

City of Scottsbluff, Nebraska

Monday, March 16, 2015

Regular Meeting

Item Resolut.2

Council to consider a Resolution expressing disapproval of Legislative Bill 189 which reduces the effectiveness of penalties to combat the possession, manufacturing and distribution of marijuana products.

Staff Contact: Kevin Spencer, Police Chief

MEMORANDUM

TO: Joshua Shasserre

FROM: Corey O'Brien

DATE: February 20, 2015

RE: Legal and Logistical Problems Posed by LB 189

- 1) Removes "marijuana" and products designated as "marijuana concentrate" (which includes resins, hashish, hash oil and extracted THC) from the Nebraska Drug Schedules under § 28-405. As a result it is absolutely legally impossible to prosecute people for the crimes of Delivery of Marijuana & Marijuana Concentrate products (currently a Class III felony); Possession with Intent to Distribute Marijuana & Marijuana Concentrate products (currently a Class III felony); and Manufacture of Marijuana & Marijuana Concentrate products (currently a Class III felony). It is also legally impossible to prosecute someone who commits one of the above trafficking offenses in a school zone or park, etc. (currently a Class II felony) or to prosecute someone who commits one of the above trafficking offenses while in possession of a firearm or money (currently separate Class

IV felonies). Finally, it is also legally impossible to prosecute someone who commits one of the above trafficking offenses and in doing so sells or is assisted by a person under eighteen (also currently a Class II felony).

- 2) The definition of “marijuana” is virtually the same as the definition for marijuana concentrate so that even though there is a small distinction in the penalties for possession of these substances there is now great confusion over whether a marijuana concentrate product actually is also marijuana.
- 3) The definition of marijuana also contains a provision that it must contain a quantifiable amount of THC whereas the current definition does not. As a result we must now prove that there is a quantifiable amount present and it impossible for our labs using todays science to quantify the amount of THC that is actually present in a given product or substance. Additionally, we will have to prove that the THC contained in the marijuana is coming from the plant material itself that is being tested. This is something that our chemists cannot do and as a result we will have to hire a botanist to come in to say that whether or not the THC detected is coming from the plant material present (as the THC being detected could very well be an additive to the plant material that is being subjected to testing).

- 4) The problems noted above also apply to the definition of “marijuana concentrate.” Further problematic for this definition is the fact that it tells us that the products covered by this definition are hashish, hash oil, cannabis resin, and other substances which contain THC extracted from the marijuana plant. Our chemists are incapable of saying that a given substance is hashish or hash oil or cannabis resin (particularly since there is no statutory definition for any of these three products). All they are capable of telling us is that the tested substance contains THC. As a result we will need to hire experts who will have to come in to opine whether any of these substances are hash, hash oil or resin (which I doubt they would be allowed to do without a statutory definition). Without someone being able to testify that they are one of these designated substances then the best we will be able to do is categorize them as marijuana (which as described earlier is rife with problems).
- 5) They have eliminated a definition for Tetrahydrocannabinol and as a result I am afraid that we have a constitutional void-for-vagueness problem or conversely an overbreadth problem.
- 6) They have also kept the synthetic THC provision which is problematic because as we point out in LB 326, it is impossible to chemically distinguish

between synthetic THC and naturally occurring THC. All our testing and chemists can say is whether or not a product or substance contains THC. No scientist or science can prove otherwise. Under LB 189, they make us prove that it is naturally occurring THC (and disprove that it is synthetically created THC) for marijuana and marijuana concentrate products or conversely prove that it is synthetically created THC (and not naturally occurring THC) if we want to pursue prosecution for non-marijuana or non-marijuana concentrate products.

- 7) Finally, they have lowered the penalties drastically for possession of products designated as “marijuana concentrate.” Under existing Nebraska law, persons convicted of possessing the products labeled as “marijuana concentrate” are subject to prosecution for a Class IV felony for possessing a product containing the Schedule I substance of Tetrahydrocannabinol. While they have reinserted Tetrahydrocannabinol back into schedule I it no longer is defined and has potentially substantial constitutional problems as a result. It would also appear that its re-inclusion in Schedule I is nullified by the exemptions created as a result of the marijuana and marijuana concentrate definitions and the infractionary penalty provisions contained in 28-416 for each of these categories. The fact that THC has been re-

inserted in Schedule I is extremely befuddling, confusing and frankly
pointless given the exemptions.

In my 17 years as a prosecutor and 11 years of working on legislation this is
without question the most poorly drafted and confusing bill I have ever seen.

If providing greater clarity was its aim then it has failed miserably and created
far more confusion and legal loopholes than are in existence now.

A RESOLUTION TO EXPRESS DISAPPROVAL OF LEGISLATIVE BILL 189

RESOLUTION NO. _____

WHEREAS, the State of Colorado has legalized the recreational use of marijuana; and

WHEREAS, the legalization of marijuana in the State of Colorado has had a negative impact on the law enforcement and criminal justice resources of Scottsbluff, Nebraska; and

WHEREAS, the problems associated with the possession, manufacture, and distribution of marijuana and marijuana products have been exacerbated by the actions of the State of Colorado; and

WHEREAS, LB 189 reduces the effectiveness of penalties and procedures utilized to combat the possession, manufacture, and distribution of marijuana and marijuana products; and

WHEREAS, LB 189 does not address the real problems associated with the proliferation of marijuana and marijuana products; and

WHEREAS, LB 189 does not promote public safety and accountability;

NOW, THEREFORE BE IT RESOLVED that the City Council of Scottsbluff, Nebraska expresses its disapproval of LB 189.

BE IT FURTHER RESOLVED that said the Scottsbluff City Council urges the members of the Nebraska Legislature to oppose LB 189 and to vote against the advancement and enactment of LB 189.

Motion by: _____ to adopt Resolution No. _____.

Seconded by: _____

Voting yes were: _____

Voting no were: _____

Motion carried.

Dated this _____ day of _____, 2015.

Mayor

Attest:

City Clerk

“SEAL”