

URGENCY

NUMBER: 270.4

TITLE: AN 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 TEN (10) MONTHS AND FIFTEEN (15) DAYS THE TEMPORARY MORATORIUM ON CANNABIS DISPENSARIES, MANUFACTURERS, CULTIVATION AND DELIVERY OF CANNABIS PENDING THE COMPLETION OF STUDIES AND THE PREPARATION OF AN UPDATE TO THE CITY’S MUNICIPAL AND ZONING CODES

HISTORY: This Ordinance was introduced and adopted by the City Council at its meeting of _____, 2016, upon motion by _____. Said Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Jose S. Esteves, Mayor

APPROVED AS TO FORM:

Christopher J. Diaz, City Attorney

RECITALS:

WHEREAS, in 1996, the voters of the State of California approved Proposition 215 (codified as Health & Safety Code Section 11362.5 et seq. and entitled "The Compassionate Use Act of 1996"); and

WHEREAS, the intent of Proposition 215 was to enable seriously ill Californians to legally possess, use, and cultivate marijuana for medical use without fear of prosecution under State law; and

WHEREAS, in 2003, the California Legislature adopted SB 420, the Medical Marijuana Program ("MMP"), codified as Health and Safety Code Section 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 the Penal Code; and

WHEREAS, neither the Compassionate Use Act ("CUA") nor the MMP require or impose an affirmative duty or mandate upon local governments to allow, authorize, or sanction the establishment of facilities that cultivate or process medical marijuana within their jurisdictions; and

WHEREAS, in May 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 cities have the authority to regulate or ban outright medical marijuana land uses; and

WHEREAS, under the Federal Controlled Substances Act, codified in 21 U.S.C. Section 801 et seq., the use, possession, and cultivation of marijuana are unlawful and subject to federal prosecution without regard to a claimed medical need; and

WHEREAS, on October 9, 2015, Governor Jerry Brown signed the "Medical Marijuana Regulation and Safety Act" ("Act") into law; and

WHEREAS, the Act became effective January 1, 2016, and contains provisions that allow for local governments to regulate licenses and certain activities thereunder; and

WHEREAS, the Act provides that the State shall become the sole authority for regulation under certain parts of the Act, unless local governments have "land use regulations or ordinances regulating or prohibiting the cultivation of marijuana..." (Health and Safety Code §11362.777(c)(4)); and

WHEREAS, several California cities have reported negative impacts of marijuana cultivation, processing, and distribution uses, including offensive odors, illegal sales and distribution of marijuana, trespassing, theft, violent robberies and robbery attempts, fire hazards, and problems associated with mold, fungus and pests; and

WHEREAS, marijuana plants, as they begin to flower and for a period of two months or more, produce a strong odor, which can be detectable far beyond property boundaries if grown outdoors; and

WHEREAS, the strong smell of marijuana creates an attractive nuisance, alerting persons to the location of the valuable plants, and creating a risk of burglary, robbery, or armed robbery; 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, the 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, based on the experiences of other cities, these negative effects on the public health, safety, and welfare are likely to occur, and to continue to occur in the City due to the establishment and operation of marijuana cultivation, processing, and distribution uses; and

WHEREAS, the City's Municipal Code ("Code") does not address the cultivation and processing of medical cannabis; and

WHEREAS, Milpitas General Plan Guiding Principle 4.c-G-1 provides that the City will "[s]upport agricultural activity that is compatible with urban uses, and as an interim use in areas that are designated for urban uses," and, based on the findings above, the cultivation and processing of medical cannabis is deemed not to be compatible with urban uses in the City, and prohibiting these uses is therefore consistent with this Guiding Principle; and

WHEREAS, based on the findings above, the potential establishment of cannabis dispensaries, cultivation, cannabis manufacturers and delivery of cannabis 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 cannabis dispensaries, cannabis cultivation, cannabis manufacturers and delivery of cannabis 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 cannabis dispensaries, cannabis cultivation, cannabis manufacturers and delivery of cannabis 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 February 2, 2016, the City Council adopted Urgency Ordinance No. 270.3 pursuant to Government Code Section 65858, establishing a forty-five (45) day moratorium on cannabis dispensaries, cannabis manufacturers, cultivation, and delivery of cannabis in the City pending the completion of studies and the preparation of an update to the City's municipal and zoning codes; 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 banning medical cannabis dispensaries, manufacturers, cultivation, and delivery in the City in order to mitigate such impacts; and

WHEREAS, City staff is continuing to gather factual data regarding the adverse impacts experienced by other cities that permit medical cannabis dispensaries, manufacturers, cultivation, and delivery; and

WHEREAS, as a result, the City Council desires to extend the moratorium for a period of ten (10) months and fifteen (15) days to allow staff and the City Council the opportunity to continue 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. 270.3, which are set out in the recitals of Urgency Ordinance No. 270.3 have not been alleviated as of the date of this Ordinance and continue to create the concerns described in Urgency Ordinance No. 270.3; and

WHEREAS, the City has subsequently complied with the notice of public hearing required by Government Code Section 65858(a) for the extension of Urgency Ordinance No. 270.3; and

WHEREAS, it is the present intention of the City Council to keep this Urgency Ordinance in effect only until the adoption of an ordinance establishing regulations regarding commercial and industrial cultivation, processing, and distribution of medical marijuana in the City.

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

SECTION 1. INCORPORATION OF RECITALS

The City Council hereby finds that all of the foregoing recitals and the staff report presented herewith are true and correct and are hereby incorporated and adopted as findings of the City Council as if fully set forth herein.

SECTION 2. FINDINGS

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

A. The Act became effective January 1, 2016 and contains provisions which allow for local governments to regulate licenses and certain activities thereunder.

B. The Act contains provisions under which the State can become the sole authority for regulation of certain marijuana cultivation activities in the absence of regulation under certain parts of the Act, unless local governments have land use regulations or ordinances regulating or prohibiting the cultivation of marijuana.

C. To allow time for the City to consider, study, and enact regulations or a ban for medical marijuana cultivation, processing, and distribution uses, it is necessary to temporarily suspend the establishment of any such 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, marijuana processing 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.

D. A moratorium will provide the City with time to study marijuana cultivation uses, marijuana processing uses, and marijuana dispensaries and potential impacts such land uses may have on the public health, safety, and welfare.

E. Without the imposition of a temporary moratorium on the establishment of marijuana cultivation, processing, and dispensary uses as described herein, the City anticipates that one (1) or more commercial cannabis cultivation centers may locate in the City before a non-urgency ordinance would become effective.

F. 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 are established only under adequate regulations. Imposition of a moratorium will allow the City sufficient time to conclude the preparation of a comprehensive ordinance for the regulation of such activities.

SECTION 3. URGENT NEED

Based on the foregoing recitals and findings, all of which are deemed true and correct, this Interim Urgency Ordinance is urgently needed for the immediate preservation of the public health, safety, and welfare. This Interim Urgency Ordinance shall take effect immediately upon adoption and shall be of no further force and effect ten (10) months and fifteen (15) days following the date of its adoption unless earlier repealed.

SECTION 4. AMENDMENT OF MILPITAS MUNICIPAL CODE, TITLE XI, CHAPTER 5

Title XI, Chapter 5 of the Milpitas Municipal Code is hereby repealed in its entirety and replaced with the text below to read as follows:

Chapter 5 - MEDICAL MARIJUANA USES PROHIBITED

XI-5-1.00 – Purpose

The purpose of this Chapter is to enact and enforce a ban on all cannabis dispensaries, cannabis manufacturers, cannabis cultivation, and delivery of cannabis located within the City limits. Nothing in this Chapter shall preempt or make inapplicable any provision of State or federal law.

XI-5-2.00 – Definitions

For purposes of this Chapter, the following definitions shall apply:

- A. “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” also means marijuana as defined by Section 11018 of the Health and Safety Code as enacted by Chapter 1407 of the Statutes of 1972.
- B. “Cannabis dispensary” means a facility where cannabis, cannabis products, or devices for the use of 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.
- C. “Cannabis manufacturer” means a person that conducts 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.
- D. “Cannabis cultivation” means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of cannabis.
- E. “Cannabis delivery” means the commercial transfer of cannabis or cannabis products, and includes origination or termination within the City as well as a delivery business.

XI-5-3.00 – Prohibited Uses

Cannabis dispensaries, cannabis cultivation, cannabis manufacturers, and delivery of cannabis, as defined herein, shall be considered prohibited uses in all zoning districts of the City. 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 cannabis dispensary, cannabis cultivation, cannabis manufacturing, or delivery of cannabis as defined herein in any zoning district, and no person shall otherwise establish such businesses or operations in any zoning district.

XI-5-4.00 – 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 Chapter. Every act prohibited or declared unlawful, and every failure to perform an act made mandatory by this Chapter, shall be an infraction. In addition to the penalties provided in this Chapter, any condition caused or permitted to exist in violation of any of the provisions of this Chapter is declared a public nuisance and may be abated as provided in Title V, Chapter 1100 and/or under State law.

SECTION 5. AUTHORITY

This Interim Urgency Ordinance Extension is enacted pursuant to the authority conferred upon the City Council of the City of Milpitas by Government Code 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, and after notice pursuant to Government Code Section 65090 and a public hearing. This Interim Urgency Ordinance Extension shall extend out this Ordinance for a period of ten (10) months and fifteen (15) days.

SECTION 6. 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 cannabis cultivation, cannabis manufacturing, cannabis dispensary and cannabis delivery 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 7. CEQA

The City Council finds that this Ordinance is not subject to the California Environmental Quality Act (“CEQA”) pursuant to CEQA Guidelines Sections 15060(c)(3) because this activity is not a project as defined by Section 15378 of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, and pursuant to CEQA Guidelines Section 15061(b)(3) as it can be seen with certainty that it will not have a significant effect on the environment.

SECTION 8. SEVERABILITY

If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance, or the application thereof to any person or place, is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remainder of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each and every 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 9. ORDINANCE PREVAILS

To the extent that any other provision of local law relating to medical cannabis is inconsistent with this Ordinance, the provisions of this Ordinance shall prevail. This Ordinance shall supersede all other previous City Council resolutions and ordinances that may conflict with, or be contrary to, this Ordinance.

SECTION 10. PUBLICATION

The City Clerk shall certify as to the adoption of this Urgency Ordinance and shall cause it to be published within fifteen (15) days of the adoption and shall post a certified copy of this 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.