



# TOWN OF FAIRFAX

## STAFF REPORT

### December 12, 2016

**TO:** Mayor and Town Council

**FROM:** Garrett Toy, Town Manager *GT*  
Janet Coleson, Town Attorney

**SUBJECT:** Discussion/consideration of the development of local regulations to address the "Adult Use of Marijuana Act" (AUMA) which governs nonmedical marijuana

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#### RECOMMENDATION

Direct staff to develop local regulations to address AUMA.

#### DISCUSSION

With the passage of Proposition 64, "Adult Use of Marijuana Act" (AUMA), the Town Council will need to consider if it wants to develop local regulations to govern nonmedical marijuana. The attached memo from the Town Attorney provides an analysis of the AUMA effects on communities.

At a minimum, the Town will need to alter its cultivation regulations to ensure they fully comply with AUMA and consider whether to apply to nonmedical as well as medical marijuana cultivation. The Council should also consider whether it wishes to enact any business regulations or land use regulations for nonmedical marijuana businesses. The Town might also consider whether it wishes to enact any local taxes on marijuana (e.g., new business license fee), which would require compliance with Proposition 218.

The following options are available to the Council:

**Option 1-** *Adopt regulations for personal cultivation of recreational (nonmedical) marijuana.* The Town may enact permanent regulations for nonmedical marijuana cultivation. This regulation would be adopted in the same manner as a zoning ordinance, meaning it would need to first go the Planning Commission for recommendation.

**Option 2 -** *Adopt regulations governing commercial marijuana businesses.* An urgency moratorium is not strictly necessary, so long as the code amendments are completed and effective prior to when the state begins licensing such businesses, but may be included as a safety measure. This regulation would be adopted in the same manner as a zoning ordinance, meaning it would need to first go the Planning Commission for recommendation.

**Option 3 –** *No action.* Beginning November 9, 2016 up to six marijuana plants legally may be cultivated in Town for nonmedical purposes, subject to the minimum limitations contained AUMA. Medical marijuana cultivation still must comply with the Town's recently adopted regulations, which makes medical cultivation subject to stricter rules than recreational cultivation. Commercial marijuana businesses (except medical marijuana dispensaries) could not legally establish in Fairfax until state licensing begins on or before January 1, 2018. The Town could adopt regulations for these businesses at a later date.

In order to maintain local control, staff recommends the Council choose both Options 1 and 2 and provide direction to staff regarding local regulations governing nonmedical marijuana cultivation and businesses. Should the Council want to develop local regulations, the next step in the process would be for the Council to establish the broad parameters for the ordinance. The Council used a similar process to develop the medical marijuana cultivation ordinance (Zoning Code Chapter 17.138 Article III). Staff would prepare an ordinance for Planning Commission (PC) consideration based on those broad parameters. We would anticipate scheduling this discussion at a future Council meeting.

**FISCAL IMPACT**

None at this time.

**ATTACHMENT**

Memorandum from Town Attorney Janet Coleson



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**MEMORANDUM**

To: Mayor and Town Council

From: Janet Coleson, City Attorney

Subject: Discussion of Proposition 64 and Needed Modifications to the Fairfax Town Code

**Background**

Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (“AUMA” or “Prop 64”) was passed by the voters at the state-wide general election on November 8, 2016. Since this detailed, 62-page legislation was an initiative measure, it took effect immediately. There are, however, certain activities, such as engaging in commercial, non-medical activity, that will not be able to be implemented until the State begins issuing licenses. The State expects to be able to issue licenses around January 1, 2018.

The Initiative accomplishes three basic objectives:

(1) Legalization of Nonmedical Personal Marijuana Use and Possession. The Initiative makes it legal for adults (21 years and older) to possess 28.5 grams of marijuana or 8 grams of concentrated cannabis and to cultivate up to six plants for personal use. AUMA Section 4 (HSC §11362.1).

(2) Regulation and Taxation of Non-Medical Marijuana Production, Manufacture and Sale. AUMA establishes the Bureau of Marijuana Control within the Department of Consumer Affairs to regulate and license marijuana transport, distribution and sale. The Department of Food and Agriculture will license cultivation, and the Department of Public Health will license manufacture and testing. Licensing authorities shall begin issuing licenses by January 1, 2018. AUMA Section 6 (BPC §§26010-26012). Licensees must comply with a variety of statewide regulations and limitations. For example, no licensee shall be located within 600-feet of a school, day care or youth center unless a local jurisdiction specifies a different radius. AUMA Section 6 (BPC §26054(b)).

Also, effective January 1, 2018, the Initiative will enact an excise tax of 15% on purchasers of marijuana and marijuana products, and a cultivation tax of \$9.25 per ounce for flowers and \$2.75 per ounce for leaves, with exceptions for medical marijuana sales and cultivation. AUMA Section 7 (BPC §§34011, 34012).

(3) Reduction of criminal penalties associated with various marijuana offenses. Offenders who illegally possess marijuana under age 18 are no longer subject to criminal punishment, but instead must complete drug education and community service. AUMA Section 8 (HSC §11357). The current mandatory felonies for cultivation, possession for sale, and transportation/importation are now eliminated. AUMA Section 8 (HSC §§11358, 11359, 11360).

The Initiative is patterned on the Medical Marijuana Regulation and Safety Act (MMRSA) passed by the California Legislature last year. Licenses for medical and non-medical commercial



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businesses are separate, but administered by the same bureau in the Department of Consumer Affairs. AUMA Section 6 (BPC §26050). The Initiative does not change the MMRSA, but the two systems may be consolidated. AUMA Sections 6 (BPC §26000) and 10.

**Impact on Local Ability to Regulate Marijuana**

The Initiative sets up a comprehensive system governing marijuana businesses at the state level, while still largely allowing local governments to regulate marijuana-related activities.

**Marijuana Businesses.** AUMA recognizes a variety of marijuana businesses, including dispensaries, cultivators, manufacturers, distributors, transporters and testing laboratories. Under AUMA, local governments may continue to 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 requirements related to reducing exposure to second hand smoke, or to completely prohibit the establishment or operation of one or more types of licensed marijuana businesses. AUMA Section 6 (BPC §26200). Local jurisdictions may also establish standards, requirements and regulations regarding health and safety, environmental protection, testing, security, food safety, and worker protections that exceed state standards. AUMA Section 6 (BPC §26201).

**Marijuana Delivery.** The Initiative provisions governing marijuana transport and delivery likely will require interpretation by the courts or clarification from the Legislature. For example, Section 11362.1 states that it would be lawful for adults to transport marijuana, but the Initiative leaves existing law intact that makes it illegal to drive while in possession of marijuana (Vehicle Code §23222(b)). AUMA prohibits a local jurisdiction from preventing transportation of marijuana or marijuana products on public roads. AUMA Section 6 (BPC §26090(c)). Some may take the position that this provision means local governments may not bar marijuana deliveries to patients in their jurisdiction. However, we believe this interpretation is incorrect for two reasons. First, based on the text of the Initiative, local governments may completely prohibit any business licensed under AUMA, and those providing delivery services would be licensed under the Initiative. AUMA Section 6 (BPC §26090(a)). Second, MMRSA contains a similar provision allowing use of public roads, while expressly allowing a city to ban delivery within the jurisdiction. Cal. Bus. & Prof. Code §19340. Therefore, we believe the correct interpretation of the Initiative is that cities may prohibit marijuana deliveries from originating or terminating within their jurisdiction, but not from simply passing through.

**Personal Cultivation.** Compared to MMRSA, cities are more limited with respect to regulating cultivation of marijuana for personal use. AUMA allows individuals to grow up to six marijuana plants at their home, and to possess all the marijuana those plants provide. AUMA Section 4 (HSC §11362.1). Under the Initiative (HSC §11362.2), cities may: (1) 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), and (2) reasonably regulate limited indoor cultivation in private residences. **AUMA does not allow cities to ban individual indoor cultivation outright.**



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Cultivation must be kept within or on the grounds of the person's private residence, in a locked space, and not visible by normal unaided vision from a public place. AUMA §11362.2(a)(2).

**Current Fairfax Regulations Regarding Marijuana**

Fairfax has adopted a number of local regulations for **medical** marijuana issues. Specifically, the Fairfax Municipal Code (currently found at Chapter 5.52) allows up to three medical marijuana dispensaries to operate in town with a two-year dispensary permit. Dispensaries may not be located within 600 feet of a school, within a residentially-zoned parcel, or directly abutting a residentially-zoned property. This section also imposes a series of operating requirements on medical marijuana dispensaries.

Fairfax also regulates the **cultivation** of **medical** marijuana. Ordinance No. 797 added Chapter 17.138, which permits outdoor cultivation of no more than 18 mature marijuana plants, and prohibits indoor cultivation of marijuana unless an administrative exception is granted. Only qualified patients or primary caregivers are allowed to cultivate under the ordinance and cultivation is subject to a number of safety regulations.

**Effects of AUMA on Fairfax Regulations**

**Marijuana Businesses.** Although Fairfax has permissive zoning (meaning uses not enumerated in the zoning code are presumptively prohibited), AUMA does not contain language regarding permissive zoning (unlike the MMRSA, Bus. & Prof. Code §11362.777(b)(3)), contemplates that local jurisdictions will take action to explicitly prohibit or regulate marijuana businesses. There is nothing in the Fairfax's existing zoning definitions to allow the Town to distinguish between a traditional retail shop and a nonmedical marijuana retail shop, or a cannabis vaporizing products manufacturer and other types of manufacturing, for example. See generally, Town Code 17.008 (zoning definitions). The current dispensary regulations are limited to facilities that distribute medical marijuana, so these regulations would not apply to sales of nonmedical marijuana. Therefore, under AUMA, state licensed non-medical marijuana businesses would become legal in Fairfax under the Town's Municipal Code. Marijuana delivery services would also be allowed to locate in the Town, and to deliver marijuana to Town residents.

AUMA, however, requires a state license to engage in commercial nonmedical marijuana activity. Until the state begins issuing licenses, criminal penalties shall continue to apply to an unlicensed person engaging in commercial marijuana activity. See AUMA Section 6 (BPC §26038); MMRSA, BPC §19360. The state is not expected to begin licensing marijuana businesses until January 1, 2018 under both MMRSA and AUMA (although they could begin issuing licenses earlier, perhaps sometime in late 2017). Thus, if Fairfax 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. Note however, that nothing prevents a city from adopting or amending commercial marijuana business regulations after the state begins issuing licenses – but it will be difficult to enforce those regulations after a state license is issued to a business.



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To give interested parties advanced warning of the Town's intent to develop such regulations, the Town might consider an interim zoning ordinance that would create a moratorium on the establishment and operation of commercial marijuana businesses within the Town until permanent regulations are adopted. Cal. Gov't Code §65858. Although not strictly necessary, a moratorium would provide added protection in the event that the state begins issuing licenses prior to January 1, 2018, and preserve additional legal arguments against those that might seek to locate in Fairfax prior to the adoption of permanent regulations.

**Personal Cultivation.** AUMA applies both retroactively and prospectively, meaning it preempts existing local regulations and prohibits new regulations to the extent such local laws conflict with its provisions. See AUMA Section 4 (HSC §11362.1(a)).

AUMA prohibits local governments from banning cultivation in private residences. **This means that Municipal Code Section 17.138.330, subsections (b) and (c) are no longer valid.**

Since AUMA allows outdoor cultivation bans, **all of the Town's outdoor cultivation regulations are still valid**, although AUMA only allows for cultivation of up to six plants for non-medical use. This means that qualified patients and primary caregivers may still grow up to 18 plants, while other citizens could grow up to six plants outdoors.

Local governments may "reasonably regulate" indoor cultivation. Nothing in the regulations set forth in Section 17.138.340 appears to violate the reasonableness standard in AUMA. Since many of the cultivation standards refer to "medical" marijuana, however, the Town may wish to consider broadening the scope of these regulations.

Since personal cultivation of marijuana is not subject to state licensure, personal grows were legal starting the day after the election on November 9, 2016. The Town's current medical marijuana cultivation standards are included in the zoning ordinance (Fairfax Municipal Code, Title 17), so any permanent amendments to address nonmedical cultivation would have to meet the requirements for amending zoning ordinances, including a hearing before the Planning Commission, two readings by the Town Council and thirty days to become effective.

### **Conclusion**

Passage of AUMA has left most of the Town's current regulatory scheme intact. The Town needs to alter the cultivation regulations to ensure they fully comply with AUMA and apply to nonmedical as well as medical marijuana cultivation. The Town should also consider whether it wishes to enact any business regulations or land use regulations for nonmedical marijuana businesses. The Town might also consider whether it wishes to enact any local taxes on marijuana, which would require compliance with Proposition 218.