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TO: Denver City Council

FROM: David W. Broadwell, Asst. City Attorney

RE: **Summary of CB 13-0570; Denver Retail Marijuana Code**

DATE: September 4, 2013

This memorandum contains a summary of the major features of CB 570, a bill for an ordinance adopting the Denver Retail Marijuana Code. This council bill reflects the work of the Special Issues/Amendment 64 Committee, chaired by Councilman Brown, and provides the City's legislative response to the adoption of Amendment 64[1] by the voters on November 5, 2012, as well as the adoption of the Colorado Retail Marijuana Code (the "CRMC")[2] during the 2013 regular session of the Colorado General Assembly.

We have previously advised the City Council that CB 570 should be adopted *no later than October 1, 2013* in order to govern applications for state licensing of retail marijuana businesses in Denver submitted on or after that date. While Amendment 64 makes the Colorado Department of Revenue the primary licensing authority for retail marijuana businesses throughout the state, it also allows local governments to regulate the "time, place, manner and number of marijuana establishment operations."[3] However, in order to be binding and effective in relation to a particular state license application, any local regulations must be in place at the time of application for the state license.[4]

Allowing retail marijuana establishments to exist in Denver

First and foremost, CB 570 reflects Denver's choice to allow state-licensed retail marijuana businesses to exist in the city, and to allow all four types of businesses contemplated in Amendment 64: retail marijuana stores, marijuana cultivation facilities, marijuana product manufacturing facilities, and marijuana testing facilities.[5] Under

[1] Art. XVIII, sec. 16, Colo. Const.
[2] HB 13-1317, codified at Art. 43.4 of Title 12, C.R.S.
[3] Art. XVIII, sec. 16(5)(f), Colo. Const.
[4] Art. XVIII, sec. 16(5)(g)(III), Colo. Const.
[5] Sec. 6-207.

Amendment 64, local governments are not required to accommodate retail marijuana businesses within their jurisdictions,[6] and rules promulgated by the Colorado Department of Revenue require local governments to inform the state whether the locality will be prohibiting or allowing retail licensing.[7]

CB 570 requires retail marijuana establishments to be licensed by the state as well as the city in order to lawfully operate in Denver. Amendment 64 contemplates several scenarios in which, even in the absence of a state license, an applicant may default to the local jurisdiction for licensing if the state fails to act. CB 570 eschews local authority for licensing in any of these scenarios, and provides that Denver will *not* act as a default licensing authority in the absence of state licensing.[8]

Requirement for local licensing in addition to state licensing

Although Amendment 64 declares "marijuana should be regulated in a manner similar to alcohol,"[9] the details of the amendment actually reflect an approach to regulating marijuana that is substantially different from liquor licensing. For example, state law has always provided a dual licensing structure for retail liquor stores, in which the applicant most start *first* by obtaining approval from a local licensing authority based upon a local determination that the application meets all state and local licensing requirements. Then and only then can the applicant obtain a state liquor license. Amendment 64 does just the opposite, requiring an applicant to start at the state level and compelling the state to act on the application within 90 days (but reserving to local governments the authority to veto the application if it does not comply with local requirements or restrictions.)[10]

Amendment 64 is silent on whether or not a local government can require retail marijuana establishments to obtain a local license in addition to the state license. However, the CRMC expressly acknowledges the authority of local governments to do so, and sets up a system in which an applicant may "conditionally" receive a state license before the local government finally determines whether or not the marijuana establishment will be allowed to commence operations.[11]

CB 570 reflects a policy choice by Denver to require a local license for all four classes of retail marijuana businesses, and to designate the director of the Department of Excise and Licenses as the local licensing authority.[12] For the most part, the qualifications for local licensing mirror the requirements for state licensing exactly, with some additional location restrictions and public hearing requirements imposed as discussed below.

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[6] Art. XVIII, sec. 16 (5)(f), Colo. Const.
[7] 1 CCR 212-2, R 1401 (B), Colorado Department of Revenue, Marijuana Enforcement Division Rules.
[8] Sec. 6-204 (c).
[9] Art. XVIII, sec. 16(1)(a) and (b).
[10] Art. XVIII, sec. 16 (5)(f) and (g).
[11] §§ 12-43.4-301 (2); 12-43.4-304, C.R.S.
[12] Sec. 6-204.

Establishing a two-year transition period during which only existing medical marijuana businesses can apply for retail licensing

In various ways, the text of Amendment 64 favors the conversion of existing medical marijuana businesses to retail marijuana businesses, and grants existing operators priority over new entrants to the market.[13] Likewise, the CRMC moves existing medical marijuana businesses to the front of the line for purposes of retail licensing, by establishing a period of time from October 1, 2013 until July 1, 2014 in which only medical marijuana businesses can apply for retail licensing by the state.

In the same vein, CB 570 proposes a two-year transition period during which only medical marijuana businesses that are "operating in good standing"[14] in Denver as of October 1, 2013 will qualify for retail licensing.[15] The transition period will continue until January 1, 2016. The rationale for the longer period is based on the extremely high concentration of medical marijuana businesses already existing in Denver. Extra time will be necessary in Denver, not only to process the large volume of applications for conversion or co-location of retail marijuana businesses anticipated in the coming months, but also to assess the impacts on the community that may be caused by a sudden and massive expansion of retail trade in marijuana by the hundreds of existing operators in the industry, before the total number of businesses is allowed to expand further.

While the transition period effectively caps the total number of marijuana businesses until 2016, CB 570 offers a great deal of flexibility for existing businesses seeking to add or convert to retail licenses. The bill allows existing medical marijuana licenses to change ownership or change location before adding or converting to retail licenses; it allows for alteration and expansion of existing licensed premises; it does not impose any numerical caps on the size of individual businesses or production limits; it imposes no limitations on the total number of licenses the same person may own; and (unlike the CRMC[16]) it imposes no requirement for "vertical integration" of retail marijuana businesses.

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[13] For example, ". . . in any competitive application process, the department shall have as a primary consideration whether an applicant . . . has prior experience distributing" medical marijuana. Art. XVIII, sec. 16(5)(b).

[14] Under the CRMC and counterpart city laws, a medical marijuana business that traces its existence back to August 1, 2010 or earlier can be considered "operating in good standing" on October 1, even if its original MMJ license applications have not yet been granted. However, CB 570 will require all medical marijuana businesses to secure their MMJ licensing prior to qualifying for a local retail license, and in any event to do so by July 1, 2014 or cease operations. Sec. 24-503 (3), reflected at Section 3 of the bill.

[15] Sec. 6-203.

[16] Under the CRMC, the state will continue to require retail stores and retail marijuana product manufacturers to self-source at least 70% of their marijuana at cultivation facilities under common ownership with the store or manufacturing facility until September 30, 2014. §§ 12-43.4-402 (1)(c); 12-43.4-404 (c), C.R.S. Moreover, the state will not issue a retail marijuana cultivation license to anyone who is not also licensed to operate a retail marijuana store or manufacturing facility until after September 30, 2014. § 12-43.4-403 (2), C.R.S.

Authorizing co-location of medical and retail marijuana businesses.

Amendment 64 states: "Nothing in this section shall be construed . . . to permit any medical marijuana center . . . to operate on the same premises as a retail marijuana store."[17] Nevertheless, the Colorado General Assembly decided in the CRMC to allow medical marijuana centers and retail marijuana stores to exist in the same location, and to do so under two distinct business models: (1) side-by-side licensed premises at the same location with physical separation between the two; or (2) sales of both medical and retail marijuana on the same licensed premises, with the premises restricted to customers who are at least 21 years of age.[18] Under either business model, state laws and regulations require the business to identify, track and account for medical marijuana inventory and sales, and to distinguish the medical inventory from the retail inventory. The CRMC also allows medical and retail co-location at marijuana cultivation and manufacturing facilities.

The CRMC expressly allows local governments to prohibit co-location or medical and retail operations within their respective jurisdictions. However, CB 570 allows co-location for all classes of licenses in Denver to the same extent permitted by the CRMC.

Public hearings required for retail marijuana store licenses; but not "needs and desires" hearings (until 2016)

The Colorado Liquor Code has traditionally required a public hearing before a local licensing authority issues a new retail liquor license, with the hearing focused on determining the reasonable requirements of the neighborhood in which the retail establishment is proposed to be located and the desires of the adult inhabitants of the neighborhood for a new liquor establishment. In contrast, state and city laws regulating the licensing of medical marijuana centers did not include any mandatory public hearing requirement at all.

CB 570 requires a public hearing before the issuance of any retail marijuana store license. Prior to 2016, when all such applications will be limited to conversion of an existing medical marijuana center to a retail marijuana store or co-location of the two types of businesses at the same location, the primary purpose of the hearing will be to assess whether or not the business has caused or potentially will cause adverse impacts on the surrounding neighborhood.[19] After January 1, 2016, a hearing for an entirely new retail marijuana store will include a requirement that the applicant show the additional store is needed to meet consumer needs and desires in the affected neighborhood in a manner similar to liquor licensing.[20]

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[17] Art. XVIII, sec. 16 (7)(d).
[18] § 12-43.4-104 (1)(a)(IV) and (V), C.R.S.
[19] Sec. 6-212 (c)(1).
[20] Sec. 6-212 (c)(3).

The rationale for CB 570 not requiring a finding of "needs and desires" in the first round of licensing for conversion of existing medical marijuana centers to retail stores is two-fold. First, in the world of liquor licensing, the concept of "needs and desires" can be rationally applied when there is already a pool of *existing* licensed liquor establishments, and an applicant seeks to add one more establishment to the pool. Under these circumstances, it is possible to evaluate whether or not the adults residing in the neighborhood desire the incremental addition of one more liquor business on the theory that the neighborhood is underserved by the existing businesses. In contrast, with the potential for up to two hundred existing medical marijuana centers seeking conversion or co-location of retail marijuana store licensing all at the same time throughout the city, there is no way to rationally distinguish the "needs and desires" for one retail store versus another. The problem of evaluating "needs and desires" would be particularly acute when multiple applicants are seeking retail marijuana store licensing in the same approximate neighborhood at the same time.

Second, an applicant for retail liquor licensing has traditionally demonstrated "needs and desires" by submitting petitions in which adult residents of the neighborhood support the issuance of the license. Requiring potential customers of a retail marijuana store to self-identify on a petition their desire to purchase marijuana at the store may run contrary to the letter and the spirit of Amendment 64, which purports to guard and protect the "individual privacy" of the customers who patronize a retail marijuana store.[21]

Maintain existing location restrictions in all licensing categories.

CB 570 carries forward *verbatim* precisely the same spacing and location restrictions as those that existed in Denver's previous medical marijuana licensing ordinances. Some of these restrictions date from the city's original dispensary licensing ordinance adopted in January of 2010, particularly the requirements for 1000-foot spacing between retail outlets and schools, child care facilities, and drug and alcohol treatment facilities; as well as the 1000-foot spacing requirement between retail and medical outlets themselves in order to avoid an undue concentration of stores in any particular neighborhood. Other location restrictions in the ordinance relate directly to conformance with the Denver Zoning Code.

Likewise, CB 570 carries forward most[22] of the "grandfathering" provisions that existed in Denver's previous medical marijuana licensing ordinances, i.e. provisions which allow established medical marijuana businesses to remain in their current locations even after the laws have changed in a manner that would make their location non-conforming. Non-conforming locations where a medical marijuana business has remained in continuous operation will be allowed to convert or co-locate with retail licensing under CB 570.

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[21] Art. XVIII, sec. 16(5)(c), Colo. Const.

[22] The one exception is the 1000-foot spacing requirement for schools. In light of actions by the U.S. Attorney for Colorado advising medical marijuana stores in proximity to schools to cease operations and relocate, CB 570 does not reflect any "grandfathering" of store locations near schools.

Maintain existing restrictions on signs and advertising

The Denver City Council adopted additional restrictions on signs and advertising related to medical marijuana businesses in 2012, restrictions which prohibit most forms of off-premises signage, handbills, leafleting, etc. These same restrictions are simply carried forward in CB 570.[23] Amendment 64 mandates that the state must also adopt "restrictions on the advertising and display of marijuana and marijuana products" as well.[24] Accordingly, the state is in the process of adopting regulations that will more extensively address advertising delivered via broadcast, internet, or mobile devices, as well as clarifying current restrictions on marijuana advertising and marketing oriented toward minors.

[23] Sec. 6-211 (e).
[24] Art. XVIII, sec. 16(5)(a)(VIII), Colo. Const.