



INFORMATIONAL MEMORANDUM

TO: **Community Services and Safety Committee**

FROM: **Police Chief Eric Drever**

BY: **Deputy Chief of Police Eric Lund
City Attorney Kari Sand
City Prosecutor Karen Lentz**

CC: **Mayor Ekberg**

DATE: **August 22, 2023**

SUBJECT

An Ordinance adopting provisions of 2E2SSB 5536, the so-called "*Blake* fix," to allow city prosecution of drug possession consistent with Washington state law.

ISSUE

To adopt by reference new state statutes in chapter 69.50 RCW, prohibiting the possession of controlled, counterfeit, and legend drugs without a prescription, enabling City prosecution of those violations in Tukwila Municipal Court.

BACKGROUND

In 2021, the Washington State Supreme Court decided the case of *State v. Blake*, which struck down Washington's criminal statute prohibiting possession of a controlled substance. Prior to the Blake decision, possession was a class C felony. The court reasoned that the lack of a requirement to prove knowledge of possession did not force the state to prove criminal intent, violating the defendant's right to due process.

In response to the *State v. Blake* decision, the Legislature passed ESB 5476, which in part modified statutes prohibiting the possession of a controlled substance, counterfeit substance, legend drug, or 40 grams or less of cannabis, to require proof of knowing possession of the prohibited substances. These offenses are classified as misdemeanor crimes, punishable by up to 90 days in jail, a \$1,000 fine, or both. Prosecutors are encouraged to divert such cases for assessment, treatment, and other services. The modifications to these possession statutes were set to expire on July 1, 2023.

In May 2023, during a special session, the Washington Legislature passed 2E2SSB 5536, establishing a permanent "*Blake* fix." Pursuant to the bill, simple possession of controlled, counterfeit, and legend drugs without a prescription is prohibited. Violations of the new simple possession statutes are classified as either misdemeanors or gross misdemeanors.

ANALYSIS

Pursuant to Article XI, Section 11 of the Washington Constitution and RCW 35A.11.020, the city is authorized to enact ordinances and may impose penalties of fines not exceeding five thousand dollars or imprisonment for any term not exceeding one year, or both, for the violation of such ordinances, constituting a misdemeanor or gross misdemeanor. It is common throughout the Tukwila Municipal Code for the City to adopt existing state statutes for both misdemeanors and gross misdemeanors violations.

By function of state law, simple possession of controlled, counterfeit, and legends drugs is prohibited within the City. Adopting the prohibitions from 2E2SSB 5536 will enable the City Prosecutor to prosecute these violations in Tukwila Municipal Court.

FINANCIAL IMPACT

No financial impact is expected from the adoption of the Ordinance.

RECOMMENDATION

The Council is being asked to approve the Ordinance and consider this item at the August 28, 2023 Committee of the Whole meeting and subsequent August 28, 2023 Special Meeting. In order for the Ordinance to be effective immediately, a majority plus one (5 “yes” votes) of the whole membership of the Council is required consistent with RCW 35A.12.130.

ATTACHMENTS

Draft ordinance

DRAFT

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, AMENDING ORDINANCE NOS. 1363 §1 (PART), 1568 §2, AND 2049 §1, AS CODIFIED AT TUKWILA MUNICIPAL CODE (TMC) SECTION 8.07.010, "STATE STATUTES ADOPTED BY REFERENCE"; REPEALING ORDINANCE NO. 1363 §1 (PART), AS CODIFIED AT TMC SECTION 8.07.020, "POSSESSION PROHIBITED"; REPEALING ORDINANCE NOS. 1621 §1, 1808 §1, AND 2369 §1, AS CODIFIED AT TMC SECTION 8.07.040, "DRUG FREE ZONE – ENHANCED PENALTIES"; REENACTING TMC SECTION 8.07.020; PROVIDING FOR SEVERABILITY; DECLARING AN EMERGENCY AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, pursuant to Article XI, Section 11 of the Washington Constitution and RCW 35A.11.020, the City of Tukwila ("City"), a non-charter optional code city, is authorized to enact ordinances of all kinds relating to and regulating its local or municipal affairs, and may impose penalties of fines not exceeding five thousand dollars or imprisonment for any term not exceeding one year, or both, for the violation of such ordinances, constituting a misdemeanor or gross misdemeanor; and

WHEREAS, in 2021, the Washington State Supreme Court struck down RCW 69.50.4013 in *State v. Blake*, 197 Wn.2d. 170, 481 P.3d 521 (2021), holding that strict liability for drug possession is unconstitutional. Prior to the *Blake* decision, possession was a class C felony. The *Blake* court reasoned that the lack of a requirement to prove knowledge of possession did not force the state to prove criminal intent, violating the defendant's right to due process; and

WHEREAS, after *Blake*, the Washington State Legislature passed Engrossed Senate Bill ("ESB") 5476, which in part modified statutes prohibiting the possession of a controlled substance, counterfeit substance, legend drug, or 40 grams or less of cannabis, to require proof of knowing possession of the prohibited substances. These offenses were classified as misdemeanor crimes, punishable by up to 90 days in jail, a \$1,000 fine, or both. Prosecutors were encouraged to divert such cases for assessment, treatment, and other services; and

WHEREAS, ESB 5476 contained a sunset clause whereupon the bill's provisions would expire on July 1, 2023, unless the Washington State Legislature took further action; and

WHEREAS, on May 16, 2023, the Washington State Legislature passed Second Engrossed Second Substitute Senate Bill ("2E2SSB") 5536, which criminalized drug possession as either a misdemeanor or gross misdemeanor; and

WHEREAS, the City Council now considers it in the best interest of the community to adopt certain provisions of 2E2SSB 5536 by reference to align the Tukwila Municipal Code ("TMC") with State law to prohibit the knowing possession of the prohibited substances. Possession of a controlled substance and possession of a counterfeit substance are classified as gross misdemeanor crimes and carry a potential maximum sentence of 364 days in jail, a \$1,000 fine, or both. Possession of a legend drug and possession of an ounce or more of cannabis, or possession of any amount of cannabis for individuals under 21 years of age, remain misdemeanor crimes and carry a maximum sentence of 90 days in jail, a \$1,000 fine, or both; and

WHEREAS, the City Council also considers that rehabilitation and treatment are critical components to combating illicit drug use and desires to give those suffering from substance use disorders an opportunity to access that treatment in lieu of prosecution; and

WHEREAS, the City Council now desires to adopt the amendments to TMC Chapter 8.07, "Controlled Substances, Paraphernalia, Poisons and Toxic Fumes," as set forth in this ordinance to harmonize the chapter with changes to state law effectuated by enactment of 2E2SSB 5536, and to adopt by reference all misdemeanor crimes identified in State law as necessary to protect the public health, safety, and welfare, and the City Council finds that a public emergency exists requiring these amendments to become effective immediately upon adoption in order for the City to effectively enforce the changes made by the Washington State Legislature;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, HEREBY ORDAINS AS FOLLOWS:

Section 1. Adoption of Findings of Fact. The City Council hereby adopts the foregoing recitals and incorporates them herein as support for these amendments.

Section 2. TMC Section 8.07.010 Amended. Ordinance Nos. 1363 §1 (part), 1568 §2, and 2049 §1, as codified at TMC Section 8.07.010, "State Statutes Adopted by Reference," are hereby amended to read as follows:

8.07.010 State Statutes Adopted By Reference

The following statutes of the State of Washington, as now in effect or as may be subsequently amended, are hereby adopted by reference as if set forth in full herein [as to non-felonies](#):

RCW 69.41.030	Sale, delivery, or possession of legend drug without prescription or order prohibited—Exceptions—Penalty.
RCW 69.50.101	Definitions.
RCW 69.50.102	Drug Paraphernalia—Definitions.
RCW 69.50.204(d)(13)	Schedule I—Marijuana.
RCW 69.50.309	Containers.
RCW 69.50.4011	Counterfeit substances – Penalties.
RCW 69.50.4013	Possession of controlled substance – Penalty – Possession of useable cannabis, cannabis concentrates, or cannabis-infused products – Delivery.
RCW 69.50.4014	Possession of Forty Grams or Less of Marijuana—Penalty.
RCW 69.50.4016	Provisions not applicable to offenses under RCW 69.50.410.
RCW 69.50.412	Prohibited Acts: E—Penalties.
RCW 69.50.4121	Drug paraphernalia – Selling or giving – Penalty.
RCW 69.50.420	Violations – Juvenile driving privileges.
RCW 69.50.425	Misdemeanor Violations—Minimum Imprisonment.
RCW 69.50.435	Violations committed in or on certain public places or facilities – Additional penalty – Defenses – Construction – Definitions.
RCW 69.50.505	Seizure and Forfeiture.
RCW 69.50.506	Burden of Proof.
RCW 69.50.509	Search and Seizure of Controlled Substances.

Section 3. TMC Section 8.07.020 Repealed. Ordinance No. 1363 §1 (part), as codified at TMC Section 8.07.020, "Possession Prohibited," is hereby repealed, thereby eliminating this section.

~~**8.07.020—Possession Prohibited.**~~

~~No person shall possess any drug paraphernalia as defined in RCW 69.50.102 with the intent to use or employ the same for manufacturing and/or consuming controlled substances.~~

Section 4. TMC Section 8.07.040 Repealed. Ordinance Nos. 1621 §1, 1808 §1, and 2369 §1, as codified at TMC Section 8.07.040, "Drug Free Zone – Enhanced Penalties," are hereby repealed, thereby eliminating this section.

~~**8.07.040 Drug Free Zone – Enhanced Penalties.**~~

~~A. Any person who, in the drug free zones described in this section, violates TMC 8.07.020 or any subsequent amendment thereto by using or possessing drug paraphernalia, or who delivers, possesses with intent to deliver, or manufactures with intent to deliver drug paraphernalia, or who violates TMC 8.07.010 or any subsequent amendment thereto, by possessing 40 grams or less of marijuana, and any such violation occurs in or at any school or community center listed in TMC 8.07.040G, or within 1,000 feet of the perimeter of any such school or community center grounds, or in any public park listed in TMC 8.07.040G, may be punished by a fine of up to twice the fine or twice the imprisonment authorized by TMC 8.01.050 or any subsequent amendment thereto, or by both such doubled fine and imprisonment.~~

~~B. It is not a defense to a prosecution for a violation of this section that the person was unaware that the prohibited conduct took place while in a school, or within 1,000 feet of the school, or in a public park.~~

~~C. It is not a defense to a prosecution for a violation of this section that persons under the age of 18 were not present in the school, the public park, or at the time of the offense, or that school was not in session.~~

~~D. It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under 18 years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401(a) for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for any offense defined in any other section of this chapter or in any other law.~~

~~E. In a prosecution under this section, a map produced or reproduced by any school district or the City of Tukwila for the purpose of depicting the location and boundaries of the area on or within 1,000 feet of the perimeter of any property used for a school or community center, or the location of any park, or a true copy of such a map, shall be admissible and shall constitute prima facie evidence of the location and boundaries of those areas. This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or testimony to establish any element of the offense. This section shall not be construed as precluding the use or admissibility of any map or diagram if such map or diagram is otherwise admissible.~~

~~F. As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:~~

~~—1. "School" has the meaning under RCW 28A.150.010 or 28A.150.020. The term "school" also includes a private school approved under RCW 28A.195.010;~~

~~—2. “Public park” means land, including any facilities or improvements on the land, that is operated as a park by the State or local government.~~

~~—3. “Community center” means the City of Tukwila Community Center located at 12424—42nd Avenue South.~~

~~—4. “Library” means a free public library supported in whole or in part with money derived from taxation.~~

~~G.—As described in this section, the following areas are designated as drug free zones, subject to the provisions of this section:~~

~~—1. Schools (includes 1,000-foot buffer zone):~~

a	Foster High School	4242 S. 144th
b	Showalter Middle School	4628 S. 144th St.
c	Tukwila Elementary	5939 S. 149th St.
d	Cascade View Elementary	13601—32nd Ave. S.
e	Thorndyke Elementary	4415 S. 150th St.
f	Aviation High School	9229 East Marginal Way S.
g	Academy Schools/ Children’s Academy	14601 Interurban Ave. S.

~~—2. Parks:~~

a	Duwamish Park	42nd Ave. S./S. 116th St.
b	Codiga Park	12535 50th Pl. S.
c	Riverton Mini Park	45th Ave. S./S. 133rd St.
d	57th Avenue Park	57th Ave. S./S. 133rd St.
e	Hazelnut Park	59th Ave. S./S. 147th St.
f	Fort Dent Park	Southcenter Blvd./Interurban Ave. S.
g	Tukwila Park	65th Ave. S./S. 153rd St.
h	Ikawa Park	6200 Southcenter Blvd.
i	Bicentennial Park	Christensen Rd./Strander Blvd.
j	Duwamish/Green River Trail	Part of valley river trail system along shores of the Duwamish/Green River
k	Interurban Trail	S. 180th to north City limits
l	Crestview Park	42nd Ave. S./S. 162nd St.
m	Crystal Springs Park	51st Ave. S./S. 158th St.
n	Joseph Foster Memorial Park	53rd Ave. S./S. 137th St.
o	Southgate Park	40th Ave. S./S. 133rd St.
p	Community Center Park	42nd Ave. S./S. 124th
q	Riverton Park	4101 S. 131st St.
r	Tukwila Pond Park	S. 168th/Strander Blvd.
s	Designated park trails	
t	Cascade View Community Park	37th Ave S. & S. 142nd St.
u	Duwamish Hill Preserve	3800 S. 115th St.
v	Macadam Wetlands Park	S. 144th St./Macadam Rd.
w	Cecil Moses Park	11013 W. Marginal Pl.

~~—3. Community Centers:~~

a	Tukwila Community Center	12424—42nd Ave. S.
b	Tukwila Heritage and Cultural Center	14475 59th Ave. S.

~~—4. Libraries:~~

a	Foster Library	4060 S. 144th
b	Library Connection @ Southcenter	1115 Southcenter Mall

Section 5. Section Reenacted. TMC Section 8.07.020 is hereby reenacted to read as follows:

8.07.020 Crimes and penalties not specifically referenced.

Any act or omission defined as a misdemeanor or gross misdemeanor in State law and not specifically identified in this chapter is also adopted by reference, as now enacted or hereafter amended. Any penalty in Article IV of chapter 69.50 RCW for a non-felony violation not specifically identified in this chapter is also adopted by reference, as now enacted or hereafter amended.

Section 6. Corrections by City Clerk or Code Reviser Authorized. Upon approval of the City Attorney, the City Clerk and the code reviser are authorized to make necessary corrections to this ordinance, including the correction of scrivener's errors; references to other local, state, or federal laws, codes, rules, or regulations; or ordinance numbering and section/subsection numbering.

Section 7. Severability. If any section, subsection, paragraph, sentence, clause or phrase of this ordinance or its application to any person or situation should be held to be invalid or unconstitutional for any reason by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portions of this ordinance or its application to any other person or situation.

Section 8. Declaration of Emergency; Effective Date. Pursuant to RCW 35A.12.130, this ordinance shall take effect and be in full force immediately as a public emergency ordinance necessary for the protection of public health, public safety, and the public peace, if approved by a majority plus one of the whole membership of the Council. A non-exhaustive list of facts supporting this emergency declaration are included in the recitals above, which are adopted by reference as findings of fact as if fully set forth herein. This ordinance or a summary thereof consisting of the title shall be published in the official newspaper of the City.

PASSED BY THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, at a Special Meeting thereof this _____ day of _____, 2023.

ATTEST/AUTHENTICATED:

Christy O'Flaherty, MMC, City Clerk

Allan Ekberg, Mayor

APPROVED AS TO FORM BY:

Filed with the City Clerk: _____

Passed by the City Council: _____

Published: _____

Effective Date: _____

Ordinance Number: _____

Office of the City Attorney