

OAKLEY



CALIFORNIA

MEMORANDUM

Date: February 22, 2017
To: Mayor and Councilmembers
From: Derek P. Cole, City Attorney
Subject: Report Regarding Potential Changes to the City Code in Light of the Passage of Proposition 64

FOR CONSIDERATION AT THE CITY COUNCIL MEETING OF FEBRUARY 28, 2017

As most Californians are aware, with the passage of Proposition 64 last November, the recreational possession and use of marijuana is now legal in this state, subject to certain limitations. While Proposition 64 gives much of the new regulatory scheme for personal marijuana use to the State, it does allow cities and counties to regulate marijuana in a number of ways. Below, we discuss the City's authority in light of Proposition 64 and identify areas in which the City Code could be amended to regulate or, in some cases, prohibit, certain activities in light of marijuana legalization.

Cultivation of Marijuana

Currently, the City Code, in Chapter 9.1.1230, provides, "[i]t shall be unlawful and a public nuisance to grow, plant or cultivate any marijuana plant within the City of Oakley." Given that this Chapter does not differentiate between medical and non-medical marijuana, traditional rules for interpreting statutory (and ordinance) text would likely construe this Chapter as a total ban on *all* marijuana cultivation within the City, including cultivation for recreational purposes.

The City could, however, reaffirm the outdoor cultivation ban by noting that it applies even in light of the passage of Proposition 64. We note that Proposition 64 does not preempt

or prohibit cities from enacting cultivation bans¹ and thus an ordinance reaffirming the City's outdoor ban would be well within the City's authority.

On the other hand, Proposition 64 does limit public agencies from banning *indoor* cultivation. Note also that, under Proposition 64, the growing of marijuana in a detached greenhouse is considered to be *indoor* cultivation so long as the greenhouse is fully enclosed, secure, and not visible from public space. So as part of an outdoor cultivation ban, the City could not prohibit the growing of marijuana in properly constructed backyard greenhouses.

Fortunately, although the City cannot ban indoor cultivation, it can still *regulate* such cultivation. For instance, the City could enact a reasonable licensing or permitting scheme that would require City approval before indoor cultivation may occur. But unless and until such a regulatory scheme is enacted, any resident 21 years of age or older would have the right to cultivate six plants in a single house within the City (or, as noted, in a backyard greenhouse).

Finally, we note that banning all outdoor cultivation could have a financial consequence for the City. Proposition 64 will impose an excise tax on all marijuana transactions beginning in 2018 and some of the tax funds would be distributed to local governments in the form of grants. The grants can be used to fund law enforcement, fire protection, and other services. Cities that ban cultivation altogether would not be eligible to receive any such grant funds.

Commercial Sale of Marijuana

Presently, the City Code, at section 4.12.106, states “[m]edical marijuana dispensaries are prohibited in the City of Oakley. No medical marijuana dispensary shall operate, locate or otherwise be permitted within the City of Oakley.”²

Under Proposition 64, cities retain the authority to regulate and ban all *recreational* marijuana businesses. Because the City's current ban is focused on *medical* uses, the City Code would need to be amended to address the new types of storefront and retail marijuana establishments that are expected in light of Proposition 64's passage.

¹ A caveat, however, is that Proposition 64 specifies that outdoor cultivation bans will become ineffective if the State Attorney General determines that the non-medical (personal) use of marijuana is no longer prohibited under federal law. Presently, marijuana remains illegal under federal law as a “Class I” drug. One would assume the incoming Presidential Administration is not likely to change marijuana's status under federal law, but I note there have been members of Congress in both major parties who have advocated for such a change.

² Section 4.12.104 of the City Code defines “medical marijuana dispensary” as “any facility or location, whether fixed or mobile, where medical marijuana is provided, sold, made available, or otherwise distributed to one or more of the following: a primary caregiver, a qualified patient or a person with an identification card.”

The argument could be made the under the City's Zoning Code, such retail establishments are not specified as either permitted or conditional uses in any zone, and thus would not be allowed. We note, however, that fellow city attorneys and the League of California Cities have advised that reliance on "permissive zoning" schemes is unlikely to be successful. Many have recommended that cities wishing to ban retail marijuana establishments do so expressly. Our office agrees with this view and recommends that if the Council's pleasure is to ban retail marijuana establishments, it direct us to prepare an ordinance accordingly.

Further, we note that, although Proposition 64 imposes no time limits on banning marijuana cultivation, its drafting does create a "de facto" deadline that must be noted. Under the initiative, local agencies will effectively lose the right to ban or regulate such establishments once the state begins issuing state licenses, which is expected to happen sometime late this year or early next year.

As described above with cultivation bans, cities that prohibit marijuana establishments within their city limits would not be eligible to receive grant funds through the state excise tax that will be imposed beginning in 2018. Any ban on retail establishments would accordingly have financial consequences that should be considered.

Marijuana Deliveries within City limits

In imposing bans on medical marijuana dispensaries, a number of cities broadly defined their bans to prohibit deliveries of marijuana within their municipal limits. As noted above, the City has an express dispensary ban. But this applies only in the *medical* context.

As for the delivery of marijuana for *commercial* purposes, Proposition 64 does authorize cities to ban deliveries within their respective territories. But cities may not prohibit transportation of marijuana along their public roads. Thus, the City could ban or regulate the delivery of marijuana to residences within the City, but it could not prohibit someone from travelling through the City to deliver marijuana in other cities or unincorporated areas.

Taxation

Proposition 64 does not prohibit cities from imposing taxes on marijuana uses. Thus, should the City wish to regulate, rather than ban, marijuana cultivation or retail sales, it could include taxation in any regulatory scheme it enacts. However, it is likely that voter approval for any taxes would be required under California's various taxation initiatives, Propositions 13, 26, and 218.

In contrast, voter approval would not be required for any fees established as part of regulatory ordinance so long as fee revenues are used only for regulatory purposes—i.e., to cover the City's costs for approving permits or licenses, verifying compliance, and taking enforcement actions.

Summary

Based on the above discussion, the City Council should consider the following questions in deciding what, if any, changes it wishes to make to the City Code in light of the passage of Proposition 64:

1. Should the City reaffirm its outdoor cultivation ban in light of the passage of Proposition 64?
2. Should the indoor cultivation of non-medical marijuana be regulated within city limits (recall that it cannot be banned)?
3. Should delivery of marijuana to residences within city limits be banned or regulated?
4. If the Council chooses to regulate in any of the above areas (rather than impose bans), what types of regulations would it like to consider?
5. If the Council chooses to regulate cultivation or commercial activity associated with marijuana, does it wish to consider imposing a tax on such activities?

With answers to the above questions, we can draft an ordinance (or ordinances) for your consideration. We look forward to receiving your direction at the February 28 meeting.