



# *CITY COUNCIL AGENDA REPORT*

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MEETING DATE: JANUARY 5, 2016

ITEM NUMBER: PH-1

**SUBJECT: AN ORDINANCE TO ADOPT CODE AMENDMENT CO-15-06: AN AMENDMENT TO TITLE 13 OF THE COSTA MESA MUNICIPAL CODE RELATED TO CULTIVATION OF MARIJUANA AND/OR MEDICAL MARIJUANA**

**DATE: DECEMBER 17, 2015**

**FROM: PLANNING DIVISION/DEVELOPMENT SERVICES DEPARTMENT**

**PRESENTATION BY: MINOO ASHABI, PRINCIPAL PLANNER**

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## **RECOMMENDATION**

Give first reading to Ordinance 16-01 to adopt Code Amendment CO-15-06 amending Costa Mesa Municipal Code Title 13, Chapter I definitions and enforcement, Chapter IV City Wide Land Use, and adding new Article 20 to Chapter IX, Special Land Use Regulations.

## **BACKGROUND**

On December 14, 2015, the Planning Commission held a public hearing and with a 5-0 vote recommended approval of Code Amendment CO-15-06. This code amendment is recommended based on the recent bills signed by Governor Jerry Brown on October 9, 2015 related to the regulation of medical marijuana. City Staff reviewed the current zoning ordinance related to prohibition of marijuana cultivation within the City. City Staff determined that a new ordinance would need to be adopted and in effect by March 1, 2016 in order to allow the City to prohibit or otherwise regulate this use. Should the City fail to have an ordinance in effect by March 1, 2016, regulation of marijuana cultivation within the City will be permitted and regulated by the state. Under the current state law, the City will be unable to thereafter regulate or prohibit marijuana cultivation.

In the state of California, cities have the authority to adopt and enforce local laws so long as they are not in conflict with state or federal law. On the basis of this authority, the City has adopted a zoning ordinance that provides the permissible uses of and development standards for all land within the City's boundaries. To this end, the City has adopted a host of 'use classifications,' which define uses within the City. Under the zoning ordinance, a use classification not listed within a given zoning district is prohibited, unless otherwise authorized by the Planning Commission. Currently, the outdoor cultivation of marijuana is not a listed use and therefore prohibited. The proposed ordinance prohibiting marijuana cultivation, however, will make the prohibition explicit as required by state law effective January 1, 2016.

Marijuana cultivation is known for persistent strong odors as marijuana plants mature, which could be offensive to many people and creates an attractive nuisance, alerting persons to the location of valuable marijuana plants and creating an increased risk of crime. Comprehensive regulation of premises used for marijuana cultivation is proper and necessary to avoid the risks of criminal activity, degradation of the natural environment, smells and indoor electrical fire hazards that may result from marijuana cultivation. The indoor cultivation of substantial amounts of marijuana also frequently requires excessive use of electricity, which often creates an unreasonable risk of fire from the electrical grow lighting systems used in indoor cultivation.

It has been reported that the cultivation of marijuana in other cities has resulted in calls for service to the police department, including calls for robberies thefts, and physical assaults from marijuana that is grown outdoors; Marijuana growth poses significant safety risks for surrounding neighbors, including but not limited to, risks of violent confrontation in connection with attempts to steal marijuana, risk of fire from improperly wired electrical lights within structures growing marijuana, risk of guard dogs and security measures associated with structures and properties growing marijuana.

Furthermore, the United States Environmental Protection Agency has not established appropriate pesticide tolerances for, or permitted the registration and lawful use of, pesticides on cannabis crops intended for human consumption under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136, *et seq.*). The use of pesticides is therefore inadequately regulated and cannabis cultivated in California can and often does contain pesticide residues. These substances can run off of outdoor cultivation sites onto neighboring properties and/or leach into the groundwater.

There are thus serious nuisance impacts associated with the outdoor cultivation of marijuana. Cultivation bans in other cities have been reviewed by the courts and have been upheld in a variety of forms, including complete bans on cultivation within city limits (see *Maral v. City of Live Oak* (2014)).

To ensure that the zoning code adequately address cultivation of medical marijuana, staff recommends an amendment to the zoning ordinance to make explicit the fact that cultivation of marijuana and/or medical marijuana is prohibited in the City.

## **STATE LAW GOVERNING MARIJUANA CULTIVATION**

The laws governing medical marijuana cultivation, sale, and use in California have evolved rapidly, and are presently in flux at the state level. As has been widely reported in the media, the State of California is attempting to create a new statewide framework to regulate medical marijuana cultivation, sale, and use (see AB 243 (Wood), AB 266 (Bonta, Cooley, Jones-Sawyer, Lackey, and Wood), and SB 643 (McGuire)). All three of these bills have been passed by the Legislature and were signed by Governor Brown on October 9, 2015. Their passage significantly affects the City's regulation of this subject.

Generally, the new laws continue to recognize the power of local governments to regulate marijuana cultivation. However, under AB 243, the State Department of Food and Agriculture will establish a 'Medical Cannabis Cultivation Program,' which will be administered by the Department's secretary "except as specified in subdivision (c)" and

will administer the new state laws pertaining to the cultivation of medical marijuana. Under subdivision (c):

If a city ... does not have land use regulations or ordinances regulating or prohibiting the cultivation of marijuana, either expressly or otherwise under principles of permissive zoning, or chooses not to administer a conditional permit program pursuant to this section, then commencing March 1, 2016, the [State Department of Food and Agriculture] shall be the sole licensing authority for medical marijuana cultivation applicants in that city... (Health & Safety Code § 11362.777(c)(4).)

Since this new framework has been signed into law, it is appropriate that the City ensure its prohibition on the cultivation of marijuana is clear, so there is no question of the need for the State to act as the only licensing authority under the new laws<sup>1</sup>.

## **ANALYSIS**

The proposed amendment is intended to further fortify the existing prohibition of the Zoning Code and explicitly provide for prohibition of marijuana cultivation in all zoning districts.

On November 16, 2010, the City adopted Ordinance No. 10-14 that prohibited “Medical Marijuana Dispensaries” in all zoning codes and added a new definition to Chapter 1 of the zoning code as follows:

**Medical marijuana dispensary.** A facility or location where medical marijuana is cultivated or by any other means made available to and/or distributed by or to three (3) or more of the following: a primary caregiver, a qualified patient, or a person with an identification card in strict accordance with State Health and Safety Code Sections 11362.5 et seq and 11362.7 et seq., which shall include, but not be limited to any facility or location engaging in the retail sale, dispensation, or distribution of marijuana for medical purposes that does not have an active role in the cultivation of the marijuana product that it sells, dispenses, or distributes, or when its cultivation of the marijuana product is off-site from the facility or location for retail sale, dispensation, or distribution.

Even though the ordinance referred to marijuana cultivation, the new proposed amendment is suggested to ensure this specific use is affirmatively prohibited throughout the City pursuant to the requirements of Health & Safety Code § 11362.777(c)(4).

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<sup>1</sup> Notwithstanding the foregoing, it should be noted that this new legislation could be overturned by the voters. The Secretary of State has recently announced that an initiative to amend the California Constitution with regard to medical marijuana issues has been cleared for circulation. According to the State Attorney General’s summary, if passed, the initiative would, among other things, bar “state and local laws that restrict patients’ ability to obtain, *cultivate*, or transport medical marijuana, including concentrated cannabis, in any way that does not apply equally to other plants.” (Emphasis added.) A second marijuana initiative to amend the State Constitution (“The Control, Regulate and Tax Cannabis Act of 2016”) was just submitted to the state Attorney General on October 5th and would likewise impact local regulation of cultivation. While there is no way of predicting whether either of these initiatives (or another that has not yet surfaced) might pass, it is certain the City will need to continue to monitor and revise regulations governing marijuana.

## **PUBLIC NOTICE**

Code requires publication of a display Ad in the local newspaper (Daily Pilot) for Title 13 Code Amendments. At the time of publication of this report, no public comments have been received. Any correspondence will be forwarded to the City Council under separate cover. In addition to the newspaper ad, homeowners associations and other neighboring cities and government agencies were notified by mail.

## **ENVIRONMENTAL DETERMINATION**

The project has been reviewed for compliance with the California Environmental Quality Act (CEQA), the CEQA guidelines, and the City's environmental procedures, and has been found to be exempt pursuant to Section 15061 (b) (3) (general rule) of the CEQA Guidelines, in that it can be seen with certainty that there is no possibility that the proposed amendment to the Zoning Code will have a significant effect on the environment.

## **ALTERNATIVES**

Direct staff to make modifications to the draft. However, the City will need to have an ordinance in effect prior to March 1, 2016 if it wishes to retain local control over marijuana cultivation. Continuing the introduction of the ordinance may compromise the ability to meet the state mandated deadline.

## **LEGAL REVIEW**

The draft ordinance has been reviewed by the City Attorney's Office.

## **CONCLUSION**

In response to AB 243, AB 266 and SB 643 that were signed into law by Governor Jerry Brown on October 9, 2015 related to regulation of medical marijuana the Planning Commission recommended that an ordinance be adopted and in effect by March 1, 2016 in order to allow the City to prohibit this use.

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Principal Planner

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GARY ARMSTRONG, AICP  
Economic and Development Services  
Director

Attachments:      1. [Draft Ordinance](#)  
                          2. [Information from League of California Cities](#)

cc:    Chief Executive Officer  
      Assistant Chief Executive Officer  
      Public Services Director  
      City Attorney  
      Transportation Services Manager  
      City Engineer  
      City Clerk (9)  
      Staff (7)  
      File (2)