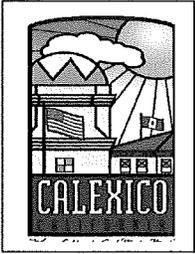


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AGENDA STAFF REPORT

DATE: January 19, 2016

TO: Mayor and City Council

APPROVED BY: Nick Fenley, Acting City Manager 

PREPARED BY: Nick Fenley, Acting City Manager
Carlos Campos, Interim City Attorney

SUBJECT: Second Reading and Adoption of Ordinance No. 1168 of the City Council of the City of Calexico amending Chapters 5.96 and 17.11 prohibiting medical cannabis dispensaries, medical cannabis cultivation, and medical cannabis delivery in the City.

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Recommendation:

Adopt an ordinance amending Chapters 5.96 and 17.11 prohibiting medical cannabis dispensaries, medical cannabis cultivation, and medical cannabis delivery in the City.

Background:

In March 2012, the City Council adopted Ordinance No. 1143, adding Calexico Municipal Code (“Code”) Chapter 5.96 and Article X of Chapter 17.11, which prohibit medical marijuana dispensaries in the City. The current Code does not specifically prohibit other medical cannabis uses such as planting, growing, harvesting, drying, storing, processing, or delivery.

The California legislature recently adopted legislation identified as the Medical Marijuana Regulation and Safety Act (AB 243, AB 266, and SB 643) (the “Act”) to comprehensively regulate medical marijuana (medical cannabis). The Act recognizes and preserves local control to regulate or ban medical cannabis cultivation, transportation, and distribution. The Act confirms and clarifies that, in addition to the complete land use control over retail dispensaries recognized in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal. 4th 729; municipalities have the power to regulate or ban the cultivation and distribution of medical marijuana. *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975.

Although the Act allows municipalities to regulate or ban cannabis cultivation, manufacturing, transportation, and distribution of medical

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cannabis within their jurisdictions, it requires some local enabling legislation to accomplish some aspects of this. If a city chooses to regulate these activities comprehensively, it must adopt an overlay of local regulatory standards that are at least as strict as the state's default regulations. **Specifically, the Act provides that if the City does not have an ordinance regulating or banning cultivation by March 1, 2016, it will lose the authority to regulate or ban cultivation within its City limits. The state would become the sole licensing authority.** The law is unclear, but the March 1, 2016 deadline might apply to legislation instituting a ban or regulation of medical cannabis **mobile dispensaries**, as well.

First reading of the ordinance amending Chapters 5.96 and 17.11 prohibiting medical cannabis dispensaries, medical cannabis cultivation, and medical cannabis delivery in the City was held and approved on January 5, 2016.

Discussion:

The cultivation, transportation, and distribution of marijuana can create problems relating to public health and safety, crime, water and air quality, and energy consumption. Marijuana uses can create nuisance activity such as loitering and criminal activity in business and residential districts. Specifically, mobile delivery can create issues relating to responsibility and resources to monitor and enforce state law, questions of patient qualification, and risks relating to the high use of large sums of cash for mobile transactions. Cultivation can create air quality, energy, and water quality damage and impair building maintenance and safety. For example, the increased moisture necessary to grow indoors can create excessive mold growth and structural damage. Additionally, the equipment utilized to grow indoors can pose a risk of fire and electrical hazards due to dangerous electrical alterations and use. Further, inadequate ventilation combined with the use of pesticides and fertilizers in an enclosed space can lead to chemical contamination within structures.

Staff recommends that the City Council adopt a ban for (1) medical marijuana distribution facilities, (2) medical marijuana cultivation, and (3) medical marijuana transportation.

1. Regulations of Medical Cannabis Dispensaries

As indicated above, the City of Riverside successfully defended its total ban of medical cannabis distribution facilities. The Riverside zoning ordinance categorizes medical marijuana dispensaries as prohibited uses throughout the city and provides that they may be abated as public nuisances.

While Riverside has exercised a total ban on medical marijuana dispensaries, other cities have decided to permit and regulate dispensaries within their jurisdiction. Regulations can include, for example:

- Limiting the number of dispensaries;
- Separation requirements from parks, schools, churches, and other dispensaries;
- Limiting the use to a specific zoning designation;
- Security requirements for the operation of the dispensary;

- Hours of operation; and
 - Prohibiting loitering.
2. *Regulation of Medical Cannabis Cultivation*

At least one California City (City of Live Oak) has successfully defended its total ban on the cultivation of marijuana for any purpose within that city. Its legally upheld regulation provides that “[m]arijuana cultivation by any person, including primary caregivers and qualified patients, collectives, cooperatives, or dispensaries” is prohibited in all zones within the City. The Act allows this approach.

Alternatively, some cities are allowing cultivation with regulations such as:

- Outdoor, residential cultivation so long as plants are enclosed, screened, and five (5) feet from the property line;
- Indoor cultivation only with a permit;
- Property owner must approve of cultivation on the property; and
- Limiting number of plants.

Should the City choose to leave cultivation unregulated, under the currently enacted version of the Act, on March 1, 2016 only State law would control cultivation activities in Calexico.

3. *Regulation of Cannabis Delivery*

Mobile delivery of products consistently creates issues for cities because of the inherent transitory nature of the activity. A quick search of weedmaps.com identifies several cannabis dispensaries that currently deliver to or near Calexico. These mobile delivery services are often attempts to avoid the effects of local dispensary bans. State law will regulate the delivery of medical marijuana unless delivery is explicitly prohibited by local ordinance. In light of the foregoing, the City has the option to ban or regulate mobile delivery. Regulations could include:

- Hours of operation;
- Amount of money or marijuana that can be carried at one time; and
- Time spent at one location.

On December 14, 2015, the Planning Commission adopted Resolution 2015-12, recommending that the City Council adopt the proposed Ordinance, attached hereto, banning medical cannabis dispensaries, including mobile dispensaries, and medical cannabis cultivation in the City.

Fiscal Impact:

No financial impact is anticipated for the adoption of the proposed Ordinance.

Environmental Analysis:

The Ordinance is not subject to environmental review under the California Environmental Quality Act (CEQA) pursuant to Sections 15060(c)(2) (the activities will not result in a direct or reasonably foreseeable indirect physical change in the environment), 15060(c)(3) (the activities are not "projects" as defined in Section 15378) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because they have no potential for resulting in physical change to the environment, directly or indirectly and 15061(b)(3) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it can be seen with certainty that it will not have a significant effect or physical change to the environment.

Coordinated With:

Best Best & Krieger LLP

Attachment:

1. Ordinance of the City Council of the City of Calexico, California, Amending Chapters 5.96 and 17.11 of the Calexico Municipal Code to Prohibit Cannabis Dispensaries, Cannabis Manufacturers, Cultivation, and Delivery of Cannabis in the City.

ORDINANCE NO. 1168

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CALEXICO, CALIFORNIA, AMENDING CHAPTERS 5.96 AND 17.11 OF THE CALEXICO MUNICIPAL CODE TO PROHIBIT CANNABIS DISPENSARIES, CANNABIS MANUFACTURERS, CULTIVATION, AND DELIVERY OF CANNABIS IN THE CITY

WHEREAS, in 1996, the voters of the State of California approved Proposition 215 (codified as Health & Safety Code Section 11362.5 *et seq.* and entitled “The Compassionate Use Act of 1996”); and

WHEREAS, the intent of Proposition 215 was to enable seriously ill Californians to legally possess, use, and cultivate marijuana for medical use under state law; and

WHEREAS, in 2003, the California Legislature adopted SB 420, the Medical Marijuana Program (“MMP”), codified as Health and Safety Code Section 11362.7 *et seq.*, which permits qualified patients and their primary caregivers to associate collectively or cooperatively to cultivate marijuana for medical purposes without being subject to criminal prosecution under the Penal Code; and

WHEREAS, neither the Compassionate Use Act (“CUA”) nor the MMP require nor impose an affirmative duty or mandate upon local governments to allow, authorize, or sanction the establishment of facilities that cultivate or process medical marijuana within its jurisdiction; and

WHEREAS, in March 2012, the City of Calexico (“City”) adopted Ordinance No. 1143, which prohibits medical marijuana distribution facilities in the City; and

WHEREAS, in May 2013, the California Supreme Court issued its decision in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal. 4th 729, holding that cities have the authority to regulate or ban outright medical marijuana land uses; and

WHEREAS, under the Federal Controlled Substances Act, codified in 21 U.S.C. Section 801 *et seq.*, the use, possession, and cultivation of marijuana are unlawful and subject to federal prosecution without regard to a claimed medical need; and

WHEREAS, on October 9, 2015, California Governor Edmund G. Brown, Jr. signed the “Medical Marijuana Regulation and Safety Act” (“Act”) into law; and

WHEREAS, the Act becomes effective January 1, 2016 and contains provisions which allow for local governments to regulate licenses and certain activities thereunder; and

WHEREAS, the Act contains a provision which sets forth that the State shall become the sole authority for regulation under certain parts of the Act, unless local governments have “land use regulations or ordinances regulating or prohibiting the cultivation of marijuana...” (Health & Saf. Code, §11362.777(c)(4)); and

WHEREAS, several California cities have reported negative impacts of marijuana cultivation, processing, and distribution uses, including offensive odors, illegal sales, and distribution of marijuana, trespassing, theft, violent robberies and robbery attempts, fire hazards, and problems associated with mold, fungus, and pests; and

WHEREAS, marijuana plants, as they begin to flower and for a period of two months or more, produce a strong odor, and detectable far beyond property boundaries if grown outdoors; and

WHEREAS, the strong smell of marijuana creates an attractive nuisance, alerting persons to the location of the valuable plants, and creating a risk of burglary, robbery, or armed robbery; and

WHEREAS, the indoor cultivation of marijuana has potential adverse effects to the health and safety of the occupants; including structural damage to the building due to increased moisture and excessive mold growth which can occur and can pose a risk of fire and electrocution; additionally, the use of pesticides and fertilizers can lead to chemical contamination within the structure; and

WHEREAS, the Attorney General’s August 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use recognizes that the cultivation or other concentration of marijuana in any location or premises without adequate security increases the risk that nearby homes or businesses may be negatively impacted by nuisance activity such as loitering or crime; and

WHEREAS, based on the experiences of other cities, these negative effects on the public health, safety, and welfare are likely to occur, and continue to occur, in the City due to the establishment and operation of marijuana cultivation, processing, and distribution uses; and

WHEREAS, the City's Municipal Code ("Code") does not address the cultivation, processing, delivery and distribution of medical cannabis; and

WHEREAS, based on the findings above, the potential establishment of cannabis dispensaries, cultivation, cannabis manufacturers and delivery of cannabis uses in the City without regulation poses a current and immediate threat to the public health, safety and welfare in the City due to the negative land use and other impacts of such uses as described above; and

WHEREAS, the issuance or approval of business licenses, subdivisions, use permits, variances, building permits, or any other applicable entitlement for cannabis dispensaries, cultivation, cannabis manufacturers and delivery of cannabis will result in the aforementioned threat to public health, safety, or welfare; and

WHEREAS, on December 14, 2015, the Planning Commission recommended that the City Council approve the following amendments to Calexico Municipal Code Chapters 5.96 and 17.11 banning the cultivation, distribution, and delivery of medical cannabis within the City.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF CALEXICO DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Incorporation of Recitals. The City Council finds and determines that each of the findings set forth above are true and correct.

SECTION 2. Amendment to Calexico Municipal Code. Chapter 5.96 of the Calexico Municipal Code is now amended in its entirety to read as follows:

“Chapter 5.96 – MEDICAL MARIJUANA USES

Sections:

5.96.010 – Purpose.

5.96.020 – Definitions.

5.96.030 – Prohibited Use.

5.96.040 – Penalty for Violation.

5.96.010 – Purpose.

The purpose of this Chapter is to enact and enforce a ban on all medical cannabis dispensaries, medical cannabis manufacturers, medical cannabis cultivation, and delivery of medical cannabis located within the City limits. Nothing in this Article shall preempt or make inapplicable any provision of state or federal law.

5.96.020 – Definitions.

For purposes of this Chapter, the following definitions shall apply:

- 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 Health and Safety Code as enacted by Chapter 1407 of the Statutes of 1972.
- B. “Cannabis dispensary” means a facility where cannabis, cannabis products, or devices for the use of cannabis or cannabis products are offered, either individually or in any combination, for retail sale, including an establishment that delivers cannabis and cannabis products as part of a retail sale.
- C. “Cannabis manufacturer” means a person that conducts the production, preparation, propagation, or compounding of manufactured cannabis, or cannabis products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis at a fixed location that packages or repackages medical cannabis or cannabis products or labels or relabels its container.

- D. “Cultivation” means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of cannabis.
- E. “Delivery” means the commercial transfer of cannabis or cannabis products, and includes origination or termination within the City as well as a delivery business.

5.96.030 – Prohibited Use.

Cannabis dispensaries, cultivation, cannabis manufacturers, and delivery of cannabis, as defined herein, shall be considered prohibited uses in all zoning districts of the City. No use permit, variance, building permit, or any other entitlement or permit, whether administrative or discretionary, shall be approved or issued for the establishment or operation of a dispensaries, cannabis cultivation, cannabis manufacturers, and delivery of cannabis as defined herein in any zoning district, and no person shall otherwise establish such businesses or operations in any zoning district.

5.96.040 – Penalty for Violation.

No person, whether as principal, agent, employee or otherwise, shall violate, cause the violation of, or otherwise fail to comply with any of the requirements of this Chapter. Every act prohibited or declared unlawful, and every failure to perform an act made mandatory by this Chapter, shall be a misdemeanor or an infraction, at the discretion of the City Attorney or the District Attorney. In addition to the penalties provided in this Chapter, any condition caused or permitted to exist in violation of any of the provisions of this Chapter is declared a public nuisance and may be abated as provided in Chapter 1.24 through 1.27 and/or under state law.”

SECTION 3. Amendment to Calexico Municipal Code. Chapter 17.11, Article X of the Calexico Municipal Code is now amended in its entirety to read as follows:

“Article X. – Medical Marijuana Uses

17.11.1010 – Definitions.

17.11.1020 – Medical Marijuana Uses.

17.11.1030 – Violations—Penalty.

17.11.1010 – Definitions.

For purposes of this chapter, the definitions laid out in Section 5.96.020 of this code apply.

17.11.1020 – Medical Marijuana Uses.

- A. Cannabis dispensaries, cultivation, cannabis manufacturers, and delivery of cannabis, as defined herein, shall be considered prohibited uses in all zoning districts of the City of Calexico. No use permit, variance, building permit, or any other entitlement or permit, whether administrative or discretionary, shall be approved or issued for the establishment or operation of a dispensaries, cannabis cultivation, cannabis manufacturers, and delivery of cannabis as defined herein in any zoning district, and no person shall otherwise establish such businesses or operations in any zoning district.
- B. This article does not apply where preempted by state or federal law.

17.11.1030 – Violations—Penalty.

- A. Any use or condition caused or permitted to exist in violation of any provisions of this article shall be and is hereby declared a public nuisance and may be abated by the City pursuant to the procedures set forth in this code or under state law.
- B. Each violation of this article and each day a violation of this article continues to exist shall be considered a separate and distinct violation.
- C. Any violation of the provisions of this article is enforceable by any means authorized in Chapters 1.24 through 1.27 of this code or under state law.”

SECTION 4. CEQA. The City Council finds that this ordinance is not subject to the California Environmental Quality Act (“CEQA”) pursuant to CEQA Guidelines Sections 15060(c)(3) because this activity is not a project as defined by Section 15378 of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, and pursuant to CEQA Guidelines Section 15061(b)(3) because it can be seen with certainty that it will not have a significant effect or physical change to the environment.

SECTION 5. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance for any reason is held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one

or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

SECTION 6. Publication. The City Clerk shall certify as to the adoption of this Ordinance and shall cause it to be published within fifteen (15) days of the adoption and shall post a certified copy of this Ordinance, including the vote for and against the same, in the Office of the City Clerk, in accordance with California Government Code Section 36933.

EFFECTIVE DATE: This Ordinance shall be effective thirty days after its adoption; and the City Clerk shall certify the adoption of this Ordinance and cause it to be published as required by law.

INTRODUCED AND FIRST READ at a regular meeting of the City Council of the City of Calexico on the 5th of January, 2016 and

THEREAFTER ADOPTED at a regular meeting of the City Council of the City of Calexico, California, on the 19th of January by the following vote:

AYES:
NOES:
ABSENT:

JOONG S. KIM, MAYOR

ATTEST:

GABRIELA GARCIA
CITY CLERK

APPROVED AS TO FORM:

CARLOS CAMPOS
INTERIM CITY ATTORNEY