

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

DATE: July 22, 2016

TO: Honorable Mayor and City Councilmembers

FROM: Shannon M. Thomas, Deputy City Attorney

SUBJECT: Local Authority Regarding Recreational Marijuana Land Use, Assuming Passage of the Adult Use of Marijuana Act (AUMA), Proposition 64; and Other Marijuana Regulation Issues

BACKGROUND

A state ballot measure has qualified for the November 2016 ballot that would in essence provide that it shall not be unlawful to engage in the following acts relating to marijuana, subject to specified limitations:

- Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of marijuana not in the form of concentrated cannabis;
- Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, eight grams of marijuana in the form of concentrated cannabis, including as contained in marijuana products;
- Possess, plant, cultivate, harvest, dry, or process not more than six living marijuana plants and possess the marijuana produced by the plants;
- Smoke or ingest marijuana or marijuana products; and
- Possess, transport, purchase, obtain, use, manufacture, or give away marijuana accessories to persons 21 years of age or older without any compensation whatsoever.

Prop. 64, Gen. Election (Nov. 8, 2016), Cal. Health & Safety Code § 11362.1(a).

Building largely on the state licensure structure established in the Medical Marijuana Regulation and Safety Act, the AUMA divides responsibility for implementation among three state agencies.¹ The AUMA provides the California Department of Consumer Affairs with regulatory

¹ For a summary of the Medical Marijuana Regulation and Safety Act, see City Att’y Report 2015-12 (Dec. 28, 2015). Note that since that Report’s publication, the deadline for local agencies to enact cultivation regulations was

authority over transportation, storage unrelated to manufacturing activities, distribution, and sale of marijuana. Prop. 64, Cal. Bus. & Prof. Code § 26012(a)(1). The AUMA provides the California Department of Food and Agriculture with the responsibility to administer the provisions of AUMA relating to cultivation. Prop. 64, Cal. Bus. & Prof. Code § 26012(a)(2). Lastly, the California Department of Public Health would implement and regulate the aspects of AUMA pertaining to the manufacture and testing of marijuana. Prop. 64, Cal. Bus. & Prof. Code § 26012(a)(3). These licensing authorities shall begin issuing licenses by January 1, 2018. Prop. 64, Cal. Bus. & Prof. Code § 26012(c). The Office of the City Attorney has been asked to address what land use authority the City of San Diego (City) would have, should the measure pass.

ANALYSIS

I. LOCAL LAND USE AUTHORITY

The City's land use authority is founded in the police powers granted by the California Constitution: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. article XI, section 7. In addition, the authority of the City to enact land use regulations regarding recreational marijuana is explicitly provided for in the AUMA, which states in part:

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.

Prop. 64, Cal. Bus. & Prof. Code § 26200(a).

Furthermore, section 3 of the AUMA states that local governments will be able to ban the nonmedical marijuana businesses. Prop. 64, § 3(d).

II. CITY OF SAN DIEGO'S LAND USE DETERMINATION PROCESS

The City has what is termed a “permissive zoning ordinance,” that is, any use that is not listed is prohibited.² For example, San Diego Municipal Code section 131.0520(b) states:

Within the commercial zones, no *structure* or improvement, or portion thereof, shall be constructed, established, or altered, nor shall any *premises* be used or maintained except for one or more of the purposes or activities listed in Table 131-05B. It is unlawful to establish, maintain, or use any *premises* for any purpose or activity not listed in this section or Section 131.0522.

The City's zoning ordinances set forth categories and subcategories of use. SDMC Chapter 13, Article 1, Division 1. An applicant or property owner may seek a use determination from the City Manager. SDMC § 131.0110(a). If an applicant or property owner disputes that determination, the applicant or property owner may request a recommendation from the Planning Commission. SDMC § 131.0110(b). If the use category and subcategory cannot be determined, an amendment to the Use Regulations Table may be sought.³ SDMC §§ 131.0110(c), 111.0107.

If the City of San Diego does not have any specific land use regulations regarding the recreational use of marijuana in effect at the time the AUMA's licensing provisions become operative, the determination of whether there is an existing appropriate land use category and subcategory shall be subject to determination by the City Manager.

III. OTHER MARIJUANA REGULATION ISSUES

As noted earlier, the Medical Marijuana Regulation and Safety Act (Act) establishes a dual licensing structure for various medical marijuana related activities such as distribution and transportation, cultivation, manufacturing, and testing. *See* City Att'y Report 2015-12 (Dec. 28, 2015). In order to obtain a state license pursuant to the Act, a state applicant must also have a local permit, license, or other authority. *Id.* The state licensing regulations and processes are expected to be operative by January 1, 2018. *Id.* To date, the City has not begun developing any regulations specifically responding to these new state licensed activities. If no City regulations are developed specifically addressing land uses such as cultivation, manufacturing, and testing,

² Other jurisdictions have determined that permissive zoning ordinances should be construed in favor of the free use of the land, and in favor of the landowner. 1 Rathkopf's *The Law of Zoning and Planning* § 5:13 (4th ed. 2015). There do not appear to be any cases in California taking a position as to whether permissive zoning ordinances should be read narrowly or expansively.

³ In 2009, an applicant sought a use determination for a medical marijuana dispensary. The Development Services Director, acting on behalf of the City Manager, determined that the use was not allowed under any existing use category or subcategory. Memo from Kelly Broughton, Director, Development Services Department, to the Public Safety and Neighborhood Services Committee, July 27, 2009.

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the land use determinations will be subject to the processes set forth in Section II of this memorandum.

CONCLUSION

The City may exercise its police powers to regulate land uses, including land uses specifically regarding recreational marijuana. If the City does not enact land use regulations specifically addressing recreational marijuana by the time the Adult Use of Marijuana Act becomes operative, an applicant or property owner may utilize the use determination authority and process in the current San Diego Municipal Code, which relies on a determination by the City Manager.

In addition, state licensing for various medical marijuana alternatives are expected to be operative by January 1, 2018. To date, the City has not begun developing any regulations specifically responding to the state licensure scheme. In the absence of any specific land use regulations, the land use determinations will be subject to the processes set forth herein.

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By /s/ *Shannon M. Thomas*

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