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MEMO

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TO: Peter Hellegers, City Planner
FROM: Kori Land, South St. Paul City Attorney
DATE: July 14, 2014
RE: Regulations on Medical Marijuana Operations

This memorandum seeks to briefly outline the major provisions of Minnesota's new Medical Cannabis Therapeutic Research Act of 2014 and possible future amendments to the Act, briefly consider whether medical marijuana operations would be permitted under current South St. Paul City Code and the relationship between current zoning and future expansion of medical marijuana operations, and discuss how cities might regulate such operations.

Overview of Legislation

The Medical Cannabis Therapeutic Research Act of 2014 ("Act") legalized the use of marijuana-derived compounds for medical purposes ("medical marijuana") in Minnesota,¹ and created a legal framework for the manufacture, testing, and distribution of medical marijuana. Patients with qualifying conditions will be able to obtain medical marijuana for use in liquid (including oil) or pill form, but not in forms which require smoking, or the vaporization of dried leaves or other plant forms.² At present, only certain enumerated diagnoses qualify a patient to use medical marijuana.³

The Act requires the state Commissioner of Health (the "Commissioner") to register two in-state manufacturers to produce medical cannabis, by December 1, 2014,⁴ and decide between

¹ The terminology surrounding the Act and the use of marijuana-derived compounds for medical compounds is contentious. Many claim that term "medical marijuana" is used a scare tactic. This memo intends no disparagement and uses the term "medical marijuana" only because of its widespread use.

² Minn. Stat. § 152.22, subd. 6

³ Minn. Stat. § 152.22 § subd. 14 (listing nine specific diagnoses, plus "any other medical condition or its treatment approved by the commissioner [of health]").

competing applicants based on specified criteria.⁵ Each manufacturer must carry on all of its cultivation, harvesting, manufacturing, packaging, and processing at a single location, in an enclosed, locked facility (“manufacturing facility”).⁶

Each manufacturer must also operate a total of four distribution facilities, one of which can be located at its manufacturing site.⁷ A manufacturer must begin distribution from at least one facility by July 1, 2015, and open all four of its distribution facilities by July 1, 2016.⁸ The locations of these distribution facilities must be “based on geographical need throughout the state to improve patient access.”⁹ The Commissioner is empowered to enact rules which could further determine where such facilities would be located.¹⁰ “No specific locations have been identified yet, and the process of selecting the locations will require input from the selected manufacturers.”¹¹

Additional requirements apply to all manufacturing and distribution facilities. First, no manufacturing or distribution facility can be located within 1,000 feet of a school, whether public or private.¹² Second no manufacturing or distribution facilities can “share office space with ... a health care practitioner.”¹³ Third, all such facilities must establish certain “security requirements, including requirements for protection of each location by a fully operational security alarm system, facility access controls, perimeter intrusion detection systems, and a personnel identification system.”¹⁴ Finally, the Commissioner is authorized to adopt regulations “relating to signage, marketing, display, and advertising of medical cannabis.”¹⁵

Finally, each manufacturer must also contract with an independent laboratory, also approved by the Commissioner, to test the medical marijuana produced by the manufacturer and verify that it meets statutory requirements for content, contamination, consistency, and form.¹⁶ None of the Act’s requirements related to location near a school, co-location with a health-care practitioner, or security measures apply to such laboratories.

⁴ Minn. Stat. § 152.25, subd. 1(a). The registration deadline can be extended to May 1, 2015. *Id.*, subd. 3(b). I note that the Commissioner need not authorize any manufacturers if he “obtains an adequate supply of federally sourced medical cannabis by August 1, 2014.” *Id.*, subd. 1(a). This scenario appears unlikely.

⁵ Minn. Stat. § 152.25, subd. 1(b), (c).

⁶ Minn. Stat. § 152.29, subd. 1(a), 2(b).

⁷ Minn. Stat. § 152.29, subd. 1(a).

⁸ Minn. Stat. §§ 152.25, subd. 3(a); 152.29, subd. 1(a). The Commissioner can extend the distribution deadline to January 1, 2016. Minn. Stat. § 152.25, subd. 3(c).

⁹ Minn. Stat. § 152.29, subd. 1(a).

¹⁰ Minn. Stat. § 152.26.

¹¹ Minn. Dep’t of Health, *Medical Cannabis*, “FAQ on Medical Cannabis in Minnesota,” (2014) (available at <http://www.health.state.mn.us/topics/cannabis/index.html#centers>).

¹² Minn. Stat. § 152.29, subd. 1(j).

¹³ Minn. Stat. § 152.29, subd. 1(e).

¹⁴ Minn. Stat. § 152.29, subd. 1(a), (d).

¹⁵ Minn. Stat. § 152.29, subd. 1(k).

¹⁶ Minn. Stat. §§ 152.25, subd. 1(d); 152.29, subd. 1(b) (*citing* Minn. Stat. § 152.22, subd. 6).

Likelihood of Expanded Medical and Other Marijuana Use in Minnesota

There are no guarantees that the current Act will remain the final version of medical marijuana regulation in Minnesota.¹⁷ During the legislative debate, proponents of a broader law argued for increasing the number of manufacturing and distribution facilities (the Senate bill authorized up to 55 such facilities), adding other qualifying conditions, including intractable pain, wasting, nausea, and post-traumatic stress disorder, and permitting smoking as a means of consumption.¹⁸ Legislative sponsors also indicated that they intend to revisit these issues in the future.¹⁹

The Act itself allows the Commissioner to add additional qualifying medical conditions and delivery mechanisms without legislative approval.²⁰ The Act specifically requires the Commissioner to reconsider whether “intractable pain” should be added to the list of qualifying medical conditions, to complete this study before considering any other additional qualifying conditions, and to produce a report “on the need for adding intractable pain to the list of qualifying medical conditions ... no later than July 1, 2016.”²¹ The Act also requires the Commissioner to consider petitions requesting that other conditions be added to the list of qualifying diagnoses.²²

These two changes alone would significantly increase legal medical marijuana use. Sources estimate that the ban on smoking will reduce enrollment by 10%.²³ Moreover, while only 5,000 patients are expected to enroll under the current Act, studies have estimated that adding “pain” to the list of qualifying medical conditions would add between 33,000 and 119,000 patients to the program.²⁴ The experience of other states suggests that if pain becomes a qualifying condition

¹⁷ See, e.g., John Welsh, “Minnesota’s medical marijuana fight now turns to those in chronic pain,” *Minnesota Post* (Jun. 26, 2014) (available at <http://www.minnpost.com/politics-policy/2014/06/minnesotas-medical-marijuana-fight-now-turns-those-chronic-pain>) (“What is clear is that the medical marijuana bill signed into law by Gov. Mark Dayton will not end the pain issue. Advocates, fresh from an impressive victory including winning 2-to-1 margins in both the House and Senate, promise to renew the debate next session.”)

¹⁸ Patrick Condon, “Minnesota Senate drops smoking from medical marijuana bill,” *Minneapolis Star-Tribune*, (May 2, 2014) (available at <http://www.startribune.com/politics/statelocal/257753911.html>); see also *Minnesotans for Compassionate Care*, “Legislation” (2014) (available at <http://www.mncares.org/legislation/>).

¹⁹ Welsh, “Minnesota’s medical marijuana fight now turns to those in chronic pain,” *supra*.

²⁰ Minn. Stat. § 152.27, subd. 2(b); see also Minn. Stat. § 152.22, subd. 14 (““Qualifying medical condition” means a diagnosis of any of the following conditions: ... any other medical condition or its treatment approved by the commissioner”).

²¹ 2014 Minn. Laws c.311, § 20 (requiring Commissioner to “consider the addition of intractable pain ... to the list of qualifying medical conditions ... prior to the consideration of any other new qualifying medical conditions” and to “report findings on the need for adding intractable pain to the list of qualifying medical conditions to the [state] task force [on medical cannabis therapeutic research]”).

²² Minn. Stat. § 152.24(1) (“The commissioner shall adopt rules that set forth the procedures and methods for ... (1) receiving petitions from the public to add debilitating medical conditions or treatments to the list of debilitating medical conditions ...”).

²³ Welsh, “Minnesota’s medical marijuana fight now turns to those in chronic pain,” *supra*.

²⁴ *Id.*; see also Nord, “Medical marijuana: Despite restrictions, pot-repreneurs want into Minnesota market,” *Politics in Minnesota*, (May 29, 2014) (available at <http://politicsinminnesota.com/2014/05/medical-marijuana-despite-restrictions-pot-repreneurs-want-into-minnesota-market/>).

the increase will be toward the higher end of this range: In Colorado and Oregon, 94% of participants list chronic pain as a qualifying diagnosis.²⁵

Many observers believe that businesses that have expressed interest in obtaining a license for medical marijuana operations will do so with the expectation that legislators will expand both the number of permitted locations and qualifying conditions.²⁶ The Act also requires revisiting this issue, as the state medical cannabis task force must evaluate whether the existing law provides sufficient access to medical marijuana.²⁷

Other legislative changes could impact local governments' ability to regulate medical marijuana operations. The Senate bill originally contained language that would prevent a city from prohibiting medical marijuana operations altogether, allowing cities to adopt only "reasonable zoning regulations" that limited their location to specified areas.²⁸ The requirement that such zoning regulations be "reasonable" creates grounds for businesses to challenge to local regulation as unreasonably limiting the location for medical marijuana operations.

Finally, some observers have expressed concern that authorization for medical marijuana may precede authorization for recreational use, noting that Colorado and Washington state both followed that sequence.²⁹

Land Use Issues Related to Medical Marijuana Operations.

Other jurisdictions have sought to regulate medical marijuana operations for a number of reasons. First, there are concerns that such operations are incompatible or inharmonious in certain zoning districts and with other land uses.³⁰ Growing and processing operations have characteristics of other agricultural and industrial land uses, including the potential to emit strong odors.³¹

²⁵ Welsh, "Minnesota's medical marijuana fight now turns to those in chronic pain," *supra*.

²⁶ Nord, "Medical marijuana: Despite restrictions, pot-repreneurs want into Minnesota market," *supra*.

²⁷ Minn. Stat. § 152.36, subd. 2.

²⁸ S.F. 1641, 88th Leg., (Minn. 2014) (5th Engrossment) ("In addition to other zoning regulations applicable within a jurisdiction, a county, home rule charter or statutory city, or town may enact reasonable zoning regulations that limit the use of land for alternative treatment centers [manufacturing and distribution facilities] or safety compliance facilities [testing laboratories] to specified areas"); *see also id.*, §§ 3 (defining "alternative treatment centers"), 16 (defining "safety compliance facilities").

²⁹ David Bailey, "Minnesota governor signs medical marijuana bill into law," *Reuters*, (May 29, 2014) (available at <http://www.reuters.com/article/2014/05/29/us-usa-minnesota-marijuana-idUSKBN0E91TN20140529>).

³⁰ *See, e.g.*, Samantha Pak, "Redmond Ridge residents lit up about marijuana ordinance," *Redmond News-Reporter*, (available at <http://www.redmond-reporter.com/news/234676601.html>).

³¹ Tom Perkins, "Ypsilanti Township wins 'seminal' case against couple pumping intense marijuana fumes into neighborhood," *Ann Arbor News* (Jul. 1, 2014) (available at http://www.mlive.com/news/ann-arbor/index.ssf/2014/07/ypsilanti_township_wins_semina.html); Jake Ellison, "King County tackles marijuana smell, tacks on heavy requirements in zoning regs.," *Seattle Post-Intelligencer*, (Dec. 9, 2013) (available at <http://blog.seattlepi.com/marijuana/2013/12/09/king-county-tackles-marijuana-smell-tacks-on-heavy-requirements-in-zoning-regs/>); Jeremy P. Meyer, "When Pot Smells in Denver, the Nasal Ranger goes in to investigate," *Denver Post*, (Nov. 11, 2013) (available at http://www.denverpost.com/politics/ci_24496810/when-pot-smells-denver-nasal-ranger-goes-investigate).

There is a contentious dispute about whether other states have experienced increased crime at or near medical marijuana dispensaries, including public consumption, driving under the influence of marijuana, and robberies and other crime.³² One factor is that federal banking regulations do not clearly authorize banks to provide services to marijuana-related businesses, and appear to prohibit such transactions. As a result, most dispensaries operate on a cash-only basis, creating security issues for both dispensaries and their customers. The Treasury Department and Department of Justice have issued revised guidelines stating that they will not prosecute banks which provide services to marijuana-related businesses that operate legally under state law; however, many banks have stated that these guidelines provide insufficient assurance for them to engage in transactions with marijuana-related businesses.³³

Use of Existing Land-Use Classifications to Operate Manufacturing and Distribution Facilities

In the absence of municipal regulation, parties are likely to argue that manufacturing, testing laboratory, and distribution facilities for medical marijuana fall under existing land use categories, and qualify as permitted or conditional uses under existing City Code. Relevant zones include industrial, commercial, and agricultural/horticultural zones, and relevant uses include medical clinics, pharmacies, and greenhouses.

Although the current Act will result in only a small number of authorized users, and a small likelihood of any medical marijuana-related facility locating within South St. Paul, much less multiple such facilities, there are no assurances that the current restrictions will remain in effect or that use will remain limited to medical purposes, rather than being expanded to allow recreational ones. Once established, cities will be restricted in how they can regulate active marijuana operations through zoning regulations, since such operations would enjoy the right to continue as a legal nonconforming use.

Current South St. Paul City zoning provisions appear to allow distribution facilities in a number of areas. The City zoning code defines “retail business uses” to include “drugs, ... laboratories, medical and dental research and testing.”³⁴ A “drugstore” is a permitted use in the C-1 Retail Business and GB General Business Districts.³⁵ Parties seeking to open such facilities are likely

³² John Ingold and Jeremy P. Meyer, “Slight increase in crimes near Denver medical-marijuana dispensaries,” *Denver Post*, Jul. 31, 2013 (available at http://www.denverpost.com/ci_23771049/slight-increase-crimes-near-medical-marijuana-dispensaries); Jason Koebler, “Report: Medical Marijuana Dispensaries Not Linked to Neighborhood Crime,” *U.S. News & World Report*, (Jun. 6, 2012) (available at <http://www.usnews.com/news/articles/2012/06/06/report-medical-marijuana-dispensaries-not-linked-to-neighborhood-crime>); see also John Ingold, “Colorado marijuana legalization’s impact on stoned driving unknown,” *Denver Post*, (Feb. 10, 2014) (available at http://www.denverpost.com/marijuana/ci_25101187/colorado-marijuana-legalizations-impact-stoned-driving-unknown); Gene Johnson, “More drivers test positive for pot in Washington,” *Seattle Times*, (Mat. 7, 2014) (available at http://seattletimes.com/html/localnews/2023075967_apxmarijuanadrivingwashington.html).

³³ Serge F. Kovalski, “U.S. Issues Marijuana Guidelines for Banks,” *New York Times* (Feb. 14, 2014) (available at http://www.nytimes.com/2014/02/15/us/us-issues-marijuana-guidelines-for-banks.html?_r=0).

³⁴ *South St. Paul City Code*, § 118-8.

to argue that distribution facilities for medical marijuana are like drugstores, as the Act allows manufacturers to make products in doses “medically beneficial for [certain] qualifying medical conditions,” describes the substance to be distributed as “medical cannabis,” and requires “that employees licensed as pharmacists ... be the only employees to distribute the medical cannabis to a patient.”³⁶

A medical clinic is a permitted use in the C-1 Retail Business, CGMU Concord Gateway Mixed Use, GB General Business, NCMU North Concord Mixed Use Districts.³⁷ In addition, other “medical uses” are conditional uses in the GB General Business District.³⁸

Moreover, “[g]eneral farming, ... horticulture, [and] truck farming” are permitted uses within the Floodway District,³⁹ and “agriculture (seasonal crops), [and] horticulture” are permitted uses within the “Zone A” area near Fleming Field.⁴⁰

Pre-emption and General Presumption in Favor of Zoning Regulations

The Act does not specifically restrict a city’s ability to put zoning restrictions on manufacturing, testing, or distribution facilities. Even when local legislation has not been expressly preempted by state law, a city cannot enact a local regulation where “the legislature has impliedly declared to be an area solely of state concern.” *City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 6 (Minn. 2008) (*quotation omitted*). Thus, a city “cannot enact a local regulation that conflicts with state law.” *Id.* Nor can a city enact a regulation when state law “fully occup[ies] a particular field of legislation so that there is no room for local regulation.” *Id.* (*quotation omitted*).

A full analysis of the preemption issue is beyond the scope of this memo. It is arguably true that the Legislature’s intent would be thwarted if too many cities throughout the state or in a particular geographic area adopted bans on all medical marijuana facilities. However, nothing in the statute expressly requires a city to allow such facilities or prohibits more restrictive ordinances regulating them. In light of the strong presumption in favor of the validity of local zoning regulations,⁴¹ the city would have a good faith basis for adopting such a ban, provided

³⁵ *South St. Paul City Code*, §§ 118-126(a)(24); 118-128(a).

³⁶ See Minn. Stat. §§ 152.22, subd. 6, 8; 152.25, subd. 2; 152.29, subd. 3(a).

³⁷ *South St. Paul City Code*, §§ 118-125(a)(32); 118-126(a)(17); 118-127(31); 118-128(a). See also *id.*, § 118-8 (defining “medical uses” to mean “uses concerned with the diagnosis, treatment, and care of human beings,” which includes “medical services or clinics.”)

³⁸ *South St. Paul City Code*, § 118-128(b)(24).

³⁹ *South St. Paul City Code*, § 118-171(d)(1)(a). The Act’s requirement of an “enclosed, locked facility” for manufacturing medical marijuana, Minn. Stat. § 152.29, subd. 2(a) prevents the manufacturing facilities from qualifying as “outdoor plant nurseries” under *South St. Paul City Code*, § 118-171(d)(1)(a).

⁴⁰ *South St. Paul City Code, Appendix A*, § 1500.41(V)(B)(2).

⁴¹ In general, a zoning ordinance is presumed constitutional, and “the burden is on the party attacking the ordinance’s validity to prove an ordinance is unreasonable or that the requisite public interest is not involved, and consequently that the ordinance does not come within the police power of the city.” *Northern States Power Co. v. City of Oakdale*, 588 N.W.2d 534, 541 (Minn. Ct. App. 1999). A party challenging a zoning ordinance as unreasonable “must prove that it is not even debatable that the challenged ordinance has any substantial relationship

that it had offered legitimate planning and zoning grounds for such action. The California Supreme Court recently held that a similar statute did not pre-empt a city's ban on cultivation and sale of medical marijuana within city limits, nor did it create a right to obtain or cultivate marijuana in all parts of the state, despite the fact that the California statute also sought to "[e]nhance the access of patients and caregivers to medical marijuana."⁴²

Outright Prohibition

It appears the city could prohibit medical and other marijuana-related facilities.

Regulating Locations

The city could adopt additional restrictions on the location of medical and other marijuana-related facilities, as nothing in the Act prohibits cities from adopting more restrictive ordinances respecting the location of a manufacturing or distribution facility than those established by the Act.

Temporary Moratorium

Cities can adopt a temporary moratorium prohibiting a particular land use pending further study. See *Pawn America Minnesota, LLC, v. City of St. Louis Park*, 787 N.W.2d 565, 573 (Minn. 2010); see also Minn. Stat. § 462.355, subd. 4(a).

Relationship to Federal Law

I note that nothing in the Act provides any immunity from prosecution under federal laws, including the federal Controlled Substances Act, which classifies marijuana as a Schedule-I controlled substance. 21 U.S.C. § 812, Schedule I(c)(10). However, the United States Department of Justice has issued memoranda stating that it would not prosecute individuals whose actions are in compliance with state laws on medical marijuana.⁴³

to public health, safety, or general welfare." *State v. Reinke*, 702 N.W.2d 308, 311 (Minn. Ct. App. 2005); see also *County of Freeborn v. Claussen*, 295 Minn. 96, 100, 203 N.W.2d 323, 326 (1972) ("before the exercise of the police power can be held unconstitutional, it must be found that it has no substantial relationship to public health, safety, morals, or general welfare").

⁴² *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 300 P.3d 494, 56 Cal.4th 729, 753-63 (2013).

⁴³ United States Dep't of Justice, *Memorandum re Guidance Regarding Marijuana Enforcement*, (Aug. 29, 2013) ("Cole II Memo") (available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>); United States Dep't of Justice, *Memorandum for Selected United State Attorneys re Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, (Oct. 19, 2009) ("Ogden Memo") (available at <http://blogs.justice.gov/main/archives/192>).