

City of Brisbane

Agenda Report

DATE: City Council meeting of February 18, 2016

TO: Mayor and City Council

FROM: Michael Roush, City Attorney
Teresa L. Stricker, Deputy City Attorney

SUBJECT: Medical Marijuana Regulations

CITY COUNCIL GOALS

To assure the safety of property and citizens residing, working, or visiting Brisbane.

To preserve and enhance livability and diversity of neighborhoods.

To preserve the unique current character of Brisbane.

To promote economic development that stabilizes and diversifies the tax base.

PURPOSE

The purpose of this item is for the Council to determine, in light of new state laws regulating medical marijuana-related businesses, whether to follow the recommendations of the Health and Safety Committee (“Committee”) regarding the City’s existing marijuana regulations and possible new marijuana regulations.

None of the new regulations recommended by the Committee would restrict the *use* of marijuana in Brisbane.

RECOMMENDATIONS

1. The Committee recommends that the Council adopt the resolution that accompanies this report to confirm that under the state's new medical marijuana laws, the state may *not* issue a license to cultivate medical marijuana within Brisbane because the City's zoning ordinance bans commercial cultivation of marijuana in every zone.
2. The Committee further recommends that the Council *not* consider amending the zoning ordinance to allow commercial cultivation of medical marijuana.
3. The Committee also recommends that the Council consider adopting a variety of *new* medical-marijuana related regulations. In particular, the Committee recommends that the Council:
 - Direct staff to initiate a zoning text amendment process before the Planning Commission to consider banning the cultivation of marijuana for *personal* medical use;
 - Direct staff to draft an ordinance banning the delivery of marijuana or marijuana products to qualifying patients, primary caregivers and testing facilities located within Brisbane;
 - Direct staff to initiate a zoning text amendment process before the Planning Commission to consider adopting an *express* prohibition against marijuana dispensaries; and
 - Direct staff to initiate a zoning text amendment process before the Planning Commission to consider banning other types of marijuana-related businesses in Brisbane, such as those engaged in researching and developing, manufacturing/processing, warehousing, testing, transporting and distributing of marijuana and/or marijuana products.
4. Should *any* marijuana-related businesses be allowed to operate in Brisbane, whether restricted or not, staff recommends that the Council consider directing staff to draft an ordinance requiring such businesses to obtain a license from the City.
5. Staff recommends that the Council plan to adopt any legislation imposing new regulations on marijuana-related businesses *no later than early 2017* to ensure that those regulations take effect well before the state begins issuing licenses to such businesses.

BACKGROUND

Last fall, the Legislature passed the Medical Marijuana Regulation and Safety Act. The Act, as originally enacted, consists of three separate pieces of legislation governing the licensing and control of medical marijuana businesses in the state. With certain limitations, the Act generally protects cities' local licensing practices, zoning ordinances and police power.

Among other things, the Act establishes dual licensing structure requiring *both* a state license and any local license or permit required by ordinance for medical marijuana-related businesses.

The Act requires state licensing for businesses engaged in cultivation, retail sales (so called "dispensaries"), distribution, transportation and delivery of medical marijuana or medical marijuana products. The Act restricts the number of categories of state medical marijuana licenses any business may hold, and prohibits medical marijuana licensees from also holding state licenses to sell alcohol. The Act also limits "vertical integration" by requiring third party distribution, transportation and testing of medical marijuana products.

The Act further establishes uniform security requirements for dispensaries and transporters, regulates physicians and recognizes local authority to levy taxes and fees.

DISCUSSION

Many anticipate a rapid growth in marijuana-related businesses once the state begins issuing licenses for such businesses. Brisbane, like other cities statewide, may wish to consider imposing local restrictions on such businesses within the broad latitude cities retain to regulate in this area.

On January 20, 2016, the Committee met to discuss the new state laws pertaining to medical marijuana and to consider new local regulations in this area. The Committee makes the following recommendations to Council:

- 1. The Committee Recommends that Council Adopt a Resolution to Confirm that, under State Law, the State May *Not* Issue a License to Cultivate Medical Marijuana in Brisbane Because the City's Zoning Ordinance Bans *Commercial Cultivation of Marijuana*.**

Under the new state law, the state may *not* issue a license to cultivate medical marijuana in any city that bans cultivation within its jurisdiction. As originally enacted, however, the Act provided that the state was to become the sole licensing authority for commercial cultivation of medical marijuana in any city that did not have local land-use regulation governing commercial cultivation in effect prior to March 1, 2016.

The League of Cities advised, based on the Act's original language, that cities that did *not* have a land-use regulation governing commercial cultivation in effect on March 1, 2016 may be *preempted* from banning or regulating commercial cultivation of medical marijuana in the future. The League took the view that, under such circumstances, the city would lose all authority to regulate commercial cultivation of medical marijuana within its jurisdiction. If a city had *any* local land-use regulation governing commercial cultivation in effect by the March 1, 2016 deadline, the League advised that the city would retain its local control over commercial cultivation and may amend its regulations in the future.

Under Brisbane's current zoning ordinance, commercial cultivation of marijuana is not a permitted use in any zoning district. Cultivation of marijuana for commercial use is neither specifically defined in the zoning ordinance nor similar in nature or character to any land use defined in the ordinance. Under section 17.01.080 of the Brisbane Municipal Code – which prohibits any land use that is not specifically defined as a permitted or conditional use – commercial cultivation of marijuana is a non-permitted use in every zone.

The Act expressly permits cities to rely on general zoning ordinance provisions that prohibit all uses that are not explicitly listed as a permitted or conditional use to ban commercial cultivation of medical marijuana. The League of Cities recommended that any city that relies on such “permissive zoning principles” to ban commercial cultivation adopt a resolution, prior to the March 1, 2016 deadline, explaining that interpretation of its zoning ordinance and clarifying that under the Act, the state may not issue a license to cultivate medical marijuana within the city. For this reason, the Committee recommended that the Council adopt such a resolution.

After the Committee met, the Legislature passed an urgency bill amending the Act to remove the March 1, 2016 deadline for local governments to have land-use regulations in effect governing commercial cultivation. This amendment, which took effect on February 3, 2016, eliminated any argument that cities that do not have commercial cultivation regulations in place by March 1, 2016 lose their local authority to regulate commercial cultivation in the future.

Although the March 1, 2016 deadline has now been lifted, staff nevertheless recommends that the Council adopt the resolution currently before the Council to avoid any confusion later, once the state begins issuing licenses to commercial cultivators, about whether the state may issue a license to cultivate marijuana in Brisbane.

2. The Committee recommends that Council *NOT* Amend the City's Zoning Ordinance to Allow *Commercial* Cultivation in Brisbane.

The Committee further recommends that Council *not* consider amending the City's zoning ordinance to allow commercial cultivation of medical marijuana in Brisbane in any zoning district.

Should, however, the Council wish to consider allowing commercial cultivation in certain zones, as either a permitted or conditional use, staff recommends that Council take three separate actions.

First, staff recommends that Council adopt, at its February 18th meeting, the proposed resolution to clarify that under *current* law, the state may not issue a license to cultivate marijuana in Brisbane.

Second, staff recommends that if Council wishes to allow any commercial cultivation of medical marijuana in Brisbane, that the Council direct staff to initiate a zoning text amendment process before the Planning Commission to consider options to permit commercial cultivation of medical marijuana in certain zones.

Third, to the extent that commercial cultivation of medical marijuana is to be allowed anywhere in Brisbane, whether regulated or not, staff recommends that Council direct staff to draft an ordinance requiring such businesses to obtain a license from the City.

3. The Committee Recommends that Council Direct Staff to Initiate a Zoning Text Amendment Process Before the Planning Commission to Consider Banning Cultivation of Marijuana for *Personal* Use in Every Zone.

State law permits cultivation of marijuana for *personal* medical use so long as the cultivation occurs within a 100 square foot area for an individual qualifying patient and within a 500 square foot area for a primary caregiver of up to five patients.

Those engaged in cultivation for personal medical use will *not* need a license from the state under the new state laws. But cultivation of medical marijuana beyond the strict limits prescribed by the state for personal cultivation constitutes commercial cultivation and will require a state license. And the Act phases out the existing model of marijuana cooperatives and collectives one year after the state commences issuing licenses.

The new state laws do not restrict the authority of cities to ban or further restrict personal cultivation of marijuana in their local jurisdictions if they choose. Although as discussed above, the City's zoning ordinance bans cultivation of marijuana for *commercial* purposes, Brisbane does not currently regulate cultivation of marijuana for *personal* use.

The Committee recommends that Council direct staff to initiate a zoning text amendment process before the Planning Commission to consider prohibiting in every zone the cultivation of marijuana for *personal* use.

4. The Committee Recommends that the Council Direct Staff to Draft an Ordinance Banning *Delivery* of Medical Marijuana to Any Brisbane Location.

Under the Act, a marijuana dispensary may obtain a separate state license to deliver medical marijuana or marijuana products to qualified patients, primary caregivers or testing facilities. The Act permits only licensed dispensaries to engage in such “delivery” services; common carriers such as UPS or Federal Express may not obtain a medical marijuana delivery license under state law. The Act provides that all medical marijuana delivery services will be subject to regulations that will be adopted in the future by the state’s newly-created Bureau of Medical Marijuana Regulation.

The Act explicitly provides that cities retain the authority to ban or restrict delivery of medical marijuana in their jurisdictions. But there are two limits the Act imposes on cities’ authority to regulate medical marijuana deliveries. First, state law does *not* permit cities to rely on permissive zoning principles to ban medical marijuana deliveries. Rather, the Act specifically requires any local ban on medical marijuana deliveries to be *express*. Second, cities may *not* restrict businesses with delivery licenses from using public roads within their jurisdictions to transport medical marijuana or medical marijuana products to and from locations outside of their jurisdictions.

Brisbane does not currently have any regulation that expressly bans or restricts the delivery of medical marijuana within Brisbane.

It is unclear at this time whether criminal activity will increase in cities that allow medical marijuana deliveries under the state’s new licensing structure. And the state has not yet adopted regulations that will ultimately govern state-licensed medical marijuana delivery services. For these reasons, the Police Chief recommends that the City ban all medical marijuana deliveries at this time. Based on the Chief’s recommendation, the Committee recommends that the Council adopt an ordinance banning all marijuana deliveries *to or from* any Brisbane location.

To accomplish that goal, staff recommends that the Council direct staff to draft an ordinance amending the City’s business regulation provisions of the Municipal Code to prohibit the delivery of marijuana or marijuana products as a business in the City. As explained above, however, such an ordinance would *not* prevent the use of public roads in Brisbane to deliver medical marijuana to and from locations outside of Brisbane. Once the state licensing program commences, and it is clearer what impact medical marijuana

deliveries have in other communities, the Council may then revisit whether to allow medical marijuana deliveries in Brisbane.

Should the Council nevertheless wish to allow any medical marijuana deliveries in Brisbane at this time, staff recommends that the Council direct staff to draft an ordinance requiring businesses delivering medical marijuana in Brisbane to obtain a license from the City.

5. The Committee Recommends that the Council Direct Staff to Initiate a Zoning Text Amendment Process Before the Planning Commission to Consider Expressly Banning Marijuana *Dispensaries* in Every Zone.

Although the City's zoning ordinance does not currently contain an express prohibition against marijuana dispensaries, staff interprets the zoning ordinance to prohibit such businesses in every zone under the permissive zoning principles discussed above.

Because, however, it could be argued that marijuana dispensaries are similar in character or nature to permitted retail uses, this interpretation may be challenged in the future. Although we believe the City would likely prevail against any such challenge, the City may be required to devote significant staff time and incur considerable legal fees in the process.

Accordingly, the Committee recommends that Council direct staff to initiate a zoning text amendment process before the Planning Commission to consider *expressly* prohibiting marijuana dispensaries in every zone.

If dispensaries are to be allowed, whether restricted or not, staff recommends that Council direct staff to draft an ordinance requiring such businesses to obtain a license from the City to operate in Brisbane.

6. The Committee Recommends that the Council Direct Staff to Initiate a Zoning Text Amendment Process Before the Planning Commission to Consider Banning *Other Types of Marijuana-Related Businesses* in Every Zone.

There are a variety of other types of marijuana-related businesses that may seek to establish themselves in Brisbane once the state starts issuing licenses under the Act. Such businesses include those engaged in researching and developing, manufacturing/processing, warehousing, testing, distributing and transporting of marijuana or marijuana products. Under the City's current zoning ordinance, these businesses would be permitted to operate in any zone in Brisbane that permits, as a matter of right, the same types of land uses for other types of substances or products.

For example, research and development is permitted as a matter of right in the Sierra Point Commercial District. Research and development, fabrication and warehousing are permitted as a matter of right in the Crocker Park Trade Commercial District. And research and development, light manufacturing/processing, and warehousing are all uses that are permitted as a matter of right in the Manufacturing (M-1) zone.

The Committee recommends that Council direct staff to initiate a zoning text amendment process before the Planning Commission to explore options to ban these types of marijuana-related businesses in Brisbane.

To the extent such businesses are to be allowed as a permitted or conditional use, staff recommends that Council direct staff to draft an ordinance requiring such businesses to obtain a license from the City to operate in the Brisbane.

TIMING CONSIDERATIONS


As we understand it, the state expects to begin issuing medical marijuana licenses in January 2018. But the state may begin sooner.

To avoid confusion about what regulations exist in Brisbane once the state begins issuing medical marijuana licenses, staff recommends that the Counsel aim to adopt *by early 2017* any new regulations it may wish to impose on marijuana-related businesses.


FISCAL IMPACT

The fiscal impact of adopting the proposed resolution is the potential *saved* staff time, including the costs of legal services, by clarifying now, long before the state begins issuing licenses, that state law precludes the state from issuing licenses to cultivate marijuana in Brisbane.

The fiscal impact of considering the new marijuana regulations discussed above is the staff time, including the costs of legal services, associated with exploring legislative options, drafting legislation and reports, and attending Planning Commission and Council meetings on these issues.



Teresa L. Stricker, Deputy City Attorney



Clayton Holstine, City Manager

RESOLUTION 2016-07

**A RESOLUTION OF THE BRISBANE CITY COUNCIL
CONFIRMING THAT STATE LAW PRECLUDES THE STATE FROM ISSUING
ANY LICENSE TO CULTIVATE MEDICAL MARIJUANA WITHIN THE CITY
OF BRISBANE BECAUSE THE CITY'S ZONING ORDINANCE
BANS COMMERCIAL CULTIVATION OF
MARIJUANA IN EVERY ZONE**

WHEREAS, the recently adopted Medical Marijuana Regulation and Safety Act establishes a state-wide licensing structure for a variety of medical-marijuana related businesses;

WHEREAS, under the Act, those engaged in cultivating medical marijuana must obtain a license from the Department of Food and Agriculture of the State of California unless the cultivation is for personal medicinal use as strictly defined under state law;

WHEREAS, Health and Safety Code section 11362.777(b)(3) prohibits the Department of Food and Agriculture from issuing a state license to cultivate medical marijuana within a city that prohibits such cultivation under general zoning regulations that ban all uses that are not explicitly defined as a permitted or conditional use;

WHEREAS, under section 17.01.080 of the Brisbane Municipal Code, any land use that is not expressly defined as a permitted or conditional use in the City's zoning ordinance is prohibited in every zone in Brisbane; and

WHEREAS, because cultivation of marijuana for commercial purposes is not expressly defined in the City's zoning ordinance, and is not similar in nature or character to any land use expressly defined in the ordinance, commercial cultivation of marijuana is banned in every zone in Brisbane.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Brisbane finds as follows:

Under Health and Safety Code section 11362.777(b)(3), the Department of Food and Agriculture of the State of California may *not* issue a license for the cultivation of medical marijuana in any zone within the City of Brisbane.

Cliff Lenz, Mayor

I hereby certify that the foregoing Resolution 2016-07 was duly and regularly adopted at a regular meeting of the Brisbane City Council on February 18, 2016, by the following vote:

AYES:
NOES:
Absent:

Sheri Marie Spediacci, City Clerk