
MEMORANDUM

DATE: November 30, 2007
TO: City Council Members
FROM: Russell Weeks
RE: Proposed Ordinance to Repeal an Ordinance Prohibiting the Solicitation of People to Sell Controlled Substances to conform *City Code* to *Utah Code*.
CC: Cindy Gust-Jenson, Lyn Creswell, Sam Guevara, Ed Rutan, Chris Burbank, Jennifer Bruno, Ken W. Pearce, Martha Stonebrook

Nothing in this memorandum purports to be a legal opinion.

This memorandum pertains to a proposed ordinance that would repeal Salt Lake City Ordinance 11.12.100 titled *Solicitation Of Person(s) With Intent To Have Another Commit An Offense Specified In Section 58-37-8, Utah Code Annotated*. The ordinance reads in part, "It is unlawful for any person to request, or solicit a controlled substance, or controlled substance precursor from another person, except as permitted by the Utah controlled substances act, section 63-37-1 et seq., *Utah Code Annotated*, or its successor." The penalty for violating the ordinance is a Class B misdemeanor. The Administration proposes to repeal Ordinance 11.12.100 because the ordinance limits the level of penalties for violating it to a Class B misdemeanor. The Administration contends that harsher penalties in state law for the same violations would be a more effective law enforcement tool.

The proposed ordinance is scheduled for a briefing at the City Council's work session December 4. The item also is scheduled for the Council's formal consideration the same night.

OPTIONS

- Adopt the proposed ordinance.
- Do not adopt the proposed ordinance.
- Postpone formal action on the proposed ordinance, if the City Council has any questions.

MOTIONS

- I move that the City Council adopt an ordinance repealing Section 11.12.100 of the Salt Lake City Code relating to the solicitation of person(s) with intent to have another commit an offense specified in Section 58-37-8 *Utah Code Annotated*.
- I move that the City Council consider the next item on the agenda.
- I move that the City Council consider this item at a later date. (Council Members may specify a date, if they wish to discuss the item more or seek more information.)

KEY POINTS

- The proposed ordinance would repeal *City Code* Section 11.12.100 that was adopted in 1995 with the intent to curb the sales of illegal drugs by targeting people who sought to purchase drugs.¹
- According to the Administration, the Class B misdemeanor penalty in *City Code* Section 11.12.100 is a penalty for illegal acts also prohibited in *Utah Code Annotated* Sections 58-37-8, 76-4-203 and 76-4-101.²
- The state laws carry harsher penalties for convictions of violating them, and the Administration contends that the harsher penalties would be more effective law enforcement tools.
- State laws that would replace *City Code* Section 11.12.100 also carry enhanced penalties for convictions of illegal activities taking place in a variety of public areas including parks.
- According to the Administration, a Utah Supreme Court ruling in 1969 holds that “when two statutory provisions define the same offense, a defendant must be sentenced under the provision carrying the lesser penalty.”³
- Under Utah law the following penalties apply to convictions for felonies and misdemeanors:
 - **First-degree felony:** Prison term of five years to life, maximum \$10,000 fine or both.
 - **Second-degree felony:** Prison term of one to 15 years, maximum \$10,000 fine or both.
 - **Third-degree felony:** Prison term of zero to five years, maximum \$5,000 fine or both.
 - **Class A misdemeanor:** Jail term of zero to one year, maximum \$2,500 fine or both.
 - **Class B misdemeanor:** Jail term of zero to 180 days, maximum \$1,000 fine or both.
 - **Class C misdemeanor:** Jail term of zero to 90 days, maximum \$2,500 fine or both.
- Just as Section 11.12.100 applies city-wide, the state laws that would replace it would apply city-wide.

MATTERS AT ISSUE/QUESTIONS FOR CONSIDERATION

- According to the Administration, the repeal of the Section 11.12.100 would have had an effect on the incarceration and prosecution of people arrested in the 49-block sweep of downtown Salt Lake City during the week of November 4 through 9.⁴
- State law prohibits municipalities from imposing criminal penalties in excess of a Class B misdemeanor.⁵
- If Section 11.12.100 is repealed, would the punishments for convictions of the state laws that would replace it fit the crimes?

BACKGROUND/DISCUSSION

The City Council unanimously adopted Section 11.12.100 on July 11, 1995, after a briefing five days earlier. The intent of the ordinance then was to disrupt the market for illegal drugs by targeting buyers. The intent also was to target “recreational” drug users in a manner similar to using decoys to arrest people who sought out prostitutes.⁶

The Administration proposes to repeal the Section because it contends that Utah law covers convictions of the same illegal activity but carries higher penalties. Again, the Administration contends that a 1969 Utah Supreme Court ruling holds that "when two statutory provisions define the same offense, a defendant must be sentenced under the provision carrying the lesser penalty." The Administration also contends in the transmittal letter that, "In today's drug world, a Class B misdemeanor has little, if any, deterrent effect."⁷

The Administration notes, "The Salt Lake City Prosecutor and the District Attorney also favor the repeal of City Code 11.12.100. By removing the effect of the *Shondel* doctrine (the 1969 Utah Supreme Court ruling), prosecutions can move forward with charges that carry stiffer penalties. This will have a much greater potential for decreasing drug crimes in the city."⁸

Briefly:

Utah Code Section 58-37-8(1)(a)(ii) makes it unlawful "for any person to knowingly and intentionally distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance."⁹ Penalties vary depending on the kind and amount of controlled or counterfeit substance involved in the arrest of someone convicted of breaking the law. However, the penalties range from second-degree felonies to Class A misdemeanors.

Utah Code Section 76-4-203 makes a person guilty of criminal solicitation if "with intent that a felony be committed, he solicits, requests, commands, offers to hire, or importunes another person to engage in specific conduct that ... would be a felony or would cause the other person to be a party to the commission of a felony."¹⁰ Generally, penalties involving controlled substances again range from second-degree felonies to Class A misdemeanors.

Utah Code Section 58-37-8(2) makes it unlawful "for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance..."¹¹

The penalties for violating the provision are:

- (1) a second degree felony if the substance is marijuana in an amount greater than 100 pounds;
- (2) a third degree felony if the substance is a Schedule I or II substance or marijuana in an amount less than 100 pounds but more than 16 ounces; or
- (3) a class A misdemeanor if the substance is marijuana in an amount less than 16 ounces.

Utah Code 76-4-101 makes it a crime to attempt to commit a crime. A person is guilty of an attempt if he engages in conduct constituting a "substantial step" (defined as conduct "strongly corroborating the actor's mental state") toward the commission of the crime and intends to commit the crime. The penalties for an attempt to commit a crime are one degree less than the penalty for the actual crime.¹²

The Administration also notes that *Utah Code Annotated* Section 58-37-8(4) contains provisions that enhance the penalties for convictions of illegal drug activities that occur: "

- (i) in a public or private elementary or secondary school or on the grounds of any of those schools;
- (ii) in a public or private vocational school or postsecondary institution or on the

grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in or on the grounds of a library;

(ix) within any area that is within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i), (ii), (iv), (vi), and (vii).

It is conceivable, then, that someone convicted of attempting to commit a crime under Utah Code 76-4-101 involving controlled substances and who received a penalty one degree less than the actual crime would have the lessened penalty increased under enhancements prescribed for attempting to commit a crime in an area listed in Section 58-37-8(4).

Finally, the Administration contends that had state law been in effect during an early November 49-block sweep of people involved in the sale or purchase of illegal drugs, the effect of the sweep would have been greater.

According to *The Salt Lake Tribune*, "Undercover police officers purchased drugs from small-time dealers in a 49-block area from State Street to 600 West and North Temple to 600 South. As dealers were taken off the street, officers took their places and focused on buyers."

The net result of the sweep was a total of 946 arrests, according to the *Deseret News*. Of that number, 87 were arrested on drug distribution and 165 were arrested on drug solicitation charges. According to the Administration, the 165 people were issued Class B misdemeanor citations under City Code 11.12.100.

"If the ordinance had been repealed, the same 165 individuals would have been charged with either a Class A misdemeanor for attempted possession or a third-degree felony for criminal solicitation, and all of the 165 individuals would have been arrested and taken to jail. Additionally, if the criminal enhancement had been available ... charges for attempted possession occurring within Pioneer Park would have increased to third-degree felonies, and the charges for criminal solicitation occurring with Pioneer Park would have increased to second-degree felonies," according to the Administration.¹³

Although one after-effect of the sweep was the highlighting of the apparent lack of capacity of the Salt Lake County Jail, the penalties for felony convictions are markedly higher than for Class B misdemeanors.

¹ Please see attached City Council meeting minutes from July 11, 1995, and staff report dated June 30, 1995.

² Please see attached memorandum from Senior City Attorney Martha S. Stonebrook.

³ Transmittal letter to City Council, Page 1.

⁴ Memorandum from Senior City Attorney Martha S. Stonebrook.

⁵ Ibid.

⁶ City Council meeting minutes from July 11, 1995, and staff report dated June 30, 1995.

⁷ Transmittal letter, Page 2.

⁸ Ibid.

⁹ Memorandum from Senior City Attorney Martha S. Stonebrook.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

NOV 06 2007



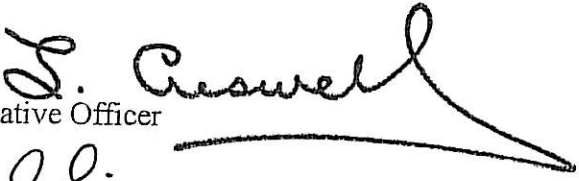
SALT LAKE CITY CORPORATION
POLICE DEPARTMENT




CHRIS BURBANK
CHIEF OF POLICE

ROSS C. "ROCKY" ANDERSON
MAYOR

COUNCIL TRANSMITTAL

TO: Lyn Creswell, Chief Administrative Officer 

FROM: Chris Burbank, Chief of Police 

SUBJECT: Repeal of Salt Lake City Ordinance 11.12.100

DOCUMENT TYPE: Ordinance

BUDGET IMPACT: None

STAFF CONTACTS: Assistant Chief Ken W. Pearce, Investigations Bureau
Senior City Attorney Martha S. Stonebrook

BACKGROUND/DISCUSSION: At this time, City Code 11.12.100 (Solicitation of Person(s) With Intent to Have Another Commit An Offense Specified in Section 58-37-8, Utah Code Annotated) makes it a Class B misdemeanor for "any person to request, or solicit a controlled substance, or controlled substance precursor from another person, except as permitted by the Utah controlled substances act." The punishment imposed by this ordinance is less than the punishments imposed by state statutes that prohibit the same conduct. (See, e.g. U.C.A. §58-37-8 and U.C.A. §76-4-102). Pursuant to the doctrine established by the Utah Supreme Court in *State v. Shondel*, 453 P.2d 146 (Utah 1969), when two statutory provisions define the same offense, a defendant must be sentenced under the provision carrying the lesser penalty. Because of this, Salt Lake City police officers engaged in drug enforcement must issue citations under City Code 11.12.100 rather than utilize the state statutory provisions that make the same conduct a Class A misdemeanor or a felony of various degree.



Additionally, because our officers must cite under City Code 11.12.100, they are not able to take advantage of the enhancement provisions of the Utah controlled substances act. (See, e.g. U.C. A. 58-37-8(4)). Enhanced penalties apply when drug crimes occur in certain places, including but not limited to, public or private elementary or secondary schools or in public parks. If a person is guilty of committing a drug crime in an area identified in U.C.A. 58-37-8(4), the person is guilty of a first degree felony or, if the classification of crime is less than a first degree felony, the person is guilty of one degree more than the maximum penalty prescribed for that offense. City Code 11.12.100 severely limits the enforcement powers of the police department because drug buyers face, at most, a Class B misdemeanor and face no enhanced penalty if they conduct their criminal activity in our parks, schools or other prohibited places. In today's drug world, a Class B misdemeanor has little, if any, deterrent effect.

By repealing City Code 11.12.100, the police department, as well as the City Prosecutor's Office and the District Attorney's Office, will have stronger enforcement tools to combat the pervasive drug activity that plagues our city. Once City Code 11.12.100 is repealed, that same activity can be charged as a Class A misdemeanor or as a felony of various degree depending on the conduct.

The Salt Lake City Prosecutor and the District Attorney also favor the repeal of City Code 11.12.100. By removing the effect of the *Shondel* doctrine, prosecutions can move forward with charges that carry stiffer penalties. This will have a much greater potential for decreasing drug crimes in the city.

RECOMMENDATION: Repeal City Code 11.12.100

SALT LAKE CITY ORDINANCE
No. _____ of 2007
(Solicitation of Person(s) with Intent to Have Another Commit
an Offense Specified in Section 58-37-8, Utah Code Annotated)

AN ORDINANCE REPEALING SECTIONS 11.12.100, *SALT LAKE CITY CODE*,
RELATING TO SOLICITATION OF PERSON(S) WITH INTENT TO HAVE ANOTHER
COMMIT AN OFFENSE SPECIFIED IN SECTION 58-37-8, UTAH CODE ANNOTATED.

Be it ordained by the City Council of Salt Lake City, Utah:

SECTION 1. That Section 11.12.100, *Salt Lake City Code*, pertaining to solicitation of
person(s) with intent to have another commit an offense specified in Section 58-38-8, Utah Code
Annotated, is repealed.

~~11.12.100 Solicitation Of Person(s) With Intent To Have Another Commit An Offense Specified
In Section 58-37-8, Utah Code Annotated:~~

~~A. 1. Solicitation Unlawful: It is unlawful for any person to request, or solicit a
controlled substance, or controlled substance precursor from another person, except as
permitted by the Utah controlled substances act, section 63-37-1 et seq., Utah Code
Annotated, or its successor.~~

~~2. Definitions:~~

~~a. "Controlled substance" means a drug, substance, or immediate precursor
as defined by section 58-37-2(4), Utah Code Annotated, or its successor.~~

~~b. "Controlled substance precursor" means any material defined as a
controlled substance precursor by section 58-37e-3(2), Utah Code Annotated, or
its successor.~~

~~B. Violation of this section is a class B misdemeanor. (Ord. 57-95 § 1, 1995)~~

SECTION 2. This ordinance shall take effect immediately upon the date of its first publication.

Passed by the City Council of Salt Lake City, Utah this _____ day of _____, 2007.

CHAIRPERSON

ATTEST:

CHIEF DEPUTY CITY RECORDER

Transmitted to Mayor on _____.

Mayor's Action: _____ Approved. _____ Vetoed.

MAYOR

ATTEST:

CHIEF DEPUTY CITY RECORDER

(SEAL)

Bill No. _____ of 2007.

Published: _____.

MAYOR

ATTEST:

CHIEF DEPUTY CITY RECORDER

(SEAL)

Bill No. _____ of 2007.

Published: _____.

*approved as to form:
Martha Stonebrook
Senior City Attorney
11/06/07*

City Council Minutes
July 6, 1995
Work Session

No. 1. Receive A Briefing Regarding An Ordinance Relating To Soliciting For Drugs.

Lt. Scott Atkinson, Greg Hawkins and Russell Weeks, briefed the Council from the attached handout. Mr. Weeks said the intent of the ordinance was to reduce the number of drug sellers in the City by disrupting the market. Lt. Atkinson said the Police would target buyers coming into Salt Lake City to open drug markets. He said currently drug dealers were targeted by undercover officers set up to purchase drugs. He said this ordinance allowed the Police Department to target the demand site and buyers.

Lt. Atkinson said breaking the demand would help eliminate drug dealers. He said this ordinance was similar to the solicitation for sex acts ordinance. He said once the ordinance was in place, when dealers approached an officer to sell drugs, the officer would be able to arrest them by citation or physically taking them into custody. Lt. Atkinson said the ordinance would discourage the recreational drug user more than the habitual user. He said no money or drugs would be exchanged at anytime and the only interaction would be a conversation between the officer and the drug buyer.

Councilmember Godfrey asked if the conversation needed to be taped for evidence. Lt. Atkinson said it did not. Councilmember Godfrey said it would be the officer's word against the individual and asked what happened when the case went to Court. Mr. Hawkins said it was up to the Court to believe which party was telling the truth. Councilmember Reid said the ordinance would send a message to drug users that they ran the risk of buying from an undercover officer.

Mr. Weeks said the City Attorney's Office said it was up to the Police Officer to decide, when an offer to purchase was made, whether the charge would be a felony or a misdemeanor.

S T A F F R E P O R T

DATE: June 30, 1995
SUBJECT: Proposed ordinance to prohibit soliciting people to sell controlled substances.
STAFF REPORT BY: Russell Weeks
RECOMMENDED ACTION: Adopt ordinance
CC: Kay Christensen, Roger Cutler, Ruben Ortega, Greg Hawkins

BACKGROUND

The proposed ordinance would add a section to the Salt Lake City Code chapter regulating offenses against public order. The chapter falls under the broader title of "Public Peace, Morals and Welfare."

The proposed ordinance would make it a Class B misdemeanor for *"any person to request, or solicit a controlled substance, or controlled substance precursor from another person, except as permitted by the Utah Controlled Substances Act, 58-37-1"* and subsequent sections of the Utah Code. Class B misdemeanors carry maximum penalties of a \$1,000 fine, a six-month jail sentence, or both. The Controlled Substances Act contains various "schedules" listing the names of natural and manmade drugs, and chemicals that when combined or refined produce drugs. In general, the act lists drugs such as opium and its derivatives, cocaine and its derivatives, and hallucinogenics under either Schedule I or Schedule II. Utah law makes it a second-degree felony for most people to produce, possess, make, agree, consent, or offer to arrange to distribute controlled substances listed under Schedules I and II. Marijuana is listed as a Schedule I controlled substance, but generally, penalties involving marijuana are either third-degree felonies or Class A misdemeanors, particularly if less than a pound of marijuana is involved. The Controlled Substances Act goes on to say, *"Any person who attempts or conspires to commit any offense unlawful under this chapter is upon conviction guilty of one degree less than the maximum penalty prescribed for that offense."*

The Salt Lake City Police Department and City Attorney's Office have proposed the ordinance to try to reduce demand for illegal drugs by targeting drug buyers, according to police literature. Initially, police officers would focus on drug sales in and around City parks because parks, notably Pioneer Park, have become open-air drug markets in the last three years, according to Lt. Scott Atkinson. The majority of drug sales involve cocaine.

The Police Department estimates that "total drug-related crimes based on arrest increased 247 percent" from 1991 through 1994. According to Dave Doepner, the department's statistician, the percentage figure is from the Uniform Crime Report Arrest Summary. The summary is done monthly and sent to the state and to the FBI for annual crime reports. The

summary represents the most serious charge listed when an arrest is made, according to Mr. Doepner. The raw numbers for drug arrests follow: 1991 -- 635; 1992 -- 735; 1993 -- 1,305; and 1994 -- 2,201.

As you can see from the attached grid titled "Drug Sales Cases 1994," police officers made about 400 drug sales arrests last year. The figure represents those cases where officers actually purchased controlled substances from sellers. Two areas roughly bordered by South Temple, Main Street, 400 South, and 800 West accounted for 68 percent of the cases. The second attachment, titled "Dangerous Drug Cases by Grid," shows the distribution of all illegal drug cases in the City. The cases range from found needles to the most serious crimes involving drugs. An area roughly bordered by 400 North, 400 East, 800 South, and 800 West accounted for about 64 percent of the total 2,813 cases. You may notice that a significant number of cases occurred between South Temple, 400 East, 400 South, and 800 West.

The Police Department says the proposed ordinance would be useful for two reasons. First, it would help eliminate open-air drug markets in the City by making the purchase of controlled substances more uncertain for "recreational" drug buyers. The uncertainty among buyers in turn is expected to make open-air markets less profitable, forcing sellers to relocate. Apparently, one reason open-air drug markets flourish nationwide is they eliminate many buyers' dread of having to go into a house or building where they feel unsafe. Law enforcement agencies still largely focus on arresting sellers of controlled substances, leaving buyers of small quantities of illegal drugs feeling relatively immune from having to contend with either the law or police. Second, under current laws and ordinances, when police focus on drug purchasers officers must follow a relatively complicated and time-consuming process in which they must prove that a drug sale actually took place. The proposed ordinance would allow an officer to arrest or issue a citation to drug buyers when they approach an officer, propose a purchase and agree to a price. The same practice is used to arrest people who solicit sex from prostitutes, which is why the Police Department and Attorney's Office compare the proposed ordinance to the City's sexual intercourse and sex acts for hire ordinance.

The proposed ordinance is somewhat different from other ordinances the Police Department cited, and it is somewhat different from other efforts around the nation to eliminate open air markets.

A major difference between the proposed ordinance and other ordinances and practices in the rest of the nation is the ordinance and Police Department policy avoid using controlled substances or items resembling controlled substances to make an arrest. The proposed ordinance would require only a proposal to purchase and an agreement on price. The Police Department apparently has at least an oral policy in which, if the ordinance is adopted, officers would not use drugs or anything resembling drugs to enforce the ordinance. A Lt. Liraldi of the Los Angeles Police Department said that department uses items that resemble drugs when officers there plan to arrest buyers. Officers in Roanoke and Martinsville, Va., have manufactured substances that "look like crack (cocaine) nuggets" with "a small amount of diluted cocaine on it," according to a news story in the Roanoke Times & World News. The article went on to say that the practice has drawn criticism there and elsewhere, but the practice has been upheld by federal courts. However, the Martinsville prosecutors opposed the idea when it first was introduced because they believed having police sell drugs would look bad in the public eye, the story said. In addition, officers in the Virginia cities "are instructed not to flag down potential suspects but

Park. The park has been the focus of police attention for about two years, and officers' work in the area has had some effect. However, one of the effects has been the shift of some drug sales out of the park to areas in the downtown, according to the Police Department. The park and the south downtown have been and will be the focus of much public and private investment in the next few years in an effort to make them attractive places to live and work. The proposed ordinance may help foster the attraction.

The proposed ordinance also appears to comport with one or more objectives in the City's strategic plan. Objective E of the plan reads: *The City will include a wide variety of affordable housing opportunities in attractive, friendly neighborhoods that provide a safe environment for families.* One of the "action steps" for the objective is *"Identify and suppress illegal drug activity,"* and two of the "progress indicators" for the action step are *"number of drug-related case investigations,"* and *"number of arrests of 'street dealers.'"* Obviously, the proposed ordinance does not address arresting "street dealers," but it attacks the presence of dealers from another direction, their customer base.

One attractive facet of the proposed ordinance is that it not only might disrupt drug retailers' customer base, it returns the responsibility for flourishing drug markets to drug buyers who, though not necessarily addicts, are the people really responsible for the strong, profitable, and prolonged drug trade and the condition of some areas in the City where they do not live. However, the Council must weigh that against concerns about entrapping people into committing crimes. Ordinances and laws with more severe penalties and, apparently, more aggressive forms of enforcement that have created questions about entrapment appear to have been upheld by courts elsewhere in the nation.

Finally, the Police Department says that the proposed ordinance would require no increase in the number of officers. Lt. Atkinson said the proposed ordinance would cut the amount of officers' time because the standards for making a case would be simpler.

OPTIONS

1. Do not adopt proposed ordinance.
2. Adopt proposed ordinance

RECOMMENDATION

Option No. 2.

RECOMMENDED MOTION

I move the City Council adopt ordinance 11.12.80 prohibiting soliciting the sale of controlled substances from another.

wait until the officers are approached” to avoid the appearance of entrapment, according to the news article.

Another major difference between the proposed ordinance and other ordinances is the degree of penalties for attempts to possess a controlled substance. According to the LAPD’s Lt. Liraldi, the department’s officers work with the L.A. District Attorney’s office when it periodically arrests drug buyers where selling drugs in open-air markets has become a problem. Buyers are charged under California state law which places attempts to buy illegal drugs one-degree less than actually possessing the drugs. Utah’s law is similar. As written earlier in this paper, possession of a Schedule I or II controlled substance generally is a second-degree felony, and possession of marijuana is either a third-degree felony or Class A misdemeanor. Penalties for attempts to possess a controlled substance are, upon conviction, one-degree less than actual possession. That means attempts to possess a Schedule I or II controlled substance theoretically are third-degree felonies, and attempts to possess marijuana are either Class A or Class B misdemeanors. The Police Department contends that the County District Attorney’s Office prosecutes few attempted possession cases because its caseload for more serious crimes is too great. Chief Deputy District Attorney Bud Ellett confirms that the office prosecutes few attempted possession cases, but says that is because most of the attempted possession cases already are filed as misdemeanors and are filed in 3rd Circuit Court. The District Attorney’s Office does and will prosecute attempted possession cases when they are felonies, Mr. Ellett said.

Tacoma, Wash., has two ordinances pertaining to illegal drug activities. The first makes it unlawful to *“Offer to sell, offer to purchase, or purchase any controlled substance with the intent to sell or purchase any such controlled substance ...”* The second makes it unlawful *“for any person to loiter in or near any thoroughfare, place open to the public, or near any public or private place in a manner and under circumstances manifesting the purpose to engage in drug-related activity ...”* Tacoma Assistant City Attorney Chris Bacha, who advises the Tacoma Police Department, said that department uses the first ordinance to focus on mid-level drug sellers and has never used the ordinance to target buyers because of concerns about entrapment. Mr. Bacha said Tacoma police rely more on the second ordinance prohibiting loitering to deal with open-air markets.

ANALYSIS

That the proposed ordinance would be included under the “Offenses Against Public Order” chapter of Title 11 says much about the proposed ordinance’s intent. Like programs in other law enforcement jurisdictions nationwide, the Police Department appears to have approached initiating the proposed under the “broken windows” theory about how crime is fostered. To recap the theory briefly, it holds that the physical condition of a neighborhood or area can influence the kinds of social elements attracted to it. However, there is a “chicken or egg” quality to the theory because anti-crime programs in other cities in the nation, notably Tampa, Fla., have included moving criminal elements out of neighborhoods as if they were a physical condition. The proposed ordinance appears aimed at doing the same thing.

As you can see from the attached grids, several areas in Salt Lake City appear to be likely areas where the ordinance might be enforced immediately. Those areas include the south downtown and its immediate environs from roughly 400 East to 400 West, including Pioneer

MEMORANDUM

Date: November 16, 2007

To: Mr. Russell Weeks

From: Martha S. Stonebrook, Senior City Attorney
Assistant Chief Ken Pearce

Re: Repeal of Ordinance 11.12.100

You have asked for supplemental information to support the Police Department's request to repeal Salt Lake City Ordinance 11.12.100. Specifically, you have raised the following issues:

1. What is the specific citation in Utah Code Annotated Section 58-37-8 that covers the same offenses in City Code Section 11.12.100?
2. Would the proposed repeal of the Section 11.12.100 have had an effect on the incarceration and prosecution of people arrested in the 49-block sweep of downtown Salt Lake City?
3. Would amending the existing ordinance be a better policy than repealing it?

Issue 1:

Salt Lake City Ordinance 11.12.100 anticipates two types of conduct. The first type of conduct is set forth in the title of the ordinance, i.e. making it unlawful for a person to request or solicit another person to commit an unlawful act, such as selling or distributing drugs. The body of the ordinance makes it unlawful for any person to request or solicit a controlled substance or a controlled substance precursor, i.e. to attempt to buy a controlled substance and/or controlled substance precursor. The ordinance makes the two types of conduct a class B misdemeanor.

The first type of conduct is prohibited by Utah law as follows:

UCA Section 58-37-8(1)(a)(ii) makes it unlawful "for any person to knowingly and intentionally distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance." The penalties for violating this provision are as follows:

- (1) a second degree felony if the substance is a Schedule I or Schedule II controlled substance or gammahydroxybutyric acid as listed in Schedule III and upon a second or subsequent conviction the penalty becomes a first degree felony;

- (2) a third degree felony if the substance is a Schedule III or IV controlled substance or marijuana and upon a second or subsequent conviction the penalty becomes a second degree felony;
- (3) a class A misdemeanor if the substance is a Schedule V controlled substance and upon a second or subsequent conviction the penalty becomes a first degree felony.

UCA Section 76-4-203 a person is guilty of criminal solicitation if "with intent that a felony be committed, he solicits, requests, commands, offers to hire, or importunes another person to engage in specific conduct that ...would be a felony or would cause the other person to be a party to the commission of a felony."

The penalty for criminal solicitation to commit:

- (1) a capital felony is a first degree felony;
- (2) a first degree felony is a second degree felony;
- (3) a second degree felony is a third degree felony;
- (4) a third degree felony is a class A misdemeanor.

Therefore, by criminally soliciting a person to distribute or to agree, consent, offer, or arrange to distribute a controlled substance classified as a second degree felony (Schedule I and II substances and gammahydroxybutyric acid), the person soliciting would be guilty of a third degree felony. By criminally soliciting a person to distribute or to agree, consent, offer, or arrange to distribute a controlled substance classified as a third degree felony (Schedule III or IV substances and marijuana), the person would be guilty of a class A misdemeanor.

By repealing Ordinance 11.12.100, greater penalties can be imposed for the same conduct. Rather than being limited to only charging a person with a class B misdemeanor, a person soliciting drugs such as heroin, cocaine, or methamphetamine could be charged with a third degree felony. Similarly, a person soliciting drugs such as marijuana or anabolic steroids could be charged with a class A misdemeanor.

Repealing Ordinance 11.12.100 would also allow the enhancement provisions of UCA 58-37-8(4) to be applied. This would mean that if any of the prohibited conduct occurred, for instance, in a park, the penalty the person receives if found guilty will be one degree more than the maximum penalty prescribed for that offense (i.e. a class A misdemeanor committed in a place where enhancements apply becomes a third degree felony; a third degree felony becomes a second degree felony; a second degree felony becomes a first degree felony).

The second type of conduct is prohibited by Utah law as follows:

UCA Section 58-37-8(2) makes it unlawful "for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance..."

The penalties for violating this provision are:

- (1) a second degree felony if the substance is marijuana in an amount greater than 100 pounds;
- (2) a third degree felony if the substance is a Schedule I or II substance or marijuana in an amount less than 100 pounds but more than 16 ounces; or
- (3) a class A misdemeanor if the substance is marijuana in an amount less than 16 ounces.

UCA 76-4-101 makes it a crime to attempt to commit a crime. A person is guilty of an attempt if he engages in conduct constituting a "substantial step" (defined as conduct "strongly corroborating the actor's mental state") toward the commission of the crime and intends to commit the crime. The penalties for an attempt to commit a crime are one degree less than the penalty for the actual crime.

Therefore, by attempting to possess a controlled substance or controlled substance precursor, a person would be attempting to commit a second degree felony, a third degree felony, or a class A misdemeanor, depending on what substance the person is attempting to possess (see above). Most recreational drug buyers attempt to purchase (i.e. attempt to possess) drugs, such as cocaine. If actually possessed, the crime is charged as a third degree felony. The attempted possession crime is charged as a class A misdemeanor (see above).

By repealing Ordinance 11.12.100, greater penalties can be imposed for the same conduct. Rather than being limited to only charging a person with a class B misdemeanor, a person attempting to possess Schedule I and II controlled substances (and larger amounts of marijuana) would be charged with a class A misdemeanor. Only attempts to possess less than 16 ounces of marijuana would carry the same penalty i.e. a class B misdemeanor, as Ordinance 11.12.100.

Repealing Ordinance 11.12.100 would also allow the enhancement provisions of UCA 58-37-8(4) to be applied. This would mean that if any of the prohibited conduct occurred, for instance, in a park, the penalty the person receives if found guilty will be one degree more than the maximum penalty prescribed for that offense (i.e. a class B misdemeanor committed in a place where enhancements apply becomes a class A misdemeanor; a class A misdemeanor becomes a third degree felony; a third degree felony becomes a second degree felony; a second degree felony becomes a first degree felony).

Issue 2:

During the week of November 4 - 9, 2007 Salt Lake City Police Department, in cooperation with other agencies, conducted an enforcement operation to crack down on illegal drug activity in the Pioneer Park/Downtown area. During that operation, 165 class B misdemeanor citations were issued for violations of Ordinance 11.12.100. Because they were only charged with a class B misdemeanor, none of those 165 individuals were taken to jail. All of those citations were for solicitation of cocaine.

If the ordinance had been repealed, the same 165 individuals would have been charged with either a class A misdemeanor for attempted possession or a third degree felony for criminal solicitation and all of the 165 individuals would have been arrested and taken to jail. Additionally, if the criminal enhancements had been available (i.e. if the ordinance had been repealed), charges for attempted possession occurring within Pioneer Park would have increased to third degree felonies and the charges for criminal solicitation occurring within Pioneer Park would have increased to second degree felonies.

Issue 3:

Amending the ordinance would definitely **not** be preferable to repealing the ordinance. The foremost reason is the obvious one: Under state law, a municipality may not impose a criminal penalty in excess of a class B misdemeanor. UCA Section 10-3-703(1). Therefore, no matter how the ordinance might be amended, the penalty would still be a class B misdemeanor. Repeal of the ordinance would allow law enforcement and prosecutors to really crack down on illegal drug crimes by utilizing the stronger penalties and enhancement provisions set forth in state law without falling victim to the doctrine established in *State v. Shondel*, 453 P.2d 146 (Utah 1969), which held that when two statutory provisions define the same offense, a defendant must be sentenced under the provision carrying the lesser penalty. Repealing the ordinance would eliminate the class B misdemeanor penalty thereby allowing prosecutors of drug offenses to seek the maximum penalties allowed under Utah law.

The Salt Lake Tribune

Police sting nets 658 suspects, but cops discouraged

S.L. County sheriff says huge effort likely won't have a lasting effect

By Nathan C. Gonzalez
The Salt Lake Tribune

Article Launched: 11/15/2007 01:10:14 AM MST

When two people were stabbed - one fatally - in Salt Lake City's Pioneer Park in mid-October, area residents and business owners pleaded with police to clamp down on violence and drug activity at the park.

Though Salt Lake City police seemed to answer that call - arresting 658 people in a 49-block sting between Nov. 5 and 10 - police and Salt Lake County sheriff's officials said all the work probably won't put a big dent in the park's longtime problem with crime.

The arrests included those now facing felony and misdemeanor drug charges, while others were picked up on outstanding warrants. Police also apprehended 68 undocumented immigrants with criminal warrants who are now in the custody of federal Immigration and Customs Enforcement officers and will likely be

deported, police said.

Though Salt Lake County Sheriff James Winder called the recent police operation "Herculean," he has grown frustrated that thousands of work-hours and taxpayer dollars spent likely won't have a lasting effect.

"I am personally very frustrated with our ability to actually impact this operation . . . that, quite frankly, will have limited impact because of our inability to house these people for any duration of time," said Winder, who earlier this week lost a battle with the Salt Lake County Council for funding toward additional jail space at the county's Oxbow jail.

"Granted, jail is not the only answer, but sometimes it's the necessary answer to help combat this kind of activity," he said.

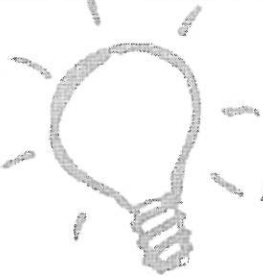
Undercover police officers purchased drugs from small-time dealers in a 49-block area from State Street to 600 West and North Temple to 600 South. As dealers were taken off the street, the officers took their places and focused on buyers.

Of those arrested, 87 were charged with distributing a controlled substance and 165 on drug-solicitation charges.

Discouraging to law enforcement officials is that nearly 71 percent of those arrested have lived in the state fewer than four years.

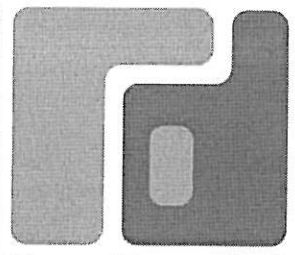
"Unfortunately, we have a reputation right now that you don't stay in jail very long

Advertisement



A bright idea in online advertising.

PrinterStitial[®] ads by Format Dynamics.



FormatDynamics[®]

Print Powered By  **FormatDynamics[™]**

The Salt Lake Tribune

- that there is no consequence for your actions here in Salt Lake," said Salt Lake City Police Chief Chris Burbank.

Winder said in some instances, the county has been unable to hold offenders long enough for warrants to be processed.

"If we cannot adequately adjudicate these cases, the people leave our facility, come back here and impact this city. That is unfair," Winder said.

City and county prosecutors called on local and state lawmakers to work together to develop policies designed to punish and treat drug offenders to keep them from reoffending.

Salt Lake City prosecutor Sim Gill said officials can neither arrest nor prosecute their way out of the problem.

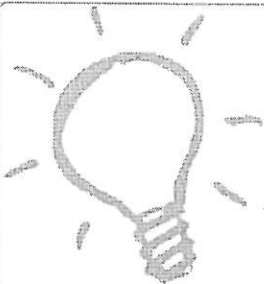
City officials have long wrangled over whether to place surveillance cameras at Pioneer Park, and Burbank said his department is still studying the idea. Aside from technology, what police need most is the public's help, he said.

Last week's arrests were a welcomed change for Luann Lakis, who lives and works nearby.

"Drug dealers know it's the cost of doing business," she said. "This is a thriving neighborhood. There is a lot of good energy. I'm going to do what I can do to make it a great place to live."

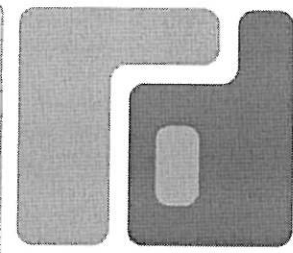
ngonzalez@sltrib.com

Advertisement




A bright idea in online advertising.

PrinterStitial® ads by Format Dynamics.



FormatDynamics®

Print Powered By  FormatDynamics™

The Salt Lake Tribune

Cracking down on drugs

Of the 658 arrests made in downtown Salt Lake City recently, nearly 200 were on out-of-state warrants. In fact, more than 70 percent of those apprehended were from outside Utah. Drug trafficking arrests included about 90 for cocaine solicitation.

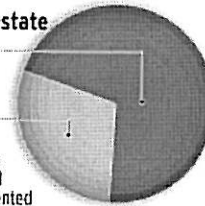
Out-of-state

70.83%

Utah

29.17%

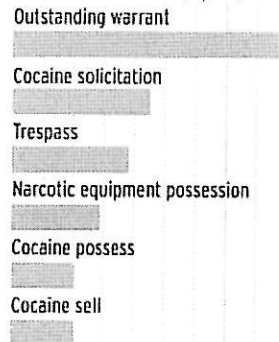
Note: Data exclude all undocumented arrestees



Source: Salt Lake City Police Department
The Salt Lake Tribune

Cracking down on drugs

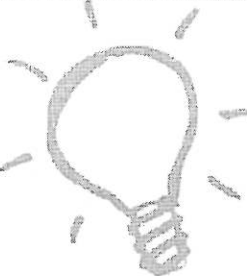
Arrest breakdown (top six)



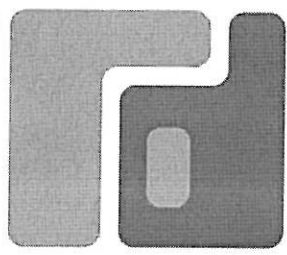
0 20 40 60 80 100 120 140 160 180

Source: Salt Lake City Police Department
The Salt Lake Tribune

Advertisement



A bright idea in online advertising.
PrinterStitial® ads by Format Dynamics.



FormatDynamics®

Print Powered By  FormatDynamics™

DESERET
Morning News

Drugs targeted in Pioneer Park

658 arrested during intense 6-day sting

By Pat Reavy

Deseret Morning News

Published: November 15, 2007

Salt Lake City police teamed up with federal immigration and state corrections officials for six days last week in an intense effort to clean up the area around Pioneer Park.

The result was 658 people arrested in the area from State Street to 600 West and from North Temple to 600 South. Eighty-seven of those arrests were for investigation of drug distribution and 165 for investigation of people trying to buy drugs.

"This is not the place to participate in drug activity," was the message Salt Lake City Police Chief Chris Burbank had for those arrested and others thinking about conducting drug transactions around the park.

Burbank called the numbers big, especially considering that after the first or second day of the operation, word had spread among dealers that police were clamping down.

Since summer, Pioneer Park has become a focal point in the city's efforts to combat an ongoing drug problem. Law enforcers have been especially concerned about the skyrocketing resurgence in the popularity of crack cocaine.

Burbank stood with other city, county and state leaders Wednesday to announce the success of last week's operation. He noted the effort wouldn't have worked without the cooperation of all agencies involved.

Because of the weeklong sting, the Salt Lake District Attorney's Office had 100 new felony cases to prosecute, and the Salt Lake City Prosecutor's Office had more than 355 new cases, he said.

The operation went 20 hours each day. Some undercover officers posed as drug dealers and others as drug buyers. Even longtime officers were amazed at some of the stories they came across.

In one incident, a man offered to trade stolen new shirts from a local chain department store for drugs. The man lifted his coat, revealing that he was wearing a stack of new shirts underneath. Salt Lake City police detective Jeff Bedard said that, a few years ago, designer jeans were being stolen in high quantities as drug dealers were willing to trade crack for jeans.

Another incident showcased the potential for drug deals to go bad and how some solicitors needed help for their drug addictions. A dealer sold a man two kernels of Trix cereal, convincing him they were actually colored balloons with drugs inside, Bedard said.

Uniformed officers also did their normal patrols during the six days, conducting strict enforcement of various crimes such as trespassing, disorderly conduct and open alcohol containers.

Once an arrest was made, the offender was taken to the Salt Lake Police Department's Pioneer Precinct, near 1000 South and 700 West, where a special room was set up for immediate booking.

Those arrested had mug shots and fingerprints taken. Agents from Immigration and Customs Enforcement had a table set up to deal with undocumented offenders, while Adult Probation and Parole had an agent on hand to deal with prisoners with outstanding warrants.

A total of 946 arrests were made citywide during the six-day period. More than 70 percent of all city arrests during that time period came from the targeted zone around Pioneer Park — an area that represented less than 1 percent of the city, according to police.

The drug arrests during those six days represented 8 percent to 10 percent of the drug arrests for the city for the entire year, Burbank said.

What made this operation more successful than others, however, was having the additional presence of AP&P and ICE. Nearly 180 of the people arrested already had outstanding warrants, according to police statistics.

A total of 68 people had federal holds placed on them for being undocumented aliens. The majority of people arrested already had been arrested in other states for drug-related offenses, and most had been in Utah less than four years, Burbank said.

Salt Lake County Sheriff Jim Winder praised the city for its efforts, then took a shot at the Salt Lake County Council, which on Tuesday rejected his \$5.9 million budget request to reopen the Oxbow Jail. Without a place to hold offenders, Winder said operations like the one the city conducted "will have limited impact."

"They're not in jail long enough to have warrants processed," he said.

Winder called on the council and Salt Lake County mayor to put more funding into jail space, saying alternatives to incarceration don't always work.

"Sometimes (jail) is the necessary answer to combat this type of activity," he said.

Salt Lake City prosecutor Sim Gill agreed that if incarceration is not an option, law enforcers lose their "credible threat."

"We will have no deterrent," he said.

Burbank said that, as of Wednesday, 68 percent of the people arrested last week were still in jail.

Gill said that, in addition to law enforcement, more funding was needed for drug programs to get offenders into rehabilitation.

"We shouldn't settle for moving the problem from one neighborhood to another," Gill said.

Some local residents and business owners attended Wednesday's news conference to show support for the police department's efforts and to encourage the media to also cover more positive events associated with the park.

Whether the increased police presence actually drives drug dealers and sellers away isn't the main point, according to residents.

"The difference is the hope we have in the neighborhood, knowing police have reinvested in the neighborhood," said resident Christian Harrison.

Rather than being frustrated, Harrison said residents are now hopeful. The next step, he said, is to get more residents out of their homes and using the park. Even Burbank noted that if the park went unused, less desirable elements would use the space.
