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To: Dr. Reggie Edwards, City Manager

From: Jason M. Hill, City Attorney
Joseph L. Sathe, Assistant City Attorney

Date: July 11, 2022

Re: Regulation of THC Products

This memorandum provides information on ways the City can potentially regulate the newly legalized products that contain up to 5mg of tetrahydrocannabinol (“THC”) derived from certified hemp. This memo does not address local government enforcement of the requirements of the law legalizing these products, Minnesota Statutes, section 151.72 (the “Act”).

I. BACKGROUND

Beginning on July 1, 2022, it became legal to sell certain products containing delta-9 THC (“THC Products”) in Minnesota. The Act allows THC Products to be sold if certain requirements are met including that there are not more than 5mg of THC per dose and 50mg of THC per container; the purchaser is at least 21 years old; and the products are not marketed towards children.

The Minnesota Board of Pharmacy (“Board”) is the state agency with oversight of THC Products.

There is currently no state-level license required in order to sell THC Products and the Board does not test or approve products prior to their sale.¹

II. REGULATIONS

The Act neither explicitly allows nor explicitly prohibits local regulation of the sale of THC Products. Therefore, to determine whether a municipality has the ability to regulate the sale of THC Products, the municipality must have the authority to regulate the sale of THC products and must not be preempted by state law.

A municipality could rely upon its general police and general welfare power to regulate the sale of THC products. The two most applicable avenues through which the municipality can regulate the sale of THC Products is through its licensing or zoning authority.

¹ [Hemp Derived Products Frequently Asked Questions](#), page 5

A. The Act Does Not Expressly Preempt Local Regulation

The Act does not expressly require a city to allow the sale of THC Products, nor does it restrict a city's ability to regulate such facilities through additional zoning or licensing requirements. Nevertheless, a city cannot enact a local regulation if it conflicts with state law or if the state law fully occupies a particular field of legislation so that there is no room for local regulation.

Any regulations would need to be drafted to not create an irreconcilable conflict with state law, be merely additional and complementary or in aid and furtherance of the Act and meet specific requirements of either licensing or zoning regulations.

Two recent Minnesota Supreme Court cases indicate a deference for local ordinances that provide greater protections than state statutes.² Additional licensing and zoning requirements adopted for the purpose of protecting the general welfare and ensuring the sale of THC Products are being conducted in accordance with the Act, including that THC Products are not being sold to individuals under the age of 21, for example, would be considered greater protections than those included in the Act.

B. Licensing

A city may license a business or activity, either (1) when expressly allowed to do so by state statute; or (2) when implied by statute, such as when a license is necessary for a city to perform its general statutory powers (like preventing public nuisance or protecting the general welfare).

Since there is no express authority for a city to license a business selling THC Products the City must look to an implied authority. The authority granted under the "general welfare" clause allows a city to provide "for the suppression of vice and immorality, the prevention of crime, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of residence, trade, and commerce, and the promotion of health, safety, order, convenience, and the general welfare by such ordinances not inconsistent with the Constitution and laws of the United States or of this state as it shall deem expedient."³

The Act contains very little regulatory structure, consumer protection, or general control of the sale of THC Products. The City very clearly has an interest in ensuring the THC Products are being sold in the manner provided for in the Act, and individual cities may each want to study the impact of the sale of THC Products in each community and determine what additional regulation is warranted to protect the general welfare of the City.

A licensing ordinance must be reasonable in its terms and conditions and cannot place unnecessary, unreasonable, or oppressive restrictions that conflict with the state or federal constitution. A licensing ordinance could include application requirements such as:

- terms;

² See *Minnesota Chamber of Commerce v. City of Minneapolis*, 944 N.W.2d 441 (Minn. 2020); and *Graco v City of Minneapolis*, 937 N.W.2d. 756 (Minn. 2020).

³ Minn. Stat. 412.221, subd. 32

- qualifications;
- bond and insurance requirements;
- hours of operation;
- reasons for denial, including no criminal conviction or license revocations related to controlled substances;
- revocation and suspension of license;
- transferability; license fees;
- limiting the number of licenses;
- Requiring licensees to ID purchasers;
- Requiring THC products to be sold from behind a counter; and
- Identify how the city will conduct compliance checks.

C. Zoning

Zoning controls generally relate to uses of property and not the sale of individual products, so using the City’s zoning authority alone may not be an effective way to regulate the sale of THC Products. However, cities have used a combination of zoning and licensing provisions to regulate the sale of THC Products.

i. Outright Prohibition

A city could probably prohibit the sale of THC Product sales if it defines such sale as a “use” in its zoning ordinance and has legitimate planning and zoning grounds for the ban. There is no “right” to sell THC Products and cities have broad discretion in establishing zoning requirements. An outright ban would likely need to be combined with other general business regulations (e.g., licensing) since the sale of THC Products is currently not a primary use of land but can be sold at any retail store.

ii. Expressly Authorize THC Product Sales

The City could expressly authorize THC Product sales at dedicated locations, establish the sale of THC Products as a dedicated permitted or conditional use, and consider imposing additional regulations on those operations that it does authorize.

Some examples of additional regulations might include:

- Restricting such uses to certain zoning districts;
- Capping the total number of THC-related land uses within the City or within certain zoning districts;
- Requiring that THC-related facilities not produce noxious odors;
- Requiring a minimum distance from certain land uses in addition to schools, such as child-care facilities; places of worship and other religious institutions; health care practitioners. and chemical dependency, alcohol and drug treatment facilities;
- Requiring a minimum distance between other THC-related uses;
- Requiring a minimum distance from liquor stores and bars; and

- Additional restrictions on signage and advertising.

Instead of including these traditional zoning provisions in the zoning code, the City could consider including similar provisions as part of a licensing regulatory scheme (e.g., only issue a license to an THC Product business that is located within particular zoning districts). This approach would be more appropriate if the City chooses not to require THC Product sales at dedicated business locations.

V. MORATORIUM/INTERIM ORDINANCE

A city may establish a moratorium on the sale of THC Products.

Cities have the authority to place moratoria on zoning matters for up to one year under Minnesota Statutes, section 462.355, subd. 4, and cities have also relied on the city's police power to enact moratoria on other issues regulated by the city so long as a moratorium is limited in duration and enacted in good faith and without discrimination.⁴

Before adopting a moratorium, a city will first decide that it does want to regulate the sale of THC Products in some manner. A moratorium would be for the purpose of studying licensing or zoning regulations related to the sale of THC Products and prohibiting such sales in the city until the study is completed.

IV. CONCLUSIONS

The state law legalizing the sale of THC Products includes minimal regulation and cities are left to establish individual regulations that can be tailored to the local needs of the community. Cities can rely on implied authority granted through its general welfare and police powers to regulate the sale of THC Products even though the Act does not contain express authority for such regulation.

The City could choose to use its licensing and/or zoning authority to restrict the sale of THC Products, and/or could issue a moratorium on the sale of THC Products to study the impacts of THC Product sales and develop appropriate restrictions.

A comprehensive approach to regulating THC Products could include both licensing and zoning aspects to ensure sales are in compliance with state law and any locally established regulations as well as regulating where within the City products can be sold.

It is also important to keep in mind that the Minnesota Legislature may act, either during a special or regular session, to regulate the sale of THC Products which could impact how the City is able to regulate THC products.

⁴ *Almquist v. Town of Marshan*, 245 N.W.2d 819 (Minn. 1976).