

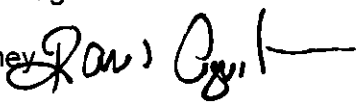
MIAMI BEACH

OFFICE OF THE CITY ATTORNEY

RAUL AGUILA, CITY ATTORNEY

COMMISSION MEMORANDUM

TO: Honorable Mayor and Members of the City Commission
Jimmy L. Morales, City Manager

FROM: Raul J. Aguila, City Attorney 

DATE: September 11, 2019

SUBJECT: AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 70 OF THE CODE OF THE CITY OF MIAMI BEACH, FLORIDA, ENTITLED "MISCELLANEOUS OFFENSES," BY AMENDING ARTICLE I, ENTITLED "IN GENERAL," BY AMENDING SECTION 70-7, ENTITLED "RESERVED," BY CREATING DEFINITIONS AND THOSE REGULATIONS WHICH SHALL PROHIBIT THE SMOKING OF CANNABIS, MARIJUANA, OR HEMP ON PUBLIC PROPERTY; ESTABLISHING SIGNAGE REQUIREMENTS FOR RETAILERS; PROVIDING PENALTIES AND ENFORCEMENT FOR VIOLATION; AND PROVIDING FOR REPEALER, SEVERABILITY, CODIFICATION, AND AN EFFECTIVE DATE.

Summary

Mayor Dan Gelber is sponsoring an Ordinance to prohibit the smoking of cannabis, marijuana, or hemp on public property. Although the City reaffirms its progressive stance urging the decriminalization of marijuana possession, it finds that there is a vital and compelling public interest to protect the City's residents and tourists from the impacts of malodorous cannabis, marijuana, and hemp smoke. The burning of these substances produces a distinctive and pungent smoke, which is unhealthy and displeasing to many people, including many children and families.

The City possesses broad authority to regulate the smoking of cannabis, marijuana, and hemp, notwithstanding that the State of Florida has recently legalized the production and distribution of hemp. Art. VIII, § 2(b), Fla. Const.; § 166.021(1), (3)(c), (4), Fla. Stat. (1999).

Background

On June 25, 2019, Governor DeSantis signed into law Senate Bill 1020, also known as the “Hemp” Bill. This law, which has significant impact upon law enforcement, took effect on July 1, 2019. The bill creates a State Hemp Program, which legalizes the possession and distribution of hemp. Hemp is defined in the bill as “the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers thereof, whether growing or not, that has a total delta-9 tetrahydrocannabinol concentration that does not exceed 0.3 percent on a dry-weight basis.” See Florida Statute §581.217(3)(d).

In layman’s terms, hemp is marijuana with a THC level of 0.3% or less and cannabis is marijuana with a THC level of greater than 0.3%. Therefore, if the THC concentration of the plant does not exceed 0.3%, then the plant is now statutorily defined as hemp, and is legal to produce and distribute (under defined conditions) in Florida. If the THC concentration of the plant does exceed 0.3%, then the plant is statutorily defined as cannabis, and is illegal to produce, distribute, or use in Florida. Implicit in the Hemp Bill’s scheme is that it is now legal pursuant to State law to possess and to use hemp.

Unfortunately, because hemp, cannabis, and marijuana, all come from the same plant, they look, smell, and feel the same. There is no way to visually or microscopically distinguish one from the other. Though hemp products are traditionally not marketed or consumed in a smokable form, and hemp will not produce a noticeable high, hemp can be – and sometimes is - also smoked. See Franjo Grotenhermen & Gero Leson, *Reassessing the Drug Potential of Industrial Hemp*, 1 (2002). When it is, there is no olfactory way to distinguish hemp from marijuana. In either their raw vegetative state, or while burning, both hemp and cannabis/marijuana smell the same. Accordingly, the only way to distinguish legal hemp from illegal cannabis/marijuana is through quantitative testing.

On August 5, 2019, the Miami-Dade State Attorney’s Office issued an Interoffice Memorandum to law enforcement agencies in its jurisdiction that stated that the Miami-Dade County crime lab does not presently have the ability to test the THC levels in hemp or cannabis. The memo stated that any arresting agency conducting arrests for cannabis offenses will be required to submit suspected cannabis to another DEA-licensed facility for quantitative testing prior to prosecution. The State

Attorney did not identify any independent facility with the capability to conduct this analysis.

The City of Miami Beach Police Department and the City Attorney's Office are diligently searching for a facility with the credentials and ability to perform the test, but one has not been identified to date. However, even if we were to identify such a lab, the State Attorney's Memorandum states that her office will not prosecute any misdemeanor marijuana possession cases going forward, due to the increased burden to provide expert testimony that the substance possessed was not actually legal hemp.

How These Developments Impact the City of Miami Beach

The City of Miami Beach is a world-famous tourist destination which attracts numerous visitors annually, including families, groups and individual travelers, seeking to enjoy the City's vast cultural, retail, dining and recreational offerings. Providing a positive experience for both residents and visitors to the City is of paramount importance, and is vital to the City's economy and tourism industry. Cannabis and marijuana are both illegal substances under federal and State law; and the public usage of illegal substances negatively impacts the City's residents and visitors. It tarnishes the City's image.

Burning of these plants and their components creates smoke which, in addition to any smoke exhaled by a user, produces secondhand cannabis, marijuana and hemp smoke. Secondhand smoke from these substances contains many of the same known carcinogens and toxins, such as ammonia, arsenic, hydrogen cyanide and formaldehyde, which are found in secondhand tobacco smoke. Moreover, the burning of these substances produces a distinctive and pungent odor, which is not pleasing to many people, including many children and families.

However, the State Attorney's Office will no longer prosecute cannabis offenses unless a laboratory test establishes the THC content of the substance involved, and has indicated that it will never again prosecute misdemeanor marijuana possession offenses. The State Attorney's decision therefore negatively impacts that City's interests.

The Local Solution

The City of Miami Beach is the State of Florida's progressive mecca, leading the charge with progressive legislation in diverse arenas ranging from LGBTQ rights to climate change to marijuana decriminalization. However, the City's interest in maintaining a pleasant and healthful atmosphere for our tourists and residents requires the ability to prohibit noxious hemp and cannabis/marijuana smoke in public spaces frequented by children and families. The proposed Ordinance balances these interests by prohibiting only the smoking of cannabis, marijuana, or hemp while on public property. This approach is consistent with other progressive jurisdictions where a state has legalized the recreational use of marijuana, but progressive cities have nonetheless prohibited smoking it in public. *See, e.g.*, D.R.M.C. § 38-175(b) (City of Denver, CO); Code of Ordinances § 94-218 (City of Aurora, CO); and Code of Ordinances § 48-911.01(a) (District of Columbia).

Smoke-free laws in outdoor areas, such as parks, recreational facilities, beaches, and patios, have proliferated throughout the U.S. Many nonsmokers – especially children – who are exposed to outdoor tobacco smoke suffer immediate symptoms including breathing difficulties, eye irritation, headaches, nausea, and asthma attacks. Several recent studies have assessed the toxic health risks from exposure to secondhand outdoor tobacco smoke.

Outdoor smoke-free laws are typically enacted by city councils, county boards of commissioners, and local boards of health, which exercising their common authority to regulate smoking on public property.

In Florida, a municipality is given broad authority to enact ordinances under its municipal home rule powers. Art. VIII, § 2(b), Fla. Const.; § 166.021(1), (3)(c), (4), Fla. Stat. (1999). Under its broad home rule powers, a municipality may legislate concurrently with the Legislature on any subject not protected by the federal or State constitution, and on any subject that has not been expressly preempted to the State. *Wyche v. State*, 619 So. 2d 231, 237-38 (Fla. 1993).

Although, Florida has broadly and expressly preempted local regulation of smoking of tobacco in public places, it has not similarly preempted local regulation of smoking cannabis, marijuana, or hemp. *See* Fla. Stat. 386.209 (regulation of tobacco preempted); *see also* Fla. Stat. 381.986(11) (regulation of cultivation, processing, and delivery of marijuana by medical marijuana treatment centers preempted).

Therefore, there being no impediment present, the City possesses the authority to prohibit smoking cannabis, marijuana, and hemp on public property.

The proposed Ordinance imposes criminal liability upon subjects observed by a police officer to be smoking any of these substances on public property within the City of Miami Beach. "Public property" defined as any public right-of-way, including any public street, avenue, road, alley or sidewalk in the City, or any pedestrian mall, park, playground, school, beach, seawall, beach access, golf course, marina, parking garage, walkway, boardwalk, beach walk, or other facility or public place which is owned, operated, leased or managed by the City.

The proposed Ordinance also requires store owners selling these substances in smokable form to post a notice stating the following:

IT IS UNLAWFUL FOR ANY PERSON TO SMOKE ANY CANNABIS, MARIJUANA OR HEMP PRODUCT ON PUBLIC PROPERTY INCLUDING, BUT NOT LIMITED TO, ANY STREET, ROAD, ALLEY, SIDEWALK, PARK, BEACH, PLAYGROUND OR OTHER SUCH PLACE WITHIN THE CITY OF MIAMI BEACH. VIOLATORS ARE SUBJECT TO CRIMINAL PROSECUTION.

The proposed Ordinance subjects persons charged with smoking cannabis, marijuana, or hemp on public property to punishment by a fine not exceeding \$500.00, or by imprisonment for a term not exceeding 60 days, or by both such fine and imprisonment. This provision will be enforced by the Miami Beach Police Department. The City's Municipal prosecutor will prosecute violations of this provision in Miami-Dade County Court.

The proposed Ordinance subjects business owners charged with violating the notice provisions of the Ordinance with civil fines ranging from \$1,000 - \$5,000. This provision will be enforced by the Miami Beach Code Compliance Department.

The proposed Ordinance is submitted for first reading at the September 11, 2019 meeting of the City Commission.

RJA/RFR/ym