

URGENCY

NUMBER: 291.2

TITLE: AN UNCODIFIED INTERIM URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS ENACTED PURSUANT TO CALIFORNIA GOVERNMENT CODE SECTION 65858 EXTENDING FOR A PERIOD OF TWELVE (12) MONTHS, FOR THE FULL TWO YEARS ALLOWED UNDER STATE LAW, THE TEMPORARY MORATORIUM ON MARIJUANA USES PENDING THE ENACTMENT OF AN UPDATE TO THE CITY'S MUNICIPAL CODE

HISTORY: This Ordinance was introduced by the City Council at its meeting of January 16, 2018, upon motion by Councilmember Nuñez, and was adopted immediately as an interim urgency ordinance pursuant to the provisions of California Government Code Section 65858. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES: (5) Mayor Tran, Vice Mayor Grilli, Councilmembers Nuñez, Barbadillo, and Phan

NOES: (0) None

ABSENT: (0) None

ABSTAIN: (0) None

ATTEST:

Mary Lavelle, City Clerk

Rich Tran, Mayor

APPROVED AS TO FORM:

Christopher J. Diaz, City Attorney

RECITALS AND FINDINGS:

WHEREAS, the City of Milpitas, California (the “City”) is a municipal corporation, duly organized under the constitution and laws of the State of California; and

WHEREAS, California Government Code Section 65800 et seq. authorizes the adoption and administration of zoning laws, ordinances, rules and regulations by cities as a means of implementing the General Plan; and

WHEREAS, on June 28, 2016, the Secretary of State certified Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act (“AUMA”), for the November 8, 2016, ballot; and

WHEREAS, the AUMA became law as a majority of the electorate voted “Yes” on the proposition; and

WHEREAS, the AUMA regulates, among other items, the use of marijuana for personal and commercial purposes, including the recreational use of marijuana by adults over 21 years of age; and

WHEREAS, to regulate personal use of marijuana the AUMA added Section 11362.1 to the Health and Safety Code, which makes it “lawful under state and local law” for persons 21 years of age or older to “possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever” up to 28.5 grams of marijuana in the form of concentrated cannabis or not more than eight grams of marijuana in the form of concentrated cannabis contained in marijuana products; and

WHEREAS, the AUMA makes it lawful for those individuals to “possess, plant, cultivate, harvest, dry, or process not more than six living marijuana plants and possess the marijuana produced by the plants; and

WHEREAS, the AUMA makes it lawful for those individuals to smoke or ingest marijuana or marijuana products; and

WHEREAS, many of the AUMA’s provisions took effect on November 9, 2016; and

WHEREAS, to regulate commercial use of marijuana, the AUMA added Division 10 (Marijuana) to the Business & Professions Code, which grants State agencies “the exclusive authority to create, issue, renew, discipline, suspend, or revoke” licenses for businesses including the transportation, storage, distribution, sale, cultivation, manufacturing, and testing of marijuana; and

WHEREAS, the AUMA provides that the above State agencies shall promulgate rules and regulations and shall begin issuing licenses under Division 10 by January 1, 2018; and

WHEREAS, the AUMA states that a local jurisdiction shall not prevent transportation of marijuana or marijuana products on public roads by a licensee transporting marijuana or marijuana products in compliance with Division 10; and

WHEREAS, the AUMA authorizes cities to “reasonably regulate” without completely prohibiting cultivation of marijuana inside a private residence or inside an “accessory structure to a private residence located upon the grounds of a private residence that is fully enclosed and secure”; and

WHEREAS, the AUMA authorizes cities to completely prohibit outdoor cultivation on the grounds of a private residence, up to and until a “determination by the California Attorney General that nonmedical use of marijuana is lawful in the State of California under federal law”; and

WHEREAS, the AUMA authorizes cities to completely prohibit the establishment or operation of any marijuana business licensed under Division 10 within its jurisdiction, including marijuana dispensaries, marijuana retailers, and marijuana delivery services; and

WHEREAS, absent appropriate local regulation authorized by the AUMA, State regulations will control; and

WHEREAS, Senate Bill 94 (“SB 94”), a budget trailer bill made effective on June 27, 2017, repealed the Medical Cannabis Regulation and Safety Act (MCRSA) which previously regulated medical cannabis commercial activity, and amended AUMA to consolidate the state licensing scheme applicable to both medical and adult-use commercial cannabis activity under a new law entitled the Medicinal and Adult-Use Cannabis Regulation and Safety Act (“MAUCRSA”);

WHEREAS, in May 2013, the California Supreme Court held in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 56 Cal. 4th 729 (2013) that cities have the authority to regulate or ban outright medical marijuana land uses; and

WHEREAS, the California Attorney General’s August 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use recognizes that the cultivation or other concentration of marijuana in any location or premises without adequate security increases the risk that nearby homes or businesses may be negatively impacted by nuisance activity such as loitering or crime; and

WHEREAS, under the Federal Controlled Substances Act, the use, possession, and cultivation of marijuana are unlawful and subject to federal prosecution without regard to a claimed medical need; and

WHEREAS, the indoor cultivation of marijuana has potential adverse effects to the health and safety of the occupants; including structural damage to the building due to increased moisture and excessive mold growth which can occur and can pose a risk of fire and electrocution; additionally, the use of pesticides and fertilizers can lead to chemical contamination within the structure; and

WHEREAS, based on the experiences of other cities, these negative effects on the public health, safety, and welfare are likely to occur, and continue to occur in the City due to the establishment and operation of marijuana cultivation, processing, and distribution uses; and

WHEREAS, based on the findings above the potential establishment of marijuana cultivation and other uses in the City without regulation poses a current and immediate threat to the public health, safety, and welfare in the City due to the negative land use and other impacts of such uses as described above; and

WHEREAS, the issuance or approval of business licenses, subdivisions, use permits, variances, building permits, or any other applicable entitlement for marijuana dispensaries, cultivation, manufacturers and delivery will result in the aforementioned threat to public health, safety, or welfare; and

WHEREAS, it is in the interest of the City, its residents, and its lawfully permitted businesses that City staff undertake a study to consider zoning, zoning ordinance amendments, and/or other measures to regulate the establishment and operation of marijuana dispensaries, cultivation, manufacturers, and delivery of marijuana uses in the City; and

WHEREAS, California Government Code Section 65858 expressly authorizes the City Council to adopt by four-fifths (4/5) vote, without following the procedures otherwise required for the adoption of a zoning ordinance, an urgency ordinance which is necessary for the immediate protection of the public health, safety, and welfare; and

WHEREAS, on January 17, 2017, the City Council adopted Urgency Ordinance No. 291 pursuant to Government Code Section 65858, establishing a forty-five (45) day moratorium on all marijuana uses to the extent allowed by law in light of the passage of Proposition 64 in the State of California; and

WHEREAS, on February 21, 2017, the City Council adopted Urgency Ordinance No. 291.1 pursuant to Government Code Section 65858, extending for a period of 10 months and 15 days, for the full year authorized under State law until January 17, 2018, the moratorium on all marijuana uses to the extent allowed by law in light of the passage of Proposition 64 in the State of California; and

WHEREAS, City staff, the Police Department, and the City Attorney's office are continuing to conduct research into the possible and likely impacts of further regulating or prohibiting marijuana uses in the City; and

WHEREAS, a City Council subcommittee has conducted meetings to analyze what types of regulations, if any, the City would like to impose on marijuana uses in light of the passage of Proposition 64 and MAUCRSA in the State of California; and

WHEREAS, on December 7, 2017 the State's three cannabis licensing authorities used the emergency rulemaking process to create new temporary regulations to implement MAUCRSA; and

WHEREAS, on January 4, 2018, the United States Attorney General rescinded prior Department of Justice policies widely known as the Cole Memorandum, which de-prioritized marijuana enforcement against businesses following state marijuana laws and adhering to certain criteria; and

WHEREAS, the rescission of those Department of Justice policies has created nationwide uncertainty regarding federal enforcement against marijuana-related activities; and

WHEREAS, as a result, the City Council desires to extend the moratorium for a period of twelve (12) months until January 17, 2019 to allow staff and the City Council the opportunity to continue to research and select the best course of action for the City's citizens and the community at large; and

WHEREAS, the City Council has determined that the circumstances and conditions that led to the adoption of Urgency Ordinance No. 291, which are set out in the recitals of Urgency Ordinance No. 291 have not been alleviated as of the date of this Ordinance and continue to create the concerns described in Urgency Ordinance No. 291; and

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. FINDINGS

The City Council hereby finds, determines, and declares that this Interim Urgency Ordinance adopted pursuant to California Government Code Section 65858 is necessary because:

- A. Certain provisions of the AUMA became effective November 9, 2016, and contain provisions which allow for local governments to reasonably regulate or ban certain activities thereunder.
- B. To allow time for the City to consider, study, and enact regulations or a ban for various marijuana cultivation, delivery, processing, manufacturing, and distribution uses, it is necessary to temporarily prohibit/suspend the establishment of any uses or the approval of any and all use permits, variances, building permits, or any other entitlement or permit authorizing the establishment of marijuana cultivation uses, delivery, processing, manufacturing and distribution uses, and marijuana dispensaries as defined herein, as such uses may be in conflict with the development standards and implementation regulations that the City will ultimately impose after the City has considered and studied this issue, which shall be accomplished within a reasonable time.
- C. A moratorium will provide the City with time to study marijuana cultivation uses, delivery, processing, manufacturing and distribution uses, and marijuana dispensaries and potential impacts such land uses may have on the public health, safety, and welfare.

- D. Without the imposition of a temporary moratorium on the establishment of marijuana cultivation, the City anticipates that one (1) or more marijuana cultivation uses may locate in the City before a non-urgency ordinance would become effective, and that such uses may pose serious risks to the public health, safety, and welfare.
- E. There is a current and immediate threat to the public health, safety, and welfare of the City and its community, thereby necessitating the immediate enactment of this moratorium as an urgency ordinance in order to ensure that permits for such facilities and uses are established only under adequate regulations. Imposition of a moratorium will allow the City sufficient time to conclude the preparation and enactment of a comprehensive ordinance for the regulation of these uses.

SECTION 3. URGENT NEED

Based on the foregoing recitals and findings, all of which are deemed true and correct, this Interim Urgency Ordinance is still urgently needed for the immediate preservation of the public health, safety, and welfare.

SECTION 4. DEFINITIONS

For purposes of this Interim Urgency Ordinance, the following definitions shall apply:

- A. “Commercial marijuana activity” includes the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, labeling, transportation, distribution, delivery or sale of marijuana and marijuana products.
- B. “Cultivation” means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of marijuana.
- C. “Delivery” means the commercial transfer of marijuana or marijuana products to a customer. "Delivery" also includes the use by a retailer of any technology platform owned and controlled by the retailer, or independently licensed under California law that enables customers to arrange for or facilitate the commercial transfer by a licensed retailer of marijuana or marijuana products.
- D. “Distribution” means the procurement, sale, and transport of marijuana and marijuana products between entities for commercial use purposes.
- E. “Manufacture” means to compound, blend, extract, infuse, or otherwise make or prepare a marijuana product.
- F. “Marijuana” means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include:
 - i. Industrial hemp, as defined in Section 11018.5 of the California Health & Safety Code; or
 - ii. The weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other product.
- G. “Marijuana accessories” means any equipment, products or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, smoking, vaporizing, or containing marijuana, or for ingesting, inhaling, or otherwise introducing marijuana or marijuana products into the human body.

- H. "Marijuana products" means marijuana that has undergone a process whereby the plant material has been transformed into a concentrate, including, but not limited to, concentrated cannabis, or an edible or topical product containing marijuana or concentrated cannabis and other ingredients.
- I. "Person" includes any individual, firm, co-partnership, joint venture, association, corporation, limited liability company, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular.
- J. "Private residence" means a house, an apartment unit, a mobile home, or other similar dwelling.
- K. "Sale" includes any transaction whereby, for any consideration, title to marijuana is transferred from one person to another, and includes the delivery of marijuana or marijuana products pursuant to an order placed for the purchase of the same and soliciting or receiving an order for the same, but does not include the return of marijuana or marijuana products by a licensee to the licensee from whom such marijuana or marijuana product was purchased.
- L. Any term defined in this Section also means the very term as defined in the California Business & Professions Code or the California Health & Safety Code, unless otherwise specified.

SECTION 5. PROHIBITED USES

For the period of this Ordinance or any extension thereof all personal, medical, and commercial marijuana activities, including but not limited to marijuana dispensaries, delivery, distribution, manufacturing, and sale of marijuana, as defined herein, shall be considered prohibited uses in all zoning districts of the City. Outdoor cultivation of marijuana is prohibited in every zoning district in the City. Indoor cultivation of marijuana is limited to residential districts, is limited to six (6) plants per private residence, and must be entirely for the personal use of a resident of the residence who is twenty-one (21) years of age or older. The City reserves the right to enact regulations regarding the indoor cultivation of marijuana at a later date. No person, as defined herein, may engage in the delivery, distribution, manufacturing, or sale of any marijuana product or marijuana accessories. During the effective period of this Ordinance, no such use shall be established, or continued if previously established, and no use permit, variance, building permit, or any other entitlement or permit, whether administrative or discretionary, shall be approved or issued for the establishment or operation of any uses prohibited by this Interim Urgency Ordinance, in any zoning district, and no person shall otherwise establish such businesses or operations in any zoning district.

SECTION 6. PENALTY FOR VIOLATION

No person, whether as principal, agent, employee or otherwise, shall violate, cause the violation of, or otherwise fail to comply with any of the requirements of this Section. Every act prohibited or declared unlawful, and every failure to perform an act made mandatory by this Section, shall be a misdemeanor or an infraction, at the discretion of the City Attorney or the District Attorney. In addition to the penalties provided in this Section, any condition caused or permitted to exist in violation of any of the provisions of this Section is declared a public nuisance and may be abated as provided in Title I, Chapter 21 of this Municipal Code and/or under State law.

SECTION 7. AUTHORITY

This Interim Urgency Ordinance is enacted pursuant to the authority conferred upon the City Council of the City of Milpitas by Government Code Section 65858, and therefore shall be in full force and effect immediately upon its adoption by a four-fifths (4/5) vote of the City Council. This Interim Urgency Ordinance shall take effect immediately upon adoption and shall be of no further force and effect on January 17, 2019 unless sooner repealed by action of the City Council.

SECTION 8. COUNCIL DIRECTION

During the period of this Ordinance, and any extension thereof, the City Council hereby directs City staff to: (1) review and consider options for the regulation or prohibition of marijuana cultivation, delivery, distribution, manufacturing uses in the

City, including but not limited to the development of appropriate rules and regulations governing the location and operation of such uses; and (2) to issue a written report describing the measures which the City has taken to address the conditions which led to the adoption of this Ordinance with the City Council ten (10) days prior to the expiration of this Interim Urgency Ordinance, or any extension thereof, and such report shall be made available to the public.

SECTION 9. CEQA

This Ordinance is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act (“CEQA”) Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. The City Council further finds, under Title 14 of the California Code of Regulations, Section 15061(b)(3), that this Ordinance is nonetheless exempt from the requirements of CEQA in that the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

SECTION 10. SEVERABILITY

If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance for any reason is held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

SECTION 11. CUSTODIAN OF RECORDS

The documents and materials that constitute the record of proceedings on which this Ordinance is based are located at the City Clerk’s office located at 455 East Calaveras Blvd., Milpitas, CA 95305. The custodian of these records is the City Clerk.

SECTION 12. RESTATEMENT OF EXISTING LAW

The adoption of this Ordinance shall not in any manner affect the prosecution for violations of ordinances, which violations were committed prior to the effective date hereof, nor be construed as a waiver of any license or penalty or the penal provisions applicable to any violation thereof.

SECTION 13. CERTIFICATION

The City Clerk shall certify as to the adoption of this Interim Urgency Ordinance and shall cause it to be published within fifteen (15) days of the adoption and shall post a certified copy of this Interim Urgency Ordinance, including the vote for and against the same, in the Office of the City Clerk, in accordance with California Government Code Section 36933.