



TOWN OF FAIRFAX

STAFF REPORT

January 13, 2016

TO: Mayor and Town Council

FROM: Garrett Toy, Town Manager *GT*
Jim Moore, Planning and Building Services Director

SUBJECT: Introduction and first reading by title only of an Ordinance Adding a New Article III ('Medical Marijuana Cultivation') to Town Code Chapter 17.138 ('Regulations Applying in Multiple Districts') of Title 17 ('Zoning') of the Fairfax Town Code, to ban marijuana cultivation with exemptions for personal cultivation for qualified patients and primary caregivers

RECOMMENDATION

1. Open/close public hearing
2. Introduce and waive first reading and read by title only an Ordinance of the Town Council of the Town of Fairfax Adding a New Article III ('Medical Marijuana Cultivation') to Town Code Chapter 17.138 ('Regulations Applying in Multiple Districts') of Title 17 ('Zoning') of the Fairfax Town Code.

BACKGROUND

In November 2015, the Council discussed the impacts of three new bills – AB 243, AB 266, and SB 643 – on local municipalities. With regard to AB 243, which requires the State to develop a Medical Cannabis Cultivation Program, staff reported that AB 243 sets a deadline of March 1 for a town to adopt regulations regarding the cultivation of medical marijuana or the State will become the sole licensing authority. The Council indicated it would like to maintain local control and agreed that the Town should take a two-pronged approach for adopting an ordinance. Specifically, staff would undertake the regular process for approving an ordinance under the Town's land use authority, meaning the Planning Commission would review the ordinance in December and the ordinance would be introduced for Council consideration at its January 2016 meeting. However, if the State does not amend its March 1st deadline, the Town may need to adopt an urgency ordinance in addition to the adoption of the regular ordinance at its February meeting.

Please note that the State has proposed "urgency" legislation (AB 21) that would delete the March 1st deadline for local actions. If approved by the State prior to the Council's February meeting to consider an urgency ordinance and the second reading of this ordinance, assuming the introduction and first reading, there would be no pressing deadline for a local ordinance. The Council would have the option of "slowing down" and could refer the matter back to the Planning Commission with additional direction.

At its December meeting, the Council further discussed medical marijuana cultivation for the express purpose of providing further guidance to the Planning Commission and staff regarding the key policy provisions of such an ordinance.

Based on the Council's discussions, staff prepared an ordinance with the following key provisions:

Cultivation of Marijuana

- Bans commercial cultivation
- Generally bans outdoor cultivation with exceptions to allow qualified patients and primary caregivers to cultivate medical marijuana outdoors up to a limit of 18 plants per residential parcel for outdoor cultivation
- Bans indoor cultivation with limited exceptions to allow qualified patients and primary caregivers to cultivate medical marijuana indoors subject to a three (3) plant limitation (note that this exception is only available on a showing that a standard otherwise required by this new ordinance cannot be met)
- Indoor cultivation must be within dwelling units, which does not include garages or accessory structures
- Contains a public nuisance provision

Standards for Cultivation

- Outdoor plants can only be located in rear or side yards and must be a minimum of 5 ft. from property lines
- Limits the area of cultivation to a maximum square footage limit of 100 and 500 square feet for cultivation for qualified patients and primary caregivers, respectively
- Plants cannot be visible from public right of way (e.g., streets, sidewalks)
- Seven (7) foot plant height limit
- Any lot or site on which marijuana plants are cultivated shall have fencing five (5) to six (6) feet in height
- No generators allowed for power
- Limitation on screening material
- Cultivation only allowed on residentially zoned lots with dwelling units (i.e., no vacant lots)
- Sets a limit of 3 plants for indoor cultivation if exception is granted by staff
- Staff decisions regarding exceptions can be appealed to the Planning Commission

DISCUSSION

The Planning Commission (PC) considered the proposed Ordinance at its December 17th meeting. The PC undertook its discussion with the knowledge that the intent of the ordinance is to retain local control by getting something on the books that indicates the Town is regulating cultivation in some fashion, even if it is a ban. We also indicated the Town can always modify the regulations later when there is more time to discuss policy issues and any unforeseen impacts.

The PC did not recommend any revisions to the Ordinance (other than typos) and recommended approval as proposed because of the accelerated approach and the need to introduce the Ordinance at the January Council meeting. However, the PC did add "whereas" clauses to its resolution recommending adoption of the Ordinance. These clauses reflect the Planning Commission's suggestions to the Council without actually modifying the Ordinance.

Specifically, the PC would have preferred the ordinance be structured to allow medical marijuana cultivation with limitations as opposed to a ban with exceptions to allow cultivation. While the PC acknowledged that a "ban" is a more comprehensive approach for ensuring the Town maintains local control, they believed the alternative structure better reflects Fairfax's philosophy to support the use of medical marijuana.

The PC also recommended that the Council consider allowing indoor cultivation with the number of plants allowed higher than the proposed three (3) plant limit and allowing more plants for caregivers given that State Law sets a higher maximum square footage planting area for caregivers. The PC did not reach consensus on some other issues discussed, such as adding a minimum distance requirement for cultivations located near schools and playgrounds. To provide the Council with more information on the PC's discussion, attached is the staff report from the PC meeting.

It should be noted that the plant cultivation limitations are also subject to State law, which sets the area of cultivation to a maximum square footage limit of 100 and 500 square feet for qualified patients and primary caregivers, respectively. This provision was added to ensure the Ordinance's consistency with State Law. The Council has the option to create more restrictive maximum square footage areas of cultivation.

CEQA REVIEW

This adoption of this Ordinance is exempt from the California Environmental Quality Act per 14 C.C.R. § 15061(b)(3), as CEQA applies only to projects which have the potential for causing a significant effect on the environment. Here, the adoption of an ordinance regulating the cultivation of medical marijuana has no potential to cause a significant effect on the environment and is thus not subject to CEQA. Further, even if the ordinance was subject to CEQA, it would be exempt per 14 C.C.R. §§ 15307 and 15308, as it is an action taken by a regulatory agency for the protection of natural resources and the environment.

FISCAL IMPACT

None at this time.

ATTACHMENTS

1. Resolution
2. Ordinance
3. PC staff report

RESOLUTION NO. 15-40

A RESOLUTION OF THE PLANNING COMMISSION OF THE TOWN OF FAIRFAX
RECOMMENDING THE TOWN COUNCIL ADOPT ORDINANCE NO. _____ FAIRFAX ADDING
A NEW ARTICLE III ('MEDICAL MARIJUANA CULTIVATION') TO CHAPTER 17.138
('REGULATIONS APPLYING IN MULTIPLE DISTRICTS') OF TITLE 17 ('ZONING') OF THE
FAIRFAX TOWN CODE

WHEREAS, on October 9, 2015, Governor Edmund "Jerry" Brown signed into law three new bills that collectively enact the Medical Marijuana Regulation and Safety Act (the "Act") and fundamentally change the manner in which the cultivation, possession, use, and sale of marijuana is regulated by the State of California;

WHEREAS, the nothing in the Act precludes towns and cities from regulating the use of land within their respective municipal boundaries, and, in fact, the Act specifically provides that local governments wishing to maintain control over the cultivation of medical marijuana must enact local ordinances to that effect by March 2, 2016; and

WHEREAS, the Town Council of the Town of Fairfax has expressed its desire to maintain such local control, and has directed staff to prepare an ordinance regulating such land use for consideration by this body and by the Council; and

WHEREAS, staff has prepared such an ordinance, a true and correct copy of which is attached hereto as **Attachment 1** (the "proposed Ordinance"), which, if adopted, will amend the Town's zoning ordinance, found at Title 17 of the Town Code; and

WHEREAS, in accordance with the State Planning and Zoning Law, the Planning Commission is tasked with considering whether any proposed amendment to the Town's zoning ordinance would be in conformance with the terms of the Town's general plan, and the Planning Commission has determined that the proposed Ordinance would, in fact, conform to the Town's General Plan on the basis of the following:

- The proposed Ordinance incorporates development standards that are meant to protect against accidental fire that could be associated with certain cultivation tools or practices. These standards implement Fairfax General Plan Safety Element Objective S-3.1.1., which looks to "protect people and property from risks associated with urban and wildland fire;" and
- The proposed Ordinance prohibits large-scale commercial cultivation and only allows cultivation on residential properties already developed with a dwelling unit. These requirements implement Fairfax General Plan Land Use Element Goal LU-1, which seeks to "preserve scenic and natural resources" by prohibiting the conversion of undeveloped parcels into commercial cultivation sites; and
- The proposed Ordinance places limitations on the number of mature plants that can be grown at a given residence, thus protecting the residential nature of the Town's neighborhoods, and helping to realize Fairfax General Plan Land Use Element Goal LU-7, which is to "preserve community and neighborhood character."

WHEREAS, the adoption of the proposed ordinance is exempt from the California Environmental Quality Act (codified at California Public Resources Code §§ 21000, *et seq.*, and 14 California Code of Regulations §§ 15000, *et seq.*, collectively, "CEQA") because it is covered by the general rule set forth in 14 C.C.R. § 15061(b)(3) that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Here, the adoption of an ordinance regulating the cultivation of medical marijuana has no potential to cause a significant effect on the environment and is thus not subject to CEQA. In addition, even if the ordinance was subject to CEQA, it would be categorically exempt from further review per 14 C.C.R. §§ 15307 and 15308, as it is an action taken by a regulatory agency for the protection of natural resources and the environment.

WHEREAS, the Planning Commission has conducted a duly-noticed public hearing to consider the draft ordinance, hear the presentation of a staff report, and receive public comment on the matter.

WHEREAS, the Planning Commission supports the concept of medical marijuana cultivation; and

WHEREAS, the Planning Commission would prefer the Ordinance be structured to allow cultivation with restrictions, as opposed to a ban with exceptions, to reflect the Fairfax philosophy of supporting the use of medical marijuana; and

WHEREAS, the Planning Commission supports indoor cultivation as long as the safety parameters contained in the ordinance are complied with and recommends the Town Council revise the ordinance accordingly to allow indoor cultivation, with limitations, in appropriate structures, including accessory structures; and

WHEREAS, the Planning Commission recommends that the Town Council consider increasing the number of plants allowed for qualified patients and caregivers based on the number allowed under state law, with specific consideration given to primary caregivers to have a larger number of plants.

WHEREAS, the Planning Commission acknowledges the need to have an ordinance in place by March 1, 2016 in order for the Town to maintain local control over medical marijuana cultivation.

NOW, THEREFORE, BE IT RESOLVED by the Planning Commission of the Town of Fairfax as follows:

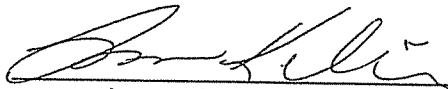
SECTION 1. The recitals set forth above are adopted as further findings of the Planning Commission.

SECTION 2. The Planning Commission has reviewed the draft ordinance attached hereto as **Attachment 1** and finds that it is consistent with the Town General Plan, as set forth above.

SECTION 3. The Planning Commission hereby recommends that the Town Council adopt the Ordinance, **Attachment B hereto**, after considering and possibly making amendments incorporating the recommendations listed above, in order to amend Title 17 of the Fairfax Town Code to adopt regulations for the cultivation of medical marijuana in Fairfax.

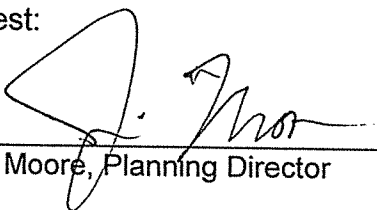
The forgoing Resolution was duly passed and adopted at a regular meeting of the Planning Commission of the Town of Fairfax held in said Town on the 17th day of December 2015 by the following vote, to wit:

AYES: Ackerman, Fragoso, Kehrlein, Newton, Chair Green
NOES: None
ABSENT: Hamilton, Parber-Gonzalez
ABSTAIN: None.



Laura Kehrlein, Vice Chair

Attest:



Jim Moore, Planning Director

ORDINANCE NO. _____

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX ADDING A NEW ARTICLE III ('MEDICAL MARIJUANA CULTIVATION') TO CHAPTER 17.138 ('REGULATIONS APPLYING IN MULTIPLE DISTRICTS') OF TITLE 17 ('ZONING') OF THE FAIRFAX TOWN CODE

WHEREAS, in 1996, California voters enacted "The Compassionate Use Act" through passage of Proposition 215 (codified at Health & Safety Code § 11362.5, *et seq.*) to allow eligible patients to cultivate, possess, and use medical marijuana without fear of prosecution under enumerated state laws; and

WHEREAS, seven years later, in 2003, the California Legislature adopted and the Governor signed into law "The Medical Marijuana Program" through Senate Bill 420 (codified at Health & Safety Code § 11362.7, *et seq.*), which established a system of collectives and cooperates for the purposes of cultivating medical marijuana for consumption by eligible patients; and

WHEREAS, neither the Compassionate Use Act nor the Medical Marijuana Program limit the police power of the Town of Fairfax to regulate the use of land within the Town's municipal boundaries; and

WHEREAS, in June 2011, the Town Council of the Town of Fairfax adopted Ordinance No. 759 ("Medical Marijuana Dispensaries," codified at Fairfax Town Code Chapter 5.52) to regulate the review process and development standards applicable to the operation of medical marijuana dispensaries in Town, but was silent on the cultivation of medical marijuana;

WHEREAS, in October 2015, Governor Edmund Brown signed into law a trio of legislation, Assembly Bill 266 (Bonta, Cooley, Jones-Sawyer, Lackey, Wood), Assembly Bill 243 (Wood) and Senate Bill 643 (McGuire), that establish a new state regulatory framework regarding medical marijuana ("The Medical Marijuana Regulation and Safety Act"); and

WHEREAS, among other provisions, the Medical Marijuana Regulation and Safety Act establishes a system whereby individuals wishing to conduct commercial cannabis activity, which includes the cultivation of medical marijuana, must seek a license to permit such activity. These licenses will be issued by the State, as well as cities, provided cities elect to permit such cultivation within their municipal boundaries and establish their own licensing system through the adoption of a local ordinance to that effect. Cities retain their police power to prohibit or otherwise limit the cultivation of medical marijuana within their borders; and

WHEREAS, pursuant to new Section 11362.777(c)(4) of Health & Safety Code (which will become effective January 1, 2016):

"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 division shall be the sole licensing

authority for medical marijuana cultivation applicants in that city, county, or city and county;” and

WHEREAS, new Section 11362.777(g) of the Health & Safety Code also provides that:

“[S]ection [11362.777] does not apply to a qualified patient cultivating marijuana pursuant to Section 11362.5 if the area he or she uses to cultivate marijuana does not exceed 100 square feet and he or she cultivates marijuana for his or her personal medical use and does not sell, distribute, donate, or provide marijuana to any other person or entity. This section does not apply to a primary caregiver cultivating marijuana pursuant to Section 11362.5 if the area he or she uses to cultivate marijuana does not exceed 500 square feet and he or she cultivates marijuana exclusively for the personal medical use of no more than five specified qualified patients for whom he or she is the primary caregiver within the meaning of Section 11362.7 and does not receive remuneration for these activities, except for compensation provided in full compliance with subdivision (c) of Section 11362.765. For purposes of this section, the area used to cultivate marijuana shall be measured by the aggregate area of vegetative growth of live marijuana plants on the premises. Exemption from the requirements of this section does not limit or prevent a city, county, or city and county from regulating or banning the cultivation, storage, manufacture, transport, provision, or other activity by the exempt person, or impair the enforcement of that regulation or ban;” and

WHEREAS, the Town Council of the Town of Fairfax desires to ban all cultivation of medical marijuana within the Town’s boundaries, except for very limited personal cultivation that falls within subdivision (g) of Health & Safety Code § 11362.777; and

WHEREAS, the Town Council of the Town of Fairfax adopts this Ordinance in order to effect land use regulations regulating the cultivation of marijuana, as contemplated by subdivision (c)(4) of Health & Safety Code § 11362.777.

NOW, THEREFORE, the Town Council of the Town of Fairfax does ordain as follows:

SECTION 1. The Town Council hereby finds that all of the foregoing recitals are true and correct and are hereby incorporated and adopted as findings of the Town Council as if fully set forth herein.

SECTION 2. Title 17 (Zoning’), Chapter 17.138 (‘Regulations Applying in Multiple Districts’) shall be amended to add the following:

“ARTICLE III: MEDICAL MARIJUANA CULTIVATION

17.138.310 PURPOSE.

It is the purpose of this Article to regulate the cultivation of marijuana within the Town of Fairfax; to require that the indoor cultivation of marijuana occur only in appropriately secured, enclosed, and ventilated structures so as not to be visible to the general public; to provide for the health, safety and welfare of the public; to prevent odor created by marijuana plants from impacting adjacent properties; and to ensure that marijuana grown for medical purposes remains secure and does not find its way to nonpatients or illicit markets. Nothing in this Article is intended to impair any defenses available to qualified patients or primary caregivers under the applicable state law or

require such patients to receive a local license to cultivate. Nothing in this Article is intended to authorize the cultivation, possession, or use of marijuana in violation of state or federal law.

17.138.320 DEFINITIONS

As used in this Article, the following definitions shall apply:

AREA USED TO CULTIVATE MARIJUANA. The aggregate area of vegetative growth of live marijuana plants on the premises, pursuant to Health & Safety Code 11362.777(g).

CULTIVATION. The planting, growing, harvesting, drying, or processing of marijuana plants or any part thereof.

FULLY ENCLOSED AND SECURE STRUCTURE. A space within a dwelling unit that complies with the California Building Code, as adopted in the Town (“CBC”); or, if exempt from the permit requirements of the CBC, an accessory structure, on a lot or site containing a dwelling unit, having a complete roof and enclosure supported by connecting walls extending from the ground to the roof, a foundation, slab or equivalent base to which the floor is secured by bolts or similar attachments, is secure against unauthorized entry, and is accessible only through one or more lockable doors. In order to qualify as a fully enclosed and secure structure, the walls and roofs must be constructed of solid materials that cannot be easily broken through, such as two-inch by four-inch or thicker studs overlaid with three-eighths inch or thicker plywood or the equivalent. Plastic sheeting, regardless of gauge, or similar products, are not considered solid materials.

INDOORS. Within a fully enclosed and secure structure.

OUTDOOR. Any location exposed to the open air not within an enclosed structure or building.

PRIMARY CAREGIVER. A “primary caregiver” as defined in Health and Safety Code Section 11362.7, as amended.

QUALIFIED PATIENT. A “qualified patient” or a “person with an identification card” as defined in Health and Safety Code Section 11362.7, as amended.

TOWN. The Town of Fairfax.

17.138.330 CULTIVATION OF MARIJUANA.

(A) Outdoor Cultivation. Except as may otherwise be provided by this Ordinance, it is hereby declared to be unlawful and a public nuisance for any person owning, leasing, occupying, or having charge or possession of any lot or site within any zoning district in the Town to cause or allow such lot or site to be used for the outdoor cultivation of more than eighteen (18) mature marijuana plants.

(B) Indoor Cultivation. Except as may otherwise be provided by this Ordinance, it is hereby declared to be unlawful and a public nuisance for any person owning, leasing, occupying, or having charge or possession of any dwelling unit within any zoning district in the Town to cause or allow for the indoor cultivation of marijuana plants. When authorized by this Ordinance, indoor cultivation may only occur within a fully enclosed and secure structure. Attached and detached garages,

designed and intended primarily for the use of vehicle parking, as well as accessory structures, are not considered dwelling units and may not be used for the cultivation of marijuana.

(C) Only qualified patients or primary caregivers shall be permitted to cultivate marijuana under this Article.

(D) "Commercial cannabis activity," as defined by Business & Professions Code § 19300.5(k), is prohibited within the Town of Fairfax, as is any marijuana cultivation that would require a license or permit from the State of California per the Medical Marijuana Regulation and Safety Act of 2015.

17.138.340 STANDARDS FOR CULTIVATION OF MARIJUANA.

(A) Outdoor marijuana plants shall be located a minimum of five feet from property lines.

(B) Outdoor marijuana plants shall be located only in the rear and side yards of a lot or site, and are not permitted to be located in front yards of any lot or site.

(C) Outdoor marijuana plants shall be screened from public view as follows:

(1) No marijuana plants cultivated under this Article shall be visible from a public right-of-way.

(2) No marijuana plants cultivated under this Article shall exceed seven feet in height.

(3) Any lot or site upon which marijuana plants are cultivated under this Article shall have fencing of no more than six feet in height surrounding the lot or site or that portion of the lot or site upon which the plants are cultivated. In no event shall netting or plastic screening be used in conjunction with marijuana cultivation.

(D) Indoor grow lights shall not exceed 1,200 watts and comply with the California Building, Electrical, Plumbing and Fire Codes as adopted by the Town. Gas products (CO₂, butane, propane, natural gas, kerosene, etc.) or generators may not be used indoors or outdoors.

(E) All electrical equipment used in the cultivation or processing of medical marijuana (e.g. lighting and ventilation) shall be plugged directly into a wall outlet or otherwise hardwired; the use of extension cords to supply power to electrical equipment used in the cultivation or processing of medical marijuana is prohibited.

(F) A qualified patient cultivating marijuana pursuant to this Article shall limit the area of cultivation of any premises used to 100 square feet or less; shall cultivate only for his or her personal medical use; and shall not sell, distribute, donate, or provide marijuana to any other person or entity, per Health & Safety Code § 11362.777(g).

(G) A primary caregiver cultivating medical marijuana pursuant to this Article shall limit the area of cultivation of any premises used to 500 square feet or less; cultivate medical marijuana exclusively for the personal medical use of no more than five specified qualified patients for whom he or she is the primary caregiver (within the meaning of Health & Safety Code 11362.7), and shall not receive remuneration for such cultivation, except for compensation provided in full compliance with Health & Safety Code § 11362.765(c), per Health & Safety Code § 11362.777(g).

(H) Medical marijuana cultivation by a qualified patient or primary caregiver shall only occur on a parcel within a zoning district that permits residential uses and upon which an occupied dwelling exists. Either the qualified patient or primary caregiver shall reside in the residence where any medical marijuana cultivation occurs.

(I) Except as may otherwise be authorized in Section 17.138.350 below, an individual qualified patient shall only be allowed to cultivate medical marijuana at his or her private residence, and a primary caregiver shall cultivate medical marijuana only at the residence of a qualified patient for whom he or she is the primary caregiver, or at the primary caregiver's residence.

(1) If cultivation or processing is to be conducted by a primary caregiver, documentation of the legally-required relationship shall be maintained at the cultivation premises.

(2) A copy of documentation of qualified patient status must be maintained at any location at which medical marijuana cultivation occurs.

(J) Any residence at which medical marijuana is cultivated under this Article shall maintain kitchen, bathrooms, and primary bedrooms for their intended use and not be used primarily for medical marijuana cultivation.

(K) All medical marijuana cultivation areas shall be in compliance with the current, adopted edition of the California Building Code as regards Mechanical Ventilation;

(L) No medical marijuana cultivation area shall be maintained or operated in such a way as to:

(1) adversely affect the health or safety of the nearby residents in any manner, including but not limited to by creating dust, glare, heat, noise, noxious gasses, odor, smoke, traffic, vibration, or other impacts, or be hazardous due to use or storage of materials, processes, products or wastes; or

(2) adversely affect the health or safety of the occupants of the residence or users of the accessory building in which it is cultivated, or occupants or users of nearby properties in any manner, including but not limited to creation of mold or mildew.

17.138.350 EXCEPTIONS.

(A) Any qualified patient or primary caregiver may seek a Medical Marijuana Administrative Exception to any provision of this Article, except for sections 17.138.340(F) or (G), from which no exceptions shall be granted.

(B) Any request for an exception to this Article shall be submitted to the Town Manager, along with documentation, such as a physician's recommendation, information regarding space limitations, or verification of more than one qualified patient living in the residence, demonstrating why a standard required by this Article is not feasible.

(C) The Town Manager who may grant a Medical Marijuana Administrative Exception only if the following findings can be made:

- (1) The requested exception is not to section 17.138.340(F) or (G);
- (2) The individual requesting the exception can demonstrate a medical need for the exception, as evidenced by the written recommendation of a treating physician;
- (3) The requested exception shall not constitute a public nuisance, as set forth in 17.138.360.
- (4) At a minimum, any interior medical marijuana cultivation area shall be constructed with a 1-hour firewall assembly if required by the Building Official.
- (5) For indoor cultivation, the Building Official may require additional specific standards to meet the California Building Code and Fire Code, including but not limited to installation of fire suppression sprinklers and code-compliant electrical systems.
- (6) The indoor cultivation of no more than three (3) mature marijuana plants shall be authorized through a Medical Marijuana Administrative Exception.

(C) The Town Manager, or his or her designee, shall prepare a written approval or denial of any request for an exception within ten business days of its submission to the Town. Approval of the requested exception may be made subject to conditions designed to lessen the impact of the exception on neighboring uses and the community generally.

(D) Any exception granted under this section shall be personal to the party to whom such exception was granted and shall not run with the land or otherwise be transferable.

(E) Notwithstanding any other provision of the Town Code, any person aggrieved by the decision of the Town Manager, or his or her designee, with respect to an exception requested under this Section 17.138.350 may appeal said decision within ten days of the date of the decision to the Planning Commission. Upon review, the Planning Commission shall issue the requested exception if it meets the requirements of Subsections (A) and (B) above, and subject to any conditions imposed per Subsection (C) above.

17.138.360 PUBLIC NUISANCE PROHIBITED.

It is hereby declared to be unlawful and a public nuisance for any person owning, leasing, occupying, or having charge or possession of any lot, site, dwelling unit, and/or fully enclosed and secure structure within the Town to create a public nuisance in the course of cultivating marijuana plants or any part thereof in any location, indoor or outdoor. A public nuisance may be deemed to exist, if such activity produces: (a) odors which are disturbing to people of normal sensitivity residing or present on adjacent or nearby property or areas open to the public, (b) repeated responses to the parcel from law enforcement officers, (c) repeated disruption to the free passage of persons or vehicles in the neighborhood, (d) excessive noise which is disturbing to people of normal sensitivity on adjacent or nearby property or areas open to the public, or (e) any other impacts on the neighborhood which are disruptive of normal activity in the area.

17.138.370 ENFORCEMENT.

(A) Public Nuisance. The violation of this section is hereby declared to be a public nuisance and may be enforced pursuant to the provisions of Chapter 1.12 of the Fairfax Town Code.

(B) Seizure and Destruction of Marijuana. Except as otherwise expressly stated in this section, all marijuana seized by the Town police in the enforcement of this article shall be seized, retained and destroyed in the same manner and subject to the same procedures as are provided in California Health and Safety Code Sections 11472 through 11479, for marijuana possessed in violation of Division 10 of the Health and Safety Code.

(C) Right of Entry. The code enforcement officer, building official, planning director, chief of police, fire inspector, or a designee is authorized to enter upon and inspect private properties to ensure compliance with the provisions of this section. Reasonable advance notice of any such entry and inspection shall be provided and, before entry, consent shall be obtained in writing from the owner or other person in lawful possession of the property. If consent cannot for any reason be obtained, an inspection warrant shall be obtained from a court of law prior to any such entry and inspection. In those cases where consent is denied, the Town may seek to recover the costs it incurs in obtaining a warrant from the property owner and/or person in lawful possession of the property.

(D) Abatement. The Town attorney, in the name of and on behalf of the Town and/or the people of the Town, may bring a civil action in a court of competent jurisdiction to enforce any provision of this section, or to restrain or abate any violation of the provisions of this section as a public nuisance pursuant to the procedures set forth in Chapter 1.12 of the Fairfax Town Code.

(E) Violation. Cultivation of marijuana that does not comply with this section constitutes a violation of the zoning ordinance and is subject to the penalties and enforcement as provided in Chapter 17.004 of the Fairfax Town Code.

(F) Penalties Not Exclusive. The remedies and penalties provided herein are cumulative, alternative and nonexclusive. The use of one does not prevent the use of any others and none of these penalties and remedies prevent the Town from using any other remedy at law or in equity which may be available to enforce this section or to abate a public nuisance.

17.138.380 LIABILITY.

The provisions of this Article shall not be construed to protect the property owner(s) of record for property associated with the cultivation of marijuana, or their lessees, tenants or participants in the cultivation of marijuana, from prosecution pursuant to any laws that prohibit the cultivation, sale and/or possession of marijuana. In particular, the possession or cultivation of marijuana remains illegal under any circumstances pursuant to the laws of the United States, and this section is not intended to protect the above-described persons from arrest or prosecution pursuant to the laws of the United States. The property owner(s) of record for property associated with the cultivation of marijuana, or their lessees, tenants and other participants in the cultivation of marijuana, assumes any and all risk and all liability that may arise or result under state and federal criminal laws from the cultivation of marijuana.”

SECTION 3. The adoption of the ordinance is exempt from the California Environmental Quality Act (codified at California Public Resources Code §§ 21000, *et seq.*, and 14 California Code of Regulations §§ 15000, *et seq.*, collectively, “CEQA”) because it is covered by the general rule set forth in 14 C.C.R. § 15061(b)(3) that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Here, the adoption of an ordinance regulating the cultivation of medical marijuana has no potential to cause a significant effect on the environment and is thus not subject to CEQA. In addition, even if the ordinance was subject to CEQA, it would be categorically exempt from

further review per 14 C.C.R. §§ 15307 and 15308, as it is an action taken by a regulatory agency for the protection of natural resources and the environment.

SECTION 4. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance, or the application thereof to any person or place, is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remainder of this Ordinance. The Town Council hereby declares that it would have adopted this Ordinance, and each and every 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, provided, however, that if any decision of a court of competent jurisdiction invalidates the increase of the water service charges set forth in this Ordinance, then the water service charges in effect on the date of adoption shall continue in existence.

SECTION 5. This Ordinance shall be effective 30 days following its adoption by the Town Council. Copies of this Ordinance shall be posted within fifteen days after its passage and adoption in three public places in the Town of Fairfax, to wit: 1. Bulletin Board, Town Hall Offices; 2. Bulletin Board, Fairfax Post Office; and 3. Bulletin Board, Fairfax Women’s Club Building, located at 46 Park.

The foregoing Ordinance was introduced at a meeting of the Town Council on the 13th day of January 2016, and duly adopted at the next regular meeting of the Town Council on the ___ day of _____ 2016, by the following vote, to wit:

- AYES:
- NOES:
- ABSENT:
- ABSTAIN:

Renee Goddard, Mayor

Attest:

Michele Gardner, Town Clerk _____
Date

**TOWN OF FAIRFAX
STAFF REPORT
Department of Planning and Building Services**

TO: Fairfax Planning Commission

DATE: December 17, 2015

FROM: Jim Moore, Director of Planning & Building Services
Garrett Toy, Town Manager

SUBJECT: Consideration of an Ordinance of the Town of Fairfax Adding A New Article III ('Medical Marijuana Cultivation') to Chapter 17.138 ('Regulations Applying In Multiple Districts') of Title 17 ('Zoning') of the Fairfax Town Code

BACKGROUND

On October 9, 2015, Governor Jerry Brown signed into law three new bills – AB 243, AB 266, and SB 643. This trio fundamentally changes the way in which medical marijuana will be regulated within the State of California. It also has consequences for cities and towns as they exercise their police powers and land use authority within their borders. As the bills were the result of midnight negotiations held prior to the end of the legislative term, attorneys across the state are now working to analyze how these bills will interact with local laws.

At a noticed public meeting held on November 4th, the Council discussed the impacts of the three new bills on the Town. The discussion focused primarily on AB 243, which requires the State to develop a Medical Cannabis Cultivation Program, because AB 243 sets a deadline of March 1, 2016, for a town to adopt regulations regarding the cultivation of medical marijuana or the State will become the sole licensing authority for most cultivation activities. The Council indicated it would like to maintain local control of cultivation issues and agreed that the Town should take a two-pronged approach for adopting an ordinance. Specifically, staff would undertake the regular process for approving a zoning ordinance under the Town's land use authority, meaning the Planning Commission would review the ordinance in December in order to make a recommendation to Council and the ordinance would be introduced for Council consideration at its January 2016 meeting. However, if the State does not amend its March 1st deadline, the Town may need to adopt an urgency ordinance in addition to the adoption of the regular ordinance at its February meeting in order to ensure that the Town has adopted regulations pertaining to cultivation by the March 1st deadline.

At its noticed public meeting on December 2nd, Council continued its discussion of policy parameters for a local ordinance governing medical marijuana cultivation. The express purpose of the discussion was to provide the Planning Commission with more

guidance on the proposed ordinance.

DISCUSSION

The intent of the ordinance is to retain local control of regulating medical marijuana cultivation. In light of the extremely short timeframe the Legislature has given cities and towns to codify local ordinances on this topic, it is anticipated that the Town may choose to re-visit and perhaps modify the regulations later when there is more time to discuss policy issues and any unforeseen impacts. Also, it is important to note that that the topic is cultivation and not a discussion on the Town's existing marijuana dispensary ordinance.

The ordinance is structured as a ban on cultivation with exemptions for personal cultivation for qualified patients and caregivers. A ban with exemptions ensures the Town maintains local control of the regulation of medical marijuana cultivation. To assist the Council in its discussion, staff provided the Council with a copy of the Healdsburg ordinance and section of Sebastopol ordinance addressing cultivation for personal medical use.

At its December 2nd meeting, the Council provided the following key direction to the Planning Commission regarding medical marijuana cultivation. The proposed ordinance incorporates the Council's direction. It should be noted that for those provisions of the ordinance where the Council lacked specificity, staff prepared the language with the knowledge that the PC will discuss and may revise such sections. Unless otherwise noted, the comments below reflect the Council's direction to the PC.

- Prohibit commercial cultivation

The proposed ordinance bans commercial cultivation. The Council agreed with staff that the Town should not allow commercial cultivation due to concerns regarding public safety, the environment, administration, and enforcement.

- Allow for personal cultivation for qualified patients with exemptions and limitations

- The Council supports some level of personal medical marijuana cultivation for qualified patients and caregivers.

Outdoor- Allow outdoor cultivation by qualified patients and primary caregivers with limitations and exceptions.

- Establish a limitation based on the number of plants and not by square footage. (From an enforcement perspective, an allowed number of plants provides greater certainty than an allowed square footage.) The proposed ordinance does include limitations on the permissible area of cultivation in order to track new state law, but the number of plants proposed to be

permitted within the personal growth exemption is less than what could be accommodated in such spaces (i.e., 18 plants in a 100 sq. ft. area)

- The Council did not reach agreement on a specific number limit during its last discussion, but did indicate a "plant limit should be established per parcel." Councilmembers discussed a concept of a limit of plants per resident with a maximum per parcel, but no consensus was reached. Staff has proposed a limit of 18 mature plants in the draft ordinance attached. The Council is seeking a recommendation from the PC regarding Section 17.138.330(A) of the proposed ordinance.
- The Council did not believe a minimal distance from other land uses was needed for cultivation (e.g., no cultivation within 300 ft. of a park).
- The Council indicated that only flowering or mature plants should be counted against the number of plants limit.
- Planting should be limited to side and rear yards, but the PC should expound on this as well as distance from property line, plant height, screening, and security requirements. RVFD has concerns regarding materials used for screening. The ordinance sets a plant height limitation (7 ft.), fencing requirement (e.g., property must have fence) and limitations on screening materials.
- The Council supported the "tagging" of plants to identify who the plants are being grown for. This envisioned the scenario where a "friend" would grow plants for a qualified patient who did not have adequate outdoor space for cultivation. Legal Counsel has indicated that the "friend" would be required to be the primary caregiver for the individual for whom they are cultivating the plants for. Otherwise, the "friend" would need a commercial license from the State. However, commercial cultivation is prohibited under the proposed Ordinance and, thus, growing for a "friend" is not allowed.
- The concept of registration was also discussed, but no consensus reached. If a database is maintained by the Town, it is unclear what the database would be used for and the information may be considered a public record.
- The proposed ordinance contains exceptions (see section 17.138.350) to the limits should it be demonstrated that additional planting is required for medical reasons. The Council thought the exception contained in the Sebastopol ordinance seemed appropriate and the draft ordinance is thus largely modeled on that language. The PC should opine on the exceptions and make recommendations to the Council.

- The ordinance does identify a process for staff to approve the exceptions with an appeal to the PC (see section 17.138.360). The objective is to have a fairly streamlined process that does not burden staff, but yet establishes clear standards.

Indoor- Ban indoor cultivation, except as an authorized exception to the general rule that cultivation must take place exclusively outdoors.

- The Council was concerned with safety and energy/water use associated with indoor cultivation. Ross Valley Fire is in the process of developing guidelines regarding cultivation, but indicated outdoor cultivation is much safer than indoor cultivation.
- The Council thought an exception allowing indoor cultivation should be allowed in certain limited circumstances, but the exact parameters of any such exception were not discussed in detail at the last Council meeting. The proposed ordinance does incorporate exceptions, but the PC will need to weigh in on the matter (see Section 17.138.350, 'Exceptions'). Some of the draft terms included in the attached ordinance include limiting any indoor cultivation to a maximum of three mature plants, and only allowing indoor cultivation in an occupied residence.

CEQA REVIEW

The adoption of the ordinance is exempt from the California Environmental Quality Act (codified at California Public Resources Code §§ 21000, *et seq.*, and 14 California Code of Regulations §§ 15000, *et seq.*, collectively, "CEQA") because it is covered by the general rule set forth in 14 C.C.R. § 15061(b)(3) that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Here, the adoption of an ordinance regulating the cultivation of medical marijuana has no potential to cause a significant effect on the environment and is thus not subject to CEQA. In addition, even if the ordinance was subject to CEQA, it would be categorically exempt from further review per 14 C.C.R. § 15307 and 15308, as it is an action taken by a regulatory agency for the protection of natural resources and the environment.

RECOMMENDATION

- 1) Conduct the public hearing
- 2) Adopt a resolution recommending that the Town Council adopt Ordinance No. 15-40

ATTACHMENTS

Attachment A - Resolution No. 15-40

Attachment B - Draft Ordinance

Attachment C- Healdsburg Ordinance (adopted prior to AB 243)

Attachment D- Selected section of Sebastopol Ordinance (adopted prior to AB 243)