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RQ-0489-KP
FILE# ML-49202-22
I.D.# 49202

December 8, 2022

Office of the Attorney General

Attn: Opinion Committee

P.O. Box 12548

Austin, Texas 78711

Via email to: Opinion.Committee@texasattorneygeneral.gov

RE: Request for Attorney General Opinion

Opinion Committee Members:

The Hays County Criminal District Attorney requests an Attorney General Opinion answering questions raised following the enactment of a City of San Marcos ordinance purporting to eliminate the enforcement of certain drug laws within the city. On November 8, 2022, voters in San Marcos passed a ballot initiative enacting an ordinance entitled "An Ordinance to Eliminate Low-Level Marijuana Enforcement." The ordinance became effective on November 17, 2022. In pertinent part, the ordinance reads as follows:

ARTICLE 4. – MARIJUANA ENFORCEMENT

Sec. 54.101. – Ending citations and arrests for misdemeanor possession of marijuana.

- (a) San Marcos police officers shall not issue citations or make arrests for Class A or Class B misdemeanor possession of marijuana offenses, except in the limited circumstances described in (b).
- (b) The only circumstances in which San Marcos police officers are permitted to issue citations or make arrests for Class A or Class B misdemeanor possession of marijuana are when such citations or arrests are part of (1) the investigation of a felony level narcotics case that has been designated as a high priority investigation by a San Marcos police commander, assistant chief of police, or chief of police; and/or (2) the investigation of a violent felony.
- (c) In every instance other than those described in (b), if a San Marcos police officer has probable cause to believe that a substance is marijuana, an officer may seize the marijuana. If the officer seizes the marijuana, they must write

a detailed report and release the individual if possession of marijuana is the sole charge.

- (d) San Marcos police officers shall not issue any charge for possession of marijuana unless it meets one or both of the factors described in (b).

...

Sec. 54.104. – Prohibition against City police using the odor of marijuana or hemp as probable cause for search or seizure.

- (a) San Marcos police shall not consider the odor of marijuana or hemp to constitute probable cause for any search or seizure, except in the limited circumstances of a police investigation pursuant to § 54.101(b).

...

Sec. 54.106. – Discipline.

- (a) Any violation of this chapter may subject a San Marcos police officer to discipline as provided by the Texas Local Government Code or as provided in City policy.

Based on the ordinance's enactment, the following questions are raised: First, is the ordinance preempted by the laws of the State of Texas criminalizing the possession and delivery of marijuana? Second, if the ordinance is void due to preemption, does it expose the city to potential legal action, particularly with respect to potential discipline of San Marcos police officers unwilling to comply with an unlawful ordinance?

San Marcos police officers are peace officers under Texas law. As such, they are bound by oath and by statute to enforce the law. *See*, art. 2.13, Tex. Code Crim. Proc. The Texas Health and Safety Code criminalizes the possession and delivery of marijuana in any amount. *See* TEX. HEALTH & SAFETY CODE §§ 481.120; 481.121; 481.122 (West 2021). Therefore, to the extent that the San Marcos ordinance requires no further investigation or arrest when an officer observes an offense being committed in his presence, it is contrary to that officer's statutory duty to enforce the law.

Also, the ordinance attempts to prohibit officers from using the odor of marijuana as probable cause for a search or seizure. This section interferes with officers' obligations to enforce the law but also raises additional concerns. Probable cause exists when an officer has reasonable grounds to believe that a violation of a criminal law has occurred or is about to occur. The requirement of probable cause is found in both the Fourth Amendment of the United States Constitution and in state law. Trial courts and juries commonly make the determination as to whether there are

reasonable grounds to believe that a violation of a criminal law has occurred or not. It is inconsistent with state and federal law for an ordinance to declare that the odor of marijuana may never be used as probable cause for a search or seizure when, as a matter of law, there are certainly times when the odor of marijuana constitutes probable cause under state or federal law. The determination of probable cause is to be made on a case-by-case basis by the judicial branch. A legislative act of a city attempting to declare that no probable cause exists when in fact reasonable grounds exist to believe that there has been a violation of a criminal law likely violates constitutional separation of powers.

Additionally, the legislature has prohibited local governments and officials from adopting policies that result in anything less than full enforcement of Texas' drug laws. Texas Local Government Code § 370.003 reads:

The governing body of a municipality, the commissioners court of a county, or a sheriff, municipal police department, municipal attorney, county attorney, district attorney, or criminal district attorney may not adopt a policy under which the entity will not fully enforce laws relating to drugs, including Chapters 481 and 483, Health and Safety Code, and federal law (West 2021).

The Texas Constitution Art. I, § 28, states that “[n]o power of suspending laws in this State shall be exercised except by the Legislature.”

Article XI, Section 5 of the Constitution of the State of Texas authorizes general law cities in the State of Texas to have an election to become home rule cities. The City of San Marcos is a home-rule city and possesses the power of self-government. TEX. LOCAL GOV'T CODE § 51.072 (West 2021); San Marcos, Texas, Code of Ordinances, Part I, § 1.01. This enabling provision, however, also makes clear that

... no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.

Tex. Const. art. XI, § 5. Thus, a home-rule city's ordinance is unenforceable to the extent it is inconsistent with a state statute preempting the same subject matter. *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993). State law and a city ordinance will not be held repugnant to each other if any reasonable construction that leaves both in effect can be reached. *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016). Therefore, the Texas legislature's intent to provide a limitation on a home-rule city's self-government must be done with “unmistakable clarity.” *Id.* at 7-8; *see also Tyra v. City of Houston*,

822 S.W.2d 626, 628 (Tex. 1991) (legislature’s intent to limit self-government must be expressed in “clear and unmistakable language”).

The City of San Marcos’ ordinance eliminating the enforcement of marijuana laws appears to be in direct conflict with the Health and Safety Code provisions that in “clear and unmistakable language” criminalize the possession and delivery of even small quantities of marijuana. It also irreconcilable with the Local Government Code provision that forbids a municipality from enacting a policy under which the municipality does not fully enforce the Health and Safety Code’s criminal prohibitions. As such, it would seem the ordinance is void upon enactment.

A municipality may not enforce a void ordinance. *See City of Laredo v. Laredo Merchants Ass’n*, 550 S.W.3d 586, 589, 598 (Tex. 2018) (affirming judgment declaring city ordinance preempted by state law and therefore unenforceable); *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 679 (Tex. 2013). For example, in *Young v. City of Seagoville*, the plaintiff sought to enjoin a municipality from enforcing a city ordinance that required pool parlors to pay an annual license fee. *Young v. City of Seagoville*, 421 S.W.2d 485, 486 (Tex. Civ. App.—Dallas 1967, no writ). At the time the city ordinance had passed, the State of Texas prohibited the operation of pool parlors. *Id.* The city ordinance was in direct conflict with the state statute, and “[t]he ordinance was therefore void when enacted.” *Id.* Injunctive relief was granted in favor of the plaintiff. *Id.* at 488. It would seem the City of San Marcos’ ordinance is likewise unenforceable, and if the city attempted to discipline an officer for failing to abide by the requirements of a void ordinance, it could be exposed to similar injunctive action, or potential damages if the imposed discipline were shown to have harmed the officer.

Are Texas’ laws criminalizing marijuana possession set forth with “unmistakable clarity,” such that the ordinance was void upon enactment? If so, would attempts by the city to enforce a void ordinance expose it to injunctive or other legal action? On behalf of myself and interested members of the public, I respectfully request that the Attorney General issue an opinion on these issues pursuant to Texas Government Code, § 402.042.

Sincerely,



Wesley A. Mau
Criminal District Attorney
Hays County, Texas