

REGULAR

NUMBER: 298

TITLE: A ZONING ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS ADDING SUBSECTION XI-10-13.15 ENTITLED “CANNABIS USES” AND AMENDING SUBSECTION XI-10-13.05 ENTITLED “HOME OCCUPATION” OF THE MILPITAS MUNICIPAL CODE, TITLE XI, CHAPTER 10, SECTION 13, TO REGULATE CANNABIS CULTIVATION FOR PERSONAL USE AND TO PROHIBIT ALL COMMERCIAL CANNABIS USES, AND MAKING FINDINGS OF EXEMPTION FROM ENVIRONMENTAL REVIEW PURSUANT TO CEQA GUIDELINES SECTIONS 15060(C)(3) AND 15061(b)(3)

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of December 19, 2018, upon motion by Councilmember Montano, and was adopted (second reading) by the City Council at its meeting of January 15, 2019, upon motion by Councilmember Nuñez. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES: (5) Mayor Tran, Vice Mayor Dominguez, Councilmembers Montano, Nuñez, 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, in 1996, the voters of the State of California approved the Compassionate Use Act of 1996 (“CUA”) (codified as Health and Safety Code, § 11362.5 et seq.) to enable seriously ill Californians to legally possess, use, and cultivate marijuana for personal medical use free from prosecution under enumerated provisions of State law; and

WHEREAS, in 2003, the California Legislature adopted the Medical Marijuana Program Act (“MMP”) (codified as Health and Safety Code, § 11362.7 et seq.), which permits qualified patients and their primary caregivers to associate collectively or cooperatively to cultivate marijuana for medical purposes without being subject to criminal prosecution under State law, however certain exemptions from criminal prosecution will expire on or about January 9, 2019 (Health & Safety Code, § 11362.775); and

WHEREAS, in 2013, the California Supreme Court issued its decision in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal. 4th 729, holding that nothing in the CUA or MMP preempted cities’ authority to regulate or ban outright medical marijuana land uses; and

WHEREAS, in 2015, the California Legislature enacted the Medical Cannabis Regulation and Safety Act (MCRSA), which for the first time in the State’s history adopted comprehensive regulations and licensing for medical marijuana businesses; and

WHEREAS, in 2016, California voters approved Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), which legalized the non-medical use of marijuana by adults over 21 years of age, and provides for State licensing of adult-use marijuana businesses; and

WHEREAS, Senate Bill 94 (“SB 94”), signed by the Governor on June 27, 2017 to take effect immediately, repealed the MCRSA, 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); and

WHEREAS, MAUCRSA recognizes, preserves and does not supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances that regulate licensed cannabis businesses, including, but not limited to, completely prohibiting the establishment or operation of one or more types of businesses licensed under MAUCRSA within the local jurisdiction (Business and Professions Code, § 26200); and

WHEREAS, AUMA, as amended by MAUCRSA, legalizes cultivation of not more than six living cannabis plants per property by persons 21 years of age or older for personal use; and

WHEREAS, AUMA, as amended by MAUCRSA, provides that a city shall not completely prohibit personal cultivation of cannabis inside a private residence or inside an accessory structure to a private residence that is fully enclosed and secure, but that a city may completely prohibit personal cultivation of cannabis outdoors (Health and Safety Code, § 11362.2); 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 the moratorium on all marijuana uses for a period of 10 months and 15 days; and

WHEREAS, in January 2017, the City Council adopted Urgency Ordinance No. 291.2 pursuant to Government Code Section 65858, extending the moratorium for an additional 12-month period for the full two years authorized under State law, to allow the City to complete its study of potential cannabis regulations; and

WHEREAS, a City Council subcommittee, City staff and the City Council have conducted numerous meetings, community outreach, polling and analysis to determine what types of regulations, if any, the City would like to impose on marijuana/cannabis uses in light of the passage of AUMA and MAUCRSA in the State of California; and

WHEREAS, as a result of that study, and in accordance with Business and Professions Code, Section 26200, this Ordinance effects zoning limitations that prohibit the physical establishment or operation of all commercial cannabis uses within Milpitas, including all commercial cultivators, manufacturers, testing laboratories, retailers/dispensaries, delivery services, distributors and microbusinesses that are or will be licensed by the State of California pursuant to the MAUCRSA, as the best course of action for the City's citizens and the community at large.

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. MUNICIPAL CODE AMENDMENT

The City Council hereby adds Subsection XI-10-13.15 entitled "Cannabis Uses" to the Milpitas Municipal Code, Title XI, Chapter 10, Section 13, as set forth on Exhibit A, attached hereto and incorporated herein by this reference.

SECTION 3. MUNICIPAL CODE AMENDMENT

The City Council hereby amends and restates Subparagraph (B)(9) of Subsection XI-10-13.05 entitled "Home Occupation" of the Milpitas Municipal Code, Title XI, Chapter 10, Section 13, as follows:

"9. The occupations listed below shall not be considered incidental and secondary to the residence because they will change the residential character of the dwelling and because they change the character of the neighborhood:

- a. Barber and beauty shops or similar cosmetology establishments;
- b. Kennels and other boarding for pets;
- c. Mechanical and auto repairs;
- d. Medical and dental offices;
- e. Retail sales (excluding retail sales in which all products are sold over the phone or internet and shipped to the customer);
- f. Commercial cannabis uses. See Subsection XI-10-13.15."

All other provisions contained in Subsection XI-10-13.05 of the Milpitas Municipal Code shall remain in full force and effect.

SECTION 4. MUNICIPAL CODE AMENDMENT

The City Council hereby repeals and reserves Chapter 5 of the Milpitas Municipal Code, Title XI.

SECTION 5. CALIFORNIA ENVIRONMENTAL QUALITY ACT

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, and therefore is exempt from environmental review pursuant to CEQA Guidelines, Section 15060(c)(3). The City Council further finds that if this Ordinance is deemed to be a project, it is nonetheless exempt from further environmental review under the general rule stated in CEQA Guidelines, Section 15061(b)(3), that CEQA applies only to projects which have the potential for causing a significant effect on the environment. The Ordinance prohibits commercial cannabis businesses and outdoor personal cannabis cultivation from establishing or occurring in the City and therefore will maintain current development levels. Accordingly, the City Council finds that this Ordinance is categorically exempt from further CEQA review because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

SECTION 6. 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 7. 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 8. 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 9. EFFECTIVE DATE

Pursuant to Government Code, Section 36937, this Ordinance shall take effect thirty (30) days after its final passage.

SECTION 10. CERTIFICATION

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

SECTION 11. FILING WITH STATE

The City Clerk shall submit a copy of this Ordinance to the Bureau of Cannabis Control as provided by Business and Professions Code, Section 26055.

EXHIBIT A

XI-10-13.15 - Cannabis Uses

- A. Purpose. The purpose of this Subsection is to prohibit the establishment and operation of all commercial cannabis uses within the City of Milpitas, including all cannabis dispensaries, cannabis retailers, cannabis manufacturers, cannabis microbusinesses, cannabis testing laboratories, cannabis distribution, cannabis cultivation, and delivery of cannabis. It is also the intent of this Subsection to regulate indoor cannabis cultivation, and to prohibit all outdoor cultivation, for personal use, including by qualified patients and primary caregivers.
- B. Definitions. For purposes of this Subsection, the following definitions shall apply:
1. “Cannabis” means all parts of the plant *Cannabis sativa* Linnaeus, *Cannabis indica*, or *Cannabis ruderalis*, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. “Cannabis” also means the separated resin, whether crude or purified, obtained from marijuana. “Cannabis” includes “cannabis” as defined in Business and Professions Code, Section 26001 and in Section 11018 of the Health and Safety Code.
 2. “Cannabis cultivation” means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of cannabis.
 3. “Cannabis delivery” means the commercial transfer of cannabis or cannabis products to a customer. “Cannabis delivery” also includes the use by a cannabis retailer of any technology platform that enables customers to arrange for or facilitate the commercial transfer by a licensed retailer of cannabis or cannabis products.
 4. “Cannabis distribution” means the procurement, sale, and transport of cannabis and cannabis products and any other activity allowed under the State distributor license(s), including, but not limited to, cannabis storage, quality control and collection of State cannabis taxes.
 5. “Cannabis manufacture” means to compound, blend, extract, infuse, or otherwise make or prepare a cannabis product. Cannabis manufacture includes the production, preparation, propagation, or compounding of manufactured cannabis, or cannabis products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis at a fixed location that packages or repackages medical cannabis or cannabis products or labels or relabels its container.
 6. “Cannabis microbusiness” means a commercial cannabis business that must engage in at least three of the following commercial cannabis activities: cultivation, manufacturing using nonvolatile solvents, distribution, and/or retail.
 7. “Cannabis products” means cannabis 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 cannabis or concentrated cannabis and other ingredients. Cannabis products include “cannabis products” as defined in Business and Professions Code, Section 26001.
 8. “Cannabis retailer” means a facility where cannabis or cannabis products are offered, either individually or in any combination, for retail sale, including an establishment that delivers cannabis and cannabis products as part of a retail sale or conducts sales exclusively by delivery. The term “cannabis retailer” includes any nonprofits that may be licensed under Business and Professions Code, Section 26070.5. For purposes of this Chapter, “cannabis retailer” also includes medical cannabis dispensaries, patient collectives and cooperatives operating, or proposing to operate, pursuant to the Compassionate Use Act (Health and Safety Code, § 11362.5) and/or the Medical Marijuana Program (Health and Safety Code, § 11362.7 et seq.), as may be amended.
 9. “Cannabis testing laboratory” means a facility, entity, or site in the State that offers or performs tests of cannabis

or cannabis products.

10. “Commercial cannabis use” includes all cannabis cultivation, cannabis manufacture, cannabis distribution, cannabis testing laboratories, cannabis microbusinesses, cannabis retailers, cannabis delivery, and sale of cannabis and/or cannabis products, whether intended for medical or adult-use, and whether or not such activities are carried out for profit. Commercial cannabis uses includes “commercial cannabis activity” as defined in Business and Professions Code, Section 26001, and includes any activity that requires, or may require in the future, a license from a State licensing authority pursuant to the Medicinal and Adult-Use Cannabis Regulation and Safety Act (Business and Professions Code, Division 10), as may be amended. Commercial cannabis use does not include those activities allowed for personal use by persons 21 years of age or older, without any compensation whatsoever, in strict accordance with Health and Safety Code, Section 11362.1 and does not include the activities of a qualified patient or a primary caregiver that are exempt from State licensure pursuant to Business and Professions Code, Section 26033.
11. “Indoor” means any location that is totally contained within a fully enclosed and secure private residence or accessory building located on the grounds of the private residence.
12. “Personal cultivation” means cannabis cultivation for a natural person’s own personal use and possession in accordance with this Code and state law, including but not limited to Health and Safety Code Sections 11362.1 and 11362.2, as may be amended, and such person does not sell or distribute cannabis to any other person. “Personal use” also means and includes cultivation of medical cannabis conducted by a qualified patient exclusively for his or her personal medical use, and cultivation conducted by a primary caregiver for the personal medical purposes of no more than five specified qualified patients for whom he or she is the primary caregiver, in accordance with state law, including Health and Safety Code Sections 11362.7 and 11362.765, as may be amended. Except as herein defined, personal cultivation does not include, and shall not authorize, any cultivation conducted as part of a business or commercial activity, including cultivation for compensation or retail or wholesale sales of cannabis.
13. “Private residence” means a house, an apartment unit, accessory dwelling unit, a mobile home, or other similar dwelling occupied for residential purposes.
14. “Outdoor” means any location that is not totally contained within a fully enclosed and secure accessory building or primary residence.

C. Personal Cultivation of Cannabis.

1. Indoor Personal Cultivation. The indoor personal cultivation of cannabis is prohibited except in compliance with the following:
 - a. Cannabis cultivation shall only occur indoors at a private residence, or inside an accessory structure located upon the grounds of a private residence.
 - b. Cannabis cultivation shall be limited to six plants total per residence, whether immature or mature, regardless of how many residents reside at the private residence.
 - c. Persons engaging in indoor cultivation must comply with all State and local laws regarding fire safety, water use, electrical wiring, buildings, and indoor cultivation, and with Health and Safety Code Sections 11362.1 and 11362.2.
 - d. The use of gas products (CO₂, butane, propane, natural gas, etc.) or generators for cultivation of cannabis is prohibited. Use of gas products shall be limited to those allowed by the California Building, Electrical, and Fire Codes as adopted and amended by the City of Milpitas.
 - e. The residence shall maintain fully functional and usable kitchen, bathroom, and bedroom areas for their

intended use by the resident(s), and the premises shall not be used primarily or exclusively for cannabis cultivation.

- f. All areas used for cannabis cultivation shall be located within a fully enclosed and secure structure. “Fully enclosed and secure structure” means a space within a building, greenhouse or other legal structure which has a complete roof enclosure supported by connecting walls extending from the ground to the roof, which is secure against unauthorized entry, provides complete visual screening, and which is accessible only through one or more lockable doors and inaccessible to minors.

2. Outdoor Personal Cultivation Prohibited. Outdoor personal cultivation of cannabis is prohibited in all zoning districts in the City of Milpitas.

D. Commercial Cannabis Uses.

1. Commercial Cannabis Uses Prohibited. All medical and adult-use commercial cannabis uses as defined herein are prohibited from establishing or operating within the City of Milpitas. 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 a commercial cannabis use in any zoning district, and no person shall otherwise establish such businesses or operations in any zoning district.
2. Deliveries. To the fullest extent allowed by State law, the ban on commercial cannabis uses also prohibits the operation of a cannabis delivery service to customers in the City of Milpitas, including those deliveries originating from a physical location outside of the City.
3. This section shall not be construed to prohibit use of the public roads pursuant to Business and Professions Code, Section 26090 or those activities allowed by Section 26054, subdivisions (c) or (d).

E. Public Nuisance; Effect of State Law.

1. It is hereby declared to be a public nuisance for any person owning, leasing, occupying, or having charge or possession of any real property in the City to cause or allow such real property to be used for a commercial cannabis use or for the cultivation of cannabis except in strict compliance with this Chapter. Any condition caused or permitted to exist in violation of any of the provisions of this Chapter may be abated as a public nuisance as provided in this Code and/or under State law.
2. In the event of any conflict between the penalties enumerated under this Code and any penalties set forth in State law, the maximum penalties allowable under State law shall govern. The City Attorney or prosecuting attorney has the authority to declare and prosecute the violation as the maximum penalty permitted by State law, including but not limited to, those penalties prescribed by California Health & Safety Code, Section 11362.4. To the extent certain conduct is immune from arrest and criminal liability pursuant to State law, including the Compassionate Use Act of 1996 (Health and Safety Code Section 11362.5) or the Medical Marijuana Program (Health and Safety Code Section 11362.7 et seq.), criminal penalties shall not apply.