



STAFF REPORT

Meeting Date: December 20, 2016

To: Honorable Mayor & City Council

From: Laurence S. Wiener, City Attorney
Maricela E. Marroquin, Assistant City Attorney

Subject: Discussion Regarding the Control, Regulate and Tax Adult Use of Marijuana Act

RECOMMENDATION

It is recommended that the City Council provide direction to staff regarding whether the City wants to (1) prohibit outdoor marijuana cultivation at private residences, (2) adopt reasonable regulations regarding indoor marijuana cultivation at private residences, (3) prohibit or regulate commercial marijuana activity in the City, and (4) explore imposing a local excise tax on non-medical marijuana businesses.

INTRODUCTION

This report will provide an overview of the Control, Regulate and Tax Adult Use of Marijuana Act ("the AUMA"), focusing on the main provisions that will impact the City. This report will identify the marijuana related activities that the City can prohibit and/or regulate. This report will also identify policy issues that the City Council should consider in response to the AUMA.

BACKGROUND

A. The AUMA

As you are aware, the AUMA was approved by California voters on November 8, 2016.¹ The AUMA legalizes the possession, use, and cultivation of non-medical marijuana for

¹ According to data obtained from the Los Angeles County Registrar-Recorder/County Clerk, the AUMA was overwhelmingly approved by the voters in Beverly Hills. 9,288 people voted in favor of the AUMA and 5,183 voted against it.

Meeting Date: December 20, 2016

those who are 21 years of age or older and establishes a comprehensive system to regulate commercial marijuana activity.² Commercial marijuana activity includes the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, labeling, transportation, delivery or sale of marijuana and marijuana products. The AUMA requires that the State begin issuing licenses to non-medical marijuana businesses by January 1, 2018. The State will not issue a license to a non-medical marijuana business if it will violate a local ordinance or regulation.

B. The City's Current Marijuana Regulations

Section 10-3-2761 of the Municipal Code provides that marijuana dispensaries, stores, co-ops and cultivation operations are prohibited in any zone or overlay zone of the City. A marijuana dispensary, store, co-op, or cultivation operation per Section 10-3-100 is defined as: "A business or other person or entity, including any location, structure, facility, residence, or similar enclosure for the same, used, in full or in part, as a place at or in which marijuana is sold, traded, exchanged, bartered for in any way, made available, located, stored, placed, planted, cultivated, or processed, including, without limitation, any location, structure, facility, residence or similar enclosure if used in connection with the delivery of marijuana."

Section 10-3-100 further provides that a marijuana dispensary does not include the cultivation and storage by a qualified patient or that patient's caregiver at the qualified patient's residence and incidental to a residential use by such patient, and for the sole use of the patient who resides at the residence.

Although the City currently prohibits medical marijuana dispensaries, store, co-ops and cultivation operations, this prohibition will not be sufficient to prohibit the establishment of non-medical marijuana businesses in the City. Additionally, the City does not currently prohibit outdoor marijuana cultivation at private residences.

DISCUSSION

A. Legalization of Marijuana

The AUMA adds Section 11362.1 to the Health and Safety Code which makes it lawful under State and local law for persons 21 years or older to:

- Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older (1) up to 28.5 grams of marijuana that is not in the form of concentrated cannabis or (2) up to eight grams of marijuana in the form of concentrated cannabis.
- Possess, plant, cultivate, harvest, dry, or process not more than six marijuana plants and possess the marijuana produced by the plants.
- Smoke or ingest marijuana or marijuana products.
- Possess, transport, purchase, obtain, use, manufacture, or give away marijuana accessories to persons 21 years of age or older.

² This memorandum primarily addresses the AUMA which pertains to non-medical marijuana. Medical marijuana is regulated by the Medical Cannabis Regulation and Safety Act ("MCRSA").

Meeting Date: December 20, 2016

Under the AUMA, it is unlawful, with certain exceptions, to:

- Smoke or ingest marijuana or marijuana products in any public place.
- Smoke marijuana or marijuana products in (1) a location where smoking tobacco is prohibited, and (2) within 1,000 feet of a school, day care center, or youth center while children are present at such a school, day care center, or youth center.
- Possess, smoke or ingest marijuana or marijuana products in or upon the grounds of a school, day care center, or youth center while children are present.
- Smoke or ingest marijuana or marijuana products, or possess an open container or open package of marijuana or marijuana products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.

B. Local Control

The AUMA permits a city to (1) adopt and enforce local ordinances to regulate non-medical marijuana businesses, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke, and (2) completely prohibit the establishment or operation of non-medical marijuana businesses within its jurisdiction.

The AUMA grants State agencies the authority to create, issue, renew, discipline, suspend, or revoke licenses for non-medical marijuana businesses. The AUMA provides that the State shall begin issuing licenses to non-medical marijuana businesses by January 1, 2018. Business and Professions Code section 26055(e) states that a State licensing authority shall not approve an application for a State license for commercial non-medical marijuana activity if approval of the State license will violate the provisions of any local ordinance. If the City wants to prohibit or limit non-medical marijuana businesses from operating in the City, it must adopt an ordinance explicitly prohibiting or limiting non-medical marijuana businesses before the State begins issuing licenses.

The City is also authorized to prohibit a person from possessing, processing, and cultivating marijuana or smoking or ingesting marijuana or marijuana products in any buildings owned, leased, or occupied by the City.

C. Personal Cultivation

The AUMA allows the planting, cultivation, harvesting, drying and processing (“cultivation activities”) of up to six marijuana plants in, or upon the grounds of, a private residence. The plants and any marijuana produced by the plants in excess of 28.5 grams must (1) be kept within the person’s private residence, or upon the grounds of that private residence (e.g., in an outdoor garden area), (2) be kept in a locked space, and (3) not be visible by normal unaided vision from a public place. A private residence is defined “a house, an apartment unit, a mobile home, or other similar dwelling.” Health and Safety Code section 11362.2(b)(5).

A city may enact and enforce an ordinance that reasonably regulates cultivation activities, but may not completely prohibit persons from engaging in any cultivation activities *inside* a private residence, or *inside* an accessory structure located upon the grounds of a private residence that is fully enclosed and secure. A city may prohibit cultivation activities

Meeting Date: December 20, 2016

outdoors upon the grounds of a private residence unless the California Attorney General determines that recreational use of marijuana is lawful in the State under federal law.

The City does not currently prohibit the outdoor cultivation of marijuana upon the grounds of a private residence.

D. Marijuana Businesses

There are 19 license classifications for non-medical marijuana businesses. The main categories for non-medical marijuana licenses are cultivation, manufacturer, testing, retailer, distributor, and microbusiness.³ The license classifications for cultivation and manufacturing vary depending on the size of the business and whether the cultivation is indoors, outdoors, or uses mixed-light. As noted above, the State will begin issuing licenses to non-medical marijuana businesses by January 1, 2018.

The AUMA prohibits non-medical marijuana businesses from locating within a 600-foot radius of a school providing instruction in kindergarten or any grades 1 through 12, day care center, or youth center that are in existence at the time the State license is issued, unless a licensing authority or a local jurisdiction specifies a different radius. The AUMA also requires that non-medical marijuana be (1) sold only by a licensed business, (2) packaged in child-resistant containers, and (3) labeled so that consumers are informed about the potency and effects of ingesting marijuana. Non-medical marijuana businesses will also be required to follow environmental and product safety standards as a condition of maintaining their license. Before it can be sold, the non-medical marijuana must be tested by an independent testing service for the presence of contaminants, including mold and pesticides. Non-medical marijuana cannot be sold by a business that also sells alcohol or tobacco. Additionally, non-medical marijuana cannot be advertised near schools or other places where children are present.

E. Marijuana Tax

Under the AUMA, the growth and sale of non-medical marijuana is taxed. Effective January 1, 2018, (1) a marijuana excise tax of 15 percent of the gross receipts of any retail sale, and (2) a cultivation tax on all harvested marijuana, are imposed. The cultivation tax is initially set at \$9.25 per ounce for marijuana flowers, and \$2.75 per ounce for marijuana leaves, and may be adjusted annually by the State Board of Equalization.

Revenue and Taxation Code section 34019 provides that the proceeds of these taxes are to be disbursed annually in the following order:

1. To reimburse various State agencies and offices for the costs of implementing the AUMA;
2. Earmarked funds totaling \$25 million, increasing to approximately \$50 million, for various programs;
3. The remainder to be disbursed as follows:

³ A microbusiness is a business that cultivates marijuana on an area less than 10,000 square feet and acts a licensed distributor, Level 1 manufacturer and retailer.

Meeting Date: December 20, 2016

- a. 60% to the Youth Education, Prevention, Early Intervention and Treatment Account, for specified purposes;
- b. 20% to the Environmental Restoration and Protection Account, for specified purposes; and
- c. 20% to the State and Local Government Law Enforcement Account.

Local taxation of marijuana is not pre-empted by the AUMA. The City could therefore adopt an excise tax on non-medical marijuana businesses. For instance, the City could impose a business license tax, or a tax based on a percentage of the gross receipts of a marijuana business. The tax would be subject to voter approval. If the City elects to adopt an ordinance allowing certain, or all types of non-medical marijuana businesses to operate in the City, it should consider making the adoption of such an ordinance contingent upon the City's voters approving a tax on those non-medical marijuana businesses. This will help the City generate the necessary funds to offset the increased law enforcement, fire protection, and other public health and safety costs that could be incurred as a result of the non-medical marijuana businesses being permitted to operate in the City.

F. What Can the City Prohibit?

The City can prohibit all commercial marijuana activity. Adopting a prohibition on commercial marijuana activity should prevent the State from issuing a license to non-medical marijuana business to legally operate in the City. The City can also prohibit all outdoor marijuana cultivation on private residences.

A portion of the proceeds of the excise and cultivation taxes adopted by the AUMA is to be allocated to grants to local governments to assist with law enforcement, fire protection, or other local programs addressing public health and safety associated with implementation of the AUMA. Local governments are prohibited from receiving these grants if they ban (1) commercial marijuana cultivation, (2) the outdoor growth of marijuana, including on private residences, or (3) the retail sale of marijuana or marijuana products. Since the City prohibits marijuana dispensaries and commercial marijuana cultivation in the City, it would not be eligible for any of these grants.

G. Regulating Marijuana Cultivation

The AUMA authorizes the City to adopt reasonable regulations for the personal cultivation of up to six plants within a private residence, or upon the grounds of that residence. The AUMA does not define or provide examples of "reasonable regulations." We are aware that some cities are considering or have imposed some of the following "reasonable regulations":

- A prohibition on marijuana being grown outdoors upon the grounds of a private residence.
- A requirement that the residence not draw more power than the residence's electrical system can withstand.
- A requirement that the fully enclosed and secure structure where the marijuana cultivation activities occur comply with the City's set back requirements to minimize the odors from marijuana plants impacting neighboring properties.

Meeting Date: December 20, 2016

The larger policy question is whether the City wants to regulate personal cultivation. Since 2011, the City has allowed qualified patients and primary caregivers to cultivate marijuana without adopting any regulations over those cultivation activities.

H. Policy Considerations

There are a number of important policy decisions that the City Council will need to make. The City will need to determine if it wants to:

1. Regulate or ban the outdoor cultivation of marijuana at private residences;
2. Regulate the indoor cultivation of marijuana at private residences;
3. Prohibit or regulate commercial marijuana activity in the City, including delivery; and
4. Seek voter approval to impose local taxes on non-medical marijuana businesses (assuming the City Council does not prohibit these businesses from operating in the City).

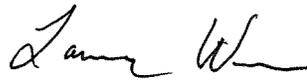
The City must determine what (if any) commercial marijuana activity it wants to allow in the City before the State begins issuing State licenses which must occur before January 1, 2018.

FISCAL IMPACT

The City will incur costs associated with the enforcement of any ordinance that regulates or prohibits marijuana cultivation or commercial marijuana activity. At this time, it is difficult to predict the specific amount the City would spend in investigating and enforcing violations of any marijuana regulations.

CITY COUNCIL ACTION

The City Council is requested to provide direction to staff regarding whether the City wants to (1) regulate or ban the outdoor cultivation of marijuana at private residences; (2) regulate the indoor cultivation of marijuana at private residences; (3) prohibit or regulate commercial marijuana activity in the City, including delivery; and (4) seek voter approval to impose a local excise tax on non-medical marijuana businesses (assuming the City Council does not completely prohibit marijuana businesses in the City).



Laurence S. Wiener
City Attorney