

EXCERPT OF THE DRAFT MINUTES FOR PLANNING COMMISSION MEETING, FEBRUARY 20, 2014

Item 7A: Public Hearings

Matter of Proposed Amendments to the City of San Leandro Zoning Code in:

- Article 3, Section 1-304 Definitions
- Article 6, Section 2-606 CC Districts – Use Regulations
- Article 7, Sections 2-706 IG District – Use Regulations, 2-708 IP District – Use Regulations, and 2-712 IG(AU) District – Use Regulations
- Article 17, Section 4-1704 Off-Street Parking and Loading Spaces Requirements related to a Medical Marijuana Dispensary. (Barros)

Actions: Recommend Approval of the following to City Council:

- A) Adopt the findings that this project is exempt under the California Environmental Quality Act (CEQA) per CEQA Guidelines, subsections (b)(2) and (b)(3) of Section 15061 as minor amendments of the Zoning Code to provide for a Medical Marijuana Dispensary use in the IG, IG(AU), IP and CC zoning districts with a Conditional Use Permit, because the amendments themselves will not have a significant effect on the environment; and
- B) Adopt an Ordinance Amending the Zoning Code to Add Regulations Related to Medical Marijuana Dispensaries in Article 3, Section 1-304 Definitions; Article 6, Section 2-606 CC Districts – Use Regulations; Article 7, Sections 2-706 IG District – Use Regulations, 2-708 IP District – Use Regulations, and 2-712 IG(AU) District – Use Regulations; and Article 17, Section 4-1704 Off-Street Parking and Loading Spaces Required.

Planner Barros noted the need to amend four sections of the Zoning Code foreshadows the comprehensive Zoning Code amendment proposal that staff is preparing to bring to the Commission in April.

Planner Barros noted that the proposed amendments proposed are necessary to implement the ordinance that took effect on January 13, 2014 allowing one medical marijuana dispensary to operate with a conditional use permit (CUP) under certain circumstances in San Leandro. Planner Barros stated, only about 400 parcels would be considered eligible for a medical marijuana dispensary CUP.

The proposed Zoning Code changes also would add definitions, drawn from the ordinance for Medical Marijuana Dispensary and Medical Marijuana.

Planner Barros said staff expects the medical marijuana dispensary to have the same demands for parking as a retail use, so the change to Article 17 of the Zoning Code would specify a requirement of one space per 200 square feet of the Dispensary.

In addition to implementing the medical marijuana dispensary ordinance, Planner Barros said staff believes the proposed Zoning Code changes also furthers the Council's long-term goals for the City's fiscal health, healthy community members, and even partnerships, compassion, communication and fairness throughout the City. The specification of minimum distances from sensitive uses also supports the Council's goal of safe neighborhoods and safe streets.

In terms of conformance with San Leandro's General Plan, Planner Barros said the General Plan aspires to reshape the industrial areas in western and central San Leandro to meet the demands of a new economy. In implementing the new Medical Marijuana Dispensary ordinance, she said, the proposed Zoning Code amendments would promote economic diversity, retail diversity, reuse of older buildings and job opportunities for residents .

The proposed amendments should be exempt from CEQA under Section 15061 as a minor amendment to the Zoning Code, she added.

As regards public outreach, **Planner Barros** said the City provided notification 10 days prior to this meeting, as required by the Government Code, and also sent courtesy notices to all the homeowners' associations in the City as well as the San Leandro Chamber of Commerce. The BZA reviewed the proposed changes as an informational item on February 6, 2014.

Commissioner Fitzsimons asked who would be at risk, whether the property owner, the business owner, the City of a raid of City-approved dispensaries by federal law enforcement agencies for violation of the Controlled Substances Act? Mr. Pio Roda said it would be a risk to the property owner and the business operator.

Commissioner Fitzsimons also questioned whether the use of the term "another dispensary" referred to another dispensary within San Leandro, inasmuch as the ordinance provides for only one dispensary in the City, or is the language intended to provide the flexibility in case the City later decides to allow a second dispensary in San Leandro. Planner Barros responded "yes" to both questions.

In terms of what a dispensary can and cannot sell, **Commissioner Fitzsimons** asked whether the Zoning Enforcement Official (ZEO) or the Police Department would be responsible for enforcement. Planner Barros said that as with any business, it would be a combination.

Commissioner Collier identified a section on the map of eligible medical marijuana dispensary locations where the railroad tracks and Washington Avenue almost come to a V point, noting that this area appears to have red lines through it. Planner Barros said the red in that section on that version of the map denotes the CC District, and the cross-hatching used to mark eligible areas is barely visible against that background.

Commissioner Rennie cited the staff report's mention of the Council making a policy decision at a time when a Court of Appeal decision indicated jurisdictions could not prohibit medical marijuana dispensaries. Pointing out that the California Supreme Court later ruled otherwise, that cities may limit, restrict or prohibit medical marijuana dispensaries, Commissioner Rennie asked whether the Council has been briefed on that more recent decision. Mr. Pio Roda said that the City Council was briefed on the outcome of the *Riverside* case in the California Supreme Court, and moved forward in making its policy decision.

Commissioner Rennie said that what's proposed could technically comply with California's Compassionate Use Act and the Medical Marijuana Program Act, but he doesn't understand how the dispensary is supposed to acquire its marijuana. He said cultivation would have to occur at the site to enable the dispensary to comply not only with State law but also with what the City anticipates it will need to do. Commissioner Rennie indicated seeing nothing in the staff report on how cultivation would work and how security would be provided. Mr. Pio Roda replied that the City Manager has created a staff task force to examine these issues, and at this point, he said, the understanding is that cultivation will not occur on the site, so that the collective or cooperative will have to receive product from its own members' farms. In response to a further question from Commissioner Rennie, Mr. Pio Roda said that growing marijuana would be considered a different use.

In regard to parking, **Commissioner Rennie** said that although we're treating the medical marijuana dispensary as a retail use, a closed-circuit relationship in which the only customers would be qualified patients and their primary caregivers seems to be a small-scale use. Planner Barros said she mentioned parking in the retail use context in her presentation, but the staff report also cites medical office uses, which can be as large as Kaiser or as small as two or three offices.

Because he is concerned about the potential secondary effects of dispensaries, **Commissioner Rennie** asked whether an application for a dispensary permit would require discretionary review subject to CEQA. Mr. Pio Roda said that is intended to be the case.

Commissioner Hernandez asked whether a cost-benefit analysis was conducted in relation to 1) the anticipated cost of enforcement and 2) tax revenue projections. Mr. Pio Roda said a full cost-benefit analysis related to the process of approving the permit and initial vetting of the applicant is underway now, and the staff task force he mentioned earlier also is considering a pre-qualification process and the costs related to that. The pre-qualification process would be designed to identify the types of operators with the experience and financial qualifications to meet the City's criteria before even going into the RFP (Request for Proposal) process, he explained. Mr. Pio Roda said the cost of enforcement time spent also is being analyzed now, with the goal of recouping the costs through permit fees.

In response to a further question from **Commissioner Hernandez**, Mr. Pio Roda said an ordinance amendment would be required if the City decided it wanted to allow more than one medical marijuana dispensary.

The City's Zoning Map seems to show one parcel in the IG(AU) District around Grant Avenue near the San Lorenzo border that is indicated as eligible for a medical marijuana dispensary and an adjacent parcel that is not so indicated, **Commissioner Hernandez** said. Planner Barros said the radius measurements around parcels were established with the City's GIS process, and if the radius touched any parcel, it would be disqualified from eligibility. Accordingly, all the parcels surrounding the parcel Commissioner Hernandez pointed out were too close to a school or recreational facility.

Commissioner Hernandez also asked why the ordinance requires edible product to be prepared at the dispensary. Secretary Barros said that language is perhaps owing to concerns about potential health issues and to encourage a higher, better use such as a cannabis goods manufacturing facility.

Commissioner Leichner, asked if it was the intention that the dispensary be allowed to make home deliveries and have offsite transactions. Planner Barros said yes, that is currently allowed by State code. Commissioner Leichner asked whether the dispensary would be required to provide parking spaces for its own vehicles. Planner Barros, noting that no additional parking requirements are imposed on restaurants that make home deliveries, said it's not included in the proposed Zoning Code amendments in this case either.

Commissioner Rennie said the RFP process seems odd in terms of this type of use. The law does not allow a for-profit operation of a medical marijuana dispensary and allows only qualified patients and primary caregivers associating collectively or cooperatively to engage in the activity of cultivating and consuming marijuana, he said. The Supreme Court in the *Riverside* case told us that primary caregivers also must have a pre-existing relationship with the qualified patient that goes beyond providing marijuana to include other types of essential life services such as health and housing. Commissioner Rennie said he cannot see an RFP process that could succeed in identifying someone who could possibly qualify as a primary caregiver and comply with the law in establishing a dispensary.

Mr. Pio Roda said that Commissioner Rennie's observations are being taken into account as this process is considered. Ultimately, he said, we have to find a way to determine that all the standards have been met, and part of the process would be ensuring the dispensary operator can demonstrate meeting those standards. One aspect of that is likely to be evaluating the effectiveness of the applicant's document-management system and his/her use of technology to back up his/her claims. Noting that the success of this land use as envisioned will depend heavily on a sustained commitment of City resources to monitor, audit and track the use to ensure ongoing compliance, Commissioner Rennie asked whether the City would commit those resources. Mr. Pio Roda said the City Manager's intention is to do the best they can, including assessing what those costs would be, establishing a commensurate permit fee and imposing an additional tax on dispensary operators.

Commissioner Leung posed two questions:

- 1) Because the dispensary cannot profit from the sale or distribution of medical marijuana, can it identify itself as a nonprofit organization? Mr. Pio Roda said the State law and the City ordinance require the dispensary to operate as a legal nonprofit business, whether a 501(3)(c) or other designation under the IRS code.
- 2) Regarding the control of the marijuana flow, can the City set a limit on the number of members and the dosage of marijuana? Mr. Pio Roda said the City Council did not limit the size of the cooperative or collective or restrict membership to San Leandro residents. Planner Barros said the ordinance establishes a daily per-patient limit, but doesn't address the total volume of marijuana the dispensary could sell on any given day.

Commissioner Leichner noted that the Zoning Code could be used to limit the size of the dispensary in terms of square footage, which would indirectly address the number of patients who could be served.

In response to further questions from **Commissioner Hernandez**, Planner Barros said a valid dispensary permit would apply to one location only, and approval of a dispensary's CUP would be up to the BZA.

When **Commissioner Leichner** asked whether live-work Zoning Code amendments proposed at the January 30, 2014 work session would conflict with any parcels identified as eligible for medical marijuana dispensary

use, Planner Barros advised that since the work session, proposals concerning both live-work/work-live and entertainment have been tabled in the interest of further research.

Because the medical marijuana dispensary would be required to renew its permit annually, **Commissioner Fitzsimons** asked if part of the renewal process would involve checking for continued conformance with the distance requirement, in case a sensitive use began operations within the 1,000-foot radius of an existing dispensary. Planner Barros said the permit-renewal requirement relates to the Municipal Code rather than the Zoning Code. The CUP runs with the land, she explained, so the dispensary's CUP wouldn't be revoked on that basis, and the grandfathered rights would transfer to a new dispensary that met the same criteria as the original dispensary and was approved to occupy the same parcel.

Chair Abero invited public comments. No speakers came forward.

Motion to close public hearing

Collier/Rennie: 7Aye, 0 No

Commissioner Rennie said he's conflicted by this proposal for both philosophical and practical reasons. He said implementation and oversight would burden City staff. As a Schedule 1 drug under the Controlled Substances Act, marijuana is not recognized as having any value by the federal government. If that position were to change, states would have the leeway to do what California and communities such as San Leandro are trying to do, but in a more rational way. That would enable treating marijuana like a prescription drug that could be appropriately evaluated for potency and application, with guidelines for prescribing and dispensing it that would discourage unlawful use. "But we're not there," Commissioner Rennie said, so we have to work within the constraints of the Compassionate Use Act and the Medical Marijuana Program Act. Although the law specifies that only qualified patients and primary caregivers could cultivate, grow and consume marijuana, he said that he fears we'll end up instead with entrepreneurs wanting to open up businesses to sell marijuana. And if a business actually complies with the law, he said we shouldn't be imposing special taxes and fees.

Commissioner Rennie said he supports the idea of medical marijuana for critically ill people who need it to ease their pain and suffering or enable them to eat, and it should be available to them without a lot of restrictions and hassles. In this instance, he said he thinks it's a question of scale. To serve four or more patients, the dispensary would need a police permit and comply with zoning regulations; with fewer than four patients, though, neither police permit nor zoning regulations would apply – and that latter scenario, Commissioner Rennie said, is where he thinks San Leandro ought to be. We should not encourage the commercial-scale distribution of marijuana because it's too subject to abuse and too difficult to control, Commissioner Rennie said, and he cannot support the zoning changes proposed. Commissioner Rennie also pointed out that, in recent years, dispensary owners have been successfully prosecuted in criminal proceedings on the grounds that they are running for-profit operations and not in the way that was intended.

Commissioner Leichner recommended two modifications to the proposed Zoning Code amendments for Commissioners to consider:

- 1) Make it clear that growhouse and cultivation would not be permitted uses
- 2) Establish a 1,500-square-foot limit to the size of the facility; an applicant who wanted a larger floorplate would come before the Planning Commission again

Commissioner Fitzsimons, who views this issue in light of how other businesses are treated, said he sees in the annual permit renewal provisions extraordinary protections for the City in the event the operator of the medical marijuana dispensary turns out to be a bad operator. In terms of the dispensary, the ordinance the Council has already approved cannot take effect without required updates in the Zoning Code. As Commissioner Fitzsimons sees it, whether or not he personally favors it, the ordinance made the medical marijuana dispensary a matter of law in the City; the Planning Commission's purview is to ensure the Zoning Code amendments mirror how the law is written. He believes it does, considers the proposals strong, and concurs with the Commissioner Leichner's suggestion about making the prohibitions against growing and cultivating marijuana. However, he said he questions imposing square-footage limitations because that could just cause people to line up outside waiting to get in. He asked for staff input regarding size.

Planner Barros said she'd be hesitant to place any limits on the size for several reasons. Harborside in Oakland, which is larger than 1,500 square feet, is very orderly dispensary that looks much like a pharmacy and stocks tinctures, oils, creams and salves as well as the flowers that many users smoke, she said, and it also uses its space for back operations such as product testing and security-camera monitoring. Planner Barros said Oakland's experience with the smaller dispensaries has not been a good one.

She noted that ensuring the dispensary has space to manufacture the value-added tinctures, creams, etc., onsite would encourage local production rather than importing this merchandise from out-of-state, and give San Leandro a better chance to capture that segment of the new economy for medicinal marijuana products. Secretary Liao added that most of the parcels eligible for medical marijuana dispensary tend to be large buildings located in the City's central industrial zone, the focal point of Leandro's Next Generation Workplace District Study.

In response to **Commissioner Hernandez**, Planner Barros affirmed that the ordinance would allow both sales and manufacturing of marijuana products.

Commissioner Rennie said the Planning Commission's job is to review zoning text amendments and make recommendations to the City Council before it passes changes to land use. In this instance, he said, the sequence has been reversed, but he still feels it's appropriate for the Planning Commission to voice its opinion as to whether the proposed land use is appropriate; the same would be true if the General Plan were being discussed – advising on amendments prior to their adoption by the City Council. Commissioner Rennie drew attention to what Los Angeles has done which allows only small-size dispensaries of people who know and depend on one another to get together and cultivate and provide marijuana products to qualified patients who need them.

When **Chair Abero** asked where a pharmaceutical company coming to San Leandro would be permitted to locate, Planner Barros said that the larger set of Zoning Code amendments staff is working on will propose including retail sales with an Administrative Review in industrial zoning districts. Chair Abero said she's comparing the dispensary and its preparation of medical marijuana products to a pharmaceutical company's preparation of an antibiotic. If it were a manufacturing operation, Planner Barros said it would be permitted outright in the industrial districts, but not in the CC District.

Commissioner Leichner asked whether manufacturing and dispensary functions could be decoupled, so a manufacturing plant might operate with no onsite distribution or sales. Mr. Pio Roda said that's probably possible, if the dispensary operator chose not to manufacture anything at all, but the City Council made a conscious decision to allow edibles and several types of medical marijuana products. Thus, Commissioner Leichner asked whether the sales floorplate could be limited while the space for manufacturing be unlimited to capture the "new economy" of marijuana. Planner Barros said it could.

Commissioner Hernandez asked what happens next if the Planning Commission does not recommend approval of the proposed resolution to the City Council. Secretary Liao said the Planning Commission's decision would be forwarded to the City Council as a denial of the staff recommendation. The City Council would take Planning Commission input into account, but it would have the final say.

Motion to:

- A) Amend Resolution 2014-1 to include language that expressly and explicitly prohibits onsite growing and cultivation of marijuana in Medical Marijuana Dispensaries;***
- B) Approve Resolution No. 2014-1 as amended, Recommending that the City Council Adopt an Ordinance Amending the Zoning Code to Add Regulations to Article 3, Section 1-304 Definitions; Article 6, Section 2-606 CC Districts – Use Regulations; Article 7, Sections 2-706 IG District – Use Regulations, 2-708 IP District – Use Regulations, and 2-712 IG(AU) District – Use Regulations; and Article 17, Section 4-1704 Off-Street Parking and Loading Spaces Required, Related to Medical Marijuana Dispensaries; and***
- C) Adopt the findings that this project is exempt under the California Environmental Quality Act***

(CEQA) per CEQA Guidelines, subsections (b)(2) and (b)(3) of Section 15061 as minor amendments of the Zoning Code to provide for a Medical Marijuana Dispensary use in the IG, IG(AU), IP and CC zoning districts with a Conditional Use Permit, because the amendments themselves will not have a significant effect on the environment

***Hernandez/Fitzsimons: 3 Aye (Hernandez, Fitzsimons, Leung),
4 No (Rennie, Abero, Collier, Leichner)***

Motion Failed

Commissioners continued their discussion, going in the direction of an alternative recommendation to forward to the Council.

Motion to forward to the City Council a recommendation to consider regulating Medical Marijuana Dispensaries as smaller-scale collectives/cooperatives and direct staff to prepare a proposal to that effect.

The Planning Commission envisions operations that:

- A) Comprise up to six individuals who depend on, work with and support each other in life***
- B) Undergo a less intense permitting/regulatory process than a large dispensary would, and***
- C) Are allowed to grow and cultivate marijuana for medicinal purposes onsite***

***Rennie/Fitzsimons: 5 Aye (Rennie, Fitzsimons, Abero, Collier, Leichner),
2 No (Hernandez, Leung)***

Motion Approved