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REPORT TO HONORABLE MAYOR AND COUNCILMEMBERS

RE: PROPOSED AMENDMENT TO THE MUNICIPAL CODE AND THE LOCAL COASTAL PROGRAM TO ADDRESS THE ADULT USE OF MARIJUANA ACT

INTRODUCTION

On September 11, 2017, the San Diego City Council (City Council) will consider amending the San Diego Municipal Code (Municipal Code or SDMC) regarding certain types of marijuana businesses within the City of San Diego. The Council will consider two options: (1) to continue to permit retail establishments only and make other clarifications,[1] or (2) to expand permitted uses to include cultivation and manufacturing businesses. In addition, it is our understanding that some Councilmembers may make additional proposals relating to the regulation of marijuana-related businesses.

This Report to Council provides an overview of actions the City Council may take in relation to the proposed ordinances, docketed as "Amendment to the Municipal Code and the Local Coastal Program to Address the Adult Use of Marijuana Act" (Item 200).[2] In addition, we discuss broader legal issues that the City Council should consider when acting on the item.

[1] Both options would clarify existing law to recognize that transportation *between* state licensed facilities, and testing of substances in general – as opposed to marijuana testing - are allowed.

[2] Since the voters approved the Compassionate Use Act in 1996, this Office has opined on many issues related to marijuana *See* 1999 City Att'y Report 169 (99-8; Aug. 31, 1999); 2001 City Att'y Report 627 (2001-17; May 18, 2001); 2001 City Att'y MOL 156 (2001-11; July 2, 2001); 2002 City Att'y MOL 79 (2002-5; Sept. 19, 2002); 2007 Op. City Att'y 381 (2007-3; June 21, 2007); 2009 City Att'y Report 496 (2009-18; July 24, 2009); 2010 City Att'y Report 660 (2010-19; May 21, 2010); 2010 City Att'y Report 673 (2010-20; May 27, 2010); 2011 City Att'y Report 314 (2011-14; Mar. 15, 2011); City Att'y MOL 2011-9 (July 21, 2011); 2013 City Att'y MOL 55 (2013-6; Apr. 17, 2013); City Att'y Report 2014-5 (Feb. 10, 2014); City Att'y MS 2015-1 (Jan. 8, 2015); City Att'y MOL 2015-2 (Jan. 30, 2015); City Att'y MS-2015-21 (Oct. 6, 2015); City Att'y Report 2015-12 (Dec. 28, 2015); City Att'y MOL 2015-2 (Jan. 30, 2015); City Att'y MS 2016-23 (July 22, 2016); and City Att'y MS 2017-9 (Mar. 30, 2017).

BACKGROUND

California voters passed the Compassionate Use Act in 1996, which provided limited immunities from criminal prosecution for qualified patients and caregivers in obtaining and using medical marijuana. On November 8, 2016, California voters passed Proposition 64, legalizing certain personal and commercial marijuana activities for non-medical purposes. The personal use provisions became effective immediately. The commercial provisions are scheduled to become effective when the state begins issuing commercial licenses for marijuana businesses.

Proposition 64 and recent law consolidating medical and non-medical marijuana regulatory systems allow for local regulation of commercial marijuana activities. California recently enacted a combined regulatory structure for commerical marijuana activities, both medical and non-medical. The Medicinal and Adult Use Cannabis Regulation and Safety Act, effective June 27, 2017, generally imposes the same licensing and regulatory requirements on medical and non-medical marijuana businesses. *See generally* Cal. Bus. & Prof. Code §§ 26000-26231.2 (Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA)). The MAUCRSA requires state licenses for various commercial cannabis businesses. The state must begin issuing licenses by January 1, 2018. Cal. Bus. & Prof. Code § 26012(d). However, the State of California licensing authorities will not issue licenses if the approval of the state license would violate a local ordinance or regulation. Cal. Bus. & Prof. Code § 26055(d). Currently, the City allows retail medical marijuana businesses under land use and operating regulations. SDMC §§ 141.0504, 42.1504-42.1509. The same Municipal Code sections allow retail non-medical marijuana businesses to operate once the state licensing system is implemented.

Additionally, retail marijuana businesses, also known as "marijuana outlets," must obtain a Conditional Use Permit from the City. SDMC § 141.0504. Marijuana outlets are limited to four per Council District, and must comply with distance, lighting, security, signage, and other operating requirements. SDMC § 141.0504(a)-(m). Marijuana outlets must obtain an operating permit and comply with additional operating regulations, including background checks and age restrictions. SDMC §§ 42.1501-42.1509.

Currently, other types of commercial marijuana activities, including commercial cultivation, distribution, storage, manufacturing, and testing are prohibited in the City. SDMC §§ 131.0112(a)(2), (a)(9), (a)(10).

While the state and City permit certain uses, marijuana remains illegal under federal law.

QUESTIONS PRESENTED

1. What actions can the City Council take at the September 11 hearing to address non-retail uses of marijuana within the City?

2. What are the legal consequences if the City Council takes no action on this item prior to the State of California beginning its license issuance?

3. What broader legal issues should the City Council consider when acting on this item?

BRIEF ANSWERS

1. Under the Brown Act, the City Council may only take actions that are properly noticed in the docket materials for the September 11 hearing. While certain changes may be made by interlineation, others may require the ordinances to be reintroduced for a first reading.

2. The City's current ordinances regulating the non-retail marijuana uses will sunset in the near future; therefore, if the City fails to enact an ordinance regulating or prohibiting these commercial marijuana businesses before the State of California begins its license issuance, the State may issue state licenses for these commercial marijuana businesses. For instance, the State could issue licenses to businesses because the State views the City as allowing those businesses.

3. Marijuana remains illegal under federal law. This continues to pose a risk that the federal government could choose to take action against the City, including officials and employees, based on federal law.

ANALYSIS

I. ACTIONS THE CITY COUNCIL MAY TAKE ON ITEM 200

Under the Brown Act, the City Council may only take actions that are properly noticed in the City Council docket materials for Item 200. The purpose of the Brown Act's noticing requirement is to inform interested members of the public about the subject matter under consideration so that they can determine whether to participate. All aspects of a matter need not be covered. Failure to alert the public to a controversial or obviously consequential piece of the matter may result in a violation. *See Carlson v Paradise Unified School District*, 18 Cal. App. 3d 196 (1971) (holding that "Continuation school site change" while not deceitful, was inadequate to describe the result, which included the relocation of students from one campus to another).

Further, separate proposed actions must be listed separately on the agenda, and not left to the public to assume that multiple actions will occur just because they are related. *San Joaquin Raptor Rescue Center v. County of Merced*, 216 Cal. App. 4th 1167 (2013) (failure to include adoption of a CEQA document on the agenda resulted in a Brown Act violation when the planning commission approved the project and adopted the CEQA document).

While the Brown Act does not require the agenda to state in advance the precise decision to be made, the docketed description must give adequate notice to interested members of the public. For example, adjustments to the caps or the number of feet for the separation requirement already in the ordinance would be within the scope of the Brown Act; however, new concepts or substantive changes that a member of the public would not anticipate from the docket description and materials would not be.

With that in mind, we caution the City Council that discussion or deliberation on proposals not included in the docketed description of Item 200 may violate the Brown Act. If there is a desire to hear a proposal that has not been properly noticed, the City Council can refer that proposal to a Council Committee for docketing at a later date, or to staff for further review.

Meanwhile, San Diego Charter section 275 requires ordinances to be introduced in written form. Therefore, if the City Council makes substantial changes to an ordinance during a hearing, the ordinance may need to be reintroduced for a first reading at a later date. Some changes to ordinances can be made on the dais by interlineation, subject to review by the City Attorney for Brown Act compliance and legality. If the change needs further legal review, the City Attorney may ask for additional time to review the proposed change, resulting in the ordinance returning for introduction at a later date. Similarly, if the proposed change is not properly noticed under the Brown Act, the ordinance would need to come back at a later date.

II. POTENTIAL LEGAL CONSEQUENCES IF THE CITY COUNCIL TAKES NO ACTION

As discussed above, the City already has in place certain ordinances pertaining to retail uses of marijuana. On February 14, 2017, the City Council adopted San Diego Ordinances O-20793 (Feb. 22, 2017) (Ordinance O-20793) and O-20795 (Feb. 22, 2017), which respectively amended various Land Development Code sections and Chapter 4, Article 2, Division 15 of the Municipal Code pertaining to marijuana outlets. Marijuana outlets are facilities for the retail sale of medical or recreational marijuana, marijuana products, and marijuana accessories. The land use and operating permit requirements track the City's previous regulations for medical marijuana consumer cooperatives. In addition, Ordinance O-20793 specified that other types of land uses relating to marijuana were not allowed. These uses are the raising, harvesting, and processing of marijuana and marijuana products; the distribution and storage of marijuana and marijuana products; and the production of goods from marijuana and the testing of marijuana and marijuana products. San Diego Ordinance O-20793, sec. 5.

When the City Council adopted Ordinance O-20793, it approved these prohibitions, but included a nine-month sunset provision from the date of the City Council's adoption. San Diego Ordinance O-20793, sec. 25. The options before Council on September 11, 2017, are to either continue with the above prohibitions (Option 1) or to instead allow these uses, contingent on compliance with regulations and the issuance of a Conditional Use Permit (Option 2). Therefore, if the City Council does not select either option, the existing prohibitions will expire pursuant to Ordinance O-20793.

The recently enacted MAUCRSA provides that the state will not issue any licenses if that use would violate local laws. Senate Bill 94; Cal. Bus. & Prof. Code § 26055(d). This language is similar to that previously contained in the Adult Use of Marijuana Act, also known as Proposition 64. If the City fails to adopt one of the options, the City will not have any regulations regarding these uses. The City has what is known as a "permissive" zoning ordinance, in which any use not listed is considered to be illegal; under the Municipal Code, use determinations are made by the City Manager. City Att'y MS No. 2016-23 (Jul. 22, 2016).

It is unknown what the State's position on a permissive zoning ordinance approach may be if our Municipal Code is silent about these uses; therefore, our Office recommends that the City act to amend the Municipal Code to state its position on these uses. We note that the League of California Cities previously created a Frequently Asked Questions document regarding Proposition 64; question 9 pertains to this permissive zoning ordinance issue and recommends

that local jurisdictions not rely on a permissive zoning approach. http://www.cacities.org/Resources-Documents/Policy-Advocacy-Section/Hot-Issues/Adult-Use-of-Marijuana-Act/AUMA-FAQ_Final.aspx .

III. OTHER CONSIDERATIONS: FEDERAL MARIJUANA LAW AND POLICY

A. Marijuana and Marijuana Activity is Illegal Under Federal Law

The Federal Controlled Substances Act (CSA) makes marijuana and marijuana activities illegal under federal law. Marijuana[3] is a Schedule I controlled substance, meaning:

1. The drug or other substance has a high potential for abuse.

2. The drug or other substance has no currently accepted medical use in treatment in the United States.

3. There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C. § 812(b)(1), (c) (Schedule I), (c)(10). Federal law prohibits manufacturing, distribution, or dispensing a controlled substance, as well as possession of a controlled substance with intent to manufacture, distribute, or dispense. 21 U.S.C. § 841(a)(1). Simple possession of marijuana is also prohibited by federal law. 21 U.S.C. § 844(a). There are currently no direct statutory exceptions or defenses to marijuana-related federal offenses based on medical use or status.

B. The Ogden and Cole Memoranda

Federal enforcement policy regarding marijuana has evolved over the years in light of the growing number of states adopting medical marijuana laws and policy. On October 19, 2009, United States Deputy Attorney General David Ogden published a memorandum intended to "guide [ ] the exercise of investigative and prosecutorial discretion" in federal marijuana cases. (Ogden Memo, pg. 2.) Mr. Ogden instructed all U.S. Attorneys in states with medical marijuana laws to focus on the core federal priority of prosecuting "significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks." (Ogden Memo, pg. 1.) Additional factors potentially warranting federal prosecution were use of firearms, violence, drug sales to minors, money laundering, excessive amounts of cash, involvement of other types of controlled substances, and ties to other criminal enterprises. (Ogden Memo, pg. 2.) Conversely, prosecutorial focus was not to be on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." (Ogden Memo, pgs. 1-2.)

[3] Spelled "marihuana" in federal law.

Nearly two years later, on June 29, 2011, United States Deputy Attorney General James Cole issued a memorandum in response to the growing commercial enterprise of medical marijuana in some states. Mr. Cole clarified for all U.S. Attorneys that the priorities described by the Ogden Memo were still accurate. He also clarified that the deprioritization for prosecuting individuals or caregivers using medical marijuana for medical treatment, was never intended to include "commercial operations cultivating, selling or distributing marijuana." (2011 Cole Memo, pg. 1.) The memo stated unequivocally that "[p]ersons who are in the business of cultivating, selling or distributing marijuana and those who knowingly facilitate such activities, are in violation of the CSA." (2011 Cole Memo, pg. 2.)

Two years later, on August 29, 2013, Mr. Cole issued a second memorandum in light of a growing number of state ballot measures legalizing small amounts of marijuana and regulating marijuana production, processing and sale. (2013 Cole Memo, pg. 1.) The memo reaffirmed the federal priorities[4] and encouraged state and local governments to enact "robust controls and procedures" and actively enforce the laws and regulations for permitted marijuana industries. *Id.* at 2. Mr. Cole cautioned, however, that "[e]ven in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances." (2013 Cole Memo, pg. 4.)

C. Congressional Appropriations Provision

Without amending the CSA, Congress weighed in on the conflict between state and federal marijuana law in December 2014. As part of a budget appropriation bill, Congress expressly prohibited the Department of Justice from using federal funds to prevent states from implementing their own laws regarding use, distribution, possession or cultivation of medical marijuana. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). This provision became known as the "Rohrabacher–Farr amendment" and more recently is known as the "Rohrabacher–Blumenauer amendment." It has since been extended through September 2017. Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537, 131 Stat. 135(2017).

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[4] Specifically, the priorities included:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequence associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

(2013 Cole Memo, pgs. 1-2.)

Notably, like the Ogden and Cole memos, this funding provision only applies to medical marijuana, not non-medical marijuana, which is now legal in California. When interpreting the funding provision, the United States Court of Appeals for the Ninth Circuit foreshadowed potential policy changes to come:

> To be clear, [the funding provision] does not provide immunity from prosecution for federal marijuana offenses. The CSA prohibits the manufacture, distribution, and possession of marijuana. Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime. The federal government can prosecute such offenses for up to five years after they occur. *See* 18 U.S.C. § 3282. Congress currently restricts the government from spending certain funds to prosecute certain individuals. But Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding. Moreover, a new president will be elected soon, and a new administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses.

United States v. McIntosh, 833 F.3d 1163, 1180 n.5 (9th Cir. 2016).

D. Liability for Local Government Engaged in Marijuana Regulation

The City Council should consider the potential for federal civil or criminal liability for City employees or officials who legislate or implement Municipal Code regulations regarding marijuana activities, which remain illegal under federal law. *Id.*

In a 2007 legal analysis of potential medical marijuana dispensaries, this Office advised that there is potential liability under federal law for City employees and officials. 2007 Op. City Att'y 381 (2007-3; June 21, 2007). Specifically, this Office opined:

> It is clear that marijuana distribution is illegal under federal law, thus any act by a local government to move beyond implementing state law in facilitating access to marijuana may be construed as aiding and abetting a violation of federal law.
>
> The federal government has not thus far directly taken action against any of the states that have passed "medical marijuana" legislation. Local government officials implementing state law likely lack the "specific intent" to violate federal law, since no court has ruled that state law is preempted by federal law, leaving state law intact. However, even if the federal government chooses not to seek criminal sanctions against local government officials for such

> actions, the federal government could withhold federal funds, such as grants for narcotic enforcement. *See South Dakota v. Dole,* 483 U.S. 203, 206 (1987). That said, we are unaware of any such withholding of funds thus far.

2007 Op. City Att'y 381 (2007-3; Jun. 21, 2007) (footnote omitted). Although ten years have passed, and we remain unaware of any federal enforcement action against a state or local government official regulating marijuana pursuant to state law, the previous opinion remains valid, and is now reiterated in an abundance of caution.[5]

Arguably, the ordinances to be considered on September 11, 2017, are outside of the medical marijuana regulatory system contemplated by the Ogden and Cole Memoranda and the Rohrabacher-Blumenauer amendment. Regulating activities associated with the non-medical marijuana industry, such as cultivation and manufacturing, may carry additional risk. The policies of the current President and Attorney General are still unknown.

Finally, there is also potential criminal or civil liability outside the CSA. For example, the Racketeer Influenced and Corrupt Organizations (RICO) act prohibits: (1) using funds obtained from a "pattern of racketeering activity" in interstate commerce; (2) acquiring an interest through a "pattern of racketeering activity" in an enterprise engaged in interstate commerce; (3) participating in the affairs of an enterprise engaged in interstate commerce through a "pattern of racketeering activity"; or (4) conspiring to violate one of these prohibitions. 18 U.S.C. § 1962. Racketeering activity is defined as, among other things, "any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical. . . ." 18 U.S.C. § 1961(1)(D). Person is defined as "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). It is conceivable that government officials engaged in commercial marijuana regulation and government entities which receive fees and tax revenue could be criminally charged under the RICO statute. However, we are unaware of any such prosecution to date.

RICO also has a civil liability provision, allowing either the United States Attorney General or a private citizen to bring a civil action for RICO violations. 18 U.S.C. § 1964. In one Colorado case, the United States Court of Appeals held that owners of private property successfully stated a civil RICO claim against the operators of a state and county licensed marijuana cultivation operation. *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 884-85 (10th Cir. 2017). Although similar claims could theoretically be made against a government entity or government employees actively regulating marijuana businesses and collecting fee and tax revenue, we are unaware of any such lawsuit to date.

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[5] *See also* 2013 City Att'y MOL 55 (2013-6; Apr. 17, 2013) for a discussion of potential meet and confer obligations with employee bargaining units that may arise.

In sum, the policies established by the Ogden and Cole memorandums discussed above are subject to change at any time by the new United States Attorney General, and do not apply to non-medical marijuana. The same is true of the Congressional budget appropriation limitation.[6] Reliance on these policies, promulgated under a different Presidential administration, or the lack of prosecution or civil action under the CSA or RICO should be met with caution. New Attorney General Jeff Sessions is quoted as stating "I'm definitely not a fan of expanded use of marijuana." *See* Legal Marijuana Advocates Are Uneasy With Sessions' Stance, NPR April 6, 2017, http://www.npr.org/2017/04/06/522821701/legal-marijuana-advocates-are-uneasy-with-sessions-stance (last accessed July 24, 2017). Mr. Sessions has reportedly requested policy recommendations on marijuana enforcement from his Justice Department attorneys. *Id*.

E. Police Regulation of Commercial Marijuana Activity

Currently, City permits are administered by the Development Services Department. However, some have raised the question of whether the marijuana industry should be police regulated, governed by Chapter 3 of the Municipal Code. However, like existing regulations for retail marijuana outlets, the draft ordinances to be considered by the City Council on September 11, 2017, are framed in the land use and business regulation context, by requiring conditional use permits and operating requirements. Marijuana businesses are not police regulated under Chapter 3 of the Municipal Code, nor is such a proposal currently made. However, we reiterate our previous advice that police regulation of marijuana is "problematic." 2007 Op. City Att'y 381 (2007-3; June 21, 2007).

In addition to the issues discussed above, the Police Department participates in various task forces involving narcotics enforcement of drugs other than marijuana. Active police regulation of marijuana in potential violation of federal law, while simultaneously enforcing the same federal law as to other drugs, places the Police Department in an inextricable conflict. Additionally, Police Department Policy requires all members of the Department to obey all federal, state, county, and municipal laws. *See* Department Policy 9.03. Thus, police regulation of commercial marijuana activity is neither tenable nor advisable.

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[6] Other entities are also beginning to form public opinions on this issue. The California Supreme Court Committee on Judicial Ethics Opinions recently issued a formal opinion cautioning judges that "involvement in a marijuana business that would violate federal law is unethical regardless of the likelihood of prosecution." CJEO Formal Opinion 2017-010 (Apr. 19, 2017) at pg. 9. Likewise, the Trademark Trial and Appeal Board (Board) recently denied a trademark to a medical marijuana business. The applicant was a medical marijuana dispensary, legal under Illinois state law. The Board ruled that the applicant could not make lawful use of the requested trademark in commerce because the activities of the business were illegal under the CSA. *In re Pharmacann, LLC*, 2017 WL 2876812 at *1, 8 (Trademark Trial and Appeal Board) (Jun. 16, 2017). The State Bar of California has yet to weigh in on whether an attorney involved in commercial marijuana activities would violate the rules of professional conduct. However, a recent article in California Lawyer Magazine advises California attorneys to proceed with caution and implores the State Bar for guidance. "Attorneys and Marijuana," California Lawyer, December 7, 2016, http://www.callawyer.com/2016/12/attorneys-and-marijuana/ (last accessed July 24, 2017).

CONCLUSION

At the September 11, 2017, hearing, the City Council may take action on the proposed ordinances regulating marijuana-related businesses, which are described in the docket. Under the Brown Act, the City Council may not consider alternative proposals that are not docketed. Alternative proposals can be referred to Committee or returned to staff for consideration at a later date. If the Council takes no action, it is unknown how the State of California may interpret that silence when evaluating applications for state licenses.

Commercial marijuana regulation is still a new and developing area of law for state and local government. We are unaware of federal prosecution or action against local government officials implementing state law. However, marijuana activity remains illegal under federal law, and actively regulating marijuana carries risk. This Office will continue to keep the Mayor and City Council informed of new legal developments in this area of law.

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