Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59
(619) 533-5800

DATE:	September 29, 2017
TO:	Honorable Mayor and Councilmembers
FROM:	City Attorney
SUBJECT:	Local Regulation of Marijuana Odors

INTRODUCTION

On September 11, 2017, the San Diego City Council (City Council) introduced two ordinances related to the regulation of marijuana production facilities, San Diego Ordinance O-2018-7 (amending Chapter 4, Article 2, Division 15) and San Diego Ordinance O-2018-8 (amending the Land Development Code). If adopted, the ordinances will regulate facilities engaged in "the agricultural raising, harvesting, and processing of marijuana; wholesale distribution and storage of marijuana and marijuana products; and production of goods from marijuana and marijuana products . . . ." San Diego Ordinance O-2018-8, introduced Sept. 11, 2017. The City Council will consider the ordinances for final adoption on October 3, 2017. In connection with these ordinances, several Councilmembers inquired about the ability of the City to regulate odor related to marijuana production facilities.

QUESTION PRESENTED

What are the City's legal options for regulating odors from marijuana production facilities?

SHORT ANSWER

Current state and local laws prohibit public nuisances and specifically address odors. The City may choose to control odors from marijuana production facilities by enforcing existing laws and/or incorporating specific requirements in use permits. The City also has the option of passing

a new odor law specific to marijuana production facilities; however, the new law could be subject to preemption, equal protection, and vagueness challenges.

ANALYSIS

The City has the power to enforce existing state and local law regarding excessive odor. However, we understand that the City Council may wish to require a greater amount of odor control for the marijuana production facilities than either California law or the San Diego Municipal Code (Municipal Code or SDMC) currently require. For example, the Council may wish to prohibit all off-site odor from marijuana production facility premises or prohibit odor that exceeds a certain measurement, similar to the approach used by the City and County of Denver.[1] We analyze the options available to the City and the legal issues associated with the options below.

I. OPTION 1: ODOR CONTROL THROUGH EXISTING LAW

There are various laws and remedies already available regarding the regulation of odor. Both state and local law currently prohibit public nuisances and specifically address odors. One option for controlling odors from marijuana facilities, should they become excessive, is enforcement of existing laws. In addition, the City could attempt to proactively control odors by including specific requirements in the Conditional Use Permits for the marijuana production facilities.

A. Overview of Existing Nuisance Law

1. State law regarding nuisance

California law currently prohibits a public nuisance. California Civil Code section 3479 states "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

The California Civil Code defines a "public nuisance" as a nuisance that "affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[2] Cal. Civ. Code § 3480. Before a nuisance can rise to the level of a public nuisance, the interference must be both

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[1] The City and County of Denver requires an odor control plan to be submitted describing the odors originating or anticipated to originate at the premises and the control technologies to be used to prevent such odor(s) from leaving the premises, if odorous contaminants are detected when one (1) volume of the odorous air has been diluted with seven (7) or more volumes of odor-free air. Denver Revised Municipal Code § 4-10. *See also* City and County of Denver, Environmental Health Rules & Regulations Governing Nuisance Odors, available at https://www.denvergov.org/content/dam/denvergov/Portals/771/documents/EQ/Odor/Rules%20Governing%20Nuisance%20Odors%20-%20draft.pdf.

[2] Any other nuisance is a private nuisance, the remedies for which are a civil action or abatement by the person injured. Cal. Civ. Code §§ 3481, 3501.

substantial, based on proof of sufficient harm as judged by an objective standard, and unreasonable, based on whether the harm outweighs the social utility of the conduct. *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292 (2006).

2. Municipal law regarding nuisance

The City has also adopted its own public nuisance law, which incorporates the state law. The Municipal Code defines public nuisance as "any condition caused, maintained or permitted to exist which constitutes a threat to the public's health, safety and welfare or which significantly obstructs, injuries or interferes with the reasonable or free use of property in a neighborhood, community or to any considerable number of persons. A public nuisance also has the same meaning as set forth in California Civil Code Section 3479." SDMC § 11.0210.

B. Specific Odor Laws

1. State law prohibits harmful or annoying odors, but exempts agricultural odors

In addition to defining a public nuisance, state law also specifically prohibits certain odors. California Health and Safety Code section 41700 states that "[e]xcept as otherwise provided in Section 41705, a person shall not discharge from any source whatsoever quantities of air contaminants or other material that cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or that endanger the comfort, repose, health, or safety of any of those persons or the public, or that cause, or have a natural tendency to cause, injury or damage to business or property." However, the list of prohibited sources specifically excludes odors necessary for the growing of crops. Cal. Health & Safety Code § 41705.

2. The Municipal Code also regulates odors

Like state law, the Municipal Code also specifically regulates odors. The Municipal Code prohibits air contaminants and odors that "endanger human health, causes damage to vegetation or property, or cause soiling . . . to emanate beyond the boundaries of the premises upon which the use emitting the contaminants is located."[3] SDMC § 142.0710.

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[3] In addition, the Municipal Code notes that the California Department of Public Health and the Air Pollution Control District regulations should be consulted for additional off-site development impact regulations. SDMC § 142.0705. The state also regulates odor. *See* Air Pollution Control District, Air Quality Complaints http://www.sdapcd.org/content/sdc/apcd/en/compliance-programs/air_quality_complaints.html (last visited Sept. 22, 2017).

C. Existing Options for Controlling Odors

1. Municipal Code Enforcement

If odors from marijuana production facilities rise to the level of the public nuisance, the City could enforce the Municipal Code. The potential remedies for a violation of the Municipal Code are criminal charges for an infraction or misdemeanor, a civil action, or abatement. SDMC, Chapter 1. The Land Development Code portion of the Municipal Code contains additional remedies regarding violations of the Land Development Code, such as permit revocation. SDMC, Chapter 12, Article 1, Division 3.

The specific remedies for a public nuisance are indictment or information, a civil action, or abatement. SDMC, Chapter 1; Cal. Civ. Code § 3491. The Land Development Code portion of the Municipal Code contains additional remedies regarding public nuisances. SDMC, Chapter 12, Article 1, Division 3.

In addition to bringing an action to enforce our own Municipal Code, the City Attorney's Office may also bring an action to enforce state laws. Violations of California Health and Safety Code section 41700 may be prosecuted by the City Attorney in the name of the People of the State of California. *People v. General Motors Corp.*, 116 Cal. App. 3d Supp. 6 (1980) (charge based on odors from paint baking ovens upheld).

2. Imposing specific odor-related conditions in the land use permits

In addition to enforcing existing nuisance and odor laws, the City may also attempt to preemptively avoid odors by including specific conditions in land use permits. For example, the Planning and Development Services Departments have issued a memo, dated September 28, 2017, which states that an odor control requirement that the installation of ventilation and exhaust systems must be "capable of eliminating excessive or offensive odors causing discomfort or annoyance to any reasonable person of normal sensitivities standing outside of the structural envelope of the permitted facility" could be added to the draft Conditional Use Permits. Whether this condition is included in the final, approved Conditional Use Permit would be made by the ultimate decision maker. Ordinance O-2018-8 requires that Conditional Use Permits for marijuana production facilities be processed in accordance with Process Three, and are therefore made by a Hearing Officer and appealable to the Planning Commission. Ordinance O-2018-8, § 2; SDMC § 112.0506. Whether an odor control condition would be placed in each approved Conditional Use Permit would be decided on a case-by-case basis by the final decision maker.

The City's authority to impose conditions on development is based on the authority granted to it by the California Constitution, which give cities broad powers to enact and enforce ordinances relating to the public welfare, including the regulation of excessive odors.[4] Development conditions must have a nexus or connection between the legitimate state interest and the

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[4] Cities are empowered to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. XI, § 7.

conditions imposed, and must also be in rough proportionality to those impacts. *Erlich v. City of Culver City*, 12 Cal. 4th 854 (1996).

II. OPTION 2: LEGISLATE NEW ODOR RESTRICTIONS FOR MARIJUANA PRODUCTION FACILITIES

Should the City Council desire to enact additional odor regulations specific to marijuana production facilities, this raises several legal issues, which we address below.

A. Preemption Concerns

The City's ability to legislate local prohibitions on odor may be limited by preemption principles. While the City generally has broad police powers, preemption occurs when a matter is of statewide concern and local law conflicts with the applicable state law. Although there is no case law directly on point, we can provide the following guidance with respect to preemption.

1. The City Has Broad Police Power

The City has broad powers to enact and enforce ordinances relating to the public welfare. Cal. Const. art. XI, § 7. These "police powers" provide the City with the "authority to impose and enforce land use regulations, through a nuisance ordinance or otherwise, without regard to whether the prohibited use falls within the Civil Code definition of nuisance." *Clary v. City of Crescent City*, 11 Cal. App. 5th 274, 289 (2017).

However, under the principal of preemption, the City may not legislate in conflict with matters of statewide concern. A conflict with general laws exists if the City enacts an ordinance that "duplicates, contradicts, or enters into an area fully occupied by general law, either expressly or by legislative implication." *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1168 (2009) (citing *Action Apartment Ass'n, Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1242 (2007)). There are two types of preemption: express and implied.

a. Express preemption

The legislature may expressly indicate an intent to fully occupy an area. *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1150 (2006). Conversely, the legislature may clearly indicate an intent to allow local regulation. Neither California Health and Safety Code section 41700 nor section 41705 contain any statement of legislative intent regarding preemption.

b. Implied preemption

While there is no express preemption clause applicable here, this does not end the preemption inquiry. Implied preemption will apply when the subject area has been so fully occupied by state law that it has become a matter of statewide concern, the subject area has been partially covered by state law in such a manner as to indicate that there is a statewide concern, or the subject area

has been partially covered by state law, and the negative effects of a local ordinance on transient state citizens outweighs the possible local benefits.[5] *Cox Cable San Diego, Inc. v. City of San Diego*, 188 Cal. App. 3d 952, 961 (1987) (citing *In re Hubbard*, 62 Cal. 2d 119, 128 (1964), a local gambling ordinance was not the type of regulation that would be of concern to transient citizens of the state, unlike traffic law, and so was not preempted by the California Penal Code).

There is no case law directly addressing whether odor control is a matter of statewide concern. However, an argument could be made that state law leaves room for the City to regulate odor with respect to agricultural operations necessary for the growing of crops. As discussed above, California Health and Safety Code section 41705 specifically exempts agricultural odors from the general odor prohibitions. There is some legislative history suggesting that this was simply intended to carve out agricultural odors from the enforcement powers of state and local air districts, and was not intended to limit the City's traditional police powers. Sen. Comm. on Environmental Qualifying, Analysis of Senate Bill 88 (2001-2002 Reg. Sess.) Apr. 16, 2001 ("Existing Law . . . b) Exempts from state and air district nuisance abatement authority odors emanating from agricultural operations necessary for the growing of crops or the raising of animals").[6]

That said, state law tends to trump local law when it is unclear whether preemption is implied. "Any fair, reasonable and substantial doubt whether a matter is a municipal affair or broader state concern must be resolved in favor of the legislative authority of the state." *Id.*

B. Equal Protection

An odor law that specifically targets marijuana production facilities (as opposed to other land uses in general or industrial facilities specifically) may be subject to an equal protection challenge. The California Constitution, Article 1, Section 7, guarantees the equal protection of the law, and is interpreted co-extensively with the federal Constitutional provision. 13 Cal. Jur. *Constitutional Law* § 339 (2012); *Landau v. Superior Court*, 81 Cal. App. 4th 191 (1998). Equal protection requires that people who are similarly situated to others be treated the same under the law. *People v. Cruz*, 207 Cal. App. 4th 664, 674 (2012).

A threshold requirement of any meritorious equal protection claim is a showing that the government has adopted a classification that affects two similarly situated groups unequally for the purposes of the law that is challenged. *Id.* If the persons are not similarly situated, then the equal protection claim fails without further analysis. *People v. Buffington*, 74 Cal. App. 4th 1149, 1155 (1999).

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[5] This Office has written numerous memoranda analyzing preemption. *See* City Att'y MS-2017-9 (Mar. 30, 2017), attached.

[6] This Office is aware that other cities in California have enacted regulations regarding marijuana odor. This Office contacted the cities of Oakland and San Jose regarding their regulations. The City of San Jose has not responded. The City of Oakland stated that they did not have any familiarity with the issue. Additionally, this Office contacted the San Diego Air Pollution Control District's Deputy County Counsel. She stated that she was not aware of any guidance regarding preemption of local regulation as it related to odor.

When distinctions are not based on a suspect classification or a fundamental interest, then the government must only demonstrate a rational relationship to a legitimate governmental purpose. *Id.* at 713. In particular, claims that individual land use permit decisions violate equal protection are reviewed under the rational relationship test. *Breneric Associates v. City of Del Mar*, 69 Cal. App. 4th 166, 187 (1998). When applying the rational relationship test, the court is to uphold the classification "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Cruz*, 207 Cal. App. 4th at 675. An equal protection claim will be rejected if "the 'wisdom [of the decision] is at least fairly debatable and it bears a rational relationship to a permissible state objective.'" *Breneric*, 69 Cal. App. 4th at 187 (citation omitted).

In *Breneric*, the court upheld the City of Del Mar's denial of a permit for a two story addition to a home. *Id.* at 172. The permit was denied because the proposed design was inconsistent with the residence's architectural style and was not in harmony with the surrounding neighborhood. *Id.* The applicant claimed that the denial violated equal protection because other similar projects had been approved. *Id.* at 186. The court found that the aesthetic considerations expressed by the City of Del Mar were legitimate government objectives for treating the project differently from other property. *Id.* at 187.

Here, the City may be able to establish a rational basis for regulating the odor from marijuana production facilities differently than other types of land uses. However, we would recommend that the City build a factual record to support its rational basis prior to enactment.

C. Vagueness

Finally, like any regulation, the prohibition of an odor-related nuisance could be subject to judicial challenge for vagueness. Due process requires that statutes forbidding or requiring any act must be set forth in such terms that people of common intelligence do not need to guess at its meaning, or differ as to its application. 58 Cal. Jur. 3d *Statutes* § 21 (2017). Such a standard not only provides law-abiding citizens with the guidelines they need to follow, it also prevents enforcement on a subjective, ad-hoc basis. 14 Cal. Jur. 3d *Constitutional Law* § 335 (2017). "Odor regulations are especially prone to claims that they are unconstitutionally vague, a claim that has succeeded on some occasions." 1 State Environmental L. § 10:9 (2016). Therefore, if the Council decided to move forward with a new odor regulation, we recommend that it be as clear and specific as possible.

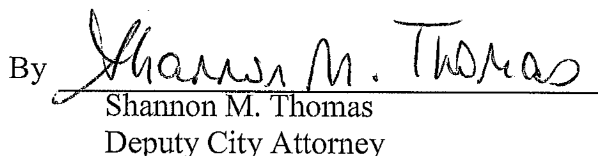
III. PROCEDURAL CONSIDERATIONS AND RECOMMENDATION

A revision to either of the two pending ordinances to regulate marijuana odor differently than the current Municipal Code provision is a significant enough change that the ordinances would need to be reintroduced. Due to the various legal concerns raised above, we recommend that such change be fully explored in Committee or Council discussions prior to enactment.

CONCLUSION

The City may choose to control odor from marijuana facilities through enforcement of existing laws or insertion of specific requirements in use permits. If the Council chooses to enact a new odor law specific to marijuana production facilities, it is unclear whether such a law would be impliedly preempted. In addition, any proposed odor regulation should be drafted to withstand legal challenges, such as equal protection and vagueness claims. Any revision to either ordinance to create a stricter odor control than is currently in the Municipal Code will require re-introduction of that ordinance. We recommend that such a revisions be fully explored through Council or Committee discussions for the reasons identified above.

MARA W. ELLIOTT, CITY ATTORNEY

By 
Shannon M. Thomas
Deputy City Attorney

SMT: als:jdf
Doc. No.: 1593841
MS-2017-28
Attachment: MS-2017-9
cc: Andrea Tevlin, Independent Budget Analyst

ATTACHMENT

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: March 30, 2017

TO: Honorable Councilmember Georgette Gomez

FROM: City Attorney

SUBJECT: Marijuana Billboard Restrictions

INTRODUCTION

On November 8, 2016, the voters in California passed Proposition 64, known as the Adult Use of Marijuana Act (AUMA). The AUMA legalized certain non-medical marijuana activities for adults age 21 and older. You have asked whether the City may enact an ordinance restricting advertising of marijuana and marijuana products (collectively, "marijuana") in a manner similar to the alcohol advertising restrictions in San Diego Municipal Code (Municipal Code) Chapter 5, Article 8, Division 5.[1] (Attachment A).

QUESTION PRESENTED

May the City prohibit billboards advertising marijuana within a specified distance of or clearly visible from a school, playground, recreation center, child care facility or library?

SHORT ANSWER

Yes, if the ordinance restricting marijuana advertising on billboards does not conflict with existing state law, and complies with established First Amendment standards.

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[1] Municipal Code section 58.0503 prohibits advertising alcoholic beverages on a billboard within 500 feet of a school, playground, recreation center, child care center, library, or in a location where the billboard face and its advertisement are clearly visible from one of these locations.

ANALYSIS

I. PREEMPTION AND THE ADULT USE OF MARIJUANA ACT

The AUMA sets forth restrictions and regulations on non-medical marijuana advertising and marketing. (Attachment B). Specifically, the AUMA prohibits advertising marijuana on a billboard or similar device "located on an Interstate Highway or State Highway which crosses the border of any other state;"[2] advertising marijuana "in a manner intended to encourage persons under 21 years to consume marijuana or marijuana products;" and advertising marijuana "on an advertising sign within 1,000 feet of a day care center, school providing instruction in kindergarten or any grades 1 through 12, playground or youth center."[3] Cal. Business & Professions Code (Business & Professions Code) § 26152(d) – (g). "Day care center" is defined as "any child day care facility other than a family day care home, and includes infant centers, preschools, extended day care facilities, and schoolage child care centers." Business & Professions Code § 26001(g) (citing Cal. Health & Safety Code (Health & Safety Code) § 1596.76). "Youth center" is defined as "any public or private facility that is primarily used to host recreational or social activities for minors, including, but not limited to, private youth membership organizations or clubs, social service teenage club facilities, video arcades, or similar amusement park facilities." Business & Professions Code § 26001(ee) (citing Health & Safety Code § 11353.1(e)(2)).

A. Legal Principles of State Law Preemption

Local ordinances in furtherance of public health, safety, morals and general welfare, or for preventing a public nuisance are traditional areas of local police power. *Berman v. Parker,* 348 U.S. 26, 32 (1954); *City of Oakland v. Williams*, 15 Cal. 2d 542, 549 (1940). However, in light of the existing state regulations on marijuana advertising, any local ordinance must be carefully examined to avoid a preemption challenge.

Generally, a city may "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. XI, § 7. A conflict with general laws (state law) exists if a local law "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1168 (2009) (citing *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1242 (2007)). An area has been fully occupied by state law when "the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized indicia of intent." *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1150 (2006).

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[2] Assembly Bill 64 would expand the interstate highway and state highway restrictions to include all interstate or state highways. Cal. Assembly Bill 64 (2017-2018) Reg. Sess. (December 12, 2016).

[3] Assembly Bill 729 would expand this list to include a church. Cal. Assembly Bill 729 (2017-2018) Reg. Sess. (February 15, 2017).

B. An Ordinance Further Regulating Billboards Advertising Marijuana is Likely Not Preempted by the AUMA

An ordinance supplementing state law restrictions on marijuana advertising would likely not be held preempted if challenged in court. However, an ordinance providing advertising rules which are less restrictive than state law would likely be preempted by the AUMA.

1. Duplication and Conflict Preemption

Expanding the AUMA restrictions on marijuana advertising to include a greater distance requirement or an expanded list of locations would not duplicate or conflict with the AUMA's marijuana advertising restrictions. "A local ordinance *duplicates* state law when it is 'coextensive' with state law." *O'Connell v. City of Stockton (O'Connell)*, 41 Cal. 4th 1061, 1067 (2007) (citing *Sherwin–Williams Co. v. City of Los Angeles (Sherwin-Williams)*, 4 Cal. 4th 893, 897-98 (1993)). For example, duplication has been found where a local law "purported to impose the same criminal prohibition that general law imposed." *Gonzales v. City of San* Jose, 125 Cal. App. 4th 1127, 1135 (2004) (citing *In re Portnoy*, 21 Cal. 2d 237, 240 (1942)).

"A local ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law." *O'Connell*, 41 Cal. 4th at 1068 (emphasis in original). A conflict may be found where a local ordinance mandates something prohibited by state law, or prohibits something mandated by state law. *Browne v. County of Tehama*, 213 Cal. App. 4th 704, 721 (2013). When an ordinance does neither, it is not inimical to state law. *Sherwin–Williams*, 4 Cal. 4th at 902.

An ordinance regulating billboards advertising marijuana must supplement state law restrictions, rather than duplicate them. For example, local regulations could contain a greater distance requirement or expand the list of prohibited locations.[4] With restrictions of this nature, advertising within 1,000 feet of a location prohibited by the AUMA would not be mandated, and nothing mandated by state law would be prohibited. Likewise, simultaneous compliance with both sets of laws would be possible under additional, more restrictive regulations.[5] Finally, the AUMA imposes only administrative licensing consequences for violation of the advertising restrictions. *See* Business & Professions Code §§ 26030 – 26037. The Municipal Code, in contrast, may be enforced in a variety of ways, including criminal, civil, and administrative proceedings. *See generally* SDMC §§ 12.0201, 12.0202, 12.0204, 12.0301. Thus, neither the substantive provisions nor the enforcement remedies would likely be found duplicative of or contradictory to existing state law.

The existing 500-foot distance restriction on alcohol billboard advertising in Municipal Code section 58.0503 could not be applied to marijuana billboard advertising. A distance restriction less than the AUMA's 1,000-foot restriction would likely be viewed as conflicting with state

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[4] Although likely allowable under a preemption analysis, expanded regulations may raise significant First Amendment concerns due to the breadth of speech affected. *See* section III.B.4, *infra*.

[5] As used in this memorandum, a greater distance requirement or an expanded list of prohibited locations, would constitute more restrictive regulations, while a lesser distance requirement, such as only 500 feet, or a smaller list of prohibited locations, would constitute less restrictive regulations.

law, and thus, preempted. Such a restriction would "permit conduct which state law forbids." *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109, 1124 (1997).

2. Field Preemption

The more complex question is whether the AUMA has occupied the field of marijuana advertising to the exclusion of local regulation. Indicia of the Legislature's intent to fully occupy a legal area include:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

Kruse, 177 Cal. App. 4th at 1169 (citing *American Financial Services Assn. v. City of Oakland,* 34 Cal. 4th 1239, 1252 (2005)). Unless there is a "clear indication of legislative intent to preempt, courts presume that local regulation in areas of traditional local concern is not preempted by state law." *Conejo Wellness Center, Inc. v. City of Agoura Hills*, 214 Cal. App. 4th 1534, 1553 (2013). "Billboards have long been recognized as a proper subject for local regulation." *Viacom Outdoor, Inc. v. City of Arcata*, 140 Cal. App. 4th 230, 237 (2006).

The AUMA does not contain an express statement of preemptive intent regarding marijuana advertising. Regulations in the AUMA cover a variety of advertising-related topics, including: identification of the licensee, ensuring an adult audience, age verification for direct communication, false advertising, consistency with product labeling, billboard and sign restrictions, marketing to minors under age 21, and free product promotions. *See* Business & Professions Code §§ 26150 – 26155. It is possible a court may view the breadth of these regulations as evidence of intent to occupy the field of marijuana advertising regulation.

However, read in light of the entire AUMA, two factors suggest the drafters did not intend to fully occupy the field of marijuana advertising. First, the AUMA advertising restrictions apply to marijuana businesses with a state license. *Id.* Business and Professions Code section 26200(a)

states "[n]othing in this division shall be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division. . . ." Additionally, Business and Professions Code section 26201 expressly states:

> Any standards, requirements, and regulations regarding health and safety, environmental protection, testing, security, food safety, and worker protections established by the state shall be the minimum standards for all licensees under this division statewide. A local jurisdiction may establish additional standards, requirements, and regulations.

Thus, to the extent an ordinance regulates marijuana businesses licensed under state law, and addresses the health and safety of those whom the ordinance is meant to protect, there is express authorization for such regulation.

Marijuana billboard restrictions similar to the existing alcohol billboard ordinance would apply more broadly than the restrictions in the AUMA because they would apply to all marijuana advertising, not only advertising by a licensed business. The AUMA is silent on advertising restrictions for non-licensees.[6] Thus, nothing in the AUMA indicates an intent to occupy the field of all marijuana advertising.

Second, the AUMA drafters did expressly indicate preemptive intent where they so desired. In describing lawful personal marijuana use activities, Health and Safety Code section 11362.1(a) specifically states "it shall be lawful under state and local law, and shall not be a violation of state or local law. . . ." Likewise, Health and Safety Code section 11362.2(b)(2) declares "no city, county, or city and county may completely prohibit" personal indoor marijuana cultivation. Finally, Business and Professions Code section 26012(a), explains that issuance of statewide licenses is "a matter of statewide concern." These examples illustrate marijuana-related subject matters where the AUMA clearly precludes local regulation.

In the absence of such clear intent regarding advertising, and in light of the broad grant of local control in the AUMA, a court would be unlikely to find the field of marijuana advertising fully preempted by state law.

II. PREEMPTION AND THE MEDICAL CANNABIS REGULATION AND SAFETY ACT

In 2015, the state adopted the Medical Cannabis Regulation and Safety Act (MCRSA), designed to establish a statewide licensing system and regulations for medical marijuana businesses. *See generally* Business & Professions Code §§ 19300 – 19360. The MCRSA does not contain

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[6] Assembly Bill 64 would apply the marijuana advertising restrictions to all advertising, regardless of whether an entity is licensed under state law. Cal. Assembly Bill 64 (2017-2018) Reg. Sess. (December 12, 2016), § 8, Business & Profession Code § 26152.

medical marijuana advertising restrictions. Thus, a preemption challenge to a medical marijuana billboard ordinance is unlikely. Even if such a challenge was made, the MCRSA contains anti-preemption, local control provisions similar to the AUMA, and the City would likely prevail. *See* Business & Professions Code §§ 19315, 19316; Health & Safety Code § 11362.83.[7]

III. THE FIRST AMENDMENT AND COMMERCIAL SPEECH

Even if a local ordinance restricting marijuana billboard advertising is not preempted by state law, regulation of advertising also raises constitutional issues. The First Amendment to the United States Constitution declares that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. These provisions are applicable to actions of the states and cities through the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV, § 1; *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

The California Constitution also protects the right of every person to "freely speak . . . his or her sentiments on all subjects" and provides that no law may "restrain or abridge liberty of speech or press." Cal. Const. art. I, § 2. The California Constitution and the case law construing it give greater protection to the expression of free speech than the United States Constitution. *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1025 (2002) (quoting *Gonzales v. Superior Court*, 180 Cal. App. 3d 1116, 1122 (1986)). The free speech rights guaranteed by the federal and state constitutions will be referred to collectively as "First Amendment" rights.

A. Commercial Speech Doctrine

Speech advertising a product for sale, and proposing a commercial transaction, has been given a basic level of First Amendment protection by the courts, and restrictions on advertising are typically analyzed under the commercial speech doctrine. *Lorillard Tobacco Co. v. Reilly (Lorillard),* 533 U.S. 525, 553-54 (2001). Commercial speech is defined as "speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation. . . ." *Central Hudson Gas & Electric Corp., v. Public Service Comm'n of New York (Central Hudson)*, 447 U.S. 557, 562 (1980) (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)). Commercial speech has also been described as that where the "advertiser's interest is a purely economic one." *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

Central Hudson established a four-part test for analyzing regulations of commercial speech:

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[7] Assembly Bill 64 would apply the same advertising restrictions to the MCRSA. Cal. Assembly Bill 64 at § 5, Business & Professions Code § 19349. In that case, a similar analysis would likely apply.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566. The California Supreme Court has also recognized the commercial speech doctrine and accepted *Central Hudson* as the controlling analysis for commercial speech regulation under the California constitution. *Kasky v. Nike, Inc.,* 27 Cal. 4th 939, 969 (2002).

Government regulations of speech based on the content of the speech or the identity of the speaker are traditionally subject to heavier scrutiny than content neutral regulations. *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 566 (2011). The same is true for content based regulation of commercial speech. *Id.* In order to justify a content based regulation of commercial speech, the government must "show at least that the statute directly advances a substantial governmental interest and that measure is drawn to achieve that interest." *Id.* at 572.[8]

B. Analysis of Marijuana Billboard Advertising Restrictions

No court has yet analyzed restrictions on marijuana billboard advertising. However, an ordinance establishing distance requirements from certain locations for billboards advertising marijuana may be evaluated using the *Central Hudson* and *Sorrell* tests.

1. Is marijuana advertising protected by the First Amendment?

In order to receive First Amendment protection, marijuana advertising must concern lawful activity and must not be misleading. *Central Hudson*, 447 U.S. at 566. Under California law certain marijuana related activities are now legal for adults age 21 or older. Cal. Health & Safety § 11362.1. Conversely, under federal law, marijuana is still a scheduled controlled substance and marijuana-related activities are illegal. *See generally* 21 U.S.C. §§ 841(a), 844(a). It is unclear how a court, either state or federal, would rule on this issue, where the sale and purchase of marijuana advertised on billboards is legal under state law but illegal under federal law.

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[8] In 2015, the United States Supreme Court held that content based speech regulations, even if viewpoint neutral, were subject to traditional strict scrutiny, meaning the law must be narrowly tailored to further a compelling government interest. *Reed v. Town of Gilbert, Ariz.,* 576 U.S. ____, 135 S. Ct. 2218, 2226 (2015). *Reed* was not a commercial speech case, and did not reference the *Central Hudson* or *Sorrell* tests for commercial speech. At least two courts have held that *Reed* and traditional strict scrutiny do not apply to the commercial speech analysis. *Lamar Central Outdoor, LLC v. City of Los Angeles*, 245 Cal. App. 4th 610, 625 (2016); *California Outdoor Equity Partners v. City of Corona*, 2015 WL 4163346 at *10 (C.D. Cal. July 9, 2015).

2. <u>The City must have a substantial government interest in restricting the location of billboards advertising marijuana.</u>

In developing a marijuana billboard ordinance, the City Council (Council) must identify the interests to be advanced by the regulation. An ordinance restricting marijuana billboards within a certain distance of or viewable from places frequented by children may be based on the City's presumed interest in preventing marijuana use by children. Such an interest has been upheld in the contexts of alcohol and tobacco advertising restrictions. *Lorillard*, 533 U.S. at 561; *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996). It is likely a court would find a significant government interest in preventing marijuana use by children, but any ordinance would need to be supported by data and legislative findings regarding the negative effects of marijuana use by children and, if available, the impact of marijuana advertising on such use. Research from Colorado regarding youth marijuana use since legalization, for example, may help establish the City's substantial government interest in preventing underage marijuana use.

Additionally, the Council should carefully examine whether the interests to be served by a proposed ordinance are already adequately protected by the marijuana advertising restrictions in state law, particularly given the broad definition of "youth center" and the AB 729 proposal to include churches in the list of prohibited locations. Any additional interests to be protected should be clearly identified and explained. If the City's interests are found to be already protected by state law, the ordinance may be open to a legal challenge on this prong of the *Central Hudson* analysis.

3. <u>A marijuana billboard advertising restriction must directly advance San Diego's substantial government interest.</u>

To ensure that a marijuana billboard restriction directly advances the City's interest, the ordinance would need to be based on facts linking visible advertising to increased marijuana use by children. It is unclear whether such information or studies exist, given the very recent passage of the AUMA. Similar data analyzing the relationship between alcohol or tobacco advertising and underage usage may be helpful and may provide a reasonable analogy to children and marijuana advertising. *See Lorillard*, 533 U.S. at 555. In developing such data, the Council should carefully consider how each proposed restriction advances a particular interest.

4. <u>A marijuana billboard advertising restriction must not be more extensive than necessary to achieve the City's interest.</u>

The fourth prong of the *Central Hudson* test has also been described as requiring a "reasonable fit between the means and ends of the regulatory scheme," not necessarily the least restrictive means of achieving the government interest. *Lorillard*, 533 U.S. at 556, 561. When the Council adopted the alcohol billboard restrictions in 2000, it gathered evidence that "more than half of the existing billboards are within one thousand feet of schools, playgrounds, recreation centers or facilities, child care centers, arcades. . . ." (San Diego Ordinance O-18879 (November 14,

2000)).[9] The Council also made findings regarding the number of billboards which would still be available for alcohol advertising despite the restrictions. *Id.* Updated, similar information regarding the City's existing billboards, and the impact of the restrictions, would be necessary to support such an ordinance and to illustrate that the restrictions are not more extensive than necessary to achieve the City's interests.

The City's alcohol billboard restrictions, contained in Municipal Code sections 58.0501 – 58.0504, were challenged in 2001. *Clear Channel Outdoor, Inc., et.al. v. City of San Diego,* 01 CV 1941 BTM (POR) (2001). The parties successfully settled the lawsuit and amended the ordinance to its current form. *See* San Diego Ordinance O-19173 (May 6, 2003).
However, not all billboard distance restrictions have survived legal challenge. In *Lorillard*, a state regulation prohibited tobacco advertising on billboards and other mediums within 1,000 feet of schools and playgrounds. *Lorillard,* 533 U.S. at 534-35. The Court noted evidence in the record showing that "the regulations prohibit advertising in a substantial portion of the major metropolitan areas of Massachusetts," and concluded that the "uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring." *Id.* at 562-63. Recognizing that although some restrictions on commercial speech may be justifiable, the Court reasoned that tobacco use is a legal adult activity, and "a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Id.* at 565.[10] The same analysis could be applied to adult marijuana use in California in light of Proposition 64.

Alcohol billboard restrictions have been challenged on similar grounds. In *Eller Media Co. v. City of Cleveland, Ohio*, 161 F. Supp. 2d 796 (N.D. Ohio, August 10, 2001), the court struck down an ordinance prohibiting alcohol advertising in any public place based on the reasoning in *Lorillard*, finding that it was "nearly a complete ban on the communication of truthful information about legal alcoholic products to adult consumers." *Id.* at 811. In contrast, an alcohol billboard ordinance challenged by the same plaintiff was upheld in *Eller Media Co. v. City of Oakland*, 2000 WL 33376585 (N.D. Cal., December 7, 2000). At issue in that case was an ordinance prohibiting signs advertising alcohol within "1000 feet of schools, city-owned youth-recreation centers, licensed child-care facilities, places of worship," or a particular local field. *Id.* at *1. Applying the *Central Hudson* test, the court found 1,000 feet to be a reasonable fit for achieving the city's interest in reducing underage drinking. *Id.* at 5, 9. The court noted that the ordinance was not a complete ban on alcohol advertising, but rather a "time, place, and manner" restriction, leaving "plenty of fora" (i.e. places) for alcohol advertising. *Id.* at 1, 9.

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[9] This distance requirement and the list of locations was subsequently amended in 2003 to restrict alcohol advertising on billboards only within 500 feet of a restricted location, and arcades were removed from the list of locations. These amendments were a result of litigation challenging the ordinance. (San Diego Ordinance O-19173 (May 6, 2003)).

[10] In 2015, the City repealed tobacco advertising restrictions within 1,000 feet of a school, playground, recreation center or facility, child care center, arcade, or library based on the reasoning in the *Lorillard* case. Those regulations also contained other outdoor advertising rules and a zoning requirement, and were broader than the existing alcohol billboard restrictions. *See* San Diego Ordinance O-20554 (August 7, 2015); City Att'y MOL No. 2015-6 (April 10, 2015).

If the Council wishes to develop an ordinance restricting billboards advertising marijuana, it should carefully tailor the ordinance to only those restrictions which directly advance San Diego's interests not adequately addressed by state law. The Council should also carefully tailor the ordinance to restrict no more speech than necessary, keeping in mind the City's recent repeal of tobacco advertising restrictions.

CONCLUSION

Although local marijuana advertising regulation is a new and untested area of law, the Council likely may enact an ordinance not in conflict with the advertising restrictions in the AUMA. However, it is also prudent to wait until the relevant pending bills in the state legislature are resolved to determine what impact, if any, each of them would have on a proposed ordinance. As currently drafted, Assembly Bills 64 and 729 would expand the scope of the advertising regulations in the AUMA. The final content of these bills, if adopted, would need to be evaluated for any impact on the preemption and First Amendment analyses contained in this memorandum. Additionally, any ordinance must be based on a developed factual record fully illustrating the City's interest in marijuana advertising restrictions, explaining how the restrictions advance the interest, and should restrict no more speech than necessary to serve the interest.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Michelle A. Garland
Michelle A. Garland
Deputy City Attorney

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MS-2017-9
Doc. No.: 1440654_13
Attachments

ATTACHMENT A

Article 8: Minors

Division 5: Restricting the Advertising of Alcoholic Beverages to Youth

("Restricting the Advertising of Alcoholic Beverages to Youth" added 11-14-2000 by O-18879 N.S.)

§58.0501 Definitions

All terms defined in this Division appear in italics.

For purposes of this Division:

Advertising means printed matter that calls the public's attention to things for sale.

Alcoholic beverages means any substance containing one-half of one percent or more alcohol by volume and which is fit for consumption as a beverage either alone or when combined with other substances.

Billboard means any sign space that is permanently placed on or affixed to the ground, the sidewalk, a pole or post, or a building, and is not appurtenant to the use of the property, a product sold, or the sale or lease of the property on which displayed and which does not identify the place of business as purveyor of the merchandise or services advertised upon the sign. *Billboard* also means any sign space that is permanently placed on a vehicle that is used primarily for the purpose of displaying outdoor advertising.

Child care center means a public or licensed private child care that has a continuous enrollment of no fewer than twenty-five (25) children and is clearly identified on the outside of the facility as a childcare center;

City has the same meaning as in Municipal Code section 11.0210.

Director has the same meaning as in Municipal Code section 11.0210.

Library means any public library operated by the *City* and clearly identified on the outside of the facility as a library.

Person has the same meaning as in Municipal Code section 11.0210.

Playground means any outdoor premises or grounds owned or operated by the *City* that contains any play or athletic equipment used or intended to be used by minors.

Recreation center or facility means any recreation center or facility owned or operated by the *City*, and clearly identified on the outside of the facility as a *City* recreation center or facility.

School means any public or licensed private elementary or secondary school, that is clearly identified on the outside of the facility as a school, attendance at which satisfies the compulsory education laws of the State of California.
("Definitions" amended 5-6-2003 by O-19173 N.S.)

§58.0502 Measure of Distance

The distance between any *billboard* and any *school, playground, recreation center or facility, child care center,* or *library* shall be measured in a straight line, without regard to intervening structures, from the *billboard* to the closest property line of the *school, playground, recreation center or facility, child care center,* or *library.*
(Amended 5-6-2003 by O-19173 N.S.)

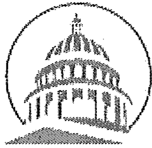
§58.0503 Advertising Restrictions

It is unlawful for any *person*, business, or retailer to place or maintain, or cause to be placed or maintained, any *advertising* of *alcoholic beverages* on a *billboard* that is within 500 feet of a *school, playground, recreation center or facility, child care center,* or *library* or that is more than 500 feet and the billboard face and its advertisement are clearly visible from a *school, playground, recreation center or facility, child care center*, or *library.* This section does not apply to any noncommercial message.
(Amended 5-6-2003 by O-19173 N.S.)

§58.0504 Enforcement

Violations of this Division shall be prosecuted as infractions for the first offense, and may be prosecuted as misdemeanors for subsequent offenses, subject to the fines and custody provided in Municipal Code Section 12.0201. Any *Director* may also seek injunctive relief and civil penalties pursuant to Municipal Code Section 12.0202 or pursue any administrative remedy as provided in Chapter 1 of this Code.
(Amended 5-6-2003 by O-19173 N.S.)

ATTACHMENT B



BUSINESS AND PROFESSIONS CODE - BPC

DIVISION 10. MARIJUANA [26000 - 26211] *(Division 10 added November 8, 2016, by initiative Proposition 64, Sec. 6.1.)*

CHAPTER 15. Advertising and Marketing Restrictions [26150 - 26155] *(Chapter 15 added November 8, 2016, by initiative Proposition 64, Sec. 6.1.)*

26150. For purposes of this chapter:

(a) "Advertise" means the publication or dissemination of an advertisement.

(b) "Advertisement" includes any written or verbal statement, illustration, or depiction which is calculated to induce sales of marijuana or marijuana products, including any written, printed, graphic, or other material, billboard, sign, or other outdoor display, public transit card, other periodical literature, publication, or in a radio or television broadcast, or in any other media; except that such term shall not include:

(1) Any label affixed to any marijuana or marijuana products, or any individual covering, carton, or other wrapper of such container that constitutes a part of the labeling under provisions of this division.

(2) Any editorial or other reading material (e.g., news release) in any periodical or publication or newspaper for the publication of which no money or valuable consideration is paid or promised, directly or indirectly, by any licensee, and which is not written by or at the direction of the licensee.

(c) "Advertising sign" is any sign, poster, display, billboard, or any other stationary or permanently affixed advertisement promoting the sale of marijuana or marijuana products which are not cultivated, manufactured, distributed, or sold on the same lot.

(d) "Health-related statement" means any statement related to health, and includes statements of a curative or therapeutic nature that, expressly or by implication, suggest a relationship between the consumption of marijuana or marijuana products and health benefits, or effects on health.

(e) "Market" or "Marketing" means any act or process of promoting or selling marijuana or marijuana products, including, but not limited to, sponsorship of

sporting events, point-of-sale advertising, and development of products specifically designed to appeal to certain demographics.

(Added November 8, 2016, by initiative Proposition 64, Sec. 6.1.)

26151. (a) All advertisements and marketing shall accurately and legibly identify the licensee responsible for its content.

(b) Any advertising or marketing placed in broadcast, cable, radio, print and digital communications shall only be displayed where at least 71.6 percent of the audience is reasonably expected to be 21 years of age or older, as determined by reliable, up-to-date audience composition data.

(c) Any advertising or marketing involving direct, individualized communication or dialogue controlled by the licensee shall utilize a method of age affirmation to verify that the recipient is 21 years of age or older prior to engaging in such communication or dialogue controlled by the licensee. For purposes of this section, such method of age affirmation may include user confirmation, birth date disclosure, or other similar registration method.

(d) All advertising shall be truthful and appropriately substantiated.

(Added November 8, 2016, by initiative Proposition 64, Sec. 6.1.)

26152. No licensee shall:

(a) Advertise or market in a manner that is false or untrue in any material particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression;

(b) Publish or disseminate advertising or marketing containing any statement concerning a brand or product that is inconsistent with any statement on the labeling thereof;

(c) Publish or disseminate advertising or marketing containing any statement, design, device, or representation which tends to create the impression that the marijuana originated in a particular place or region, unless the label of the advertised product bears an appellation of origin, and such appellation of origin appears in the advertisement;

(d) Advertise or market on a billboard or similar advertising device located on an Interstate Highway or State Highway which crosses the border of any other state;

(e) Advertise or market marijuana or marijuana products in a manner intended to encourage persons under the age of 21 years to consume marijuana or marijuana products;

(f) Publish or disseminate advertising or marketing containing symbols, language, music, gestures, cartoon characters or other content elements known to appeal primarily to persons below the legal age of consumption; or

(g) Advertise or market marijuana or marijuana products on an advertising sign

within 1,000 feet of a day care center, school providing instruction in kindergarten or any grades 1 through 12, playground, or youth center.

(Added November 8, 2016, by initiative Proposition 64, Sec. 6.1.)

26153. No licensee shall give away any amount of marijuana or marijuana products, or any marijuana accessories, as part of a business promotion or other commercial activity.

(Added November 8, 2016, by initiative Proposition 64, Sec. 6.1.)

26154. No licensee shall publish or disseminate advertising or marketing containing any health-related statement that is untrue in any particular manner or tends to create a misleading impression as to the effects on health of marijuana consumption.

(Added November 8, 2016, by initiative Proposition 64, Sec. 6.1.)

26155. (a) The provisions of subdivision (g) of Section 26152 shall not apply to the placement of advertising signs inside a licensed premises and which are not visible by normal unaided vision from a public place, provided that such advertising signs do not advertise marijuana or marijuana products in a manner intended to encourage persons under the age of 21 years to consume marijuana or marijuana products.

(b) This chapter does not apply to any noncommercial speech.

(Added November 8, 2016, by initiative Proposition 64, Sec. 6.1.)