



City of San Leandro

Meeting Date: February 1, 2016

Staff Report

File Number: 16-035

Agenda Section: PUBLIC HEARINGS

Agenda Number: 4.A.

TO: City Council

FROM: Chris Zapata
City Manager

BY: Rich Pio Roda
City Attorney

FINANCE REVIEW: Not Applicable

TITLE: Staff Report for an Urgency Ordinance to Amend the San Leandro Municipal Code to Prohibit Medical Cannabis Cultivation Activities, and to Affirm that Under the Principles of Permissive Zoning, Medical Cannabis Cultivation Is Not a Permitted Land Use Under the City of San Leandro Zoning Code

RECOMMENDATION

Staff recommends that the City Council approve, by a 4/5 vote of its membership, an urgency ordinance to amend the San Leandro Municipal Code to prohibit medical cannabis cultivation activities, and to affirm that under the principles of permissive zoning, medical cannabis cultivation is not permitted land use under the City of San Leandro Zoning Code, such that the State may not issue a license or permit for large scale and commercial medical cannabis cultivation within the City. Cultivation for personal use and distribution by primary caregivers under California Health & Safety Code section 11362.77(g) would be exempt under the new Ordinance, and under State law as it relates to land use regulations.

BACKGROUND AND ANALYSIS

By way of background, and as an overview of the State of California's law related to medical cannabis, California Health and Safety Code section 11362.5, the Compassionate Use Act of 1996 ("CUA"), authorizes a limited defense to criminal charges for the use, possession or cultivation of cannabis for medical purposes when a qualified patient has a doctor's recommendation for the use of cannabis. Health and Safety Code section 11362.7 et seq., the Medical Cannabis Program Act ("MMPA"), was adopted by the state legislature and offers some clarification on the scope of the Compassionate Use Act of 1996, and section 11362.83 specifically authorizes cities and other governing bodies to adopt and enforce rules and regulations related to medical cannabis. Neither the CUA nor the MMPA prevent a city from enacting nuisance and land use regulations regarding medical cannabis. A city is constitutionally authorized to make and enforce within its limits all local police, sanitary, and other ordinances. (Cal. Const. Art. XI, § 7.)

The Legislature recently passed, and the Governor signed, new legislation - the "Medical Marijuana Regulation and Safety Act" (MMRSA) - that requires certain state agencies to promulgate regulations relating to medical cannabis cultivation. Under the new legislation an individual or entity wishing to cultivate medical cannabis must receive a license from the California Department of Food and Agriculture ("DFA"), which may only provide a license to an individual or entity that has also received a permit, license or entitlement from the city in which the cultivation is to occur. The new legislation further provides that if a city does not have land use regulations or ordinances regulating or prohibiting the cultivation of medical cannabis, then commencing on March 1, 2016, the DFA will be the sole licensing authority for medical cannabis cultivation applications in that city. Conversely, a city with a prohibition or regulations regarding the cultivation of medical cannabis in effect before March 1, 2016 retains the authority to later modify that prohibition or those regulations.

The adoption of this Urgency Ordinance is designed to satisfy the State-imposed March 1, 2016 deadline by establishing an ordinance prohibiting commercial-scale medical cannabis cultivation activities in the City. In addition, the Ordinance affirms that under the principles of permissive zoning, medical cannabis cultivation land uses are not permitted uses in any City zoning district, such that the State may not issue a license for medical cannabis cultivation in the City. The proposed Ordinance has an exemption for personal cultivation, which is provided in California Health & Safety Code section 11362.77(g), which allows cultivation by patients for personal use, or in the case of primary caregivers, limited to five patients.

In addition to the urgency created by the March 1, 2016 deadline to have land use regulations or a prohibition in place, because the cultivation of medical cannabis in San Leandro and other cities has resulted in calls for service to the police department, including calls for robberies and thefts, medical cannabis cultivation poses safety risks to City residents, including but not limited to, risks of violent confrontation in connection with attempts to steal cannabis and the risk of fire from improperly wired electric facilities and appliances within structures growing cannabis. These risks, and the potential for increased calls for service to address crime and fire suppression present an immediate threat to the public health, safety and welfare of the community if medical cannabis is cultivated in the City without proper City-specific regulations, resulting in harmful effects to businesses, property owners and residents of the City. Therefore, an urgency ordinance, which is permitted under California Government Code section 36937, is appropriate in this instance. An urgency ordinance must be passed by a 4/5 vote of the City Council (6 affirmative votes). If passed, it goes into effect immediately.

In the meantime, staff is preparing Zoning Code amendments through the normal process to establish specific land use definitions and regulations relating to the prohibition. The Planning Commission will hear the proposed Zoning Code changes, make a recommendation to the City Council, and then they will come to the City Council for review and approval. If those zoning changes are approved by the City Council, the amendments promulgated by the urgency ordinance will be rescinded. The City Council retains the power to amend its regulations to allow and tax large scale and commercial cultivation should it so desire.

Article XI, Section 7 of the California Constitution provides that a city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws. Consistent with this authority, staff recommends that the San Leandro City Council should amend the Municipal Code to prohibit medical cannabis cultivation activities,

except for that which is allowed by State law for individual patients and primary caregivers. Staff recommends that the San Leandro City Council also affirm that under principles of permissive zoning, medical cannabis cultivation is not a permitted land use within the City, and as such the State may not issue a license or permit for medical cannabis cultivation. Thus, the San Leandro City Council can maintain local control of commercial-scale medical cannabis cultivation by initially prohibiting it, and then subsequently adopting City-specific regulations at a later time.

Fiscal Impact

There are minimal fiscal impacts expected from the passage of this urgency Ordinance.

ATTACHMENT

None.

PREPARED BY: Richard D. Pio Roda, City Attorney



City of San Leandro

Meeting Date: February 1, 2016

Urgency Ordinance

File Number: 16-031

Agenda Section: PUBLIC HEARINGS

Agenda Number:

TO: City Council

FROM: Chris Zapata
City Manager

BY: Rich Pio Roda
City Attorney

FINANCE REVIEW: Not Applicable

TITLE: URGENCY ORDINANCE Establishing an Ordinance that Prohibits the Cultivation of Medical Cannabis and Affirming that Under the Principles of Permissive Zoning, Cultivation of Medical Cannabis Is Not Permitted by the City of San Leandro's Zoning Code

Section 1. Authority. This Ordinance is adopted pursuant to the provisions set forth in California Government Code Section 36937(b) and pursuant to all other applicable laws.

Section 2. Findings.

WHEREAS, Health and Safety Code Section 11362.5, the Compassionate Use Act of 1996 ("CUA"), adopted by the voters in the State of California, authorizes a limited defense to criminal charges for the use, possession or cultivation of cannabis for medical purposes when a qualified patient has a doctor's recommendation for the use of cannabis; and

WHEREAS, Health and Safety Code Section 11362.7 et seq., the Medical Cannabis Program Act ("MMPA"), was adopted by the state legislature and offers some clarification on the scope of the Compassionate Use Act of 1996, and Health and Safety Code Section 11362.777 specifically authorizes cities and other governing bodies to adopt and enforce rules and regulations related to cultivation of medical cannabis; and

WHEREAS, neither the CUA nor the MMPA prevent a city from enacting general regulations or prohibitions, nuisance regulations, or land use regulations regarding cultivation of medical cannabis; and

WHEREAS, the Legislature recently passed, and the Governor signed, new legislation - the Medical Marijuana Regulation and Safety Act - that requires certain state agencies to promulgate regulations relating to medical cannabis cultivation; and

WHEREAS, under the new legislation an individual or entity wishing to cultivate medical cannabis must receive a license from the California Department of Food and

Agriculture (“DFA”), which may only provide a license to an individual or entity that has also received a permit, license or entitlement from the city in which the cultivation is to occur; and

WHEREAS, the new legislation further provides that if a city does not have land use regulations or ordinances regulating or prohibiting the cultivation of medical cannabis, then commencing on March 1, 2016, the DFA will be the sole licensing authority for medical cannabis cultivation applications in that city; and

WHEREAS, a city with a prohibition or regulations regarding the cultivation of medical cannabis in effect before March 1, 2016 retains the authority to later modify that prohibition or those regulations; and

WHEREAS, Health and Safety Code Section 11362.777(b)(3) provides that the DFA may not issue a State license to cultivate medical cannabis within a city that prohibits cultivation within its boundaries under principles of permissive zoning; and

WHEREAS, the San Leandro Zoning Code is adopted and operates under the principles of permissive zoning, and any use that is not expressly permitted is prohibited; and

WHEREAS, the San Leandro City Council desires to confirm that passage of a municipal code regulation prohibiting cultivation activities and that the cultivation of medical cannabis is not an expressly permitted land use under the San Leandro Zoning Code, and is therefore prohibited throughout the City; and

WHEREAS, the San Leandro City Council recognizes Health and Safety Code Section 11362.777(g), such that it does not wish to prohibit individual cultivation for personal use; and

WHEREAS, Health and Safety Code Section 11362.77(g) provides that a qualified patient cultivating marijuana pursuant to Section 11362.5 may do so if the area he or she uses to cultivate marijuana does not exceed 100 square feet and he or she cultivates marijuana for his or her personal medical use and does not sell, distribute, donate, or provide marijuana to any other person or entity. In addition, Section 11362.77(g) does not apply to a primary caregiver cultivating marijuana pursuant to Section 11362.5 if the area he or she uses to cultivate marijuana does not exceed 500 square feet and he or she cultivates marijuana exclusively for the personal medical use of no more than five specified qualified patients for whom he or she is the primary caregiver within the meaning of Section 11362.7 and does not receive remuneration for these activities, except for compensation provided in full compliance with subdivision (c) of Section 11362.765. The area used to cultivate marijuana must be measured by the aggregate area of vegetative growth of live marijuana plants on the premises; and

WHEREAS, the San Leandro City Council desires to retain local control, including prohibition thereof, over the cultivation of medical cannabis except as permitted by Health and Safety Code Section 11362.77(g), and therefore desires to adopt an urgency land use ordinance prohibiting cannabis cultivation that will be in effect before March 1, 2016; and

WHEREAS, the illicit large scale and commercial cultivation of medical cannabis in San Leandro has resulted in calls for service to the police department, including calls for robberies and thefts, and the fire department, including calls to abate fires caused by the misuse of

electrical wiring and loads; and

WHEREAS, illicit large scale and commercial medical cannabis cultivation currently poses and has posed specific safety risks within San Leandro especially for surrounding neighbors, including but not limited to risks of violent confrontation in connection with attempts to steal cannabis, increased fires and fire risk from improper wiring within structures growing cannabis; and

WHEREAS, based on specific facts and circumstances to which the Chief of Police and various other peace officers of the City can and would attest, there is a threat to the public health, safety and welfare of the community if large scale and commercial medical cannabis is cultivated in the City without proper regulations, and such unregulated cultivation will result in harmful effects to the businesses, property owners and residents of the City; and

WHEREAS, by adopting this ordinance, the City will satisfy the requirement under the new state legislation that the City have land use regulations or ordinances regulating or prohibiting the cultivation of medical cannabis, then commencing on March 1, 2016; and

WHEREAS, in light of the new state legislation requiring the City have land use regulations or ordinances regulating or prohibiting the cultivation of medical cannabis commencing on March 1, 2016, the City considered the adoption of this urgency ordinance in accordance with California Government Code Section 36937 at a duly noticed public meeting on February 1, 2016, at which time it received and considered testimony from members of the public; and

WHEREAS, Article XI, Section 7 of the California Constitution provides a city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws.

NOW THEREFORE IN ACCORDANCE WITH CALIFORNIA GOVERNMENT CODE SECTION 36937, and pursuant to the findings and declarations of facts stated herein, the City Council of the City of San Leandro does ordain as follows:

Section 1. **Ordinance**

1. All of the facts and declarations above are true, correct, incorporated herein and made a part hereof such that there exists a current and immediate threat to the public health, safety, and welfare requiring immediate implementation of an urgency ordinance to prohibit medical cannabis cultivation beyond that permitted by Health and Safety Code Section 11362.77(g) within the City of San Leandro.

2. This urgency ordinance is necessary for the immediate preservation of public health, safety and welfare because the large scale and commercial cultivation of medical cannabis in San Leandro and other cities has the strong potential to result in increased calls for service to the police department, including calls for robberies and thefts; such cultivation operations pose safety risks to surrounding neighbors, including but not limited to, risks of violent confrontation in connection with attempts to steal cannabis and risk of fire damage and property loss from improper wiring within structures growing cannabis.

3. By adopting this ordinance, the City will satisfy the requirement under the new state

legislation that the City have land use regulations or ordinances regulating or prohibiting the cultivation of medical cannabis, then commencing on March 1, 2016.

4. The City of San Leandro's Municipal Code is hereby amended to add Article 12 to Chapter 4 as follows:

“ARTICLE 12 CULTIVATION OF MEDICAL CANNABIS

4-1-1200 DEFINITIONS

(a) “Cannabis” means all parts of the plant *Cannabis sativa* Linnaeus, *Cannabis indica*, or *Cannabis ruderalis*, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. “Cannabis” also means the separated resin, whether crude or purified, obtained from marijuana. “Cannabis” also means marijuana as defined by Section 11018 of the California Health and Safety Code as enacted by Chapter 1407 of the Statutes of 1972. “Cannabis” does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

(b) “Cultivation” means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of cannabis.

4-1-1205 CULTIVATION OF MEDICAL CANNABIS PROHIBITED

Unless an exemption applies, it is declared to be unlawful for any person or entity to engage in medical cannabis cultivation activities, including cultivation activities within any building or structure or upon any land, in the City of San Leandro.

4-1-1210 EXEMPTION

Cultivation of medical cannabis is exempt from the provision of this Title if performed in accordance with subsection (g) of California Health and Safety Code Section 11362.77.”

5. Notwithstanding this ordinance, the City Council declares that pursuant to the principles of permissive zoning, cultivation of medical cannabis is not a permitted use or activity of or upon land within the City of San Leandro, such that it is prohibited under the City's Zoning Code. Therefore, the State, and any of its agencies charged with the regulation and permitting of medical cannabis cultivation, may not issue a license, permit or entitlement for the cultivation of medical cannabis within the City of San Leandro.

Section 2. Environmental Review. The City Council finds that this ordinance is not subject to the California Environmental Quality Act (CEQA) pursuant to the statutory exemption set forth in Section 15061(b)(3) (specific actions necessary to prevent or mitigate an emergency) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because this ordinance is in direct response to the new state legislation requiring the City have a land use regulations or ordinances regulating or prohibiting the cultivation of medical cannabis, then commencing on March 1, 2016.

Section 3. Severability. If any section, subsection, sentence, clause or phrase of this

ordinance is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision will not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance and each of every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of the ordinance would be subsequently declared invalid or unconstitutional.

Section 4. Effective Date and Duration. This ordinance is an urgency ordinance enacted under California Government Code Sections 36934 and 36937(b). This urgency ordinance is effective upon adoption by a four-fifths (4/5) vote of the City Council. This urgency ordinance shall remain in full force and effect until it is repealed by a new regulatory scheme by the City Council.

Section 5. Publication. The City Clerk is directed to cause this ordinance to be published in the manner required by law.

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