



OFFICE OF THE CITY ATTORNEY

City of Charleston | P.O. Box 2749 | Charleston WV 25330 | 304-348-8031

MEMORANDUM

Date: December 18, 2020

To: Chief James A. "Tyke" Hunt, Charleston Police Department

From: Kevin Baker, City Attorney **KB**

Re: Distribution of Hypodermic Syringes, Municipal Code Section 78-381

☐ Urgent ☐ For review ☐ Please comment ☐ Please reply ☐ Please recycle

I have now completed my legal analysis of Municipal Code Section 78-381 and am writing today to share my analysis in order to assist in the Charleston Police Department's ongoing investigation. As explained more fully below, Section 78-381 ultimately does not require a person who seeks to distribute hypodermic syringes by giving those syringes away (rather than selling them) to have any state license.

Section 78-381 of the Municipal Code of the City of Charleston reads, in full, as follows:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell, market, or distribute any hypodermic syringes, needles and other similar objects used or designed for injecting substances into the human body, without obtaining and having any and all licenses required under state law to do so: except that, items distributed by or exchanged at a needle exchange program sponsored or approved by the Chief of Police of the Charleston Police Department, as provided by Subdivision III herein, are thereby approved and are not unlawful.

Applying this ordinance to a person or entity that is giving away hypodermic syringes, it serves to make it unlawful to distribute hypodermic syringes "without obtaining and having any and all licenses required under state law to do so[.]" It then creates an exception that makes clear any needle exchange program sponsored or approved by the Chief is not unlawful. In other words, if a person or entity does not have "any and all licenses required under state law" to distribute hypodermic syringes then it could seek approval or

sponsorship from the Chief of Police. That approval or sponsorship is not necessary, however, if the person or entity has “any and all licenses required under state law” to distribute hypodermic syringes.

This clearly begs the question, what licenses are required under state law to distribute hypodermic syringes? In order to address this question, I first sought the origin of the language used in Section 78-381 when Bill No. 7666 was adopted on September 21, 2015. Upon my review, I am confident the City Attorney’s Office at that time drafted the language based on West Virginia Code § 47-19-1, which reads in full:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with controlled substances, as defined in chapter sixty-a of this code, without obtaining a license therefor from the State Tax Commissioner. Such licenses shall be in addition to any or all other licenses held by applicant. The fee for such license shall be \$150.

Notably, West Virginia Code § 47-19-1 requires a special state license from the Tax Commissioner only for people who “sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with controlled substances[.]” A person selling hypodermic syringes would need this license, but it is only required for entities that sell paraphernalia. In other words, West Virginia Code § 47-19-1 does not require a license if the person is giving away hypodermic syringes.

Rather than performing an analysis regarding what licenses the state required for the distribution of hypodermic syringes, the City Attorney’s Office and City Council in 2015 simply required “any and all licenses required under state law[.]” While state law requires many different types of licenses for various professions, privileges, and programs, there is not a license required for the distribution of hypodermic syringes. In order to arrive at this conclusion, I spent time reviewing state code, agency materials and rules, and ultimately sought written confirmation from the West Virginia Department of Health and Human Resources (“DHHR”). DHHR is the logical entity that would have a licensing program for people distributing hypodermic syringes if such a license requirement exists. As you can see in the response letter attached to this memo as Exhibit A, DHHR “does not license persons or entities that distribute hypodermic syringes regardless of whether such distribution is in connection with any [DHHR] program.” The letter notes that “harm reduction programs must be **certified** by the Bureau for Public Health **in connection with the receipt of grant funding from [DHHR]**” (emphasis added). This certification is not a license requirement and is not even required to distribute hypodermic syringes, but is rather required in order to access grant funding from DHHR.

Municipal Code Section 78-381 does not require a person distributing hypodermic syringes to obtain the state certification, as it is both not a license and not **required** by the state for the distribution of hypodermic syringes. The certification option from DHHR simply does not fit within the requirements of the Municipal Code of the City of Charleston.

Conclusion

Because there are no licenses required by state law to distribute hypodermic syringes for free, Section 78-381 of the Municipal Code of the City of Charleston effectively places no restrictions on persons who seek to distribute hypodermic syringes without receiving compensation in exchange. Because there is no license required, there is no reason to reach the question of when the Chief of Police could or should approve a program that is not fully licensed.

Please note that this analysis is strictly limited to non-profit entities that are distributing hypodermic syringes free of charge. An entity selling such items would at least be required to obtain the license from the tax department required by West Virginia Code § 47-19-1. However, this requirement is only for entities conducting sales.

With this information and analysis, I recommend that your investigation into the operations of Solutions Oriented Addiction Response Corp. ("SOAR") with respect to Section 78-381 of Municipal Code be closed and that you declare that they are not in violation of that City ordinance because there are no licenses required by the State of West Virginia to operate a hypodermic syringe distribution program.

Should you have any questions, please feel free to contact me.



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MEMORANDUM

Date: January 12, 2021

To: Chief James A. "Tyke" Hunt, Charleston Police Department

From: Kevin Baker, City Attorney

KB

Re: Distribution of Hypodermic Syringes, Municipal Code Section 18-1035

☐ Urgent

☒ For review

☐ Please comment

☐ Please reply

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As a follow-up to my December 18, 2020 memo regarding Municipal Code Section 78-381, and in light of the Charleston Police Department's final report of investigation regarding S.O.A.R., I am writing today to provide my analysis with respect to Municipal Code Section 18-1035, which was also noted in the report of investigation. Although we discussed the problems with prosecuting a violation of this section in late 2020, I apologize for failing to put my legal analysis in writing until today.

Section 18-1035 of the Municipal Code is part of the City's street vendor ordinance. In relevant part, it requires people who "sell or offer for sale or barter any goods, wares, merchandise, food, confection or drink upon any street or sidewalk or any other city-owned property" to have a vending license and meet certain requirements. Based on the report, there is no evidence that S.O.A.R. is selling, offering for sale, or bartering. Rather, it appears as though they are distributing items for free and without expecting anything in return. Furthermore, they are licensed with the West Virginia Secretary of State as a non-profit entity, as shown in the attached Exhibit A. This type of activity by a non-profit does not require a vendor's license. Furthermore, the vending ordinance only applies to vendors who are operating on the street, sidewalk, or city-owned property, but the report states that the operations were conducted on private property. Therefore, Municipal Code Section 18-1035 does not apply to the facts in the report.

Combined with the legal analysis in my December 18, 2020 memo, there is no violation contained in the report that would allow for prosecution of S.O.A.R. under the Municipal Code of the City of Charleston.

Should you have any questions, please feel free to contact me.