

# City of Hesperia STAFF REPORT



**DATE:** March 21, 2017

**TO:** Mayor and Council Members

**FROM:** Nils Bentsen, City Manager

**BY:** Mike Blay, Director of Development Services  
Dave Reno, Principal Planner  
Tina Bulgarelli, Administrative Analyst

**SUBJECT:** Discussion on Marijuana Related Activities

---

## RECOMMENDED ACTION

It is recommended that the City Council receive and file this report and provide staff direction regarding marijuana related activities to be permitted and/or regulated within the City of Hesperia.

## BACKGROUND

### Federal Law

Marijuana possession and use has been illegal under federal law since 1934 with the passage of the Marijuana Tax Act. In 1970, Congress passed the Controlled Substances Act ("CSA"), which banned all cultivation, distribution and possession of marijuana. The federal government still classifies marijuana as a Schedule 1 substance, with no known medical use, meaning that marijuana is completely prohibited under federal law.

However, in 2013 the U.S. Justice Department ordered enforcement of the CSA a low priority in states like California which regulate medical marijuana. On December 9, 2014 the U.S. Congress passed the Rohrabacher-Farr amendment, which specifically prohibits federal funds from being used to prevent states from implementing laws authorizing the use, distribution, possession or cultivation of medical marijuana. On October 19, 2015 a U.S. District Court affirmed that the Rohrabacher-Farr amendment prevents the U.S. Justice Department from prosecuting otherwise lawful state medical marijuana businesses.

Despite this recent change in the federal stance regarding CSA enforcement (which could change again), the CSA remains valid federal law.

### California and Hesperia Law

- **Compassionate Use Act of 1996 (CUA) (Proposition 215)**

In 1996, California voters adopted the Compassionate Use Act (i.e., Proposition 215) ("CUA") as a ballot initiative, codified as Health and Safety Code section 11362.5. The CUA decriminalized medical marijuana by providing a limited defense from prosecution under state law for cultivation and possession of marijuana. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th

1153). Since the passage of the CUA in 1996, 29 other states and the District of Columbia have allowed some form of medical marijuana use.

- **Medical Marijuana Program Act of 2004 (MMP) (Senate Bill 420)**

In 2004, California Senate Bill (SB) 420 went into effect. SB 420 was enacted by the Legislature to clarify the scope of the CUA. SB 420 established a voluntary program for medical marijuana identification cards, provided state criminal immunity to certain medical marijuana activities, and allowed California cities and counties to adopt and enforce rules and regulations consistent with SB 420 and the CUA. These new regulations and rules became known as the Medical Marijuana Program (“MMP”), which among other things enhanced the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.

- **Hesperia Medical Marijuana Dispensary Ordinance No. 2005-12**

In 2005, the City Council adopted Ordinance No. 2005-12, establishing the prohibition of medical marijuana dispensaries within City limits.

- ***City of Riverside v. Inland Empire Patients Health and Wellness Center* (2013) 56 Cal.4th 729; *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975**

In 2013, the California Supreme Court found that neither the CUA nor the MMP provide medical marijuana patients with an unfettered right to obtain, cultivate, or dispense marijuana for medical purposes and confirmed a city’s ability to prohibit medical marijuana dispensaries within its boundaries. (*City of Riverside v. Inland Empire Patients Health and Wellness Center* (2013) 56 Cal.4th 729; *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975.) Rather, the court held that the statutes set up limited defenses to state criminal prosecution.

- **Hesperia Urgency Marijuana Cultivation Ordinance of 2015**

In March 2015, the City Council adopted an urgency ordinance prohibiting the commercial cultivation of marijuana within commercial and industrial zones and land-use designations. This urgency ordinance expired on April 6, 2016.

- **Medical Marijuana Regulation and Safety Act of 2015 (MMRSA) (Assembly Bill 266, Assembly Bill 243, Senate Bill 643)**

In October 2015, the State legislature enacted the Medical Marijuana Regulation and Safety Act (“MMRSA”) to establish a statewide regulatory system for the licensing and operation of cultivation, processing, transportation, testing, distribution, and use of medical marijuana. The MMRSA consists of three bills: AB 266, AB 243 and SB 643. Among other things, these bills create a dual licensing system, which allows the State to govern aspects of the operation such as cultivation and mobile delivery unless the City adopts land use regulations prohibiting or allowing these activities or uses. MMRSA provides for seventeen different types of commercial medical marijuana state licenses.

State licenses for these activities will likely start being issued in January, 2018. A state license is required to lawfully operate any of these commercial medical marijuana businesses. Until 2018 (and for a year after commercial licenses start being issued) medical marijuana

dispensaries (unless banned by local laws) may continue to operate as non-profit cooperatives/collectives.

- **Hesperia Consideration of (Updated) Medical Marijuana Ordinance**

In February 2016, the City Council considered, but did not take action on a proposed ordinance to prohibit additional medical marijuana activities within the City.

- **Adult Use of Marijuana Act of 2016 (AUMA) (Proposition 64)**

On November 8, 2016, California voters adopted Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act ("AUMA"). AUMA legalizes personal use of marijuana, personal possession of up to one ounce of marijuana, and personal cultivation of up to six marijuana plants. AUMA largely preempts local control over these personal activities (although cities may completely prohibit outdoor personal cultivation and may also regulate - though not ban - indoor cultivation). AUMA authorizes cities to define, regulate and/or prohibit certain commercial marijuana related activities. At this time, seven other states and the District of Columbia permit the adult use of marijuana.

Largely mirroring MMRSA's medical marijuana state licensing regime, AUMA provides for (on or about January 1, 2018) 19 different state licenses for commercial marijuana businesses (for cultivation, manufacturing, testing, distribution and retail sale) and establishes a statewide marijuana regulatory system to be administered by a new Bureau of Marijuana Control. A state license is required to operate a commercial marijuana business.

The state now authorizes (and preempts local control over) personal marijuana use and personal marijuana possession (with limited exceptions concerning personal cultivation). However, the City may regulate and/or prohibit marijuana business activities.

The City's existing land use regulations that prohibit medical marijuana dispensaries are still in place. Presently, the City neither permits nor issues business licenses for any marijuana related activity. By 2018 the State will begin issuing licenses for both medical and nonmedical marijuana commercial business operations under the provisions of both MMRSA and AUMA.

While Hesperia Municipal Code § 16.16.073 expressly prohibits medical marijuana dispensaries within the City of Hesperia, staff recommends that by 2018 the City specifically address whether some or all of the multiple state authorized marijuana businesses (e.g., cultivation, transportation, manufacturing, testing, retail sales) be expressly permitted or prohibited.

## **ISSUES/ANALYSIS**

Staff is seeking direction regarding the various types of commercial marijuana activities that starting on or about January 1, 2018 may be permitted within the City. The City retains the authority to regulate and/or prohibit commercial marijuana activities.

Staff is also seeking direction on whether the City desires to expressly prohibit outdoor personal cultivation and/or regulate indoor personal cultivation. However, there is a limited amount of activity that the City cannot prohibit:

### **Permitted Under Proposition 64 – Effective as of November 9, 2016**

Individuals over 21 years of age may possess no more than one ounce (28.4 grams) of marijuana and eight grams of concentrated marijuana. Individuals may also cultivate up to six plants per residence at one time (cities may prohibit outdoor cultivation). Adults may give away, without compensation, up to 28.4 grams of marijuana or eight grams of concentrated marijuana, to another adult.

However, cities may “reasonably” regulate (but not prohibit) indoor personal cultivation of marijuana. Examples of such regulations would be odor control, security provisions and regular fire department inspections. Cities may ban outdoor personal cultivation through an express prohibition. However, unless outdoor personal cultivation is expressly prohibited, then individuals under State law have the right to cultivate at his/her residence up to six plants outdoors.

Medical marijuana patients may cultivate and possess more than the above limits, provided that the quantities are substantiated by a doctor’s recommendation and are allowable under existing Medical Marijuana laws.

Cities may ban or regulate deliveries of both medical and adult marijuana to locations within the city, but may not prevent a delivery service for using public roads to pass through the city from a dispensary to a delivery destination outside the city.

### **Commerical Marijuana State Business Licenses (Medical and Recreational)**

There are several different categories of licenses that will be available from the State beginning on or about January 1, 2018. These are summarized below, with information regarding what the Council can allow and prohibit for each license type. Proposition 64 allows local jurisdictions to “hand-pick” which license types will be allowed in their jurisdiction, and where such businesses can be located. Staff recommends that the City Council expressly decide what will be the status of each of the different types of both medical and recreational commerical marijuana businesses.

#### **Cultivation**

The Council may define, and regulate cultivation by private citizens on residential properties indoors and outdoors and prohibit cultivation outdoors. The Council may restrict commercial/medical cultivation operations to certain zones and limit their number.

Should the Council allow outdoor personal cultivation, each residence is limited to six plants at a time and the cultivation must not be viewable from a public place (the right-of-way).

Outdoor commercial/medical cultivation, if allowed by Council, may be restrained by zoning, however, the State license types, size of cultivation site, and labeling, packaging, and growing regulations are restricted by Proposition 64.

Proposition 64 defines and allows for the cultivation of industrial hemp products that fall below a certain content of THC and restricts their operations to agricultural areas.

### **Production and Manufacturing**

The Council may define the kinds of production and manufacturing that may occur within the City. The Council may also define the zones where these types of businesses are allowed. These activities could include volatile extraction of THC (allowed for medical marijuana manufacture only, per State law), the non-volatile extraction of THC (allowed for adult and medical manufacture) as well as the manufacture of oils, pills or edible products. Should these activities be permitted, they would be subject to state laws regulating their manufacture, content, labeling and packaging.

### **Distribution/Transportation**

The Council may allow distribution of marijuana, either medical or adult, through licensed distributors. These licensees differ from retail sale licensees in that they may only distribute product to retail licensees for subsequent sale to customers.

### **Sales: Dispensaries and Delivery Services**

The City currently bans dispensaries, in effect since 2005. The Council may elect to continue this ban as well as define and prohibit the establishment of mobile dispensaries and delivery services for both medical and adult users (except for the use of public roads as discussed above).

Should the Council choose to permit sales activities, these may be limited to a specific number or an allocation based on the City's population. (i.e. 1/10,000). The Council may also limit sales activities to specific zones or land use designations and prohibit their establishment within proximity to residential areas and sensitive uses, such as parks or schools (this would be similar to adult business regulations). It should be noted that sales activities will not be permitted until the state licensing scheme is established, scheduled for January 2018. Any proposed sales activities would have to first be permitted by the state before obtaining any permits from the City.

Proposition 64 bans the sale or dispensing of recreational marijuana within 600 feet of schools, daycare centers, or youth centers which are in existence at the time the license is issued. Cities may increase this radius. Additionally, the sale of marijuana cannot occur at an establishment that sells tobacco or alcohol products.

### **Testing**

Another type of commercial marijuana business activity that will be authorized statewide in or about January 1, 2018 is the testing of marijuana for pesticides, etc., before retail sales are allowed. The City may allow or completely prohibit both medical and nonmedical commercial marijuana testing businesses.

### **Sale of Marijuana Accessories**

Section 26054 of Proposition 64 prohibits the sale of marijuana by retailers licensed to sell tobacco and alcohol products. Currently, items that are known to be used to smoke or ingest marijuana are available at retail stores selling tobacco or alcohol. These stores typically label

their merchandise as “for tobacco use only”. Proposition 64 would allow these retailers to continue to sell these items, however, they would not be allowed to keep, sell or transact marijuana on premises, excepting in small amounts used for testing and development, and not for consumption by customers.

### **Microbusinesses**

Microbusinesses differ from all other sale, distribution, and cultivation categories and are licensed separately by the State. The Council may choose to prohibit or allow this use. If allowed, this use can also be restricted by zoning and local regulations, similar to the other license types. A microbusiness is defined as “for the cultivation of marijuana on an area less than 10,000 square feet and act as a licensed distributor, Level 1 Manufacturer (uses non-volatile or no solvents for manufacturing marijuana products), and retailer”.

### **FISCAL IMPACT**

By January 1, 2018, the state is preparing to issue up to 19 different licenses to cover various types of cultivation, manufacturing, testing, retailing and distribution of marijuana products. Applicants who receive a state license may then apply to the City to obtain a local license before commencing business. Should the City Council determine that marijuana related activities should be permitted, the Council may also determine whether additional taxes or business license fees should be collected.

### **Taxes**

Both medical and nonmedical marijuana will be subject to a new statewide tax on cultivation as well as a retail excise tax. Nonmedical marijuana will also be subject to existing state and local sales taxes, while medical marijuana retail sales will be exempt from state sales taxes. Finally, cities may elect to establish new local taxes on both medical and nonmedical sales, as well as cultivation. The establishment of a new tax will require voter approval of a ballot measure. Cities that have established new taxes include Adelanto, Palm Springs, San Jose, Santa Ana and Desert Hot Springs.

Additionally, the County may elect to establish a sales tax on marijuana and marijuana products, and this tax may extend into incorporated and unincorporated areas. This would require voter approval.

### **Business Licensing**

Currently, the City collects a \$50 annual business license fee, in addition to an administrative fee of \$33. License renewals also require a \$50 fee as well as a \$19 administrative fee.

The City also collects an annual investigation fee for certain types of businesses. Massage establishments and adult businesses currently pay a \$200 fee to cover inspections by Fire, Building and Planning.

There are alternative methods to generate business license fees, such as basing the fee on number of employees or gross receipts. These methods may generate increased revenues over time. New fees may be adopted by resolution of the City Council, but should be justified to cover the costs reasonably borne to administer the business license program.

**ALTERNATIVE(S)**

1. Provide alternative direction to staff.

**ATTACHMENT(S)**

1. Table of potential medical and adult marijuana uses
2. Ballot summary of Proposition 64.