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**The Council of  
the City of New York**

**REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION**

**Robert Newman, Legislative Director  
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**COMMITTEE ON PUBLIC SAFETY  
Hon. Peter Vallone, Chair**

**June 12, 2012**

**PROPOSED RESOLUTION No. 986-A:**

By Council Members Mark-Viverito, Koppell, Williams, Brewer, Dromm, Lander, Mendez, Vann, Jackson, Chin, Rose, Palma, James, Rodriguez, Comrie, Seabrook, Koslowitz, Barron, Sanders, Levin, Gonzalez, Foster, Dickens, Arroyo, Wills, Ferreras, Lappin, and Van Bramer

**TITLE:**

Resolution supporting the Governor's proposal to amend the Penal Law to make possession of a small quantity of marihuana in public view a violation, applauding the Speaker of the Assembly for his support of the proposal, and calling upon the New York Senate to pass legislation enacting the same.

## **I. INTRODUCTION**

On June 12, 2012, the Committee on Public Safety, chaired by Council Member Peter Vallone Jr., will hold a public hearing on Proposed Resolution 986-A. The resolution supports Governor Cuomo's proposal to amend the Penal Law to make possession of a small quantity of marihuana in public view a violation. It also applauds the Speaker of the Assembly for supporting the proposal and calls upon the New York Senate to pass legislation enacting the proposal.

The Committees have invited representatives of the Administration and New York City District Attorneys offices, defense attorneys, drug policy experts, and other concerned community members to testify.

## **II. BACKGROUND**

The resolution to be heard at today's committee hearing supports proposed changes to the New York penal law regarding the possession of small quantities of marihuana. Under current law mere possession of small quantities of marihuana is not a crime; it is a violation.<sup>1</sup> It only becomes a crime when additional factors are present. One such factor is that the marihuana be possessed in a public place and be "open to public view," at which point what would otherwise be a violation becomes the crime of possession of marihuana in the fifth degree.<sup>2</sup> This crime is a

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<sup>1</sup> NY Penal § 221.05. Without aggregating factors, this violation is punishable by a maximum fine of one hundred dollars. If the defendant has previously been convicted of a similar offense within the last three years, then he or she may be given a fine of up to two hundred dollars; if he or she has been convicted of two such offenses during the last three years, then the penalty may be a fine of up to two hundred fifty dollars and/or up to fifteen days in prison. "Small quantities" is an amount up to and including twenty-five grams.

<sup>2</sup> NY Penal § 221.10. The other factors that lead possession of marihuana to be criminal possession in the fifth degree are that the marihuana be burning in a public place or that a person possesses one or more "preparations, compounds, mixtures or substances" containing marihuana and of an aggregate weight of more than twenty-five grams.

class B misdemeanor, punishable by up to three months in jail and/or a fine of up to five hundred dollars.<sup>3</sup>

In recent years, arrests for misdemeanor marijuana possession in New York City have increased dramatically, averaging about 50,000 per year.<sup>4</sup> In fact, more people were arrested for marijuana possession in 2010 than were arrested during the entire 19 year period from 1978 to 1996.<sup>5</sup> The vast majority of these arrests affect black and latino youth. Eighty percent of low-level marijuana arrests over the past several years have been of blacks or latinos, over half of whom have been under the age of 25.<sup>6</sup> There are additional harms to such arrests in addition to the penalty of the arrest and the accompanying punishment.

Depending on an individual's situation, it is possible for such an arrest to affect his or her job, housing, and family. Although it is illegal to exclude individuals from jobs based *solely* on arrest or conviction, it may nevertheless affect an individual's chance of employment to have such information on one's record as employers may have an easier time narrowing a field of applicants based on this information.<sup>7</sup> For young people just starting their working lives, such an arrest could serve as an even greater setback in a job search as they will not have past employment experience or references to rely upon. Additionally, people convicted of some misdemeanors cannot apply for public housing for three years, and those convicted of violations will not be eligible for two years.<sup>8</sup> Finally, some parents have found themselves the subject of

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<sup>3</sup> NY Penal §§ 70.15, 80.05.

<sup>4</sup> See Thomas Kaplan, "Bloomberg Backs Plan to Limit Arrests for Marijuana," *The New York Times* (June 4, 2012) and Alisa Chang, "Alleged Illegal Searches by NYPD May be Increasing Marijuana Arrests," *WNYC* (April 26, 2011).

<sup>5</sup> Alice Speri, "2010 Marijuana Arrests Top 1978-1996 Total," *The New York Times* (February 11, 2011).

<sup>6</sup> Sean Gardiner, "Pot Arrests Drop Over 25% Across the City," *The Wall Street Journal* (June 6, 2012).

<sup>7</sup> Brent Staples, "The Human Cost of 'Zero Tolerance,'" *The New York Times* (April 28, 2012). (Explaining the difficulties that arrests for low level marijuana usage can lead to, stating that even when a case is dismissed there are times when errors result in criminal records, and commenting that "sealing," a criminal record is also no guarantee that the information contained therein will never be used as background-screening companies sometimes obtain data at the time of an arrest and may not necessarily update it to reflect dismissals or to delete a record that has been sealed. These records then are passed on to private employers who may discard applications flagged with this information.)

<sup>8</sup> *Id.*

neglect accusations in family court following an arrest for marijuana, even without having been charged with a crime.<sup>9</sup>

Complicating the situation are allegations that many of the misdemeanor marijuana arrests stem from illegal searches.<sup>10</sup> In the spring of 2011, WNYC ran several reports profiling multiple individuals who claimed that they were arrested for having small amounts of marijuana in open view when it was in fact only revealed to public view because a police officer either removed it from their person, or ordered them to empty their pockets.<sup>11</sup> Once arrested, individuals rarely fight such charges as proving their case is difficult.<sup>12</sup> Following these reports, Commissioner Kelly of the New York City Police Department (NYPD) issued an operations order instructing police officers that criminal possession of marijuana should “not be charged to an individual who is requested or compelled to engage in the behavior that results in the public display of marijuana.”<sup>13</sup> Although arrests for misdemeanor marijuana possession dropped following this order, they remain high and are on track to exceed 40,000 for this year.<sup>14</sup>

In addition to the apparent inequalities of misdemeanor marijuana arrests, the high number of arrests results in great expense for New York City both in terms of resources expended and actual dollars. One report has estimated that the city spent at least \$75 million on misdemeanor marijuana arrests in 2010.<sup>15</sup> Eliminating these arrests could save the city money and allow police officers, judges and district attorneys to re-direct their energies towards dangerous criminal activity.

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<sup>9</sup> *Id.*

<sup>10</sup> Alisa Chang, “Alleged Illegal Searches by NYPD May be Increasing Marijuana Arrests,” *WNYC* (April 26, 2011) and “Alleged Illegal Searches by NYPD Rarely Challenged in Marijuana Cases,” *WNYC* (April 27, 2011).

<sup>11</sup> *Id.*

<sup>12</sup> Alisa Chang, “Alleged Illegal Searches by NYPD Rarely Challenged in Marijuana Cases,” *WNYC* (April 27, 2011).

<sup>13</sup> NYPD Operations Order No. 49, “Charging standards for possession of marijuana in a public place open to public view,” issued September 19, 2011. The order provides that commanding officers should ensure the contents of the order are brought to the attention of the members of their commands. The order is available at Appendix A of this report.

<sup>14</sup> Sean Gardiner, “Pot Arrests Drop Over 25% Across the City,” *The Wall Street Journal* (June 6, 2012).

<sup>15</sup> Andy Newman, “Marijuana Arrests Rose in 2011, Despite Police Directive,” *The New York Times* (Feb. 1, 2012).

On June 4, 2012, Governor Cuomo called for the penal law to be changed so that possession of small amounts of marihuana would be a violation even if possessed in public view.<sup>16</sup> Governor Cuomo stated that this would bring “fairness and consistency” to the law.<sup>17</sup> Supporters of the change include, among others, Mayor Bloomberg, NYPD Commissioner Kelly, State Assembly Speaker Silver, and all five District Attorneys in New York City.<sup>18</sup> The resolution to be discussed today explains the current problems with the law, applauds Assembly Speaker Silver for his support of the proposed changes, and urges passage of the changes called for by Governor Cuomo.

### **III. CONCLUSION**

The Committee looks forward to having a robust discussion on Proposed Resolution 986-A. It is the committee’s hope that the legislation supported by the resolution will lead to consistency in the application of the law surrounding marihuana possession and will result in a fair application of the law for all New Yorkers.

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<sup>16</sup> See Press Release, “Governor Cuomo Announces Legislation to Bring Consistency and Fairness to the State’s Penal Law and Save Thousands of New Yorkers from Unnecessary Misdemeanor Charges,” *available at* <http://www.governor.ny.gov/press/060412legislation>. Under the proposed changes it would remain a misdemeanor to burn marihuana or to possess more than twenty-five grams of it.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

# Appendix A



# OPERATIONS ORDER

SUBJECT: <b>CHARGING STANDARDS FOR POSSESSION OF MARIHUANA IN A PUBLIC PLACE OPEN TO PUBLIC VIEW</b>	
DATE ISSUED:	NUMBER:
<b>09-19-11</b>	<b>49</b>

1. Questions have been raised about the processing of certain marihuana arrests. At issue is whether the circumstances under which uniformed members of the service recover small amounts of marihuana (less than 25 grams) from subjects in a public place support the charge of Criminal Possession of Marihuana in the Fifth Degree Penal Law section 221.10 (1) (CPM 5<sup>th</sup>).

2. The specific circumstances in question include occasions when the officers recover marihuana pursuant to a search of the subject's person or upon direction of the subject to surrender the contents of his/her pockets or other closed container. A crime will not be charged to an individual who is requested or compelled to engage in the behavior that results in the public display of marihuana. Such circumstances may constitute a violation of Penal Law section 221.05 - Unlawful Possession of Marihuana, a violation *not* Penal Law section 221.10 (1) – Criminal Possession of Marihuana in the 5<sup>th</sup> degree, a class B misdemeanor.

3. To support a charge of PL 221.10 (1) the public display of marihuana must be an activity undertaken of the subject's own volition. Thus, uniformed members of the service lawfully exercising their police powers during a stop *may not* charge the individual with PL 221.10(1) CPM 5<sup>th</sup> if the marihuana recovered was disclosed to public view at an officer's direction.

4. In such situations, uniformed members of the service must charge the violation, Unlawful Possession of Marihuana (UPM), Penal Law section 221.05. Unlawful Possession of Marihuana is a non-fingerprintable offense and is punishable by a fine. As a general matter, the defendant is entitled to a criminal court summons for the violation Unlawful Possession of Marihuana. Alternately, *Patrol Guide 208-27, "Desk Appearance-General Procedure"* (see *NOTE* at the top of page "6"), provides for the defendant to be released when \$100 pre-arraignment bail is posted under certain circumstances. Finally, a field test on the recovered substance must be conducted pursuant to *Patrol Guide 218-08, "Field Testing of Marijuana by Selected Uniformed Members of the Service Within the Patrol Services and Housing Bureaus."*

5. Where there is uncertainty regarding what provision of Penal Law Article 221 Offenses Involving Marihuana to charge, members of the service are directed to contact the Legal Bureau.

6. Commanding officers will ensure a sufficient supply of marihuana field test kits are available at their commands. Additionally, commanding officers will ensure and sufficient personnel are trained and available on all tours to conduct marihuana field tests and prepare the relevant reports.

7. Commanding officers will ensure that the contents of this Order are brought to the attention of members of their commands.

**BY DIRECTION OF THE POLICE COMMISSIONER**

**DISTRIBUTION**  
All Commands