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DATE: April 6, 2016
TO: City Council Members, Mayor Prussing
CC: Police Chief Pat Connolly, HRO Alex Bautista, Chief of Staff Mike Monson,
Assistant City Attorney Michelle Brooks
FROM: James Simon, City Attorney
RE: Drug Paraphernalia.

This memorandum is intended to identify and discuss some of the legal issues regarding the City's enforcement of its ordinance and state law concerning drug paraphernalia. The Legal Division takes no policy position concerning the enforcement of drug paraphernalia laws other than that the City must comply with the United States Constitution (U.S. Const.), Illinois Constitution of 1970 (ILCS Const.), the Illinois Municipal Code (65 ILCS 5/1-1-1, et seq.), and other applicable state and federal law to the extent that home rule authority has been preempted.

Any discussion regarding means or methods for enforcing drug paraphernalia laws is intended to demonstrate the complexities involved in choices made concerning enforcement of such laws. Whether or not to enforce, amend or repeal the City's drug paraphernalia ordinance (UCC Sec. 15-67) or increase, decrease or eliminate the fine amount for an offense thereof (UCC Sec. 1-18) is a policy question left to the City Council to address. The City Council, however, has no authority to change or refrain from enforcing the Drug Paraphernalia Control Act (720 ILCS 600/1 et seq.) or any other part of the Criminal Code of 2012 (720 ILCS 5/1 et seq.).

Introduction:

At the March 28th meeting of the Committee of the Whole, following a recommendation to the City Council to lower the fine for possession of smaller amounts of cannabis, one or more Committee members suggested that the City also consider reducing its fine for violating the City's drug paraphernalia ordinance (UCC Sec. 1-18). It was suggested that further discussion be had on the issue at the Committee's next meeting (April 11th). This memorandum is intended to provide a basic overview of the law applicable to enforcement of drug paraphernalia laws.

At the outset of any discussion regarding reduction of the City's fine for violating its drug paraphernalia ordinance, the City Council must determine whether such reduction would apply to drug paraphernalia when used in conjunction with cannabis, other controlled substances, or both.

The language of the City's drug paraphernalia ordinance (UCC Sec. 15-67) and the Drug Paraphernalia Control Act (720 ILCS 600/1 et seq.) make changing the fine for violating the City's ordinance a complex task since both laws cover far more than drug paraphernalia typically

associated with inhaling, ingesting, and other means of introducing cannabis into the human body. The ordinance and the Drug Paraphernalia Control Act essentially define “drug paraphernalia” in terms of how otherwise lawful items are used rather than what they are intrinsically – i.e., whether the otherwise lawful item is used in connection with cannabis or another controlled substance included in the Illinois Controlled Substances Act list of schedules. 720 ILCS 570/204-212.¹ For example, one may lawfully possess a grinder for grinding coffee beans or spices while the same item becomes illegal drug paraphernalia when used to grind cannabis and/or any controlled substance listed in the Illinois Controlled Substances Act schedules of controlled substances (720 ILCS 570/204-212). An otherwise lawful scale will become unlawful drug paraphernalia when used to weigh cannabis or a controlled substance for the purpose of delivering the cannabis or controlled substance to another person.

The Urbana Police Department charges offenses of violating the Drug Paraphernalia Control Act or the City’s drug paraphernalia ordinance based on the totality of observed circumstances at the scene where the item is observed along with the cannabis and/or other controlled substance. If cannabis or another controlled substance or the residue thereof is present in, on or with the item, that item will likely be deemed illegal drug paraphernalia under the statute and ordinance, as the case may be. Whether to issue a ticket for violating the drug paraphernalia ordinance or issue a criminal charge under the Drug Paraphernalia Control Act depends on (i) the quantity of cannabis and/or controlled substance found with the paraphernalia, (ii) the type of activity suggested by the particular items of drug paraphernalia, and (iii) the presence of evidence of further criminal activity. For example, under the Cannabis Control Act, possession of a pipe with cannabis residue and 30 grams or less of cannabis can be charged as a misdemeanor. The City might issue a ticket under its cannabis and drug paraphernalia ordinances. On the other hand, if more than 10 grams of cannabis, a scale, small sandwich bags (several packaged with cannabis), and a stack of \$20 bills are found, felony charges would under the Cannabis Control Act and the Drug Paraphernalia Control Act. In the first example, the amount of cannabis and the pipe provide likely evidence that the cannabis was intended for personal consumption by the suspect. In the second example, the amount of cannabis and the three other items provide evidence under the statute that the suspect is delivering or intends to deliver cannabis to other persons.

Applicable Statutes and Ordinance:

Since a determination of whether an item constitutes “drug paraphernalia” under the City’s drug paraphernalia ordinance or the state Drug Paraphernalia Control Act depends on whether the paraphernalia is used to facilitate the growing, manufacture, sale, delivery, or use of cannabis or a controlled substance, one must consider the aforesaid statute and other statutes concerning cannabis and controlled substance offenses. As quoted below, both the state’s Drug Paraphernalia Control Act and the City’s drug paraphernalia ordinance include specific references to the Cannabis Control Act and the Illinois Controlled Substances Act.

State Drug Paraphernalia Control Act:

The Drug Paraphernalia Control Act defines “drug paraphernalia” as:

¹ Controlled substances, while lawful when possessed pursuant to a physician’s prescription, become illegal when they are possessed without a prescription or sold without a license.

all equipment, products and materials of any kind, other than methamphetamine manufacturing materials as defined in Section 10 of the Methamphetamine Control and Community Protection Act, which are intended to be used unlawfully in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body cannabis or a controlled substance in violation of the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act or a synthetic drug product or misbranded drug in violation of the Illinois Food, Drug and Cosmetic Act. It includes, but is not limited to:

(1) kits intended to be used unlawfully in manufacturing, compounding, converting, producing, processing or preparing cannabis or a controlled substance;

(2) isomerization devices intended to be used unlawfully in increasing the potency of any species of plant which is cannabis or a controlled substance;

(3) testing equipment intended to be used unlawfully in a private home for identifying or in analyzing the strength, effectiveness or purity of cannabis or controlled substances;

(4) diluents and adulterants intended to be used unlawfully for cutting cannabis or a controlled substance by private persons;

(5) objects intended to be used unlawfully in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, hashish oil, or a synthetic drug product or misbranded drug in violation of the Illinois Food, Drug and Cosmetic Act into the human body including, where applicable, the following items:

(A) water pipes;

(B) carburetion tubes and devices;

(C) smoking and carburetion masks;

(D) miniature cocaine spoons and cocaine vials;

(E) carburetor pipes;

(F) electric pipes;

(G) air-driven pipes;

(H) chillums;

(I) bongs;

- (J) ice pipes or chillers;
- (6) any item whose purpose, as announced or described by the seller, is for use in violation of this Act.

720 ILCS 600/2(d), emphasis supplied. The act provides for offenses involving (i) the sale of and/or intent to sell drug paraphernalia to third persons and (ii) the use of drug paraphernalia to facilitate the introduction of cannabis and/or controlled substances into the human body. 730 ILCS 600/3(a), (b); 3.5(a), (b).

City's Drug Paraphernalia Ordinance:

Urbana City Code Section 15-67 provides:

(a) ... *Drug paraphernalia* shall mean all equipment, products and materials of any kind, other than methamphetamine manufacturing materials as defined in section 10 of the Methamphetamine Control and Community Protection Act, which are intended to be used unlawfully in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body cannabis or a controlled substance in violation of the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act, as these acts are amended from time to time.

(b) *Possession of drug paraphernalia prohibited.* No person shall knowingly possess an item of drug paraphernalia with the intent to use it in ingesting, inhaling, or otherwise introducing cannabis or a controlled substance into the human body or in preparing cannabis or a controlled substance for that use.

As the above-quoted ordinance and statute indicate, the Drug Paraphernalia Control Act addresses issues of use of drug paraphernalia to (i) introduce cannabis and controlled substances to the human body and (ii) to facilitate the delivery of and the intent to deliver such substances to third persons. The City's drug paraphernalia ordinance is limited to just the use of such items to introduce cannabis and controlled substances to the human body. Compare 720 ILCS 600/3(a), (b) and 3.5(a) and (b) with UCC Sec. 15-67(b).

Punishment for Use/Delivery of Drug Paraphernalia:

The Drug Paraphernalia Control Act provides the following fines for delivery and intent to deliver drug paraphernalia:

(a) Any person who keeps for sale, offers for sale, sells, or delivers for any commercial consideration any item of drug paraphernalia commits a Class 4 felony for which a minimum fine of \$1,000 for each such item shall be imposed. Any person 18 years of age or older who sells or delivers for any commercial consideration any item of drug paraphernalia to a person under 18 years of age is guilty of a Class 3 felony.

(b) Any person who sells or delivers for a commercial consideration any item of drug paraphernalia to a woman he knows to be pregnant is guilty of a Class 2 felony.

720 ILCS 600/3(a), (b). In addition to the fines provided in the act, penalties for Class 2, 3 and 4 felonies include –

- Class 2 Felony – not less than 3 years and no more than 7 years imprisonment.
- Class 3 Felony – not less than 2 years and no more than 5 years of imprisonment.
- Class 4 Felony – not less than 1 year and no more than 3 years of imprisonment.

730 ILCS 5/5-4.5-35; 4.5-40; 4.5-45. Other sentencing elements are also available. *Id.*

The act provides the following fines for possession of drug paraphernalia used or intended for use in introduction of cannabis and other controlled substances into the human body:

(a) A person who knowingly possesses an item of drug paraphernalia with the intent to use it in ingesting, inhaling, or otherwise introducing cannabis or a controlled substance into the human body, or in preparing cannabis or a controlled substance for that use, is guilty of a Class A misdemeanor for which the court shall impose a minimum fine of \$750 in addition to any other penalty prescribed for a Class A misdemeanor. This subsection (a) does not apply to a person who is legally authorized to possess hypodermic syringes or needles under the Hypodermic Syringes and Needles Act.

(b) In determining intent under subsection (a), the trier of fact may take into consideration the proximity of the cannabis or controlled substances to drug paraphernalia or the presence of cannabis or a controlled substance on the drug paraphernalia.

720 ILCS 600/3.5(a), (b). In addition to the above referenced fine, the penalty for possession of drug paraphernalia used to introduce cannabis or another controlled substance into the human body includes imprisonment of no more than one year. Other penalties are also available. 730 ILCS 5/5-4.5-55.

Rather, while the presence of drug paraphernalia may evidence delivery or an intent to deliver cannabis or a controlled substance to a third person, the offenses of delivery and intent to deliver are addressed in the Cannabis Control Act and the Illinois Controlled Substances Act.

As noted above, whether an otherwise lawful object becomes drug paraphernalia depends on whether the item is used in connection with an unlawful act involving cannabis or a controlled substance. Thus, it is relevant to briefly review the Cannabis Control Act (720 ILCS 550/1 *et seq.*) and the Illinois Controlled Substances Act (720 ILCS 570/1 *et seq.*).

Cannabis Control Act:

As discussed above, the offense of delivering or intent to deliver cannabis to another person is often charged based on the presence of cannabis or residue thereof with otherwise

lawful items which may or do facilitate such intent. Regarding the offenses of delivery and intent to deliver cannabis, the Cannabis Control Act states:

It is unlawful for any person knowingly to manufacture, deliver, or possess with intent to deliver, or manufacture, cannabis. Any person who violates this section with respect to:

(a) not more than 2.5 grams of any substance containing cannabis is guilty of a Class B misdemeanor;

(b) more than 2.5 grams but not more than 10 grams of any substance containing cannabis is guilty of a Class A misdemeanor;

(c) more than 10 grams but not more than 30 grams of any substance containing cannabis is guilty of a Class 4 felony;

(d) more than 30 grams but not more than 500 grams of any substance containing cannabis is guilty of a Class 3 felony for which a fine not to exceed \$50,000 may be imposed;

(e) more than 500 grams but not more than 2,000 grams of any substance containing cannabis is guilty of a Class 2 felony for which a fine not to exceed \$100,000 may be imposed;

(f) more than 2,000 grams but not more than 5,000 grams of any substance containing cannabis is guilty of a Class 1 felony for which a fine not to exceed \$150,000 may be imposed;

(g) more than 5,000 grams of any substance containing cannabis is guilty of a Class X felony for which a fine not to exceed \$200,000 may be imposed.

720 ILCS 550/5, emphasis supplied. As quoted, any offense which involves delivery or intent to deliver cannabis involving more than 10 grams (such offense usually being evidenced by the presence of drug paraphernalia) is a felony which is beyond the bounds of any City ordinance.

Illinois Controlled Substances Act:

Likewise, the offense of intent to deliver a controlled substance to a third person is often charged based on the presence of the controlled substance or residue thereof where otherwise lawful items are found which may or do facilitate such intent.

The term “controlled substance” is defined in the Illinois Controlled Substances Act as:

(i) a drug, substance, immediate precursor, or synthetic drug in the Schedules of Article II of this Act or (ii) a drug or other substance, or immediate precursor, designated as a controlled substance by the Department through administrative rule. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in the Liquor Control Act of 1934 and the Tobacco Products Tax Act of 1995.

720 ILCS 570/102(f). The Illinois Controlled Substances Act schedules contain hundreds of named controlled substances and general references to derivatives and compounds thereof, thus greatly expanding the number of such substances. 720 ILCS 570/204-212. The act also provides numerous general descriptions of what might constitute a controlled substance. 720 ILCS 570/201 *et seq.* These schedules are subject to annual review and updating by the Illinois Department of Public Health. 720 ILCS 570/213.

The offenses, in general, for knowingly manufacturing or delivering, or possessing with intent to manufacture or deliver, a controlled substance include both fines and terms of imprisonment. The penalty structure under the Illinois Controlled Substances Act is complex based on the nature of the controlled substance and amount of such substance in issue. Penalties range from terms of imprisonment from six years up to 60 years and fines from \$250,000 up to \$500,000 per offense, again based on the controlled substance and quantity thereof.

Discussion:

The fines for possession of cannabis for personal use and possession with intent to deliver to another person are based on differing quantities of cannabis and the presence or absence of other evidence. Possession of 30 grams of cannabis or less for personal use is a ticket under the City's cannabis ordinance (UCC Sec. 15-66) and a Class A, B, or C misdemeanor (depending on the quantity) under the Cannabis Control Act (720 ILCS 550/4(a)-(c)). The Cannabis Control Act provides that possession of more than 10 grams of cannabis, with evidence of delivery or intent to deliver will be charged as Class X, 1, 2, 3, or 4 felonies depending on the quantity involved. 720 ILCS 550/5(c)-(g). Often what distinguishes whether a cannabis violation should be charged as a misdemeanor or a felony is the presence of otherwise lawful items which becomes drug paraphernalia when associated with the cannabis.

The City's cannabis ordinance only addresses cannabis possession for personal use. However, the City's drug paraphernalia ordinance addresses possession of drug paraphernalia for personal use of both cannabis and controlled substances. The City's drug paraphernalia ordinance does not address activity involving drug paraphernalia which may evidence delivery or intent to deliver cannabis or controlled substances to other persons. Thus, the Cannabis Control Act and the Illinois Controlled Substances Act must be taken into consideration since drug paraphernalia may be associated with both types of substances.

There are no bright-line tests insofar as whether the presence of certain otherwise lawful items may provide evidence of delivery or intent to deliver cannabis or a controlled substance to another person. For example, a "Weight Watcher's" scale may be present in a kitchen where cannabis is found. The mere fact that the scale is present in the same room as cannabis, without more, does not necessarily prove delivery or intent to deliver. The mere fact that cannabis residue is found on the said scale may also not be sufficient to charge someone with delivery or intent to deliver cannabis to another person. The scale and cannabis may be present and used solely to facilitate the suspect's personal use of cannabis. However, the presence of money, small sandwich bags and a scale provide strong evidence of delivery and/or intent to deliver cannabis to other persons.

Whether to reduce the City's fine for possession of drug paraphernalia becomes more complicated given the statutory penalty scheme under the Cannabis Control Act, the Illinois Controlled Substances Act, and the Drug Paraphernalia Act. For example, the penalties for the following criminal acts which may involve the use of drug paraphernalia include:

- Manufacture or delivery, possession with intent to manufacture or deliver – Class X felonies punishable by a term of imprisonment from 6 years to 60 years and/or a fine between \$75,000 and \$500,000 or the street value of certain particular controlled substances. Length of imprisonment is dependent on the type and/or quantity of controlled substance manufactured and/or delivered. 720 ILCS 570/401.
- Chemical breakdown to derive controlled substance – Class 4 felony punishable by a term of imprisonment from 1 to 3 years and/or a fine up to \$25,000 per offense. 720 ILCS 570/401.5
- Possession – Class 1 felony punishable by a term of imprisonment from 4 years to 50 years and/or a fine between \$25,000 and \$200,000 or the street value of the controlled substance. Length of imprisonment is dependent on the type and quantity of controlled substance possessed. 720 ILCS 570/402.
- Look-alike substances manufacture, distribution – Class 3 felony punishable by a term of imprisonment from 2 to 5 years and a fine up to \$150,000 per offense. Length of imprisonment is dependent on the nature and quantity of mimicked substance sought to be manufactured. 720 ILCS 570/404(b); 730 ILCS 5/5-4.5-404.

These and other penalties may vary by the quantity of controlled substances and whether the controlled substances violation occurs in conjunction with other activity – e.g., drug conspiracy, “streetgang” criminal drug conspiracy. E.g., 720 ILCS 570/405.1, 405.2.

As suggested above, addressing issues involving drug paraphernalia, cannabis and controlled substances are complicated.