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Office of the City Manager

INFORMATION CALENDAR
June 13, 2017

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Timothy Burroughs, Interim Director, Planning and Development

Subject: Referral Response: Council Questions Regarding Medical Cannabis

INTRODUCTION
At the direction of Council, staff is providing responses to questions provided by Councilmember Hahn related to the City's medical cannabis ordinances.

CURRENT SITUATION AND ITS EFFECTS
On January 31, 2017, the City Council considered new and revised ordinances related to medical cannabis uses. At that meeting, Councilmember Hahn raised a number of questions related to the City's existing and proposed cannabis regulations. The Council asked staff to provide an information report with an analysis of the questions.

BACKGROUND
In 2010, Berkeley residents passed Measure T, which amended the Zoning Ordinance to allow for cultivation facilities and a fourth dispensary and established the Medical Cannabis Commission (MCC). The measure restricted approval of new dispensaries and cultivation facilities until the Council adopted standards for such uses. The Council adopted standards for dispensaries in 2014.

In October 2015, the Governor approved the Medical Cannabis Regulation and Safety Act (MCRSA), which created a comprehensive licensing system for commercial medical cannabis businesses. In November 2016, California state voters passed the Adult Use of Marijuana Act (AUMA), which legalized recreational cannabis use. The State is expected to begin issuing licenses under AUMA and MCRSA in January 2018. Cannabis businesses will need to have state and local approval in order to legally operate. The MCC has been crafting regulations for Council consideration in order to ensure that the city has local control over cannabis-related businesses.

The attached document provides a summary of the questions and responses.

ENVIRONMENTAL SUSTAINABILITY
There are no identifiable environmental effects or opportunities associated with the subject of this report.

POSSIBLE FUTURE ACTION
No action is needed. If the Council desires to make changes to the BMC or Zoning Ordinance as a result of this information, a referral to either the Cannabis Commission or Planning Commission would be necessary.

FISCAL IMPACTS OF POSSIBLE FUTURE ACTION
No impact.

CONTACT PERSON
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Attachment:
1: Councilmember Hahn's questions from January 31, 2017, with staff responses

ATTACHMENT 1
City Council Information Item
June 13, 2017

Questions from Councilmember Hahn related to Medical Cannabis ordinances

Responses (*in italics*) from Planning and Development Department staff.

1. What is the long-term prospect for this ordinance - how quickly might it be overwritten/rendered obsolete by an ordinance to bring us in-line with Prop 64?

   A: This ordinance only relates to medical cannabis regulations, while Prop 64 relates to recreational cannabis. The Governor signed the Medical Cannabis Regulations and Safety Act (MCRSA) in October 2015, and a state agency has been created to develop state regulations for medical cannabis. City staff has been following the proposed changes; some of the language in the January 31st ordinances is in response to the state changes. Based on information from the state, City staff does not expect changes on a state level that would require significant changes to the City's regulations. The City's regulations regarding recreational cannabis are not expected to significantly change the regulations already in place for medical cannabis in Berkeley.

2. What was the rationale for allowing medical cannabis sites to be permitted by-right? I know that was in Measure T, but given that everything in T is subject to change by the Council (and it looks like much of it has been or will be changed), why was that carried forward?

   A: Measure T was a Berkeley ballot measure that passed in 2010. It stipulated that "four medical cannabis dispensaries shall be permitted as of right with a Zoning Certificate in C-prefixed zones if they comply with the parking requirements applicable to the uses they include, and any security requirements promulgated by the Chief of Police". For cultivation businesses, Measure T specified that they "shall be permitted as a matter of right with a Zoning Certificate at 6 locations in the M District, subject to the following limitations…".

   City staff carries regulations forward as specified in a ballot measure unless modified by the City Council. Historically, the Council does not modify direction from ballot measures. The City Council modified the 6 cultivation location limit in 2016.

3. Does the City have the capacity to undertake the regulatory, financial, police, and public health (etc.) oversight responsibilities detailed in the ordinance, both in terms of expertise and staffing? Have the logistics been sketched out/costed? I know tax monies are expected to flow in - will the costs come from the same pot of money as the income? I assume there is a big net gain anticipated?

A: Three primary types of medical cannabis businesses are anticipated in Berkeley: dispensaries, manufacturing and cultivation. The most readily available tax figure is the $638,938 in taxes collected from the three existing dispensaries in 2014. This figure will be higher once the three new dispensaries come on-line. The taxes from the 5 – 10 existing manufacturing businesses have not been calculated. Potential taxes from cultivation are anticipated to range between $650,000 and $1,300,000 (MCC calculation based on 180,000 sf of cultivation).

In terms of City cost, a Health Inspector was hired in January to focus on developing an inspection program. The Finance Department is selecting a consultant to review financial records, to ensure compliance with the City's ordinances and also to verify that the taxes are reported correctly.

4. Measure T (2010) required all safety measures to be "promulgated by the Chief of Police". Did the Chief of Police promulgate the safety measures?

   A: Staff reviewed the security measures for dispensaries with representatives from the Police Department appointed by the Police Chief. The security measures for the cultivation facilities match those for the dispensaries.

5. Energy efficiency measures may be undercut by the cap on costs of offsets at 10% of the facility's annual energy bill. Has an analysis been done to explore cultivation energy use and costs as compared to cost of energy offsets? How much of the energy use will reasonably be offset under the 10% cap?

   A: In November 2015, the Manager of Office of Energy and Sustainable Development (Neal DeSnoo) calculated the lighting costs for a 30,000 square-foot grow facility. He estimated that using the most efficient lighting available at the time would result in 2,360 megawatt hours per year, and would cost approximately $354,000 per year. Staff was unable to estimate the heating and ventilation costs of a cultivation facility. The energy offset costs to a cultivator, using a market cost of 1.5 cents/kilowatt hour would result in approximately 10% of the energy cost. This cost will vary depending on the cost of energy and the cost of the offsets.

6. On a similar note, we might want to consider how the advent of Community Choice Energy (imminent) will affect this element of the legislation. Is it worth investing time in a complex energy scheme just a few months before CCA comes online? I think requiring cultivators to opt into (or maintain) 100% clean energy through the CCA would probably be a much easier way to handle this challenge. There might be a reason to ask for further measures to account for being an "energy hog" as well, but access to 100% clean energy is coming soon … and might help out on this element of the new code.

   A: Staff will recommend modifying the ordinance to make participation in the CCA the primary way to address the energy use of cultivation facilities, allowing for purchase of RECs only until

the CCA option is available. Staff will also recommend removing the option to pay into a City-based fund.

7. What is the rationale for the definition of "smoking" and the exclusion of e-cigarettes and similar? Where else has this been done in Berkeley, or in CA? How can the carve-out of E-cigarettes be reconciled with the State definition of tobacco products[1] and Berkeley's position on E-cigarettes?

   A: Ordinance 7,369 (2014) developed regulations to incorporate e-cigarettes and "vaping" into the definition of smoking. An exception was included to allow "the inhalation of medical cannabis through the use of an electronic smoking device inside a dispensary … and on the public right of way within 50 feet of such a Dispensary by a member of that dispensary". An exception was also developed for the use of an electronic device within an enclosed area of a unit "by a person for whom using medical cannabis is not a crime" (BMC Sections 12.70.035 and .037). These carve-outs were created at the request of the Medical Cannabis Commission in order to allow medical cannabis patients to be able to use vaporizers in order to take their medicine.

8. Section C of 12.25.050 says "Cultivation Businesses may only provide Medical Cannabis or Medical Cannabis Products to other Medical Cannabis Organizations that are permitted by local authorities or permissible under local law". What is "local"? Is this Berkeley, Alameda County, or local ordinances anywhere?

   A: "Local law" refers to the regulations of any jurisdiction related to activities within its boundaries. The Berkeley ordinance does not permit Berkeley-based cultivation facilities to circumvent the regulations of other jurisdictions. Approval of a business to operate in Berkeley does not allow that business to provide Medical Cannabis or Medical Cannabis Products to businesses that are not legally established in their own jurisdiction.

9. Have the environmental impacts of parking lot lighting been evaluated? There might be unintended effects on adjacent residents and businesses and there is the issue of light pollution and birds.

   A: The language for the lighting requirement was recommended by the Police Department. Exterior lighting at these businesses will be subject to the same requirements as other Berkeley businesses: "Exterior lighting shall be shielded in a manner which avoids direct glare onto abutting lots in a residential District" (BMC Section 23E.04.060.C). Berkeley's lighting regulations have focused on reducing adverse impacts to neighboring properties rather than environmental impacts.

10. I think the multiple standards for reporting and record keeping (some 120 days, some 90 days, some unspecified, etc.) could benefit from being standardized and clarified. Not only are time

[1] http://www.cdph.ca.gov/Pages/NR16-035.aspx

periods different, but the questions of who gets to see what, when, and why, and also whether the cultivator must produce records (for whom?) or the city must request them, seem very complex for the perspectives of both the cultivator and the city. Can we fix that?

A: Different record keeping requirements fulfill different functions. This ordinance has retention requirements related to financial information, batch information, surveillance footage and testing results. The retention requirements vary because each one serves a different function; for example, security footage doesn't need to be kept as long as financial information because it will be known in a fairly short period whether it is needed. Information to be submitted to the City is on an annual basis at the beginning of the year; other information is requested by specific City departments only as needed.

11. Why is the membership age set at 18 years of age, instead of 21? Do other states have different legal ages for medical marijuana than for drinking and/or smoking tobacco? What does the new CA legislation provide for recreational use? Also, given that a caretaker can be a member of a collective, why do we let youth under 18 become members at all? I think 18 is mentioned 2-3 times, and all mentions of this age concern me as they may signal that Berkeley endorses a lower age for cannabis consumption than we or the state wants to endorse.

    This is from State website - I don't think this ordinance encourages adherence, as written:

    Can a minor apply for a MMIC?

    Yes. A minor (under 18 years of age) can apply as a patient or caregiver under certain conditions. Minors may apply for themselves as qualified patients if they are lawfully emancipated or have declared self-sufficiency status. If the minor has not declared self-sufficient status or is not emancipated, the county's program is required to contact the minor's parent, legal guardian, or person with legal authority to make medical decisions for the minor. This is to verify information on the Application/Renewal Form. An emancipated minor or the minor's parent of a qualified patient may apply as a primary caregiver. If a minor declares status as a self-sufficient minor or is an emancipated minor, his or her county program may require additional documentation. Contact your county's program for more information on additional required documentation.

    A: The membership age reflects state law. Staff has not researched the relationship between medical cannabis, recreational cannabis, alcohol and tobacco smoking age limits.

12. Requiring facilities to have bars, metal gates, and secured windows and roof hatches seems like it could be a fire hazard if implemented in a haphazard manner. Fire code specifications may be implied, but given the danger of improvised solutions to this kind of thing, I think we should be specific about compliance - and require the fire department to inspect on installation and then on a regular basis. There is so much electrical as well in these facilities.

    A: For security reasons, the Police Department requested that bars be mandated at all dispensaries and cultivation sites unless the site provides security during non-business hours.

Building Code/Fire Code regulations require that any bars would need to be fitted with panic hardware to enable individuals to exit the windows in case of a fire.

13. I think the 100 foot noticing requirement is short, especially considering these may be large parcels. We require 300 feet for various types of land use notice, and more may be appropriate in M areas. Can you clarify why 100 ft was chosen, or suggest an alternative?

    A: The 300-foot notice requirement for applications serves a different function than the 100-foot requirement for contact information. The 100-foot requirement provides 24-hour contact information for the dispensary to neighbors who would be most likely to be impacted by activities clearly connected to the dispensary. Staff reasoned that giving this information just to abutting and confronting properties would not be adequate, but that providing it to all properties within 300 feet of a dispensary would be excessive.

14. There are a number of places that reference the "sourcing" of cannabis products. Could you clarify if cultivation sites are also able to sell products that were produced off-site? Or does "sourcing" refer to some other aspect of the cultivation process that I'm unaware of?

    A: Cultivation sites are not allowed to sell products. Cannabis produced on site can only be sold on a wholesale basis to another medical cannabis business (dispensary or manufacturer). "Source" is also used in Section 12.27.070.C, and refers to the entity (grower, manufacturer or dispensary) that provides a batch of cannabis product to a testing lab for testing. All product must be tested by a testing lab that is independent of the entity providing the product. If the batch does not pass testing requirements, the tester will return the batch to the entity that provided it. Depending on the product, it may be used in another product, as long as that product passes a subsequent analysis.

15. Some of the language seems to suggest that some aspects of cultivation businesses will be for-profit. If that is the case, what other businesses will they be engaged in and how does that work? Are they incidental?

    A: BMC Section 12.25.090.B provides that cultivation businesses must operate on a Not-for-Profit basis when setting prices for medical cannabis. These businesses do not need to operate on a Not-for-Profit basis if providing goods or services that are not medical cannabis. Examples of this would be t-shirts, mugs, etc. advertising the business or books related to medical cannabis growing. Section 12.27.090.B.1 establishes the same requirement for dispensaries.

16. I think there is an unintended mistake in the definitions section, that essentially results in the requirement that medical cannabis organizations only operate in residential districts. Medical Cannabis Organizations can only be "Collectives," and Collectives can only be in Residential Districts. Therefore . . . Medical Cannabis Organizations can onl*y be in Residential Districts*. What was the intention on this?

A: The Berkeley regulations include two similar terms: collectives (a business organization), and Collectives (residential uses). A collective identifies the organizational structure of a business. According to the state law in effect in 2014, all medical cannabis businesses have to be organized as collectives or cooperatives.

Residential Collectives are a City of Berkeley construct which allows patients and caregivers to work together to provide medical cannabis to each other. It is not a retail establishment, and is allowed only as an incidental use to a residential use in a residential district. In Berkeley, only residential Collectives could be located in a Residential District, and they have to be incidental to a residential use. Other uses (dispensaries, cultivation facilities, manufacturing) are not permitted in residential districts. The State has not identified a classification for the residential Collectives, and will not issue State licenses to them in 2018. Because residential Collectives will not be able to obtain a State license, the City will cease issuing and/or renewing business licenses for these businesses starting in January 2018.

17. I am concerned that the limit on dispensing only one ounce of cannabis per day is rendered moot by the exception. It seems the DISPENSARY is allowed to decide what is "consistent with needs" rather than the recommending physician. This may be a wording error, but the door is open for dispensaries to decide themselves.

    A. This language is consistent with the California Health and Safety Code Section 11362.77 and refers to the amount of medical cannabis a patient or primary caregiver can possess.

18. Similarly, loopholes in dispensing protocols invite physicians to recommend without expiration dates, resulting in the ability to dispense in perpetuity. We don't allow this with other medical prescriptions; I don't see why we would here.

    A. The rules for doctors and recommendations for medical cannabis come from the state, not individual jurisdictions. Local jurisdictions have no authority to supersede state rules for doctors. The new MCRSA regulations will update the regulations for doctors. See Senate Bill 643 (McGuire, 2015), which amended sections of the California Business and Professions Code related to recommendations of medical cannabis.

    BMC Section 12.23.030.D provides that dispensaries may not dispense medical cannabis to patients whose recommendation is more than 12 months old, "unless the recommendation expressly states that it has a longer term or does not expire".

19. The only protections for youth are the short recital that packaging attractive to children or imitating candy is not allowed. It seems youth have not been very carefully considered in this legislation. How else can we protect our youth from consumption of Cannabis, other than for true medical uses with parental involvement per the State regulations? I'm curious about what other cities and states have done to protect youth or discourage youth smoking of marijuana.

A. The Zoning Ordinance (Sections 23E.16.070.A.2 and 23E.72.040.B) includes a 600-foot distance requirement between dispensaries/cultivation facilities and K–12 schools. Businesses that admit persons under the age of 18 (except patients in the company of a parent/guardian) or that hire people under the age of 18 would be subject the public nuisance laws of BMC Chapter 1.26. The City also requires that products are packaged so that they are not attractive to children (i.e. imitating candy) and have warnings that the product must be kept away from children.

Staff has researched protections identified in Colorado, Oregon and Washington State. Some state-wide programs developed in these states include: a public health hotline for resources related to treatment for cannabis abuse; community grants that support prevention and reduction of cannabis use by youth; and a social media education campaign about the risks of abusing cannabis. Proposition 64 prohibits marketing and advertising cannabis directly to minors, and would direct some of the state revenues that will be collected to youth programs aimed at education, prevention and treatment related to cannabis.