



# TOWN OF FAIRFAX

## STAFF REPORT

### April 5, 2017

**TO:** Mayor and Town Council

**FROM:** Garrett Toy, Town Manager *GT*  
Janet Coleson, Town Attorney  
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**SUBJECT:** Discuss Local Regulatory Options for Non-Medical Marijuana

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CONTINUED from the February and March Council Meetings

#### **RECOMMENDATION**

Provide guidance to staff regarding local regulation of marijuana so that staff may develop proposed revisions to the Town Code to present to the Planning Commission for review and recommendation back to the Town Council.

If the Council desires to regulate or prohibit commercial marijuana activity, including deliveries, the Town should amend its business and/or zoning regulations prior to the date the state begins issuing licenses. We recommend that the Town amend its personal cultivation regulations to ensure they fully comply with Proposition 64 and apply to nonmedical as well as medical marijuana cultivation. The Council might also consider whether it wishes to enact any local taxes on marijuana, which would require compliance with Proposition 218.

#### **BACKGROUND**

On November 8, 2016, voters approved Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA"), which became effective the day after the election. Previously, the State Legislature approved the Medical Marijuana Regulation and Safety Act ("MMRSA"), effective January 1, 2016. These two statutory schemes exist in parallel to regulate commercial marijuana businesses, with MMRSA governing medical marijuana activity and AUMA governing non-medical or recreational marijuana.

While personal cultivation and use of marijuana is now legal, it is still illegal to engage in *commercial* marijuana activity until the state begins licensing medical and non-medical marijuana businesses on or about January 1, 2018. Per the Town Council's request, this report outlines various possible options to regulate marijuana cultivation and commercial marijuana businesses for the Town Council's consideration and policy direction.

#### **DISCUSSION**

The discussion regarding the regulation of marijuana could begin with the following four categories:

- 1) Commercial Marijuana Businesses – includes dispensaries/retailers, cultivators, manufacturers, distributors, transporters and testing laboratories

- 2) Personal Cultivation – Indoor
- 3) Personal Cultivator – Outdoor
- 4) Delivery of Marijuana

**(1) Commercial Marijuana Businesses – includes dispensaries/retailers, cultivators, manufacturers, distributors, transporters and testing laboratories**

MMRSA recognizes twelve state license types in six basic categories: Cultivation, Manufacturer, Testing Laboratory, Dispensary, Distributor, and Transporter. The licensing scheme requires both local approval and a state license to operate legally. MMRSA imposes the burden of providing the state licensing entity with documentation of compliance with local regulations on the applicant. With regard to medical marijuana cultivation, a cultivator cannot even apply for a state cultivation license unless the applicant “has received a license, permit, or other entitlement, specifically permitting cultivation pursuant to these provisions, from” the local jurisdiction.

AUMA recognizes a slightly different range of 19 license types that include Retailer, Distributor, Cultivation, Manufacturing, Testing, and Microbusiness, and does not require an applicant to provide evidence of local approval prior to being issued a state license. Instead, the burden of evaluating local regulatory compliance is on state licensing official who must determine whether approval of the state license would violate local ordinances.

AUMA contains a restriction on any licensee locating within 600 feet of a school, daycare or youth center unless the local agency or the state establishes a different radius. It appears that a local jurisdiction or the State could establish a limitation that is either farther away or closer to a school, but the statute has yet to be interpreted by the courts.

Under both AUMA and MMRSA, local governments can adopt and enforce local ordinances to regulate licensed marijuana businesses, including, but not limited to, local zoning and land use requirements, business license requirements, and may completely prohibit the establishment or operation of one or more types of licensed marijuana businesses. Under both laws, local jurisdictions may also establish standards, requirements and regulations regarding health and safety, testing, security, and worker protections that exceed state standards.

MMRSA recognizes a local government’s authority to rely on permissive zoning to prohibit medical marijuana land uses. Conversely, AUMA contemplates that local governments will adopt regulations expressly prohibiting or regulating marijuana businesses, or treat it as an agricultural product.

At present, the Fairfax Town Code only regulates medical marijuana dispensaries. Fairfax Municipal Code, Chapter 17.110, allows up to three medical marijuana dispensaries to operate in the Town in certain commercial zones with a two-year dispensary permit. Dispensaries cannot be located within 600 feet of a school, within a residentially-zoned parcel, or directly abutting a residentially-zoned property. Chapter 17.110 also imposes a series of operating requirements on medical marijuana dispensaries.

**Options:**

- (a) Do nothing. Commercial marijuana activities may locate within Fairfax in accordance with the rules that apply to the most closely analogous land use category. However, the Council expressed desire at its December 12<sup>th</sup> meeting to regulate these activities.
- (b) Prohibit all commercial marijuana businesses/activities (medical and non-medical), with the exception of medical marijuana dispensaries. This would keep the current medical dispensary regulation as is.
- (c) Prohibit all commercial marijuana businesses/activities, except medical dispensaries and non-medical retailers. Revise the medical marijuana dispensary regulations to accommodate non-medical marijuana retailers.
- (d) Allow one or more categories of commercial marijuana businesses (medical and/or non-medical) subject to local regulations, if desired depending on policy concerns. Local regulations could include zoning regulations as well as health and safety /business regulations. If the Council is interested in allowing one or more categories of commercial marijuana businesses, we will provide more detailed information about the complex state licensing requirements and limitations for a further Council discussion.

The Council may want to provide guidance on specific restrictions such as distances from certain type of uses (e.g., 600 ft.) or add to the list of uses the distance restriction applies (e.g., parks). For illustrative purposes, attached is a map was showing the commercial locations outside of a 600 foot radius of a school, daycare, or youth center. The Council may want to consider modifying the medical marijuana standards to apply to non-medical marijuana which would impose a three (3) dispensary limit. The benefit to such an approach is that the standards have already been developed and established.

**(2) Personal Cultivation – Indoor**

MMRSA recognizes that local governments can ban all marijuana cultivation — even cultivation of small amounts by qualified patients. AUMA limits local government general police power by making it lawful under state and local law to cultivate up to six marijuana plants. Under AUMA, local governments can reasonably regulate, but cannot ban, personal indoor cultivation of up to six marijuana plants within a person’s private residence. This includes cultivation in a greenhouse on the same property as the residence as long as it is fully enclosed, secure and not visible by normal unaided vision from a public place.

The Town Code currently allows medical marijuana cultivation only. Fairfax Municipal Code, Section 17.138.330, provides for outdoor cultivation of up to 18 marijuana plants and totally prohibits indoor cultivation unless an administrative exception is granted for up to six (6) plants. Additionally, there are standards for both indoor and outdoor cultivation set forth in Section

17.138.340.

**Options:**

- (a) Allow up to 6 plants of non-medical marijuana cultivated indoors (required by AUMA).
- (b) Allow up to 6 plants of medical marijuana cultivated indoors. Currently, indoor cultivation is prohibited with an exception for up to 6 plants. This revision is recommended to provide for fairness among medical and non-medical users.
- (c) Revise cultivation standards to apply to accommodate medical and non-medical cultivation.

**(3) Personal Cultivation - Outdoor**

AUMA provides that local governments may ban outdoor cultivation of marijuana unless the California Attorney General determines that marijuana is no longer illegal under federal law (if marijuana is federally legalized, outdoor cultivation could be regulated, but not prohibited). As previously mentioned, local governments can ban all marijuana cultivation under the MMRSA. Fairfax currently allows outdoor cultivation of up to 18 mature marijuana plants for medical purposes. Because AUMA allows outdoor cultivation bans, the Town's outdoor cultivation regulations would continue to be valid.

**Options:**

- (a) Keep rules the same so that qualified patients and primary caregivers could continue to grow up to 18 plants outdoors, while other citizens would be prohibited from outdoor cultivation.
- (b) Add rule allowing up to 6 plants of non-medical marijuana to be cultivated outdoors, subject to the same cultivation standards in Section 17.138.340 (to the extent they apply).

**(4) Delivery of Marijuana**

Under both AUMA and MMRSA, local governments may prohibit or regulate marijuana deliveries to customers from originating or terminating within their jurisdiction. Under both laws, local governments cannot ban deliveries from using the roads to reach a delivery location outside the jurisdiction (i.e. simply passing through Town). Under MMRSA, medical marijuana deliveries can only be made from a state-licensed dispensary in a city or county that does not explicitly prohibit them by local ordinance.

At its March 2016 meeting, the Town Council expressed interest in developing local standards for medical marijuana delivery in addition to whatever standards are developed by the State agencies. The Council referred the matter to the Planning Commission for consideration since the PC previously adopted delivery standards for the former medical marijuana dispensary in Town.

Per Council direction, the Planning Commission (PC) discussed delivery standards for medical marijuana in April 2016. At that meeting, staff presented the results of the on-line community forum regarding medical marijuana delivery. Over 70% (32 of 44) of the respondents to the forum supported the Town Council's desire to regulate delivery. The PC directed staff to research industry best practices and report back. Staff is still working to develop standards for delivery.

We are operating under the assumption that the Council would also like to develop delivery standards for non-medical marijuana and that the PC would develop the standards for Council consideration. We would also anticipate that the proposed delivery standards will be the same for both medical and non-medical marijuana. However, if that is not the case, then the Council should provide direction on the following options.

**Options:**

- (a) Remain silent. The default is that deliveries will be permitted.
- (b) Expressly prohibit deliveries.
- (c) Expressly allow deliveries. Expressly allow deliveries with some type of regulation. The regulatory options will depend on the concerns of the Town Council, given the state regulatory structure. For example, AUMA does not expressly require that delivery persons carry or maintain any records. We would return to the Council with a policy discussion on the specific aspects of delivery similar to the discussion the Council had for the delivery of medical marijuana.

**Community Outreach**

The Council may want to consider additional community input on the above issues before providing direction to staff. Similar to the community on-line forums done for medical marijuana cultivation and delivery, staff could conduct similar surveys for non-medical marijuana. In addition, the Council may want to schedule Town forums or study sessions to consider community input. One option for the Council to consider is to enact a moratorium on non-medical marijuana commercial activities while it solicits community input on the matter. This would also alleviate the concern that the Town should have in place its local regulations prior to the state issuing commercial licenses.

**FISCAL IMPACT**

The taxes generated by marijuana businesses would be additional revenue for the Town. The amount of revenue is uncertain and would depend on the number, size and success of the marijuana establishments.

**ATTACHMENT**

600 ft. radius map



