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MEMORANDUM¹

To: League of California Cities' City Managers Department
League of California Cities' City Attorneys Department
From: League Staff
Date: September 12, 2016
Re: The Control, Regulate and Tax Adult Use of Marijuana Act

On November 8, 2016, the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA" or "Act") will come before California voters as Proposition 64. If passed, the AUMA will legalize the nonmedical use of marijuana by persons 21 years of age and over, and the personal cultivation of up to six marijuana plants. In addition, the AUMA will create a state regulatory and licensing system governing the commercial cultivation, testing, and distribution of nonmedical marijuana, and the manufacturing of nonmedical marijuana products. The regulatory system governing these commercial marijuana activities largely mirrors the Medical Marijuana Regulation and Safety Act ("MMRSA"), but there are key differences. This memorandum will provide an overview of the AUMA, highlight the ways in which the AUMA differs from the MMRSA, and identify the issues that cities will need to take action on if the AUMA passes.

I. Overview of the AUMA

A. Personal Nonmedical Marijuana Use

The AUMA makes it legal for persons 21 years of age or older to: (1) smoke or ingest marijuana or marijuana products; (2) possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older, without any compensation, 28.5 grams of marijuana, or 8 grams of concentrated marijuana, including as contained in marijuana products; and (3) possess, plant, cultivate, harvest, dry or process up to six living marijuana plants for personal use.² The AUMA requires that marijuana in excess of 28.5 grams that is produced by plants kept pursuant to the personal cultivation provision of the Act be kept in a locked space on the grounds of a private residence that is not visible from a public place.³

Although persons 21 years of age or older may use and possess nonmedical marijuana under the Act, their ability to engage in these activities is not unfettered. The AUMA prohibits the smoking

¹ **DISCLAIMER:** These materials are not offered as or intended to be legal advice. Readers should seek the advice of an attorney when confronted with legal issues. Attorneys should perform an independent evaluation of the issues raised in these materials.

² Health & Saf. Code § 11362.2(a).

³ Health & Saf. Code § 11362.2(a)(2).

of marijuana: (1) in any public place, except where a local jurisdiction has authorized use on the premises of a retailer or microbusiness in accordance with Business and Professions Code section 26200; (2) where smoking tobacco is prohibited; (3) within 1,000 feet of a school, day care center, or youth center while children are present; and (3) while driving, or riding in the passenger seat of, any vehicle used for transportation.⁴ Moreover, individuals cannot possess marijuana on school grounds, in day care centers, or in youth centers while children are present, or possess an open container of marijuana or marijuana products while driving, operating, or riding in any vehicle used for transportation.⁵ The AUMA further provides that cities may prohibit possession and smoking in buildings owned, leased, or occupied by the city, and that employers, including cities, may maintain a drug and alcohol free workplace by prohibiting the use, consumption, possession, transfer, transportation, sale, display or growth of marijuana in the workplace.⁶

1. Personal Cultivation

The AUMA provides that local governments can reasonably regulate, but cannot ban, personal indoor cultivation of up to six living marijuana plants within the person's private residence.⁷ The Act defines private residence as "a house, an apartment unit, a mobile home, or other similar dwelling unit."⁸ This includes cultivation in a greenhouse on the same property as the residence that is not physically part of the home, as long as it is fully enclosed, secure, and not visible from a public space.⁹

The AUMA completely protects the ability of local governments to regulate, and to ban, personal outdoor cultivation operations.¹⁰ However, it purports to repeal any ordinance that bans outdoor cultivation upon the California Attorney General's determination that nonmedical use of marijuana is lawful under federal law.¹¹

B. Commercial Nonmedical Marijuana Activity

Under the AUMA, California will have a comprehensive state regulatory system for nonmedical marijuana that governs the industry from "seed to sale." The Bureau of Marijuana Control, currently the Bureau of Medical Cannabis Regulation, which is within the Department of Consumer Affairs, will have primary responsibility for administering and enforcing the AUMA.¹²

The AUMA divides state licensing and enforcement responsibilities among three agencies: (1) the Department of Consumer Affairs, which will issue licenses for marijuana the transportation,

⁴ Health & Saf. Code § 11362.3(7)-(8).

⁵ Health & Saf. Code §§ 11362.3(3), 11362.3(4).

⁶ Health & Saf. Code § 11362.45 (f)-(g).

⁷ Health & Saf. Code §§ 11362.1(a)(3), 11362.2.

⁸ Health & Saf. Code § 11362.2(5).

⁹ Health & Saf. Code § 11362.2(a)(2).

¹⁰ Health & Saf. Code § 11362.2(b)(3).

¹¹ Health & Saf. Code § 11362.2(b)(4).

¹² Bus. & Prof. Code § 26010.

storage, distribution, and sale of marijuana;¹³ (2) the Department of Food and Agriculture will issue marijuana cultivation licenses, which will administer the provisions of the AUMA related to the cultivation of marijuana;¹⁴ and (3) the Department of Public Health, which will issue licenses for marijuana manufacturers and testing laboratories.¹⁵ Each of these state licensing authorities is responsible for creating regulations governing their respective areas of responsibility, and must begin issuing licenses by January 1, 2018.¹⁶

A state marijuana license will be valid for one year.¹⁷ A separate state license is required for each commercial marijuana business location.¹⁸ With the exception of testing facilities, any person or entity licensed under the AUMA may apply for and be issued more than one type of state license.¹⁹

1. Local Control

All nonmedical marijuana businesses must have a state license.²⁰ A state license cannot issue to an applicant whose operations would violate the provisions of any local ordinance or regulation.²¹ However a state applicant need not provide documentation that the applicant has a local license or permit.

The AUMA does not limit the authority of a local jurisdiction to adopt and enforce local ordinances regulating or completely prohibiting state-licensed marijuana businesses.²² Local jurisdictions may establish “standards, requirements, and regulations regarding health and safety, environmental protection, testing, security, food safety, and worker protections that exceed state standards.”²³

2. Local Enforcement

Like the MMRSA, the AUMA establishes a dual enforcement scheme for commercial marijuana activities that violate either state or local laws. The state licensing authorities will enforce state statutes and regulations. State authorities can suspend or revoke state licenses,²⁴ pursue civil penalties against violating businesses in an amount equal to three times the applicable licensing fee per violation,²⁵ or may prosecute violators criminally.²⁶ Local authorities will be responsible

¹³ Bus. & Prof. Code § 26012(a)(1).

¹⁴ Bus. & Prof. Code § 26012(a)(2).

¹⁵ Bus. & Prof. Code § 26012(3).

¹⁶ Bus. & Prof. Code §§ 26012(c), 26013 (a).

¹⁷ Bus. & Prof. Code § 26050(c).

¹⁸ Bus. & Prof. Code § 26055(c).

¹⁹ Bus. & Prof. Code § 26053.

²⁰ Bus. & Prof. Code § 26038.)

²¹ Bus. & Prof. Code § 26055(e).

²² Bus. & Prof. Code § 26200(a). But see, Bus. & Prof. Code §§ 19340(f), 26080(b), 26090(c) [prohibiting cities from preventing the use of public roads to lawfully transport or deliver nonmedical marijuana].

²³ Bus. & Prof. Code § 26201.

²⁴ Bus. & Prof. Code § 2603.

²⁵ Bus. & Prof. Code § 26038(a)

²⁶ Bus. & Prof. Code § 26038(c).

for enforcing local ordinances and regulations.²⁷ For state-licensed facilities operating within a city, a city may have authority to enforce state law and regulations “if delegated the power to do so by the [B]ureau [of Marijuana Control] or a licensing authority.”²⁸

II. Key Differences Between the AUMA and MMRSA

A. Licensing

The MMRSA established dual licensing of medical marijuana businesses, requiring both local approval and a state license in order for a business to operate legally.²⁹ Specifically, the MMRSA requires applicants to provide the relevant state licensing entity with documentation proving their compliance with local ordinances and regulations.³⁰

The AUMA does not require an applicant to provide evidence of local permission prior to being issued a state license.³¹ Instead, the AUMA prohibits state licensing entities from approving licenses for activities that would violate local ordinances.³² Thus, state licensing officials bear the onus of evaluating local regulatory compliance.

Under this system, the AUMA allows a nonmedical marijuana business licensed by the state to operate within city limits unless the city’s municipal code prohibits the use. Cities that wish to regulate or prohibit nonmedical marijuana businesses will need to do so before the State begins issuing licenses, either by enacting a nonmedical marijuana ordinance/regulation or by amending an existing medical marijuana ordinance/regulation to include nonmedical marijuana within its scope.

B. License Revocation

Under the MMRSA, revocation of a local license or permit unilaterally terminates the ability of the medical marijuana business to operate in the jurisdiction issuing the permit, until such time as the local permitting entity reinstates it.³³

Under the AUMA, if a local jurisdiction revokes a local license, permit, or authorization for a licensee to engage in commercial marijuana activity within the local jurisdiction, the Bureau of Marijuana Control must initiate proceedings to determine whether the state license issued should be suspended or revoked within ten days of being notified by the local jurisdiction of the local revocation.³⁴ Note, however, that, even if the state license is not suspended or revoked immediately, the business cannot operate within the local jurisdiction once local revocation occurs.

²⁷ Bus. & Prof. Code § 26200 (b).

²⁸ Bus. & Prof. Code § 23202(a).

²⁹ Bus. & Prof. Code § 19320(b).

³⁰ Bus. & Prof. Code § 19322(a).

³¹ Bus. & Prof. Code § 26056.

³² Bus. & Prof. Code § 26055(e).

³³ Bus. & Prof. Code § 19320(d).

³⁴ Bus. & Prof. Code § 26200(c).

C. Personal, Indoor Cultivation

Under the MMRSA, local governments possess the power to regulate and completely ban personal, indoor cultivation.³⁵ Under the AUMA local governments can “reasonably regulate” indoor cultivation of up to six marijuana plants for personal use, but cannot ban it.³⁶

D. Personal Outdoor Cultivation

Under the MMRSA local governments can prohibit all outdoor cultivation. Under the AUMA local governments can prohibit all outdoor cultivation, until such time as the Attorney General determines that the use of nonmedical marijuana is lawful in the State of California under federal law.³⁷ Upon such determination, the AUMA purports to repeal all local bans on outdoor cultivation.³⁸

E. Amendment

Any portion of the MMRSA can be amended at any time, if there is sufficient political support within the Legislature for making substantive changes to the regulatory structure. Under some circumstances, an amendment to the MMRSA by the Legislature might arguably violate The Compassionate Use Act of 1996 (adopted by the voters as Proposition 215), which decriminalized the personal use of medical marijuana.³⁹

Under the AUMA, the Legislature may amend Sections 5 (relating to the use of medical marijuana for medical purposes) and 6 (relating to state licensing) and the provisions relating to penalties by majority vote. The Legislature may amend any other provision of the Act by a 2/3 vote. Any amendment must further the purposes and intent of the AUMA. The purpose and intent of the Act include allowing local governments to ban nonmedical marijuana businesses.

F. Taxation

The AUMA imposes new state taxes on medical and nonmedical marijuana in the following manner:

- Effective January 1, 2018, the AUMA imposes an excise tax at the rate of 15% of gross retail sales receipts.⁴⁰
 - This tax will be in addition to existing state and local sales tax.⁴¹ Given that state and local sales taxes can range from 7-10%, the combined excise tax + sales tax at the retail level could approach 25%;

³⁵ Health & Saf. Code § 11362.777(g); *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975, 984; *Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940, 969-970.

³⁶ Bus. & Prof. Code § 11362.2(b)(1).

³⁷ Bus. & Prof. Code § 11362.2(b)(4).

³⁸ Bus. & Prof. Code § 11362.2(b)(4).

³⁹ Health & Saf. Code § 11362.5.

⁴⁰ Rev. & Tax Code § 34011(a).

- Effective January 1, 2018, the AUMA imposes a separate cultivation tax on all harvested marijuana as follows:⁴²
 - \$9.25 per dry-weight ounce on all marijuana flowers;
 - \$2.75 per dry-weight ounce on all marijuana leaves;
- The AUMA prohibits imposition of state and local sales taxes on medical marijuana.⁴³
- The AUMA exempts marijuana cultivated for personal use from taxation.⁴⁴

The AUMA does not pre-empt local taxation.⁴⁵ However, the AUMA's estimated cumulative tax rate of nearly 35% on the purchase of nonmedical marijuana has potentially troubling implications for local governments. A high state tax rate by itself may depress sales and stimulate the black market. Any local taxation of marijuana should be governed by an awareness that a high retail sales tax rate, imposed on an industry that, until recently, has not been regulated at all, might stimulate black market activity and compromise the anticipated yield of revenue. In order to avoid such a result, cities might consider imposing an excise tax on discrete commercial nonmedical marijuana activities rather than on retail sales. New taxes on marijuana require compliance with Proposition 218.

1. Allocation of State Tax Revenues

After repaying certain state agencies for marijuana regulatory costs not covered by license fees, and making certain grants to universities for research and development and the Governor's Office of Business and Economic Development, the AUMA distributes the remaining tax revenue as follows:

- 60% for youth programs, substance abuse education, prevention and treatment;
- 20% for environmental cleanup and remediation; and
- 20% for state and local programs that reduce DUI and grant programs designed to reduce negative health impacts resulting from marijuana legalization

G. Deliveries

Under the MMRSA, medical marijuana deliveries can only be made from a state-licensed dispensary in a city, county, or city and county that does not explicitly prohibit it by local ordinance.⁴⁶ A delivery person must carry a copy of the dispensary's state-issued license, a government ID, and a copy of the delivery request.⁴⁷ The patient or caregiver requesting the delivery must also maintain a copy of the delivery request.⁴⁸ Dispensaries and delivery people who comply with MMRSA are immune from prosecution for marijuana transportation.⁴⁹

⁴¹ Rev. & Tax Code § 34011(d).

⁴² Rev. & Tax Code § 34012.

⁴³ Rev. & Tax Code § 34011(g).

⁴⁴ Rev. & Tax Code § 34012(j).

⁴⁵ Rev. & Tax Code § 34021.

⁴⁶ Bus. & Prof. Code § 19340(a).

⁴⁷ Bus. & Prof. Code §§ 19340(b)(2), 19340(d).

⁴⁸ Bus. & Prof. Code § 19340(e).

⁴⁹ Bus. & Prof. Code § 19317(f).

Under the AUMA, deliveries can be made by a state-licensed retailer, microbusiness, or nonprofit unless they are prohibited by local ordinance.⁵⁰ Although the AUMA does require a customer requesting delivery to maintain a copy of the delivery request, there is no express requirement that delivery people carry or maintain any records.⁵¹ Moreover, unlike the MMRSA, the AUMA does not require that deliveries come *from* a dispensary. Instead, it states that “Deliveries, as defined in this division, may only be made *by* a licensed retailer or microbusiness, or a licensed nonprofit under Section 26070.5.”⁵² Thus, there is at least some question regarding whether deliveries may be made from non-retail locations by retail employees.

Under both the MMRSA and the AUMA, local jurisdictions can ban or regulate deliveries within their borders.⁵³ However, local jurisdictions cannot prevent a delivery service from using public roads to simply pass through its jurisdiction from a licensed dispensary to a delivery location outside of its boundaries.⁵⁴

III. Local Regulatory Options⁵⁵

The AUMA preserves the authority of a city to adopt business regulations and land use regulations for nonmedical marijuana activities.⁵⁶

A. Personal Marijuana Cultivation

Under the AUMA local governments can regulate or prohibit all personal, outdoor cultivation, until such time as the Attorney General determines that the use of nonmedical marijuana is lawful in the State of California under federal law. In addition, local governments can “reasonably regulate” personal, indoor cultivation. Nothing in the AUMA requires a city to enact a regulatory scheme or ban by a certain date. However, assuming that the AUMA passes, if a city does not have a ban or regulatory scheme governing personal cultivation in place before November 9, 2016, a person may legally engage in personal cultivation of up to six marijuana plants within the person’s private residence.

⁵⁰ Bus. & Prof. Code §26090(a).

⁵¹ Bus. & Prof. Code §26090(b).

⁵² Bus. & Prof. Code § 26090(a).

⁵³ Bus. & Prof. Code §§ 19340(a), 19316(a), 26200.

⁵⁴ Bus. & Prof. Code §§ 19340(f), 26080(b), 26090(c).

⁵⁵ For a thorough discussion of the various marijuana regulatory options that a city may consider, see McEwen, *Medical Marijuana-Revisited After New State Laws* (Spring 2016) <<http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/Spring-2016/5-2016-Spring-Medical-Marijuana-%E2%80%93Revisited-After>>. In addition, sample ordinances may be found on the League’s website, at: <http://www.cacities.org/Policy-Advocacy/Hot-Issues/Medical-Marijuana>. **But note:** the regulatory schemes discussed in the McEwen paper and posted on the League’s website pertain to medical marijuana businesses under the MMRSA and may need to be modified to comply with the requirements of the AUMA.

⁵⁶ Health & Saf. Code § 11362.2; Bus. & Prof. Code §§ 26201, 26200(a).

B. Nonmedical Marijuana Businesses

The AUMA recognizes a range of businesses, including dispensaries, cultivators, manufacturers, distributors, transporters, and testing laboratories. Cities may expressly ban, adopt business regulations, or adopt land use regulations pertaining to any or all of these businesses.

Again, the AUMA does not require a city to enact a regulatory scheme or ban by a certain date. However, assuming that the AUMA passes in November, if a city wishes to regulate or ban marijuana businesses before marijuana businesses may legally operate within the city, the regulations or ban will need to take effect before the state begins issuing nonmedical marijuana business licenses. The League anticipates that cities have until January 1, 2018 to enact bans or regulations relating to nonmedical marijuana businesses, because: (1) nonmedical marijuana businesses cannot operate in any city without a state license;⁵⁷ (2) the state licensing agencies in charge of implementing the AUMA have stated that they anticipate that they will not begin issuing licenses under the MMRSA until January 2018, and it is unlikely that said agencies will be able to begin issuing licenses under the AUMA before they begin issuing licenses under the MMRSA; and (3) the AUMA does not require state agencies to issue licenses until January 1, 2018.⁵⁸ It is not the League's position that state licensing agencies cannot issue licenses before January 1, 2018, just that it is unlikely that they will do so.

C. Caution Against Use of Permissive Zoning

Under a permissive zoning code, any use not enumerated in the code is presumptively prohibited, unless an authorized city official finds that the proposed use is substantially the same in character and intensity as those land uses listed in the code.⁵⁹ Although the MMRSA upheld a city's authority to rely on permissive zoning to prohibit medical marijuana land uses, it is unlikely that cities will succeed in arguing that nonmedical marijuana land uses are prohibited by permissive zoning under the AUMA. This is so because: (1) the statutory language in the AUMA regarding local control seems to anticipate that a city will adopt an ordinance explicitly prohibiting and/or regulating nonmedical marijuana businesses (rather than relying on the silence of its Code to argue for a prohibited use);⁶⁰ (2) the AUMA does not contain the same protective language as the

⁵⁷ Bus. & Prof. Code § 26038.

⁵⁸ Bus. & Prof. Code § 26012 (c).

⁵⁹ See *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 433-436. See also *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 871 [holding that "medical marijuana dispensaries and pharmacies are not 'similarly situated' for public health and safety purposes"]; *City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1091 [holding that a medical marijuana dispensary was not substantially similar to the listed commercial use classifications for personal services, retail sales, pharmacies and medical supplies]; *County of Tulare v. Nunes* (2013) 215 Cal.App.4th 1188, 1205 [holding that a medical marijuana collective did not qualify as an "agricultural" land use because "marijuana is a controlled substance and is not treated as a mere crop or horticultural product under the law"].

⁶⁰ Bus. & Prof. Code § 26200 ["Nothing in this division shall be interpreted to supersede or limit the authority of a local jurisdiction to *adopt and enforce* local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to second hand smoke, or to completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction."] (emphasis added).

MMRSA with respect to permissive zoning;⁶¹ and (3) the AUMA explicitly designates nonmedical marijuana as an agricultural product—thus if a city’s permissive zoning code authorizes agricultural uses, the city may be precluded from arguing that marijuana is prohibited.⁶² Therefore, cities that wish to ban all or some nonmedical marijuana activities should adopt express prohibitions, even if they operate under a permissive zoning code.

IV. What actions need to be taken?

At this time city officials should: (1) review the city’s municipal code; (2) consider whether they wish to regulate the personal cultivation of nonmedical marijuana indoors; (3) consider whether they wish to regulate or ban the personal cultivation of nonmedical marijuana outdoors; (3) consider whether they wish to enact business regulations of nonmedical marijuana businesses; (4) consider whether they wish to enact land use regulations of nonmedical marijuana businesses; and (5) consider whether they wish to enact local taxes on marijuana. Cities should prioritize considering or enacting ordinances regulating personal nonmedical marijuana cultivation, because it will be legal under state law on November 9, 2016 if the AUMA passes, whereas nonmedical marijuana businesses will not be able to operate lawfully until the state licensing system becomes operational (likely in late 2017). New taxes on marijuana require compliance with Proposition 218.

⁶¹ Compare Health & Saf. Code § 11362.777(b)(3) [a “person or entity shall not submit an application for a state license . . . if the proposed cultivation of marijuana will violate the provisions of any local ordinance or regulation, or if medical marijuana is prohibited by the city, county, or city and county in which the cultivation is proposed to occur, either expressly or otherwise under principles of permissive zoning”] with Bus. & Prof Code § 26205(e) [“Licensing authorities shall not approve an application for a state license under this division if approval of the state license will violate the provisions of any local ordinance or regulation adopted in accordance with Section 26200.”].

⁶² Bus. & Prof. Code § 26067(a).