



CITY OF LOVELAND
CITY ATTORNEY'S OFFICE

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AGENDA ITEM: 1
MEETING DATE: 1/22/2013
TO: City Council
FROM: John Duval, City Attorney
PRESENTER: John Duval; Luke Hecker, Chief of Police; Julia Holland, Director of Human Resources; Greg George, Director of Development Services

TITLE: Amendment 64 Legalizing Marijuana in Colorado

RECOMMENDED CITY COUNCIL ACTION: Hear presentation, ask questions and discuss the implications for and effects on the City as the result of the adoption of Amendment 64 legalizing in Colorado marijuana to be regulated and taxed similar to alcohol and to provide direction to staff concerning next steps.

DESCRIPTION: Presentation and discussion concerning the various implications for and effects on the City related to the recent adoption of Amendment 64 legalizing marijuana to be regulated and taxed similar to alcohol.

BUDGET IMPACT:

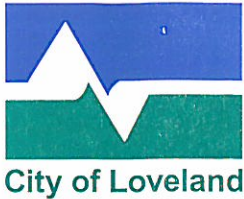
It is not known at this time what the budget impact will be to the City as a result of the adoption of Amendment 64. The nature of any budget impact, whether positive, negative or neutral, and the magnitude of that impact will depend on what, if any, action the City Council takes in reaction to Amendment 64 and probably also dependent on how the federal government reacts to Amendment 64.

SUMMARY: The presentation will review what Amendment 64 does and does not do, it will describe the City's current marijuana-related regulations, it will describe Council actions needed for City's Code to be consistent with Amendment 64, and identify issues needing further study or direction from the City Council.

REVIEWED BY CITY MANAGER:

LIST OF ATTACHMENTS:

1. Memorandum dated January 16, 2013, from Chief Hecker regarding "Amendment 64, Local Considerations"
2. Amendment 64: What Now? PowerPoint presentation



Police Department

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MEMORANDUM

TO: Loveland City Council
FROM: Luke Hecker, Chief of Police *LH*
DATE: January 16, 2013
RE: January 22nd, Study Session: Amendment 64, Local Considerations

For Loveland city officials, the passage of Amendment 64 has created a question of consequence – Shall local officials knowingly and willingly violate federal law by crafting or modifying Ordinances which allow for the retail possession, cultivation, use, and transport of a Schedule I controlled substance?

By ranking marijuana as a Schedule I Controlled Substance, the United States Drug Enforcement Administration (DEA) assessed that marijuana, among other drugs, is the most highly controlled (illegal) substance possible in the United States. In the definition of marijuana as a Schedule I drug, the DEA articulated that cannabis possesses a “high potential for abuse”.

The passage of Amendment 64 is an instance in which the will of the voters in the State of Colorado clashes with the United States Constitution. As such enacting the provisions of Amendment 64 would create an irreconcilable conflict with the Loveland police oath of office which states in part: “I solemnly swear to support the Constitution of the United States of America and the laws of the State of Colorado”. While I am certain that Colorado voters did not vote in favor of Amendment 64 with the intent of creating such an incompatible outcome, its passage has none the less produced this truth.

The passage of Amendment 64 nullified some state laws and local ordinances related to the personal possession of marijuana and drug paraphernalia. In order to ensure the most stringent prosecution of violations related to marijuana, the City of Loveland should consider aligning applicable municipal marijuana ordinances with the state law. Beyond those alignments the Loveland Police Department firmly recommends that as opposed to crafting provisions for licensing the retail use, cultivation, possession, and transport of marijuana in the community, the City of Loveland should apply every real and available lawful provision toward the prohibition of marijuana.

For your review and consideration at January 22nd Study Session, I am attaching a document that was drafted in December of 2012 by Thomas Gorman, the Director of Rocky Mountain High Intensity Drug Trafficking Areas (HIDTA). The document draws the thoughtful attention of appointed and elected local officials to serious considerations surrounding Colorado Amendment 64 and existing federal law.

***Attachment: Implementing Amendment 64**



Implementing Amendment 64

Some Options for Local Jurisdictions

City councils or board of county commissioners may:

- Enact an ordinance to prohibit marijuana establishments from operating in their jurisdictions.
- Enact an ordinance prohibiting or enact a moratorium prohibiting marijuana establishments from operating in their jurisdiction pending:
 - The federal government's response to Amendment 64
 - The state legislature and Department of Revenue adopting laws, regulations, etc. related to Amendment 64
 - Refer the measure for the general election in 2014
 - Refer the measure for the general election in 2016 after assessing the impact on those jurisdictions who did not choose to opt out and permitted marijuana establishments
- Enact an ordinance prohibiting certain types of marijuana establishments (retail store, cultivation facility, marijuana products manufacturing facility, or marijuana testing facility.)
- Enact an ordinance and/or regulations permitting marijuana establishments by October 1, 2013.

Issues for Consideration

- The city and/or county government would be violating the law by aiding and abetting what would be criminal enterprises and acts under the Federal Criminal Code. The city or county has no authority to authorize individuals to violate federal law, which pre-empts state law. This would place some employees in the precarious position of being federal law violators as part of their work, and technically subject to prosecution by the federal government. The only option would be to request immunity from prosecution in implementing Amendment 64.
- The question government officials might want to consider: Do they follow their oath of office to uphold the law or disregard the oath and the laws of this nation. The issue concerning the "will of the people" is countered with the fact that the voter cannot authorize people to commit an illegal act. It is doubtful that most realized they were voting to violate the laws of this nation. There were other options available to prevent the arrest of individuals for use or possession of small amounts of marijuana. The proponents chose not to pursue those legal options.
- Should Schedule 1 controlled substances (marijuana) from the retail stores, cultivation sites or food products be diverted to another state that would potentially put at risk anyone who aided and abetted that operation? Legally a district attorney from another state could not only prosecute the person caught selling Colorado marijuana in that county but anyone who aided by facilitating that illegal act.
- **During the campaign there were two issues that the Regulate Marijuana Like Alcohol campaign repeatedly emphasized.** The first was it would prevent the arrest of 10,000 people a year for possessing or using small amounts of marijuana. That position is not accurate but, regardless, the people accepted it. The fact that the city or county bans retail stores, cultivation sites, food factories and testing sites would not impact the portion of Amendment 64 where an adult can possess an ounce or less of marijuana (56 - 84 marijuana cigarettes).

The second issue of revenue deals primarily with an excise tax which needs to be approved by the legislature and then sent to the voters. The impact on local and county jurisdictions would be minimal. The counties and cities would be eligible for fees and sales tax from an all- cash industry. All-cash because banks cannot deal with any of the establishments under Amendment 64 because they are illegal. The economic issue to consider: Will whatever revenues generated cover the cost of additional enforcement, citizen complaints, increase in treatment and medical needs, traffic crashes/fatalities, etc. If alcohol is the model, the answer is a resounding, "NO."

- The cities and counties might also carefully consider the quality of life issue. It's doubtful many who voted for Amendment 64 would want "pot shops" or major cultivation operations in their neighborhoods. Having retail stores, cultivation sites, marijuana factories and testing sites could potentially affect other businesses, property values, use among teens, and general quality of life issues. The question to consider: Would "pot shops" make the city or county more or less attractive for legitimate businesses and families to want to locate?

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AMENDMENT 64: WHAT NOW?

PRESENTED TO COUNCIL JANUARY 22, 2013

JOHN DUVAL, CITY ATTORNEY

Issues Addressed

- ▶ **What Amendment 64 Does**
 - **Stated Purpose and Preemption**
 - **Personal Use**
 - **Marijuana Establishments**
 - **Licensing and Regulating Marijuana Establishments**

- ▶ **What Amendment 64 Does Not Do**

- ▶ **City's Current Marijuana-Related Regulations**

- ▶ **Code Changes for Consistency with Amendment 64**

- ▶ **Issues Needing Further Study or Direction**

- ▶ **Questions and Discussion**

What Amendment 64 Does

- ▶ Stated Purpose and Preemption
- ▶ That marijuana be regulated and taxed similar to alcohol
- ▶ Declares regulation of marijuana to be a matter of statewide concern and preempts all State laws and the laws of all Colorado counties and municipalities that are in conflict with Amendment 64

What Amendment 64 Does

➤ Personal Use

- ▶ Makes it lawful for an adult (21 or older) to consume marijuana, but does not permit such consumption to be conducted “openly and publicly or in a manner that endangers others”
- ▶ Makes it lawful for an adult to possess, use, display, purchase and transport one ounce or less of marijuana
- ▶ “Marijuana” defined to include all parts of the cannabis plant, seeds, resin extracted and every compound, manufacture, salt, derivative, mixture or preparation of the plant, including marijuana concentrate, but not including “Industrial Hemp”
- ▶ One ounce limit does not include weight of other ingredients combined with marijuana (i.e., food and drink)
- ▶ “Marijuana” does not include “Industrial Hemp,” which is defined as a cannabis plant with a THC concentration of .3% or less --- Not later than July 1, 2014, General Assembly required to enact legislation governing cultivation, processing and sale of industrial hemp

What Amendment 64 Does

➤ Personal Use

- ▶ Makes it lawful for adults to possess, grow, process and transport up to six marijuana plants, with no more than three of them being mature, flowering plants
- ▶ The six plants must be grown in an “enclosed, locked space” and the growing must not be conducted “openly or publicly”
- ▶ On the premises where the six plants are grown, an adult may possess all of the marijuana produced from these plants, apparently regardless of amount
- ▶ The growing plants and the product from them may not be made available for sale
- ▶ Makes it lawful for an adult to possess, use, display, purchase and transport “Marijuana Accessories”
- ▶ “Marijuana Accessories” are defined to mean “any equipment, products, or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, composting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, vaporizing, or containing marijuana, or for ingesting, inhaling, or otherwise introducing marijuana into the human body”

What Amendment 64 Does

➤ Personal Use

- ▶ Makes it lawful for an adult to transfer to another adult, without remuneration, one ounce or less of marijuana
- ▶ Makes it lawful for an adult to assist another adult to:
 - Consume, possess, use, display, purchase and transport one ounce or less of marijuana;
 - Possess, grow, process and transport up to six marijuana plants, and the product from the plants, so long as grown in an enclosed, locked space and not conducted openly or publicly and the plants and product are not made available for sale;
 - Transfer to another adult, for no remuneration, one ounce or less of marijuana; and
 - Possess, use, display, purchase or transport marijuana accessories
- ▶ Makes it lawful under “Colorado law” (but maybe not under local law) to manufacture marijuana accessories and to sell them to an adult

What Amendment 64 Does

➤ Marijuana Establishments

- ▶ Requires the State to license and regulate “Marijuana Establishments,” which are:
 - “Marijuana Cultivation Facilities” licensed to cultivate, prepare and package marijuana and sell it to certain other types of licensed facilities, but not to “Consumers” (an adult purchasing marijuana or marijuana products for personal use by adults, but not for resale to others);
 - “Marijuana Testing Facilities” licensed to analyze and certify the safety and potency of marijuana;
 - “Marijuana Product Manufacturing Facilities” licensed to purchase marijuana and use it to manufacture, prepare and package “Marijuana Products,” defined to be products containing marijuana mixed with ingredients for consumption, such as edibles, ointments and tinctures, for sale to certain other licensed facilities, but not to consumers; and
 - “Retail Marijuana Stores” licensed to purchase marijuana from marijuana cultivation facilities and marijuana products from marijuana production manufacturing facilities and to sell them to consumers

What Amendment 64 Does

➤ Marijuana Establishments

- ▶ Makes it lawful under State law (but again, maybe not under the local laws) for any person or entity to lease or allow the use of their property for any of the activities licensed marijuana establishments are legally authorized to conduct

➤ Licensing and Regulation of Marijuana Establishments

- ▶ Requires the Colorado Department of Revenue to adopt no later than July 1, 2013, regulations to implement Amendment 64, to include:
 - Procedures for licensing marijuana establishments;
 - Schedule for licensing fees;
 - Licensee qualifications;
 - Premises security requirements;
 - Requirements to prevent sale or diversion of marijuana and marijuana products to minors (under 21);
 - Labeling requirements;
 - Health and safety standards;
 - Restrictions on advertising and display; and
 - Civil penalties for violation of regulations

What Amendment 64 Does

➤ Licensing and Regulation of Marijuana Establishments

- ▶ Regulations adopted by Department of Revenue cannot be “unreasonably impracticable,” meaning a regulation cannot “require such a high investment of risk, money, time, or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson”

- ▶ The General Assembly is required prior to January 1, 2017, to enact an excise tax of not greater than 15% on the marijuana sold by marijuana cultivation facilities with the tax revenues to be used for the construction of public schools

- ▶ However, the Colorado Attorney General has already given the opinion that the General Assembly will not be able to do this without a TABOR election

- ▶ In the event the Department of Revenue has not enacted regulations by July 1, 2013, or has otherwise failed to process and issue licenses, then not later than October 1, 2013, the City is required to adopt an ordinance that specifies who within the City will process licensing applications and to provide for the issuance of those licenses without the Department of Revenue’s involvement (this assumes the City has not opted-out of licensing as hereafter described)

What Amendment 64 Does

- Licensing and Regulation of Marijuana Establishments

- ▶ The City can enact its own regulations governing the time, place, manner and number of licensed marijuana establishments operating in the City so long as such regulations are not in conflict with Amendment 64 or any State law, and these regulations can include:
 - Licensing procedures;

 - Schedule of fees; and

 - Civil penalties for violation of regulations

What Amendment 64 Does

- Licensing and Regulation of Marijuana Establishments

- ▶ Alternatively, the City can by ordinance prohibit the operation of any or all types of marijuana establishments in the City and the ordinance may be adopted in one of three ways:
 - Council can adopt the ordinance at any time;
 - Council can refer the ordinance to the voters at the November 4, 2014, statewide general election; or
 - Citizens can by initiative present the ordinance to the voters at the November 4, 2014 election

What Amendment 64 Does

- Licensing and Regulation of Marijuana Establishments
- ▶ If Council decides to refer the question to the voters, nothing in the Amendment would prohibit the Council from enacting a moratorium prohibiting licensed marijuana establishments in Loveland until the voters can consider the prohibition question at the November 4, 2014 election

What Amendment 64 Does Not Do

- ▶ Does not change, preempt or affect in any way the enforceability of existing federal criminal and civil laws related to marijuana, marijuana products and industrial hemp --- In most, if not all, of its aspects, Amendment 64 is in conflict with existing federal law and possibly preempted by federal law
- ▶ Does not permit minors (under 21) to possess, use, consume, grow, purchase, sell or transport marijuana or marijuana products in any amount and does not preempt State and local laws that prohibit minors from doing so
- ▶ Does not permit minors to manufacture, possess, use, purchase or sell marijuana accessories and does not preempt State and local laws that prohibit minors from doing so

What Amendment 64 Does Not Do

- ▶ Does not permit adults or marijuana establishments to sell, distribute, transfer or otherwise assist minors in obtaining marijuana, marijuana products or marijuana accessories and does not preempt State and local laws that prohibit adults and marijuana establishments from doing so
- ▶ Does not require an employer “to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees”
- ▶ However, C.R.S. § 24-34-402.5 makes it an actionable discriminatory or unfair employment practice for an employer to terminate an employee for engaging in any lawful activity off the employer’s premises and during non-working hours, unless the activity relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities of the particular employee, rather than to all of the employer’s employees (i.e., a police officer or firefighter)

What Amendment 64 Does Not Do

- ▶ Does not eliminate or change the current State laws making it a crime to drive under the influence of marijuana or to drive while ability impaired by marijuana or lessen the penalties for these crimes
- ▶ Does not prohibit any person or entity that owns, occupies or controls property from “prohibiting or otherwise regulating the possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property”
- ▶ Does not eliminate or change the current State and local laws in effect regulating medical marijuana
- ▶ Does not permit anyone, adults or minors, to consume marijuana or marijuana products “openly and publicly or in a manner that endangers others”

City's Current Marijuana-Related Regulations

- Chapter 9.41 – Marijuana and Drug Paraphernalia
- Unlawful for any person (adult or minor) to consume or possess two ounces or less of marijuana --- Conflicts with Amendment 64 as to adults consuming or possessing one ounce or less of marijuana
- Unlawful for any person to “openly and publicly display, consume or use” two ounces or less of marijuana --- Not in conflict with Amendment 64
- Unlawful for any person to sell or offer for sale drug paraphernalia, which includes marijuana accessories --- Conflicts with Amendment 64 as to an adult selling or offering for sale marijuana accessories to an adult
- Unlawful for any person to possess any item of drug paraphernalia, which includes marijuana accessories --- Conflicts with Amendment 64 as to adults possessing marijuana accessories

City's Current Marijuana-Related Regulations

- Chapter 7.40 – Smoking in Public Places
- With certain exceptions, unlawful to smoke tobacco or “any other plant matter or product that is packaged for smoking” in “any indoor area,” which arguably includes smoking marijuana
- “Indoor Area” defined as any enclosed area or portion thereof, regardless of whether doors or windows are open

City's Current Marijuana-Related Regulations

- Chapter 7.40 – Smoking in Public Places
- ▶ Indoor area exceptions are:
 - Private residences, unless used for child care;
 - Private automobiles, unless used for public transportation of children or used for healthcare or daycare transportation;
 - Commercial limousines;
 - Hotel and motel rooms;
 - Retail tobacco businesses (businesses where tobacco is the primary product sold);
 - Cigar-tobacco bars;
 - Airport smoking concessions;
 - Outdoor area of any business;
 - Place of employment not open to public with three or fewer employees;
 - Private, nonresidential buildings on a farm or ranch that has annual gross income of less than \$5,000; and
 - Licensed casinos

City's Current Marijuana-Related Regulations

- Chapter 7.40 – Smoking in Public Places

- Chapter 7.40 not in conflict with Amendment 64, but could be amended to:
 - Clarify that it applies to smoking marijuana;

 - Specify additional places where smoking of marijuana prohibited because it is occurring “openly and publicly or in a manner that endangers others”; and

 - To increase penalties for prohibited marijuana smoking, since maximum penalties under Chapter 7.40 are relatively light (\$200 first violation, \$300 second violation and \$500 for any subsequent violations within one year)

City's Current Marijuana-Related Regulations

- Chapter 7.60 – Medical Marijuana
- Prohibits State-licensed medical marijuana businesses from operating in Loveland
- Acknowledges that medical marijuana patients and primary caregivers who are lawfully registered with the State may use, possess and grow medical marijuana so long as they are doing so in accordance with Amendment 20 (the medical marijuana constitutional amendment) and applicable State law and City Code provisions
- Chapter 7.60 does not conflict with Amendment 64

City's Current Marijuana-Related Regulations

- Chapter 18.48 – Accessory Buildings and Uses
- Prohibits the cultivation and storage of medical marijuana for sale as an accessory use in any building or on any real property in the City unless conducted by a primary caregiver as a home occupation
- There can only be one primary caregiver per dwelling unit cultivating, storing or providing medical marijuana to his or her patients as a home occupation and no more than 30 medical marijuana plants can be grown on that premises
- Medical marijuana patients are allowed to grow six plants in their residence
- Chapter 18.48 does not conflict with Amendment 64

City's Current Marijuana-Related Regulations

- Title 18 – Zoning
- If licensed marijuana establishments are allowed to operate in Loveland, their location will be governed by the City's existing zoning regulations --- for example, retail marijuana stores would likely be allowed in those zoning districts where other retail stores are allowed
- If licensed marijuana establishments are not allowed to operate in Loveland, the City could nevertheless see the establishment and operation of cooperative grow operations and businesses offering for a fee a fully-equipped location for adults to grow their six plants for personal use, though they would need to provide their own seeds
- Such operations might be considered a “Greenhouse” under Title 18 which are currently allowed as a use by right in the developing industrial (I) zone district and a use by special review in the established business (BE), employment (E) and developing resource (DR) zone districts
- A “Greenhouse” is currently defined as “a facility where plants are raised inside a permanent structure constructed of rigid materials and the plants are for sale or transplanting” --- there is a good argument that this definition doesn't apply to such operations since they would not be selling the plants grown nor likely transplanting them
- Title 18 is not in conflict with Amendment 64, but Council may want to consider amendments to it to address specific concerns about the location of future marijuana establishments and cooperative grow operations and businesses offering use of grow facilities for a fee

City's Current Marijuana-Related Regulations

- Chapter 7.18 – Weed Control
- ▶ Unlawful for any property owner to allow or permit “weeds” growing uncontrolled or to remain when grown on the owner’s property
- ▶ Marijuana is expressly included within the definition of “weed”
- ▶ This Chapter is not in conflict with Amendment 64, except to the extent it could be interpreted to apply to the growing of marijuana on an owner’s property within “an enclosed, locked space” and is “not conducted openly or publicly”

Code Changes for Consistency with Amendment 64

- ▶ Amend Chapter 9.41 to provide that it is only unlawful for an adult to possess more than one ounce of marijuana or marijuana product
- ▶ Amend Chapter 9.41 to clarify that it remains unlawful for minors to possess two ounces or less of marijuana or marijuana product
- ▶ Amend Chapter 9.41 to clarify that it is not unlawful for an adult to sell or offer to sell to another adult marijuana accessories, but it remains unlawful for an adult or a minor to sell or offer to sell marijuana accessories to a minor

Code Changes for Consistency with Amendment 64

- ▶ Amend Chapter 9.41 to clarify that it is not unlawful for an adult to possess marijuana accessories, but that it remains unlawful for a minor to do so
- ▶ Amend Chapter 7.40 to clarify that smoking marijuana is prohibited in “any indoor area” and in other specified areas where to do so would be smoking marijuana “openly or publicly or in a manner that endangers others”
- ▶ Amend Chapter 7.18 to clarify that an adult growing six marijuana plants, a “weed,” for personal use on his or her property in “an enclosed, locked space” and “not conducted openly or publicly” is not a violation of Chapter 7.18

Issues Needing Further Study or Direction

- ▶ Whether Council wants staff to move forward with the Code changes needed to be consistent with Amendment 64?
- ▶ Whether Council wants to consider now an ordinance prohibiting licensed marijuana establishments in Loveland?
- ▶ Whether Council wants to consider now a moratorium ordinance prohibiting licensed marijuana establishments in Loveland until it is known how the federal government, the General Assembly and the Department of Revenue will respond to Amendment 64?
- ▶ Whether Council wants to consider a moratorium ordinance prohibiting licensed marijuana establishments in Loveland until the voters can decide the question at the November 4, 2014 election?
- ▶ Whether Council wants staff to begin drafting an ordinance to license and regulate marijuana establishments in Loveland?

Issues Needing Further Study or Direction

- ▶ Issues for further study:
 - Zoning code amendments;
 - Building code requirements; and
 - Complicity concerns
- ▶ Any other Council direction or issues for further study?

Questions and Discussion