

COUNTY OF SACRAMENTO
OFFICE OF THE COUNTY COUNSEL
Inter-Department Correspondence

Date: December 1, 2009

To: John Rogers

From: John Reed

Subject: Food Regulation of Medical Marijuana "Dispensaries"

You have requested that this Office evaluate whether the Environmental Management Department, in its role as the Health Officer for all of Sacramento County, has a duty to enforce the provisions of the California Food Code in businesses licensed or permitted by incorporated cities within Sacramento County as medical marijuana dispensaries or cooperatives.

This evaluation is limited to those instances where the dispensaries are offering food items containing marijuana to their customers and the analysis will only be as to those marijuana containing foods. This memorandum will not address the distribution by those dispensaries of marijuana in a form where it is not combined with food.

Recommendation

The recommendation of this office at this time is that Environmental Management not attempt to include marijuana dispensaries in its retail food program or to provide them with placards. The basis for this recommendation is the fact that any permit application would have to be automatically denied due to the fact the addition of marijuana to a food source constitutes an adulteration of that food source.

It is also the recommendation of this office that your department, in its capacity as the Local Health Officer, refer any dispensaries, of which it is aware, who are combining marijuana with food, to the Attorney General, District Attorney or applicable City Attorney for evaluation of possible prosecution under the Sherman Food, Drug and Cosmetic Act.

Analysis

The Compassionate Use Act and supporting legislation exempt the possession, use, cultivation and transportation of marijuana from the application of specified prohibitive provisions of the Health and Safety Code pertaining to controlled substances (Division

10 of the Health and Safety Code). Simply put, those acts remain illegal, except that if the defendant has a recommendation for marijuana use from a physician, that person cannot be prosecuted.

Nothing in the act exempts marijuana use from the provisions of the Retail Food Code or the Sherman Act (Division 104 of the Health and Safety Code).

The Attorney General's guidelines place an emphasis on the legitimacy and compliance with other laws by those dispensing marijuana. This includes compliance with applicable local license laws, zoning laws and taxation laws. There is an emphasis on record keeping, security and avoidance of nuisance activities resulting from the activities of the dispensary. Requiring compliance with applicable food laws and safe food handling practices is consistent with this emphasis. The Compassionate Use Act says little about the methods by which marijuana may be consumed. Where form of usage is referenced it is typically smoking.

The definitions of both Food and Drug are quite broad under the Sherman Act:

§ 109925. Drug

"Drug" means any of the following:

- (a) Any article recognized in an official compendium.
- (b) Any article used or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or any other animal.
- (c) Any article other than food, that is used or intended to affect the structure or any function of the body of human beings or any other animal.
- (d) Any article used or intended for use as a component of any article designated in subdivision (a), (b), or (c) of this section.

The term "drug" does not include any device.

Any food for which a claim (as described in [Sections 403\(r\)\(1\)\(B\)](#) ([21 U.S.C. Sec. 343\(r\)\(1\)\(B\)](#)) and [403\(r\)\(3\)](#) ([21 U.S.C. Sec. 343\(r\)\(3\)](#)) or [Sections 403\(r\)\(1\)\(B\)](#) ([21 U.S.C. Sec. 343\(r\)\(1\)\(B\)](#)) and [403\(r\)\(5\)\(D\)](#) ([21 U.S.C. Sec. 343\(r\)\(5\)\(D\)](#)) of the federal act), is made in accordance with the requirements set forth in [Section 403\(r\)](#) ([21 U.S.C. Sec. 343\(r\)](#)) of the federal act, is not a drug under subdivision (b) solely because the label or labeling contains such a claim.

➡ § 109935. Food

"Food" means either of the following:

- (a) Any article used or intended for use for food, drink, confection, condiment, or chewing gum by man or other animal.
- (b) Any article used or intended for use as a component of any article designated in subdivision (a).

In addition, the Sherman act creates definitions for food additives:

§ 109940. Food additive

“Food additive” means any substance, the intended use of which results or may reasonably be expected to result, directly or indirectly, in the substance becoming a component of the food or otherwise affecting characteristics of the food. This includes any substance or radiation source intended for use in producing, manufacturing, packing, treating, packaging, transporting, or holding any food.

The term “food additive” does not include any of the following:

- (a) A pesticide chemical in or on a raw agricultural commodity.
- (b) A pesticide chemical that is used, or intended for use, in the production, storage, or transportation of any raw agricultural commodity.
- (c) A color additive.
- (d) Any substance used in accordance with a sanction or approval granted prior to the enactment of the Food Additives Amendment of 1958 (72 Stat. 1784), pursuant to the federal act; the Poultry Products Inspection Act (71 Stat. 441; [21 U.S.C. Sec. 451 et seq.](#)); the Meat Inspection Act of March 4, 1907 (34 Stat. 1260), as amended and extended ([21 U.S.C. Sec. 71 et seq.](#)); or the Food and Agricultural Code of this state.

The Sherman Act also defines Medical Food:

109971. Medical food

“Medical food” means any product that meets the definition of medical food in the Federal Food, Drug, and Cosmetic Act ([21 U.S.C. Sec. 360ee\(b\)\(3\)](#)). The department shall review all changes to the federal definition of “medical food” before those changes are incorporated by reference pursuant to this section. Within six months after the effective date of any changes to the federal definition, the department shall complete its review of the changes, and submit a report to the Senate Health and Human Services Committee and the Assembly Health Committee that describes the changes and makes a recommendation as to whether it is appropriate to incorporate the changes by reference pursuant to this section. Any change to the federal definition shall take effect pursuant to this section one year after the effective date of the federal change, unless a law that specifically prohibits the change from taking effect is enacted and becomes effective.

(3) The term “medical food” means a food which is formulated to be consumed or administered enterally under the supervision of a physician and which is intended for the specific dietary management of a disease or condition for which distinctive nutritional requirements, based on recognized scientific principles, are established by medical evaluation.

When poisonous or deleterious substances are added to food, including food additives, it becomes adulterated:

§ 110445. Added substances as unsafe; exception

Any added poisonous or deleterious substance, or any food additive, pesticide chemical, preservative, or color additive, shall be considered unsafe for use with respect to any food unless there is in effect a regulation adopted pursuant to [Section 110080](#), [110085](#), or [110090](#), that limits the quantity and the use, or intended use, of the substance to the terms prescribed by the regulation.

§ 110545. Poisonous or deleterious substance

Any food is adulterated if it bears or contains any poisonous or deleterious substance that may render it injurious to health of man or any other animal that may consume it. The food is not considered adulterated if the substance is a naturally occurring substance and if the quantity of the substance in the food does not render it injurious to health.

§ 110550. Added unsafe substance

Any food is adulterated if it bears or contains any added poisonous or deleterious substance that is unsafe within the meaning of [Section 110445](#).¹

Potentially, food containing marijuana could meet the definition of Health and Safety Code Section 109925(b) as it is an article used in the mitigation of a disease in humans. However, a more logical determination would be that it is the marijuana, not the food, that is the mitigating article.

Very clearly the Brownie or Cookie meets the definition of food, in section 109935(a). An argument could be made that the marijuana becomes part of that food, or that it meets the definition of section 109935(b) as it is a component of that article.

The obstacle to inclusion of marijuana dispensaries in the retail food program is that the addition of marijuana to food items creates an adulterated food. This is the case under any of the three definitions above.

Additionally, marijuana remains an illegal substance, both under state and federal law. Its use, other than in select instances where the users are protected from criminal prosecution, is a crime and is morally hurtful. Further, marijuana is classified as an intoxicant. It remains a criminal offense to operate a motor vehicle while under its influence, or to smoke it while driving or near a school or recreation center. The Compassionate Use Act did not change either of those factors. The act does not require accommodation by employers to allow its use. These factors clearly rise to a level of physically hurtful or an injurious influence.

Even if not deleterious, marijuana as being offered for oral consumption in the dispensaries is a food additive, and as such, unless its included within the Federal list of

¹ See CA Jur.3d Food and Food facilities sec 19

approved additives, or included by regulation in that list by the State of California pursuant to any of the three sections referenced in H&S 110445 it is an unsafe added substance, and is therefore an adulterant.

The Retail Food program cannot approve an application for an establishment to provide adulterated foods (H&S 114380) or in the alternative, would immediately have to suspend or revoke a permit for an establishment preparing adulterated foods (H&S 114405)

§ 110625. Adulteration of food

It is unlawful for any person to adulterate any food.

It is the recommendation of this office that your department not include marijuana dispensaries, licensed as such by incorporated cities among its permitted retail food establishments.

Nevertheless, the Health Officer does have an obligation to enforce provisions of the Sherman Act. Therefore, in the event of a health inspector determining that a dispensary is providing food containing marijuana to its customers, that information should be reported to the Attorney General, District Attorney or appropriate City Attorney for a determination regarding prosecution pursuant to Health and Safety Code Section 111825 and/or Penal Code 383 (adulteration of food).

In making the above recommendation this Office takes no position regarding the propriety of dispensaries distributing marijuana contained in food, other than the fact that under the current state of the law, such activity violates the Sherman act. The recommendation is not intended to be punitive.

This Office notes that implementation and clarification of Proposition 15 has been an ongoing progression. Some aspects of the legalities created by Proposition 15 remain gray areas, as is evidenced by Attorney General's own comments concerning the vague legalities of dispensaries generally. The conflict created between the Compassionate Use Act and the Sherman Act may be one of those grey areas.

However, until such time as the State of California exempts marijuana from application of the food safety provisions of the Sherman Act, this office must conclude that the addition of marijuana to a food product constitutes the adulteration of food