconsider directly undermine equity goals, damage Oakland's cannabis industry as a whole, and violate U.S. and California Constitutions. In short, the City would take serious legal risks by including the amendments in exchange for provisions that are counterproductive to the City's own aims.

Specifically, one amendment requires that all applicants prove Oakland residency for the past three years ("Residency Rule"). The other constrains "general" applicants from receiving an Oakland operating permit by requiring that half of all permits be issued to "equity" applicants for an indefinite period of time ("1-1 Rule"). The rule goes further, and gives permit review priority to general applicants with the financial means to offer real estate or pay rent to equity applicants, while denying all other general applicants an alternative to improve their position in line.

## **Constitutional Issues**

### **Commerce Clause**

The Commerce Clause of the U.S. Constitution is intended to protect the free-flow of business among and between cities and states. The Clause is relevant to Oakland's proposed cannabis permitting system because it prevents municipalities from burdening businesses outside a city to the benefit of those within. The U.S. Supreme Court has said that any local law focused on protecting local businesses by excluding or burdening outsiders is presumed to be invalid. *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994); *City of Philadelphia v. New Jersey* 437 U.S. 617 (1978). However, the Court has said that cities may be permitted to discriminate against non-resident businesses if they can show that there is no other way to advance a legitimate local goal – other than goal of protecting local businesses from competition.

In one case involving states' permitting of wine sales, the Court found that Michigan and New York State rules allowing in-state wineries to make direct sales to customers, while permitting out-of-state wineries to sell only through wholesalers and retailers violated the Commerce Clause. The states argued that the laws were intended to promote tax collection and reduce underage drinking. The Court ruled that there were alternatives, other than burdening the outside companies, to achieve the stated goals. *Granholm v. Heald*, 544 U.S. 460 (2005).

Applying Commerce Clause principles to the Residency Rule, the Oakland City Council has never advanced a legitimate local purpose for the Residency Rule, let alone demonstrated that it has no other way to accomplish such a local purpose. The Council hastily added the Residency Rule toward the end of the March 7 City Council meeting without attempting to offer a purpose, and as a result, never reached the issue of whether there was no alternative to achieving it. As stated above, such a purpose would have to be something other than shielding local businesses from competition.

### **Privileges and Immunities Clause**

The Privileges and Immunities Clause, of U.S. Constitution prevents city governments from discriminating against citizens of other cities and states. In the context of a city or state favoring its own residents over outsiders in a business context, the courts have said that the government must demonstrate that the nonresidents are the specific source of the harm that they are trying to prevent by favoring residents. *Hicklin v. Orbeck*, 437 U.S. 518 (1978). In *Hicklin*, Alaska claimed it was trying to alleviate its unemployment problem by requiring private employers to favor residents over non-residents. The Court struck down the Alaska requirement, concluding that the state's unemployment issues were not attributable to an influx of outside job seekers, but rather that many jobless Alaskan residents lacked education and job training and lived in remote areas. With respect to the Residency Rule, the City of Oakland cannot demonstrate that nonresident cannabis businesses are the source of a particular harm that the City is attempting to remedy by excluding the outsiders.

**Self-Defeating 1-1 Rule**

The text of OMC 5.80 and 5.81, and related city staff reports indicate that the 1-1 Rule is intended to bolster historically disadvantaged equity permit holders' chances of succeeding in the marketplace by restricting the number of general permits issued for some undefined period. "If the City initiates an unrestricted permitting process before an Equity Assistance Program is in place, well-positioned operators will only move further ahead as historically marginalized operators fall further behind due to lack of capital and real estate (Staff Report Feb. 23, 2017)."

The stated intent of the 1-1 is directly undermined by constraining the tax revenue available for the Equity Assistance Program by limiting the number of general permits issued. Meanwhile, slowing the application process for Oakland general applicants does nothing to restrict the issuance of permits for cannabis business outside of Oakland. In fact, Richmond, Santa Rosa and other Bay Area cities began issuing cannabis business permits many months ago. This means that prospective Oakland cannabis operators already are at a competitive disadvantage. The 1-1 Rule exacerbates this problem and does nothing to shield Oakland equity applicants from statewide competition.

**Conclusion**

The City's cannabis permitting rules are greatly improved from where they started nearly a year ago and, in many ways, are models for the State of California. As it stands today, Oakland's equity applicants will have financial and technical assistance unavailable anywhere else in the State. The City must decide whether it wants to risk this significant social and economic achievement and the tax benefits the cannabis industry can bring to Oakland, by including the Residency and 1-1 Rules in OMC 5.80 and 5.81. We urge you to postpone the March 21 second reading of the ordinances and eliminate these unconstitutional and ultimately self-defeating provisions.

Very truly yours,

WENDEL, ROSEN, BLACK & DEAN LLP



Robert W. Selna

CC: City Attorney Barbara Parker  
CC: Mayor Libby Schaaf  
CC: City Administrator Sabrina Landreth