



TOWN OF FAIRFAX

142 Bolinas Road, Fairfax, California 94930
(415) 453-1584 / Fax (415) 453-1618

DATE: January 17, 2019
TO: Planning Commission
FROM: Garrett Toy, Town Manager *GT*
Ben Berto, Planning Director
SUBJECT: Discuss/consider proposed commercial cannabis regulations

RECOMMENDATION

Discuss/consider local cannabis regulatory policy options and provide direction to staff.

BACKGROUND

Fairfax is currently operating under a moratorium for commercial cannabis businesses (except for existing medical marijuana dispensaries allowed under the Town Code) that is in effect until October 31, 2019. The current moratorium provides the Town the time to be able to determine what types of commercial cannabis businesses and associated regulations are desired for Fairfax.

The Town began its formal review of commercial cannabis in December 2017, with a community survey and an expert panel discussion. Since that time the Town Council has considered cannabis policies and regulations six times. The Council provided the Planning Commission ("PC") with general policy direction to begin the process of developing cannabis regulations, and also provided direction on permitting existing medical cannabis dispensaries to conduct adult-use deliveries.

On September 20th the PC started general discussions regarding commercial cannabis. The Commission discussed the policy issues at length and at the conclusion of the meeting took a straw poll of its members' positions on the key policy issues.

On October 25th, the PC considered a draft ordinance permitting existing medical cannabis dispensaries to conduct adult-use deliveries and forwarded its recommendations to the Town Council.

On November 15, the PC continued its general cannabis discussions, restated/confirmed its position on some issues and requested additional information on other issues.

On November 29th, the PC continued its general discussions, restated/confirmed its position on some issues and requested additional information on issues. The PC followed the same format as discussed at its previous meetings.

DISCUSSION

The Planning Commission continued its discussion on commercial cannabis at its December 20, 2018 meeting. At the conclusion of the PC discussion, staff indicated we would begin work on code revisions. For those policy areas where there does not seem to be a PC consensus/majority position, staff would either note that further direction is needed or offer policy options.

At the meeting, staff recommended simplifying the regulations for medical marijuana dispensaries because the State's requirements are very comprehensive in addressing all the same operational issues (e.g., security, inventory) that the Town Code tries to address. We also indicated that there are substantial differences between the current State regulations governing storefront retail and delivery versus the Town's medical marijuana dispensary storefront and delivery requirements.

We will need to substantially revise the current stand-alone medical dispensary code (Chapter 17.110) to make the code apply to both adult-use and medical cannabis uses as well as be consistent with current State law and reflect the PC's direction on the key policy issues discussed below. For example, the Town Code will no longer have specific operating requirements such as operating plans or record keeping for dispensaries (Chapter 17.110.090), but rather defer to State law and regulations.

In discussions with legal counsel, they suggested before proceeding with wholesale code revisions, it would be helpful for the PC to confirm key policy decisions such as the approval process for cannabis permits.

Towards that end, below is a list of the key policy issues and staff's understanding of the current PC position on specific topics. In some instances, where the PC did not reach a consensus or majority position on an issue, staff recommends an option or approach for PC consideration. With regard to the PC approval process of cannabis businesses, staff has proposed a process for consideration.

1) Eliminate the following Categories of Use:

- Distribution of cannabis products
- Commercial cannabis cultivation
- Cannabis testing laboratories
- Microbusiness
- Commercial manufacturing

Staff would inform the Town Council PC would like to "revisit" the ban regarding microbusinesses and potentially also manufacturing uses next year.

2) Eliminate Cannabis Temporary Events Category of Use

3) Permit cannabis deliveries in Town

- 4) Comply with State law and permit up to 6 cannabis plants to be cultivated for personal use, whether for medical or non-medical purposes, and whether grown indoors and/or outdoors.

Attached is a redline of the Town Code (Chapter 17.138 Article III) to reflect the following key provisions:

- Allow up to 6 cannabis plants to be cultivated for personal use, whether for medical or non-medical purposes, and whether grown indoors and/or outdoors.
- The total number of plants allowed outdoors would not to exceed a total of 6 plants per property.
- Existing outdoor cultivations standards would still apply.
- Eliminate the ability to request exceptions to the cultivation limit.

- 5) Require on-site parking per Town Code for any cannabis retailers.

Retailers would need to comply with the parking standards in Chapter 17.052.030 (e.g., retail requires 3 spaces for the first 500 sf of gross floor area and 1 space for each additional 500 sf.)

- 6) Establish a gross square footage limit for retail operations.

Staff is recommending 1,500 sf which seem to be in the mid-range of the sizes discussed by the PC.

- 7) Allow medical and adult-use retail uses, but establish a limit

No PC consensus/majority position was reached on this key policy issue.

Ideally, the ordinance should identify the number and types of businesses (i.e., medical retail, adult-use retail, and/or delivery-only businesses) allowed in Town. However, if the PC is unable to determine a majority position on the number and type of businesses, the PC could recommend a range of options for the Council to consider and let the Council decide on the issue.

- 8) Location of retail uses

The majority of the PC seem to support maintaining the State buffer zone. State regulations require a default mandatory 600-foot setback buffer distance to a school, day-care, or youth-center. The Town may create a local buffer different than the State zone.

The base assumption is that medical/adult-use retail would only be allowed in commercial zones which allow retail uses (i.e., CH, CC). Except for the existing medical marijuana dispensary, medical retail storefront businesses would no longer

be allowed in the CL zone.

The PC should determine if delivery-only retail businesses should be permitted in the CL zone.

9) PC Approval Process

The consensus of the PC was that it wanted to have discretionary approval of the retail permits, but did not necessarily want the approvals to “run” with the land. There also appeared to be consensus on requiring a “pre-application” process to ensure applications meet minimum standards.

In order to meet the PC’s direction, we are recommending the following competitive process to select retail establishments:

- a) Applications are taken from date X to date Y,
- b) Staff would screen applications to evaluate if they meet the submittal requirements. Application meeting the submittal requirements would be forwarded to the PC for consideration,
- c) PC picks X number based on specific review criteria to be developed and the pre-determined number allowed (X),
- d) Should a selected business go out of business or be closed for a pre-determined amount of time (e.g., 6 months), the PC would declare a vacancy and take applications for another retailer following the process established in “a” and “b” above.

10) Business permit procedures and regulations

Staff is recommending a two-prolonged approach which requires an applicant after receiving PC approval to obtain a Town cannabis business permit. This permit would only require ministerial approval. In order to operate a retail establishment, an applicant must have been selected by the PC and obtain and maintain a business permit. The operating regulations would be established by the business permit similar to the process established for adult-use deliveries for existing medical marijuana dispensaries. The regulations and business permit process would be contained in Town Code Chapter 5.5 “Cannabis Businesses.” Staff will provide more details regarding this approach at the meeting.

11) Appeal Process

This issue was not previously discussed with the PC, but it would be helpful to receive direction on following issue:

Should applicants be allowed to appeal to the Town Council if they are denied and others approved?

In this instance, the Town Council would conduct a “de novo” hearing on the entire application process since it is likely that if the appeal is upheld it would affect one of the PC approved applications. This assumes the Town received more applications than the number of retail uses allowed.

Staff recommends the PC not allow any appeals as all the conditions of approval will be established in the Town Code.

NEXT STEPS

With sufficient policy direction, the Town Attorney would draft an ordinance for consideration at the PC’s February meeting.

ATTACHMENTS:

1. Redline of current Town code (Chapter 17.138 Article III)
2. Map of Fairfax commercial zones with State-mandated buffer zone
3. Map of Fairfax commercial districts without State buffer zone

DRAFT REDLINE OF CURRENT TOWN CODE

ARTICLE III: PERSONAL CANNABIS CULTIVATION

§ 17.138.310 PURPOSE.

It is the purpose of this article to regulate the cultivation of cannabis for personal medical use and personal adult-use within the Town of Fairfax for the health, safety and welfare of the public. Nothing in this article is intended to impair any defenses available to qualified patients or primary caregivers under the applicable state law or to authorize the cultivation, possession, or use of cannabis in violation of state or federal law. This article is not intended to give any person or entity legal authority to operate a cannabis business or to engage in commercial cannabis activity; it is intended simply to impose zoning restrictions on personal cultivation of cannabis allowed by state law.

§ 17.138.320 DEFINITIONS.

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

CANNABIS. All parts of the plant Cannabis sativa Linnaeus, Cannabis indica, or Cannabis ruderalis, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. "Cannabis" also means the separated resin, whether crude or purified, obtained from marijuana. "Cannabis" includes "cannabis" as defined in Business and Professions Code, Section 26001 and in Section 11018 of the Health and Safety Code.

CULTIVATION. The planting, growing, harvesting, drying, or processing of cannabis 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 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.

PERSONAL CULTIVATION. Cultivation of cannabis for a natural person's own personal use and possession in accordance with this Code and state law, including but not limited to Health and Safety Code Sections 11362.1 and 11362.2, as may be amended, and such person does not sell or distribute cannabis to any other person. "Personal use" also means and includes cultivation of medical cannabis conducted by a qualified patient exclusively for his or her personal medical use, and cultivation conducted by a primary caregiver for the personal medical purposes of no more than five specified qualified patients for whom he or she is the primary caregiver, in accordance with state law, including Health and Safety Code Sections 11362.7 and

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

WHEREAS, in 1996, California became the first state in the nation to allow the use of medicinal marijuana/cannabis after voters approved Proposition 215, the California Compassionate Use Act; and

WHEREAS, in 2016, California voters approved Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), which legalized the non-medical use of marijuana/cannabis by adults over 21 years of age; and

WHEREAS, the AUMA made it lawful for adults to possess, plant, cultivate, harvest, dry, or process not more than six living marijuana/cannabis plants within a single private residence, or upon the grounds of that private residence, at one time; and

WHEREAS, the AUMA, as amended by the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), authorizes cities and towns to "reasonably regulate" the cultivation of marijuana/cannabis for personal use, and may even completely prohibit cultivation activities outdoors upon the grounds of a private residence (Health & Safety Code, §11362.2); and

WHEREAS, numerous court decisions confirm that a municipality has authority to regulate medical marijuana activities, including personal cultivation of medical marijuana under the state's medical marijuana laws (Kirby v County of Fresno (2015) 242 Cal. App.4th 940, 964-967; see also, City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc. (2013) 56 Cal. 4th 729; Maral v. City of Live Oak (2013) 221 Cal. App.4th 975); and

WHEREAS, the outdoor cultivation of marijuana/cannabis unregulated by local law poses a risk of adverse effects to the ... [1]

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11362.765, as may be amended. Except as herein defined, personal cultivation does not include, and shall not authorize, any cultivation conducted as part of a business or commercial activity, including cultivation for compensation or retail or wholesale sales of cannabis.

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

PRIVATE RESIDENCE. A house, an apartment unit, accessory dwelling unit, a mobile home, or other similar dwelling occupied for residential purposes, or as defined in Cal. Health and Safety Code § 11362.2, as may be amended.

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

TOWN. The Town of Fairfax.

§ 17.138.330 PERSONAL CULTIVATION OF CANNABIS.

Personal cultivation of cannabis is prohibited except in compliance with the following:

(A) No more than six cannabis plants per private residence are allowed to be cultivated either indoors or outdoors upon the grounds of a private residence, or a combination of both indoors and outdoors, regardless of the number of individuals residing at the residence. However, outdoor cultivation shall not exceed 6 plants per lot, regardless of the number of private residences located upon the lot.

(B) *Outdoor.* Outdoor personal cultivation of cannabis shall comply with the following standards:

- (1) Outdoor cannabis plants shall be located a minimum of five feet from property lines.
- (2) Outdoor cannabis plants shall be located only in the rear and side yards of a lot, and are not permitted to be located in front yards of any lot.
- (3) No cannabis plants cultivated under this article shall be visible from a public right-of-way or any other public place by normal unaided vision.
- (4) No cannabis plants cultivated under this article shall exceed seven feet in height.
- (5) The area used for cannabis cultivation shall be contained within a locked space (e.g. enclosed within a locked gate).
- (6) Any lot upon which cannabis plants are cultivated under this article shall have fencing of no more than six feet in height surrounding the lot or that portion of the lot upon which the plants are cultivated. In no event shall netting or plastic screening be used in conjunction with cannabis cultivation.
- (7) Outdoor cultivation is prohibited on parcels within 200 feet of any public or private preschool, elementary, or middle school.

(C) *Indoor.* Indoor personal cultivation of cannabis shall comply with the following standards:

- (1) Plants shall be contained within a fully enclosed and secure structure, as defined, either within the primary residence or within an accessory structure on the same lot as the primary residence.
- (2) 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

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Deleted: (A) Outdoor cultivation. Except as may otherwise be provided by this article, 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 18 mature marijuana plants.¶
<#> (B) Indoor cultivation. Except as may otherwise be provided by this article, 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 article, indoor cultivation may only occur within a fully enclosed and secure structure.¶
<#> (C) Only qualified patients or primary caregivers shall be permitted to cultivate marijuana under this article.¶
(D) 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 is prohibited within the Town of Fairfax. Nothing in this article is intended to abrogate any existing section of the Town Code including, but not limited to, Medical Marijuana Dispensaries.¶
(Ord. 797, passed 8-3-2016)

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Deleted: (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.

Deleted: <#> (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)

(CO2, butane, propane, natural gas, kerosene, etc.) or generators may not be used indoors or outdoors.

(3) All electrical equipment used in the cultivation or processing of cannabis (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 cannabis is prohibited.

(4) All cannabis cultivation areas shall be in compliance with the current, adopted edition of the California Building Code as regards mechanical ventilation.

(5) Shall not be conducted in a manner that results in the creation of mold or mildew inside the residence or the accessory structure.

(D) General. All personal cultivation of cannabis, whether indoors or outdoors, shall comply with the following generally applicable standards;

(1) A copy of documentation of qualified patient status must be maintained at any location at which medical cannabis cultivation occurs. If cultivation is to be conducted by a primary caregiver, documentation of the legally-required relationship shall be maintained at the location where medical cannabis cultivation occurs.

(2) The residence shall maintain fully functional and usable kitchen, bathrooms, and bedrooms for their intended use, and the premises shall not be used primarily or exclusively for cannabis cultivation.

(3) No cannabis cultivation area shall be maintained or operated in such a way as to 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.

(4) Any cannabis cultivation that would require a license or permit from the State of California per the Medical and Adult-Use Regulation and Safety Act (Cal. Business & Professions Code, Division 10) is prohibited within the Town of Fairfax.

§ 17.138.340 RESERVED.

§ 17.138.350 RESERVED.

§ 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 cannabis 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.

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Deleted: <#> (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 Cal. Health and 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, subject to no more than 100 square feet or less per qualified patient; 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 Cal. Health and Safety Code § 11362.7), and shall not receive remuneration for such cultivation, except for compensation provided in full compliance with Health and Safety Code § 11362.765(c), per Health and 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. Outdoor cultivation is prohibited on parcels within 200 feet of any public or private preschool, elementary, or middle school.¶

<#> (I) Except as may otherwise be authorized in § 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.¶ [5]

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(A) *Public nuisance.* The violation of this ~~chapter~~ 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.

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(B) *Seizure and destruction of cannabis.* Except as otherwise expressly stated in this section, all cannabis 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 §§ 11472 through 11479, for cannabis possessed in violation of Division 10 of the Health and Safety Code.

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(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 Town Code.

(E) *Violation.* Cultivation of cannabis 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 Town Code.

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(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.

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The provisions of this article shall not be construed to protect the property owner(s) of record for property associated with the cultivation of cannabis, or their lessees, tenants or participants in the cultivation of cannabis, from prosecution pursuant to any laws that prohibit the cultivation, sale and/or possession of cannabis. In particular, the possession or cultivation of cannabis remains illegal under federal law. The property owner(s) of record for property associated with the cultivation of cannabis, or their lessees, tenants and other participants in the cultivation of cannabis, assumes any and all risk and all liability that may arise or result under state and federal criminal laws from the cultivation of cannabis.

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Deleted: 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

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