

August 7, 2020

Dear Assistant City Attorney Langer, City Attorney Jenkins, Ms. Rocco, Mayor Horvath, Mayor Pro Tempore Heilman, and Councilmembers:

I understand the City Attorney has been asked to advise the West Hollywood City Council on whether California state law requires the city to prohibit cannabis smoking or vaping in apartment complexes and condominiums if the City Council decides to prohibit tobacco smoking and electronic cigarettes in those private homes. A provision of Prop. 64 (2016) was referenced during the City Council's August 3, 2020 discussion on the topic. As a co-author of Prop. 64 and the attorney who served as the lead drafter for that provision — Health & Safety Code § 11362 — I wanted to clarify the letter and intent of the voter-enacted law.

There are two core questions, which I will begin by providing a short answer to:

- 1) Under California state law, are cities *required* to ban cannabis smoking or vaping in any location where those cities decide to prohibit tobacco smoking or vaping, including private homes?

No. Prop. 64 does not require that any municipality ban cannabis smoking if it bans tobacco smoking.

- 2) Under California state law, are cities *allowed* to ban medical cannabis smoking and vaping in private homes?

No. Prop. 215 prevents cities from prohibiting individuals whose physicians have recommended cannabis — in writing or orally — from smoking and vaporizing cannabis at home. The city will be inviting litigation if it prohibits patients from smoking and/or vaporizing medical cannabis in their homes.

1) Health & Safety Code § 11362.3 does not require cities to ban non-medical cannabis smoking or vaping in locations where cities prohibit tobacco smoking.

The plain language and intent of Prop. 64 was to allow, *but not require*, localities to prohibit non-medical cannabis smoking and vaporization where they prohibit tobacco smoking and e-cigarettes.

Health & Safety Code § 11362.1 makes it “lawful under state and local law” for persons 21 years of age or older to engage in a number of activities involving cannabis, including to possess limited amounts of cannabis and to “[s]moke or ingest marijuana or marijuana products.”

Health & Safety Code § 11362.3 (a) provides a limitation: “Nothing in Section 11362.1 shall be construed to permit any person to: ... ” smoke marijuana in public or certain other locations or to “[s]moke marijuana or marijuana products in a location where smoking tobacco is

prohibited.” The section also defines “smoke” to include “the use of an electronic smoking device that creates an aerosol or vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking in a place.”

Health & Safety Code § 11362.3 was crafted to allow state and local penalties for smoking to be imposed for cannabis smoking despite § 11362.1’s legalization of cannabis smoking by adults. For example, Labor Code § 6404.5 (c) prohibits, among other things, a person smoking “tobacco products at a place of employment or in an enclosed space of employment.” Subsection (i) imposes a \$100 fine for a first offense, with escalating fines for subsequent offenses. Due to § 11362.3, those penalties would also apply to smoking cannabis at a place of employment or in an enclosed space.

In short, Health & Safety Code § 11362.1 *removes* state and local penalties for adults who possess and use cannabis while § 11362.3 limits the instances where those penalties are *removed*. § 11362.3 does not explicitly or implicitly *require* cities to *impose* penalties on any conduct, including smoking cannabis where tobacco smoking is prohibited. Instead, both § 11362.3’s plain language and intent are to limit the instances in which § 11362.1 *removes* penalties.

There is no civil or criminal penalty under California law for smoking or vaporizing cannabis in a private residence. Therefore, if West Hollywood were to impose a ban on smoking tobacco in private residences that exempted cannabis, § 11362.1 simply would not remove any penalties — but there are not penalties needing to be removed.

There is nothing in the language of § 11362.3 that in any way requires West Hollywood or any city to *impose* penalties on cannabis smoking or vaping.

2) West Hollywood would be vulnerable to a legal challenge if it banned smoking or vaporizing medical cannabis in a private home.

In 1996, California voters enacted Prop. 215, the first modern medical marijuana law. Unless it explicitly waives the protection, a voter-enacted law can only be amended by voters themselves.¹ Prop. 215 did not waive the protection.

Prop. 215, codified as Health & Safety Code § 11362.5, provides:

- (a) This section shall be known and may be cited as the Compassionate Use Act of 1996.
- (b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

¹ California Constitution, Article II, Section 10 (c). (“The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors’ approval.”)

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

...

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes. ...

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

If West Hollywood were to prohibit the smoking and vaporizing of cannabis in private homes, I believe it would be violating patients' "right to obtain and use marijuana for medical purposes," and that it would be impermissibly subjecting them to a "sanction" for using marijuana for medical purposes.

Prop. 64 did not amend or repeal Prop. 215's protections. It provided, "Nothing in section 11362.1 shall be construed or interpreted to amend, repeal, affect, restrict, or preempt: ... (i) Laws pertaining to the Compassionate Use Act of 1996." (§ 11362.45.)

3) Banning smoking or vaporizing cannabis by individuals in their homes violates the intent of Prop. 64.

Prop. 64 was enacted with 57.13% of the vote on November 8, 2016. It passed in West Hollywood with 83.16% of the vote.² The *primary purpose* of Prop. 64 was to make it lawful for adults 21 years of age or older to consume cannabis, including smoking cannabis.

The drafters of Prop. 64 were also mindful of public health and the need to protect public spaces, so we included language allowing for restrictions on smoking in public, or in places where tobacco smoking is restricted, such as restaurants, bars, and workplaces. Prop. 64 did not intend to allow for the banning of smoking or vaporizing in a private home. Such a ban creates an overly broad barrier to smoking or vaporizing anywhere — if such activity is not

² <https://elections.cdn.sos.ca.gov/sov/2016-general/ssov/ballot-measures-by-political-districts.pdf>

allowed in public or in a private home — as to effectively ban it completely, which is directly contrary to Prop. 64.

The ban is not limited to instances where neighbors are harmed in any way by the vaporization or smoking of cannabis — or even to instances where they can smell the cannabis. It would apply even if a landlord walked in to perform maintenance and became aware a tenant was vaporizing cannabis. Likewise, it would apply if someone looked in a window and saw, but did not smell, a renter smoking a joint.

A city banning state-legal conduct, even when it does not harm or disrupt others, is deeply at odds with what the voters aimed to achieve. Additionally, a ban on private conduct that applies *only* to those who live in multi-family homes — who are disproportionately people of color and people with less wealth — is offensive to principles of equality. Such a ban will force people to consume in public spaces, subjecting themselves to an increased risk of fines and police interaction and subjecting the public to increased smoke exposure.

Conclusion

I appreciate the city's long history of commitment to standing up for those who could benefit from medical cannabis and adults who consume cannabis. I hope you will reject the cannabis smoking and vaporization ban. State law does not require the city to enact such a dramatic assault on medical patient or adult-use cannabis consumers' rights in the privacy of their own homes. I suspect the law also does not allow such a ban.

Please don't hesitate to contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tamar Todd', with a stylized flourish at the end.

Tamar Todd, Esq.
Co-author, Prop. 64