



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: March 19, 2020
TO: Mayor and City Council Members
FROM: Michael Guina, City Attorney
SUBJECT: **Ordinance Of The City Council Of The City Of Emeryville To Modify Sections of Chapter 28 of Title 5 of the Emeryville Municipal Code, “Cannabis”; CEQA Determination: Exempt Pursuant to CEQA Guideline Section 15061(b)(3)**

RECOMMENDATION

Staff recommends that the City Council adopt the above-referenced ordinance, which would modify sections of Chapter 28 of Title 5 of the Emeryville Municipal Code.

BACKGROUND

On March 21, 2017, the City Council introduced two separate ordinances to create a local regulatory framework that would create opportunities in Emeryville for the cannabis industry. The first ordinance, Ordinance No. 17-002, amended the City’s Planning Regulations to allow for retail Cannabis Sales and Cannabis Manufacturing uses, which encompass manufacturing, testing, distribution, transport, delivery, research and development, and retail/dispensary. Pursuant to the Planning Regulations, a commercial cannabis business must obtain a conditional use permit from the City’s Planning Commission prior to commencing operations. The second ordinance, Ordinance No. 17-003, codified as Chapter 28 of Title 5 of the Emeryville Municipal Code (“Chapter 28”), requires businesses to obtain an annual permit from the Police Chief, often referred to as an “Operator’s Permit”. Ordinance No. 19-004, adopted on March 19, 2019, subsequently amended Chapter 28 by removing a provision that required all commercial cannabis activity to be visually shielded from the public right of way.

At the July 23, 2019, City Council meeting, the City Council requested staff to bring forward an amendment to Chapter 28 to bring the City’s limitations on delivery hours in line with state law.

DISCUSSION

Attached is a proposed ordinance modifying Chapter 28 consistent with Council’s request. In addition, the proposed ordinance makes several other changes to Chapter 28 to reflect changes in state law that occurred after adoption of Ordinance No. 17-003 and to codify City practice. Attachment 1 is a legislative draft of the current Chapter 28, with proposed deletions shown as ~~striketthrough~~ and additions shown as **bold and underlined**. Below, the modifications to the existing Chapter 28 are discussed.

References to the Medicinal and Adult-Use Cannabis Regulation and Safety Act. Ordinance No. 17-003 was adopted prior to the Medicinal and Adult-Use Cannabis Regulation and Safety Act (Bus. & Prof. Code § 26000, et seq.) (“MAUCRSA”) when the state had two separate cannabis regulatory systems, the Medical Cannabis Regulation and Safety Act (“MCRSA”) to govern medical cannabis, and the Control, Regulate and Tax Adult Use of Marijuana Act (“AUMA”) to govern adult-use cannabis. The MAUCRSA integrated the MCRSA and the AUMA into one regulatory system. Sections One, Two, and Five of the proposed ordinance modify Chapter 28 to account for the adoption of the MAUCRSA and to reference this current state regulatory framework.

Exclusion of Synthetic Cannabis. Section Two of the proposed ordinance modifies the definition of “cannabis” to explicitly exclude synthetic cannabis. Occasionally, staff has received the question as to whether Chapter 28 of Title 5 of the Emeryville Municipal Code governs synthetic cannabis. The MAUCRSA provides the framework in which cities can allow for cannabis business within their jurisdiction. However, Health and Safety Code section 11357.5 still makes the selling, dispensing, distributing, furnishing, or giving of synthetic cannabis a misdemeanor. Accordingly, staff concluded that the definition of cannabis in Chapter 28 excluded synthetic cannabis because of Health and Safety Code section 11357.5. The proposed modification to the definition of cannabis in Section 5-28.03 of the Emeryville Municipal Code is to make explicit that synthetic cannabis is excluded.

Modifications to Streamline the Permit Process. Currently, Section 5-28.04(b) of the Emeryville Municipal Code provides that a cannabis business may apply for different types of permits under Chapter 28. The different types of permits correspond to the state licenses that were anticipated when Ordinance No. 17-003 was drafted. Current state licenses differ slightly from what is listed in Chapter 28, and Section 5-28.04(b) needs to be updated to reference current state licenses. In addition, differentiating between permit types is no longer relevant given that the MAUCRSA allows cannabis businesses to hold multiple licenses to vertically integrate their businesses. Accordingly, Section Three of the proposed ordinance eliminates the different types of permits to streamline permit application and issuance process. However, Chapter 28 continues to distinguish one type of permit, the “dispensary/retailer permit”. Dispensary/retailer permits still need to be identified because those types of permits are still subject to Resolution No. 17-135, which sets forth the City Council’s regulations for issuance of dispensary/retailer permits to limit the number of storefront dispensaries. Therefore, Section Two of the proposed ordinance adds a definition for “dispensary/retailer permit”.

In addition, Section Two of the proposed Ordinance modifies the definition of “cannabis business owner”. The MAUCRSA defines “owner” as any of the following: “(1) a person with an aggregate ownership of 20 percent or more in the person applying for a license or a licensee, unless the interest is solely a security, lien or encumbrance”; (2) “the chief executive officer of a nonprofit or other entity”; (3) “a member of the board of directors of a nonprofit”; or (4) “an individual who will be participating in the direction, control, or management of the person applying for a license”.¹ The Emeryville Municipal Code

¹ Cal. Bus. & Prof. Code, § 26001(al).

definition and the MAUCRSA definition are similar (see Attachment 1). By having Chapter 28 reference the MAUCRSA, it is explicit that an owner under the MAUCRSA is also an owner under Chapter 28.

Delivery of Cannabis to Consumers. At the time of adoption of Ordinance No. 17-003, state law did not regulate delivery of cannabis to consumers extensively. Accordingly, in adopting Ordinance No. 17-003, the City included provisions to regulate the delivery of cannabis to consumers. Currently, Section 5.28.11(a) of the Emeryville Municipal Code requires delivery drivers to possess copies of the permit, to deliver cannabis to a residential or business address, and to track packages delivered. In addition, deliveries must be made between 8:00 a.m. and 8:00 p.m., and delivery vehicles must be unmarked. Since the adoption of Ordinance No. 17-003, under the authority of MAUCRSA, the Bureau of Cannabis Control has promulgated regulations, effective January 16, 2019, related to the delivery of cannabis to the consumer, which make the City's regulations superfluous. State regulations² provide:

- A licensed retailer may only sell or delivery cannabis goods between the hours of 6:00 a.m. and 10:00 p.m.
- Deliveries must be made by the retailer's employees.
- Delivery employees must carry a copy of the employer's state license, and employee identification.
- Deliveries must be made to a physical address in California and cannot be made to any address on land that is owned or leased by a public agency or to a school, day care center or youth center.
- Delivery vehicles may not have any markings that indicate it is a vehicle being used to delivery cannabis.
- Delivery employees may not carry cannabis goods in excess of \$5,000.
- Deliveries must be tracked.

Most importantly, 16 California Code of Regulation § 5416(d) provides that a delivery employee "may deliver to any jurisdiction within the State of California provided that such delivery is conducted in compliance with all delivery provisions of this division." This provision has been interpreted as precluding cities from imposing any additional delivery regulations. Several cities have filed a lawsuit to challenge the validity of this regulation. However, the regulation remains in effect while the lawsuit works its way through the judicial system.³ Given the state's regulation of deliveries, which are consistent with the City's regulations, City staff recommends repealing the local delivery regulations and deferring to state regulation on deliveries. Accordingly, Section Four of the proposed ordinance repeals requirements for delivery permits. Section Six of the proposed Ordinance modifies the Hours of Operation to clarify that the remaining restrictions relate

² 16 Cal. Code Reg. §§ 5403, 5415, 5416, 5417, 5418.

³ County of Santa Cruz, et al. v. Bureau of Cannabis Control, et al., Fresno Superior Court Case No. 19CECG01224. Currently, trial is set for April 20, 2020.

to commercial deliveries, and the deliveries to the consumer, are subject to state law and its regulations.

ENVIRONMENTAL REVIEW

The proposed ordinance is exempt from environmental review under California Environmental Quality Act ("CEQA") pursuant to CEQA Guideline 15061(b)(3). It can be seen with certainty that adoption of the ordinance will not have any environmental impact because the changes are to conform the ordinance to existing state law and City practice. There is no change in policy.

STAFF COMMUNICATION WITH THE PUBLIC

There has been no communication with the public about the specific proposed ordinance, but the ordinance addresses public comments or concerns since the City adopted Ordinance No. 17-003.

CONCLUSION

Staff recommends that the City Council:

1. Introduce the proposed ordinance by title only.
2. Take public comment on the proposed ordinance.
3. Adopt the first reading of the proposed ordinance.

PREPARED BY: Andrea Visveshwara, Assistant City Attorney

APPROVED AND FORWARDED TO THE CITY COUNCIL OF THE CITY OF EMERYVILLE:



Michael Guina, City Attorney

ATTACHMENTS

- Attachment 1: Legislative Draft
- Attachment 2: Proposed Ordinance