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OAKLEY
CALIFORNIA

STAFF REPORT

Date: November 2, 2015

To: Mayor and Members of City Council

From: William R. Galstan, Special Counsel

Cc: Bryan H. Montgomery, City Manager; Derek P. Cole, City Attorney; Chris Thorsen, Chief of Police; Troy Edgell, Code Enforcement Manager

Subject: Work Session on Possible Medical Marijuana Cultivation Ordinance

FOR CONSIDERATION AT THE CITY COUNCIL MEETING ON NOVEMBER 10, 2015

Summary and Recommendation

Discuss the options listed in this report and provide direction to staff. Possible actions include:

- Do nothing and be bound by regulations to be drafted by the State; or
- Direct staff to prepare an ordinance regulating medical marijuana cultivation; or
- Direct staff to prepare ordinance and thereafter rescind ordinance if State regulations are acceptable.

Fiscal Impact

If an ordinance were to be adopted, possible modest revenues from permit applications, which would be used to cover staff costs.

Background and Analysis

Several months ago, Council considered a draft ordinance that would have strictly regulated the cultivation of medical marijuana within the city limits of Oakley and largely prohibited the outdoor cultivation thereof. A consensus was not reached by Council on this proposal. Thereafter, this office recommended that we await the Legislature's consideration of AB 266, the "Medical Cannabis Regulation and Control Act" which would be a State effort to comprehensively address several aspects of the medical use of marijuana. AB 266 did pass and Governor Brown signed it into law.

AB 266 does respect regulations that cities have adopted regarding marijuana cultivation and sale. A recent Webinar on AB 266 pointed out a "window" that cities may use. Basically, the law states that if a city has not adopted an ordinance dealing with cultivation by March 1, 2016, it will lose the authority to regulate or ban cultivation. The State would become the sole authority on this subject in that jurisdiction.

Cities will therefore continue to have authority to adopt their own regulations until March 1, 2016. Since the State regulations are not yet drafted, no one yet knows what criteria the State would impose after that date. Therefore, it has been suggested that cities may desire to adopt urgency ordinances prior to March 1, but if the State thereafter adopts regulations similar to those adopted by the cities, the cities could rescind their ordinances and then rely on State control.

AB 266 provides that the State will not issue a State license for cultivation if the applicant does not have a local license from a city that regulates cultivation and has issued a local permit. Thus local ordinances will also need to have a permit approval process.

This office has reviewed research on some of the objections that were raised regarding the earlier draft ordinance, specifically the total prohibition on outdoor cultivation and the issue of prohibiting cultivation regarding plants that were "already in the ground." The following comments relate to our thoughts about how a new ordinance could be drafted to address these concerns.

- *Outdoor regulation; no indoor regulation.*

  The proposed ordinance would limit the number of plants that could be grown outdoors, but would not address indoor cultivation. This is because the primary thrust of the ordinance would be to protect neighbors from the odor associated with outdoor cultivation. This would be accomplished primarily by limiting the number of plants that could be grown outdoors. Limiting the number of plants could also be beneficial in protecting against burglaries, as plots of large numbers of plants could be attractive to persons wishing to steal them.

- *Limitation on number of plants.*

  The proposed ordinance would limit the number of plants that could be grown outdoors to six mature or 12 immature plants. This is because Prop. 215 sets these numbers as guidelines. Although a medical marijuana user may grow whatever amount of marijuana is necessary for their personal medical use, SB 420 sets a baseline statewide guideline of 6 mature or 12 immature plants. Cities and counties are authorized by this law to enact higher, but not lower, numbers of plants that can be cultivated. A person with more than this number of plants would not only violate the ordinance, but also potentially be in violation of state law for cultivation for the purpose of sale. (California Norml website, "Patients' Guide to Medical Marijuana in California.") It should be remembered that cultivation *for the purpose of sale* continues to be illegal under State law and thus the "large grow" activities that are the subject of media coverage are and continue to be illegal.

- *Setback from property lines.*

  To further buffer neighbors from the odors of growing plants, the ordinance would propose that no marijuana plants could be located within ten (10') feet of any

property line. Staff does not have a high degree of confidence that such a distance limitation would be entirely effective in controlling odors, but it does seem to be a reasonable attempt at doing so.

- *"Plants in the ground" issue.*

  When the City Council last considered a possible cultivation ordinance, one of the objections aired was that it would be unlawful to prohibit cultivation of plants there were already planted. This issue can be addressed by the timing of adoption of the ordinance. "Cannabis is what is known as an annual plant. This means that the cannabis goes through its entire life cycle within a year. Generally speaking, most strains of cannabis complete their life cycle, from seed to death, in 4 – 10 months." (*The Daily Smoker*, Aug. 3, 2015.) Thus if the ordinance is adopted in January or February, it should take effect prior to the regular planting season.

- *Opportunities for private enforcement.*

  The ordinance would be enforced primarily on the objective standards established within it, I.e. the limitation on the number of plants and the requirement for setback from property lines. However, it would recognize that residents may still have odor objections even with the regulations contained in the ordinance. Since an odor nuisance is such a subjective issue and difficult for a city to prosecute, the ordinance would leave open to residents the opportunity to seek civil court/small claims court redress against marijuana cultivators should they feel that odors are a nuisance to their properties.

- *Local permit requirement.*

  Because AB 266 requires the State to honor local permits for cultivation, a permit process would have to be incorporated into our ordinance. This could be a relatively simple application and permit issuance process, wherein the applicant acknowledges that he/she will not exceed the maximum number of plants, and the property line setbacks. A modest application fee could be imposed for the processing of the permit. Additionally, permits could be revoked if the conditions of approval are violated. We would not anticipate that staff would inspect licensees unless complaints are received.

Conclusion

While Oakley retains the legal authority to prohibit cultivation of marijuana, the trend statewide and also in several parts of the United States is toward a more tolerant approach to the practice. Because of the "window" opportunity in AB 266, Oakley should decide whether it wishes to enact its own set of regulations, or to be satisfied with whatever regulations the State may impose. As we noted earlier in this memo, a local ordinance could always be rescinded if it turns out that we are satisfied with the State rules.

The suggested provisions of a possible draft ordinance seek to accommodate and respect the interests of all sides of this issue. If Council wishes to see and consider a draft ordinance (which would require 4 "yes" votes to go into effect prior to March 1), then please provide direction to staff. If Council wishes to take no action and simply follow new State law, that is also a reasonable option.

Attachments

None.