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August 19, 2010

Stephen Postema
City Attorney's Office- Ann Arbor
PO Box 8647
Ann Arbor, MI 48107

*VIA E-MAIL &
FIRST-CLASS MAIL*

**RE: Ann Arbor City Council; Open Meetings Act and Medical Marijuana Zoning
Moratorium**

Dear Mr. Postema:

I'd like to acknowledge and thank you for your offer to meet and talk about the discussions you conducted with the City Council in a closed session on July 19, 2010. I am certainly willing to do that, but first, my client would like some clarification on what exactly occurred during that closed session. Obviously, there may be privileged information that you would not be required to disclose to my client or the general public, but perhaps we can have a discussion that could clarify the events of that night without violating privilege.

First, was the purpose of the closed session strictly to discuss a medical marijuana zoning moratorium? If the purpose of the closed session was to discuss medical marijuana policy, that would not be a permissible basis to formulate public policy behind closed doors.

We asked for very simple and reasonable corrective actions to be taken at the August 16, 2010 Council meeting. At that meeting, no mention was made of my client's concerns, and no corrective action was taken by the City. You did not ask the Council to enter into closed session to discuss this matter. Have you had a closed session meeting with the Council to discuss my client's threat of pending litigation? While I appreciate that sometimes a slow-playing tactic can be effective in resolving legal disputes, in this case it works counter to the best interests of the City Council and the citizens of Ann Arbor, because it increases the likelihood that a lawsuit will need to be filed. As you're probably aware, my client has very specific and short deadlines under the Open Meetings Act to file suit.

Your initial emailed response provided the conclusory statement that the July 19th closed session was conducted legally. However, various comments made by you and several councilmembers during the August 5th open session, and elsewhere, provide prima facie evidence of violating the Open Meetings Act. My client has collected further information that tends to support the unlawful nature of the discussions on July 19th.

Specifically, I refer to statements made by councilmember Stephen Rapundalo at the August 5th open meeting regarding the moratorium. To quote Rapundalo, "In fact, this was discussed at our

last meeting and a directive was given to the city attorney at that time to bring this forward to this meeting tonight and I believe everybody was in the room when that was indicated." [Timecode: 2:12].

From councilmember Teall--"We had talked about it, I had expressed interest in looking at this issue, but [she didn't think it would be coming this soon.]" [Timecode 2:07:30].

Other councilmembers have made off the record remarks that indicate discussions were made regarding public policy that did not involve privileged written legal communications to the council. One councilmember has reportedly stated that Rapundalo's statement may not be accurate. It would seem that you would be a fact witness to many of these discussions as well.

Further, it is my understanding that all legal "opinions" must be made public in Ann Arbor under the City Code/Charter. It is my understanding that legal communications are termed "advice" rather than opinions to keep such opinions/advice from being submitted to the public.

My client's concern is that the City is using the idea of written legal privilege to evade the requirements of the Open Meetings Act. I would point you to *State of Michigan v Whitney et al*, which succinctly addresses this issue:

"It would be illogical to construe the attorney-client privilege exemption as authorizing a public body to evade the open meeting requirements of the OMA merely by involving a written opinion from an attorney in the substantive discussion of a matter of public policy for which no other exemption in the OMA would allow a closed meeting. *See Gross v General Motors Corp*, 448 Mich 147, 164; 528 NW2d 707 (1995) (statutes must be construed to prevent illogical or absurd results). To avoid this illogical result, we conclude that proper discussion of a written legal opinion at a closed meeting is, with regard to the attorney-client privilege, limited to the meaning of any strictly legal advice presented in the opinion. The attorney-client privilege exemption does not extend to matters other than the provision of strictly legal advice."

It appears from statements made by councilmembers that they seem to have been discussing a course of action, not the meaning of any legal advice you may have provided. Was Mr. Rapundalo's statement inaccurate regarding directing your office to take some direction on this matter? Or are you suggesting that such a directive would not be a "decision" under the statute? I assume that when you mention a single councilmember in your response to me that you are referring to Rapundalo. Please advise if that is who you are referring to.

In looking forward to your formal response, which you indicated would come later this week, I would suggest that you, together with the Council, are in a position to provide a detailed description of all the events of the closed session in a way that could, hypothetically, provide a convincing narrative that might allow the conclusion that the closed session discussions were not unlawful. That would leave only the statements made in open session and privately to my client

to be accounted for--which your formal response could also address.

Certainly, it is in everyone's best interest to avoid litigation. My client's demands are very reasonable. He is not asking for money damages, drastic action, or anything extraordinary. With that in mind, I'm hopeful that we may be able to resolve this matter pre-suit.

Consistent with the timeframe you previously indicated, in the absence of a formal response from your office by Friday, August 20th, by 5:00 P.M., which provides descriptive accounts of the closed session and of the remarks made in open session -- which of course go beyond the statement that the discussions were lawful -- we will be forced to file suit in the week of Monday August 23, 2010. I know you are receiving this communication on Thursday afternoon, but as a practical matter, the Friday 5:00 P.M. deadline effectively translates to Monday morning when the court opens for business. In addition, if the Council were to give public notice of their intent to convene a special meeting of the Council in the week of August 23rd, which is allowed under the OMA -- provided various criteria are met -- to effect our suggested remedy and take appropriate corrective action, then a lawsuit would not need to be filed.

As always, feel free to contact me at (888) 490-8550 ext. 107, or via email at jah@consumerpractice.com.

Very truly yours,

HANK LAW, PLLC

A handwritten signature in black ink, appearing to read "Jeffrey A. Hank", with a long horizontal flourish extending to the right.

Jeffrey A. Hank
Attorney and Counselor

JAH/
Enclosures:
Copies: Client