



CITY COUNCIL TRANSPORTATION & LAND USE SUBCOMMITTEE Approved Meeting Minutes

Date/Time: Wednesday April 18, 2012, 2:00 pm

Where: City Hall Committee Conference Room

Attendants: Council Member Gomez (Chair), Council Member Polanski,

Quorum was established

1. Call to order

The meeting was called to order at 2:00 pm.

2. Public Forum *Please limit comments to 3 minutes*

There were no speakers during public forum

3. Approval of Agenda & Minutes*

The agenda and minutes were approved. The Subcommittee requested item 5B on the agenda be discussed prior to 5A

4. Announcements

There were no announcements

5. Old Business

A. Medical Marijuana Facilities Update

This item was discussed after item 5b Review of Doyle Heaton Project at Los Coches and S. Milpitas Blvd.

City Manager Tom Williams shared a policy put together by Felix Reliford and legal counsel. Mr. Williams had Mr. Reliford walk through the policy and there will be a brief legislative update.

City Attorney Mike Ogaz stated Mr. Reliford will report on the policy, Assistant City Attorney Bryan Otake will provide an update on legal issues, and he will report on AB 2321, recent proposed legislation, which was pointed out in today's newspaper.

Mr. Reliford reviewed page by page the important features of the ordinance. The first page is the purpose and intent of the ordinance, a definition of the health and safety code. The third provision is important as it limited the number of dispensaries to two. It also safe guards from sensitive uses, as it can not be located within 1000 feet of residential area, schools, park, library, day care facility, religious institutions, or other facility frequented by minors.

Council Member Polanski asked about the 1000 feet. Is there anything that can be added for 1500 feet instead? Mr. Ogaz stated to the extent that it is such a huge area that it creates a prohibition, because of the Supreme Court, but this would have to be reviewed. She asked if there is any distance for other areas, such as adult entertainment. Mr. Reliford stated they

are restricted to zoning district. In addition, he added this is highway services which isolates the locations.

Mr. Reliford continued, that application and procedures would be reviewed by the Planning Commission, allowing conditioning the permit and revoking it. Council Member Gomez thought we can not permit. Mr. Ogaz stated that there are conflicts: permitting would attempt to override federal law, however another scheme, or in use of another word, would be devised. Council Member Gomez clarified, that the policy would include the permitting process as a preference, until things work out [legally]. Mr. Ogaz concurred as this is a policy document.

Mr. Reliford reviewed the second page and the application and submittal requirements, which is 24 items through page 5. The biggest considerations are the tax history of the business, criminal background. Council Member Polanski asked regarding the verification of age, the requirement for the age of 18 or older. Mr. Otake stated for public health and safety reasons, not necessarily for a state reason. Mr. Ogaz added, in order to operate a business, the owner must be some kind of adult, though a patient can be under the age of 18. Council Member Polanski stated 18 just seem young. Mr. Reliford asked 21? Mr. Ogaz stated creating an older age requirement may create some legal issues, but staff can look into it.

Council Member Polanski added if someone wanted a permit, do we usually verify the age? Chief Graham stated he think it is almost impossible to lease a building if a person is not a legal adult. Mr. Otake stated the legal age for business transactions is usually 18. Council Member Polanski stated okay.

Mr. Reliford continued to review the items for submittal requirements, including site and floor plan, information about distance requirements, a map, lighting plan, City authorization, and statement of owners consent. In addition, the policy includes investigation by the Police department to perform background checks. Mr. Reliford asked if item number 7 on page 6, regarding a 10 day extension time for incomplete application. Council Member Polanski suggested 10 business days. Mr. Ogaz stated if there is a land use application, there really is no time line to complete it. Mr. Ogaz asked there is a reason for a limitation, so this may not be something they want to have. If the applicant doesn't want to complete their application, then they don't have to. Mr. Reliford stated with a Planning application, staff has 30 days to deem it complete. Mr. Ogaz questioned if this was a necessary limitation that would invite litigation. Council Member Polanski asked if 30 days, after it is deemed complete. If it never complete, the time line never starts.

Mr. Reliford asked Chief Graham, if there was a time line to include response. Chief Graham needs time to review, which will be 45 days after completion of the investigation. Mr. Ogaz stated there should be a time frame to perform the investigation. He added, at some point, there needs to be a point to file fees. There has to be a cut-off point, where they have to process their application or they have to reapply with new fees. Maybe it is 30-days instead of 10-days, and then they would have to reapply. Chief Graham stated whatever the time frame for the massage parlor is suitable for this review, which they believe is 60 days.

Mr. Ogaz asked this document for staff consideration or for Planning Commission review. Mr. Reliford stated this is left open for decision.

Mr. Reliford reviewed the *Criteria for Review* from the policy. He stated they have given the Police department leverage and regulations for health, peace or safety of persons living or working in the surrounding area.

Council Member Polanski stated anything that refers to ten days should be ten working days.

Mr. Reliford asked Mr. Ogaz can this permit be denied. Mr. Ogaz stated with some changes, it can be changed to more of a policy document, which in that case, should not have a denial. He suggested staff go back and look at that.

Mr. Reliford went on to discuss *Suspension and Revocation and Transfer of Permits*. He reminded the Subcommittee, a Use Permit is tied to the land and it is only permitted in the Highway Services. Mr. Reliford went onto review the 10th page regarding fees. In regards to taxing, Mr. Reliford says staff has not touched and would have to go back and discuss that at another time.

In regards to *Operations Standards*, he stated they will change hours of operations from 7 am to 11 am. Item D on Page 11, in regards to *Consumption Restrictions*, Mr. Reliford, clarified with Mr. Ogaz regarding on-site consumption. Mr. Ogaz added he would not it not-on-site and not within 200 feet. Mr. Ogaz referred to page 18, and regards to the age requirements. He stated this item made sense and the discussion on employees. He said enforcement, under 18, would require going to juvenile court, he would prefer that all persons working on the premises and owning the business as adults.

Council Member Polanski asked regarding consumption, if there are creams or lotions, is that considered consumption. Mr. Ogaz stated consuming, is more of use, as opposed to eating. Council Member Gomez added that his understanding is the on-site use. Mr. Ogaz stated this item on consumption can be broadened.

Mr. Reliford reviewed the 12th page on operation standards including *Law Enforcement*, which would require security cameras, and contact information for Milpitas Police Department. Page 13 discussed *Site Management, Trash, Litter, Graffiti, and Compliance with Other Requirements*.

On Page 14, *Annual Review*, Mr. Reliford stated he would like to add there would be a six month review from the initial approval, then one year from then, which would be 18-months. This would establish the dispensary as a business, then subsequent review from law enforcement.

Mr. Reliford concluded his review of the policy.

Council Member Gomez asked if staff reviewed on site versus off site cultivation. Council Member Gomez said if that's an open question, he'd be happy to leave it out. Mr. Ogaz stated in conjunction with legislation, you may not be able to have a stand-alone dispensary. He stated Mr. Otake would discuss [legislation] further.

Mr. Otake stated as directed, staff presented the City of Lake Forest case. The last case, held this court of appeal decisions that dispensaries are authorized under state law only if they cultivate on site. If you cultivate off-site and try to transfer it, according to the Lake Forest case, this would be illegal under state law. That was reported by City staff at the last Subcommittee meeting. Since then, the decisions were published, which created conflict with other decisions in the State of California. The Supreme Court has 4 decisions that are in conflict with each other, which will be consolidated together. With the recent Lake Forest decision, the Supreme Court can now have 5. To summarize, Mr. Otake, if the Supreme Court answers all the questions answered, there are issues such as 1) whether a City can ban dispensaries, 2) can it authorize dispensaries, 3) if they can authorize dispensaries, does it have to have on-site cultivation or can they include off-site transportation. He added

other things such as if you can only authorize with a permit or allow it to happen but prohibiting areas. All these questions are consolidated by the Supreme Court. The policy in front of you today is staff recommendations with policies based on what we know now, with the caveat that the California Supreme Court will set the rules, clarify rules. The League of California Cities expects a decision within the next 120 days.

Mr. Ogaz segued to Mr. Ammiano's Bill [AB 2312]. The bill attempts to create a state wide regulation of medical marijuana facilities. This required a board to be established that would have duties that would issue and/or deny registration of facilities, regulations, etc. The Bill would supersede City laws. This would prohibit dispensaries from operating without State approval. It would require a City or County no less than 1 medical marijuana dispensary per 50,000 residents. This City would then require 1 under this bill. Approval would have to happen within 180 days or deemed approved. A medical marijuana fund would be established where fee monies would be deposited and creates an interesting authorization to allow the City to levy, increase or extend taxation of sale, storage of consumption of medical marijuana for general purposes for a combined rate to not exceed 2.5%. It expands the taxing capabilities.

Mr. Ogaz continued the bill allows for local zoning but limited to the 1/50,000 population. It preempts local regulation if you don't have a zoning law. The Board of Medical Marijuana Enforcement (BMME) will create an ordinance if you don't have one. The BMME is created of physicians, law enforcement, residents and medical marijuana patients. The legislature would appoint one. He stated a total ban can be created by voter approval. The League of Cities wrote a letter to Mr. Ammiano which opposes his bill based on several concerns regarding the draft elements of the proposed bill, asking this bill be postponed until the Supreme Court ruling is complete. The timeline was that it was introduced February 24, and will go through the public health and safety commissions. It was withdrawn by his request. Mr. Ogaz concluded his update of the legislative front.

Council Member Gomez confirmed with Mr. Ogaz if you don't have something in place [ordinance or zoning] then you would have to follow state regulations. Mr. Ogaz stated if you have a zoning or permitting process, this proposed bill supersedes it. Council Member Gomez asked if it would be best to get out with a zoning ordinance prior to this Bill. Mr. Ogaz stated that if this is considered a permitting "scheme" then this bill can also be thrown out based on the Supreme Court decision. With the zoning ordinance, the City can possibly move forward.

Council Member Gomez envisioned a report by April/May timeframe to the City Council. This shows the Council where this project is at, not proposing anything, or making recommendations as of yet. He said what is missing is a cover memo or ARS putting things in context. He was thinking staff could type something up or even (to Council Member Polanski) if it's ready, they say hey look, there is some bullet points now, nothing is changing, and however recent court cases are changing. Council Member Gomez direct Mr. Ogaz to do a quick summary of legislation cases. He said to say we are researching this issue and it's better to be prepared and not waiting until any ruling deems or bans illegal dispensaries. Council Member Gomez added we are discussing this issues with the intent to protect the schools, neighborhoods, and businesses and avoid the over proliferation San Jose has. What we don't want is the state to take this over and adopt a one size fits all approach to the issue. We say this is a moving document and is subject to change. We aren't asking Council for approval but maybe we are looking for other suggestions and ideas as we keep tracking this issue. The reason we brought this to the Subcommittee is to have a public discussion.

Mr. Ogaz said turning this from proposed legislation and policy is to consider it as a model ordinance we are proposing. This is something we want the Council to consider for adoption at some point and time with modification as they deem fit. With the cases, we suggest not moving forward until the Supreme Court makes a decision.

Council Member Polanski agreed this is a starting point because the Supreme Court will make a decision in the next 60-120 days. We have the ban in place; we have the policy that has some good solid things in it if we can't ban them, that would protect our citizens with the concerns of our Chief [of Police]. Mr. Reliford clarified if this would be a memo or an ARS. The Subcommittee said it will be an ARS. Council Member Polanski passed a letter out. Her concern is as a Subcommittee we do our due-diligence. She said Linda Windisch sent a letter to the school Board memos and PTA members. Council Member Polanski read the letter regarding Mrs. Windisch's reference to the January TALU meeting minutes. She read the concerns of Mrs. Windisch's misunderstanding that the proposed number of dispensaries would be within 1000 feet of sensitive uses (schools, neighborhoods, religious facilities). This is incorrect and Council Member Polanski is concerned that this letter has gone to elected officials and how do we address this. Will the ARS go to PTA members, Superintendent and MUSD Board? Mr. Ogaz stated once the agenda goes out; staff can send it to these members and the on-site principals in the City. Council Member Polanski said separate from the political area, when someone going out there and spreading this type of fear and lies to the community, we should be able to do something to say this isn't true. Don't be scaring our citizens for political garbage you want. She was wondering if there is something we would be able to do. She thinks it's important, especially the Superintendent and the governing [Milpitas Unified School] Board, because she wouldn't want these people to feel we are doing something that would any way ever endanger the schools, the children, or the community.

Council Member Gomez said he personally feels a follow up with an individual letter to these people [recipients of the Windisch letter] should be done. Council Member Polanski agreed.

Council Member Gomez said Council May 1 with the ARS Council Member Polanski agreed and stated the ban stays in place until we see what the Supreme Court does. Gomez said it's important we are studying the issue, not a proposal.

Mr. Ogaz said it's important if there are particular concerns of the Council irrespective of what the law ultimately says, there maybe issues, methodologies, etc that are disfavored. We should know about that. It would be unfortunate if we went down the road, if we had a concise specific ordinance to find out the majority of the council doesn't want to go that way. It is good to find out now, than going further into.

Mr. Ogaz said the ARS would be prepared for the first meeting of May.

B. Review of Doyle Heaton Project at Los Coches and S. Milpitas Blvd.

This item was discussed prior to item 5a Medical Marijuana Facilities Update.

Council Member Gomez stated the applicant requested this item be discussed to confirm items on this project on Los Coches and S. Milpitas Blvd.

Staff Felix Reliford, Acting Planning & Neighborhood Services Director, referred to an attachment of the January Transportation and Land Use Subcommittee which discussed this project. This was a proposed project with concerns that this area is affected by the [Land Use] Moratorium. This area is zoned Town Center designation, permitting housing. The issue was the clarity in the minutes in regards to the frontage of the property on Los Coches and South Milpitas Blvd. Mr. Reliford asked if it is appropriate for applicant to continue a

request for a full residential project or would it be more beneficial to the City to have commercial along the frontage of S. Milpitas Blvd at this area. Staff is requesting clarification prior to the applicant moving forward with the direction of the Subcommittee. In review of the previous minutes, staff could not quite tell what the direction is.

Council Member Gomez asked is how do we know if commercial works?

Mr. Reliford stated the developer looks at financial impact in getting commercial funding, which other developers have mentioned to him as well. Staff states they look at it as a land use and compatibility standpoint and what is appropriate for a site. Staff tries to give recommendations based on sound land use decisions.

Council Gomez asked can commercial work there; does Milpitas need another strip mall? Mr. Reliford said any commercial would have to be small. Mr. Reliford also reminded the Subcommittee that the Read-Rite site proposes another 50-70 units would less likely be suitable for commercial.

Council Member Polanski said with the Town Center and Serra Center across the street, she is concerned this is a small area and how does access and parking work? Mr. Reliford said the access would come from Los Coches, he doesn't believe a driveway from S. Milpitas Blvd. given the traffic patterns. Council Member Polanski asked what kind of retail would fit. Mr. Reliford stated it would be a small strip commercial if the Council desires 10,000-15,000 sf. He referred to an old plan the developer provided staff, and pointed out the frontage area. He stated the developer has concerns in regards to marketing and funding. In fairness to the developer, other developers stated they are having problems getting commercial funding.

Council Member Gomez asked if it's a 7-Eleven or Quiznos. Mr. Reliford agreed and possibly businesses that would attract businesses to the south. With about 15,000 sf, it will not be another town center. Council Member Gomez asked what the benefit would be. Mr. Reliford stated, tax benefit, theory housing doesn't pay for itself, but mostly taxes would be the biggest benefit.

Council Member Gomez noted staff didn't seem to have strong opinions about this. Mr. Reliford stated staff said other commercial areas, such as the Serra Center would provide much larger area for the City. Mr. Reliford said if there is housing, staff can make it work.

City Manager Tom Williams stated the only thing that comes to mind is the urban flow. To have residential on Milpitas Blvd. is somewhat of an issue and was hoping the developer would consider townhomes in order to install good urban design. He is not sure the developer would entertain this, but just throwing out the idea.

Council Member Polanski asked what the long-term vision of Milpitas Blvd. She knows in the Transit Area, what is the vision, such as Robson homes where Cal Skate used to be. Mr. Reliford stated obviously with Town Center, we do envision some type of commercial, which there are banks, and some type of housing which this is.

Council Member Polanski said she talked to the developers and pointed out one of the areas she expressed concerns, because of that intersection, how it would work. She is curious to hear about the high density with the retail, maybe. She stated she hoped for a Whole Foods or Trader Joes in another area.

The Subcommittee invited the developer to speak.

Ed McGovern, the representative from Doyle & Heaton; He also said Doyle and Eldon are the landowners. He thanked the Subcommittee to allowing them to come to the meeting. He said retail on the site, obviously had a number of discussions about it. The short answer, from a practical standpoint, from the market place standpoint, it would be a one-off retail store like a 7-Eleven or something like that. You have to think about the attraction, and what the people will come from. You have small shops in the retail mall areas north of Calaveras, with a number of them empty. What retail developers want is synergy, with foot traffic. A medical office building and two banks with a piece of empty property is what is currently there. He stated they have tried to do due-diligence and studied retail and empty retail space in Milpitas. He shared a graph. Mr. McGovern stated there is 40% empty retail space with the absorption space, still in the negative. There is more space emptying than people filling the empty spaces you have. Mr. McGovern stated the retail, in their open, would happen. They don't think it will be financed per their broker. Mr. McGovern stated he thinks they wouldn't have more than 10,000 sf if there were to be retail, given parking and other things.

Council Member Polanski gave the handout to staff for their records.

Mr. McGovern added, in regards to townhomes and high density, they did their due-diligence with the bankers on the product-type people are looking for, what can be financed, what can be bought or sold. He stated Milpitas has a lot of multi-family approved but not built and there is more of a demand for single family, big single family homes. He had discussion with Mr. Reliford, and said there is a demand for the units. Along with Braddock & Logan, they are looking at single-family. Residences can use the under-pass to patronize the stores [on North Calaveras Blvd], creating foot traffic.

Mr. McGovern stated they would love to get direction. They can finance and build it quickly and create traffic for the empty retail space.

Mr. Heaton added there is over 400,000 sf of retail empty. Showing the 40%, with no net leasing, every time it is leased, another goes out. He says there may be 10 years of retail supply without building big boxes. Mr. Heaton, stated by having heavy landscaping with berms, trees, fences, with 30 feet from the frontage, with access of Los Coches, they can make it work. He really thinks, with a 5th version, going back and forth, this is the best reiteration. As per a letter from their broker, retail is a non-starter. If that was the case, someone would have bought it already. Mr. McGovern stated this land was owned by a church and they are looking for more of a higher return on their land. Mr. Heaton stated he is available to discuss and staff has his contact information.

Council Member Polanski stated, looking from her window, putting anything like a 7-Eleven or sandwich shop doesn't make sense. Because you have the dental across the street, and the others, the vision doesn't seem to work. Mr. Reliford said they would only be concerned with the commercial retail that the developer would have to find. He also said, if it's the desire of the Subcommittee, staff will work with the developer for special treatment, because of the trucks and traffic at the intersection of Los Coches and Milpitas Blvd.

Council Member Polanski asked what she envisioned, is anything small enough, with a strip type mall, would not look good to her. She is not opposed to doing the houses, however she is really concerned, which she expressed to them, is Calaveras Blvd and Milpitas Blvd as a really busy, and dangerous intersection. Whatever takes place for that pathway and walking under so people can come to the Town Center and Beresford Center safely. Mr. Reliford stated the developers would have to improve that walkway to have safe accessibility for shoppers and strollers to travel. Council Member Polanski wants to make sure the pathway is lit. She is not opposed to it; as long as staff works with them to ensure that the residents

are buffered from the intersection. Council Member Gomez totally agreed with Council Member Polanski.

6. Other Business

There was no other business

7. Adjourn

The meeting adjourned at 3:14 pm.