



# CITY OF EMERYVILLE

## MEMORANDUM

**DATE:** March 15, 2016

**TO:** Mayor Martinez and Members of the City Council

**FROM:** Michael A. Guina, City Attorney

**SUBJECT: STUDY SESSION: CONSIDERATION OF REGULATION OF MEDICAL MARIJUANA**

### **RECOMMENDATION**

Staff recommends that the City Council receive this informational report, receive public comment, and provide direction to staff as to whether the City would like to amend the current complete prohibition on medical and recreational marijuana.

### **BACKGROUND**

#### **Federal Law: The Prohibition Remains; Federal Enforcement in Question**

The Federal Controlled Substances Act, 21 U.S.C. Section 801, *et. seq.*, was adopted in 1970, and prohibits the manufacture, cultivation, distribution and possession of cannabis, commonly referred to as marijuana. In the wake of states taking steps to legalize marijuana to some degree, in 2005, the United States Supreme Court issued its decision in *Gonzalez v. Raich*, which held that pursuant to the Commerce Clause of the United States Constitution, Congress has the authority, through the Controlled Substances Act, to prohibit local cultivation and use of marijuana even though that cultivation and use would be in compliance with California law.

Although the federal prohibition has remained constant throughout the years, and remains in place today, the federal enforcement is changing in light of changes at the state level. In August 2013, Deputy Attorney General James Cole issued a memorandum to all federal prosecutors to provide guidance on enforcement of the prohibition against marijuana. The memo outlines priorities for enforcement, and specifically states<sup>1</sup>:

The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory

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<sup>1</sup> Memorandum for All United States Attorneys, From James M. Cole, Deputy Attorney General, Re: Guidance Regarding Marijuana Enforcement (August 29, 2013), pp. 2-3, available at [www.justice.gov](http://www.justice.gov).

and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement protection.

[Enforcement priorities include:] preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession or use on federal property.<sup>2</sup>

Subsequent to the memo, Congress adopted the Rohrabacher-Farr amendment, codified as Section 538 of the 2015 Appropriations Act<sup>3</sup>, which essentially defunded enforcement activities related to marijuana where enforcement would “prevent such States [which includes California] from implementing their own state laws that authorize the use, distribution, possession or cultivation of medical marijuana.” In October 2015, in *USA v. Marin Alliance for Medical Marijuana*<sup>4</sup>, the federal district court ruled that Section 538 precluded the U.S. Government, as the prosecuting authority, from enforcing the federal prohibition on marijuana, provided the defendant was operating lawfully under state law. There has been a notice of appeal filed in this case.

### **State Law: Medical Marijuana is to Be Comprehensively Regulated, and Recreational Marijuana May Follow Soon.**

In 1996, the voters of the State of California approved Proposition 215, which was codified as “The Compassionate Use Act of 1996,” at California Health and Safety Code, section 11362.5 (“CUA”). In 2003, the California Legislature enacted the Medical Marijuana Program Act (“MMPA”) codified at Health and Safety Code, Section 11362.7, *et. seq.*, which provided that qualified patients and primary caregivers could collectively

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<sup>2</sup> *Id.* pp. 1-2.

<sup>3</sup> Pub. L. 114-53, § 103, 129 Stat. 502 (2015).

<sup>4</sup> --F.Supp.3d.-- (2015, N.D. Cal.).

or cooperatively cultivate marijuana for medical purposes with a limited defense to certain specified State criminal statutes. Despite such state law, many cities, including Emeryville, prohibited medical marijuana dispensaries and cultivation, creating conflict between medical marijuana advocates and local governments. Subsequently, in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*<sup>5</sup>, the California Supreme Court upheld the right of local public agencies to regulate, including to prohibit, medical marijuana operations through their land use powers.

On October 9, 2015, Governor Brown approved the Medical Marijuana Regulation and Safety Act (“MMRSA”), which was effective on January 1, 2016, and which establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical marijuana through Assembly Bills 243 and 266 and Senate Bill 643. The MMRSA is a comprehensive state statutory framework to regulate medical marijuana from seed to ingestion by a patient. It sets forth uniform health and safety standards designed to implement quality control, which includes labeling and a track-and-trace program. It requires that license holders obtain both state and local permits to operate lawfully. It has specific provisions that allow local governments to enact ordinances prohibiting marijuana cultivation, processing, delivery and dispensaries.<sup>6</sup> The MMRSA preempts cities from enacting any local legislation that prohibits the transport of medical marijuana through public streets.<sup>7</sup> Recently, Government Brown signed AB 21, which clarified that under the MMRSA, cities retain their local ability to regulate cultivation after March 1, 2016.

With respect to state law, on the horizon is the potential for several state voter initiatives to legalize recreational marijuana. Of the various initiatives, the “Control, Regulate, and Tax Adult Use of Marijuana Act”, also referred to as the “Parker Initiative” because it is backed and received funding from Sean Parker, is receiving quite a bit of attention. It sets forth a comprehensive regulatory scheme, similar to the MMRSA. However, there are some significant differences that if the initiative passed, would impact local government. First, although the initiative recognizes local government’s ability to regulate, it does not require licensees to obtain both state and local permits to operate lawfully under state law.<sup>8</sup> Second, according to comments by the California Police Chiefs’ Association, it does not contain some of the consumer protections, such as quality control, labeling, background screening, and regulatory accountability, as the

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<sup>5</sup> 56 Cal.4th 729 (2013).

<sup>6</sup> See Bus. Prof. Code, § 19332(e)(2); Health & Saf. Code, §§ 11362.769; 11362.777(b)(1)(A), (b)(3); 11362.777(c)(1) [authority to regulate cultivation]; Bus. Prof. Code, §§ 19315; 19316(a)(1); 19320 [authority to regulate medical marijuana activity under local police power]; Bus. Prof. Code, § 19340(a) [authority to prohibit delivery by ordinance].

<sup>7</sup> Bus. Prof. Code, § 19338(b).

<sup>8</sup> McEwan, Stephan. “A Practitioner’s Approach to Implementing the Medical Marijuana Regulation and Safety Act (AB 243, AB 266 and SB 643).” Presented on January 22, 2016.

MMRSA. Third, generally, it prohibits cities from banning indoor cultivation for personal use, defined as six plants.<sup>9</sup>

### **Emeryville: Medical and Recreational Marijuana is Prohibited**

In 2006, the City Council adopted Ordinance No. 06-007, adding Chapter 23 of Title 5 of the Emeryville Municipal Code. Chapter 23 of Title 5 explicitly prohibits medical marijuana dispensaries, which includes cultivation of medical marijuana. At the time the prohibition was adopted, the City Council recognized potential adverse impacts on public health, safety, and welfare from secondary effects associated with the cultivation and distribution (which implies delivery) of medical marijuana.<sup>10</sup> Although the findings implied delivery was included, the prohibition of medical marijuana delivery was not explicit. Therefore following the introduction of the MMRSA, on January 19, 2016, the City Council adopted an urgency ordinance (Ordinance No. 16-001) and introduced a regular ordinance regulating medical marijuana (Ordinance No. 16-002). The urgency ordinance amended Chapter 28 of Title 5 to prohibit the delivery of medical marijuana and took effect immediately. The regular ordinance repealed and replaced Chapter 28 of Title 5 to make the City's prohibition related to medical marijuana consistent with state law and to reaffirm the City's prohibition related to non-medical marijuana.

The purpose of the City Council's actions on January 19, 2016, was to ensure that the City retained local control to the maximum extent possible and to maintain the status quo following the introduction of the MMRSA. By doing so, the City would be able to study whether it was time to reconsider its complete prohibition on marijuana. Therefore, the City Council directed staff to bring forward a study session on medical marijuana with information related to options for local regulation, especially in neighboring jurisdictions. The Council expressed specific interest in obtaining information as it related to smoking and revenue from medical marijuana.

### **DISCUSSION**

#### **Cultivation and Dispensaries: Neighboring Jurisdictions are on Either Side of the Spectrum**

Neighboring jurisdictions' regulation of medical marijuana runs the spectrum from a complete prohibition to affirmative steps toward legalization. Both the cities of Albany and Alameda completely prohibit marijuana.<sup>11</sup> However, Alameda, similar to Emeryville, has taken the approach to prohibit all use and conduct arising out of marijuana to

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<sup>9</sup> *Ibid.*

<sup>10</sup> EMC 5-28.01(i).

<sup>11</sup> City of Albany Municipal Code, § 20.12.040; City of Alameda Municipal Code, § 30.5.15.

maximize its local control and maintain the status quo while it considers whether it may want to regulate marijuana in the future.<sup>12</sup>

On the other end of the spectrum are the cities of Berkeley and Oakland, with Berkeley having a voter mandated policy directive to support the legalization of marijuana, and to not fund certain local law enforcement activities as it relates to marijuana.<sup>13</sup> Both cities allow dispensaries and personal cultivation; tax medical dispensaries; and are poised to tax non-medical marijuana business should recreational use become legal under state law.<sup>14</sup>

Both Berkeley and Oakland have transitioned into allowing medical marijuana by limiting the number of medical marijuana businesses, and then expanding that number as the cities became more familiar with the impacts of those businesses and how to mitigate some of those impacts.<sup>15</sup> For example as it relates to dispensaries, both cities determine who will be allowed to have a medical cannabis dispensary by issuing a request for proposals (RFP) so the businesses are competing for the opportunity, with the most qualified applicant receiving the opportunity.<sup>16</sup> In Oakland, the dispensary receives an operator's permit, which contains conditions that regulate the use.<sup>17</sup> In Berkeley, the dispensary receives a business license and operates pursuant to code – no subsequent approvals may be necessary, provided the location is in a zone where the use is allowed by right.<sup>18</sup> As for cultivation, it is allowed by right in Berkeley, provided it is considered incidental to a residential use, as defined in the code.<sup>19</sup> The city is currently considering whether to adopt an ordinance that would allow cultivation on a commercial level in the manufacturing zone.<sup>20</sup> As for Oakland, it also allows for personal cultivation as an incidental use, which is defined in the code.<sup>21</sup> However, it also allows for cultivation on a larger scale, but issues only four permits for such operation, that must be renewed on an annual basis.<sup>22</sup>

San Leandro falls in the middle of the spectrum. Initially, San Leandro prohibited both medical marijuana dispensaries and cultivation, but undertook an extensive study and

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<sup>12</sup> Staff Report, Proposed Text Amendment to the City of Alameda Medical Marijuana Dispensaries Ordinance (AMC § 30.5.15), File No. 2015-2303, for City Council Meeting November 23, 2015.

<sup>13</sup> Chapter 12.24 of the Berkeley Municipal Code;

<sup>14</sup> Chapters 9.04, 12.26, and 12.27 and § 23E.16.070 of the Berkeley Municipal Code; Chapters 5.80, 5.81, 8.46 and §§ 5.04.480 and 5.04.481 of the Oakland Municipal Code.

<sup>15</sup> City of Berkeley Resolution No. 66,711-N.S.; Memorandum to Sabrina B. Landreth, City Administrator, From Greg Minor, Assistant to the City Administrator, Re: Update on State Medical Cannabis Law and Local Proposals (Dec. 21, 2015), p. 8.

<sup>16</sup> *Ibid.*

<sup>17</sup> Oakland Municipal Code, § 5.80.020.

<sup>18</sup> See Chapter 12.27 of the Berkeley Municipal Code.

<sup>19</sup> Berkeley Municipal Code, §§ 12.26.040, 12.26.070.

<sup>20</sup> Attachment VII.A.1 of the Staff Report to the Medical Cannabis Commission of the City of Berkeley (Meeting Date Aug. 6, 2015).

<sup>21</sup> Oakland Municipal Code, § 5.81.101.

<sup>22</sup> Oakland Municipal Code, § 5.81.030.

public outreach to consider whether it should regulate medical marijuana.<sup>23</sup> Ultimately, after adopting an ordinance and issuing an RFP, San Leandro decided to issue one operator permit to a medical marijuana dispensary.<sup>24</sup> The ordinance adopted specifically does not apply to cultivation and distribution by qualified patients or their primary caregivers when the group of patients is three or less and such use is either incidental to a residential unit or non-residential parcel of land.<sup>25</sup> San Leandro does not have a special tax at this time on medical marijuana, but the permit recipient, Harborside, voluntarily agreed to pay a certain amount to the City (discussed in more detail below).<sup>26</sup>

Included as Attachments 1 and 2 are charts comparing how the different cities treat cultivation and dispensaries. Attachment 3 is the recently adopted San Leandro ordinance to provide the City Council with some context of the form of the regulation. Finally, under state law, medical marijuana facilities (whether cultivation, dispensary or distributor) must have a 600 foot radius buffer zone from any school, which is defined as: "any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, but does not include any private school in which education is primarily conducted in private homes."<sup>27</sup> Attachment 4 is a map depicting sites where there is the state required 600 foot buffer zone, meaning no medical cannabis business can locate there. Local jurisdictions may expand upon this buffer zone by either increasing the distance, or adding additional sensitive sites to the buffer zone, such as preschools or other youth centers. Attachment 5 depicts where tobacco shops may be located in the City. Section 5-29.10 of the Emeryville Municipal Code prohibits tobacco shops from being located 1000 Feet of public or private schools and parks, greenways and playgrounds.

### **Neighboring Jurisdictions: Smoking**

Of the three jurisdictions that allow for medical marijuana, Berkeley, Oakland and San Leandro have all adopted Smoking Pollution Control Ordinances, which to some degree, are applicable to the smoking of medical marijuana. Berkeley's definition of smoking is broad enough to include medical marijuana, and in Berkeley, smoking is prohibited in most areas of the City, including multi-family residential units. However, Berkeley's Ordinance exempts the inhalation of medical marijuana through the use of an electronic smoking device inside a permitted dispensary, within the public right of

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<sup>23</sup> Staff Report for the City Manager's Recommendation to the City Council Regarding the Selection of a Medical Cannabis Dispensary Operator, Issuance of the Medical Cannabis Dispensary Permit and Establishment of the \$60,000 Annual Permit Fee, File No. 15-463, Date of Proposed Action: 9/8/2015, pp. 1-2.

<sup>24</sup> Resolution No. 2015-145 of the City of San Leandro (Sept. 8, 2015).

<sup>25</sup> San Leandro Municipal Code, § 4-33-200(b).

<sup>26</sup> Staff Report for the City Manager's Recommendation to the City Council Regarding the Selection of a Medical Cannabis Dispensary Operator, Issuance of the Medical Cannabis Dispensary Permit and Establishment of the \$60,000 Annual Permit Fee, File No. 15-463, Date of Proposed Action: 9/8/2015, p. 6.

<sup>27</sup> Bus. & Prof. Code, § 19322(a)(4); Health & Safety Code, § 11362.768.

way within 50 feet of such dispensary, and within an enclosed area of a unit.<sup>28</sup> Similar to Berkeley, the breadth of Oakland's definition of smoking includes the smoking of medical marijuana. Oakland's Smoking Pollution Ordinance also prohibits smoking in the common areas of multi-unit housing. However, a landlord can designate a portion of outside common area to be used for smoking, and a landlord can determine whether to allow for smoking in units.<sup>29</sup> Finally, in San Leandro, the definition of smoking also encompasses the smoking of medical marijuana. However, San Leandro does not prohibit smoking in private residential units, unless the unit also is used as a child care or health care facility.<sup>30</sup>

## **ANALYSIS**

One important distinction between Emeryville and neighboring cities is that Emeryville's neighbors adopted their regulations prior to the MMRSA. Prior to the MMRSA, dispensaries and collectives essentially operated as non-profits, serving only members, with membership restricted to patients and their primary caregivers. Under the MMRSA, it is anticipated that businesses will operate as for profit enterprises. In addition, in the absence of federal and state regulation, all three jurisdictions sought to regulate the manufacturing and quality control of marijuana products, and encouraged vertical integration of the businesses. Vertical regulation refers to the concept of one business operating two or more stages of production, normally operated by separate companies. For example, the dispensary both conducts quality control testing and delivers the product to the end user. Under the MMRSA, vertical integration is discouraged. Although the regulations from these other jurisdictions provide examples, Emeryville's ordinance, if any is adopted, would need to take on a different form to account for the fact that it is adopted after the MMRSA.

The MMRSA creates four different general types of licenses<sup>31</sup> associated with marijuana business. Therefore, the analysis is framed as to whether the City Council is interested in allowing the business and use associated with the general type of licenses. Below, each general license is discussed, followed by staff's recommendation for Council's direction in italics.

As for recreational marijuana, that use remains unlawful under state law at this time. However, staff is seeking direction on whether the Council wishes to consider regulating recreational marijuana if it becomes legal under state law. The regulation of recreational marijuana could influence how the City drafts any future regulations as it relates to medical marijuana.

## **Cultivation**

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<sup>28</sup> Chapter 12.70 of the Berkeley Municipal Code.

<sup>29</sup> Chapter 8.30 of the Oakland Municipal Code.

<sup>30</sup> Chapter 4-12 of the San Leandro Municipal Code.

<sup>31</sup> The specific type of licenses include: cultivation, manufacturing and laboratory testing, dispensaries, distributors and transporters. Within these license categories, there may be sub-licensing categories.

Under the MMRSA, cultivation is defined as “any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of cannabis.”<sup>32</sup> Medical marijuana is considered an agricultural product.<sup>33</sup> There are four general state license types related to cultivation, with several sub-categories in some categories.<sup>34</sup> The largest site to be cultivated is 1 acre (Type 3 license) and the number of licenses is to be limited. Smaller cultivators may hold retail license, but larger retailers may not.

State licensing requirements for cultivation do not apply to cultivation that does not exceed 100 square feet by qualified patient and to cultivation that does not exceed 500 square feet for qualified primary caregiver.

The potential impacts associated with cultivation depend somewhat on whether the cultivation is indoor or outdoor. For indoor cultivation, one of the primary concerns is whether the building that houses the cultivation meets certain health and safety requirements in light of the increased electricity for indoor cultivation due to increased lighting and temperature controls.<sup>35</sup> Thus, fire safety issues are of great concern with indoor cultivation. In addition, proper ventilation is important to control for odor and to reduce the risk of mold infecting the plant.<sup>36</sup> For outdoor cultivation, security is of great concern if the cultivation is visible from other properties, especially the public right of way. Impacts associated with both indoor and outdoor cultivation include odor, impacts on water quality from discharge, pesticide use, and security.<sup>37</sup> To some degree, potential impacts related to the quality of the product, i.e., mold and pesticide use, are addressed through some of the quality controls imposed by the MMRSA. As for other impacts, neighboring jurisdictions have sought to mitigate the negative impacts from cultivation by limiting the square footage for personal cultivation, limiting the square footage for cultivation viewable from the public right of way, requiring a buffer zone around a cultivation site from certain sensitive uses (e.g., parks, residential zones, schools), requiring buildings meet certain building and safety requirements (e.g. special ventilation), and regulating energy usage.<sup>38</sup>

*Staff recommends that the City Council provide direction on the following questions as it relates to cultivation:*

*1. Commercial Cultivation:*

- a. Should the City allow for commercial medical marijuana cultivation?*

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<sup>32</sup> Bus. Prof. Code, § 19300.5(l).

<sup>33</sup> Health and Safety Code, § 11362.777(a).

<sup>34</sup> Bus. Prof. Code, § 19332(g).

<sup>35</sup> Rocky Mountain High Intensity Drug Trafficking Area, “The Legalization of Marijuana in Colorado The Impact”. Vol. 3 (Sept. 2015), pp. 149-150.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Berkeley Municipal Code, §§ 12.27.120, 12.27.130; Oakland Municipal Code, § 5.81.101.



*b. If yes, should commercial medical marijuana cultivation be allowed at the maximum size under state law?*

*2. Limited Cultivation:*

*a. Should medical marijuana cultivation by a qualified patient or his or her primary caregiver be allowed as an incidental use to a residential use?*

*b. If yes, should limited medical marijuana cultivation be allowed by right or subject to a permit, e.g., an administrative permit?*

*3. Recreational Marijuana: If recreational marijuana use becomes legal under state law, does the City Council want to consider allowing for commercial cultivation for recreational marijuana?*

### **Distributors, Manufacturers and Testers**

Under the MMRSA, a licensed cultivator cannot sell directly to a licensed dispensary (discussed below). Instead, the licensed cultivator must sell the marijuana to a licensed distributor. A distributor is defined as a “person licensed to purchase medical cannabis from a cultivator or medical cannabis products from a manufacturer to sell to a dispensary.”<sup>39</sup> Prior to delivering the marijuana to either a dispensary or a manufacturer, the distributor delivers the marijuana product to a third party licensed testing facility, which performs the quality control testing on the product.<sup>40</sup> After the marijuana has gone through quality control testing, it is delivered back to the distributor for distribution to either a licensed dispensary or a manufacturer. A manufacturer takes the raw product, and turns it into a finished product.<sup>41</sup> A manufacturer must then deliver the finished product back to a distributor, who takes it to a licensed, third party testing facility for further quality control testing before delivering it to the dispensary for final retail sale.

Impacts associated with these types of licenses would include security issues, odor and building safety issues. For manufacturing licenses, there are two subcategories: one for using volatile solvents and one for non-volatile solvents. Manufacturing licenses for volatile solvents are to be limited. The use of volatile solvents can result in an increased risk of lab explosions.<sup>42</sup> In other neighboring jurisdictions, these types of businesses are integrated into the dispensary or cultivation businesses, and thus, there are no separate regulations, apart from those regulating the impacts of dispensaries and cultivation.

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<sup>39</sup> Bus. Prof. Code, § 19300.5(q).

<sup>40</sup> See Bus. Prof. Code, § 19300.5(z).

<sup>41</sup> See Bus. Prof. Code, § 19300.5(y) [manufacturer] and 19300.5(af) [manufacturing site].

<sup>42</sup> Rocky Mountain High Intensity Drug Trafficking Area, “The Legalization of Marijuana in Colorado The Impact”. Vol. 3 (Sept. 2015), pp. 133-136.

*Staff recommends that the City Council provide direction on the following questions:*

4. *For each business, distributor, manufacturer or testing, should the City allow for the business as it relates to medical marijuana?*
5. *For each business, distributor, manufacturer or testing, should the City allow for the business as it relates to recreational marijuana?*

## **Dispensary**

A marijuana dispensary is defined as “facility where medical cannabis, medical cannabis products, or devices for the use of medical cannabis or medical cannabis products are offered, either individually, or in any combination, for retail sale, including an establishment that delivers, pursuant to express authorization by local ordinance, medical cannabis and medical cannabis products as part of a retail sale.”<sup>43</sup> During the January 19, 2016, City Council meeting, two different pictures were painted regarding dispensaries. On the one hand, some dispensaries are more clinical, similar to a pharmacy, where it is a place to pick up medicine, and there is no social component. On the other hand, some dispensaries are more of a wellness center, meaning that patients can pick up their medicine, but other services might be offered, such as classes, support groups, etc.

If unregulated, impacts from dispensaries may include those identified by the City Council in its findings, such as security issues, loitering, nuisance, driving under the influence, odor from smoking. To mitigate such impacts, neighboring cities require dispensaries to submit detailed security plans, limit the amount of product and cash on hand, limit distribution to members only, prohibit consumption of medical marijuana products on site, prohibit the sale of both marijuana and alcohol by an outlet, provide for buffer zones that go beyond the requirements in state law and limit the business hours.<sup>44</sup> They also limit the number of dispensaries, which creates an atmosphere of competition, and which requires dispensaries to articulate the benefit they will offer to the community as the operator of a medical cannabis dispensary in the community. Interestingly, staff learned that a proposed optimal ratio for dispensary to population is one dispensary for every 10,000 in population.<sup>45</sup> In addition, because dispensaries have retail nature to their business, dispensaries may generate the usual impacts of traffic and parking. Those impacts can be mitigated by limiting distribution to the members of the dispensary, or locating near public transportation.<sup>46</sup>

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<sup>43</sup> Bus. Prof. Code, § 19300.5(n); delivery defined Bus. Prof. Code, § 19300.5(m).

<sup>44</sup> Berkeley Municipal Code, § 12.27.050; Oakland Municipal Code, § 5.80.020; San Leandro Municipal Code, § 4-33-200.

<sup>45</sup> SCI Consulting Group. “Cutting Through the Haze: Creating Effective Local Agency Marijuana Policy in California”. (Webinar on Feb. 10, 2016).

<sup>46</sup> See e.g., Berkeley Municipal Code, § 12.27.050.A.

*Staff recommends that the City Council provide direction on the following questions related to dispensaries:*

- 6. Brick and Mortar Medical Marijuana Dispensaries: should medical marijuana dispensaries be allowed?
  - a. If no, should medical marijuana dispensaries located outside of the City be allowed to deliver within the City?*
  - b. If yes, how does the City Council envision the character of a medical marijuana dispensary, e.g., clinic vs. wellness center or both?*
  - c. If yes, should the medical marijuana dispensary be allowed to deliver within the City?**
- 7. Mobile Medical Marijuana Dispensaries: should medical marijuana dispensaries that provide delivery-only service to patients be allowed within the City?*
- 8. Recreational Marijuana Dispensaries: If recreational marijuana becomes legal under state law, should the City allow for recreational marijuana dispensaries?*

## **Potential Revenue**

There are two potential income streams from medical marijuana business: fees and taxes.

### *Fees*

Cities typically charge fees to offset the cost of administering the program, such as an application fee to offset staff time in reviewing the application, or a permit fee to offset staff time in administering the program tied to the permit. All three cities charge a fee if the activity requires a permit, but San Leandro's fees may be the most relevant for Emeryville to consider because the City is in the process of establishing a program, whereas Berkeley and Oakland have established programs that are being maintained. San Leandro implemented the following fees during the application process to offset staff and third party consultant costs<sup>47</sup>:

- Phase I Application Fee: \$157 for each member of applicant team for criminal background check, a portion of which goes to a third party vendor assisting in the background check.
- Phase II Application Fee: \$3000 per applicant team.
- Phase III Application Fee: \$7000 per applicant team.

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<sup>47</sup> City of San Leandro, Application to Operate a Medical Cannabis Dispensary. Release Date: December 5, 2014.

San Leandro staff estimates that once the operations begin, the annual fee for the operator's permit will be \$60,000 to offset staff's time and costs of third parties to monitor compliance with permit requirements.<sup>48</sup> There is no direction being sought by staff at this time as it relates to fees.

### *Taxes*

The other income stream from medical marijuana includes two different types of taxes: the sales and use tax, and the business license tax. The Board of Equalization in recent years began issuing sellers' permits, and therefore, to the extent that a medical marijuana business obtains a seller's permit, then the cities are collecting the sales and use tax.<sup>49</sup> Prior to the MMRSA, medical marijuana dispensaries and collectives had to operate as a non-profit. The status of non-profit typically exempts the entity from having to pay local business taxes, except for a small flat administrative fee. However, both the electorates of Oakland and Berkeley adopted taxes specific to medical marijuana, and therefore, have been able to tax businesses related to medical marijuana.

San Leandro does not appear to have a business tax specific to medical marijuana. Instead, in issuing its RFP for the sole operator's permit, it asked applicants to identify how their business would provide a community benefit. Harborside, who was operating as a non-profit and was awarded the permit in San Leandro, volunteered to pay certain taxes as part of its community benefit. Until San Leandro's electorate adopts a tax specific to medical marijuana, if it does, Harborside has voluntarily committed to paying one percent of gross tax receipt, estimated to generate \$47,800 in 2016 and \$71,800 in 2017, and ten percent of net operating income, estimated to be \$14,000 in 2016 and \$45,000 in 2017. With respect to sales tax, Harborside is expected to generate \$71,800 in 2016 and \$107,000 in 2017.<sup>50</sup> In sum, the revenue generated by the one medical marijuana dispensary is anticipated to be: \$133,600 in 2016 and \$223,800 in 2017.

Similar to San Leandro, Emeryville's existing taxation tools include: the sales and use tax, and the business license tax. With seller's permits now issued to medical marijuana businesses, if Emeryville had a lawfully operating dispensary, the City would presumably receive its share of tax revenue under its sales and use tax ordinance. Collection of the business tax may present some issues. Section 3-1.139(a) of the

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<sup>48</sup> Staff Report for the City Manager's Recommendation to the City Council Regarding the Selection of a Medical Cannabis Dispensary Operator, Issuance of the Medical Cannabis Dispensary Permit and Establishment of the \$60,000 Annual Permit Fee, File No. 15-463, Date of Proposed Action: 9/8/2015, pp. 8-9.

<sup>49</sup> SCI Consulting Group. "Cutting Through the Haze: Creating Effective Local Agency Marijuana Policy in California". (Webinar on Feb. 10, 2016).

<sup>50</sup> Staff Report for the City Manager's Recommendation to the City Council Regarding the Selection of a Medical Cannabis Dispensary Operator, Issuance of the Medical Cannabis Dispensary Permit and Establishment of the \$60,000 Annual Permit Fee, File No. 15-463, Date of Proposed Action: 9/8/2015, pp. 8-9.

Emeryville Municipal Code exempts non-profits from paying business tax. If the medical marijuana business operates as a non-profit, the City will not be able to collect any business tax. As for medical marijuana for-profit businesses, Section 3-1.04 of the Emeryville Municipal Code provides that a business tax certificate shall not issue for any use that is prohibited under federal, state, or local law. Whether medical marijuana use is considered prohibited under federal law may turn on how the Ninth Circuit resolves the issues in *USA v. Marin Alliance for Medical Marijuana*, --F.Supp.3d.-- (2015, N.D. Cal.) or any other case working its way through the judicial system.

*Staff recommends that the City Council provide direction on the following question:*

9. *Is the City Council interested in pursuing a specific business tax on medical marijuana, and on recreational marijuana, if recreational marijuana becomes legal under state law?*

### **Smoking and Vaping**

In addition, Chapter 29 of Title 5 of the Emeryville Municipal Code, "Smoking Pollution Control" specifically includes the smoke of medical marijuana in the prohibition on smoking as outlined in the chapter. Given that smoking of marijuana is one of the most popular forms in which to consume marijuana, the City Council should consider how it may want to regulate the smoke and / or vapor from medical marijuana. Smoking marijuana with tobacco is a common way of smoking marijuana,<sup>51</sup> and the smoke and / or vapor from marijuana often drives complaints. Individuals who may be impacted by the secondhand smoke or vapor from marijuana complain about the odor and the impacts of secondhand smoke on their health.

*Staff recommends that the City Council provide direction on the following questions:*

10. *Should the smoke and / or vapor from medical marijuana be regulated differently than the smoke of tobacco and other products?*
11. *Should the smoke and/or vapor from recreational marijuana be regulated differently than the smoke of tobacco and other products?*
12. *If yes to either question above, should smoking and/or vaping of marijuana in multi-unit residential buildings be regulated differently from smoking in single family houses?*

### **FISCAL IMPACT**

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<sup>51</sup> SCI Consulting Group. "Cutting Through the Haze: Creating Effective Local Agency Marijuana Policy in California". (Webinar on Feb. 10, 2016).

At this time, it would be premature to undertake a full fiscal impact analysis on adopting, implementing, and enforcing any new regulations on the marijuana industry. Once the City Council has provided direction, staff will develop a work plan. It is important to note that medical marijuana is referenced throughout the municipal code, which means that not only new regulations would need to be adopted, but existing regulations would need to be modified, which may require first presenting regulations to an advisory body. For example, the City's Planning Regulations explicitly prohibit medical marijuana dispensaries, which means a modification to this regulation, will require that the amendment be first presented to the Planning Commission. (Emeryville Municipal Code, § 9-5.207.) In addition, staff anticipates that there may need to be other meetings to obtain input from various stakeholders. Furthermore, it is anticipated that depending upon the direction provided by Council, the City may need to retain third party consultants to advise on some of the more technical issues, such as taxation and the operations of marijuana businesses to ensure that the regulations address the impacts of the businesses.

### **ENVIRONMENTAL REVIEW**

Any proposed regulations will need to be analyzed in compliance with the California Environmental Quality Act (CEQA).

### **CONCLUSION**

In sum, staff recommends that the City Council hears staff's presentation, take public comment, and then provide direction to staff on the following twelve questions:

1. *Commercial Cultivation:*
  - a. *Should the City allow for commercial medical marijuana cultivation?*
  - b. *If yes, should commercial medical marijuana cultivation be allowed at the maximum size under state law?*
2. *Limited Cultivation:*
  - a. *Should medical marijuana cultivation by a qualified patient or his or her primary caregiver be allowed as an incidental use to a residential use?*
  - b. *If yes, should limited medical marijuana cultivation be allowed by right or subject to a permit, e.g., an administrative permit?*
3. *Recreational Marijuana: If recreational marijuana use becomes legal under state law, does the City Council want to consider allowing for commercial cultivation for recreational marijuana?*
4. *For each business, distributor, manufacturer or testing, should the City allow for the business as it relates to medical marijuana?*

5. *For each business, distributor, manufacturer or testing, should the City allow for the business as it relates to recreational marijuana?*
6. *Brick and Mortar Medical Marijuana Dispensaries: should medical marijuana dispensaries be allowed?*
  - a. *If no, should medical marijuana dispensaries located outside of the City be allowed to deliver within the City?*
  - b. *If yes, how does the City Council envision the character of a medical marijuana dispensary, e.g., clinic vs. wellness center or both?*
  - c. *If yes, should the medical marijuana dispensary be allowed to deliver within the City?*
7. *Mobile Medical Marijuana Dispensaries: should medical marijuana dispensaries that provide delivery-only service to patients be allowed within the City?*
8. *Recreational Marijuana Dispensaries: If recreational marijuana becomes legal under state law, should the City allow for recreational marijuana dispensaries?*
9. *Is the City Council interested in pursuing a specific business tax on medical marijuana, and on recreational marijuana, if recreational marijuana becomes legal under state law?*
10. *Should the smoke and/or vapor from medical marijuana be regulated differently than the smoke of tobacco and other products?*
11. *Should the smoke and/or vapor from recreational marijuana be regulated differently than the smoke of tobacco and other products?*
12. *If yes to either question above, should smoking and/or vaping of marijuana in multi-unit residential buildings be regulated differently from smoking in single family houses?*

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



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Michael Guina, City Attorney

Attachments:

1. Comparison Chart for Cultivation Regulations
2. Comparison Chart for Dispensary Regulations
3. San Leandro's Ordinance
4. Map depicting 600 foot buffer around certain educational institutions
5. Map depicting 1000 foot buffer around certain sites as it relates to Tobacco Shops