



City of Emeryville

C A L I F O R N I A

MEMORANDUM

DATE: February 7, 2017

TO: Mayor Donahue and Members of the City Council

FROM: Michael A. Guina, City Attorney
Charles S. Bryant, Community Development Director

SUBJECT: **Study Session: Consideration Of Regulation Of Cannabis (Marijuana)**

RECOMMENDATION

Staff recommends that the City Council receive this informational report, receive public comment, and provide direction to staff.

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 cannabis 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 cannabis 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 enforcement of the federal prohibition 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 cannabis. The memo outlines priorities for enforcement, and specifically states¹:

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 and enforcement systems that will address the threat those state laws could

¹ 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.

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.²

Subsequent to the memo, Congress adopted the Rohrabacher-Farr amendment, codified as Section 538 of the 2015 Appropriations Act³, which essentially defunded enforcement activities related to cannabis 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 November 2016, the Ninth Circuit issued an opinion in *United States v. McIntosh*⁴, which held that such an amendment prohibits the federal government from prosecuting individuals who are engaged in activities allowed under a state medical cannabis law. It is important to note that the foregoing Congressional limit on federal enforcement relates to states’ *medical* cannabis programs.

Given the recent change in federal administration, which includes the appointment of a new U.S. Attorney General, the direction of the federal government as it relates to the enforcement of the federal prohibition against cannabis, whether medical or recreational, is unclear. As of the writing of this staff report, cannabis remains a Schedule I drug under the Federal Controlled Substances Act, meaning the manufacture, cultivation, distribution and possession is unlawful under federal law, and violation of the Federal Controlled Substances Act is subject to serious criminal penalties.

² *Id.* pp. 1-2.

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

⁴ (2016) 833 F.3d 1163, 1177.

State Law: Both Medical and Recreational Cannabis to Be Regulated Comprehensively

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”). It exempts patients and defined caregivers who possess or cultivate marijuana for medical treatment recommended by a physician from criminal laws which otherwise prohibit possession or cultivation of marijuana. 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 or cooperatively cultivate cannabis for medical purposes with a limited defense to certain specified state criminal statutes. Despite such state law, many cities, including Emeryville, prohibited medical cannabis dispensaries and cultivation, creating conflict between medical cannabis advocates and local governments. Subsequently, in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*⁵, the California Supreme Court upheld the right of local public agencies to regulate, including to prohibit, medical cannabis operations through their land use powers.

On October 9, 2015, Governor Brown approved the Medical Cannabis Regulation and Safety Act (“MCRSA”), 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 cannabis through Assembly Bills 243 and 266 and Senate Bill 643. The MCRSA is a comprehensive state statutory framework to regulate medical cannabis 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 cannabis cultivation, processing, delivery and dispensaries.⁶ The MCRSA preempts cities from enacting any local legislation that prohibits the transport of medical cannabis through public streets.⁷ Governor Brown then signed AB 21, which clarified that under the MCRSA, cities retain their local ability to regulate cultivation after March 1, 2016.

More recently, in November 2016, California state voters adopted Proposition 64, the “Control, Regulate, and Tax Adult Use of Marijuana Act”, also referred to as the “AUMA”, legalizing recreational marijuana for persons aged 21 years or older under state law and establishing certain sales and cultivation taxes. Proposition 64 makes it legal for individuals to use and grow marijuana for personal use on November 9, 2016. However, the sale and subsequent taxation of recreational marijuana will not go into effect until

⁵ 56 Cal.4th 729 (2013).

⁶ 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].

⁷ Bus. Prof. Code, § 19338(b).

January 1, 2018. The AUMA sets forth a comprehensive regulatory scheme, similar to the MCRSA. However, there are some significant differences that impact local government. For example, 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.⁸ In addition, the AUMA generally prohibits cities from banning indoor cultivation for personal use, defined as up to six plants.⁹

Included as Attachment 1 is a memorandum from the League of California Cities discussing the differences between the two state regulatory systems.

Emeryville: Medical and Recreational Cannabis is Prohibited Except for Delivery to Qualified Patients or Their Primary Caregivers

In 2006, the City Council adopted Ordinance No. 06-007, adding Chapter 28 of Title 5 of the Emeryville Municipal Code. Chapter 28 of Title 5 explicitly prohibits medical cannabis dispensaries, which includes cultivation of medical cannabis. 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 cannabis.¹⁰ Although the findings implied delivery was included, the prohibition of medical cannabis delivery was not explicit. Therefore, following the introduction of the MCRSA, on January 19, 2016, the City Council adopted an urgency ordinance (Ordinance No. 16-001) and introduced a regular ordinance regulating medical cannabis (Ordinance No. 16-002). The urgency ordinance amended Chapter 28 of Title 5 to prohibit the delivery of medical cannabis and took effect immediately. The regular ordinance repealed and replaced Chapter 28 of Title 5 to make the City's prohibition related to medical cannabis consistent with state law and to reaffirm the City's prohibition related to non-medical cannabis.

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 MCRSA. By doing so, the City would be able to study whether it was time to reconsider its complete prohibition on cannabis.

On March 15, 2016, the City Council held a study session to provide guidance to staff on how to set up a local regulatory framework governing cannabis. The Council directed staff to draft regulations that would allow for: personal cultivation of medical cannabis, manufacturing and testing of medical cannabis, and one medical dispensary, which would be determined by issuing a request for proposals. The City Council indicated it was not interested in allowing for commercial cultivation given Emeryville's urban character. Although there was some discussion regarding recreational cannabis, given that the

⁸ 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.

⁹ *Ibid.*

¹⁰ EMC 5-28.01(i).

AUMA was not adopted yet, the City Council indicated that it was open to recreational cannabis, but declined to take any formal position.

The Council also directed staff to return with regulations that would allow for dispensaries licensed in other jurisdictions to deliver cannabis to qualified patients or their primary caregivers in Emeryville. The first reading of this ordinance was adopted on April 19, 2016. The City Council then re-adopted the first reading of the ordinance on May 3, 2016, after modifying the regulations as it related to background investigation, and adopted the second reading on May 17, 2016. As of the writing of this staff report, the Police Department has one application for a delivery permit pending.

On December 8, 2016, the Planning Commission considered proposed modifications to the City's Planning Regulations (Title 9 of the Emeryville Municipal Code), which would implement the Council's direction as well as Proposition 64. The proposed modifications to the Planning Regulations create two new use classifications, Cannabis Sales and Cannabis Manufacturing, and include locational criteria and permitting procedures for each, as well as regulations for personal cultivation. The Planning Commission unanimously recommended that the City Council approve the proposed modifications to the Planning Regulations with the following minor changes: allow personal cultivation in accessory structures; allow commercial cultivation that is accessory to cannabis manufacturing and research and development activities; include parking requirements for cannabis manufacturing and retail activities; and include all types of child care, including day care, as a sensitive receptor for locating cannabis retail activities. The attached proposed draft ordinance incorporates the Planning Commission's comments.

DISCUSSION

Staff is proposing that commercial cannabis activities be subject to two separate permits: a conditional use permit and an Operator's Permit. Accordingly, attached are two proposed ordinances for the Council's consideration. The first ordinance proposes to add a new Article 22, entitled "Cannabis-Related Activities", to Chapter 5 of Title 9 (Planning Regulations) of the Municipal Code to regulate the land use of cannabis activities (Attachment 2). The proposed ordinance will require a land use permit from the Planning Commission for commercial cannabis activity, and is intended to mitigate against the potential land use impacts from cannabis activity.

The second ordinance proposes to repeal and replace Chapter 28 (Marijuana) of Title 5 of the Municipal Code in its entirety to require an Operator's Permit for commercial cannabis activity and set forth what personal cannabis activity is allowed as require under the AUMA (Attachment 5). This proposed ordinance is intended to ensure that the commercial cannabis activity is not a front for illegal activity or otherwise presenting a threat to the public's health, safety and welfare. The Operator's Permit, similar to a Cabaret Permit, will be handled by the Police Department, which will look into various operational characteristics such as the applicant's background and proposed security plan.

Although state law has created two similar but separate regulatory schemes, one for medical and one for recreational cannabis, the two proposed ordinances do not distinguish between recreational and medical cannabis. In staff's opinion, the potential impacts from either recreational or medical cannabis are the same, and therefore, staff proposes one regulatory scheme to govern both recreational and medical cannabis. However, if the Council is inclined to move forward with only medical cannabis and continue to prohibit recreational cannabis to the extent the City may do so under the AUMA, the proposed ordinances have been drafted in a manner that can easily be modified to make that distinction per Council direction.

Proposed Land Use Regulations

In order to help ensure that individuals and businesses engaged in cannabis-related activities will pose minimal impacts to the public health, safety and welfare, the proposed amendments to the Planning Regulations outline performance criteria for personal cultivation, whether for medical or recreational purposes; define and treat manufacturing of cannabis products similar to manufacturing of pharmaceutical products; and lay out the locational criteria for a dispensary or retailer, similar to the criteria for Tobacco Shops.

Below is a discussion of the proposed regulations with key highlights. The attached draft ordinance (Attachment 2) provides the exact language that is proposed to be incorporated into the Planning Regulations.

Personal Cultivation (Including Processing for Personal Use)

The proposed regulations would allow cultivation of no more than six cannabis plants in any dwelling unit by any individual that is 21 years or older for recreational purposes. For enforcement purposes, it will be difficult to distinguish between cultivation of cannabis for a qualified patient and personal cultivation allowed for recreational purposes. Therefore, staff recommends one cultivation standard that is consistent with both the City Council's direction and Proposition 64. Personal cultivation may occur in any zoning district provided that the activity is in compliance with the following:

- (1) Growing, processing, or transporting of cannabis plants for personal use must be in full compliance with all the applicable provisions of California law.
- (2) Cannabis plants shall be grown, possessed, and processed within the residence of the person growing, possessing and processing the cannabis plants for personal use. No more than six plants may be cultivated in a dwelling unit.
- (3) Cannabis plants shall not be grown or processed in the common areas of a multi-unit residential development nor in common areas of any commercial or industrial building.
- (4) Cultivation and processing of cannabis plants must occur within a building or a dwelling unit and must not be perceptible from the exterior of the building or dwelling unit including but not limited to: visual observation, including any form of signage; unusual odors, smells, fragrances, or other olfactory stimulus; light pollution, glare or brightness; and excessive noise from ventilation fans.

- (5) Cannabis growth and processing shall meet the requirements of all applicable building and life/safety codes, including requirements concerning electrical systems and ventilation systems.
- (6) Any use of a compressed flammable gas as a solvent or other volatile solvent in the extraction of THC or other cannabinoids for personal use is prohibited.

Manufacturing, Distribution and Processing of Cannabis Products

Manufacturing, distribution and processing of cannabis and cannabis products such as extracts, concentrates, edible products, and topical products would have characteristics similar to the manufacturing of pharmaceuticals. Therefore, Cannabis Manufacturing would be allowed in the same zoning districts as Pharmaceutical Manufacturing, namely the Mixed Use with Non-Residential (MUN), Office/Technology Doyle Hollis North (OT/DH), Office/Technology (OT), Light Industrial (INL), and Heavy Industrial (INH) districts. (See map, Attachment 3.) However, because Cannabis Manufacturing would be classified as a “Use of Special Concern”, it would require a Major Conditional Use Permit from the Planning Commission in any of these zoning districts.

Retail Sale of Cannabis Products

The draft ordinance allows for retail cannabis sales with a Major Conditional Use Permit in the same locations where Tobacco Shops are allowed, i.e. in the Mixed Use with Residential (MUR), Mixed Use with Residential South (MURS) and Mixed Use with Non-Residential (MUN) zoning districts. In addition, any such use may not be located within 500 feet of any public parks, religious institutions, or elementary or secondary schools or other child care locations, such as day care facilities. The attached map indicates possible locations where an application to establish Cannabis Sales may be proposed (see Attachment 4).

The City Council has expressed interest in limiting the number of retail outlets. Accordingly, although the Planning Regulations allow for several different sites where Cannabis Sales could occur, the proposed ordinance to establish the Operator’s Permit provides that an Operator’s Permit issues at the City Council’s sole discretion, and may not issue until the City Council adopts a resolution providing for guidelines on the issuance of an Operator’s Permit for a retail cannabis activity. As noted above, the City Council direction for retail sale includes allowance of one dispensary in the City that would be selected via a Request for Proposals (RFP) process thereby giving the City Council an opportunity to review and select a viable vendor.

Structure of Regulations

The new cannabis-related regulations would appear in various places within the Planning Regulations (Title 9 of the Emeryville Municipal Code). The personal cultivation standards, locational criteria for retail outlets and/or dispensaries, and definitions of key words such as manufacturing, dispensary, and testing laboratory, would be contained in a new Article 21 of Chapter 5, entitled “Cannabis-Related Activities”. In addition to the

new Article 21, there would be five related modifications to the Planning Regulations, in Chapters 2 (“Use Classification”), 3 (“Zoning Districts”), and 5 (“Citywide Use and Development Regulations”). The first is to add a new use classification for “Cannabis Sales” as a retail use type in Section 9-2.353(i). The second modification is to add a new use classification for “Cannabis Manufacturing” as an Industrial use type in Section 9-2.417(f). The third is to add Cannabis Sales as a retail use and Cannabis Manufacturing as a manufacturing use under Uses of Special Concern (Sections 9-2.417 (i)(4) and 9-2.417 (m)(3), respectively). The fourth modification is to include Cannabis Sales and Cannabis Manufacturing as new use classifications in Table 9-3.202 that shows the zoning districts in which these uses are conditionally permitted or prohibited. And the fifth modification is deletion of the section prohibiting medical marijuana dispensaries (Section 9-5.207). Please see the attached draft ordinance for exact language to be added and modified (Attachment 2).

Proposed Operator’s Permit

Overall, the proposed ordinance to establish the Operator’s Permit is designed to ensure that the City’s regulatory program allowing for cannabis activities is consistent with “lawful” cannabis activities as set forth in the Cole Memo. In addition, the proposed ordinance is designed to achieve consistency with both the AUMA and the MCRSA to facilitate the economic development surrounding cannabis activities while mitigating against potential impacts from those activities. (See Attachment 5).

Application Process

The ordinance sets forth a process to apply for an Operator’s Permit, which requires a background check of the owners of the business and employees. The existing Chapter 28 of Title 5 currently has an application process for medical cannabis delivery permits, which was modeled after other city application processes, with some modifications made by the Council. Instead of expanding the current application process for delivery permits, the proposed ordinance sets forth an application process, including background check, that is modeled after the application process set forth in both the AUMA and the MCRSA, to ensure consistency across both recreational and medical cannabis and consistency between state and local law.

Permit Issuance

Assuming that an application is approved and conditions are met, the Police Chief may issue the Operator’s Permit for all commercial cannabis activities, with the exception of any permit for retail/dispensary. With respect to commercial cannabis activities that fall within the Cannabis Manufacturing use classification, these businesses transact with other businesses, and do not interface with the general public. Given the conditions placed on businesses engaged in Cannabis commercial activities falling within the Cannabis Manufacturing use classification, these businesses should be indistinguishable from other non-cannabis businesses in the area. Thus, staff recommends that a staff-issued permit is appropriate for these businesses, provided it is consistent with the

adopted ordinance. A staff issued permit streamlines the approval process, which encourages the economic development of this new industry within the City.

With respect to the retail/dispensary permit, staff proposes that Council first adopt a resolution setting forth the criteria for when it will issue an Operator's Permit for a retail outlet. Through a subsequent resolution, the City Council can determine how many Operator Permits for retail/dispensary it will issue. At the March 15, 2016, study session, the Council had indicated interest in issuing one Operator's Permit for a medical dispensary, following a competitive request for proposals (RFP) process. Since the March 15, 2016, study session, the AUMA has been enacted, and the industry is rapidly changing. Staff anticipates that the Council may want to further study and consider its vision for one dispensary in Emeryville. Therefore, during the study session, staff is requesting that the Council provide direction to staff regarding its vision for the initial cannabis retail/dispensary outlet. Some questions for Council's consideration include:

- 1. Should the initial retail outlet focus on recreational or medical cannabis or both?*
- 2. What should the scale be of the initial retail/dispensary outlet? Is the Council interested in a locally serving retail/dispensary outlet or a more regional serving retail/dispensary outlet?*
- 3. Should on-site use be allowed at the initial retail/dispensary outlet?*
- 4. Does the Council wish to provide any other direction that would assist staff in developing criteria to establish when a retail/dispensary permit should issue?*

Conditions for Permits

The proposed ordinance sets forth standard conditions, such as operation hours, odor control, indemnification, insurance requirements, and security measures. The ordinance also sets forth packaging and labeling requirements. It is anticipated that the state will also develop packaging and labeling requirements. Until those regulations are developed, local jurisdictions will need to impose packaging and labeling requirements. Jurisdictions that have allowed for medical cannabis activities already have developed packaging and labeling requirements. Instead of establishing packaging and labeling requirements in the ordinance, the ordinance allows for the Police Chief to impose conditions on packaging and labeling. For example, if a business seeking to locate in Emeryville already meets Berkeley packaging and labeling requirements, then the Police Chief could require that the business continue to satisfy those requirements in Emeryville. By allowing the Chief to impose conditions, as opposed to articulating the conditions in the ordinance, the City is able to mitigate against impacts to the public health, safety and welfare while providing consistency to businesses, which encourages economic development of the industry in Emeryville.

Expiration Date of Permit

Staff proposes the Operator's Permit expire at midnight on on midnight of the thirty-first of December of the calendar year in which the Permit was issued or renewed. This term is identical to provisions in the Cabaret and Card Room Ordinances.

Effective Date

Staff proposes that the effective date allow for more than thirty days after its final passage. Staff will need time to implement the Operator's Permit program. However, the delay in effective date should not ultimately delay businesses from establishing operations. The proposed ordinance anticipates that businesses will obtain their land use permit prior to their Operator's Permit. The Planning Division is prepared to accept applications for cannabis land use permits as soon as the regulations become effective because the Planning Regulations modify an already existing program to allow for cannabis land use. The Operator's Permit is establishing a new program, and therefore, more time is needed to implement the program once Council adopts the ordinance.

Remaining Issues

Adoption of the two proposed ordinances will constitute a significant milestone because it will allow for a new industry to establish in Emeryville. However, there are still further issues that staff will bring forward for Council's attention. First, staff is investigating whether smoke or vapor from cannabis, either medical or recreational, should be regulated in the same manner as smoke and vapor from tobacco products. This investigation and proposed recommendations arising from the investigation will be incorporated into modifications to the City's Smoking Pollution Control Regulations, found at Chapter 29 of Title 5 of the Municipal Code. Per Council's direction, the Housing Committee will be studying proposed changes to the City's smoking regulations. Second, the Council was interested in considering whether it should pursue a tax on cannabis, similar to the taxes levied by Berkeley and Oakland. Since the Council provided that direction, the AUMA has been adopted. The AUMA imposes a new state tax on cannabis. As staff learns more about the new taxation system, and how the industry and markets are responding, staff will bring forward information to the City Council on taxation issues.

FISCAL IMPACT

Staff will be proposing modifications to the Master Fee Schedule so the City may recover its costs in processing and approving applications for an Operator's Permit. (Land use permit processing fees are already included in the Master Fee Schedule.)

ENVIRONMENTAL REVIEW

The proposed ordinances are exempt from environmental review under State CEQA Guidelines Section 15061(b)(3), the "general rule" that CEQA does not apply to projects where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment. Medicinal and recreational Cannabis

Sales activities are anticipated to have characteristics similar to Tobacco Sales activities, and medicinal and recreational Cannabis Manufacturing activities are anticipated to have characteristics similar to Pharmaceutical Manufacturing activities. Both are expected to generate a negligible amount of vehicle trips, and any potential impacts on air quality, light and glare, liquid or solid waste, noise, odor, and vibration will be addressed through adherence to the existing Performance Standards in Article 11 of Chapter 5 of the Planning Regulations. In addition, the proposed standards for personal cultivation would address any potential impacts of this accessory use.

CONCLUSION

In sum, staff recommends that the City Council hears staff's presentation, take public comment, and then provide direction to staff.

Prepared by:

Andrea Visveshwara, Assistant City Attorney

Miroo Desai, Senior Planner

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



Michael Guina, City Attorney

Attachments:

1. Memorandum from California League of Cities re: AUMA dated September 26, 2016
2. Proposed Land Use Regulations
3. Map Depicting Locations for Cannabis Manufacturing
4. Map Depicting Locations for Cannabis Retail
5. Proposed Operator's Permit Regulations