



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: July 25, 2017

TO: Mayor and Members of the City Council

FROM: Michael Guina, City Attorney

SUBJECT: Cannabis Study Session

RECOMMENDATION

Staff recommends that the City Council receive the informational report, and provide direction on regulations related to issuing an Operator's Permit for a cannabis dispensary/retail outlet.

BACKGROUND

On April 4, 2017, the City Council adopted the final reading for two ordinances to establish a local regulatory framework that would allow for commercial cannabis within the City. Ordinance No. 17-002 amended the City's planning regulations to allow for all commercial cannabis activity, except commercial cultivation, subject to a conditional use permit from the City's Planning Commission. The ordinance became effective on May 4, 2017, and the City's Planning Department is accepting applications for conditional use permits for cannabis businesses. As of the drafting of this staff report, the City has not yet received an application for any cannabis business seeking to obtain a conditional use permit.

Ordinance No. 17-003 repealed and replaced Chapter 28 of Title 5 of the Emeryville Municipal Code, and requires all commercial cannabis businesses to obtain an Operator's Permit, prior to commencing operation. This ordinance will be effective September 1, 2017. Except for an Operator's Permit for retail/dispensary, cannabis businesses may apply for their Operator's Permit after obtaining the conditional use permit from the Police Department. With respect to Operator's Permits for retail/dispensary cannabis businesses, the ordinance provides that such permit will issue pursuant to regulations adopted via resolution by the City Council. The purpose of this study session is to discuss those proposed regulations. To date, within the context of regulating retail/dispensary outlets, Council has provided direction that: 1) it is interested in issuing only one Operator's Permit, after issuing a request for proposals, similar to the process followed in San Leandro; 2) the retail/dispensary should be regional serving and allow for on-site consumption of cannabis; and 3) the retail/dispensary may sell either medical or recreation cannabis or both.

DISCUSSION

Including Individuals from Communities Damaged by the War on Drugs

City of Oakland Model

The Council also indicated it was interested in exploring an equity share program. At the time of the drafting of this staff report, only Oakland had an adopted equity share program. Oakland's equity share program is to implement its stated goal of "promoting equitable ownership and employment opportunities in the cannabis industry in order to decrease disparities in life outcomes for marginalized communities of color and to address the disproportionate impacts of the war on drugs in those communities."¹ Following adoption of Proposition 215 in 1996, Oakland began to embrace cannabis advocacy community, which was experimenting with open medical cannabis businesses, and also, which was predominantly white.² During this time period, arrests for cannabis related crimes in the African American community continued to increase, while cannabis related arrests for whites remained relatively low. For example, "in 2015 African American arrests were 'down' to 71 percent of all arrests, but Asian, and Latino arrests were up to 6.95 percent and 16.31 percent respectively, as compared to 3.02 percent White arrests."³ Oakland recognized that the possession of a criminal record can inhibit employment opportunities and undermine economic security and contribute to a downward cycle of poverty.⁴ The equity share program is to mitigate against Oakland's unequal enforcement priorities from past years, which has led to a disparity in impacts amongst the communities in Oakland.⁵

Under the Equity Permit Program, Oakland will issue at least half of the cannabis operator's permits to an Equity Applicant during the time period in which the Equity Assistance Program is being funded and implemented.⁶ An Equity Applicant must be an Oakland resident, have an annual income of at or less than 80% of the Oakland Average Median Income, and either live in a particular Oakland police beat or have been arrested after November 5, 1996, and convicted of a cannabis crime in Oakland.⁷ Once the Equity Permit Program is funded, the program will provide Equity Applicants with financial and technical assistance, including no interest business startup loans, and the restrictions on the number of general applicant permits will cease.⁸ General applicants may receive preference for a permit if they serve as an incubator for an Equity Applicant by providing real estate to the Equity Applicant.⁹

¹ "Equity Analysis and Proposed Medical Cannabis Ordinance Amendments." Staff Report, p. 2, prepared for March 7, 2017, City Council Meeting for the City of Oakland.

² *Id.* p. 4.

³ *Id.* p. 3.

⁴ *Id.* p. 5.

⁵ *Id.* p. 5.

⁶ Oakland Municipal Code, § 5.80.045.D.2.

⁷ Oakland Municipal Code, § 5.80.045.A.

⁸ Oakland Municipal Code, § 5.80.45.C.

⁹ Oakland Municipal Code, § 5.80.045.D.3.

Emeryville and Oakland Not Similarly Situated

As it relates to making amends to communities who have been harmed by the War on Drugs, Emeryville and Oakland are not similarly situated for several reasons. First, unlike Oakland, Emeryville prohibited all cannabis activities until 2016, which is when Emeryville first adopted regulations to allow for delivery of medical cannabis by dispensaries licensed in other jurisdictions. Second, the population difference between Oakland and Emeryville is substantial, which means the numbers of individuals arrested for cannabis related crimes differs significantly. In looking back to 2006, the most number of individuals arrested for cannabis related crimes in any one year by Emeryville Police Department was 25, which included all races, compared to the hundreds of individuals arrested by Oakland Police Department. Third, Oakland is issuing multiple dispensary/retail permits, whereas the City Council has indicated it is interested in issuing such permits one at a time.

Thus, the policy set by Emeryville on how to include individuals from communities harmed by the War on Drugs will need to be tailored to account for its population, and geographic size. In considering how to include individuals from communities harmed by the War on Drugs, the policy should consider how to create access to: 1) ownership, 2) employment, and/or 3) medical dispensaries, which can improve the health of such communities, which are traditionally underserved by the medical establishment.¹⁰

With respect to access to ownership, cannabis business owners do not have access to the federal grants that support small businesses or loans from commercial lenders because of its status as a federally prohibited controlled substance. Therefore, the cannabis industry is still largely a cash industry.¹¹ If individuals from the harmed communities amass the cash necessary to enter the legal market, they do so, often as a small business, and therefore, they benefit from many of the programs that support small businesses.¹²

Prior drug convictions that were the result of the War on Drugs can present a barrier to individuals from harmed communities obtaining employment in the cannabis industry. To remove barriers to employment, licensing agencies should: 1) make their criteria for licensing transparent, 2) require background checks (opposed to relying on an individual's memory to list prior convictions), and 3) institute a review process for denials.¹³ The City

¹⁰ Title, Shaleen, et al. "Sustainably Growing the Industry Through Inclusion of Communities Targeted by the War on Drugs." National Cannabis Industry Association, 4th Annual Cannabis Business Summit and Expo. Marriott Convention Center, Oakland. June 14, 2017. Live Panel.

¹¹ See, e.g., Abcarian, Robin. "Your business is legal, but you can't use banks. Welcome to the cannabis all-cash nightmare." Los Angeles Times (January 29, 2017) available at: <http://www.latimes.com/local/abcarian/la-me-abcarian-cannabis-cash-20170129-story.html>; Quinton, Sophie. "Why Marijuana Businesses Still Can't Get Bank Accounts." March 22, 2016 available at: <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/22/why-marijuana-businesses-still-cant-get-bank-accounts>.

¹² Title, Shaleen, et al. "Sustainably Growing the Industry Through Inclusion of Communities Targeted by the War on Drugs." National Cannabis Industry Association, 4th Annual Cannabis Business Summit and Expo. Marriott Convention Center, Oakland. June 14, 2017. Live Panel.

¹³ Little Hoover Commission. "Jobs for Californians: Strategies to Ease Occupational Licensing Barriers," Report No. 234, October 2016, pp. 27-30.

already has implemented these policy recommendations in adopting Ordinance No. 17-003. First, the Ordinance prescribes the requirements for the application and the grounds on which the permit can be denied. Second, once effective, Section 5-28-05 of the Emeryville Municipal Code provides that applicants will be required to fill out a form prescribed by the Police Chief, and the Police Department will require consent to run a background check as part of the form. Third, if any applicant is denied a permit, there is an administrative appeals process.

Finally, medical dispensaries that serve communities harmed by the War on Drugs present an opportunity to improve the health of the community through education, not just on cannabis, but on general well-being.¹⁴ It can become an access point to medical care, which can facilitate addressing major public health issues, such as obesity, and diabetes.

Change in Federal Administration

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. Despite this prohibition, 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.¹⁵ Subsequent to the memo, Congress adopted the Rohrabacher-Farr amendment, codified as Section 538 of the 2015 Appropriations Act¹⁶, 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*¹⁷, 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.

It is unclear how the change in the federal administration will impact the enforcement of the cannabis prohibition. On the one hand, in approving an omnibus funding bill in May 2017, President Trump attached a signing statement providing: “*Division B, section 537 provides that the Department of Justice may not use any funds to prevent implementation of medical marijuana laws by various States and territories. I will treat this provision consistently with my constitutional responsibility to take care that the laws be faithfully executed.*” On the other hand, the current Attorney General Jeff Sessions has been opposed to the legalization of cannabis. In a memo dated March 8, 2017, the Attorney General directed all federal prosecutors to identify criminals responsible for significant violent crime in their districts, and to prosecute using statutes traditionally geared towards curbing violence, such as those involving firearm offenses, but also to use the Controlled

¹⁴ “Title, Shaleen, et al. “Sustainably Growing the Industry Through Inclusion of Communities Targeted by the War on Drugs.” National Cannabis Industry Association, 4th Annual Cannabis Business Summit and Expo. Marriott Convention Center, Oakland. June 14, 2017. Live Panel.

¹⁵ 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.

¹⁶ Pub. L. 114-53, § 103, 129 Stat. 502 (2015).

¹⁷ (2016) 833 F.3d 1163, 1177.

Substances Act since “many violent crimes are driven by drug trafficking and drug trafficking organizations.” Nonetheless, at a press conference in March, the Attorney General said: “The Cole Memorandum set up some policies under President Obama's Department of Justice about how cases should be selected in those states and what would be appropriate for federal prosecution, much of which I think is valid.” Thus, based on this evidence, it appears that the current administration *could* continue to respect the California's legalization of medical cannabis, but recreational cannabis faces uncertainty and therefore, involves more risk. Nonetheless, the only certainty provided at the federal level at the moment is its uncertainty.

Taxing Cannabis

Cannabis may be subject to both state and local taxes. State law levies a state excise tax of fifteen percent of average market price on any retail sale of cannabis, whether medical or recreational.¹⁸ It also imposes a tax of \$9.25 per dry-weight ounce of flowers and \$2.75 per dry-weight ounce of cannabis leaves on licensed commercial cannabis cultivators, whether medical or recreational.¹⁹ In turn, 20% of the revenue derived from these taxes is to be disbursed for state and local law enforcement purposes, which may include grants to cities, unless a city has banned cultivation (including personal cultivation) or the retail sale of cannabis.²⁰ At this time, there is no further state guidance on how the funds will be disbursed to local agencies.

As for local taxes, commercial cannabis activity is potentially subject to the City's sales and use tax or the City's business tax or both. The City's sales and use tax is imposed on the privilege of selling tangible personal property at retail and on the storage, use, or other consumption of the tangible personal property.²¹ The rate of the tax is .95% on the purchase price.²² The buyer pays the tax (which is collected and then remitted by the seller), and therefore, customers of recreational dispensaries would pay the City's local sales and use tax. Customers who hold a state medical cannabis card are exempt from paying the local sales and use tax. Revenue and Taxation Code section 34011(f) provides:

The sales and use taxes imposed by Part 1 (commencing with Section 6001) shall not apply to retail sales of medicinal cannabis, medicinal cannabis concentrate, edible medicinal cannabis products or topical cannabis as those terms are defined in Division 10 (commencing with Section 26000) of the Business and Professions Code when a qualified patient or primary caregiver for a qualified patient provides his or her card

¹⁸ Rev & Tax Code, § 34011(a). Average market price is defined as follows: “In an arm's length transaction, the average market price means the average retail price determined by the wholesale cost of the cannabis or cannabis products sold or transferred to a cannabis retailer, plus a mark-up, as determined by the board on a biannual basis in a six-month intervals. In a nonarm's length transaction, the average market price means the cannabis retailer's gross receipts from the retail sale of the cannabis or cannabis products.” (Rev. & Tax Code, § 34010(b).)

¹⁹ Rev & Tax Code, § 34012(a).

²⁰ Rev & Tax Code, § 34019(f)(3).

²¹ Emeryville Municipal Code, §§ 3-3.306, 3-3.308.

²² Emeryville Municipal Code, § 3-3.302.

issued under Section 11362.71 of the Health and Safety Code and a valid government-issued identification card.

In 2011, the California Branch of the National Organization for the Reform of Marijuana Laws estimated that there were between 750,00 and 1,125,000 patients using medical cannabis in California.²³ Of that, only a small portion obtain a medical cannabis-identification card from the state. In September 2016, the San Diego Union-Tribune reported that from 2004 through January 2016, there were approximately 85,370 cards issued under Section 11362.71 of the Health and Safety Code, which is an average of 7,100 cards per year.²⁴ Thus, because of the exemption for patients using cannabis for medicinal purposes, it is possible that a medical cannabis dispensary will generate less revenue compared to a recreational cannabis dispensary, but there is insufficient data to assess whether the impact of the tax exemption will be significant in Emeryville.

In addition, any dispensary located within the City would need to pay the City's business tax. The business tax is a tax on the privilege to conduct business in Emeryville, and would be paid by the cannabis business. Generally, the business pays .1% of the annual gross receipts of the business, unless the business falls into one of the exceptions listed in the Emeryville Municipal Code.²⁵ Prior to 2016, cannabis businesses had to operate as non-profits because of state law. Non-profits typically do not pay business taxes.²⁶ With the passage of Proposition 64, and new state law governing cannabis, it is anticipated that most cannabis businesses will operate as for-profit, and therefore, be required to pay the applicable business tax. It is worth noting that 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. Given the prior federal administration's policy on cannabis, there was evidence to suggest that the federal government would allow cannabis business in California, and thus, the City could collect its business tax. Once effective, Emeryville Municipal Code section 5-28.06(d)(6) conditions issuance of the Operator's Permit on payment of the City's business tax. However, the uncertainty of federal policy could have implications on City efforts to collect its business tax.

Included as Attachment 6 is a chart summarizing cannabis specific taxes that cities are imposing on the cannabis industry.

Buffer Zone

There are conflicting state laws on buffer zones. Proposition 64 provides: "No licensee under this division shall be located within a 600-foot radius of a school providing instruction in kindergarten or any grades 1 through 12, day care center, or youth center that is in existence at the time the license is issued, unless a licensing authority or a local

²³ Available at: <http://canorml.org/news/cbcsurvey2011.html>.

²⁴ Gilchrist, Michelle. "How many people in California have medical marijuana cards? Not Many." The San Diego Union-Tribune. Sep. 14, 2016. Available at <http://www.sandiegouniontribune.com/news/data-watch/sd-medical-marijuana-cards-20160914-story.html>.

²⁵ Emeryville, Municipal Code, §§ 3-1.124-125.

²⁶ See e.g., Emeryville Municipal Code, § 3-1.139(a).

jurisdiction specifies a different radius.”²⁷ State law prior to Proposition 64 requires there to be a minimum of 600 feet from a public or private school (k-12), and does not provide for local agencies to allow for a different radius requirement.²⁸ Attachment 4 depicts a buffer zone that is compliant with the state law that requires 600 feet around schools. Staff anticipated that the Legislature would need to address this discrepancy when they modify the MCRSA to create one state regulatory system. Given that Proposition 64 is a voter-mandate, and provides for greater local control, in staff’s opinion, the discrepancy should be resolved in favor of Proposition 64’s requirement. Therefore, in adopting Ordinance No. 17-002, the City Council mandated a 250 buffer zone between a dispensary/retail outlet and school, day care center or park (including planned parks). Attachment 5 shows where dispensaries can be located within the City. Although the Legislature appears to agree that local agencies should be able to set the buffer zone²⁹, unfortunately, they failed to modify Health and Safety Code section 11362.768.

Therefore, in reading the state law and local law together, a recreational retail outlet has more location opportunities in Emeryville because it is only subject to the City’s 250 feet buffer zone. However, a medical dispensary has fewer opportunities to locate because it is subject to both the local 250 feet buffer zone and the state-mandated 600 feet buffer zone. In comparing the two maps, the discrepancy in the buffer zone requirements does not appear to be substantial. Medical dispensaries lose location opportunities in an area that is bounded by Hollis on the west, 55th Street on the North, 45th Street to the South, and the area along San Pablo Avenue. At this time, it is unclear how the State will address this discrepancy.

Co-Location of Medical and Recreational Dispensary at One Site

The original 2017 trailer bill issued by the Governor’s Office prohibited co-location of license types (e.g., a medical and recreational dispensary could not co-locate), and those with recreational cannabis licenses could only transact business with other recreational cannabis licensee, and the same parity was required for medical cannabis licensees. There was opposition to the prohibition to the co-location on the basis that local agencies should be able to regulate co-location in their jurisdiction. The trailer bill was subsequently amended, which the Assembly approved. The amended trailer bill removed many of the provisions that implemented the prohibition on co-location. However, not all provisions prohibiting co-location have been removed, and thus, there is some ambiguity as to whether a single dispensary could sell both recreational and medicinal cannabis.³⁰ Future regulations promulgated by the State could clarify the ambiguity.

Outstanding Issues

Although the study session item is focused on the retail/dispensary regulations to issue an Operator’s Permit, discussion of the item may touch on other cannabis topics that staff

²⁷ See Bus. & Prof. Code, § 26054(b).

²⁸ See Health & Safety Code, § 11362.768.

²⁹ Bus. & Prof. Code, § 26054(b).

³⁰ Bus. & Prof. Code, §§ 26001 (ap) [premises definition]; 26050(b), 26053 [conditions of holding multiple licenses].

is still developing. Council has indicated that it is interested in learning more about potentially allowing commercial cultivation. Further, regulations related to the smoking of cannabis are being considered as an update to Chapter 29 of Title 5 of the Emeryville Municipal Code, Smoking Pollution Control. Finally, staff may bring forward minor modifications to Chapter 28 of Title 5 of the Emeryville Municipal Code that are necessitated by the State creating one regulatory framework for both medical and recreational cannabis and issuing regulations.

DISCUSSION

Overview of Dispensary/Retailer Permit Regulations

The proposed regulations set forth a process in which the City will issue a Request for Qualifications (RFQ) to determine which dispensary/retailer will be deemed qualified to obtain an Operator's Permit from the Police Chief after the cannabis business obtains a conditional use permit for the site selected by the cannabis business and provides any updates on its application to the Police Chief. (See Attachment 1.) Once the City Council authorizes the City Manager to issue the RFQ, City staff will publish the RFQ and solicit proposals as it would for other RFQs or request for proposals. Staff would utilize the rating sheet (Attachment 3) to rank the businesses submitting responses. It is assumed that the weight factor for each criterion will be one, unless specified otherwise by the City Council. The top three ranked businesses would be forwarded to the City Council for consideration, and for the Council to deem one of the respondents qualified to receive an Operator's Permit from the Police Chief. Any cannabis business deemed qualified will then have one year from the City Council's action to obtain the Operator's Permit from the Police Chief. During this one year period, the cannabis business also will need to obtain a conditional use permit from the Planning Commission for the site selected for operations. The time period to obtain these permits may be extended by the Council if the Council finds there is good cause for such an extension. It is envisioned that the Council will deem one cannabis business qualified per RFQ issued, but reserves the right to not qualify any one cannabis business or to deem more than one qualified. Subsequent renewals of the Operator's Permit, and any modifications, suspensions or revocations would be approved or initiated by the Police Chief, as provided for in Chapter 28 of Title 5 to be codified once Ordinance No. 17-003 becomes effective on September 1, 2017.

The proposed regulations attempt to address two competing goals. The process for issuing a RFQ should be standard, to allow the City to issue subsequent RFQs in a more efficient manner by using the template from a prior RFQ. However, the goals of issuing a RFQ may change over time, and therefore, the process should have sufficient flexibility to allow for the process to satisfy different goals. Therefore, the proposed RFQ and rating sheet are intended to be standard, form documents, which allows for efficiency in issuing the RFQ. However, there are two components to the RFQ that provide for flexibility. First, because the City Council must approve the issuance of a RFQ, the City Council may identify different goals to be satisfied in the RFQ. (See Attachment 2, p. 4.) The rating sheet then has a criterion to rate how well the response meets the Council's stated goals. (See Attachment 3, p. 2.) Second, the rating sheet is standard, but the City Council's weight of each criterion can vary from RFQ to RFQ. Therefore, the City Council can vary

the attributes that it considers crucial in deeming a cannabis business qualified to receive an Operator's Permit.

Goals to Be Set

As noted above, the Council has expressed interest in a retail/dispensary that is regional serving and allows for on-site consumption of cannabis. The Council previously had indicated that it was interested in a retail/dispensary that sells either medical or recreation cannabis or both. Given the ambiguity of co-location, the taxation issues, and federal policy, the Council may want to consider whether it wants to specify a goal of a medical or a recreational retail/dispensary outlet.

There are several advantages to a recreational retail/dispensary outlet. In maximizing revenue generation, a business selling recreational cannabis is theoretically likely to generate more revenue for the City compared to a business selling medical cannabis. In light of the buffer zone issue, there are also more location opportunities for a recreational retail/dispensary outlet. Finally, an Emeryville recreational dispensary will be competing on an equal playing field in obtaining a state license for recreational use because there are no other recreational dispensaries operating lawfully under the state law that would receive priority in obtaining a license. However, the disadvantage of a recreational dispensary is it may be more likely subject to federal enforcement.

Similarly, a medical dispensary also provides advantages and disadvantages. In contrast to a recreational dispensary, one advantage of a medical cannabis dispensary is that it may entail less risk of federal enforcement. It also may provide an opportunity to provide a benefit to individuals from communities harmed by the War on Drugs. However, a medical dispensary located in Emeryville has fewer location opportunities than a recreational dispensary. In addition, it has the potential to generate less sales and tax revenue compared to a recreational dispensary. Finally, a medical dispensary located in Emeryville would not receive any priority for a state license because there are no existing, lawfully operating medical dispensaries as of September 1, 2016.³¹

Inclusion of Individuals from Communities Harmed by the War on Drugs

The proposed regulations do not set forth any specific means by which the bidders must include individuals from communities harmed by the War of Drugs. Instead, one of the criterion simply rates bidders on how the business intends to include or serve individuals who come from communities that traditionally have been harmed by the War on Drugs. Inclusion of these individuals can take many forms, such as an applicant team including individuals from harmed communities, creation of an apprenticeship program with partner agencies who place individuals from harmed communities, or an employment program designed to assist with rehabilitation, providing funding or subsidy to other cannabis businesses owned by individuals from harmed communities, etc. The criterion and the weight factor given to this criterion by the City Council sets the objective for the bidder to meet, while affording flexibility to the bidder to be as creative as possible to find a solution that meets the Council goals in a manner that the bidder can implement. In addition, the

³¹ Bus. & Prof. Code, § 26054.2(a).

Council could incorporate any specific goals it would like to achieve as it relates to the individuals from harmed communities by addition a goal to the RFQ.

Community Benefits

The Council may want to consider whether to articulate any goals in the RFQ that would facilitate applicants' understanding of what form the community benefits should take. In San Leandro, Harborside, the applicant selected through the RFQ process, offered a community benefit of a voluntary donation of 4% of the annual gross receipts from the San Leandro dispensary towards a community benefits fund, which has an oversight board to disburse grants to community organizations.³² In addition, Harborside made a voluntary donation of 1% of gross receipts to the City of San Leandro.³³ However, community benefits can take many different forms. Here in Emeryville, in approving the Sherwin Williams Project, the applicant offered several community benefits, which included: a retrofit of a building with a permanent public pass-through, a public art gallery and community room space, and a community shuttle to West Oakland Bart station for five years. Thus, the creativity of the applicant is the only limitation on the community benefits that could be offered.

If the Council is inclined to include goals in the RFQ related to community benefits, staff recommends to include a goal that applicants quantify their community benefits offered. Such a goal facilitates comparison of community benefits among the applicants. In addition, any community benefits that offer or seek to modify programmatic services should articulate the scope of City resources and support needed to support any community benefit offered.

Non-Storefront Dispensaries

Staff has received several inquiries regarding non-storefront dispensaries. Non-storefront dispensaries are those dispensaries which sell directly to the consumer through a delivery service, or alternatively, have partnered with another vendor to sell directly to the consumer at a site. There are some manufacturing cannabis businesses that may want to engage in direct sales to consumers through a delivery service. The benefit of allowing manufacturing cannabis businesses to engage in direct sales through a delivery service is that Emeryville is the point of sale for purposes of calculating sales and use tax, even if the consumer is located outside of Emeryville.³⁴

Under the proposed regulations, a non-storefront dispensary would need to compete with a storefront dispensary in the same manner to obtain an Operator's Permit. Thus, it would be unlikely that a non-storefront dispensary would be issued a dispensary/retailer permit because it would not fulfill the current goal of onsite consumption.

³² "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." Prepared for City of San Leandro City Council Meeting on September 8, 2015, pp. 5-6.

³³ *Ibid.*

³⁴ https://www.boe.ca.gov/industry/medical_cannabis.html#Dispensaries.

The Council should consider whether to exempt non-storefront dispensaries from the competitive RFQ process, especially if the dispensary is associated with a cannabis business holding a manufacturing permit. If the Council is inclined to exempt non-storefront dispensaries from the competitive RFQ process, staff recommends that non-storefront dispensaries be allowed in the same zoning districts as Cannabis 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, and *not* allowed where storefront cannabis dispensaries are allowed, such as the Mixed Use with Residential (MUR), Mixed Use with Residential South (MURS) and Mixed Use with Non-Residential (MUN) zoning districts. A non-storefront dispensary is more similar to a manufacturing and distribution cannabis uses, opposed to a retail dispensary, because like manufacturing and distribution, the non-storefront dispensary does not interact with the general public.

Taxes

Although staff has brought forward some information related to taxing the cannabis industry per Council's prior direction, further research and analysis needs to be conducted prior to the Council considering any tax measure specific to the cannabis industry. At the June 20, 2017, special City Council meeting, the Council formed an ad hoc budget committee comprised of Vice Mayor John Bauters and Council Member Dianne Martinez. One of the tasks for this ad hoc committee is to consider revenue sources for the City. Staff recommends that the study of any tax specific to the cannabis industry be considered by the ad hoc committee, as well as Budget Advisory Committee, because any tax measure should be considered in the context of the City's overall revenue sources for context. Staff would continue to research and analyze cannabis tax issues in its support of the ad hoc Budget Advisory committees.

FISCAL IMPACT

Adopting the regulations and conducting an RFQ does not have any fiscal impact, except for the staff resources dedicated to the effort. The City's Master Fee Schedule provides for applicants of an operator's permit to pay two fees to offset staff costs. Each individual identified as a key employee by a cannabis business must submit a key person application and pay a fee of \$447. The cannabis business also submits an application, and the permit fee is based on cost recovery.³⁵ In San Leandro, applicants paid fees based on how far they made it in the application process. To offset staff and third party consultant costs, San Leandro implemented the following fees during the application process³⁶:

- 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.

³⁵ These fees are based on the proposed resolution to be considered at a City Council public hearing on July 25, 2017.

³⁶ City of San Leandro, Application to Operate a Medical Cannabis Dispensary. Release Date: December 5, 2014.

- Phase II Application Fee: \$3000 per applicant team.
- Phase III Application Fee: \$7000 per applicant team

For a cannabis business applying for a dispensary, staff estimates the cost to apply for the Operator's Permit to be as follows:

- Phase I: Review of written application would cost each applicant team approximately \$1,831.52. In addition to this fee, each owner and key member would need to pay the \$447 fee.
- Phase II: An in-person meeting with the City review panel would cost \$1,352.31.

This fee estimate assumes that the review panel will consist of staff from the Police Department, City Attorney's Office and Economic Development Division, with oversight from the Police Chief and City Attorney.

STAFF COMMUNICATION WITH THE PUBLIC

Staff from the City Attorney's Office, Economic Development and Housing, Planning and Police Department routinely respond to inquiries from potential cannabis business applicants about the status of Emeryville's regulations and the timing of the City's process. City staff also engages with businesses in the industry to learn as much as possible on how to regulate this new industry.

CONCLUSION

Staff recommends that the Council provide direction to staff on the following questions:

1. In the RFQ, does the City Council wish to state a goal of issuing a permit to a regional serving dispensary/retail outlet?
2. In the RFQ, does the City Council wish to state a goal of issuing a permit to a dispensary/retail outlet that will allow for on-site consumption?
3. In the RFQ, does the City Council wish to state a preference for issuing a permit to either recreational or medicinal dispensary/retail outlet?
4. In the RFQ, does the City Council wish to provide any goals as it relates to community benefits?
5. In the RFQ, does the City Council wish to state any other goals?
6. With respect to the rating sheet, does the City Council wish to assign a weighted factor besides one (1) to any of the criteria?

7. Is the Council interested in exempting non-storefront retail/dispensary outlets from the competitive RFQ process?
8. Does the Council have any other comments about the process to issue the RFQ, review responses and select a cannabis business deemed qualified to hold an Operator's Permit?
9. Does the Council concur that cannabis tax issues should be considered with the City's overall revenue sources by the budget ad hoc and / or Budget Advisory Committee?

PREPARED BY: Andrea Visveshwara, Assistant City Attorney

REVIEWED BY: Chad Smalley, Economic Development Manager

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



Michael Guina, City Attorney

ATTACHMENTS

1. Draft Resolution
2. Draft Request for Qualifications
3. Draft Rating Sheet
4. Map Depicting State Mandated 600' Buffer for Medical Dispensaries
5. Map Depicting 250' Buffer Pursuant to City Planning Regulations
6. Chart Comparing Local Jurisdiction Cannabis Taxes