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SENT VIA EMAIL

February 20, 2015

Honorable Senator McGuire
Chair, Senate Judiciary Committee

Honorable Senator Coghill
Vice-Chair, Senate Judiciary Committee

Re: SB 30, version S

Honorable Senators:

Thank you for the opportunity to address the latest draft of SB 30. Because we intend to provide more detail during committee hearings and be available to answer questions, this letter is intended to provide an overview of our intended comments. The overview is categorized by bill section number, not by priority.

Section 126. Page 71. AS 29.35.148. "The authority to regulate marijuana is reserved to the state, and, except as specifically provided by statute, a municipality may not enact an ordinance that is inconsistent with AS 17.38."

This proposed language mirrors that in AS 29.35.145. That statute completely eliminates the ability of local governments, including home rule municipalities, from in any way regulating firearms – except for a few small exceptions contained within the statute. While that may be the State's prerogative with a Constitutional issue like the right to bear arms, it creates confusion in this context. Just like the State constantly complains about federal overreach and unfunded mandates, local governments say the same about the State. There is no reason to enact this provision. Home rule local governments were created in the State Constitution to honor and protect the tradition of Alaskan self-government at the local level. This section muddies the water and does injustice to the intent of the Constitution. Instead of merely complying with AS 17.38, which local governments are already required to do, this section can be read to mandate that local governments cannot exercise any of the powers normally reserved to them absent some explicit permission that does not yet even exist: the so called "except as specifically provided by statute." If we are truly regulating marijuana "like alcohol," then we recommend language similar to that found in AS 04.21.010. Language being proposed for HB 75 on this topic has already been drafted and should be considered, as we think that bill is the proper legislative vehicle for addressing the balancing of legislative responsibilities between the State and local governments.

Sections 103 and 104. Pages 60-61. Open container.

AS 28.35.029 provides that a person may not drive a motor vehicle on a highway or vehicular way or area, when there is an open bottle, can, or other receptacle containing an alcoholic beverage in the passenger compartment of the vehicle. There are some exceptions under AS 28.35.029(b):

(b) Except as provided in AS 28.33.130, a person may transport an open bottle, can, or other receptacle containing an alcoholic beverage

(1) in the trunk of a motor vehicle;

(2) on a motor driven cycle, or behind the last upright seat in a motor home, station wagon, hatchback, or similar trunkless vehicle, if the open bottle, can, or other receptacle is enclosed within another container;

(3) behind a solid partition that separates the vehicle driver from the area normally occupied by passengers; or

(4) if the open bottle, can, or other receptacle is in the possession of a passenger in a motor vehicle for which the owner receives direct monetary compensation and that has a capacity of 12 or more persons.

SB 30 proposes to add into the statute an additional requirement for open container as it applies to marijuana through the definition of "open marijuana container." In order to find a violation, law enforcement will have to be able to prove there is "**evidence that marijuana has been consumed in the motor vehicle.**" This will be virtually impossible to enforce. The smell of marijuana in the car does not mean that it was consumed in the vehicle. A passenger, who smoked just before getting into the car, will always claim to be the source of the smell. The fact that the cookie is half-eaten does not mean it was consumed in the vehicle. The driver had a bite outside the car and then decided to take the rest with him. The fact that there might be some leafy substance on the floorboard only means that something was spilled there, not that it was consumed in the vehicle. Only if law enforcement actually observes the consumption in the vehicle or someone in the vehicle confesses to it, would this be enforceable. We fail to see the policy justification for making this law effectively unenforceable, especially when alcohol is not treated this way.

In addition, much of what will be in vehicles will be in the form of "dry" edibles, not in the form of liquids like alcohol. There will often be no container. There is no apparent prohibition in the bill for edibles in the vehicle that are not in any container. There appears to be no prohibition for the lollypop, brownie, or any of thousands of similar variations that are not, or might not be, in containers in a vehicle. If we are serious about preventing driving under the influence, then we should not make it this easy to violate the law.

We recommend something along these lines:

A. No person may consume marijuana while driving a vehicle on a roadway or street.

B. No person may drive a vehicle at such time as there is marijuana of any amount in the passenger compartment of the vehicle unless the vehicle is:

1. A limousine licensed pursuant to title 11;

2. With the exception of the area occupied by the driver, equipped with darkened windows which obscure the view into the vehicle and such windows are all fully closed; and
3. Equipped with a partition between the driver and the area where the marijuana is located and that partition is fully closed.

Section 51. Pages 29-32. AS 17.38.200-.230 Penalty for possession of more than 1 ounce of marijuana.

There appears to be a gap or oversight related to the new provisions for misconduct involving marijuana. Misconduct can involve possession, manufacture, transport, or delivery. By law, we thus must assume that misconduct involving possession can be different from misconduct involving transport or delivery. Under the initiative, possession, transportation, or delivery of an ounce is legal (AS 17.38.020). SB 30 contains criminal penalties for transportation or delivery of more than one ounce of "usable marijuana," but makes no clear mention of possession of more than one ounce as a distinct offense. For example, proposed AS 17.38.200 says a person commits the crime of misconduct in the first degree if "at the time of possession ... the person transports more than one ounce." Since *transport* is not a defined term, we look at a dictionary definition, which means to take or carry from one place to another. A person can be in possession – even in public - without transporting. We do not see text that says possession of more than one ounce is an offense, whether its 4 ounces or 400 ounces.

Section 51. Pages 31-32. AS 17.38.200-.230 Discrepancy between penalties for alcohol offenses by minors and marijuana offenses by minors.

AS 17.38.220 creates a violation with a $300 fine for a person under the age of 21 to enter a marijuana store and present a form of ID that is false and does so for the purpose of inducing the store to sell the person marijuana/products. By comparison, AS 04.16.049/04.16.180 (Alcoholic beverages) makes it a class A misdemeanor for a person under the age of 21 to enter a licensed premises (without statutory justification). In this bill, there is no penalty for a person under 21 to be on marijuana premises; no penalty for being under 21 and using a false ID to get into the marijuana store (because we have to prove the purpose was to induce selling, not simply obtain entrance); and there is no penalty for a person under 21 attempting to buy marijuana (as long as they use their real ID). The initiative provided for a prohibition for using a false ID to purchase or attempt to purchase marijuana/products or to simply gain access to the establishment (Ballot Measure 2 @ AS 17.38.050(a)(2)). The current bill creates a vast discrepancy in both the penalty, as well as the elements of the comparable offenses, despite the stated intent to treat alcohol and marijuana similarly. Among other issues, we anticipate significant problems with marijuana vendors trying to keep minors out of their stores.

Section 51. Page 30. Lines 6-26. AS 17.38.200 No culpability for an establishment allowing a person to do certain marijuana-related activities for a person under the age of 18.

AS 17.38.200(a)(2) makes it a class A misdemeanor for a marijuana establishment/employee, with criminal negligence, to allow a person to deliver marijuana to a person under the age of 21 but at least 18 (AS 17.38.200(a)(2)(A)); allow a person under the age of 21 but at least 18 to enter and

remain on the premises (AS 17.38.200(a)(2)(B)); or while working on the premises to deliver marijuana to a person under the age of 21 but at least 18 (AS 17.38.200(a)(2)(E)). However, there is no penalty for an establishment/employee allowing any of these things to happen or doing these things to/for a person under the age of 18.

Section 51. Page 29. Lines 11-20. Page 30. Lines 6-24. AS 17.38.200. Mens Rea (culpable mental state) associated with youth sales.

AS 17.38.200(a)(1)(A)(iv) makes it a crime for an unlicensed seller (i.e., a dealer) to knowingly deliver marijuana to a person under 21. AS 17.38.200(a)(2)(E) makes it a crime for a licensed seller to negligently allow a person to deliver marijuana to a person under 21 (and over 18).

So, the completely illegal street dealer is held to a higher level of intent regarding delivering to youth than an otherwise legal and regulated establishment. That is, it will be harder to prove the illegal dealer did wrong than it will be to convict the licensed dealer.

General Comments. Concern about diversion to youth.

Both the 2009 Federal Department of Justice ("Ogden") memo and the 2014 Federal Department of Justice ("Cole") memo relating to federal enforcement of marijuana laws specifically reference the act of, respectively, "sales to minors" and "preventing the distribution of marijuana to minors" as one of the enforcement priorities under federal law.

The 2014 memo further states that the federal relaxation of enforcement rests on the "expectation that states that have enacted laws authorizing marijuana-related conduct will implement clear, strong and effective regulatory and enforcement systems in order to minimize the threat posed to federal enforcement priorities."

1. There are no longer any prohibitions on possession of marijuana in/around schools, or recreation or youth centers, or on a school bus (AS 11.71.040(a)(4)).

2. It is a $300 fine for a person under 18 to possess, use, or display any amount of marijuana. This is the same fine as, for example, doing an improper tow under state code (13 AAC 04.205(d), $300). It is a $100 fine for a person 18-20 to do the same. This is the same fine as, for example, driving a snowmobile on a sidewalk or through an alley (13 AAC 04.455(g), $100). This bill sends the message to our kids that using a federal Schedule 1 controlled substance is the same as these minor traffic offenses. We are also concerned that this is not the clear, strong and effective regulatory system that will fend off federal intervention. In Colorado, marijuana offenses related to adults providing to minors are still felonies for those adults. Persons under 21 who possess an ounce or less of marijuana in Colorado face a petty infraction, yes.[1] But, minors who possess more than an ounce face significantly stiffer penalties, depending on the number of ounces.[2] Part of the concern here is using young people to illegally transport marijuana. We recommend some distinction between persons under 21 possessing under an ounce and over an ounce, to help curb this potential problem.

[1] Colorado Revised Statutes §18-13-122.
[2] Colorado Revised Statutes §18-18-406.

We understand other bills may address some of these issues and we may have, in the rush to get timely comments to you, missed applicable provisions in the bill. Still, we hope you find this review helpful and useful. Thank you for the opportunity to address this important legislation.

Regards,

Dennis Wheeler
Municipal Attorney

Mark Mew
Chief of Police

Seneca Theno
Municipal Prosecutor