



Agenda Date: 12/08/2015  
Agenda Item: 4.5

## STAFF REPORT

**Date:** November 17, 2015  
**To:** Mayor and Members of City Council  
**From:** William R. Galstan, Special Counsel *William R. Galstan*  
**Cc:** Bryan H. Montgomery, City Manager; Derek P. Cole, City Attorney;  
Chris Thorsen, Chief of Police; Joshua McMurray, Planning Manager;  
Troy Edgell, Code Enforcement Manager  
**Subject:** Ordinance Regulating Marijuana Cultivation

### FOR CONSIDERATION AT THE CITY COUNCIL MEETING ON DECEMBER 8, 2015

#### Summary and Background

On November 10, 2015, the City Council conducted a Work Session on the topic of medical marijuana cultivation. At that time, we reported that AB 266, the Medical Cannabis Regulation and Control Act, would allow municipal control of medical marijuana cultivation if an ordinance is adopted prior to March 1, 2016. A copy of the staff report from that meeting is attached.

During the Work Session, Council selected an approach that would allow certain limited cultivation of medical marijuana under limited circumstances. A public hearing has been scheduled for this meeting to consider the introduction of an ordinance. Following is a summary of the ordinance provisions:

- There is a finding by the Council that regulation of outdoor cultivation is necessary to limit the number of plants due to potential odor complaints from neighbors and also to discourage theft;
- A permit would be required to be obtained from the City in order to cultivate medical marijuana outdoors.
- No more than six mature plants, or 12 immature plants, could be grown. An "immature" plant is defined as one that is not yet in bud. (Apparently more immature plants are allowed in order to ensure that sufficient numbers will survive into maturity.)
- Plants would be required to be set back at least 10 feet from all property lines. This provision is intended to minimize odor complaints from neighbors.
- Permit areas would have to be fenced with a 6' high fence and locked gate.

- Neighbors could pursue their own nuisance actions in court if odors are objectionable.
- Persons receiving permits would be required to allow City inspections to determine compliance with the permit upon reasonable advance notice; if inspections are not allowed by the permittee, the permit would be revoked.
- If a permit is revoked, a new permit cannot be issued for that person or property for at least one year following revocation. Also, reasonable fees to cover administrative costs for permits will be established by the City Council by resolution.

The ordinance has also been drafted with an eye toward the possibility that recreational use of marijuana may occur in California in the future. If this occurs, the ordinance would still apply, unless that future law interferes with the City's ability to enforce such regulations.

Although not previously discussed, the attached draft ordinance would prohibit the indoor cultivation of marijuana due to the inherent fire danger and excessive use of electricity. If Council wishes to allow indoor cultivation, these provisions can be deleted.

### **Fiscal Impact**

Modest revenues from permit applications.

### **Recommendation**

Conduct the public hearing. If Council concurs with the terms of the ordinance:

- Introduce the ordinance by title only;
- Introduce the ordinance adding Chapter 36 to Title 4 of the Oakley Municipal Code.

### **Attachments**

- A) Ordinance adding Chapter 36 to Title 4 of the Oakley Municipal Code;
- B) Staff report dated Nov. 2, 2015 from Work Session.

ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF OAKLEY ADDING CHAPTER 36 TO TITLE 4 OF THE OAKLEY MUNICIPAL CODE, DEALING WITH MARIJUANA CULTIVATION**

The City Council of the City of Oakley does ordain as follows:

Section 1. Chapter 36 is hereby added to Title 4 of the Oakley Municipal Code, to read as follows:

**CHAPTER 36 MARIJUANA CULTIVATION**

**4.36.002. Findings.**

The City Council hereby finds that the growing and cultivation of marijuana has the potential to create nuisances to neighboring properties due to the odor emitted by marijuana plants. Also, the cultivation of marijuana can be attractive to burglars wishing to steal the plants, which can also lead to violent confrontations with the owners. Therefore, the Council finds that it is necessary to regulate the cultivation of marijuana by allowing only a limited number of plants to be grown, and that premises be secured. Also, because of the inherent danger of fire and excessive use of electricity, the indoor cultivation of marijuana is prohibited.

**4.36.004. Definition.**

“Marijuana” means all parts of the plant Cannabis sativa L.

**4.36.006. Permit required.**

It shall be unlawful to plant, cultivate or grow any marijuana plant within the City of Oakley without first having obtained a permit authorizing such cultivation from the Planning Division. No marijuana plant may be cultivated or grown indoors.

**4.36.008. Number of plants limited.**

No more than six (6) mature or twelve (12) immature marijuana plants shall be authorized to be grown outdoors on any parcel of land within the City. An immature plant shall be considered to be a plant that is not yet in bud.

**4.36.010. Setback from property lines.**

No marijuana plant may be planted, grown, or cultivated within ten (10) feet of any property line of the premises where the plant is cultivated. In cases of small rear yards, the Planning Manager may grant an administrative exception where it would be impossible to cultivate any plant because of this requirement. In such case, plants shall be located to the maximum extent possible in the center of the available yard area.

**4.36.012. Security of premises.**

Any premises where a permit has been granted pursuant to this Chapter shall secure the outdoor area where the marijuana is grown or cultivated. There shall be a fence six feet in height separating the area where the marijuana is grown from all exterior properties. Any gate leading to this secured area shall be locked with an effective locking device at all times when the permittee is not present.

**4.36.014. Private enforcement.**

Nothing contained in this Chapter shall limit the ability of private individuals from bringing an action in a court of competent jurisdiction to either enforce the terms of this ordinance, or from bringing a private nuisance abatement action. Nothing herein is intended to, or does, authorize any conduct that a court of competent jurisdiction finds is a private nuisance.

**4.36.016. Permit application.**

Persons applying for a permit under this Chapter shall acknowledge the terms of this Chapter and agree to be bound thereby. Any person receiving a permit shall agree to City inspections of the property where the marijuana is grown upon reasonable advance notice from the City. If the permittee fails or refuses to allow any inspection, then the permit shall be revoked and any marijuana cultivated at the premises shall be deemed to be unauthorized and illegal. No permit shall be granted unless the Department determines that the applicant has documented medical authorization for marijuana use, or that the possession and/or cultivation of marijuana is otherwise legal. Applicants for a permit shall pay a fee as established from time to time by Resolution. The Resolution shall also establish fees for inspections and the consideration of granting exceptions.

**4.36.018. Permit revocation.**

The Planning Manager or his/her designee may revoke any permit issued pursuant to this Chapter if he/she finds any violation of any term of this Chapter. Any such revocation may be appealed to the Administrative Hearing Officer pursuant to the terms for such appeals as

specified in this Code. A permit may not be issued to any person or premises where a permit has been revoked until at least one year after such revocation.

**4.36.020. Enforcement.**

A civil administrative citation may be issued for any violation of this Chapter. Additionally, the City retains all rights and remedies under civil law to enforce the provisions of this Chapter.

Section 2. California Environmental Quality Act (CEQA) Finding.

This ordinance is exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(3), Review for Exemption, because it can be seen with certainty that the project will not have a significant effect on the environment; therefore the project is not subject to CEQA.

Section 3. Severability.

In the event any section or portion of this ordinance shall be determined to be invalid or unconstitutional, such section or portions shall be deemed severable and all other sections or portions hereof shall remain in full force and effect.

Section 4. Effective Date and Publication.

This ordinance shall take effect and be in force thirty (30) days from and after the date of its passage. The City Clerk shall cause the ordinance to be published within fifteen (15) days after its passage in a newspaper of general circulation, or by publishing a summary of the proposed ordinance, posting a certified copy of the proposed ordinance in the City Clerk's Office at least five (5) days prior to the City Council meeting at which the ordinance is to be adopted, and within fifteen (15) days after its adoption, publishing a summary of the ordinance with the names of the Council Members voting for and against the ordinance.

The foregoing ordinance was adopted with the reading waived at a regular meeting of the Oakley City Council on \_\_\_\_\_, 201\_\_ by the following vote:

AYES:

NOES:

ABSTENTIONS:

ABSENT:

APPROVED:

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Mayor

ATTEST:

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Libby Vreonis, City Clerk

Date

# OAKLEY



CALIFORNIA

## STAFF REPORT

**Date:** November 2, 2015  
**To:** Mayor and Members of City Council  
**From:** William R. Galstan, Special Counsel  
**Cc:** Bryan H. Montgomery, City Manager; Derek P. Cole, City Attorney;  
Chris Thorsen, Chief of Police; Troy Edgell, Code Enforcement Manager  
**Subject:** Work Session on Possible Medical Marijuana Cultivation Ordinance

### FOR CONSIDERATION AT THE CITY COUNCIL MEETING ON NOVEMBER 10, 2015

#### Summary and Recommendation

Discuss the options listed in this report and provide direction to staff. Possible actions include:

- Do nothing and be bound by regulations to be drafted by the State; or
- Direct staff to prepare an ordinance regulating medical marijuana cultivation; or
- Direct staff to prepare ordinance and thereafter rescind ordinance if State regulations are acceptable.

#### Fiscal Impact

If an ordinance were to be adopted, possible modest revenues from permit applications, which would be used to cover staff costs.

#### Background and Analysis

Several months ago, Council considered a draft ordinance that would have strictly regulated the cultivation of medical marijuana within the city limits of Oakley and largely prohibited the outdoor cultivation thereof. A consensus was not reached by Council on this proposal. Thereafter, this office recommended that we await the Legislature's consideration of AB 266, the "Medical Cannabis Regulation and Control Act" which would be a State effort to comprehensively address several aspects of the medical use of marijuana. AB 266 did pass and Governor Brown signed it into law.

AB 266 does respect regulations that cities have adopted regarding marijuana cultivation and sale. A recent Webinar on AB 266 pointed out a "window" that cities may use. Basically, the law states that if a city has not adopted an ordinance dealing with cultivation by March 1, 2016, it will lose the authority to regulate or ban cultivation. The State would become the sole authority on this subject in that jurisdiction.

Cities will therefore continue to have authority to adopt their own regulations until March 1, 2016. Since the State regulations are not yet drafted, no one yet knows what criteria the State would impose after that date. Therefore, it has been suggested that cities may desire to adopt urgency ordinances prior to March 1, but if the State thereafter adopts regulations similar to those adopted by the cities, the cities could rescind their ordinances and then rely on State control.

AB 266 provides that the State will not issue a State license for cultivation if the applicant does not have a local license from a city that regulates cultivation and has issued a local permit. Thus local ordinances will also need to have a permit approval process.

This office has reviewed research on some of the objections that were raised regarding the earlier draft ordinance, specifically the total prohibition on outdoor cultivation and the issue of prohibiting cultivation regarding plants that were "already in the ground." The following comments relate to our thoughts about how a new ordinance could be drafted to address these concerns.

- Outdoor regulation; no indoor regulation.

The proposed ordinance would limit the number of plants that could be grown outdoors, but would not address indoor cultivation. This is because the primary thrust of the ordinance would be to protect neighbors from the odor associated with outdoor cultivation. This would be accomplished primarily by limiting the number of plants that could be grown outdoors. Limiting the number of plants could also be beneficial in protecting against burglaries, as plots of large numbers of plants could be attractive to persons wishing to steal them.

- Limitation on number of plants.

The proposed ordinance would limit the number of plants that could be grown outdoors to six mature or 12 immature plants. This is because Prop. 215 sets these numbers as guidelines. Although a medical marijuana user may grow whatever amount of marijuana is necessary for their personal medical use, SB 420 sets a baseline statewide guideline of 6 mature or 12 immature plants. Cities and counties are authorized by this law to enact higher, but not lower, numbers of plants that can be cultivated. A person with more than this number of plants would not only violate the ordinance, but also potentially be in violation of state law for cultivation for the purpose of sale. (California Norml website, "Patients' Guide to Medical Marijuana in California.") It should be remembered that cultivation for the purpose of sale continues to be illegal under State law and thus the "large grow" activities that are the subject of media coverage are and continue to be illegal.

- Setback from property lines.

To further buffer neighbors from the odors of growing plants, the ordinance would propose that no marijuana plants could be located within ten (10') feet of any

property line. Staff does not have a high degree of confidence that such a distance limitation would be entirely effective in controlling odors, but it does seem to be a reasonable attempt at doing so.

- *"Plants in the ground" issue.*

When the City Council last considered a possible cultivation ordinance, one of the objections aired was that it would be unlawful to prohibit cultivation of plants there were already planted. This issue can be addressed by the timing of adoption of the ordinance. "Cannabis is what is known as an annual plant. This means that the cannabis goes through its entire life cycle within a year. Generally speaking, most strains of cannabis complete their life cycle, from seed to death, in 4 – 10 months." (*The Daily Smoker*, Aug. 3, 2015.) Thus if the ordinance is adopted in January or February, it should take effect prior to the regular planting season.

- *Opportunities for private enforcement.*

The ordinance would be enforced primarily on the objective standards established within it, i.e. the limitation on the number of plants and the requirement for setback from property lines. However, it would recognize that residents may still have odor objections even with the regulations contained in the ordinance. Since an odor nuisance is such a subjective issue and difficult for a city to prosecute, the ordinance would leave open to residents the opportunity to seek civil court/small claims court redress against marijuana cultivators should they feel that odors are a nuisance to their properties.

- *Local permit requirement.*

Because AB 266 requires the State to honor local permits for cultivation, a permit process would have to be incorporated into our ordinance. This could be a relatively simple application and permit issuance process, wherein the applicant acknowledges that he/she will not exceed the maximum number of plants, and the property line setbacks. A modest application fee could be imposed for the processing of the permit. Additionally, permits could be revoked if the conditions of approval are violated. We would not anticipate that staff would inspect licensees unless complaints are received.

## Conclusion

While Oakley retains the legal authority to prohibit cultivation of marijuana, the trend statewide and also in several parts of the United States is toward a more tolerant approach to the practice. Because of the "window" opportunity in AB 266, Oakley should decide whether it wishes to enact its own set of regulations, or to be satisfied with whatever regulations the State may impose. As we noted earlier in this memo, a local ordinance could always be rescinded if it turns out that we are satisfied with the State rules.

The suggested provisions of a possible draft ordinance seek to accommodate and respect the interests of all sides of this issue. If Council wishes to see and consider a draft ordinance (which would require 4 "yes" votes to go into effect prior to March 1), then please provide direction to staff. If Council wishes to take no action and simply follow new State law, that is also a reasonable option.

**Attachments**

None.