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**COMMENTS ON PROPOSED ORDINANCE #2015-15,
REGARDING IMPLEMENTING LOCAL ZONING
FOR VARIOUS MEDICAL MARIJUANA USES**

December 2, 2015

Dear Town Council Members:

We were recently apprised by the Rhode Island Patient Advocacy Coalition of this proposed ordinance, which would establish various zoning requirements for patients and caregivers growing medical marijuana pursuant to the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act. For the reasons expressed below, we urge your opposition to the ordinance.

While the ACLU agrees with the Coalition's objections to the breadth of this ordinance and the burdens it would unnecessarily impose on growers far beyond what the state law requires, we wish to focus on one particularly troubling aspect of the proposal – its impact on the privacy of medical marijuana patients residing in Bristol. The impact, we submit, would be quite severe.

Under this proposal, any individual cardholders seeking to lawfully grow more than 12 plants would require approval from a zoning official. Any individuals desiring to participate in either residential or non-residential cooperative cultivations authorized by state law would first need to obtain Zoning Board approval. These approvals are not required by state law. In apparent response to concerns about the effect this requirement would have on the privacy of medical marijuana patients, the proposal purports to solve this problem by (1) allowing a representative to appear on the cardholder's behalf before the Zoning Board, and (2) specifying that special use permit applications "shall not be a public record." Respectfully, while we do not doubt the good intentions behind them, these "confidentiality" protections are, for a number of reasons, no protection at all.

First, the ordinance makes clear that "the proposed location of the cooperative cultivation and the identity of the real estate and the designated representative, if any, shall be specified" in the public notices for the Zoning Board hearings. By making the location of the site public, particularly for residential growers, the identity of the patients and/or caregivers will often be extremely easy to determine.

The publication of the name of the cardholder's "representative" will likely do the same. Many of the participants in the program are not wealthy by any means and, by virtue of their status, may have large medical bills to pay. They often are growing marijuana – not an easy task – because they cannot afford the high prices that compassion centers charge. We doubt many patients will go to the expense of hiring an attorney to appear before the Zoning Board simply in order to exercise the growing rights that state law has given them. Instead, they may be forced to go themselves or, if they instead send a "representative," we suspect that person will, by necessity, more likely than not be a friend, neighbor or relative easily traceable back to the patient. In some instances, as a result, some patients may decide to forego the prospect of growing in order to protect their privacy.

In short, the ordinance's attempt to protect the confidentiality of patients strikes us as woefully inadequate. Further, the harm to patients could be even larger than the loss of their privacy. The publicizing of the locations where medical marijuana is being grown may make patients the targets of burglars and others engaged in criminal activities.

Even for individual cardholders growing more than 12 plants and not participating in a co-op, their privacy is by no means guaranteed. Although they need not seek zoning board approval, they must get approval from a zoning official. The promise of confidentiality in these instances does not apply when disclosure is "necessary by law in the performance" of the zoning official's duties, whatever those undefined circumstances may be.

The ordinance's back-up attempt to protect confidentiality by stating that the zoning applications will not be public records also fails to provide patients any meaningful relief. First, for the reasons mentioned above, it will likely not matter that the name on the application is withheld, as the information will often otherwise be obtainable.

But this language is unhelpful for another reason: Put simply, cities and towns cannot decide on their own that a document is not a public record. The state Access to Public Records Act (APRA) controls what records of public bodies are and are not subject to disclosure, and if a record is public under that law, no town ordinance claiming otherwise will save it from disclosure.

It is true that APRA does contain an exemption for "personal individually-identifiable records otherwise deemed confidential by federal or state law or regulation, or the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." R.I.G.L. 38-2-2(4)(A)(I)(b). But that exemption only demonstrates the hollowness of the ordinance's protection. If the zoning information generated by this ordinance were already deemed "confidential" by state law, the proposed language would not be necessary. We can only assume this language was added precisely because of the concern that these town-generated zoning records may not be confidential under state law.

And while a strong argument could certainly be made that the zoning records identifying applicants should be deemed confidential under the second clause of APRA's "personal records" exemption, it must be emphasized that that clause imposes a balancing test in determining whether personally-identifiable records should be withheld. It does not guarantee confidentiality unless the invasion of privacy is "clearly unwarranted." The fact that the Town has established an elaborate process to regulate the growing of medical marijuana could provide heft to the argument that, in certain instances, the public interest in disclosing the names outweighs the applicants' privacy interests.

A key aspect of the state's medical marijuana law is its attempt to protect the confidentiality of patients and caregivers. The Town's attempt to impose additional zoning burdens on cardholders undermines that goal. Because these burdens have the potential to cause much harm to patients in Bristol, while doing little to protect the Town, the ACLU of Rhode Island urges rejection of this proposal.

Thank you in advance for considering our views.

Submitted by: Steven Brown, Executive Director
American Civil Liberties Union of Rhode Island