


OAKLEY



CALIFORNIA

Date: December 14, 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; Joshua McMurray, Planning Manager;
Troy Edgell, Code Enforcement Manager
Subject: Marijuana Cultivation Ordinance

FOR CONSIDERATION AT THE CITY COUNCIL MEETING ON JANUARY 12, 2016

Summary and Recommendation

This agenda item contains a "main ordinance" with three optional ordinances. If Council wishes to exercise local control regarding this subject, one of the ordinance variations should have the reading waived and be introduced. If Council does not wish to exercise local control, then it should do nothing and allow state regulations to be effective within Oakley.

Fiscal Impact

None.

Background and Analysis

The City Council has considered the question of marijuana cultivation at a handful of meetings. The public hearing conducted on December 8 was continued to this evening, with the public hearing open. This staff report is intended to explain the different ordinance variants attached here, as well as answer some questions/concerns raised at the December 8 meeting. Following is a brief summary of the ordinance options, with full explanations contained in this report as well.

- *Main Ordinance.* This ordinance would allow cultivation of six mature or 12 immature marijuana plants outside or inside, but not to exceed those maximum numbers in total.
- *Option One.* This ordinance would allow 6/12 outside and an unlimited number of plants inside, as long as the inside cultivation area does not exceed 50 square feet.
- *Option Two.* This ordinance would allow a maximum of 6/12 plants, but on parcels of five acres in size or more, would allow more plants with the issuance of a conditional use permit.

- *Option Three.* This ordinance would prohibit the cultivation of marijuana within Oakley.

Questions and Amendments.

A number of questions were raised at the last meeting and responses are provided below:

- *Does federal law prohibit the cultivation of marijuana?* Yes, federal law prohibits the cultivation of even one plant or the possession of even one ounce of marijuana. We are aware that the U.S. Attorney General's Office has issued memoranda to its attorneys instructing them not to prosecute these laws if the conduct is authorized by state law.
- *Would approving a cultivation ordinance violate my oath of office?* No. The oath of office taken by Council Members states that the member will support and defend the Constitution of the United States and the Constitution of the State of California. There is no mention of marijuana prohibition in the U.S. Constitution.
- *Couldn't a person harvest buds from a mature plant and then claim it is an immature plant?* The ordinance has been revised to clarify that a plant that has reached the size of being capable of producing buds where the buds have been removed is considered to be a mature plant.
- *What is the nature of the fence required for outside cultivation?* The ordinance has been clarified that the fence must be a six-foot high solid fence and that the side and rear yard fences are satisfactory if they are of that height and are solid.

"Main Ordinance" provisions.

The "main ordinance" is similar to the one seen at the public hearing on December 8, except that indoor cultivation is also permitted. Staff understands that this was the direction provided by a majority of the City Council. The total number of plants, whether indoors or outdoors, would remain at 6/12.

The ordinance does follow provisions of an ordinance adopted by the City of Live Oak that was upheld by the appellate court in *Moral v. City of Live Oak* (2013) 221 CA4th 975. It specifies that the indoor area of cultivation is limited to 50 square feet, that cultivation not be visible from outdoors, and that lighting equipment not exceed 1,200 watts.

Option One

The Option One ordinance has the same provisions as the Main Ordinance, except that it does not regulate the number of plants that can be grown indoors, as long as the grow area is limited to 50 square feet and the equipment does not exceed 1,200 watts. Thus a cultivator could have 6/12 plants outdoors and an unregulated number indoors, as long as the indoor grow area does not exceed 50 square feet.

Option Two

The Option Two ordinance contains the 6/12 limitation, but makes allowance for more plants on larger parcels. If a parcel is of five acres or larger, more than 6/12 plants could be grown if a conditional use permit is obtained. The Use Permit would designate the number of plants allowed, along with any security requirements.

Option Three

Given Council Member Hardcastle's comments at the Dec. 8 meeting, it appears that he would be most comfortable with an ordinance prohibiting the cultivation of marijuana in Oakley. Option Three ordinance does this.

Our office has pointed out that neither the Compassionate Use Act or the Medical Marijuana Program Act, or the recent AB 266 legalizes marijuana in California. Rather, those laws have eliminated criminal penalties for medical marijuana use. The California Supreme Court, in *City of Riverside v. Inland Empire Patients Health & Welfare Ctr.* (2013) 56 C4th 729 has unanimously held that cities retain the land use authority to prohibit cultivation of marijuana and the sale thereof through dispensaries. Enforcement of such prohibitions would be through civil law tools. Five appellate court decisions have echoed this legal holding.

Under AB 266, cities must adopt ordinances prior to March 1, 2016 to either prohibit, or regulate, medical marijuana cultivation. If they do not, then unspecified State regulations will prevail within that jurisdiction.

“Do Nothing” Option

If the majority of the City Council determines that it does not wish to prohibit marijuana cultivation, the “do nothing” option is a viable choice. If a regulation ordinance is adopted, surely the Council will receive complaints from some factions that not enough plants are authorized to be grown, and complaints from other factions that no plants should be allowed, thus leaving the city in a somewhat untenable “Catch-22”. The advantages of a local ordinance are that the provisions are known and local enforcement officers will probably be more responsive to complaints than would state officers. Whether those advantages outweigh the disadvantages as described above is a policy choice for the Council to make.

Conclusion

Taking any of the options outlined herein is legally viable. Council should choose one.

Attachments

- (A) Main Ordinance;
- (B) Option One;
- (C) Option Two;
- (D) Option Three

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF OAKLEY ADDING SECTION 9.1.1226 TO THE OAKLEY MUNICIPAL CODE, DEALING WITH MARIJUANA CULTIVATION

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

Section 1. Section 9.1.1226 is hereby added to the Oakley Municipal Code, to read as follows:

9.1.1226. Marijuana cultivation

(A) 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 lead to violent confrontations with the owners. Indoor cultivation can lead to the risk of fire and other safety issues. Notwithstanding such concerns, state law has recognized potential patient benefits of marijuana when authorized by a medical professional. Therefore, the Council wishes to balance the concerns about cultivation with the needs of authorized patients by adopting these regulations.

(B) Definition.

"Marijuana" means all parts of the plant *Cannabis sativa* L.

(C) 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.

(D) Number of plants limited.

No more than six (6) mature or twelve (12) immature marijuana plants shall be authorized to be grown on any parcel of land within the City. An "immature" plant shall be considered to be a plant that is not yet in bud. An "immature" plant is not one which has reached the size of a plant capable of producing buds where the buds have been removed or harvested.

(E) Setback from property lines.

No marijuana plant may be planted, grown, or cultivated outdoors 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, the plants shall be located to the maximum extent possible in the center of the available yard area.

(F) Security of premises.

Any premises where a permit has been granted pursuant to this Section for the outdoor cultivation of marijuana plants shall secure the outdoor area where the marijuana is grown or cultivated. There shall be a solid fence of at least six feet in height securing this area, which can be the rear and side yard fences of the premises. Any gate leading to this secured area shall be locked with an effective locking device at all times when the permittee is not present.

(G) Indoor cultivation.

Indoor cultivation shall occur in an area of the premises not exceeding 50 square feet. Such cultivation shall not be visible from the exterior. Lighting for such cultivation shall not exceed 1,200 watts. There shall be no illicit modifications to the electrical system of the structure.

(H) Private enforcement.

Nothing contained in this Section shall limit the ability of private individuals from bringing an action in a court of competent jurisdiction to either enforce the terms of this Section, 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.

(I) Permit application.

Persons applying for a permit under this Section shall acknowledge the terms of this Section 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, 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's intended cultivation is lawful under California law. 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 to these requirements.

(J) Permit revocation.

The Planning Manager or his/her designee may revoke any permit issued pursuant to this Section if he/she finds any violation of this Section. 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.

(K) Enforcement.

A civil administrative citation may be issued for any violation of this Section. Additionally, the City retains all rights and remedies under civil law to enforce the provisions of this Section. This Section shall not be enforced by any criminal proceedings.

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 _____, 2016 by the following vote:

AYES:

NOES:

ABSTENTIONS:

ABSENT:

APPROVED:

Mayor

ATTEST:

Libby Vreonis, City Clerk

Date

OPTION ONE

Medical Marijuana Cultivation Ordinance

All of the provisions of the Main Ordinance, except:

Paragraph D to be reworded as follows:

(D) 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. An "immature" plant is not one which has reached the size of a plant capable of producing buds where the buds have been removed or harvested.

Paragraph G to be reworded as follows:

(G) Indoor cultivation.

The number of marijuana plants cultivated indoors shall not be limited, except that the growth or cultivation area of the premises indoors shall not exceed 50 square feet. Such cultivation shall not be visible from the exterior. Lighting for such cultivation shall not exceed 1,200 watts. There shall be no illicit modifications to the electrical system of the structure.

OPTION TWO

MEDICAL MARIJUANA CULTIVATION ORDINANCE

All of the provisions of the Main Ordinance, except:

Paragraph D to be reworded as follows:

(D) Number of plants limited.

No more than six (6) mature or twelve (12) immature marijuana plants shall be authorized to be grown on any parcel of land within the City, except as provided in Paragraph L hereof.

Paragraph L to be added as follows:

(L) Large parcels.

More than six (6) mature or twelve (12) immature marijuana plants may be grown or cultivated on parcels located within the Limited Agricultural (AL) zoning district if the parcel is of at least five (5) acres in size and if a Conditional Use Permit has first been obtained. A Conditional Use Permit shall not be issued unless the cultivation of the number of plants has been specified by the applicant and such cultivation would be lawful under California law. The Conditional Use Permit shall include such restrictions as may be deemed by the City necessary or desirable to protect adjoining properties from odor objections and to provide a reasonable level of security.

OPTION THREE

ORDINANCE NO. _____

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Section 1. Section 9-1.1226 is hereby added to the Oakley Municipal Code, to read as follows:

9.1.1226. Marijuana cultivation

(A) 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 lead to violent confrontations with the owners. Indoor cultivation can lead to the risk of fire and other safety issues, as well as excessive consumption of electricity and greenhouse gas emissions.

(B) Definition.

"Marijuana" means all parts of the plant Cannabis sativa L.

(C) Prohibition.

It shall be unlawful and a public nuisance to grow, plant or cultivate any marijuana plant within the City of Oakley.

(D) Enforcement.

A civil administrative citation may be issued for an violation of this Section. Additionally, the City retains all rights and remedies under civil law to enforce the provisions of this Section. This Section shall not be enforced by any criminal proceeding.

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.

Introduced
ORD 05-16

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