



REPORT TO THE CITY COUNCIL

DATE: Meeting of August 8, 2017

TO: Mayor de Vera and Members of the City Council

SUBMITTED BY: David Biggs, City Manager
J. Patrick Tang, City Attorney

SUBJECT: Discussion of Local Regulation of Recreational Cannabis Uses

RECOMMENDED ACTION: Receive staff report regarding California law legalizing recreational nonmedical cannabis and provide staff with direction regarding options for local regulation of cannabis-related activities for future consideration.

Absent a local ordinance specifically addressing nonmedical cannabis business uses, there is a potential for the state to issue licenses for cannabis businesses to operate in the City. Staff recommends that any local regulations be adopted and effective before the state begins to issue licenses on January 1, 2018.

BACKGROUND:

Federal Law.

Cannabis is currently illegal under federal law. Federal law classifies cannabis as a Schedule I controlled substance, like LSD and heroin.¹ A bill has been introduced in the House of Representatives that could remove cannabis from the controlled substance list.² A bill is also pending with the California legislature to request the United States Congress and President to reschedule cannabis.³ Until federal law classifying cannabis as a Schedule I drug changes, cannabis businesses will remain essentially “cash-only,” because federally regulated banks consider it an illegal activity. This makes it difficult to collect taxes (difficult to track income and there are security considerations for cash tax payments), and increases the risk of violent crime (due to large

¹ 21 United States Code Section 812

² H.R. 1227 Ending Federal Marijuana Prohibition Act of 2017 (2017-2018) <https://www.congress.gov/bill/115thcongress/house-bill/1227/text>

³ Senate Joint Resolution 5 (2016-2017)

http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SJR5

amounts of cash on hand).⁴ The City of Oakland is considering establishing a public bank to provide banking services to their cannabis businesses.⁵

State Medical Cannabis Laws.

In 1996, voters approved Proposition 215, which legalized the use of medical cannabis in California. The City of Hercules voters supported Proposition 215 with a vote of 3,694 for and 2,288 against the measure.⁶ In 2015, the state enacted three bills known as the Medical Cannabis Regulation and Safety Act (MCRSA)⁷ that established a regulatory framework for state licensing and enforcement of cultivation, manufacturing, retail sale, transportation, storage, delivery, and testing of medical cannabis in California. On February 3, 2016, the Governor signed AB-21 (Wood) which deleted a provision of the MCRSA that required jurisdictions to adopt any regulations by March 1, 2016, or lose the right to exercise their police power to regulate the uses. The MCRSA requires City authorization before a business can apply for a state medical cannabis business license.⁸ In 2016, Hercules passed Ordinance No. 492, prohibiting medical marijuana dispensaries, deliveries, and cultivation. See Attachment 1.

State Recreational Cannabis.

In November 2016, California voters approved Proposition 64, the Adult Use of Marijuana Act (AUMA). Contra Costa County voters supported the AUMA with 60.72% voting in favor and 39.28% voting against the measure.⁹ The AUMA sets state standards for both personal nonmedical cultivation and use of marijuana, and commercial cultivation and sale of marijuana. The state can begin issuing licenses for the commercial cultivation and sale of marijuana beginning January 1, 2018.

Personal Nonmedical Use.

Under Proposition 64, adults 21 years of age or older can legally grow, possess, and use cannabis for non-medical purposes, with certain restrictions.¹⁰ The law prohibits the following: (1) smoking or ingesting cannabis in any public place, except if the City authorizes use at a licensed retail location; (2) Smoking cannabis in a location where smoking tobacco is prohibited; (3) Smoking cannabis on or within 1,000 feet of a school, day care center, or youth center while children are present, except in or upon the grounds of a private residence or at a permitted retailer and only if such smoking is not detectable by others on the grounds of the school, day care center, or youth center while children are present; (4) Possessing an open container or open package of cannabis while driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation; (5) smoking or ingesting cannabis while driving or as a passenger in a car. (Health & Safety Code, § 11362.3).

⁴ John Chiang, California State Treasurer, December 1, 2016, letter to president elect Trump and Cannabis Banking

⁵ Oakland City Council Resolution, November 29, 2016,

<https://oakland.legistar.com/LegislationDetail.aspx?ID=2862923&GUID=62098AA0-7030-4165-A111-EEF012C58038&Options=ID|Text|&Search=bank>, which also has other reasons for establishing the public bank.

⁶ November 5, 1996, election results provided by the Contra Costa County Elections Office, Candidate Services Department

⁷ AB 243 (Wood, Chapter 688); AB 266 (Bonta, Chapter 689); and SB 643 (McGuire, Chapter 719)

⁸ California Business and Professions Code Section 19322(a)

⁹ http://www.cocovote.us/wp-content/uploads/110816_Summary_RS.pdf

¹⁰ California Health and Safety Code Section 11362.1

Local governments may prohibit possession or smoking of cannabis in public buildings. In addition, private and public employers may maintain a drug and alcohol free workplace by prohibiting the use, consumption, possession, sale, display, or cultivation of cannabis in the workplace.¹¹

Commercial Use and State Licensing.

Beginning on January 1, 2018, the AUMA makes it legal to cultivate, process, manufacture, distribute, and test, nonmedical cannabis and cannabis products intended to be sold to adults 21 years and older, with a license from the state and subject to state taxes. The state is expected to begin issuing licenses for cannabis businesses on January 1, 2018.

For commercial nonmedical cannabis activities, the AUMA establishes a regulatory and licensing system involving three state agencies, and tasks each agency with licensing and enforcement responsibilities. The details of the duties of the state agencies is beyond the scope of this report, but staff can provide more detail if the Council requests additional information.

The AUMA provides that the state will not approve an application for a state license if approval will violate the provisions of any local ordinance or regulation adopted to regulate nonmedical cannabis businesses, including those that completely prohibit the businesses.¹² However, unlike the MCRSA, under the AUMA applicants for nonmedical/recreational cannabis licenses do not need local jurisdiction authorization to apply for a license.¹³ The AUMA essentially requires the state licensing agencies to know all of the cannabis ordinances and regulations for all 58 counties and 482 towns/cities. A budget trailer bill is currently pending that would clarify the issues regarding local cannabis regulations and implementation of the AUMA.¹⁴ The proposed bill specifies that the state cannabis regulations would not supersede or limit enforcement of local zoning requirements or local ordinances.¹⁵ The bill would allow an applicant for a state cannabis license to voluntarily provide proof of local authorization. The bill would require all local jurisdictions to provide the state with, “a copy of any ordinance or regulation related to commercial cannabis activity and the name and contact information for the person who will serve as the contact for state licensing authorities regarding commercial cannabis activity within the jurisdiction.”¹⁶ However, until the proposed bill becomes law, it will be up to the state to determine which regulations apply in each jurisdiction. The League of California Cities advises that “Cities that wish to regulate or prohibit nonmedical cannabis businesses will need to do so before the State begins issuing licenses by enacting a nonmedical cannabis ordinance/regulation...”¹⁷ In other words, the AUMA appears to require local jurisdictions to explicitly regulate nonmedical cannabis by adopting local ordinances.

¹¹ California Health & Safety. Code § 11362.45(f)-(g))

¹² California Business and Professions Code Sections 26055(e) and 26200

¹³ CA Bus. & Prof. Code Section 26056

¹⁴ Draft Cannabis Regulation Trailer Bill 200, April 4, 2017,
http://www.dof.ca.gov/Budget/Trailer_Bill_Language/documents/200CannabisRegulationDraft.pdf

¹⁵ Ibid. at page 28, proposed amendment to Business and Professions Code Section 26036

¹⁶ Ibid. at page 36, proposed amendment to Bus. & Prof. §26055 (f and g)

¹⁷ League of California Cities Memo to City Managers, September 26, 2016, at page 4

Delivery.

The AUMA allows for deliveries of nonmedical cannabis by state-licensed retailers, micro businesses, or nonprofits, unless a local ordinance prohibits delivery.¹⁸ Although local laws can ban deliveries, the ordinance cannot prevent a delivery service from using public roads to pass through the jurisdiction in route to another location outside its limits.¹⁹

Personal Cultivation.

The AUMA specifies that cities can permit, regulate, or prohibit outdoor cultivation of six plants on private property for personal consumption; however, cities may not prohibit indoor cultivation of up to six plants inside a residence or accessory structure on private property.²⁰ The law goes on to state that personal cultivation is subject to restrictions, including the following: “The living plants and any marijuana produced by the plants in excess of 28.5 grams are kept within the person's private residence, or upon the grounds of that private residence (e.g., in an outdoor garden area), are in a locked space, and are not visible by normal unaided vision from a public place.”²¹ The AUMA permits local governments to “reasonably regulate” indoor personal cultivation of six or fewer plants, but it may not ban this type of cultivation.²²

Current City Regulation.

Medical cannabis uses are not allowed in Hercules. In 2016, the City Council adopted Ordinance No. 492, prohibiting cultivation, processing, dispensing, and commercial delivery of medical marijuana. While there are no express prohibitions on non-medical cannabis, most cannabis businesses arguably cannot lawfully operate since they are not listed in the Land Use Table as a specifically allowed or permitted use.²³ The Land Use Regulations Table permits “Home Occupations” in every zoning district and the code contains limitations on what types of businesses can be considered a “home occupation.” The Home Occupation definition does not appear to expressly allow for cannabis businesses in residential neighborhoods, and just defines home occupations as “an art, profession, offering of service, conduct of businesses or handicrafts conducted solely in the dwelling unit, a portion of a garage (*so long as it doesn't use more than required for the main house*) or an accessory building, by an inhabitant in a manner incidental to the residential occupancy”:

The two pages of Section 35.270 of the Hercules Zoning Ordinance delineates all the provisions, prohibitions, and limitation within Home Occupations. Provisions related to this topic include “no home occupation shall create noise, odor, electrical disturbances, dust vibrations, fumes, or smoke readily discernible at the exterior boundaries of the parcel on which it is situated.” and “No exterior operation of any home occupation is permitted” and “the home occupation shall be compatible with and secondary to the use of the premises as a residential dwelling unit.”

¹⁸ California Business & Professions Code Section 26090(a)

¹⁹ CA Bus. & Prof. §26090(c)

²⁰ Health & Saf. Code §§ 11362.1((a)(3); 11362.2.

²¹ Health & Saf. Code, § 11362.2(a)(2)

²² Health & Saf. Code § 11362.2(b)(1)

²³ See Full Set of Zoning Regulations at Section 35.270

DISCUSSION:

The City Council has not discussed cannabis regulations since California voters approved the AUMA in November, 2016. The AUMA allows the City to permit, regulate, or prohibit the commercial cultivation and/or commercial sales/distribution of nonmedical cannabis. The League of California Cities has recommended that local regulations should be adopted before January 1, 2018, at which time the State can begin issuing licenses to local commercial cannabis operations. If the City does not enact local regulations the State standards will be the basis upon which permit applications will be evaluated.

Staff would like direction from the Council regarding prohibiting or allowing nonmedical cannabis business uses. Staff will present more information on issues and options, including if the Council is interested, more information on fees and taxation, at a future Council meeting. Staff has provided a list detailing options available to the Council as Attachment 2. Although County voters have supported legalization of cannabis, it is unknown at this time if Hercules residents would support cannabis businesses in the City.

Commercial Sale of Cannabis.

The City has the option to:

1. Regulate and ban recreational marijuana businesses. Absent an ordinance specifically prohibiting cannabis business uses, there is a potential for the state to issue licenses for businesses to operate in the City. If the Council would like to prohibit cannabis related businesses, staff recommends the Council direct staff to draft an ordinance to expressly prohibit the uses, to take effect prior to January 1, 2018. Council should be aware that banning cultivation and dispensaries will make the City ineligible for some grants from the state excise tax on cannabis.
2. Permit recreational marijuana businesses and subject them to sales tax and business license tax. Prop. 64 imposes a state excise tax of 15 percent on recreational marijuana, so new local taxes should take the cumulative tax rate into account. Any pre-existing local sales taxes would apply to all recreational marijuana sales. Any business license taxes would also apply. A cumulative tax rate that is too high might stimulate black market activity. Examples of tax rates being considered in other jurisdictions is provided in Attachment 1. Note that unlike recreational marijuana sales, medical marijuana sales are not subject to taxation under Prop. 64. If the Council would like to consider allowing recreational cannabis businesses, staff recommends that any local regulations, fees and taxes be adopted and be in effect before the state begins to issue licenses on January 1, 2018.

Any city thinking about adopting regulatory ordinances to allow for marijuana businesses should consider a numerical limit on how many dispensaries it will ultimately have – in his Western Cities article published in February 2017, Tim Cromartie suggested allowing no more than one per 15,000

residents. Limiting the number of such businesses would make it easier for the city to regulate them. See Cromartie article, Attachment 3.

Cash Payments a Security Issue.

Marijuana sales are predicted to be a largely cash only business, and there are legitimate concerns with having cannabis related businesses within the City, as the large amounts of cash can attract criminal activity. There is some discussion of migrating to bitcoin and other crypto-currencies, but there are issues with this alternative as well.²⁴ Cities that opt to regulate medical or recreational marijuana businesses should have a secure procedure in place for receiving and depositing large all-cash tax and license payments. This must include making appropriate security arrangements for payment of annual business license fees and tax payments. It may also include surveying local financial institutions to see which ones are willing to accept money from marijuana businesses. Credit unions may be more receptive than banks, but they too are regulated by a federal entity, the National Credit Union Administration, and may be reluctant to take any action that could be perceived as violating federal law or regulations. (For more information, read “Why Banks Don’t Serve Marijuana Businesses” at www.westerncity.com.)

Cannabis Delivery.

The Council may expressly prohibit or allow medical cannabis deliveries by businesses located outside of the City. The Council should consider if it would like to allow recreational cannabis deliveries.

Personal Cultivation.

Under the AUMA, the personal cannabis cultivation limit is six plants. Patients with a doctor's recommendation can grow more plants under the MCRSA. While the smoking of marijuana would be subject to the same limitations for tobacco smoking under the City’s current smoking ordinance, no existing City regulation would help neighbors bothered by the smell of outdoor (or indoor) cannabis cultivation. The Council may wish to consider regulations that staff may enforce on a complaint-basis. There are additional options for regulating personal cultivation in the League of California Cities article (Attachment 3).

Home Occupations.

Due to potential criminal activity, the visual appearance of security measures (window and door bars, lights, and cameras), and potential smell in close proximity to neighbors, cannabis related businesses may be inappropriate for residential neighborhoods. Additionally, if it were allowed in accessory structures as the Waterford example shows, units under 120 square feet would be difficult to get the contracted County Building Inspections as normally building permits are not needed for structure not on a foundation and less than 120 square feet in size.

CONCLUSION:

²⁴ <https://www.forbes.com/sites/kashmirhill/2014/02/10/irony-alert-major-bitcoin-processor-rejects-pot-shop-as-too-legally-dubious/#4fb19855613d>

Staff seeks direction regarding options for local regulation of cannabis-related activities for future consideration.

ATTACHMENTS:

Attachment 1 – Hercules Ordinance 492.

Attachment 2 – Summary of Cannabis Options

Attachment 3 – “What Cities Should Know About the Adult Use of Marijuana Act Proposition 64” by Tim Cromartie, Western City, February 2017

Attachment 4 – Memo and Frequently Asked Questions about AUMA Proposition 64 by League of California Cities, September 26, 2016 and January 9, 2017



REPORT TO THE CITY COUNCIL

DATE: Meeting of September 12, 2017

TO: Mayor de Vera and Members of the City Council

SUBMITTED BY: David Biggs, City Manager
J. Patrick Tang, City Attorney

SUBJECT: Local Regulation of Recreational Cannabis Uses

RECOMMENDED ACTION: Receive and discuss staff report and draft legislation, and provide further direction to staff and the City Attorney.

BACKGROUND:

On November 8, 2016, Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA"), was approved by California voters and became effective on November 9, 2016.

The AUMA has legalized the nonmedical use of marijuana by persons 21 years of age and older, and allows for the personal cultivation of up to six marijuana plants. It makes it legal for persons 21 years of age or older to: (1) smoke or ingest marijuana or marijuana products; (2) possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older, without compensation, 28.5 grams of marijuana, or 8 grams of concentrated marijuana; and (3) possess, plant, cultivate, harvest, dry or process up to six living marijuana plants for personal use.

Although persons 21 years of age or older may use and possess nonmedical marijuana under AUMA, their ability to engage in these activities is not unfettered. The law prohibits the smoking of marijuana in certain places. Individuals cannot possess marijuana on school grounds and daycare centers, or in youth centers while children are present, or possess an open container of marijuana or marijuana products while driving, operating or riding in any vehicle used for transportation.

AUMA further provides that cities may prohibit possession and smoking in buildings owned, leased or occupied by the city, and that employers, including cities, may maintain a drug and alcohol-free work place by prohibiting the use, consumption, possession, transfer, transportation, sale, display or growth of marijuana in the work place.

Additionally, while outdoor cultivation may continue to be prohibited, indoor cultivation for personal use cannot be prohibited by the City, but it can be regulated.

As reported to you at the Council meeting of August 8, 2017, absent a local ordinance specifically addressing nonmedical cannabis business uses, there is a potential for the state to issue licenses for cannabis businesses to operate in the City beginning in January 2018. Unless the City has adopted local regulations at the time a permit is processed by the state, the state regulations would apply, essentially pre-empting the City from objecting to the terms of a permit thus issued. Staff recommends that any local restrictions be adopted and effective before the state begins to issue licenses. A copy of the staff report from the August 8, 2017 meeting is provided as Attachment 1 to this report.

DISCUSSION:

At the August 8, 2017 Council meeting, staff was directed to bring back draft legislation for Council consideration that would establish the following restrictions in Hercules:

- Not allow outdoor cultivation.
- Not allow accessory structure cultivation (including greenhouses).
- Retain medical cannabis dispensary ban.
- Not allow retail sales of cannabis for recreational purposes.
- Not allow deliveries of medical or recreational cannabis within Hercules.

A draft ordinance is provided for Council consideration as Attachment 2 that would accomplish the above goals set out by the Council at the August 8, 2017 meeting. If the draft measure were to be enacted by the City Council, the Council could always modify the regulations at a future date should a decision be made to adjust the City's policy in order to allow for some of the activities prohibited by the draft ordinance.

At the August 8th meeting, Council also requested additional clarifying information as follows:

- Provide a comparison of current medical cannabis regulations and proposed recreational cannabis regulations.

The draft ordinance would amend existing medical marijuana restrictions to include restrictions on recreational cannabis activities. Staff is recommending one cultivation standard, applicable to both medical cannabis and recreational cannabis, so that a comparison chart or diagram is not necessary.

- Provide the breakdown of Hercules votes for and against Proposition 64 from the November 2016 election.

The voting breakdown for Proposition 64 is as follows:

Statewide:	57.13% in favor; 42.87% opposed.
County of Contra Costa:	60.72% in favor; 39.28% opposed.
City of Hercules:	70.76% in favor; 29.24% opposed.

- Provide that the restrictions on tobacco, medical cannabis, and recreational cannabis uses be equally as stringent, and similarly applicable, in or about public facilities, offices, and open spaces.

A review of the existing smoking regulations and the prior restrictions on medical cannabis activities enacted in 2015 suggests that these regulations do not conflict with the terms of the proposed ordinance restricting recreational cannabis activities, and in fact would provide comparable restrictions, at least as to their uses in public buildings and in and around public spaces within the City. It is important to note that under the AUMA, the smoking of cannabis is subject to the same limitations as tobacco smoking. In the case of Hercules, restrictions on smoking in public areas were enacted in 1992, and are codified in the Hercules Municipal Code at Sec. 5-6. A copy of the City's smoking regulations is provided as Attachment 3 to this report.

Additional Comments:

Ordinance No. 492. The Council passed Ordinance No. 492 in February 2016, imposing restrictions on medical marijuana (attached to the staff report from the meeting of August 8th). Ordinance No. 492 has been codified within the Hercules Municipal Code as Sec. 4-18. There was discussion at the meeting of August 8th whether additional restrictions on recreational cannabis should be adopted by amending Sec. 4-18, or in the alternative, whether a separate amendment to the municipal code addressing recreational cannabis should be prepared instead. Since Sec. 4-18 would need to be amended in order to harmonize some of the language, references, and definitions with the newly proposed regulation of recreational cannabis, it was decided to amend Sec. 4-18 to include the recreational cannabis regulations, so that the City's cannabis regulations would be located within the same code section.

Personal Cultivation. For enforcement purposes, it would be difficult to distinguish between cultivation of cannabis for a qualified patient, and personal cultivation for recreational purposes. Staff thus recommends one cultivation standard. Personal cultivation under the proposed ordinance must be in compliance with, among other requirements: A person must be 21 years or older. The marijuana plants and anything produced by the plants must be kept within the person's private residence, fully enclosed and secure, and not visible by normal unaided vision from a public place. Not more than six plants may be planted or cultivated at one time. Outdoor cultivation is prohibited at all times. Building permits must be obtained. And, accessory structures cannot be used for cultivation.

Permit and Inspection Option. An unresolved question at this stage is whether the City as a matter of policy finds it is in the public interest to develop a permit and inspection program that would apply to the indoor cultivation of cannabis. Of course such a program would impact staffing, and would require extensive training as well as active monitoring and follow up. If Council considers it a priority to implement a permit and inspection program, this function might have to be contracted out. The draft ordinance, provided as Attachment 2 to this report, contains for your consideration a permit and inspection requirement, which is identified in red text. The safety and security standards contained within the draft ordinance cannot be proactively enforced without a robust permit and inspection program.

CONCLUSION:

Staff seeks further direction regarding options for local regulation of recreational cannabis-related activities.

ATTACHMENTS:

Attachment 1 – August 8, 2017 Staff Report and Attachments.

Attachment 2 – Draft Ordinance Restricting Recreational Cannabis Within the City of Hercules.

Attachment 3 – Current Hercules Smoking Regulations



STAFF REPORT TO THE CITY COUNCIL

DATE: Meeting of September 26, 2017

TO: Mayor de Vera and Members of the City Council

SUBMITTED BY: David Biggs, City Manager
J. Patrick Tang, City Attorney

SUBJECT: Local Regulation of Cannabis Uses Pursuant to Proposition 64

RECOMMENDED ACTION:

Receive and discuss staff report and revised draft legislation, and provide further direction to staff and the City Attorney.

BACKGROUND:

At the council meeting of September 12, 2017, the City Council discussed staff recommendations regarding a proposed ordinance that would impose restrictions on local marijuana activities. This report addresses some of the issues raised by Council at the September 12th meeting. A redline draft ordinance containing changes directed by Council is provided for as Attachment 1. A clean copy of the revised draft ordinance is provided as Attachment 2 to this report.

As previously reported to the Council, with the November 2016 passage of statewide Proposition 64, the Adult Use of Marijuana Act ("AUMA"), there is a potential for the state to issue licenses for cannabis businesses to operate in the City beginning in January 2018.

While nothing in the AUMA requires a city to enact an ordinance or regulation by a certain date, if a city does not have a ban or regulatory scheme in place at the time a permit is processed by the state, the City would have no ability to impose local conditions on a permit thus issued. For this reason, staff recommends that any local restrictions be adopted and effective before the state begins to issue licenses.

A copy of the staff report from July 12th is provided as Attachment 3 to this report.

DISCUSSION:

At the September 12, 2017 Council meeting, staff was directed to make the following changes to the draft ordinance:

- Reference the City's Smoking Ordinance.

See Attachment 1, Sec. 4-18.02(F)(2).

- Propose amendments to the City's Smoking Ordinance.

The City's Smoking Ordinance was adopted in 1992 and is out of date. Included as Attachment 4 to this report is a draft Model Smoking Ordinance that includes express restrictions on vaping and marijuana smoke. The City Attorney is reviewing other model ordinances and if directed to do so will bring back a report with recommendations to Council. It is important to note that under the AUMA, the smoking of cannabis is subject to the same limitations as tobacco smoking.

- Reserve the right to enact further restrictions on marijuana related activities in the city.

See Attachment 1, Sec. 4-18.06.

- Include provisions to address objectionable smells from cultivation activities (Emeryville model).

See Attachment 1, Sec. 4-18.03(B)(7).

- Include Vaping.

Vaping is not specifically included in the draft marijuana ordinance, but the definition of "smoking" in the City's Smoking Ordinance appears to be broad enough to cover vaping. It is recommended that a revised Smoking Ordinance should expressly include vaping.

- Prohibit outdoor cultivation.

See Attachment 1, Sec. 4-18.03(A).

- Prohibit accessory structure cultivation (including greenhouses).

Originally included as a prohibition in the September 12th draft ordinance; further research indicates that the AUMA does not allow cities to completely prohibit marijuana cultivation for personal use in accessory structures (Cal. Health and Safety Code Sec. 11362.2(b)(2)). Revised language requires compliance with the

City's setback and permitting requirements for accessory structures, see Attachment 1, Sec. 4-18.03(B)(6).

- Prohibit retail sales of cannabis for recreational purposes.

See Attachment 1, Sec. 4-18.02(B).

- Prohibit deliveries of cannabis within Hercules.

See Attachment 1, Sec. 4-18.02(C). Note: In light of the Council's discussion on September 12th, staff is offering for Council consideration modified language that would make an exception for noncommercial delivery of medical marijuana by primary caregivers only, consistent with Ordinance 492, adopted in 2016. This is a policy issue; legally the City has the discretion to ban all deliveries, or allow an exception for deliveries by primary caregivers of noncommercial medical marijuana to patients residing in Hercules.

- Remove the indoor cultivation permit and inspection provisions from Sec. 18.03, but retain the health and safety requirements that would apply to indoor cultivation for personal use.

Council discussed during the September 12th meeting whether a permit and inspection program should be adopted. Council determined that at this time, such a program is infeasible. However, Council requested that staff retain as many of the health and safety requirements as possible in the revised draft, without requiring inspection and permitting. Staff is offering a hybrid approach with new subsections 10 and 11 that would require a person engaging in indoor cultivation to sign an Acknowledgment and Consent Form to verify compliance with local cultivation requirements and provide consent to an inspection, with 24 hours notice, when a complaint has been filed. See Attachment 1, Sec. 4-18.03(B)(1)-(11).

Additional Comments:

Given the number of references in the draft ordinance to provisions of the AUMA and the several questions posed by the Council at the September 12th meeting regarding AUMA provisions, a link to the [full text of the AUMA](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf) is being provided for your reference:

[https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20\(Marijuana\)_1.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf)

CONCLUSION:

Staff seeks further direction regarding options for local regulation of cannabis related activities. A public hearing notice for October 10, 2017 has been prepared and submitted to the newspaper in anticipation that the Council may direct staff to proceed with introduction of a final ordinance.

ATTACHMENTS:

Attachment 1 – Redline version of Revised Draft Ordinance.

Attachment 2 – Clean version of Revised Draft Ordinance.

Attachment 3 – Staff report from September 12, 2017.

Attachment 4 – ANR Model Smoking Ordinance.

NOTES:

- 1) Text in Underline identifies proposed amendments to Ordinance No. 492, reviewed by the City Council at the September 12, 2017 meeting.
- 2) Text in **RED** identifies changes recommended by staff in response to comments received from the City Council at the September 12, 2017 meeting, and pursuant to additional research regarding Proposition 64 requirements.
- 3) Text in ~~Strikethrough~~ identifies language reviewed by the City Council on September 12th that is now proposed to be deleted.
- 4) Text in ~~Double-Strikethrough~~ identifies permit, licensing, and inspection language that was presented on September 12, and by consensus of the Council, directed to be left out of this draft and deferred for later consideration.
- 5) Text in parentheses on the right margin are September 12th comments from council members, with staff responses.

Chapter 18. ~~Medical~~ Marijuana Dispensaries, Cultivation, Processing, **Usage, Sales, and Commercial Delivery**

Sec. 4-18.01 Purpose.

~~Medical~~ Marijuana Dispensaries and Other Uses. The City Council finds that prohibitions on marijuana cultivation, marijuana processing, **marijuana usage, marijuana sales,** marijuana commercial delivery, and marijuana dispensaries are necessary for the preservation and protection of the public health, safety, and welfare of the City and its community, **and that such local prohibitions are specifically authorized under state law pursuant to Sections 11362.2 and 26200 of the California Health and Safety Code, and the Adult Use of Marijuana Act ("AUMA"), Section 3. "Purpose and Intent", subsections (c) and (d).** Notwithstanding any provision of this Code to the contrary, any land use that cannot be conducted or carried out without being in violation of State or Federal law or this Code, expressly including, but not limited to, ~~medical~~ marijuana dispensaries, marijuana commercial deliveries, and ~~medical~~ marijuana cultivation, shall be prohibited in all planning areas and zoning districts within the City.

[GB: Where is the authority in the AUMA for allowing local regulation? Response: the draft ordinance Sec. 4-18.01 has been amended to

*include express references to state law allowance
for local control and regulation]*

Sec. 4-18.02 Prohibited Uses.

A. Notwithstanding any provision of this Section or Chapter, no person shall transact, perform, engage in and carry on in the City any business, trade, profession, calling, use or occupation that cannot be, or is not, conducted or carried out without being in violation of State or Federal law, or this Code, and no license will be issued for any such business, trade, profession, calling, use, or occupation, including but not limited to a ~~medical~~ marijuana dispensary, ~~medical~~ **marijuana commercial sales**, marijuana delivery, or ~~medical~~ marijuana cultivation as defined in Section 4-18.03. ~~In the event of any future amendments to this Code, including amendments to allowable medical marijuana uses, the City hereby expressly reserves the right to develop, implement, and conduct local licensing of medical marijuana cultivation under Health and Safety Code Section 11362.777(c).~~

B. Commercial and non-personal use marijuana activities of all types are expressly prohibited in all planning areas and zoning districts within the City. No person shall establish, operate, conduct or allow any commercial or non-personal use marijuana activity anywhere within the city.

C. To the extent not already covered by subsection B above, **and except for the noncommercial delivery of medical marijuana or medical marijuana products by primary caregivers**, all deliveries of medical or non-medical marijuana are expressly prohibited within the city of Hercules. No person shall conduct any deliveries that either originate or terminate within the city.

[Staff is offering for further consideration the optional language above that would allow for delivery of medical marijuana by primary caregivers only, in response to concerns raised by the Council on September 12th, and consistent with the previously adopted Ordinance No. 492]

D. This section is meant to prohibit all activities for which a state license is required. Accordingly, the city shall not issue any permit, license or other entitlement for any activity for which a state license is required under the Medical Marijuana Regulation and Safety Act ("MMRSA") or the Adult Use of Marijuana Act ("AUMA").

E. Cultivation of marijuana for non-commercial purposes including, but not limited to, cultivation by a qualified patient or a primary caregiver, is expressly prohibited in all zones, planned developments, and all specific and master plan areas in the city of Hercules, except ~~by permit~~ in residential zones as described in

~~Section 4-18.03. No person including, but not limited to, a qualified patient or primary caregiver, shall cultivate any amount of marijuana for personal use in the city, without said permit.~~

F. As specified by California Health and Safety Code Section 11362.3 the following are prohibited:

1. Smoke or ingest marijuana or marijuana products in any public place, except in accordance with Section 26200 of the Business and Professions Code.

2. Smoke marijuana or marijuana products in a location where smoking tobacco is prohibited, pursuant to Section 11362.3(a)(2) of the Business and Professions Code, and the City's Smoking Ordinance, Title 5, Chapter 6 of this Code.

[Per MDV; cross reference the Smoking Ordinance? Response: This subsection simply restates the language contained in the AUMA; the section has been amended to include a cross reference to the Smoking Ordinance]

3. Smoke marijuana or marijuana products within one thousand feet of a school, day care center, or youth center, except in or upon the grounds of a private residence or in accordance with Section 26200 of the Business and Professions Code or Chapter 3.5 of Division 8 of the Business and Professions Code and only if such smoking is not detectable by others on the grounds of such a school, day care center, or youth center.

4. Possess an open container or open package of marijuana or marijuana products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.

5. Possess, smoke or ingest marijuana or marijuana products in or upon the grounds of a school, day care center, or youth center while children are present.

6. Manufacture concentrated cannabis using a volatile solvent, unless done in accordance with a license under Chapter 3.5 of Division 8 or Division 10 of the Business and Professions Code.

*[MDV: Why does this subsection reference a licensing scheme, since the City will not issue permits? Response: This is a restatement of the language from the state code. State law allows permitting for the manufacture of concentrated cannabis, **but also allows for the City to ban manufacturing, which is provided for in the draft ordinance at Sec. 4-18.02(D).**]*

7. Smoke or ingest marijuana or marijuana products while driving, operating a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.

[MDV: Suggested re-grouping similar topics so that 3 and 5 (schools) are together, and 4 and 7 (driving) are together. Response: While this is a sensible suggestion, the language in our draft restates the language of the AUMA, B&P Code 11362.3, in the order it appears in the state law. Yes, the subsections can be reordered, but this

may cause confusion when the provisions are cross-referenced]

8. Smoke or ingest marijuana or marijuana products while riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation except as permitted on a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation that is operated in accordance with Section 26200 of the Business and Professions Code and while no persons under the age of twenty-one years are present.

Sec. 4-18.03 Indoor Marijuana Cultivation-Permit.

A. Outdoor cultivation of marijuana is prohibited within the city limits of the city of Hercules.

B. Indoor personal use cultivation of marijuana is ~~allowed pursuant to an approved indoor marijuana cultivation permit~~ authorized by Health and Safety Code Section 11362.1(a)(3), **and in accordance with the following local requirements:** ~~The permit shall be submitted to the building department for approval, and appealed to the administrative hearing board as necessary.~~

1. A person twenty-one years and older must plant, cultivate, harvest, dry, or process plants in accordance with this chapter.

2. The marijuana plants and anything produced by the plants must be kept within the person's private residence, fully enclosed and secure, and not visible by normal unaided vision from a public place. **Cultivation, harvesting, or processing of plants in accessory structures is prohibited at all times.**

[Further research indicates that the AUMA disallows a complete local prohibition on cultivation inside accessory structures. H&S Code Sec. 11362.2(b)(2). Staff recommends requiring accessory structures used for cultivation to meet the requirements for accessory structures as listed in the city's Zoning Ordinance, see subsection 4-18.03(B)(6) below.]

3. Not more than six living plants may be planted, cultivated, harvested, dried, or processed at one time, but outdoor cultivation, harvesting, or processing will continue to be prohibited at all times.

4. ~~Permit applicant~~ **A person engaging in indoor cultivation pursuant to this Section** shall obtain written and signed consent of the property owner where the indoor cultivation of marijuana is located. ~~and evidence that the applicant resides full time on the premises and as reflected by utility accounts. The residence shall remain occupied, and required to maintain a functioning kitchen and bathroom(s) and the use of primary bedrooms for their intended purposes.~~

5. The property used for indoor cultivation of marijuana shall be a residential unit located upon the grounds of a private residence that is fully enclosed and secure, and not visible by normal unaided vision from a public place ~~located in a residential or commercial zone.~~

~~6. The application must include verification that Hercules police services will confirm, that the property owner, legal tenant, and/or operator of the indoor cultivation has not been convicted of an offense including, but not be limited to, the following:~~

~~a. A violent felony conviction, as specified in subdivision (c) of Section 667.5 of the Penal Code.~~

~~b. A serious felony conviction, as specified in subdivision (c) of Section 1192.7 of the Penal Code.~~

~~c. A felony conviction involving fraud, deceit, or embezzlement.~~

~~d. A felony conviction for hiring, employing, or using a minor in transporting, carrying, selling, giving away, preparing for sale, or peddling, any controlled substance to a minor; or selling, offering to sell, furnishing, offering to furnish, administering, or giving any controlled substance to a minor.~~

~~e. A felony conviction for drug trafficking with enhancements.~~

~~7. The applicant must submit plans prepared by licensed professionals reflecting the cultivation area including:~~

~~a. Ventilation and filtration systems as prepared by a licensed mechanical engineer;~~

~~b. Electrical plans with load calculations as prepared by a licensed electrical engineer;~~

~~c. Building plans for building alterations as prepared by a licensed engineer;~~

~~d. Plans reflecting how the cultivation area is locked and inaccessible to minors, and if inside an accessory structure to a private residence located upon the grounds of a private residence that it is fully enclosed, secure, and not visible by normal unaided vision from a public place.~~

6. The property used for indoor cultivation of marijuana shall be locked and inaccessible to minors, and if inside an accessory structure located upon the grounds of a private residence that it is fully enclosed, secure, and not visible by normal unaided vision from a public place. An accessory structure used for the cultivation of marijuana pursuant to Section 11362.2(b)(2) of the California Health and Safety Code must meet the permitting and setback requirements for accessory structures provided for in the Hercules Zoning Ordinance.

7. Odors shall be contained on the property on which the cultivation is located. If the City receives complaints of odors, the City may cause the inspection and abatement of the nuisance pursuant to subsection 4-18.03(b)(10) below, or any other remedy available at law.

[DR requested adding a provision regarding control of odor from usage and cultivation, citing the Emeryville draft ordinance. This new

provision is modelled on the Emeryville odor control provision]

8. Generators or gas products used to power electrical or lighting fixtures or equipment for indoor cultivation shall be prohibited.

9. Use of volatile solvents for indoor cultivation shall be prohibited, including, but not limited to: (a) explosive gases, such as butane, propane, xylene, styrene, gasoline, kerosene, O₂ or H₂; and (b) dangerous poisons, toxins, or carcinogens, such as methanol, isopropyl alcohol, methylene chloride, acetone, benzene, toluene, and trichloroethylene, unless evidence of a current license to operate such solvents is provided.

~~10. The application shall include proposed indoor signage identifying the secured space where cultivation is occurring, including identification of any chemicals, fertilizers and pesticides located in the space or in the operation of the cultivation to aid public safety officials in times of emergency response to the location.~~

~~11. Initiation of a permit application will trigger a pre inspection by the building inspector to ensure that the building and/or accessory structure fully complies with the Uniform Building Code, California Building Code, and applicable municipal codes. Upon issuance of the permit, another inspection will be made by the building inspector to ensure approved plans were followed. Additional inspections will be performed over the term of the permit and~~

10. A person engaging in indoor cultivation pursuant to this Section shall first provide a signed Acknowledgment and Consent Form to the City of Hercules on a form prescribed by the City Manager confirming compliance with state law and the conditions contained in this Section, and granting the building inspector and/or code enforcement officer access with twenty-four-hour notice upon receipt by the City of a complaint regarding the person's cultivation activity. If the inspection is denied, an enforcement and/or abatement action shall be commenced to abate the nuisance conditions.

11. The Acknowledgment and Consent form ~~permit~~ will expire after twelve months and must be renewed annually with approval from the building department to be in compliance if indoor personal use marijuana cultivation is to continue.

[Council directed that the inspection and permit requirements in the September 12th draft be deferred for future consideration, but requested that the health and safety requirements for indoor cultivation be retained to the extent possible. Revised sections 1-11 above establish certain safety requirements and require that an Acknowledgment and Consent Form be provided the City to allow inspections on a complaint basis]

Sec. 4-18.03 Definitions.

"Accessory Structure" shall mean an enclosed structure either attached to and having a common wall with the main structure or may be freestanding enclosure, as defined in Section 35.210 of the Hercules Zoning Ordinance.

"Adult Use of Marijuana Act" or "AUMA" shall mean Proposition 64 now contained in Health and Safety Code Sections 11108, and 11362.

“Cannabis” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(f) as the same may be amended from time to time, and means any or all parts of the plant Cannabis sativa Linnaeus, Cannabis indica, or Cannabis ruderalis, whether growing or not; the seeds thereof; the resin or separated 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, including marijuana infused in foodstuff or any other ingestible or consumable product containing marijuana. The term “marijuana” shall also include “medical marijuana” as such phrase is used in the August 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, as may be amended from time to time, that was issued by the office of the Attorney General for the State of California or subject to the provisions of California Health and Safety Code Section 11362.5 (Compassionate Use Act of 1996) or California Health and Safety Code Sections 11362.7 to 11362.83 (Medical Marijuana Program Act).

“Caregiver” or “primary caregiver” shall have the same meaning as set forth in Health and Safety Code Section 11362.7 as the same may be amended from time to time.

“Commercial cannabis activity” shall have the same meaning as that set forth in Business and Professions Code Section 19300.5(k) as the same may be amended from time to time.

“Cooperative/collective” shall mean two or more persons collectively or cooperatively cultivating, distributing, using, transporting, possessing, administering, delivering or making available medical marijuana, with or without compensation.

“Cultivation” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(l) as the same may be amended from time to time.

“Cultivation site” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(x) as the same may be amended from time to time.

“Delivery” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(m) as the same may be amended from time to time. “Delivery” shall not include the carriage of medical marijuana or medical marijuana products on public roads when otherwise in compliance with California Business and Professions Code Section 19340, and shall not include the noncommercial delivery of medical marijuana or medical marijuana products by primary caregivers as defined in Section 11362.7 of the California Health and Safety Code.

[Staff is providing the additional language above that would allow for delivery of medical marijuana by primary caregivers in response to concerns raised by the Council on September 12th, and consistent with the previously adopted Ordinance No. 492]

“Dispensary” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(n) as the same may be amended from time to time. For purposes of this chapter, “dispensary” shall also include a cooperative/collective.

“Dispensing” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(o) as the same may be amended from time to time.

“Distribution” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(p) as the same may be amended from time to time.

“Distributor” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(q) as the same may be amended from time to time.

“Manufacturer” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(y) as the same may be amended from time to time.

“Marijuana” see “Cannabis.”

“Medical marijuana cultivation” means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of any form of cannabis, regardless of whether there is an intent to produce, distribute, or sell the resulting product commercially.

~~“Medical marijuana delivery” means the commercial transfer of medical marijuana or medical marijuana products from a medical marijuana dispensary to a primary caregiver or qualified patient as defined in California Health and Safety Code Section 11362.7, or to a testing laboratory, and including the use of any technology platform owned or controlled by a dispensary to arrange or facilitate the transfer of medical marijuana or medical marijuana products within the City. “Medical marijuana delivery” shall not include the carriage of medical marijuana or medical marijuana products on public roads when otherwise in compliance with California Business and Professions Code Section 19340, and shall not include the noncommercial delivery of medical marijuana or medical marijuana products by caregivers.~~

[Staff recommends deleting this definition because it repeats the state code definition for “delivery” that is referenced in the definitions section above]

“Medical marijuana dispensary” means any facility or location, whether fixed or mobile, where marijuana, marijuana products, or devices for the use of marijuana or marijuana products, either individually or in any combination, are offered, carried, transported, transmitted, manufactured, stored, placed, cultivated, sold, traded, exchanged, bartered, made available to and/or distributed, expressly including an establishment that delivers marijuana or marijuana products as part of a retail sale.

“Medical marijuana processing” means any method used to prepare marijuana or its byproduct for commercial retail and/or wholesale distribution, including but not limited to: drying, cleaning, curing, packaging, and extraction of active ingredients to create marijuana related products and concentrates.

“Medical marijuana,” “medical marijuana product,” or “marijuana product” shall have the same meanings as set forth in Business and Professions Code Section 19300.5(ag) as the same may be amended from time to time and shall also include “medical marijuana” as such phrase is used in the August 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, as may be amended from time to

time, that was issued by the office of the Attorney General for the State of California or subject to the provisions of California Health and Safety Code Section 11362.5 (Compassionate Use Act of 1996) or California Health and Safety Code Sections 11362.7 to 11362.83 (Medical Marijuana Program Act).

“Medical Marijuana Regulation and Safety Act” or “MMRSA” shall mean the following bills signed into law on October 9, 2015 as the same may be amended from time to time: AB 243, AB 246, and SB 643.

“Nursery” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(ah) as the same may be amended from time to time.

“Qualifying patient” or “qualified patient” shall have the same meaning as set forth in Health and Safety Code Section 11362.7 as the same may be amended from time to time.

“Testing laboratory” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(z) as the same may be amended from time to time.

“Transport” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(am) as the same may be amended from time to time.

“Transporter” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(aa) as the same may be amended from time to time.

Sec. 4-18.04 Penalties.

A person who violates this Chapter is subject to all abatement and civil penalty provisions of the Hercules Municipal Code, including but not limited to the public nuisance provisions of Chapter 4-10, and any and all applicable laws and regulations without limitation. In addition to any other administrative enforcement action authorized pursuant to the Hercules Municipal Code, the city attorney may bring a civil action for injunctive relief and civil penalties against any person or entity that violates this chapter.

Sec. 4-18.05 Public Nuisance.

Any use or condition caused, or permitted to exist, in violation of any provision of this Chapter shall be, and hereby is declared to be, a public nuisance and may be summarily abated by the city pursuant to Code of Civil Procedure Section 731 or any other remedy available to the city.

Sec. 4-18.06 Future Amendments and Preservation of Local Control.

The City expressly reserves the right to adopt and enforce local ordinances to regulate and control all local marijuana related activities in a manner consistent with state law, including but not limited to regulation of use, possession, use for medical purposes, licensing, retail and distribution, cultivation, transportation, delivery, manufacturing, packaging, advertising, marketing, records keeping, fees, taxation, permits, and inspections.

[This section has been added based on comments made by the Council and staff at the September 12th meeting]

Chapter 18. Marijuana Dispensaries, Cultivation, Processing, Usage, Sales, and Commercial Delivery

Sec. 4-18.01 Purpose.

Marijuana Dispensaries and Other Uses. The City Council finds that prohibitions on marijuana cultivation, marijuana processing, marijuana usage, marijuana sales, marijuana commercial delivery, and marijuana dispensaries are necessary for the preservation and protection of the public health, safety, and welfare of the City and its community, and that such local prohibitions are specifically authorized under state law pursuant to Sections 11362.2 and 26200 of the California Health and Safety Code, and the Adult Use of Marijuana Act (“AUMA”), Section 3. “Purpose and Intent”, subsections (c) and (d). Notwithstanding any provision of this Code to the contrary, any land use that cannot be conducted or carried out without being in violation of State or Federal law or this Code, expressly including, but not limited to, marijuana dispensaries, marijuana commercial deliveries, and marijuana cultivation, shall be prohibited in all planning areas and zoning districts within the City.

Sec. 4-18.02 Prohibited Uses.

A. Notwithstanding any provision of this Section or Chapter, no person shall transact, perform, engage in and carry on in the City any business, trade, profession, calling, use or occupation that cannot be, or is not, conducted or carried out without being in violation of State or Federal law, or this Code, and no license will be issued for any such business, trade, profession, calling, use, or occupation, including but not limited to a marijuana dispensary, marijuana commercial sales, marijuana delivery, or marijuana cultivation as defined in Section 4-18.03.

B. Commercial and non-personal use marijuana activities of all types are expressly prohibited in all planning areas and zoning districts within the City. No person shall establish, operate, conduct or allow any commercial or non-personal use marijuana activity anywhere within the city.

C. To the extent not already covered by subsection B above, and except for the noncommercial delivery of medical marijuana or medical marijuana products by primary caregivers, all deliveries of medical or non-medical marijuana are expressly prohibited within the city of Hercules. No person shall conduct any deliveries that either originate or terminate within the city.

D. This section is meant to prohibit all activities for which a state license is required. Accordingly, the city shall not issue any permit, license or other entitlement for any activity for which a state license is required under the Medical Marijuana Regulation and Safety Act (“MMRSA”) or the Adult Use of Marijuana Act (“AUMA”).

E. Cultivation of marijuana for non-commercial purposes including, but not limited to, cultivation by a qualified patient or a primary caregiver, is expressly prohibited in all zones, planned developments, and all specific and master plan areas in the city of Hercules, except in residential zones as described in Section 4-18.03.

F. As specified by California Health and Safety Code Section 11362.3 the following are prohibited:

1. Smoke or ingest marijuana or marijuana products in any public place, except in accordance with Section 26200 of the Business and Professions Code.

2. Smoke marijuana or marijuana products in a location where smoking tobacco is prohibited, pursuant to Section 11362.3(a)(2) of the Business and Professions Code, and the City’s Smoking Ordinance, Title 5, Chapter 6 of this Code.

3. Smoke marijuana or marijuana products within one thousand feet of a school, day care center, or youth center, except in or upon the grounds of a private residence or in accordance with Section 26200 of the Business and Professions Code or Chapter 3.5 of Division 8 of the Business and Professions Code and only if such smoking is not detectable by others on the grounds of such a school, day care center, or youth center.

4. Possess an open container or open package of marijuana or marijuana products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.

5. Possess, smoke or ingest marijuana or marijuana products in or upon the grounds of a school, day care center, or youth center while children are present.

6. Manufacture concentrated cannabis using a volatile solvent, unless done in accordance with a license under Chapter 3.5 of Division 8 or Division 10 of the Business and Professions Code.

7. Smoke or ingest marijuana or marijuana products while driving, operating a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.

8. Smoke or ingest marijuana or marijuana products while riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation except as permitted on a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation that is operated in accordance with Section 26200

of the Business and Professions Code and while no persons under the age of twenty-one years are present.

Sec. 4-18.03 Indoor Marijuana Cultivation.

A. Outdoor cultivation of marijuana is prohibited within the city limits of the city of Hercules.

B. Indoor personal use cultivation of marijuana is authorized by Health and Safety Code Section 11362.1(a)(3), and in accordance with the following local requirements:

1. A person twenty-one years and older must plant, cultivate, harvest, dry, or process plants in accordance with this chapter.

2. The marijuana plants and anything produced by the plants must be kept within the person's private residence, fully enclosed and secure, and not visible by normal unaided vision from a public place.

3. Not more than six living plants may be planted, cultivated, harvested, dried, or processed at one time, but outdoor cultivation, harvesting, or processing will continue to be prohibited at all times.

4. A person engaging in indoor cultivation pursuant to this Section shall obtain written and signed consent of the property owner where the indoor cultivation of marijuana is located.

5. The property used for indoor cultivation of marijuana shall be a residential unit located upon the grounds of a private residence that is fully enclosed and secure, and not visible by normal unaided vision from a public place.

6. The property used for indoor cultivation of marijuana shall be locked and inaccessible to minors, and if inside an accessory structure to a private residence located upon the grounds of a private residence that it is fully enclosed, secure, and not visible by normal unaided vision from a public place. An accessory structure used for the cultivation of marijuana pursuant to Section 11362.2(b)(2) of the California Health and Safety Code must meet the permitting and setback requirements for accessory structures provided for in the Hercules Zoning Ordinance.

7. Odors shall be contained on the property on which the cultivation is located. If the City receives complaints of odors, the City may cause the inspection and abatement of the nuisance pursuant to subsection 4-18.03(b)(10) below, or any other remedy available at law.

8. Generators or gas products used to power electrical or lighting fixtures or equipment for indoor cultivation shall be prohibited.

9. Use of volatile solvents for indoor cultivation shall be prohibited, including, but not limited to: (a) explosive gases, such as butane, propane, xylene, styrene, gasoline, kerosene, O₂ or H₂; and (b) dangerous poisons, toxins, or carcinogens, such as methanol, isopropyl alcohol, methylene chloride, acetone, benzene, toluene, and trichloroethylene.

10. A person engaging in indoor cultivation pursuant to this Section shall first provide a signed Acknowledgment and Consent Form to the City of Hercules on a form prescribed by the City Manager confirming compliance with state law and the conditions contained in this Section, and granting the building inspector and/or code enforcement officer access with twenty-four-hour notice upon receipt by the City of a complaint regarding the person's cultivation activity. If the inspection is denied, an enforcement and/or abatement action shall be commenced to abate the nuisance conditions.

11. The Acknowledgment and Consent form will expire after twelve months and must be renewed annually with approval from the building department if indoor personal use marijuana cultivation is to continue.

Sec. 4-18.03 Definitions.

“Accessory Structure” shall mean an enclosed structure either attached to and having a common wall with the main structure or may be freestanding enclosure, as defined in Section 35.210 of the Hercules Zoning Ordinance.

“Adult Use of Marijuana Act” or “AUMA” shall mean Proposition 64 now contained in Health and Safety Code Sections 11108, and 11362.

“Cannabis” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(f) as the same may be amended from time to time, and means any or all parts of the plant *Cannabis sativa* Linnaeus, *Cannabis indica*, or *Cannabis ruderalis*, whether growing or not; the seeds thereof; the resin or separated 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, including marijuana infused in foodstuff or any other ingestible or consumable product containing marijuana.

“Caregiver” or “primary caregiver” shall have the same meaning as set forth in Health and Safety Code Section 11362.7 as the same may be amended from time to time.

“Commercial cannabis activity” shall have the same meaning as that set forth in Business and Professions Code Section 19300.5(k) as the same may be amended from time to time.

“Cooperative/collective” shall mean two or more persons collectively or cooperatively cultivating, distributing, using, transporting, possessing, administering, delivering or making available medical marijuana, with or without compensation.

“Cultivation” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(l) as the same may be amended from time to time.

“Cultivation site” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(x) as the same may be amended from time to time.

“Delivery” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(m) as the same may be amended from time to time. “Delivery” shall not include the carriage of medical marijuana or medical marijuana products on public roads when otherwise in compliance with California Business and Professions Code Section 19340, and shall not include the noncommercial delivery of medical marijuana or medical marijuana products by primary caregivers as defined in Section 11362.7 of the California Health and Safety Code.

“Dispensary” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(n) as the same may be amended from time to time. For purposes of this chapter, “dispensary” shall also include a cooperative/collective.

“Dispensing” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(o) as the same may be amended from time to time.

“Distribution” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(p) as the same may be amended from time to time.

“Distributor” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(q) as the same may be amended from time to time.

“Manufacturer” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(y) as the same may be amended from time to time.

“Marijuana” see “Cannabis.”

“Medical marijuana cultivation” means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of any form of cannabis, regardless of whether there is an intent to produce, distribute, or sell the resulting product commercially.

“Medical marijuana dispensary” means any facility or location, whether fixed or mobile, where marijuana, marijuana products, or devices for the use of marijuana or marijuana products, either individually or in any combination, are offered, carried, transported, transmitted, manufactured, stored, placed, cultivated, sold, traded, exchanged, bartered, made available to and/or distributed, expressly including an establishment that delivers marijuana or marijuana products as part of a retail sale.

“Medical marijuana processing” means any method used to prepare marijuana or its byproduct for commercial retail and/or wholesale distribution, including but not limited to: drying, cleaning, curing, packaging, and extraction of active ingredients to create marijuana related products and concentrates.

“Medical marijuana,” “medical marijuana product,” or “marijuana product” shall have the same meanings as set forth in Business and Professions Code Section 19300.5(ag) as the same may be amended from time to time and shall also include “medical marijuana” as such phrase is used in the August 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, as may be amended from time to time, that was issued by the office of the Attorney General for the State of California or subject to the provisions of California Health and Safety Code Section 11362.5 (Compassionate Use Act of 1996) or California Health and Safety Code Sections 11362.7 to 11362.83 (Medical Marijuana Program Act).

“Medical Marijuana Regulation and Safety Act” or “MMRSA” shall mean the following bills signed into law on October 9, 2015 as the same may be amended from time to time: AB 243, AB 246, and SB 643.

“Nursery” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(ah) as the same may be amended from time to time.

“Qualifying patient” or “qualified patient” shall have the same meaning as set forth in Health and Safety Code Section 11362.7 as the same may be amended from time to time.

“Testing laboratory” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(z) as the same may be amended from time to time.

“Transport” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(am) as the same may be amended from time to time.

“Transporter” shall have the same meaning as set forth in Business and Professions Code Section 19300.5(aa) as the same may be amended from time to time.

Sec. 4-18.04 Penalties.

A person who violates this Chapter is subject to all abatement and civil penalty provisions of the Hercules Municipal Code, including but not limited to the public nuisance provisions of Chapter 4-10, and any and all applicable laws and regulations without limitation. In addition to any other administrative enforcement action authorized pursuant to the Hercules Municipal Code, the city attorney may bring a civil action for injunctive relief and civil penalties against any person or entity that violates this chapter.

Sec. 4-18.05 Public Nuisance.

Any use or condition caused, or permitted to exist, in violation of any provision of this Chapter shall be, and hereby is declared to be, a public nuisance and may be summarily abated by the city pursuant to Code of Civil Procedure Section 731 or any other remedy available to the city.

Sec. 4-18.06 Future Amendments and Preservation of Local Control.

The City expressly reserves the right to adopt and enforce local ordinances to regulate and control all local marijuana related activities in a manner consistent with state law, including but not limited to regulation of use, possession, use for medical purposes, licensing, retail and distribution, cultivation, transportation, delivery, manufacturing, packaging, advertising, marketing, records keeping, fees, taxation, permits, and inspections.



REPORT TO THE CITY COUNCIL

DATE: Meeting of September 12, 2017

TO: Mayor de Vera and Members of the City Council

SUBMITTED BY: David Biggs, City Manager
J. Patrick Tang, City Attorney

SUBJECT: Local Regulation of Recreational Cannabis Uses

RECOMMENDED ACTION: Receive and discuss staff report and draft legislation, and provide further direction to staff and the City Attorney.

BACKGROUND:

On November 8, 2016, Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA"), was approved by California voters and became effective on November 9, 2016.

The AUMA has legalized the nonmedical use of marijuana by persons 21 years of age and older, and allows for the personal cultivation of up to six marijuana plants. It makes it legal for persons 21 years of age or older to: (1) smoke or ingest marijuana or marijuana products; (2) possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older, without compensation, 28.5 grams of marijuana, or 8 grams of concentrated marijuana; and (3) possess, plant, cultivate, harvest, dry or process up to six living marijuana plants for personal use.

Although persons 21 years of age or older may use and possess nonmedical marijuana under AUMA, their ability to engage in these activities is not unfettered. The law prohibits the smoking of marijuana in certain places. Individuals cannot possess marijuana on school grounds and daycare centers, or in youth centers while children are present, or possess an open container of marijuana or marijuana products while driving, operating or riding in any vehicle used for transportation.

AUMA further provides that cities may prohibit possession and smoking in buildings owned, leased or occupied by the city, and that employers, including cities, may maintain a drug and alcohol-free work place by prohibiting the use, consumption, possession, transfer, transportation, sale, display or growth of marijuana in the work place.

Additionally, while outdoor cultivation may continue to be prohibited, indoor cultivation for personal use cannot be prohibited by the City, but it can be regulated.

As reported to you at the Council meeting of August 8, 2017, absent a local ordinance specifically addressing nonmedical cannabis business uses, there is a potential for the state to issue licenses for cannabis businesses to operate in the City beginning in January 2018. Unless the City has adopted local regulations at the time a permit is processed by the state, the state regulations would apply, essentially pre-empting the City from objecting to the terms of a permit thus issued. Staff recommends that any local restrictions be adopted and effective before the state begins to issue licenses. A copy of the staff report from the August 8, 2017 meeting is provided as Attachment 1 to this report.

DISCUSSION:

At the August 8, 2017 Council meeting, staff was directed to bring back draft legislation for Council consideration that would establish the following restrictions in Hercules:

- Not allow outdoor cultivation.
- Not allow accessory structure cultivation (including greenhouses).
- Retain medical cannabis dispensary ban.
- Not allow retail sales of cannabis for recreational purposes.
- Not allow deliveries of medical or recreational cannabis within Hercules.

A draft ordinance is provided for Council consideration as Attachment 2 that would accomplish the above goals set out by the Council at the August 8, 2017 meeting. If the draft measure were to be enacted by the City Council, the Council could always modify the regulations at a future date should a decision be made to adjust the City's policy in order to allow for some of the activities prohibited by the draft ordinance.

At the August 8th meeting, Council also requested additional clarifying information as follows:

- Provide a comparison of current medical cannabis regulations and proposed recreational cannabis regulations.

The draft ordinance would amend existing medical marijuana restrictions to include restrictions on recreational cannabis activities. Staff is recommending one cultivation standard, applicable to both medical cannabis and recreational cannabis, so that a comparison chart or diagram is not necessary.

- Provide the breakdown of Hercules votes for and against Proposition 64 from the November 2016 election.

The voting breakdown for Proposition 64 is as follows:

Statewide:	57.13% in favor; 42.87% opposed.
County of Contra Costa:	60.72% in favor; 39.28% opposed.
City of Hercules:	70.76% in favor; 29.24% opposed.

- Provide that the restrictions on tobacco, medical cannabis, and recreational cannabis uses be equally as stringent, and similarly applicable, in or about public facilities, offices, and open spaces.

A review of the existing smoking regulations and the prior restrictions on medical cannabis activities enacted in 2015 suggests that these regulations do not conflict with the terms of the proposed ordinance restricting recreational cannabis activities, and in fact would provide comparable restrictions, at least as to their uses in public buildings and in and around public spaces within the City. It is important to note that under the AUMA, the smoking of cannabis is subject to the same limitations as tobacco smoking. In the case of Hercules, restrictions on smoking in public areas were enacted in 1992, and are codified in the Hercules Municipal Code at Sec. 5-6. A copy of the City's smoking regulations is provided as Attachment 3 to this report.

Additional Comments:

Ordinance No. 492. The Council passed Ordinance No. 492 in February 2016, imposing restrictions on medical marijuana (attached to the staff report from the meeting of August 8th). Ordinance No. 492 has been codified within the Hercules Municipal Code as Sec. 4-18. There was discussion at the meeting of August 8th whether additional restrictions on recreational cannabis should be adopted by amending Sec. 4-18, or in the alternative, whether a separate amendment to the municipal code addressing recreational cannabis should be prepared instead. Since Sec. 4-18 would need to be amended in order to harmonize some of the language, references, and definitions with the newly proposed regulation of recreational cannabis, it was decided to amend Sec. 4-18 to include the recreational cannabis regulations, so that the City's cannabis regulations would be located within the same code section.

Personal Cultivation. For enforcement purposes, it would be difficult to distinguish between cultivation of cannabis for a qualified patient, and personal cultivation for recreational purposes. Staff thus recommends one cultivation standard. Personal cultivation under the proposed ordinance must be in compliance with, among other requirements: A person must be 21 years or older. The marijuana plants and anything produced by the plants must be kept within the person's private residence, fully enclosed and secure, and not visible by normal unaided vision from a public place. Not more than six plants may be planted or cultivated at one time. Outdoor cultivation is prohibited at all times. Building permits must be obtained. And, accessory structures cannot be used for cultivation.

Permit and Inspection Option. An unresolved question at this stage is whether the City as a matter of policy finds it is in the public interest to develop a permit and inspection program that would apply to the indoor cultivation of cannabis. Of course such a program would impact staffing, and would require extensive training as well as active monitoring and follow up. If Council considers it a priority to implement a permit and inspection program, this function might have to be contracted out. The draft ordinance, provided as Attachment 2 to this report, contains for your consideration a permit and inspection requirement, which is identified in red text. The safety and security standards contained within the draft ordinance cannot be proactively enforced without a robust permit and inspection program.

CONCLUSION:

Staff seeks further direction regarding options for local regulation of recreational cannabis-related activities.

ATTACHMENTS:

Attachment 1 – August 8, 2017 Staff Report and Attachments.

Attachment 2 – Draft Ordinance Restricting Recreational Cannabis Within the City of Hercules.

Attachment 3 – Current Hercules Smoking Regulations

**Model Ordinance Prohibiting Smoking in
All Workplaces and Public Places
(100% Smokefree)**

Sec. 1000. Title

This Article shall be known as the _____ [name of City or County] Smokefree Air Ordinance of _____ [year].

Sec. 1001. Findings and Intent

The _____ [City or County Governing Body] does hereby find that:

The 2006 U.S. Surgeon General's Report, *The Health Consequences of Involuntary Exposure to Tobacco Smoke*, has concluded that (1) secondhand smoke exposure causes disease and premature death in children and adults who do not smoke; (2) children exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory problems, ear infections, and asthma attacks, and that smoking by parents causes respiratory symptoms and slows lung growth in their children; (3) exposure of adults to secondhand smoke has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer; (4) there is no risk-free level of exposure to secondhand smoke; (5) establishing smokefree workplaces is the only effective way to ensure that secondhand smoke exposure does not occur in the workplace, because ventilation and other air cleaning technologies cannot completely control for exposure of nonsmokers to secondhand smoke; and (6) evidence from peer-reviewed studies shows that smokefree policies and laws do not have an adverse economic impact on the hospitality industry.¹ According to the 2010 U.S. Surgeon General's Report, *How Tobacco Smoke Causes Disease*, even occasional exposure to secondhand smoke is harmful and low levels of exposure to secondhand tobacco smoke lead to a rapid and sharp increase in dysfunction and inflammation of the lining of the blood vessels, which are implicated in heart attacks and stroke.² According to the 2014 U.S. Surgeon General's Report, *The Health Consequences of Smoking—50 Years of Progress*, secondhand smoke exposure causes stroke in nonsmokers. The report also found that since the 1964 Surgeon General's Report on Smoking and Health, 2.5 million nonsmokers have died from diseases caused by tobacco smoke.³

Numerous studies have found that tobacco smoke is a major contributor to indoor air pollution, and that breathing secondhand smoke (also known as environmental tobacco smoke) is a cause of disease in healthy nonsmokers, including heart disease, stroke, respiratory disease, and lung cancer. The National Cancer Institute determined in 1999 that secondhand smoke is responsible for the early deaths of approximately 53,000 Americans annually.⁴

The Public Health Service's National Toxicology Program (NTP) has listed secondhand smoke as a known carcinogen.⁵

Based on a finding by the California Environmental Protection Agency in 2005, the California Air Resources Board has determined that secondhand smoke is a toxic air contaminant, finding that exposure to secondhand smoke has serious health effects, including low birth-weight babies; sudden infant death syndrome (SIDS); increased respiratory infections in children; asthma in

children and adults; lung cancer, sinus cancer, and breast cancer in younger, premenopausal women; heart disease; and death.⁶

There is indisputable evidence that implementing 100% smoke-free environments is the only effective way to protect the population from the harmful effects of exposure to secondhand smoke.⁷

In reviewing 11 studies concluding that communities see an immediate reduction in heart attack admissions after the implementation of comprehensive smokefree laws, the Institute of Medicine of the National Academies concluded that data consistently demonstrate that secondhand smoke exposure increases the risk of coronary heart disease and heart attacks and that smokefree laws reduce heart attacks.⁸

A significant amount of secondhand smoke exposure occurs in the workplace. Employees who work in smoke-filled businesses suffer a 25-50% higher risk of heart attack and higher rates of death from cardiovascular disease and cancer, as well as increased acute respiratory disease and measurable decrease in lung function.⁹

Studies measuring cotinine (metabolized nicotine) and NNAL (metabolized nitrosamine NNK, a tobacco-specific carcinogen linked to lung cancer) in hospitality workers find dramatic reductions in the levels of these biomarkers after a smokefree law takes effect. Average cotinine levels of New York City restaurant and bar workers decreased by 85% after the city's smokefree law went into effect.¹⁰ After the implementation of Ontario, Canada's Smokefree Indoor Air Law, levels of NNAL were reduced by 52% in nonsmoking casino employees and cotinine levels fell by 98%.¹¹

Smokefree indoor air laws result in a significant reduction in fine particulate matter and improved air quality. A Grand Rapids, Michigan study that monitored six restaurants before and after implementation of the state's smokefree air law found that PM2.5 fine particulate matter was reduced by 92 percent after the law went into effect, indicating that the vast majority of indoor air pollution in all six venues was due to secondhand smoke. The results in Grand Rapids were consistent with results in Wilmington, Delaware; Boston, Massachusetts; and Western New York.¹²

Following a Health Hazard Evaluation of Las Vegas casino employees' secondhand smoke exposure in the workplace, which included indoor air quality tests and biomarker assessments, the National Institute of Occupational Safety & Health (NIOSH) concluded that the casino employees are exposed to dangerous levels of secondhand smoke at work and that their bodies absorb high levels of tobacco-specific chemicals NNK and cotinine during work shifts. NIOSH also concluded that the "best means of eliminating workplace exposure to [secondhand smoke] is to ban all smoking in the casinos."¹³ A subsequent study in Nevada, whose Clean Indoor Air Act permits smoking in designated areas of casinos, bars, and taverns, indicates that strong 100% smokefree laws are the only effective way to protect indoor air quality. The study sampled the air quality in 15 casino gaming areas and corresponding nonsmoking areas, and the results indicated that the Clean Indoor Air Act failed to protect air quality in the nonsmoking areas, including children-friendly areas.¹⁴

Secondhand smoke is particularly hazardous to elderly people, individuals with cardiovascular disease, and individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease.¹⁵ The Americans With Disabilities Act, which requires that disabled persons have access to public places and workplaces, deems impaired respiratory function to be a disability.¹⁶

The U.S. Centers for Disease Control and Prevention has determined that the risk of acute myocardial infarction and coronary heart disease associated with exposure to tobacco smoke is non-linear at low doses, increasing rapidly with relatively small doses such as those received from secondhand smoke or actively smoking one or two cigarettes a day, and has warned that all patients at increased risk of coronary heart disease or with known coronary artery disease should avoid all indoor environments that permit smoking.¹⁷

Given the fact that there is no safe level of exposure to secondhand smoke, the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) bases its ventilation standards on totally smokefree environments. ASHRAE has determined that there is currently no air filtration or other ventilation technology that can completely eliminate all the carcinogenic components in secondhand smoke and the health risks caused by secondhand smoke exposure, and recommends that indoor environments be smokefree in their entirety.¹⁸

During periods of active smoking, peak and average outdoor tobacco smoke (OTS) levels measured in outdoor cafes and restaurant and bar patios near smokers rival indoor tobacco smoke concentrations.¹⁹ Nonsmokers who spend six-hour periods in outdoor smoking sections of bars and restaurants experience a significant increase in levels of cotinine when compared to the cotinine levels in a smokefree outdoor area.²⁰

Residual tobacco contamination, or "thirdhand smoke," from cigarettes, cigars, and other tobacco products is left behind after smoking occurs and builds up on surfaces and furnishings. This residue can linger in spaces long after smoking has ceased and continue to expose people to tobacco toxins. Sticky, highly toxic particulate matter, including nicotine, can cling to walls and ceilings. Gases can be absorbed into carpets, draperies, and other upholsteries, and then be reemitted (off-gassed) back into the air and recombine to form harmful compounds.²¹ Tobacco residue is noticeably present in dust throughout places where smoking has occurred.²² Given the rapid sorption and persistence of high levels of residual nicotine from tobacco smoke on indoor surfaces, including clothing and human skin, this recently identified process represents an unappreciated health hazard through dermal exposure, dust inhalation, and ingestion.²³ The dangers of residual tobacco contamination are present in hotels, even in nonsmoking rooms. Compared with hotels that are completely smokefree, surface nicotine and air 3EP are elevated in nonsmoking and smoking rooms of hotels that allow smoking. Air nicotine levels in smoking rooms are significantly higher than those in nonsmoking rooms of hotels that do and do not completely prohibit smoking. Hallway surfaces outside of smoking rooms also show higher levels of nicotine than those outside of nonsmoking rooms. Partial smoking restrictions in hotels do not protect non-smoking guests from exposure to tobacco smoke and tobacco-specific carcinogens.²⁴

Unregulated high-tech smoking devices, commonly referred to as electronic cigarettes, or "e-cigarettes," closely resemble and purposefully mimic the act of smoking by having users inhale vaporized liquid nicotine created by heat through an electronic ignition system. After testing a number of electronic cigarettes from two leading manufacturers, the Food and Drug Administration (FDA) determined that various samples tested contained not only nicotine but also detectable levels of known carcinogens and toxic chemicals, including tobacco-specific nitrosamines and diethylene glycol, a toxic chemical used in antifreeze. The FDA's testing also suggested that "quality control processes used to manufacture these products are inconsistent or non-existent."²⁵ According to a more recent study, electronic cigarette emissions are made up of a high concentration of ultrafine particles, and the particle concentration is higher than in conventional tobacco cigarette smoke.²⁶ Electronic cigarettes produce an aerosol or vapor of undetermined and potentially harmful substances, which may appear similar to the smoke emitted by traditional tobacco products. Their use in workplaces and public places where

smoking of traditional tobacco products is prohibited creates concern and confusion and leads to difficulties in enforcing the smoking prohibitions. The World Health Organization (WHO) recommends that electronic smoking devices not be used indoors, especially in smokefree environments, in order to minimize the risk to bystanders of breathing in the aerosol emitted by the devices and to avoid undermining the enforcement of smokefree laws.²⁷

The Society of Actuaries has determined that secondhand smoke costs the U.S. economy roughly \$10 billion a year: \$5 billion in estimated medical costs associated with secondhand smoke exposure and \$4.6 billion in lost productivity.²⁸

Numerous economic analyses examining restaurant and hotel receipts and controlling for economic variables have shown either no difference or a positive economic impact after enactment of laws requiring workplaces to be smokefree. Creation of smokefree workplaces is sound economic policy and provides the maximum level of employee health and safety.²⁹

There is no legal or constitutional "right to smoke."³⁰ Business owners have no legal or constitutional right to expose their employees and customers to the toxic chemicals in secondhand smoke. On the contrary, employers have a common law duty to provide their workers with a workplace that is not unreasonably dangerous.³¹

Smoking is a potential cause of fires; cigarette and cigar burns and ash stains on merchandise and fixtures causes economic damage to businesses.³²

The smoking of tobacco, hookahs, or marijuana and the use of electronic cigarettes are forms of air pollution and constitute both a danger to health and a material public nuisance.

Accordingly, the _____ [City or County Governing Body] finds and declares that the purposes of this ordinance are (1) to protect the public health and welfare by prohibiting smoking in public places and places of employment; and (2) to guarantee the right of nonsmokers to breathe smokefree air, and to recognize that the need to breathe smokefree air shall have priority over the desire to smoke.

Sec. 1002. Definitions

The following words and phrases, whenever used in this Article, shall be construed as defined in this Section:

- A. "Bar" means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages, including but not limited to, taverns, nightclubs, cocktail lounges, and cabarets.
- B. "Business" means a sole proprietorship, partnership, joint venture, corporation, or other business entity, either for-profit or not-for-profit, including retail establishments where goods or services are sold; professional corporations and other entities where legal, medical, dental, engineering, architectural, or other professional services are delivered; and private clubs.
- C. "Electronic Smoking Device" means any product containing or delivering nicotine or any other substance intended for human consumption that can be used by a person in any manner for the purpose of inhaling vapor or aerosol from the product. The term includes

any such device, whether manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, e-hookah, or vape pen, or under any other product name or descriptor.

- D. "Employee" means a person who is employed by an employer in consideration for direct or indirect monetary wages or profit, and a person who volunteers his or her services for a non-profit entity.
- E. "Employer" means a person, business, partnership, association, corporation, including a municipal corporation, trust, or non-profit entity that employs the services of one or more individual persons.
- F. "Enclosed Area" means all space between a floor and a ceiling that is bounded on at least two sides by walls, doorways, or windows, whether open or closed. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent and whether or not containing openings of any kind.
- G. "Health Care Facility" means an office or institution providing care or treatment of diseases, whether physical, mental, or emotional, or other medical, physiological, or psychological conditions, including but not limited to, hospitals, rehabilitation hospitals or other clinics, including weight control clinics, nursing homes, long-term care facilities, homes for the aging or chronically ill, laboratories, and offices of surgeons, chiropractors, physical therapists, physicians, psychiatrists, dentists, and all specialists within these professions. This definition shall include all waiting rooms, hallways, private rooms, semiprivate rooms, and wards within health care facilities.
- H. "Hookah" means a water pipe and any associated products and devices which are used to produce fumes, smoke, and/or vapor from the burning of material including, but not limited to, tobacco, shisha, or other plant matter.
- I. "Place of Employment" means an area under the control of a public or private employer, including, but not limited to, work areas, private offices, employee lounges, restrooms, conference rooms, meeting rooms, classrooms, employee cafeterias, hallways, construction sites, temporary offices, and vehicles. A private residence is not a "place of employment" unless it is used as a child care, adult day care, or health care facility.
- J. "Playground" means any park or recreational area designed in part to be used by children that has play or sports equipment installed or that has been designated or landscaped for play or sports activities, or any similar facility located on public or private school grounds or on [City or County] grounds.
- K. "Private Club" means an organization, whether incorporated or not, which is the owner, lessee, or occupant of a building or portion thereof used exclusively for club purposes at all times, which is operated solely for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose, but not for pecuniary gain, and which only sells alcoholic beverages incidental to its operation. The affairs and management of the organization are conducted by a board of directors, executive committee, or similar body chosen by the members at an annual meeting. The organization has established bylaws and/or a constitution to govern its activities. The organization has been granted an exemption from the payment of federal income tax as a club under 26 U.S.C. Section 501.
- L. "Public Event" means an event which is open to and may be attended by the general public, including but not limited to, such events as concerts, fairs, farmers' markets,

festivals, parades, performances, and other exhibitions, regardless of any fee or age requirement.

- M. "Public Place" means an area to which the public is invited or in which the public is permitted, including but not limited to, banks, bars, educational facilities, gambling facilities, health care facilities, hotels and motels, laundromats, parking structures, public transportation vehicles and facilities, reception areas, restaurants, retail food production and marketing establishments, retail service establishments, retail stores, shopping malls, sports arenas, theaters, and waiting rooms. A private residence is not a "public place" unless it is used as a child care, adult day care, or health care facility.
- N. "Recreational Area" means any public or private area open to the public for recreational purposes, whether or not any fee for admission is charged, including but not limited to, amusement parks, athletic fields, beaches, fairgrounds, gardens, golf courses, parks, plazas, skate parks, swimming pools, trails, and zoos.
- O. "Restaurant" means an eating establishment, including but not limited to, coffee shops, cafeterias, sandwich stands, and private and public school cafeterias, which gives or offers for sale food to the public, guests, or employees, as well as kitchens and catering facilities in which food is prepared on the premises for serving elsewhere. The term "restaurant" shall include a bar area within the restaurant.
- P. "Service Line" means an indoor or outdoor line in which one (1) or more persons are waiting for or receiving service of any kind, whether or not the service involves the exchange of money, including but not limited to, ATM lines, concert lines, food vendor lines, movie ticket lines, and sporting event lines.
- Q. "Shopping Mall" means an enclosed or unenclosed public walkway or hall area that serves to connect retail or professional establishments.
- R. "Smoking" means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, including hookahs and marijuana, whether natural or synthetic, in any manner or in any form. "Smoking" also includes the use of an electronic smoking device which creates an aerosol or vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking in this Article.
- S. "Sports Arena" means a place where people assemble to engage in physical exercise, participate in athletic competition, or witness sports or other events, including sports pavilions, stadiums, gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, and bowling alleys.

Sec. 1003. Application of Article to [City-Owned or County-Owned] Facilities and Property

All enclosed areas, including buildings and vehicles owned, leased, or operated by the _____ [City or County] of _____, as well as all outdoor property adjacent to such buildings and under the control of the _____ [City or County], shall be subject to the provisions of this Article.

Sec. 1004. Prohibition of Smoking in Enclosed Public Places

Smoking shall be prohibited in all enclosed public places within the _____ [City or County] of _____, including but not limited to, the following places:

- A. Aquariums, galleries, libraries, and museums.
- B. Areas available to the general public in businesses and non-profit entities patronized by the public, including but not limited to, banks, laundromats, professional offices, and retail service establishments.
- C. Bars.
- D. Bingo facilities.
- E. Child care and adult day care facilities.
- F. Convention facilities.
- G. Educational facilities, both public and private.
- H. Elevators.
- I. Gambling facilities.
- J. Health care facilities.
- K. Hotels and motels.
- L. Lobbies, hallways, and other common areas in apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes, and other multiple-unit residential facilities.
- M. Parking structures.
- N. Polling places.
- O. Public transportation vehicles, including buses and taxicabs, under the authority of the _____ [City or County], and ticket, boarding, and waiting areas of public transportation facilities, including bus, train, and airport facilities.
- P. Restaurants.
- Q. Restrooms, lobbies, reception areas, hallways, and other common-use areas.
- R. Retail stores.
- S. Rooms, chambers, places of meeting or public assembly, including school buildings, under the control of an agency, board, commission, committee or council of the

_____ [City or County] or a political subdivision of the State, to the extent the place is subject to the jurisdiction of the _____ [City or County].

T. Service lines.

U. Shopping malls.

V. Sports arenas, including enclosed places in outdoor arenas.

W. Theaters and other facilities primarily used for exhibiting motion pictures, stage dramas, lectures, musical recitals, or other similar performances.

Sec. 1005. Prohibition of Smoking in Enclosed Places of Employment

A. Smoking shall be prohibited in all enclosed areas of places of employment without exception. This includes, without limitation, common work areas, auditoriums, classrooms, conference and meeting rooms, private offices, elevators, hallways, medical facilities, cafeterias, employee lounges, stairs, restrooms, vehicles, and all other enclosed facilities.

B. This prohibition on smoking shall be communicated to all existing employees by the effective date of this Article and to all prospective employees upon their application for employment.

Sec. 1006. Prohibition of Smoking in Private Clubs

Smoking shall be prohibited in all private clubs.

Sec. 1007. Prohibition of Smoking in Enclosed Residential Facilities

Smoking shall be prohibited in the following enclosed residential facilities:

A. All private and semi-private rooms in nursing homes.

B. All hotel and motel guest rooms.

Sec. 1008. Prohibition of Smoking in Outdoor Public Places

Smoking shall be prohibited in the following outdoor places:

A. Within a reasonable distance of _____ [recommended 15-25] feet outside entrances, operable windows, and ventilation systems of enclosed areas where smoking is prohibited, so as to prevent tobacco smoke from entering those areas.

B. On all outdoor property that is adjacent to buildings owned, leased, or operated by the _____ [City or County] of _____ and that is under the control of the _____ [City or County].

- C. In, and within _____ [*recommended 15-25*] feet of, outdoor seating or serving areas of restaurants and bars.
- D. In outdoor shopping malls, including parking structures.
- E. In all outdoor arenas, stadiums, and amphitheaters. Smoking shall also be prohibited in, and within _____ [*recommended 15-25*] feet of, bleachers and grandstands for use by spectators at sporting and other public events.
- F. In outdoor recreational areas, including parking lots.
- G. In, and within _____ [*recommended 15-25*] feet of, all outdoor playgrounds.
- H. In, and within _____ [*recommended 15-25*] feet of, all outdoor public events.
- I. In, and within _____ [*recommended 15-25*] feet of, all outdoor public transportation stations, platforms, and shelters under the authority of the _____ [*City or County*].
- J. In all outdoor service lines, including lines in which service is obtained by persons in vehicles, such as service that is provided by bank tellers, parking lot attendants, and toll takers. In lines in which service is obtained by persons in vehicles, smoking is prohibited by both pedestrians and persons in vehicles, but only within _____ [*recommended 15-25*] feet of the point of service.
- K. In outdoor common areas of apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes, and other multiple-unit residential facilities, except in designated smoking areas, not to exceed twenty-five percent (25%) of the total outdoor common area, which must be located at least _____ [*recommended 15-25*] feet outside entrances, operable windows, and ventilation systems of enclosed areas where smoking is prohibited.

Sec. 1009. Prohibition of Smoking in Outdoor Places of Employment

- A. Smoking shall be prohibited in all outdoor places of employment where two or more employees are required to be in the course of their employment. This includes, without limitation, work areas, construction sites, temporary offices such as trailers, restroom facilities, and vehicles.
- B. This prohibition on smoking shall be communicated to all existing employees by the effective date of this Article and to all prospective employees upon their application for employment.

Sec. 1010. Where Smoking Not Regulated

Notwithstanding any other provision of this Article to the contrary, smoking shall not be prohibited in private residences, unless used as a childcare, adult day care, or health care facility.

Sec. 1011. Declaration of Establishment or Outdoor Area as Nonsmoking

Notwithstanding any other provision of this Article, an owner, operator, manager, or other person in control of an establishment, facility, or outdoor area may declare that entire establishment, facility, or outdoor area as a nonsmoking place. Smoking shall be prohibited in any place in which a sign conforming to the requirements of Section 1012(A) is posted.

Sec. 1012. Posting of Signs and Removal of Ashtrays

The owner, operator, manager, or other person in control of a place of employment, public place, private club, or residential facility where smoking is prohibited by this Article shall:

- A. Clearly and conspicuously post "No Smoking" signs or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) in that place.
- B. Clearly and conspicuously post at every entrance to that place a sign stating that smoking is prohibited or, in the case of outdoor places, clearly and conspicuously post "No Smoking" signs in appropriate locations as determined by the _____ [Department of Health or City Manager or County Administrator] or an authorized designee.
- C. Clearly and conspicuously post on every vehicle that constitutes a place of employment under this Article at least one sign, visible from the exterior of the vehicle, stating that smoking is prohibited.
- D. Remove all ashtrays from any area where smoking is prohibited by this Article, except for ashtrays displayed for sale and not for use on the premises.

Sec. 1013. Nonretaliation; Nonwaiver of Rights

- A. No person or employer shall discharge, refuse to hire, or in any manner retaliate against an employee, applicant for employment, customer, or resident of a multiple-unit residential facility because that employee, applicant, customer, or resident exercises any rights afforded by this Article or reports or attempts to prosecute a violation of this Article. Notwithstanding Section 1015, violation of this Subsection shall be a misdemeanor, punishable by a fine not to exceed \$1000 for each violation.
- B. An employee who works in a setting where an employer allows smoking does not waive or otherwise surrender any legal rights the employee may have against the employer or any other party.

Sec. 1014. Enforcement

- A. This Article shall be enforced by the _____ [Department of Health or City Manager or County Administrator] or an authorized designee.
- B. Notice of the provisions of this Article shall be given to all applicants for a business license in the _____ [City or County] of _____.

- C. Any citizen who desires to register a complaint under this Article may initiate enforcement with the _____ [Department of Health or City Manager or County Administrator].
- D. The Health Department, Fire Department, or their designees shall, while an establishment is undergoing otherwise mandated inspections, inspect for compliance with this Article.
- E. An owner, manager, operator, or employee of an area regulated by this Article shall direct a person who is smoking in violation of this Article to extinguish or turn off the product being smoked. If the person does not stop smoking, the owner, manager, operator, or employee shall refuse service and shall immediately ask the person to leave the premises. If the person in violation refuses to leave the premises, the owner, manager, operator, or employee shall contact a law enforcement agency.
- F. Notwithstanding any other provision of this Article, an employee or private citizen may bring legal action to enforce this Article.
- G. In addition to the remedies provided by the provisions of this Section, the _____ [Department of Health or City Manager or County Administrator] or any person aggrieved by the failure of the owner, operator, manager, or other person in control of a public place or a place of employment to comply with the provisions of this Article may apply for injunctive relief to enforce those provisions in any court of competent jurisdiction.

Sec. 1015. Violations and Penalties

- A. A person who smokes in an area where smoking is prohibited by the provisions of this Article shall be guilty of an infraction, punishable by a fine not exceeding fifty dollars (\$50).
- B. Except as otherwise provided in Section 1013(A), a person who owns, manages, operates, or otherwise controls a public place or place of employment and who fails to comply with the provisions of this Article shall be guilty of an infraction, punishable by:
 - 1. A fine not exceeding one hundred dollars (\$100) for a first violation.
 - 2. A fine not exceeding two hundred dollars (\$200) for a second violation within one (1) year.
 - 3. A fine not exceeding five hundred dollars (\$500) for each additional violation within one (1) year.
- C. In addition to the fines established by this Section, violation of this Article by a person who owns, manages, operates, or otherwise controls a public place or place of employment may result in the suspension or revocation of any permit or license issued to the person for the premises on which the violation occurred.
- D. Violation of this Article is hereby declared to be a public nuisance, which may be abated by the _____ [Department of Health or City Manager or County Administrator] by restraining order, preliminary and permanent injunction, or other means provided for by

law, and the _____ [City or County] may take action to recover the costs of the nuisance abatement.

- E. Each day on which a violation of this Article occurs shall be considered a separate and distinct violation.

Sec. 1016. Public Education

The _____ [Department of Health or City Manager or County Administrator] shall engage in a continuing program to explain and clarify the purposes and requirements of this Article to citizens affected by it, and to guide owners, operators, and managers in their compliance with it. The program may include publication of a brochure for affected businesses and individuals explaining the provisions of this ordinance.

Sec. 1017. Governmental Agency Cooperation

The _____ [City Manager or County Administrator] shall annually request other governmental and educational agencies having facilities within the _____ [City or County] to establish local operating procedures in cooperation and compliance with this Article. This includes urging all Federal, State, _____ [County or City], and School District agencies to update their existing smoking control regulations to be consistent with the current health findings regarding secondhand smoke.

Sec. 1018. Other Applicable Laws

This Article shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws.

Sec. 1019. Liberal Construction

This Article shall be liberally construed so as to further its purposes.

Sec. 1020. Severability

If any provision, clause, sentence, or paragraph of this Article or the application thereof to any person or circumstances shall be held invalid, that invalidity shall not affect the other provisions of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable.

Sec. 1021. Effective Date

This Article shall be effective thirty (30) days from and after the date of its adoption.

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