

ATTACHMENT 5
Study Session Staff Report
May 22, 2017



CITY OF POMONA COUNCIL REPORT

May 22, 2017

To: Honorable Mayor and Members of the City Council

From: Linda Lowry, City Manager *Lowry*

Submitted: Arnold M. Alvarez-Glasman, City Attorney

By: Andrew Jared, Assistant City Attorney *AS*
Norma Copado, Deputy City Attorney

Subject: **STUDY SESSION – PRESENTATION AND DISCUSSION ON PROPOSITION 64 (ADULT USE OF MARIJUANA ACT) AND ITS IMPACTS ON THE CITY OF POMONA; REQUEST TO OBTAIN DIRECTION FROM CITY COUNCIL**

ACTION REQUESTED

Receive information from staff on the passage of Proposition 64 regarding the legalization of recreational marijuana in California and its impacts on the City. City staff is seeking direction from City Council on key questions related to marijuana-related commercial activities, both medical and non-medical (i.e., recreational), as well as regulation on personal cultivation, and the smoking of marijuana in public places. Consistent with City Council's past legislative actions prohibiting medical marijuana dispensaries and marijuana deliveries citywide, attached is a Draft Ordinance explicitly prohibiting commercial marijuana activities citywide, enacting a permitting and regulatory scheme as to indoor personal cultivation of marijuana in a private residence, and the prohibition of smoking in public places. (Attachment 2).

STUDY SESSION IN BRIEF

On November 8, 2016, California voters passed Proposition 64, the Control, Regulate, and Tax

Submitted to City Council: _____
Approved: _____
Continued to: _____
Denied: _____

Agenda Item # _____
Resolution No(s): _____
Ordinance No. _____

Adult Use of Marijuana Act (“AUMA”). Effective November 9, 2016¹, AUMA legalizes the nonmedical use (hereinafter, also “recreational use”) of marijuana by persons 21 years of age and over, and the personal cultivation of up to six marijuana plants per residence. Generally, AUMA creates a state regulatory licensing system, which becomes effective January 1, 2018, governing the commercial cultivation, testing, and distribution of nonmedical marijuana, and the manufacturing of nonmedical marijuana products.

This report specifies the implications on the City of Pomona’s (“City”) local authority to regulate recreational commercial and personal marijuana activities, per AUMA. The report also provides for a summary of what the Pomona City Code and Pomona Zoning Ordinance currently regulates concerning marijuana. The report also illustrates the City’s general two options: to explicitly prohibit commercial recreational marijuana activities, or to allow and regulate any or all commercial recreational marijuana activities. The report includes issues and concerns the City must consider and evaluate before deciding the City’s enforcement route, as well raising awareness to potential future federal enforcement of marijuana laws.

During the study session, the Office of the City Attorney will provide a report on the above topics. The topic of community impacts and regulatory approaches to address these, will be covered in a presentation by Catherine Branson from the Los Angeles County Department of Public Health, and “RAM: Rethinking Access to Marijuana”. (Attachment 1).

The topic of economic opportunities for the City of Pomona, will be presented in a discussion by Christopher Kim.

The topics of health effects of modern marijuana on adolescents in Pomona, will be presented by Michael Coleman, M.A., PhD. Student, from the Claremont Graduate University. The topic of adolescent attitudes and access to marijuana in Pomona, will be presented by Ariel Andreas, Garey High School student. (Attachment 3)

DISCUSSION

A. Summary and History of State Marijuana Related Laws, and Pomona’s Legislative Actions

- In 1996, the voters of the State of California approved Proposition 215 (codified as California Health and Safety Code Section 11362.5 and entitled “The Compassionate Use Act of 1996” or “CUA”).

- The intent of Proposition 215 was to enable persons who need marijuana for medical purposes to use it without fear of criminal prosecution under limited, specified circumstances. The proposition further provides that “nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, or to condone the diversion of marijuana for non-medical purposes.”

¹ An initiative statute approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. (Cal Const. Art. II § 10(a)).

- In 2004, the Legislature enacted Senate Bill 420 (codified as California Health and Safety Code section 11362.7 *et seq.* and referred to as to the “Medical Marijuana Program” or “MMP”) to clarify the scope of Proposition 215, and to provide qualifying patients and primary caregivers who collectively or cooperatively cultivate marijuana for medical purposes with a limited defense to certain specified state criminal statutes.

- On April 3, 2006, City Council adopted interim Urgency Ordinance No. 4058 to establish a forty-five (45) day citywide moratorium on the establishment and operation of medical marijuana dispensaries.

- On May 15, 2006, the City Council adopted Interim Ordinance 4060 to extend the moratorium for an additional ten (10) months and fifteen (15) days.

- On March 5, 2007, the City Council adopted Interim Ordinance No. 4080 to extend the moratorium for an additional year.

- On November 14, 2007, the City’s Planning Commission voted to adopt Planning Commission Resolution 07-086 recommending City Council approval of Code Amendment (06-001) and Specific Plan Amendments (SPA 07-004, SPA 07-005, SPA 07-006, SPA 07-007, and SPA 07-008) to prohibit the establishment and operation of medical marijuana dispensaries citywide.

- On December 17, 2007, City Council considered Code Amendment (06-001) and Specific Plan Amendments (SPA 07-004, SPA 07-005, SPA 07-006, SPA 07-007, and SPA 07-008) and voted to approve the introduction for the first reading of Ordinance No. 4096 to prohibit the establishment and operation of medical marijuana dispensaries citywide.

- On February 4, 2008, City Council passed and adopted Ordinance No. 4096 to prohibit the establishment and operation of medical marijuana dispensaries citywide.

- Assembly Bill 2650 (2010) and Assembly Bill 1300 (2011) amended the Medical Marijuana Program to expressly recognize the authority of counties and cities to “[a]dopt local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective” and to civilly and criminally enforce such ordinances.

- In *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, the California Supreme Court held that “[n]othing in the CUA or the MMP expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land” Further, in *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975, the Court of Appeal held that “there is no right – and certainly no constitutional right – to cultivate medical marijuana” The Court in *Maral* affirmed the ability of a local government entity to prohibit the cultivation of marijuana under its land use authority.

- On October 9, 2015 Governor Jerry Brown signed three bills into law (AB 266, AB 243, and SB 643), collectively currently known as the Medical Cannabis Regulation and Safety Act (“MCRSA”, formerly “MMRSA”). MCRSA establishes a state-licensing scheme for commercial

medical marijuana uses, while protecting local control by requiring that all such businesses must have a local license or permit to operate in addition to a state license. MCRSA allows the City to completely prohibit commercial medical marijuana activities.

- Business and Professions Code section 19340(a) provides that deliveries of marijuana can only be made in a city that does not explicitly prohibit it by local ordinance.

- On February 22, 2016 City Council adopted Ordinance No. 4217, amending Chapter 34 of the Pomona City Code to add Article IX relating to the prohibition of marijuana deliveries citywide.

- On November 8, 2016, California voters approved Proposition 64, titled the “Adult Use of Marijuana Act” (the “AUMA”), which became effective immediately, and enacted a state statutory scheme legalizing, controlling, and regulating the cultivation, processing, manufacturing, distribution, testing, and sale of nonmedical (i.e., recreational) marijuana, including marijuana products, for use by adults twenty-one (21) years of age and older. The AUMA sets an implementation date for commercial operations of January 1, 2018.

- The AUMA added, among other provisions, subdivision (a)(3) to Section 11362.1 of the Health and Safety Code (which all subsequent statutory references being to such Code) making it legal under state and local law for persons twenty-one (21) years and older to possess, plant, cultivate, harvest, dry, or process not more than six (6) living marijuana plants, and possess the marijuana produced by the plants, upon the grounds of a private residence, provided such personal cultivation activities comply with various requirements set forth in Section 11362.2.

- Notwithstanding the foregoing, in subdivision (b) of Section 11362.2 the AUMA allows cities to completely prohibit persons from engaging in outdoor Personal Cultivation Activities, and while cities may not completely prohibit indoor Personal Cultivation Activities, cities may enact and enforce reasonable regulations on indoor Personal Cultivation Activities.

- Pursuant to Business & Professions Code section 26200(a), the AUMA allows cities to ban all or part of the uses allowed under its provisions:

Nothing in this division shall be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, 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 businesses licensed under this division within the local jurisdiction.
(Emphasis added).

- Under federal law, the Federal Controlled Substance Act, 21 U.S.C § 801 et seq., continues to classify marijuana as a Schedule 1 drug, which is defined as a drug or other substance that has a high potential for abuse, that has no currently accepted medical use in treatment in the United States, and that has not been accepted as safe for use under medical supervision. Currently,

the Federal Controlled Substances Act contains no exemption for medical purposes.

B. Pomona's Local Authority, and Limits, to Regulate Recreational Marijuana Per AUMA

Per AUMA, below is a synopsis of what the City has authority to regulate and prohibit, and what it cannot, concerning non-medical/recreational marijuana:

1. The City's Prohibitory, Regulatory and Taxing Authority:

The City can adopt ordinances regulating non-medical/recreational marijuana business activities, or to completely prohibit them.² For example, under the state's regulatory system, the state will issue marijuana businesses licenses. However, under AUMA, state licenses cannot be issued to an applicant whose operations would violate the provisions of any local ordinance or regulation.³

As a result, the City's regulatory scheme may consider zoning and land use implications establishing where non-medical/recreational marijuana business activities may be prohibited, allowed, permitted, and/or conditionally permitted. Further, the City has authority to tax said commercial non-medical/recreational marijuana activities by placing a taxation measure on the ballot at a future election. Alternatively, the City may prefer to completely prohibit said businesses. For example, the City is authorized to ban recreational retailers, medical dispensaries, and any delivery service originating from or terminating in the City's jurisdiction, outdoor cultivations, and any other state-licensed marijuana business. Such a ban may involve all or any of such uses, except personal cultivation in one's home for personal use, though the City may establish a licensing measure to keep track of such personal growing operations.

If the City does not adopt any ordinances concerning nonmedical/recreational marijuana businesses, the state can issue a license for a business in a City without local input, as silence and/or omission in the City's code on this activity will be deemed permissive by the state.

2. The City's Public and Safety Interest in Limiting Exposure to Smoke and Possession of Non-Medical/Recreational Marijuana:

The City may prohibit smoking, and possession of, non-medical/recreational marijuana, in specified locations, including, but not limited to: (a) ... in buildings owned, leased, or occupied by the City; (b) ... in public places, except where locally authorized; (c) ... where smoking tobacco is prohibited; (d) ... within 1,000 feet of a school, day care center, or youth center while children are present at such school, day care center or youth center, except in or upon the grounds of such residence so long as said smoking is not detectable by others on the grounds of such a school, day care center or youth center while children are present.⁴

Further, employers, including the City, may continue to maintain drug-free workplaces regardless of

² Business and Professions Code § 26200 (a).

³ Business and Professions Code § 26055 (e).

⁴ Cal. Health and Safety Code § 11362.2 (b) (3).

whether use of marijuana is medical or recreational.⁵

3. *What May the City Not Prohibit and/or Regulate?*

The City cannot (a) prohibit the non-medical/recreational use of marijuana by persons 21 years of age and over; (b) prohibit the personal cultivation of up to six (6) marijuana plants per residence; nor, (c) tax marijuana cultivated for personal use.

C. Current Regulations Concerning Marijuana in Pomona

1. *Medical Marijuana Dispensaries and Marijuana Deliveries.*

Currently, the Pomona Zoning Ordinance expressly prohibits the operation and establishment of medical marijuana dispensaries citywide.⁶ The Pomona City Code also prohibits marijuana deliveries citywide.⁷

2. *Restricting Exposure to Marijuana Smoke:*

Pomona currently restricts places where smoking is prohibited including public places, such as public parks.⁸ AUMA also restricts the places where marijuana may be smoked. A significant restriction bans smoking marijuana for personal use where smoking tobacco is prohibited.⁹ AUMA also allows private property owners to exclude marijuana consumption on their property.¹⁰ While said smoking restrictions may be inferred to be applicable to marijuana smoking, the City Attorney recommends that the City adopt an explicit provision restricting the areas where smoking of marijuana is not allowed.

D. Economic Considerations Regarding Marijuana

Local Tax. As previously indicated, local governments can impose a local tax on commercial marijuana operations. Such tax would be required to be approved by the voters of Pomona at a future election. Revenue would depend on several factors, including tax rate, amount of marijuana product sales, method of taxation (i.e., per ounce of buds/flowers vs. per ounce of other plant parts, quantity of THC/CBD in the product being taxed), amount of other regulated activity (i.e., tax on each plant harvested or grown), among other variables. The amount of revenue taxation would bring is completely speculative now.

Statewide Taxes. Under AUMA there are two kinds of statewide tax imposed on marijuana: harvesting tax and general excise tax. Those monies would go directly to the California Marijuana

⁵ Cal. Health and Safety Code § 11362.45 (f); see also *Ross v. Raging Wire Telecommunications, Inc.* (2008) 42 Cal.4th

⁹20 (the California Supreme Court held that an employee does not have a right to smoke marijuana in the workplace).

⁶ Pomona Ordinance No. 4096, passed on February 4, 2008.

⁷ Pomona Ordinance No. 4217, passed on February 22, 2016.

⁸ Pomona City Code, section 38-73.

⁹ Business and Professions Code § 26201.

¹⁰ Cal. Health and Safety Code § 11362.45 (h)

Tax Fund to pay for a series of research and enforcement programs: 60% for youth programs, substance abuse education, prevention and treatment; 20% for environmental clean-up and remediation related to illegal harvesting; and 20% for DUI marijuana enforcement, and to reduce negative health impacts due to marijuana legalization. After 2027, the state legislature may alter this tax revenue allocation scheme.

Under this scheme, at an unidentified time in the future and in non-proscribed sums, the state may give monies to cities via grants for enforcement and education purposes. The primary method of this likely will be through \$30 million in such revenues to be earmarked for the California Highway Patrol to develop DUI and other enforcement strategies with local law enforcement. These programs however would only be funded if proceeds to the California Marijuana Tax Fund are exceeded for operation of the Bureau of Marijuana Control within the Department of Consumer Affairs, and other specified operational and research projects specified in AUMA have been funded. AUMA specifies that cities banning cultivation or retail sales of marijuana will not be eligible to receive such grants.

The general excise tax will be in the amount of 15% on all sales of recreational and non-recreational marijuana sold. The harvesting tax will be imposed “upon all persons required to be licensed to cultivate marijuana”.¹¹ The rate of such tax is based on the product being cultivated, namely “flowers” (i.e., the more potent portions of the plants commonly referred to “bud”) or marijuana leaves. The rates for these two products are set at \$9.25 per ounce for flowers harvested, and \$2.75 per ounce for marijuana leaves harvested and is due after the product is harvested. The harvesting and excise tax will begin to be imposed and collected after January 1, 2018 from licensed retail sellers and commercial growers. Part of the state licensing system to be developed and implemented prior to January 1, 2018 is to establish a harvest identification system. Under AUMA there is no tax on personal cultivation. It is also unclear if non-profits will be taxed in the same way or separate licenses issued for “non-profit” activities.¹²

Sales Tax. The general sales tax of a jurisdiction can be collected on non-medical sales of marijuana, effective November 9, 2016. Of that sales tax, cities receive only 1% of sales tax. Cities may impose their own tax directly on marijuana sales after approval at an election by the vote of the people. Medical marijuana is exempt from state/local sales tax but NOT state or local taxes specifically taxing marijuana.

Business License. Local revenue would be generated through business licenses. At this time, the City does not have a specific license designation for marijuana related businesses. It is likely that sales of recreational marijuana would be considered as “general retail” based on the gross receipts reported by the business. If, however the business operated as a non-profit or other exempt organization, a business license would be required but under the taxation schedule the business would be exempt from paying a business tax.

Under the City’s current business license categories, staff believes that sale of recreational marijuana would be categorized as “retail”¹³ and the business license fee would be based at the rate of \$113.00

¹¹ Cal. Revenue and Tax. Code § 34012(a).

¹² Business and Professions Code § 26070.5(a), requiring the bureau to investigate these issues by January 1, 2018.

¹³ PCC § 50-411

plus \$0.50 for each thousand dollars of revenue after the first \$10,000.00. Retail pharmacies are categorized as retail establishments. Based on such rate, fees are estimated to be as follows:

<u>Revenue</u>	<u>Business License Fee (per establishment)</u>	<u>Assuming 10 Establishments</u>
\$300,000	\$258.00	\$2,580.00
\$1,000,000	\$608.00	\$6,080.00

Currently, one difficulty jurisdictions have in enforcing taxation and business license payment is that this industry is a cash-based business. Because federal law prohibits marijuana, marijuana businesses cannot generally use banks and credit card companies to handle sales or the revenue from such businesses known to be derived from sales still illegal under federal law. The difficulty the City faces with cash-based businesses is the inability to verify revenues; therefore, the verification of the gross receipts of any one business is almost impossible.

Regulatory Permit Fee. Finally, revenue can be recouped for enforcement and processing costs associated with a local regulatory permit. Should the City decide to proceed with allowing certain types of marijuana industry activities, it is recommended that a fee be imposed to address the costs associated with monitoring compliance with conditions and regulations imposed as part of an ordinance to address conditions to be placed on such businesses.

Though the City is prohibited from banning indoor personal cultivation, the City may regulate such activity. Certain issues to address are security of the plants, odor impacts on neighboring properties, and access to children. A personal cultivator registration license and fee to offset the costs of enforcement of such program is strongly recommended to be implemented by the City. These regulatory provisions have been incorporated into the attached draft Ordinance. (Attachment 2)

E. Policy Options:

1. Prohibit All Commercial Marijuana Activities:

The City may continue to prohibit and ban any type of commercial marijuana activities, including medical marijuana dispensaries, non-medical/recreational marijuana retailers, and/or commercial cultivators, delivery, distributors, and/or transporting of, manufacturing, and testing in laboratories of marijuana. If the City opts to ban all commercial marijuana activity, the Office of the City Attorney recommends that amendments to the Pomona Zoning Ordinance be amended by adopting an ordinance to make an explicit prohibition as to each zoning district and specific plan. (Attachment 2). Otherwise, if the Pomona City Code and/or Pomona Zoning Ordinance are silent on nonmedical/recreational marijuana, the state can issue a license for a business in the City once the state licensing scheme goes into effect January 1, 2018.

As noted above, though the City cannot ban the personal non-medical/recreational use and indoor cultivation, it can regulate personal cultivation, as discussed in option 3 below.

2. Allow Commercial Marijuana Activity:

The City may instead choose to allow some or all commercial marijuana uses and activities, which would include the retail sale of medical and nonmedical/recreational marijuana, such as store fronts open to the public, commercial cultivation for sale to retailers, wholesale, warehouse and distribution centers not open to the public, and/or delivery services originating or terminating in the City. The City would need to adopt corresponding land use and business regulations, and impose corresponding regulatory fees. The City may also impose taxes on nonmedical/recreational businesses to cover costs incurred with licensing, regulation, tax collection, enforcement, auditing, etc. Any tax imposed would require voter approval. Allowing commercial marijuana activity would be a departure with City Council's past legislative and enforcement actions to prohibit marijuana related activity, use, and exposure citywide.

3. *Smoking and Possession Regulations, and Indoor Personal Marijuana Cultivation*

The City may (1) regulate the locations where marijuana may be smoked with restrictions, and (2) enact a permitting scheme for indoor personal marijuana cultivation. The City may decide to adopt an ordinance to address these regulatory provisions to be consistent with state law, while invoking local control and authority in these regulatory areas. (Attachment 2).

F. Federal Preemption and Enforcement

Marijuana remains an illegal Schedule I drug. While the Obama administration and Congress during that administration did not make federal criminal enforcement of medical marijuana a policy priority, during the Bush administration the Drug Enforcement Agency did conduct numerous operations to prosecute medical marijuana dispensaries under federal law. The current Trump administration and Attorney General Jeff Sessions have expressed an intent to enforce federal law against marijuana related activities. As recent as February 23, 2017, the White House said it expects law enforcement agents to enforce federal marijuana laws when they come into conflict with states where recreational use of the drug is permitted. "I do believe you will see greater enforcement of it," White House press secretary Sean Spicer said regarding federal drug laws.¹⁴ Attorney General Jeff Sessions further has said he is "not a fan" of the expanded use of marijuana, and vows that there will be "greater enforcement" of federal marijuana laws.¹⁵

CONCLUSION

The City of Pomona has not lost its local regulatory authority to enact regulations concerning nonmedical/recreational marijuana, despite the use of nonmedical/recreational marijuana by adults 21 or older now being legal in California. The City may continue to enact ordinances and policies, and consistent with state law, to further the City's interest in protecting and furthering public, safety, health and economic considerations, while balancing a person's right to use nonmedical/recreational marijuana, under AUMA.

¹⁴ "White House: Feds Will Step Up Marijuana Law Enforcement," (<http://www.cnn.com/2017/02/23/politics/white-house-marijuana-donald-trump-pot>) [February 24, 2017].

¹⁵ "Jeff Sessions: 'We're not going to a better nation if we have marijuana sold at every corner grocery store,'" (<http://www.businessinsider.com/jeff-sessions-against-weed-trump-administration-wants-to-crack-down-2017-2>) [February 28, 2017].

The City Attorney is prepared to provide additional information on any topic raised herein. In the meantime, for City Council's consideration attached is a draft ordinance explicitly prohibiting commercial marijuana activity citywide, implementing a permitting and regulatory scheme for the personal cultivation of marijuana, and prohibiting smoking marijuana in public places.

The City Attorney will continue to monitor all significant developments arising from the adoption of AUMA, and related state and federal regulations, laws, and policies.

Attachments:

1. "Marijuana Regulation and Enforcement Priorities for Cities", by Rethinking Access to Marijuana, Policy Manual, 2017 (<https://www.lacountyram.org/download-materials.html>)
2. Draft Ordinance
3. Power Point Presentation re Survey of Garey High School Students, by Ariel Andres, Garey High School student