

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: November 3, 2020

TO: Councilmembers Monica Montgomery Steppe and Chris Ward

FROM: City Attorney

SUBJECT: Proposed Cannabis Equity Program

INTRODUCTION

You have asked our Office for legal guidance regarding the establishment of a Cannabis Equity Program in the City of San Diego (City). The proposed program would use the City's cannabis business tax revenue to make targeted investments in grassroots programs that assist communities and individuals who may have experienced disproportionate enforcement of cannabis-related crimes. You have referred us to two existing cannabis equity studies: (1) a study performed by the American Civil Liberties Union, dated June 2013 (ACLU Study); and (2) a study performed by the Mid-City Community Action Network, dated August 2019 (Mid-City Study). This memorandum provides preliminary guidance regarding the formation and implementation of a Cannabis Equity Program. Such a program may raise other legal issues not addressed in this memorandum, which will require additional legal review.

QUESTIONS PRESENTED

1. May the City implement a Cannabis Equity Program that focuses on certain impacted communities and individuals?
2. Is the City's reliance on either the ACLU Study or the Mid-City Study sufficient to defend against equal protection challenges to a Cannabis Equity Program?

SHORT ANSWERS

1. Yes, provided such a program is supported by an equity study with race-neutral data specific to the City to best protect against an equal protection challenge.
2. No. Courts have held that these types of studies must be particularized to the region and economic groups that the government assistance program wishes to target.

ANALYSIS

I. AN INDEPENDENT CANNABIS EQUITY STUDY IS NEEDED TO SUPPORT THE CITY'S FORMATION OF A CANNABIS EQUITY PROGRAM

Equal protection principles in the federal and state Constitutions prohibit public entities from discriminating against, or giving preferential treatment to, any person or firm based upon certain suspect classifications, such as race (subject to very limited exceptions that do not apply in this instance). Our Office's legal memorandum dated September 10, 2007, attached, provided an overview of equal protection requirements that apply to City programs and contracts.

Generally, federal law requires that a race-based governmental program survive a rigorous "strict scrutiny" review, meaning that the program is determined to be: (1) necessary to serve a compelling state interest; and (2) narrowly tailored to address that interest. *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 496-97, 507 (1989). State law currently prohibits preferences based on race or gender in public employment, public education, or public contracting. Cal. Const. art. I, § 31.¹ Current state law imposes an even more stringent restriction on race-based programs than the strict scrutiny test under federal law and prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the program could be justified under strict scrutiny. *C&C Constr., Inc. v. Sacramento Municipal Utility Dist.*, 122 Cal. App. 4th 284, 293 (2004).

When an action neither targets a suspect class nor impinges on a fundamental right, it is reviewed according to the "rational basis" standard. *Rui One Corp. v. City of Berkeley*, 371 F.3d 1137, 1154 (9th Cir. 2004). Under the rational basis standard, an action will be upheld on equal protection grounds so long as the action is rationally related to a legitimate government interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993). Legislative acts that are subject to the rational relationship test are presumed valid, and such a presumption is overcome only by a "clear showing of arbitrariness and irrationality." *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) (quoting *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981)).

To create a Cannabis Equity Program that survives an equal protection challenge, we recommend that the City first procure a comprehensive, independent cannabis equity study (Equity Study) demonstrating that certain local communities and individuals have suffered disproportionate levels of law enforcement of cannabis-related crimes. An Equity Study of this nature would provide reliable data supporting the need for specialized assistance to impacted communities and individuals and would also provide a rational basis for the program to counter any equal protection challenges.

¹ Proposition 16, if approved by California voters in the November 2020 election, would remove the ban on affirmative action involving race-based or sex-based preferences from the California Constitution. If Proposition 16 is enacted into law, our Office can provide supplemental analysis, although we note that federal equal protection principles would still apply to any Cannabis Equity Program.

In addition, the documents establishing a Cannabis Equity Program must focus on racially neutral factors, such as socio-economic demographics. A program focused on racially neutral factors would be scrutinized using a rational basis review, with a court showing considerable deference to the City's rationale for establishing the program. By contrast, if the City establishes a Cannabis Equity Program on the basis of race, the program would need to survive a rigorous strict scrutiny review under federal law and could be found to be flatly prohibited under current state law.

II. BEFORE FORMING A CANNABIS EQUITY PROGRAM, THE CITY SHOULD PROCURE AN EQUITY STUDY WITH DATA PARTICULARIZED TO THE REGION AND ECONOMIC GROUPS THE PROGRAM WISHES TO TARGET

As discussed above, a race-based program must survive "strict scrutiny" review under federal equal protection laws. *City of Richmond*, 488 U.S. 469 at 507. As such, a program may not be based on a broad-based disparity study. *Id.* at 504-05 (generalized findings of discrimination in the national or statewide marketplace did not establish a "compelling state interest" in a program targeting the Richmond construction industry). Rather, race-based programs must be based on particularized findings of discrimination in the specific location and industries that the program targets. *Id.*; see also 2015 City Att'y Report 2015-11 (Dec. 16, 2015) (finding that a statewide Caltrans study was not specific enough to support a regional race-conscious equal opportunity contracting program).

As stated above, our Office recommends that the City procure a comprehensive, independent Equity Study to assist in the formation of a Cannabis Equity Program. While both the ACLU Study and the Mid-City Study may reinforce the need for a Cannabis Equity Program to assist populations impacted by enforcement of cannabis-related crimes, the City cannot rely on those studies. The ACLU Study helps explain the national themes related to the criminalization of cannabis, but lacks local data that would assist the City in forming a Cannabis Equity Program and justifying its eligibility requirements. The Mid-City Study contained data from a limited timeframe (2012-2017), which is unlikely to persuade a court that historic discrimination exists in the specific locations to be targeted by a local Cannabis Equity Program. Further, the City cannot verify the accuracy and completeness of the data that was obtained for the Mid-City Study nor determine if the data contained in the study was correctly tabulated.

A comprehensive, independent Equity Study procured by the City in support of a Cannabis Equity Program will help insulate the program from a legal challenge. This type of Equity Study will provide the City with statistics regarding the impacts of past cannabis policies in the San Diego region, which the City may rely upon to create and defend a Cannabis Equity Program aimed at rectifying specific, identified inequities. By way of example, the City of Los Angeles retained Amec, Foster, Wheeler Environmental & Infrastructure, Inc. to prepare a Cannabis Social Equity Analysis Report (LA Report), available at https://clkrep.lacity.org/onlinedocs/2017/17-0653_rpt_CLA_10-20-2017.pdf. The LA Report tabulated and analyzed data relevant to forming a Cannabis Equity Program in Los Angeles and provided specific recommendations for the City of Los Angeles' Social Equity Program that

would be supported by pertinent data. Similarly, we recommend that the City retain a qualified consultant, with relevant expertise, to prepare a report of this comprehensive nature.²

CONCLUSION

The City may implement a Cannabis Equity Program that focuses on communities and individual impacted by disproportionate enforcement of cannabis-related crimes following the completion of a comprehensive, independent Equity Study. An Equity Study will assist the City in complying with equal protection principles by basing the Cannabis Equity Program on findings particular to the City of San Diego.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ David L. Powell
David L. Powell
Deputy City Attorney

DLP:jdf

MS-2020-28

Doc. No.: 2518379

Attachment

cc: Aimee Faucett, Chief Operating Officer
Andrea Tevlin, Independent Budget Analyst

² The Office of the Independent Budget Analyst or the appropriate City department may be able to assist with evaluating comparable models for establishment of a Cannabis Equity Program and determining the costs associated with obtaining an Equity Study and other costs associated with establishment of the program.