



CITY OF PACIFIC GROVE
300 Forest Avenue, Pacific Grove, California 93950

AGENDA REPORT

TO: Honorable Mayor and Members of City Council
FROM: Jessica Kahn, Environmental Programs Manager
Heidi Quinn, Assistant City Attorney
MEETING DATE: January 6, 2016
SUBJECT: First Reading of an Amendment to the City's Prohibition on Marijuana
Dispensaries and regarding Cultivation
CEQA: This is Not a "Project" per CEQA Guidelines

RECOMMENDATION

1. Introduce and hold first reading of an ordinance to amend the City ban of marijuana dispensaries and cultivation within the City, Chapter 11.100 of the Pacific Grove Municipal Code.
2. Direct that publication of the ordinance be satisfied by publication of a summary, approved by the City Attorney.

DISCUSSION

In 1996, California voters approved the Compassionate Use Act (CUA), codified at California Health and Safety Code Section 11362.5, which legalized the use of marijuana for specific medical purposes. In 2003, the Legislature adopted SB 420, the Medical Marijuana Program Act (MMP), set forth at California Health and Safety Code Section 11362.7, which clarifies the scope of the CUA and allows local jurisdictions to adopt and enforce rules. Under the Federal Controlled Substances Act, codified in 21 U.S.C. Section 801 *et seq.*, the use, possession, and cultivation of marijuana remains unlawful and subject to federal prosecution without regard to a claimed medical need.

California case law has established that neither the CUA nor the MMP preempt local zoning or moratoria. In May 2013, the California Supreme Court ruled the state's medical marijuana laws do not preempt local bans on medical marijuana dispensaries. (*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 Cal.4th 729.) Further, the appellate court held that the CUA and MMP do not preempt a city's police power to prohibit all cultivation of marijuana, including for personal use. (*Mural v. City of Live Oak* (2013) 221 Cal.App.4th 975.)

On October 9, 2015, Governor Jerry Brown signed into law the Medical Marijuana Regulation and Safety Act (MMRSA), comprised of the state legislative bills known as AB 243, AB 266, and SB 643. MMRSA set up a state licensing scheme for commercial medical marijuana activities while protecting local control by requiring that all such businesses have a local license or permit to operate, in addition to a state license. MMRSA allows a city to completely prohibit commercial medical marijuana activities.

AB 243 provides that cities which do not have an ordinance that regulates or prohibits cultivation in place by March 1, 2016 will lose the authority to regulate or ban cultivation within their city limits. Under this new law, the State Department of Food and Agriculture will become the sole licensing authority for medical marijuana cultivation applicants. It is anticipated that the preemption of cities' authority to regulate cultivation will be amended. In the meantime, however, it is recommended the City adopt the proposed amendment to clarify the City's current prohibition to protect the City's ability to prohibit medical marijuana cultivation.

The City already expressly prohibits marijuana cultivation within the City. In 2010, the City Council adopted an ordinance prohibiting medical marijuana dispensaries as well as growing, selling, or distributing marijuana within the City. As currently drafted, cultivation of marijuana is prohibited except for cultivation under the CUA. Under the MMRSA, however, cultivation by qualified patients is not regulated as long as the area used for cultivation does not exceed 100 square feet, or 500 square feet for a primary caregiver with no more than five patients. The proposed amendment will prohibit the cultivation of all marijuana within the City, and clarify the definition of cultivation to align with the MMRSA.

The MMRSA also contains provisions regarding the delivery and distribution of marijuana within the City. The City expressly prohibits distribution of marijuana within the City. As the new rules do not take effect until January 2018 and further legislative amendments are anticipated, City staff will return to Council with proposed amendments in the near future.

The amendment is not subject to the California Environmental Quality Act (CEQA) pursuant to Guidelines Section 15060(c)(2) as the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment, and Guidelines Section 15060(c)(3) as the activity is not a project as defined in Guidelines Section 15378 because it has no potential for resulting in physical change to the environment directly or indirectly.

FISCAL IMPACT

None.

ATTACHMENTS

1. Proposed Ordinance
2. League of Cities Tip Sheet Regarding Cultivation

RESPECTFULLY SUBMITTED,



Jessica Kahn
Environmental Programs Manager

REVIEWED BY,



Thomas Frutchet
City Manager

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY OF PACIFIC GROVE
AMENDING CHAPTER 11.100 OF THE PACIFIC GROVE MUNICIPAL CODE
PROHIBITING MARIJUANA DISPENSARIES IN THE CITY**

WHEREAS, the Compassionate Use Act (CUA), codified at California Health and Safety Code Section 11362.5, was approved by California voters in 1996 and legalized the use of marijuana for specific medical purposes;

WHEREAS, in 2003, the Legislature adopted SB 420, the Medical Marijuana Program Act (MMP), codified at California Health and Safety Code Section 11362.7, which clarifies the scope of the CUA and allows local jurisdictions to adopt and enforce rules consistent with SB 420;

WHEREAS, California case law has established that neither the CUA nor the MMP preempt local zoning or moratoria;

WHEREAS, under the Federal Controlled Substances Act, codified in 21 U.S.C. Section 801 *et seq.*, the use, possession, and cultivation of marijuana are unlawful and subject to federal prosecution without regard to a claimed medical need;

WHEREAS, in May 2013, the California Supreme Court held that the state's medical marijuana laws do not preempt local bans on medical marijuana dispensaries. (*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 Cal.4th 729.) Thereafter, the court of appeal in *Mural v. City of Live Oak* (2013) 221 Cal.App.4th 975, held that the CUA and MMP do not preempt a city's police power to prohibit all cultivation of marijuana, including for personal use;

WHEREAS, on October 9, 2015, Governor Jerry Brown signed into law the Medical Marijuana Regulation and Safety Act (MMRSA), which is comprised of the state legislative bills known as AB 243, AB 266, and SB 643;

WHEREAS, MMRSA, effective January 1, 2016, sets up a state licensing scheme for commercial medical marijuana activities while protecting local control by requiring that all such businesses must have a local license or permit to operate in addition to a state license. The MMRSA allows a city to completely prohibit commercial medical marijuana activities;

WHEREAS, the California Constitution grants charter cities the power to make and enforce all ordinances and regulations with respect to municipal affairs; and

WHEREAS, Article 4 of the City's Charter vests the City Council with the authority to make and enforce all laws, rules and regulations with respect to municipal affairs subject only to the restrictions and limitations contained in the Charter and the State Constitution, and the power to exercise, or act pursuant to any and all rights,

powers, and privileges, or procedures granted or prescribed by any law of the State of California;

WHEREAS, the General Plan encourages commercial uses that maintain the economic integrity and character of the City;

WHEREAS, in 2010, the Pacific Grove City Council adopted an ordinance expressly prohibiting establishment, operation or use of marijuana dispensaries and cultivation of marijuana within the City, and they were determined to be in conflict with the existing General Plan, its implementing regulations and its development standards;

WHEREAS, the failure to prohibit marijuana dispensaries and cultivation within the City can adversely affect the health, safety and well-being of City residents and will expose the City to costs related to regulation, enforcement, and secondary effects of dispensaries, such as litter and security;

WHEREAS, the City desires to clarify its existing prohibition on the cultivation of marijuana within the City to ensure consistency with the MMRSA;

WHEREAS, prior to the effective date of this ordinance, the cultivation of medical marijuana is prohibited in the City to the extent such activities are prohibited by the Federal Controlled Substances Act or other law; and

WHEREAS, the amendment is not subject to the California Environmental Quality Act (CEQA) pursuant to Guidelines Section 15060(c)(2) as the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment, and Guidelines Section 15060(c)(3) as the activity is not a project as defined in Guidelines Section 15378 because it has no potential for resulting in physical change to the environment directly or indirectly.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF PACIFIC GROVE DOES ORDAIN AS FOLLOWS:

SECTION 1. The foregoing recitals are adopted as findings of the City Council as though set forth fully herein.

SECTION 2. The text set forth in existing Section 11.100.010 of the Pacific Grove Municipal Code entitled, "Definitions," of Chapter 11.100, Marijuana Dispensaries, shall be changed by the addition of all text shown in bold, italic, underscored text (***bold, italic, underscored text***), as follows:

11.100.010 Definitions

The following words and phrases shall, for the purposes of this chapter, have the meanings respectively ascribed to them by this section, as follows:

“Cultivation” shall have the same meaning as Cannabis, as set forth in subpart (l) of the Business & Professions Code section 19300.5, as may be amended from time to time.

“Marijuana” shall have the same meaning as Cannabis, as set forth in subpart (f) of the Business & Professions Code section 19300.5, as may be amended from time to time.

“Marijuana Dispensary” means any facility, clinic, cooperative, club, business, group or location, whether fixed or mobile where marijuana is made available to, distributed, sold or distributed to any person.

“Medical Marijuana Dispensary” means any facility, clinic, cooperative, club, business, group or location, whether fixed or mobile where medical marijuana is made available to, distributed, sold, or distributed to a Qualified Patient, a Person with an Identification Card, and/or a Primary Caregiver as those terms are defined in this chapter.

“Person” means any person, firm, corporation, association, club, society, or other organization. The term Person shall include any owner, manager, proprietor, employee, volunteer or salesperson.

“Person with an Identification Card” shall have the meaning given that term by Health and Safety Code section 11362.7.

“Primary Caregiver” shall have the meaning given that term by Health and Safety Code section 11362.7.

“Operation” means any effort to locate, operate, own, lease, supply, allow to be operated, or aid, abet or assist in the operation of a Marijuana Dispensary or Medical Marijuana Dispensary.

“Qualified Patient” shall have the meaning given that term by Health and Safety Code section 11362.7.

“Sales” or “Selling” shall be given a plain and ordinary meaning, shall include each and every derivation of those terms, and shall also include and refer to related actions such as “buying” and “purchasing.”

SECTION 3. The text set forth in existing Section 11.100.040 of the Pacific Grove Municipal Code entitled, “Marijuana Sales Prohibited,” of Chapter 11.100, Marijuana Dispensaries, shall be changed by the deletion of all text shown in strikeout text (~~strikeout text~~) and the addition of all text shown in bold, italic, underscored text (***bold, italic, underscored text***), as follows:

11.100.040 Marijuana Sales Prohibited

- (a) No Person shall ***cultivate*** grow, sell or distribute marijuana within the City in any zone, or engage in any Operation for this purpose.
- (b) No Person shall or make, sell or distribute any marijuana-infused product such as tinctures, baked goods or other consumable products, or participate in any Operation for this purpose.
- (c) This section shall not apply to Excluded Facilities defined in this chapter.
- ~~(d) This section shall not limit cultivation in strict compliance with the Compassionate Use Act, codified at California Health and Safety Code Section 11362.5.~~

SECTION 4. The text set forth in existing Section 11.100.060 of the Pacific Grove Municipal Code entitled, "Public Nuisance Declared," of Chapter 11.100, Marijuana Dispensaries, shall be changed by the deletion of all text shown in strikeout text (~~strikeout text~~) and the addition of all text shown in bold, italic, underscored text (***bold, italic, underscored text***), as follows:

11.100.060 Public Nuisance Declared

~~Operation of any Medical Marijuana Dispensary or Marijuana Dispensary~~ ***Any use or condition caused, or permitted to exist*** within the City in violation of the provisions of this chapter is hereby declared a public nuisance and shall be abated by action of the City attorney pursuant to all available remedies.

SECTION 5. If any provision, section, paragraph, sentence, clause or phrase of this ordinance, or any part thereof, or the application thereof to any person or circumstance is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance, or any part thereof, or its application to other persons or circumstances. The City Council hereby declares that it would have passed and adopted each provision, section, paragraph, subparagraph, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, paragraphs, subparagraphs, sentences, clauses or phrases, or the application thereof to any person or circumstance, be declared invalid or unconstitutional.

SECTION 6. This ordinance shall become effective on the thirtieth (30th) day following passage and adoption hereof.

PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF PACIFIC GROVE THIS ____ day of _____, 2016, by the following vote:

AYES:

NOES:

ABSENT:

APPROVED:

BILL KAMPE, Mayor

ATTEST:

SANDRA KANDELL, Deputy City Clerk

APPROVED AS TO FORM:

DAVID C. LAREDO, City Attorney

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MEDICAL MARIJUANA REGULATION AND SAFETY ACT¹

What Cities Need to Know About the New Law and Cultivation

OVERVIEW

Here's what you need to know:

- **Local prohibition or regulation:** Cities may prohibit or regulate medical marijuana businesses within their jurisdictions. **Local authority remains intact under the new law.**
- **State license required:** All medical marijuana businesses – dispensary sales, delivery service, cultivation, transport or distribution – must have a State license².
- **State license not enough:** A medical marijuana business in any city may only operate if it has permission from the State and permission from the city (“dual licensing”).
- **Enforcement:** Revocation of local permission to operate means a medical marijuana business must terminate operation because the new law requires dual licensing. Upon approval of the State, a city may enforce State law.
- **State law penalties for unlicensed activity:** There are civil penalties and criminal penalties for operating without a State license.

CULTIVATION

Here's what you need to know:

If your city does **not** have a land use ordinance in place regulating or prohibiting the cultivation of marijuana, *either expressly or otherwise under the principles of permissive zoning*, or chooses not to administer a conditional permit program, then commencing **March 1, 2016**, the State Department of Food and Agriculture will be the sole licensing authority for medical marijuana cultivation applicants.

1 AB 266 (Bonta, Cooley, Jones-Sawyer, Lack, Wood); AB 243 (Wood); and SB 643 (McGuire). Effective 1/1/2016.

2 The Department of Consumer Affairs estimates it will begin issuing State licenses in January 2018. The Department of Food and Agriculture and the Department of Public Health also have licensing authority under the new law. Businesses operating in compliance with local ordinances will get priority in the State licensing application process.

October 27, 2015

CULTIVATION

Here's what you need to do:

Determine if your city fits within City #1 or City #2 as described below:

- **City #1:** Municipal Code that does not expressly prohibit nor expressly regulate cultivation of medical marijuana and is not a “permissive zoning” code. **Need to take action.**
ACTION REQUIRED: Adopt a land use ordinance regulating or prohibiting the cultivation of medical marijuana. The ordinance must be effective by February 28, 2016. The ordinance may be adopted as an “urgency ordinance,” or second reading must occur on or before January 29, 2016.
- **City #2:** Municipal Code that is a “permissive zoning” code and does not enumerate cultivation of medical marijuana as a permitted or conditional use. **Need to take action.**
ACTION REQUIRED: (1) Check and confirm that your city’s zoning code is adopted and implemented under the principles of permissive zoning. If not, take action recommended for City #1. (2) If confirmed, adopt a resolution that includes the following provisions:
 - States that Health & Safety Code section 11362.777(b)(3) provides that the Department of Food and Agriculture may not issue a State license to cultivate medical marijuana within a city that prohibits cultivation under principles of permissive zoning;
 - Re-affirms and confirms that the Zoning Code is adopted and operates under the principles of permissive zoning;
 - States this means that cultivation of marijuana is not allowed within City #2 because it is not expressly permitted; and
 - Therefore, the State is not allowed to issue a license for the cultivation of medical marijuana within City #2.

Be sure to consult with your city attorney before taking any of the actions recommended in this document.

