MEMORANDUM OF LAW

DATE: May 1, 1989

TO: Councilmembers Bob Filner and Wes Pratt

FROM: City Attorney

SUBJECT: Enforcement of the Drug Paraphernalia Law

Reference is made to your memorandum of April 3, 1989, noting that many San Diego businesses continue to display and sell drug paraphernalia in violation of the California Penal Code and Health and Safety Code section 11364.5. Your memorandum also requested reports from the City Manager and City Attorney addressing the City's efforts to enforce the "Drug Paraphernalia Law," any actions taken against business establishments that violate this law and any actions that the City Council could consider to ensure these products are not available to minors.

Background of Drug Paraphernalia Law

In 1980 the legislature enacted Senate Bill Number 1660 (Stat. 1980, ch. 505 , section 1 at 1060) effective January 1, 1989, which added California Health and Safety Code section 11364.5 regulating the sale of drug paraphernalia by special regulations relating to minors. The bill also allowed for local regulations on the sale or display of drug paraphernalia to persons under the age of eighteen (18). In 1984 the legislature enacted Assembly Bill Number 3876 (Stat. 1984, ch. 1635, section 57 at 67) effective January 1, 1985, amending California Health and Safety Code section 11364.5 with minor changes such as substituting "are" for "is" in the first and second sentences of subdivisions (a) and (c); by adding to the first sentence of subdivision (a) "years" following "18" and by adding to the end of subdivision (d)(2), "the following."

In 1982 the Legislature enacted Senate Bill Number 341, (Stat. 1982, ch. 1278, section 1 at 4725) effective January 1, 1983, adding California Health and Safety Code sections 11364.7 11014.5. Section 11364.7 makes it a misdemeanor to deliver, furnish, transfer or to possess or manufacture with intent to deliver, furnish or transfer drug paraphernalia and provides

penalties and punishment for violations. Section 11014.5 defines "drug paraphernalia" and establishes criteria for courts to consider when determining what constitutes drug paraphernalia. The definition of "drug paraphernalia" reads in pertinent part: "Drug paraphernalia" means all equipment, products or materials of any kind which are designed for use or marketed for use in

. . . ingesting, inhaling or otherwise introducing into the human body a controlled substance . . . ." The criteria for drug paraphernalia is outlined in section 11014.5 as follows:

> In determining whether an object is drug paraphernalia, a court or other authority may consider, in addition to all other logically relevant factors, the following:
> (1) Statements by an owner or by anyone in control of the object concerning its use.
> (2) Instructions, oral or written, provided with the object concerning its use for ingesting, inhaling, or otherwise introducing a controlled substance into the human body.
> (3) Descriptive materials, accompanying the object which explain or depict its use.
> (4) National and local advertising concerning its use.
> (5) The manner in which the object is displayed for sale.
> (6) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.
> (7) Expert testimony concerning its use.

The constitutionality of California Health and Safety Code sections 11014.5 and 11364.7 was challenged but the court held that the phrases "designed for use" and "marketed for use" contained in Health and Safety Code section 11014.5, which defines the term "drug paraphernalia," are not unconstitutionally vague since they clearly refer to the person in control of the item, i.e., the manufacturer or seller without reference to a third person's state of mind. People v. Nelson, 171 Cal. App. 3d (Supp. 1 1985).

While the terms "marketed for use" and "designed for use" with controlled substances meet constitutional standards they present problems of proof for law enforcement and prosecutors because of practical difficulties in proving that an item is drug paraphernalia using the criteria outlined in section 11014.5.

Controlling State Law on Drug Paraphernalia

The statutory scheme regulating drug paraphernalia presents a statutory incongruity because on the one hand businesses are directed on how drug paraphernalia must be marketed, while the other hand imposes misdemeanor penalties if a retailer complies

with those provisions to market drug paraphernalia.

Penal Code section 308, prohibiting the furnishing of drug paraphernalia to minors, and Health and Safety Code section 11364.5, requiring the exclusion of minors from businesses selling drug paraphernalia are inconsistent with Health and Safety Code sections 11014.5 and 11364.7, defining "drug paraphernalia" and wholly prohibiting furnishing it to another.

> Clearly, the law as codified within Penal Code section 308 and section 11364.5 is inconsistent with sections 11014.5 and 11364.7, requiring the former to give way to the latter. For, it is a firmly established principle of statutory instruction that "where there are potentially conflicting legislative enactments, the latter enactment controls."

A & B Cattle Co. v. City of Escondido, 192 Cal. App. 3d 1032, 1043 (1987) (citation omitted).

In other words, the court held that section 11364.7 is an enforcement section which conflicts with and overrides section 11364.5, an earlier regulatory provision.

A & B Cattle Co. also held that a City of Escondido ordinance purporting to license the sale of drug paraphernalia to minors was void due to state preemption when Health and Safety Code sections 11014.5 and 11364.7 were enacted. Prior to A & B Cattle Co., Division 38, sections 33.3800 through 33.3806 of the Municipal Code regulating drug paraphernalia establishments within The City of San Diego, originally enacted on January 19,

1981, by Ordinance O-15428 N.S., was repealed on June 18, 1984, by Ordinance O-16227 N.S. because of preemption arising out of state legislation.

Enforcement of "Drug Paraphernalia Law"

Any actions against business establishments for drug paraphernalia violations should be based on Health and Safety Code section 11364.7, rather than section 11364.5. Section 11364.7 provides for a misdemeanor penalty of up to one (1) year imprisonment and a fine of one thousand dollars ($1,000.00) for delivery, furnishing or transferring drug paraphernalia to minors, for revocation of business or liquor license based on violations; and for seizure and forfeiture of all drug paraphernalia by any peace officer.

Penal Code section 308 which allows a criminal action for a misdemeanor or a civil action by the City Attorney is another potential tool for use against businesses which knowingly sell, give or furnish any tobacco, cigarettes or smoking paraphernalia

to minors. Twenty-five percent (25%) of each civil and criminal penalty collected would be paid to the City Attorney's Office. Section 308 is punishable by a fine of two hundred dollars ($200.00) for the first offense, five hundred dollars ($500.00) for the second offense, and one thousand dollars ($1,000,00) for the third offense. As an enforcement tool Penal Code section 308 is of dubious value due to its conflict with the overriding provisions of Health and Safety Code section 11364.7 as analyzed in A & B Cattle Co. v. City of Escondido.

Records maintained by the San Diego Police Department reveal that violations of Health and Safety Code section 11364.7 resulted in seven (7) citations during the period from October 1, 1988, to March 31, 1989.

The City Attorney's office is prepared to prosecute any person who markets drug paraphernalia in violation of the "Drug Paraphernalia Law." The inherent difficulty in obtaining the evidence needed for a successful prosecution given the statutory criteria and definition of "drug paraphernalia" minimizes the effectiveness of the law as a tool to keep drugs from minors.

Since the existing state law on drug paraphernalia is conflicting, and the criteria used in determining whether an object is drug paraphernalia presents problems of proof for law enforcement and prosecutors, it is recommended that the city council support state legislation to remedy these two problem areas.

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