



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: March 16, 2021
TO: Christine Daniel, City Manager
FROM: Charles S. Bryant, Community Development Director
SUBJECT: **An Ordinance Of The City Council Of The City Of Emeryville Amending Section 5-28.06(d) Of The Emeryville Municipal Code, “Cannabis, Review of Applications – Appeal of Disapprovals and Suspensions” (CEQA Determination: Exempt Pursuant To CEQA Guideline 15061(b)(3))**

RECOMMENDATION

Staff recommends that the City Council adopt the first reading of the above-referenced ordinance, which modifies Section 5-28.06(d) of Chapter 28 of Title 5 of the Emeryville Municipal Code regarding grounds for denial, revocation or suspension of an operator’s permit for a cannabis business.

BACKGROUND

On April 4, 2017, the City Council adopted 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 the following commercial cannabis uses: 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 cannabis businesses to obtain an annual permit from the Police Chief, often referred to as an “Operator’s Permit”.

On November 6, 2018, the voters of Emeryville adopted Measure S, approving a Cannabis Business Tax, by a margin of 84% in favor and 16% opposed.

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 shielded from the public right of way. On April 7, 2020, the City Council adopted Ordinance No. 20-004 which further modified Chapter 28 to align the City’s regulations with state law and to reflect then-current City practice.

At the October 20, 2020, City Council meeting, the City Council requested staff to bring forward an item to address Operator’s Permits that are issued to businesses that do not commence operations. On February 2, 2021, the City Council considered an ordinance

amendment that would have required cannabis businesses to lawfully transact business in the three-month period prior to expiration of an Operator’s Permit. The City Council did not take an action on the ordinance amendment and provided direction to staff to return with a modified ordinance, as described below.

DISCUSSION

Since the adoption of Ordinances 17-002 and 17-003, the City has issued Conditional Use Permits for cannabis businesses at seven locations, and the City has issued six Operator’s Permits. Staff continues to see strong interest and frequently receives inquiries from cannabis businesses interested in locating in Emeryville, however, the combination of Emeryville’s small size (limited commercial property inventory), high demand for research and development space, and limited number of property owners willing and able to transact with cannabis businesses has limited the number of businesses able to establish Emeryville locations due to a lack of available sites. Properties that have already received Conditional Use Permits for cannabis business are especially in high demand due to the limited pool of owners willing to lease to cannabis businesses and because Conditional Use Permits run with the land, not the operator, which reduces the risk and timespan for a prospective cannabis business to begin operations.

Cannabis businesses have the potential to generate significant revenue for the City due to the City’s Cannabis Business Tax. The COVID-19 pandemic has impacted the City’s most important revenue sources, including retail sales tax, transient occupancy tax (“TOT”), and business tax, resulting in a decline in revenues of \$10.4 million for Fiscal Year 2020-2021 as compared to Fiscal Year 2018-2019 revenues¹. Sales tax declined by 15%, TOT by 85% and business tax by 27%. Cannabis businesses have paid over \$729,000 in cannabis business taxes to the City from the initiation of the tax in the second quarter of 2019 through the third quarter of 2020 and appear to have been relatively resilient to the pandemic. Cannabis business taxes from same-store sales (i.e. businesses that were operating in both comparative periods) *increased* by 39% comparing the third quarter of 2019 with the third quarter of 2020. Growth of the cannabis business tax base could diversify the City’s revenue sources and help the City recover from the fiscal impacts of the pandemic. Consequently, it is in the City’s interest to ensure that properties that have received approval for cannabis operations are utilized.

As noted above, Chapter 28 of Title 5 of the Emeryville Municipal Code requires businesses to obtain an Operator’s Permit on an annual basis. Section 5-28.08(b) specifically provides that there is no entitlement or vested right to a receive a permit. Section 5-28.06(d) sets forth the grounds for denial of a permit renewal or revocation of an existing permit. These include knowingly making false statement in applications or reports to the City, conviction of certain crimes, sanctions by a licensing authority, failure to pay City taxes and fees, any reason that would allow the state to deny a license, and

¹ Staff Report to City Council “Budget Strategies; Fiscal Year 2020-2021 and Beyond” dated September 15, 2020. Presented during City Council Study Session September 15, 2020.

other similar circumstances. Under these provisions, it is possible for a business to obtain an Operator's Permit and occupy a site that has received a Conditional Use Permit for cannabis business use, but not operate the business for an extended period of time. Such a situation defeats the purpose of Chapter 28, which is to promote the general welfare, i.e., economic recovery.

As noted above, on February 2, 2021 the City Council considered an ordinance that would have required cannabis businesses to lawfully transact business in the three-month period prior to expiration of the Operator's Permit. The City Council raised concerns about the potential for a cannabis business to conduct a minimal level of transaction activity within the three-month window to meet the requirements of the proposed ordinance. Additionally, the City Council raised questions regarding the identification of the Police Chief as the City official with responsibility for determinations under this section of the ordinance.

In response to the City Council's direction, the attached ordinance would add subsection (9) to Section 5-28.06(d) of Chapter 28 to add additional grounds for nonrenewal of an Operator's Permit, to facilitate the active use of sites available for cannabis business use, which in turn would help to grow the industry in Emeryville and generate Cannabis Business Tax revenues for the City. The proposed Section 5-28.06(d)(9) would allow for the revocation or nonrenewal of an Operator's Permit in the event the business does not engage in a "commercially reasonable level of lawful sales" for any continuous period of 30 days or more without good cause. The proposed ordinance defines "commercially reasonable level of lawful sales" as a level reasonably expected to result in at least \$25,000 in annual gross receipts. This level corresponds to the minimum amount of business tax due for most businesses regulated in the City under Section 3-1.124, which provides that businesses either pay .01% of annual gross receipts or \$25.00. This level was selected since it is an existing City policy that represents an objective level of business activity.

The Operator's Permit process is administered by the Police Department, consequently, Chapter 28 of Title 5 of the Emeryville Municipal code includes multiple references to the Police Chief as the final decisionmaker for purposes of Operator's Permits. However, in practice the Police Department coordinates closely with multiple City departments in administering the Operator's Permit process, including the Finance Department (regarding compliance with the City's Cannabis Business Tax), the Planning Division (regarding compliance with Conditional Use Permit requirements), and the Economic Development and Housing Division (regarding community benefits requirements, as applicable). Accordingly, Police Department staff would coordinate with other City departments on determining whether a permit should be revoked or not renewed due to low levels of sales.

Monitoring non-utilized permits burdens existing City resources while yielding no benefit to the general welfare. This aligns with the City's interest in promoting the cannabis industry to benefit the City's economic recovery from the pandemic in the near-term and

diversify revenue sources in the long-term. An applicant may appeal any permit denial to a hearing officer for review, and the hearing officer's decision is final.

ENVIRONMENTAL REVIEW

The proposed ordinance is exempt from environmental review under California Environmental Quality Act ("CEQA") pursuant to the "common sense exemption" at CEQA Guideline 15061(b)(3) because 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.

FISCAL IMPACT

The proposed ordinance does not have a direct fiscal impact. The proposed ordinance could have an indirect and positive but unquantifiable fiscal impact if the possibility of revocation or nonrenewal of Operator's Permits incentivizes the timely commencement of cannabis business operations and/or the re-tenanting of properties previously permitted for cannabis uses with active business operations.

STAFF COMMUNICATION WITH THE PUBLIC

Staff will inform existing Emeryville cannabis businesses of the proposed ordinance via email prior to the City Council meeting.

CONCLUSION

Emeryville is an attractive place for cannabis businesses to locate, which has led to strong, sustained demand for locations that allow cannabis operations. Demand for cannabis business real estate far outstrips supply. Accordingly, the City's Operator's Permits should be held by businesses that are actively conducting business, and this would benefit the City's general fund. To accomplish this, the proposed ordinance requires businesses to be in operation and conducting a minimum level of lawful sales. If that level of activity is not maintained for 30 days or more without good cause, the business risks revocation or nonrenewal of the Operator's Permit. Staff recommends that the City Council:

1. Introduce the proposed ordinance after a motion to read by title only.
2. Take public testimony on the proposed ordinance.
3. Adopt the first reading of the proposed ordinance.

PREPARED BY: Chadrick Smalley, Economic Development and Housing Manager

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



Christine Daniel, City Manager

ATTACHMENT

- Proposed Ordinance