STAFF REPORT

MEETING
DATE: November 15, 2016

TO: City Council

FROM: Jeffrey A. Walter, City Attorney

SUBJECT: ADOPTING URGENCY ORDINANCES ADDRESSING CULTIVATION OF NONMEDICAL MARIJUANA FOR PERSONAL USE

REQUEST

Consider adopting two interim, urgency ordinances imposing temporary moratoria on the (a) outdoor cultivation of nonmedical marijuana for personal use; and (b) indoor cultivation of nonmedical marijuana for personal use, except under certain conditions and making findings that the adoption of same is exempt under CEQA because, among other things, there is no possibility that their adoption may have a significant, negative, physical impact on the environment.

RECOMMENDATION

1. Adopt interim ordinance imposing a moratorium on the outdoor cultivation of nonmedical marijuana and make findings that said adoption is exempt under CEQA.

2. Adopt interim ordinance imposing moratorium on the indoor cultivation of nonmedical marijuana, except under certain conditions, and make findings that the adoption of said ordinance is exempt under CEQA.

BACKGROUND

On November 8, 2016, California voters passed Proposition 64 (sometimes, “Prop 64”), the Control, Regulate, and Tax Adult Use of Marijuana Act (“AUMA”). Proposition 64 legalizes the nonmedical use of marijuana by persons 21 years of age and older, and the personal cultivation of up to six marijuana plants. Proposition 64 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. Proposition 64 requires that marijuana in excess of 28.5 grams that is produced by plants pursuant to the personal cultivation provisions of Proposition 64 be kept in a locked space on the grounds of a private residence that is not visible from a public place.

Although persons 21 years of age or older may use and possess nonmedical marijuana under Proposition 64, their ability to engage in these activities is not unfettered. Proposition 64 prohibits the smoking of marijuana in certain places. Moreover, 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. Proposition 64 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 workplace by prohibiting the use, consumption, possession, transfer, transportation, sale, display or growth of marijuana in the workplace. The League of California Cities has prepared a memorandum further explaining Proposition 64 and it is attached as Exhibit C.

**Commercial Nonmedical Marijuana Activity**

Commercial nonmedical marijuana activity will not be permitted until and unless the Bureau of Marijuana Control adopts a state regulatory system that governs the industry from “seed to sale.” All nonmedical marijuana businesses must have a state license. A state license cannot issue to an applicant whose operations would violate the provisions of any local ordinance or regulation, thus creating a dual-licensing scheme. Proposition 64 does not limit the authority of a local jurisdiction to adopt and enforce local ordinances regulating or completely prohibiting state-licensed marijuana businesses.

Consequently, the City does not need to take action at the present time to adopt regulations or bans pertaining to nonmedical marijuana businesses since those businesses cannot operate until and unless they are licensed by the state, and the state will not issue such licenses until the state adopts regulations pertaining to same and it is not likely that those regulations will be adopted before January 2018.

**Personal Cultivation**

*Indoor Cultivation for Personal Use Cannot be Prohibited by the City; But it Can be Regulated*

On the other hand, Proposition 64 provides that local governments can reasonably regulate, but cannot ban, personal indoor cultivation of up to 6 living marijuana plants within the person’s private residence or an accessory structure on the same parcel as the person’s residence. Private residence is defined as “a house, an apartment unit, a mobilehome, or other similar dwelling unit.” This includes cultivation, for example, in a greenhouse on the same property as the residence that is not physically part of the home, as long as it is fully enclosed, secure and not visible from a public space. Because this activity is not subject to state licensing requirements, private individuals may theoretically cultivate up to 6 living marijuana plants indoors beginning November 9, 2016. I say “theoretically” because until the State licensing scheme is underway, it is illegal to sell marijuana plants for cultivation or for other purposes. To reiterate, however, cities cannot adopt or enforce bans on private indoor cultivation of up to 6 living nonmedical marijuana plants under Proposition 64.

*Outdoor Cultivation for Personal Use Can be Banned or Regulated by the City*

On the other hand, local governments may regulate or ban all outdoor personal cultivation. Strangely, Proposition 64 includes language that purports to repeal any local ban on personal outdoor cultivation if, in the future, the Attorney General determines that nonmedical use of marijuana is lawful under federal law.
Options Available to the Council

*It is Recommended that the Council Adopt Urgency Ordinances Banning Outdoor Cultivation of Nonmedical Marijuana and Regulating Indoor Cultivation of Same*

The City Council has already adopted amendments to the City’s zoning code which prohibit the establishment of medical marijuana dispensaries in the City. Additionally, the City’s zoning code is considered a “permissive” zoning scheme, which means that unless a specific use is listed in the code as being permitted or conditionally permitted, it is presumed prohibited. Medical and nonmedical marijuana activities of any sort (commercial activities, cultivation for personal or commercial uses) are not listed as permitted or conditionally permitted uses in any zoning district in the City. Thus, it is presumed that such uses are prohibited in Novato.

However, the attached League materials caution against relying on the permissive nature of the City’s zoning code to prohibit nonmedical marijuana activities, including the personal cultivation of same. The League points out that at a minimum, given that Proposition 64 characterizes nonmedical marijuana as an agricultural product, there may be a strong argument that wherever the City’s zoning code allows crop production, plant growing or horticultural activities, the cultivation of nonmedical marijuana would also be permitted.

If the City Council desires to adopt bans or regulations pertinent to the personal cultivation of nonmedical marijuana, such regulations would likely take the form of amendments to the zoning code. Such proposals would likely entail some sort of initial study by staff and the conducting of one or more study sessions or Council meetings to flesh out the parameters of the regulations and/or the bans. Any proposed amendment(s) that might result from such a process would need to be submitted to the Planning Commission for its review and recommendation, and then presented to the Council at two Council meetings (at a minimum) in order for the Council to introduce and then adopt such zoning code enactments. This all takes time, and while such a process is on-going, individuals may begin cultivating -- indoors and outdoors -- nonmedical marijuana without benefit of or subject to the restrictions and other local controls the Council may be considering and desirous of adopting. Such on-going cultivation activities may present later enforcement problems should the Council subsequently adopt cultivation prohibitions and/or regulations which are at odds with the cultivation activities previously commenced. Thus, the Council should consider taking steps now to temporarily preserve the status quo, pending its ultimate determinations regarding the cultivation of nonmedical marijuana.

Recall, however, that under Proposition 64, the City is precluded from banning – even temporarily – the indoor cultivation of 6 marijuana plants for nonmedical, personal purposes. Thus, any temporary ordinance pertaining to the indoor cultivation of nonmedical marijuana would have to be regulatory in nature.

On the other hand, since Proposition 64 permits cities to outright ban outdoor cultivation of nonmedical marijuana for personal use, the Council could adopt an interim moratorium precluding such cultivation.

A. *It is Recommended that the Council Adopt an Urgency Ordinance Prohibiting Outdoor Cultivation of Nonmedical Marijuana for Personal Use.*
Given that the City Council has already expressly banned medical marijuana dispensaries and its zoning code does not list medical or nonmedical marijuana activities as permitted or conditionally permitted uses in any zoning district, it is logical for the Council to, at this time, expressly prohibit the outdoor cultivation of nonmedical marijuana. This is particularly compelling given the uncertainties that the passage of Proposition 64 creates in terms of understanding how the existing laws pertaining to medical marijuana will be impacted, in terms of how the County will be addressing nonmedical marijuana activities in communities immediately adjacent to the City and in terms of the impacts that will have on the City.

In short, the proposed urgency ordinance is an interim device allowing the City to stand back, and take the time to analyze and thoughtfully determine what the best course for the City is. This urgency ordinance would only be in effect for 45 days unless the Council extended it for up to a total of 2 years. Such an ordinance, if adopted by the Council, will provide the City time to comprehensively study the impacts of Proposition 64 and the recently enacted laws (the Medical Marijuana Regulation and Safety Act (“MMRSA”)) pertaining to medical marijuana, how those two enactments inter-relate and affect the City and how best to treat the outdoor cultivation of nonmedical marijuana in the best interests of the citizens of the City. The proposed ordinance is attached as Exhibit A.

B. It is Recommended that the Council Adopt an Urgency Ordinance Regulating Indoor Cultivation of Nonmedical Marijuana for Personal Use.

Given that Proposition 64 guarantees that persons over the age of 21 have the right to cultivate indoors up to six marijuana plants per residence for personal use, it is recommended that the Council adopt reasonable regulations pertaining to same, rather than to allow such uses to be established without adherence to reasonable conditions aimed at safeguarding and promoting the community’s health, safety and welfare. This is particularly important in terms of making sure that the electrical power used to grow the marijuana and the structures in which cultivation occurs are code-compliant and that the demands of the cultivation activities do not exceed the electrical capacity servicing the property in question.

The proposed ordinance makes the indoor cultivation of nonmedical marijuana subject to the following requirements, among others:

1. The structure where the cultivation is occurring shall fully comply with the UBC and applicable sections of Novato’s building and construction codes.
2. Indoor grow lights cannot exceed 1,000 watts per lighting unit.
3. Gas products for cultivations are prohibited.
4. Appropriate ventilation and filtration systems must be installed.
5. Cultivation can only occur in conjunction with residential use.
6. No exterior evidence of cultivation shall be visible from a public right of way.
7. Written consent of the property owner must be obtained and maintained at the cultivation site.
8. A portable fire extinguisher must be kept in the same room where cultivation is occurring.

These conditions are aimed at minimizing the adverse effects of indoor marijuana grows. This urgency ordinance would only be in effect for 45 days unless the Council extended it for up to a total of 2 years. Such an ordinance, if adopted by the Council, will provide the City time to
comprehensively study the impacts of Proposition 64 and the MMRSA, how those two enactments inter-relate and affect the City and how best to treat the indoor cultivation of nonmedical marijuana in the best interests of the citizens of the City. The proposed ordinance is attached as Exhibit B.

Environmental Issues

The adoption of these urgency ordinances is considered exempt under CEQA, because, *inter alia*, there is no possibility that their adoption may have a significant negative physical impact on the environment.

PURPOSE OF THIS REPORT

To provide the City Council with background information about the implications of Proposition 64 and the options available to the Council at this time to regulate the cultivation of nonmedical marijuana for personal use.

FISCAL IMPACT

The adoption of these ordinances will not cause the City to incur any significant expenses. Their enforcement, however, may cause the City to incur expenses, but the amount of such expenses is too speculative to warrant an estimation at this time.

ATTACHMENTS

1. **Exhibit A:** Urgency Ordinance Prohibiting the Outdoor Cultivation of Nonmedical Marijuana

2. **Exhibit B:** Urgency Ordinance Prohibiting the Indoor Cultivation of Nonmedical Marijuana Except Under Certain Conditions

3. **Exhibit C:** September 26, 2016, Materials Prepared by the League of California Cities re Proposition 64
CITY COUNCIL OF THE CITY OF NOVATO

ORDINANCE NO. ________

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE
CITY OF NOVATO ESTABLISHING A TEMPORARY
MORATORIUM ON THE OUTDOOR CULTIVATION OF
NONMEDICAL MARIJUANA

WHEREAS, in 1996 the voters of California approved Proposition 215, codified as California Health and Safety Code Section 11362.5 and entitled “The Compassionate Use Act of 1996;” and

WHEREAS, the intent of Proposition 215 was to enable persons who are in need of medical marijuana for specified medical purposes to obtain medical marijuana, and use it under limited, specified circumstances without fear of criminal prosecution under State law; and

WHEREAS, in 2003, the State Legislature enacted SB 420, codified as California Health and Safety Code Section 11362.7 et seq. and entitled the “Medical Marijuana Program Act” (“MMPA”) to clarify the scope of The Compassionate Use Act of 1996; and

WHEREAS, effective January 1, 2016, the Medical Marijuana Regulation and Safety Act (“MMRSA”) became effective under which an extensive state regulatory scheme was established providing for the monitoring, inspecting and licensing of commercial medical marijuana businesses. The MMRSA created a dual-licensing system under which medical marijuana businesses have to obtain both state and local licenses in order to conduct such businesses. However, the MMRSA explicitly acknowledged that cities and counties retain the right to not only regulate such activities, but to ban them entirely. The MMRSA also acknowledged that permissive zoning schemes can implicitly prohibit such activities, including the indoor and outdoor cultivation of medical marijuana when those zoning regulations do not expressly list such activities as permitted or conditionally permitted uses; and

WHEREAS, on November 8, 2016, the State’s voters passed the Control, Regulate and Tax Adult Use of Marijuana Act as Proposition 64 (“Proposition 64”). Proposition 64 legalizes the recreational use of marijuana in California for individuals 21 years of age and older; and

WHEREAS, Proposition 64 authorizes the personal cultivation of up to six marijuana plants within a private residence or upon the “grounds” of that private residence for nonmedical purposes; and

WHEREAS, pursuant to Proposition 64, the City may completely prohibit outdoor nonmedical marijuana cultivation for personal use until such time as the California Attorney General determines that the nonmedical use of marijuana is lawful in California under federal law, at which time any ban on the outdoor cultivation of nonmedical marijuana would be nullified. The California Attorney General has not made a determination that nonmedical use of marijuana is lawful in California under Federal law; and
WHEREAS, Article XI, Section 7 of the California Constitution provides that a city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws; and

WHEREAS, under and after Proposition 64 passes, it is more likely than not that the number of individuals who will desire to and will cultivate nonmedical marijuana for personal use will be significant. It is further more likely than not that substantial numbers of persons interested in cultivating nonmedical marijuana will commence doing so immediately after or soon after Proposition 64 passes, unless and until local regulations and/or prohibitions (on outdoor cultivation) are enacted which control such activities; and

WHEREAS, the cultivation of medical and nonmedical marijuana in other cities has resulted in calls for service to their police departments, including calls for robberies and thefts, and the increase in criminal activity, and it is reasonable to assume that Proposition 64’s adoption without reasonable controls imposed by the City of Novato, will generate similar, if not greater, numbers of such incidents pertaining to the cultivation of nonmedical marijuana occurring in the City of Novato. Similar incidents involving complaints resulting in criminal investigations and the discovery of illegal marijuana cultivations have already occurred in the City of Novato. Without the restrictions imposed by this Ordinance, there is a current and immediate threat to the public health, safety and welfare of substantial numbers of persons cultivating nonmedical marijuana outdoors and creating the complaints and enforcement problems already experienced in other communities and in the City of Novato and exposing citizens to robberies, potential violence, vandalism of property and theft of marijuana plants being openly and visibly grown in the yards and grounds of residential properties throughout the City; and

WHEREAS, based upon the experience of the State of Colorado and other states in which nonmedical marijuana has been legalized, it is likely that Proposition 64 will have significant impacts on law enforcement, the medical resources of the State and the regulatory function of local agencies, including the City of Novato; and

WHEREAS, the short period between Proposition 64’s passage and the need to adopt local controls over the cultivation of nonmedical marijuana and Proposition 64’s creation of a complex, state-wide licensing system for the commercial production, delivery, marketing, testing and selling of nonmedical marijuana have impeded and prevented the City from adequately studying its impacts and the most appropriate manner in which to comprehensively address the issues implicated by the Proposition and its implementation. The City needs time to further study the Proposition and whether and to what extent the City’s General Plan, zoning code and other regulations will need to be or should be modified to accommodate and/or address the impacts of Proposition 64 on the City and its citizens. Were the City Council to permit the outdoor cultivation of nonmedical marijuana while it studied the means and methods to address such activities, those persons who engaged in such outdoor cultivation activities may garner rights to continue such activities as grandfathered uses, unaffected by later-enacted legislation by the City Council, creating enforcement problems that can be avoided. Such an outcome presents an immediate and current threat to the ability of the City Council to properly plan and regulate such activities and will undermine the purpose of any such plan and regulation as to those persons who are able to commence the outdoor cultivation of nonmedical marijuana before such plans and/or regulations are put into place; and
WHEREAS, in order to determine the most appropriate and publicly beneficial manner in which to address the outdoor cultivation of nonmedical marijuana issues implicated by Proposition 64 and the effect of such outdoor cultivation activities should the City determine to permit such uses within the City’s corporate boundaries, and in order to protect residents and businesses from the potential harmful effects of some outdoor nonmedical marijuana cultivators, the City needs time to study whether to permanently permit and regulate or prohibit such uses and, if the Council determines to permit such uses, to examine the regulations relating thereto and to permit the public adequate time to review and comment upon the issue in accordance with state law in tandem with the City’s consideration of any such regulations or prohibition; and

WHEREAS, it would be destructive of and render ineffective any proposed policies, restrictions, ordinances and regulations if, during the period they are being studied and considered by the City, parties seeking to avoid their operation and effect establish such uses, which said operations and activities will defeat, in whole or in part, the objectives of such policies, restrictions, ordinances and regulations; and

WHEREAS, absent the adoption of this interim urgency ordinance, it is likely that the establishment and operation of outdoor nonmedical marijuana cultivations within the City, without appropriate controls in place to regulate outdoor nonmedical marijuana cultivations and their impacts on the community, will result in harmful effects to the businesses, property owners and residents of the City; and

WHEREAS, because of the facts set forth above, there exists a current and immediate threat that persons shall commence outdoor nonmedical cultivation operations, that such poses a current and immediate threat to the health, safety and welfare of the citizens of the City and having such uses commence operations and operate in the City before the City has had an opportunity to consider, study and/or adopt regulations (or prohibitions) governing the said outdoor cultivations will render such regulations ineffective and destroy the purpose of engaging in such an analysis and process in the first place, thus constituting a current and immediate threat to the health, safety and welfare of the citizens of the City; and

WHEREAS, the City Council desires to adopt an interim moratorium on the outdoor cultivation of nonmedical marijuana throughout the City; and

WHEREAS, the City Council desires that this ordinance shall only take effect upon its adoption; and

WHEREAS, pursuant to Section 15001 of the California Environmental Quality Act (CEQA) Guidelines, this ordinance is exempt from CEQA based on the following findings:

(1) This ordinance is not a project within the meaning of Section 15378 of the State CEQA Guidelines, because it has no potential for resulting in physical change in the environment, directly or ultimately.

(2) This ordinance is categorically exempt from CEQA under Section 15308 of the CEQA Guidelines as a regulatory action taken by the City pursuant to its police power and in accordance with Government Code Section 65858 to assure maintenance and protection of the environment pending the consideration, evaluation and possible adoption of contemplated local legislation, regulation and policies.
(3) This ordinance is not subject to CEQA under the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. For the reasons set forth in subparagraphs (1) and (2), above, and pursuant to CEQA Guidelines Section 15061, it can be seen with certainty that there is no possibility that this ordinance will have a significant effect on the environment:

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

Section 1. Recitals Made Findings. The above recitals are hereby declared to be true and correct and represent the findings of the City Council of the City of Novato, made in the exercise of its independent judgment. Said findings are incorporated by this reference.

Section 2. Moratorium Imposed.

A. Scope.

In accordance with the authority granted the City of Novato under Article XI, Section 7 of the California Constitution and California Government Code Section 65858, from and after the effective date of this ordinance, no permit, variance, building permit, approval or any other applicable license or entitlement for use, including, but not limited to any land use entitlement, or the issuance of a business license, shall be approved or issued for the cultivation of nonmedical marijuana outdoors. The cultivation of nonmedical marijuana outdoors is hereby expressly prohibited in all areas and in all zoning districts of the City during the period of time which this ordinance, and any extension thereof, if any, is in effect.

B. Definitions.

1. "Fully enclosed and secure structure" means a space within a building that complies with the applicable provisions of the California Building Standards Code as adopted and amended by Chapter IV (Building and Housing) of the Novato Municipal Code, and has a complete roof enclosure supported by connecting walls extending from the ground to the roof, a foundation, slab or equivalent base to which the floor is secured by bolts or similar attachments, is secure against unauthorized entry, and is accessible only through one or more lockable doors. Walls and roof must be constructed of solid materials that cannot be easily broken through, and must be constructed with non-transparent material. Plastic sheeting, canvas, vinyl, or similar products or materials, regardless of gauge, are not considered solid materials. A fully enclosed and secure structure must be an accessory structure to a private residence located upon the parcel on which that private residence is situated.

2. "Nonmedical marijuana" means marijuana that is intended to be used for nonmedical purposes pursuant to Health and Safety Code section 11362.1 et seq., as those sections may be amended from time to time.

3. "Nonmedical marijuana cultivation" or the “cultivation of nonmedical marijuana” means the planting, growing, harvesting, drying, curing, grading, trimming or processing of marijuana plants or any part thereof pursuant to Health and Safety Code section 11362.1 et seq., as those sections may be amended from time to time.
4. “Marijuana” means all parts of the plant cannabis sativa L, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; cannabis; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin.

5. “Outdoors” means any location within the City that is not within a fully enclosed and secure structure or a private residence.

6. “Private residence” is defined as a house, an apartment unit, a mobilehome, or other similar dwelling unit.

C. Statutory Findings and Purpose.

This ordinance is declared to be an interim ordinance as defined under California Government Code Section 65858. This ordinance is deemed necessary based on the findings of the City Council of the City of Novato as set forth in the recitals, incorporated by Section 1 of this ordinance.

Section 3. Establishment, Maintenance or Operation of Nonmedical Marijuana Cultivation Outdoors Declared Public Nuisance.

It is unlawful and a public nuisance for any person owning, leasing, occupying, or having possession of any legal parcel or premises within any zoning district in the city to cause or allow such parcel or premises to be used for the outdoor cultivation of nonmedical marijuana. Violations of this ordinance may be enforced by any applicable laws or ordinances, including but not limited to injunctions, or administrative penalties under the Novato Municipal Code.

Section 4. Severability.

If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council of the City of Novato hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

Section 5. Effective Date and Duration.

This ordinance shall become effective on November 15, 2016, if adopted by at least four-fifths vote of the City Council, and shall be in effect for 45 days from its adoption unless extended by the City in accordance with California Government Code Section 65858.

Section 6. Posting. This ordinance shall be published in accordance with applicable provisions of law, by either:

publishing the entire ordinance once in a newspaper of general circulation, published in the City of Novato, within fifteen (15) days after its passage and adoption, or
publishing the title or appropriate summary in a newspaper of general circulation, published in the City of Novato, at least five (5) days prior to adoption, and a second time within fifteen (15) days after its passage and adoption with the names of those City Council members voting for and against the ordinance.

*   *   *   *   *

This ordinance was adopted on the 15th day of November, 2016, by the following vote:

AYES: Councilmembers
NOES: Councilmembers
ABSTAIN: Councilmembers
ABSENT: Councilmembers

__________________________
Mayor of the City of Novato

Attest:

__________________________
Deputy City Clerk of the City of Novato

Approved as to form:

__________________________
City Attorney of the City of Novato
CITY COUNCIL OF THE CITY OF NOVATO

ORDINANCE NO. ________

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF NOVATO ESTABLISHING A TEMPORARY MORATORIUM (EXCEPT UNDER CERTAIN CONDITIONS) ON THE INDOOR CULTIVATION OF NONMEDICAL MARIJUANA

WHEREAS, in 1996 the voters of California approved Proposition 215, codified as California Health and Safety Code Section 11362.5 and entitled “The Compassionate Use Act of 1996;” and

WHEREAS, the intent of Proposition 215 was to enable persons who are in need of medical marijuana for specified medical purposes to obtain medical marijuana, and use it under limited, specified circumstances without fear of criminal prosecution under State law; and

WHEREAS, in 2003, the State Legislature enacted SB 420, codified as California Health and Safety Code Section 11362.7 et seq. and entitled the “Medical Marijuana Program Act” (“MMPA”) to clarify the scope of The Compassionate Use Act of 1996; and

WHEREAS, effective January 1, 2016, the Medical Marijuana Regulation and Safety Act (“MMRSA”) became effective under which an extensive state regulatory scheme was established providing for the monitoring, inspecting and licensing of commercial medical marijuana businesses. The MMRSA created a dual-licensing system under which medical marijuana businesses have to obtain both state and local licenses in order to conduct such businesses. However, the MMRSA explicitly acknowledged that cities and counties retain the right to not only regulate such activities, but to ban them entirely. The MMRSA also acknowledged that permissive zoning schemes can implicitly prohibit such activities, including the indoor and outdoor cultivation of medical marijuana when those zoning regulations do not expressly list such activities as permitted or conditionally permitted uses; and

WHEREAS, the State’s voters have passed the Control, Regulate and Tax Adult Use of Marijuana Act as Proposition 64 (“Proposition 64”). Proposition 64 legalizes the recreational use of marijuana in California for individuals 21 years of age and older; and

WHEREAS, Proposition 64 authorizes the personal cultivation of up to six marijuana plants within a private residence or upon the “grounds” of that private residence for nonmedical purposes; and

WHEREAS, pursuant to Proposition 64, the City can enact reasonable regulations for the cultivation of nonmedical marijuana that occurs inside a residence or accessory structure; and

WHEREAS, Article XI, Section 7 of the California Constitution provides that a city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws; and
WHEREAS, after the passage of Proposition 64 and given its margin of victory, it is more likely than not that the number of individuals who will desire to and will cultivate nonmedical marijuana for personal use will be significant. It is further more likely than not that substantial numbers of persons interested in cultivating nonmedical marijuana will commence doing so immediately after or soon after Proposition 64 passed, unless and until local regulations and/or prohibitions (on outdoor cultivation) are enacted which control such activities; and

WHEREAS, the cultivation of medical and nonmedical marijuana in other cities has resulted in (a) calls for service to their police departments, including calls for robberies and thefts, and (b) the increase in criminal activity, and it is reasonable to assume that without reasonable controls imposed by the City of Novato, similar, if not greater, numbers of such incidents pertaining to the indoor cultivation of nonmedical marijuana will occur in the City of Novato following passage of Proposition 64. Similar incidents involving complaints resulting in criminal investigations and the discovery of illegal marijuana cultivations have occurred in the City of Novato. Without the restrictions imposed by this ordinance, there is a current and immediate threat to the public health, safety and welfare of substantial numbers of persons cultivating nonmedical marijuana indoors and creating the complaints and enforcement problems already being experienced in other communities and the City of Novato and exposing citizens to robberies, potential violence, vandalism of property and theft of marijuana plants; and

WHEREAS, the City Council finds that allowing the use of property within the City for the indoor cultivation of marijuana for nonmedical purposes without the City having any authority to establish conditions, regulations, restrictions, and limitations upon such activities presents a current and immediate threat to the public health, safety, or welfare, including but not limited to the harmful effects associated with such activities, such as: the spread of malodorous smells; indoor electrical fire hazards; inadequate ventilation; health hazards from mold and water damage; criminal activity such as robberies, burglaries, and trespassing, which have been experienced by other communities and/or are significant risks resulting from such activities; and increased nuisance conditions in neighborhoods, among others; and

WHEREAS, based upon the experience of the State of Colorado and other states in which nonmedical marijuana has been legalized, it is likely that Proposition 64 will have significant impacts on the City’s police department, the medical resources of the State and the regulatory function of local agencies, including the City of Novato; and

WHEREAS, the short period between Proposition 64’s passage and the need to adopt local controls over the cultivation of nonmedical marijuana and Proposition 64’s creation of a complex, state-wide licensing system for the commercial production, delivery, marketing, testing and selling of nonmedical marijuana have impeded and prevented the City from adequately studying its impacts and the most appropriate manner in which to comprehensively address the issues implicated by the Proposition and its implementation. The City needs time to further study the Proposition and whether and to what extent the City’s General Plan, zoning code and other regulations will need to be or should be modified to accommodate and/or address the impacts of Proposition 64 on the City and its citizens. Were the City Council to permit the unregulated, indoor cultivation of nonmedical marijuana while it studied the means and methods to address such activities, those persons who engaged in such indoor cultivation activities may garner rights to continue such activities as grandfathered uses, unaffected by later-enacted legislation by the City Council. Such an outcome presents an immediate and current threat to the ability of the City Council to properly plan and regulate such activities and will undermine the purpose of any such
plan and regulation as to those persons who are able to commence the indoor cultivation of nonmedical marijuana before such plans and/or regulations are put into place; and

WHEREAS, in order to determine the most appropriate and publicly beneficial manner in which to address the indoor cultivation of nonmedical marijuana issues implicated by Proposition 64 and the effect of such indoor cultivation activities should the City determine to regulate such uses within the City’s corporate boundaries, and in order to protect residents and businesses from the potential harmful effects of some indoor nonmedical marijuana cultivators, the City needs time to study whether to permanently regulate such uses and, if so, the City needs time to examine the regulations relating thereto and to permit the public adequate time to review and comment upon the issue in accordance with state law in tandem with the City’s consideration of any such regulations; and

WHEREAS, it would be destructive of and render ineffective any proposed policies, restrictions, ordinances and regulations if, during the period they are being studied and considered by the City, parties seeking to avoid their operation and effect establish such uses, which said operations and activities will defeat, in whole or in part, the objectives of such policies, restrictions, ordinances and regulations; and

WHEREAS, absent the adoption of this interim urgency ordinance, it is likely that the establishment and operation of indoor nonmedical marijuana cultivations within the City, without appropriate controls in place to regulate such and their impacts on the community, will result in harmful effects to the businesses, property owners and residents of the City; and

WHEREAS, because of the facts set forth above, there exists a current and immediate threat that persons shall commence indoor nonmedical cultivation operations, that such poses a current and immediate threat to the health, safety and welfare of the citizens of the City and having such uses commence operations and operate in the City before the City has had an opportunity to consider, study and/or adopt regulations governing the said indoor cultivations will render such regulations ineffective and destroy the purpose of engaging in such an analysis and process in the first place, thus constituting a current and immediate threat to the health, safety and welfare of the citizens of the City; and

WHEREAS, subject to the provisions of this ordinance, the City Council desires to adopt an interim moratorium on the indoor cultivation of nonmedical marijuana throughout the City; and

WHEREAS, the City Council desires that this ordinance shall take effect upon its adoption; and

WHEREAS, pursuant to Section 15001 of the California Environmental Quality Act (CEQA) Guidelines, this ordinance is exempt from CEQA based on the following findings:

(1) This ordinance is not a project within the meaning of Section 15378 of the State CEQA Guidelines, because it has no potential for resulting in physical change in the environment, directly or ultimately.

(2) This ordinance is categorically exempt from CEQA under Section 15308 of the CEQA Guidelines as a regulatory action taken by the City pursuant to its police power and in accordance with Government Code Section 65858 to assure maintenance and protection of the

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environment pending the consideration, evaluation and possible adoption of contemplated local legislation, regulation and policies.

(3) This ordinance is not subject to CEQA under the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. For the reasons set forth in subparagraphs (1) and (2), above, and pursuant to CEQA Guidelines Section 15061, it can be seen with certainty that there is no possibility that this ordinance will have a significant effect on the environment:

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

Section 1. Recitals Made Findings. The above recitals are hereby declared to be true and correct and represent the findings of the City Council of the City of Novato, made in the exercise of its independent judgment. Said findings are incorporated by this reference.

Section 2. Urgency Moratorium Imposed.

A. Cultivation not in compliance with this ordinance. It is declared to be unlawful and a public nuisance for any person owning, leasing, occupying or having charge or possession of any parcel or premises within any zoning district in the city to cultivate nonmedical marijuana except as provided for in this ordinance. No person other than an individual 21 years of age or older may engage in the cultivation of nonmedical marijuana.

B. Indoor cultivation. Indoor cultivation of nonmedical marijuana is prohibited in all zoning districts of the city, except when such cultivation occurs on a parcel with an approved private residence. All indoor cultivation of nonmedical marijuana must be in compliance with this ordinance.

C. Indoor cultivation in private residence. The indoor cultivation of nonmedical marijuana on a parcel with an approved private residence shall only be conducted within a fully enclosed and secure structure or within a residence. Such cultivation shall be in conformance with the following minimum standards:

1. The primary use of the property shall be for a residence. Nonmedical marijuana cultivation is prohibited as a home occupation.

2. All areas used for cultivation of nonmedical marijuana shall comply with Chapter IV (Building and Housing) of the Novato Municipal Code, as well as applicable law.

3. Indoor grow lights shall not exceed 1,000 watts per luminaire, and shall comply with the applicable provisions of the California Building Standards Code as adopted and amended by Chapter IV of the Novato Municipal Code.

4. The use of gas products (CO2, butane, propane, natural gas, etc.) or generators for cultivation of nonmedical marijuana is prohibited.

5. Any fully enclosed and secure structure or residence used for the cultivation of nonmedical marijuana must have a ventilation and filtration system installed that shall prevent marijuana plant odors from exiting the interior of the structure and that complies with the
applicable provisions of the California Building Standards Code as adopted and amended by Chapter IV of the Novato Municipal Code.

6. A fully enclosed and secure structure used for the cultivation of nonmedical marijuana shall be located in the rear yard area of the parcel, and must maintain a minimum ten-foot setback from any property line. The yard where the fully enclosed and secure structure is maintained must be enclosed by a solid fence at least six feet in height. This provision shall not apply to cultivation occurring in a garage.

7. Adequate mechanical locking or electronic security systems must be installed as part of the fully enclosed and secure structure or the residence prior to the commencement of cultivation.

8. Nonmedical marijuana cultivation shall be limited to six marijuana plants per private residence, regardless of whether the marijuana is cultivated inside the residence or in a fully enclosed and secure structure. The limit of six plants per private residence shall apply regardless of how many individuals reside at or in the private residence.

9. The residential structure shall remain at all times a residence, with legal and functioning cooking, sleeping and sanitation facilities with proper ingress and egress. These rooms shall not be used for nonmedical marijuana cultivation where such cultivation will prevent their primary use for cooking of meals, sleeping and bathing.

10. Cultivation of nonmedical marijuana shall only take place on impervious surfaces.

11. From a public right-of-way, there shall be no exterior evidence of nonmedical marijuana cultivation occurring on the parcel.

12. The nonmedical marijuana cultivation area, whether in a fully enclosed and secure structure or inside a residence, shall not be accessible to persons under 21 years of age.

13. Written consent of the property owner to cultivate nonmedical marijuana within the residence or in a fully enclosed and secure structure shall be obtained and shall be kept on the premises, and available for inspection by the chief of police or his/her designee.

14. A portable fire extinguisher, that complies with the regulations and standards adopted by the state fire marshal and applicable law, shall be kept in the fully enclosed and secure structure used for cultivation of nonmedical marijuana. If cultivation occurs in a residence, the portable fire extinguisher shall be kept in the same room as where the cultivation occurs.

D. Definitions.

1. "Fully enclosed and secure structure" means a space within a building that complies with the applicable provisions of the California Building Standards Code as adopted and amended by Chapter IV of the Novato Municipal Code, and has a complete roof enclosure supported by connecting walls extending from the ground to the roof, a foundation, slab or equivalent base to which the floor is secured by bolts or similar attachments, is secure against unauthorized entry, and is accessible only through one or more lockable doors. Walls and roof must be constructed of solid materials that cannot be easily broken through, and must be
constructed with non-transparent material. Plastic sheeting, canvas, vinyl, or similar products or materials, regardless of gauge, are not considered solid materials. A fully enclosed and secure structure must be an accessory structure to a private residence located upon the parcel on which that private residence is situated.

2. "Indoors" means inside a fully enclosed and secure structure or within a private residence.

3. “Luminaire” means a complete lighting unit consisting of lamp(s) and the parts that distribute the light, position and protect the lamp(s), and connect the lamp(s) to the power supply.

4. "Nonmedical marijuana" means marijuana that is intended to be used for nonmedical purposes pursuant to Health and Safety Code section 11362.1 et seq., as those sections may be amended from time to time.

5. "Nonmedical marijuana cultivation" or the “cultivation of nonmedical marijuana” means the planting, growing, harvesting, drying, curing, grading, trimming or processing of marijuana plants or any part thereof pursuant to Health and Safety Code section 11362.1 et seq., as those sections may be amended from time to time.

6. “Marijuana” means all parts of the plant cannabis sativa L, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; cannabis; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin.

7. “Outdoors” means any location within the City that is not within a fully enclosed and secure structure or a private residence.

8. "Private residence" or “residence” means a house, an apartment unit, a mobile home or other similar dwelling.

9. "Solid fence" means a fence constructed of substantial material, such as wood or metal, that prevents viewing the contents from one side to the other side of the fence.

D. Statutory Findings and Purpose.

This ordinance is declared to be an interim ordinance as defined under California Government Code Section 65858. This ordinance is deemed necessary based on the findings of the City Council of the City of Novato as set forth in the recitals, incorporated by Section 1 of this ordinance.

Section 3. Except as Provided in this Ordinance, Establishment, Maintenance or Operation of Nonmedical Marijuana Cultivation Indoors Declared Public Nuisance.

It is unlawful and a public nuisance for any person owning, leasing, occupying, or having possession of any parcel or premises within any zoning district in the city to cause or allow such parcel or premises to be used for the indoor cultivation of nonmedical marijuana except as provided in this ordinance. Violations of this ordinance may be enforced by any applicable laws or
ordinances, including but not limited to injunctions, or administrative penalties under the Novato Municipal Code.

Section 4. Severability.

If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council of the City of Novato hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

Section 5. Effective Date and Duration.

This ordinance shall become effective on November 15, 2016, if adopted by at least four-fifths vote of the City Council, and shall be in effect for 45 days from its adoption unless extended by the City in accordance with California Government Code Section 65858.

Section 6. Posting. This ordinance shall be published in accordance with applicable provisions of law, by either:

publishing the entire ordinance once in a newspaper of general circulation, published in the City of Novato, within fifteen (15) days after its passage and adoption, or

publishing the title or appropriate summary in a newspaper of general circulation, published in the City of Novato, at least five (5) days prior to adoption, and a second time within fifteen (15) days after its passage and adoption with the names of those City Council members voting for and against the ordinance.

* * * * *

This ordinance was adopted on the 15th day of November, 2016, by the following vote:

AYES: Councilmembers
NOES: Councilmembers
ABSTAIN: Councilmembers
ABSENT: Councilmembers

__________________________
Mayor of the City of Novato

Attest:

__________________________
Deputy City Clerk of the City of Novato
Approved as to form:

____________________
City Attorney of the City of Novato
MEMORANDUM

To: League of California Cities’ City Managers Department
League of California Cities’ City Attorneys Department
From: League Staff
Date: September 26, 2016
Re: The Control, Regulate and Tax Adult Use of Marijuana Act

On November 8, 2016, the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA" or "Act") will come before California voters as Proposition 64. If passed, the AUMA will legalize the nonmedical use of marijuana by persons 21 years of age and over, and the personal cultivation of up to six marijuana plants. In addition, the AUMA will create a state regulatory and licensing system governing the commercial cultivation, testing, and distribution of nonmedical marijuana, and the manufacturing of nonmedical marijuana products. The regulatory system governing these commercial marijuana activities largely mirrors the Medical Marijuana Regulation and Safety Act ("MMRSA"), but there are key differences. This memorandum will provide an overview of the AUMA, highlight the ways in which the AUMA differs from the MMRSA, and identify the issues that cities will need to take action on if the AUMA passes.

I. Overview of the AUMA

A. Personal Nonmedical Marijuana Use

The AUMA 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 any compensation, 28.5 grams of marijuana, or 8 grams of concentrated marijuana, including as contained in marijuana products; and (3) possess, plant, cultivate, harvest, dry or process up to six living marijuana plants for personal use. The AUMA requires that marijuana in excess of 28.5 grams that is produced by plants kept pursuant to the personal cultivation provision of the Act be kept in a locked space on the grounds of a private residence that is not visible from a public place.

Although persons 21 years of age or older may use and possess nonmedical marijuana under the Act, their ability to engage in these activities is not unfettered. The AUMA prohibits the smoking

1 DISCLAIMER: These materials are not offered as or intended to be legal advice. Readers should seek the advice of an attorney when confronted with legal issues. Attorneys should perform an independent evaluation of the issues raised in these materials.

2 Health & Saf. Code § 11362.2(a).

3 Health & Saf. Code § 11362.2(a)(2).
of marijuana: (1) in any public place, except where a local jurisdiction has authorized use on the premises of a retailer or microbusiness in accordance with Business and Professions Code section 26200; (2) where smoking tobacco is prohibited; (3) within 1,000 feet of a school, day care center, or youth center while children are present; and (3) while driving, or riding in the passenger seat of, any vehicle used for transportation. Moreover, individuals cannot possess marijuana on school grounds, in day care 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. The 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 workplace by prohibiting the use, consumption, possession, transfer, transportation, sale, display or growth of marijuana in the workplace.

1. Personal Cultivation

The AUMA provides that local governments can reasonably regulate, but cannot ban, personal indoor cultivation of up to six living marijuana plants within the person’s private residence. The Act defines private residence as “a house, an apartment unit, a mobile home, or other similar dwelling unit.” This includes cultivation in a greenhouse on the same property as the residence that is not physically part of the home, as long as it is fully enclosed, secure, and not visible from a public space.

The AUMA completely protects the ability of local governments to regulate, and to ban, personal outdoor cultivation operations. However, it purports to repeal any ordinance that bans outdoor cultivation upon the California Attorney General’s determination that nonmedical use of marijuana is lawful under federal law.

B. Commercial Nonmedical Marijuana Activity

Under the AUMA, California will have a comprehensive state regulatory system for nonmedical marijuana that governs the industry from “seed to sale.” The Bureau of Marijuana Control, currently the Bureau of Medical Cannabis Regulation, which is within the Department of Consumer Affairs, will have primary responsibility for administering and enforcing the AUMA.

The AUMA divides state licensing and enforcement responsibilities among three agencies: (1) the Department of Consumer Affairs, which will issue licenses for marijuana the transportation,
storage, distribution, and sale of marijuana, 13 (2) the Department of Food and Agriculture will issue marijuana cultivation licenses, which will administer the provisions of the AUMA related to the cultivation of marijuana; 14 and (3) the Department of Public Health, which will issue licenses for marijuana manufacturers and testing laboratories. 15 Each of these state licensing authorities is responsible for creating regulations governing their respective areas of responsibility, and must begin issuing licenses by January 1, 2018. 16

A state marijuana license will be valid for one year. 17 A separate state license is required for each commercial marijuana business location. 18 With the exception of testing facilities, any person or entity licensed under the AUMA may apply for and be issued more than one type of state license. 19

1. Local Control

All nonmedical marijuana businesses must have a state license. 20 A state license cannot issue to an applicant whose operations would violate the provisions of any local ordinance or regulation. 21 However a state applicant need not provide documentation that the applicant has a local license or permit.

The AUMA does not limit the authority of a local jurisdiction to adopt and enforce local ordinances regulating or completely prohibiting state-licensed marijuana businesses. 22 Local jurisdictions may establish “standards, requirements, and regulations regarding health and safety, environmental protection, testing, security, food safety, and worker protections that exceed state standards.” 23

2. Local Enforcement

Like the MMRSA, the AUMA establishes a dual enforcement scheme for commercial marijuana activities that violate either state or local laws. The state licensing authorities will enforce state statutes and regulations. State authorities can suspend or revoke state licenses, 24 pursue civil penalties against violating businesses in an amount equal to three times the applicable licensing fee per violation, 25 or may prosecute violators criminally. 26 Local authorities will be responsible

13 Bus. & Prof. Code § 26012(a)(1).
14 Bus. & Prof. Code § 26012(a)(2).
15 Bus. & Prof. Code § 26012(3).
16 Bus. & Prof. Code §§ 26012(c), 26013 (a).
17 Bus. & Prof. Code § 26050(c).
18 Bus. & Prof. Code § 26055(c).
19 Bus. & Prof. Code § 26053.
20 Bus. & Prof. Code § 26038.
21 Bus. & Prof. Code § 26055(e).
22 Bus. & Prof. Code § 26200(a). But see, Bus. & Prof. Code §§ 19340(f), 26080(b), 26090(c) [prohibiting cities from preventing the use of public roads to lawfully transport or deliver nonmedical marijuana].
23 Bus. & Prof. Code § 26201.
24 Bus. & Prof. Code § 2603.
25 Bus. & Prof. Code § 26038(a)
26 Bus. & Prof. Code § 26038(c).
for enforcing local ordinances and regulations.\textsuperscript{27} For state-licensed facilities operating within a city, a city may have authority to enforce state law and regulations “if delegated the power to do so by the [B]ureau [of Marijuana Control] or a licensing authority.”\textsuperscript{28}

II. Key Differences Between the AUMA and MMRSA

A. Licensing

The MMRSA established dual licensing of medical marijuana businesses, requiring both local approval and a state license in order for a business to operate legally.\textsuperscript{29} Specifically, the MMRSA requires applicants to provide the relevant state licensing entity with documentation proving their compliance with local ordinances and regulations.\textsuperscript{30}

The AUMA does not require an applicant to provide evidence of local permission prior to being issued a state license.\textsuperscript{31} Instead, the AUMA prohibits state licensing entities from approving licenses for activities that would violate local ordinances.\textsuperscript{32} Thus, state licensing officials bear the onus of evaluating local regulatory compliance.

Under this system, the AUMA allows a nonmedical marijuana business licensed by the state to operate within city limits unless the city’s municipal code prohibits the use. Cities that wish to regulate or prohibit nonmedical marijuana businesses will need to do so before the State begins issuing licenses, either by enacting a nonmedical marijuana ordinance/regulation or by amending an existing medical marijuana ordinance/regulation to include nonmedical marijuana within its scope.

B. License Revocation

Under the MMRSA, revocation of a local license or permit unilaterally terminates the ability of the medical marijuana business to operate in the jurisdiction issuing the permit, until such time as the local permitting entity reinstates it.\textsuperscript{33}

Under the AUMA, if a local jurisdiction revokes a local license, permit, or authorization for a licensee to engage in commercial marijuana activity within the local jurisdiction, the Bureau of Marijuana Control must initiate proceedings to determine whether the state license issued should be suspended or revoked within ten days of being notified by the local jurisdiction of the local revocation.\textsuperscript{34} Note, however, that, even if the state license is not suspended or revoked immediately, the business cannot operate within the local jurisdiction once local revocation occurs.

\begin{itemize}
\item \textsuperscript{27} Bus. & Prof. Code § 26200 (b).
\item \textsuperscript{28} Bus. & Prof. Code § 23202(a).
\item \textsuperscript{29} Bus. & Prof. Code § 19320(b).
\item \textsuperscript{30} Bus. & Prof. Code § 19322(a).
\item \textsuperscript{31} Bus. & Prof. Code § 26056.
\item \textsuperscript{32} Bus. & Prof. Code § 26055(e).
\item \textsuperscript{33} Bus. & Prof. Code § 19320(d).
\item \textsuperscript{34} Bus. & Prof. Code § 26200(c).
\end{itemize}
C. Personal, Indoor Cultivation

Under the MMRSA, local governments possess the power to regulate and completely ban personal, indoor cultivation.\(^{35}\) Under the AUMA local governments can “reasonably regulate” indoor cultivation of up to six marijuana plants for personal use, but cannot ban it.\(^{36}\)

D. Personal Outdoor Cultivation

Under the MMRSA local governments can prohibit all outdoor cultivation. Under the AUMA local governments can prohibit all outdoor cultivation, until such time as the Attorney General determines that the use of nonmedical marijuana is lawful in the State of California under federal law.\(^{37}\) Upon such determination, the AUMA purports to repeal all local bans on outdoor cultivation.\(^{38}\)

E. Amendment

Any portion of the MMRSA can be amended at any time, if there is sufficient political support within the Legislature for making substantive changes to the regulatory structure. Under some circumstances, an amendment to the MMRSA by the Legislature might arguably violate The Compassionate Use Act of 1996 (adopted by the voters as Proposition 215), which decriminalized the personal use of medical marijuana.\(^{39}\)

Under the AUMA, the Legislature may amend Sections 5 (relating to the use of medical marijuana for medical purposes) and 6 (relating to state licensing) and the provisions relating to penalties by majority vote. The Legislature may amend any other provision of the Act by a 2/3 vote. Any amendment must further the purposes and intent of the AUMA. The purpose and intent of the Act include allowing local governments to ban nonmedical marijuana businesses.

F. Taxation

The AUMA imposes new state taxes on medical and nonmedical marijuana in the following manner:

- Effective January 1, 2018, the AUMA imposes an excise tax at the rate of 15% of gross retail sales receipts.\(^{40}\)
  - This tax will be in addition to existing state and local sales tax.\(^{41}\) Given that state and local sales taxes can range from 7-10%, the combined excise tax + sales tax at the retail level could approach 25%.

\(^{36}\) Bus. & Prof. Code § 11362.2(b)(1).
\(^{37}\) Bus. & Prof. Code § 11362.2(b)(4).
\(^{38}\) Bus. & Prof. Code § 11362.2(b)(4).
\(^{39}\) Health & Saf. Code § 11362.5.
\(^{40}\) Rev. & Tax Code § 34011(a).
• Effective January 1, 2018, the AUMA imposes a separate cultivation tax on all harvested marijuana as follows: 42
  o $9.25 per dry-weight ounce on all marijuana flowers;
  o $2.75 per dry-weight ounce on all marijuana leaves;
• The AUMA prohibits imposition of state and local sales taxes on medical marijuana. 43
• The AUMA exempts marijuana cultivated for personal use from taxation. 44

The AUMA does not pre-empt local taxation. 45 However, the AUMA’s estimated cumulative tax rate of nearly 35% on the purchase of nonmedical marijuana has potentially troubling implications for local governments. A high state tax rate by itself may depress sales and stimulate the black market. Any local taxation of marijuana should be governed by an awareness that a high retail sales tax rate, imposed on an industry that, until recently, has not been regulated at all, might stimulate black market activity and compromise the anticipated yield of revenue. In order to avoid such a result, cities might consider imposing an excise tax on discrete commercial nonmedical marijuana activities rather than on retail sales. New taxes on marijuana require compliance with Proposition 218.

1. Allocation of State Tax Revenues

After repaying certain state agencies for marijuana regulatory costs not covered by license fees, and making certain grants to universities for research and development and the Governor’s Office of Business and Economic Development, the AUMA distributes the remaining tax revenue as follows:

• 60% for youth programs, substance abuse education, prevention and treatment;
• 20% for environmental cleanup and remediation; and
• 20% for state and local programs that reduce DUI and grant programs designed to reduce negative health impacts resulting from marijuana legalization

G. Deliveries

Under the MMRSA, medical marijuana deliveries can only be made from a state-licensed dispensary in a city, county, or city and county that does not explicitly prohibit it by local ordinance. 46 A delivery person must carry a copy of the dispensary’s state-issued license, a government ID, and a copy of the delivery request. 47 The patient or caregiver requesting the delivery must also maintain a copy of the delivery request. 48 Dispensaries and delivery people who comply with MMRSA are immune from prosecution for marijuana transportation. 49

41 Rev. & Tax Code § 34011(d).
42 Rev. & Tax Code § 34012.
43 Rev. & Tax Code § 34011(g).
44 Rev. & Tax Code § 34011(j).
45 Rev. & Tax Code § 34021.
46 Bus. & Prof. Code § 19340(a).
47 Bus. & Prof. Code §§ 19340(b)(2), 19340(d).
48 Bus. & Prof. Code § 19340(e).
49 Bus. & Prof. Code § 19317(f).
Under the AUMA, deliveries can be made by a state-licensed retailer, microbusiness, or nonprofit unless they are prohibited by local ordinance. Although the AUMA does require a customer requesting delivery to maintain a copy of the delivery request, there is no express requirement that delivery people carry or maintain any records. Moreover, unlike the MMRSA, the AUMA does not require that deliveries come from a dispensary. Instead, it states that “Deliveries, as defined in this division, may only be made by a licensed retailer or microbusiness, or a licensed nonprofit under Section 26070.5.” Thus, there is at least some question regarding whether deliveries may be made from non-retail locations by retail employees.

Under both the MMRSA and the AUMA, local jurisdictions can ban or regulate deliveries within their borders. However, local jurisdictions cannot prevent a delivery service from using public roads to simply pass through its jurisdiction from a licensed dispensary to a delivery location outside of its boundaries.

III. Local Regulatory Options

The AUMA preserves the authority of a city to adopt business regulations and land use regulations for nonmedical marijuana activities.

A. Personal Marijuana Cultivation

Under the AUMA local governments can regulate or ban all personal, outdoor cultivation, until such time as the Attorney General determines that the use of nonmedical marijuana is lawful in the State of California under federal law. In addition, local governments can “reasonably regulate,” but cannot ban, personal, indoor cultivation. Nothing in the AUMA requires a city to enact an ordinance or regulation by a certain date. However, assuming that the AUMA passes, if a city does not have a ban or regulatory scheme governing personal, outdoor cultivation or a regulatory scheme governing personal, indoor cultivation in place before November 9, 2016, a person may legally engage in personal cultivation of up to six marijuana plants at his or her private residence.

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50 Bus. & Prof. Code §26090(a).
51 Bus. & Prof. Code §26090(b).
52 Bus. & Prof. Code § 26090(a).
53 Bus. & Prof. Code §§ 19340(a), 19316(a), 26200.
54 Bus. & Prof. Code §§ 19340(b), 26080(b), 26090(c).
55 For a thorough discussion of the various marijuana regulatory options that a city may consider, see McEwen, Medical Marijuana-Revisited After New State Laws (Spring 2016) <http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/Spring-2016/5-2016-Spring-Medical-Marijuana-%E2%80%93-Revisited-After>. In addition, sample ordinances may be found on the League’s website, at: http://www.cacities.org/Policy-Advocacy/Hot-Issues/Medical-Marijuana. But note: the regulatory schemes discussed in the McEwen paper and posted on the League’s website pertain to medical marijuana businesses under the MMRSA and may need to be modified to comply with the requirements of the AUMA.
56 Health & Saf. Code § 11362.2; Bus. & Prof. Code §§ 26201, 26200(a).
B. Nonmedical Marijuana Businesses

The AUMA recognizes a range of businesses, including dispensaries, cultivators, manufacturers, distributors, transporters, and testing laboratories. Cities may expressly ban, adopt business regulations, or adopt land use regulations pertaining to any or all of these businesses.

Again, the AUMA does not require a city to enact a regulatory scheme or ban by a certain date. However, assuming that the AUMA passes in November, if a city wishes to regulate or ban marijuana businesses before marijuana businesses may legally operate within the city, the regulations or ban will need to take effect before the state begins issuing nonmedical marijuana business licenses. The League anticipates that cities have until January 1, 2018 to enact bans or regulations relating to nonmedical marijuana businesses, because: (1) nonmedical marijuana businesses cannot operate in any city without a state license; 57 (2) the state licensing agencies in charge of implementing the AUMA have stated that they anticipate that they will not begin issuing licenses under the MMRSA until January 2018, and it is unlikely that said agencies will be able to begin issuing licenses under the AUMA before they begin issuing licenses under the MMRSA; and (3) the AUMA does not require state agencies to issue licenses until January 1, 2018. 58 It is not the League’s position that state licensing agencies cannot issue licenses before January 1, 2018, just that it is unlikely that they will do so.

C. Caution Against Use of Permissive Zoning

Under a permissive zoning code, any use not enumerated in the code is presumptively prohibited, unless an authorized city official finds that the proposed use is substantially the same in character and intensity as those land uses listed in the code. 59 Although the MMRSA upheld a city’s authority to rely on permissive zoning to prohibit medical marijuana land uses, it is unlikely that cities will succeed in arguing that nonmedical marijuana land uses are prohibited by permissive zoning under the AUMA. This is so because: (1) the statutory language in the AUMA regarding local control seems to anticipate that a city will adopt an ordinance explicitly prohibiting and/or regulating nonmedical marijuana businesses (rather than relying on the silence of its Code to argue for a prohibited use); 60 (2) the AUMA does not contain the same protective language as the

57 Bus. & Prof. Code § 26038.
58 Bus. & Prof. Code § 26012 (c).
59 See City of Corona v. Naults (2008) 166 Cal.App.4th 418, 433-436. See also County of Los Angeles v. Hill (2011) 192 Cal.App.4th 861, 871 [holding that “medical marijuana dispensaries and pharmacies are not ‘similarly situated’ for public health and safety purposes”]; City of Monterey v. Curnshimba (2013) 215 Cal.App.4th 1068, 1091 [holding that a medical marijuana dispensary was not substantially similar to the listed commercial use classifications for personal services, retail sales, pharmacies and medical supplies]; County of Tulare v. Nunes (2013) 215 Cal.App.4th 1188, 1205 [holding that a medical marijuana collective did not qualify as an “agricultural” land use because “marijuana is a controlled substance and is not treated as a mere crop or horticultural product under the law”].
60 Bus. & Prof Code § 26200 ["Nothing in this division shall be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related..."].
MMRSA with respect to permissive zoning,\(^6\) and (3) the AUMA explicitly designates nonmedical marijuana as an agricultural product—thus if a city’s permissive zoning code authorizes agricultural uses, the city may be precluded from arguing that marijuana is prohibited.\(^6\) Therefore, cities that wish to ban all or some nonmedical marijuana activities should adopt express prohibitions, even if they operate under a permissive zoning code.

IV. What actions need to be taken?

At this time city officials should: (1) review the city’s municipal code; (2) consider whether they wish to regulate the personal cultivation of nonmedical marijuana indoors; (3) consider whether they wish to regulate or ban the personal cultivation of nonmedical marijuana outdoors; (4) consider whether they wish to enact business regulations of nonmedical marijuana businesses; (5) consider whether they wish to enact land use regulations of nonmedical marijuana businesses; (6) consider whether they wish to enact local taxes on marijuana; and (7) comply with Proposition 218 if they decide to enact local taxes on marijuana.

Cities should prioritize considering or enacting ordinances regulating personal nonmedical marijuana cultivation, because it will be legal under state law on November 9, 2016 if the AUMA passes, whereas nonmedical marijuana businesses will not be able to operate lawfully until the state licensing system becomes operational (likely in late 2017). Although cultivation for personal use will be legal as of November 9, 2016 if the AUMA is approved by voters, local governments will not lose any regulatory authority if they do not have an ordinance in place addressing personal cultivation before the election. Locals will retain the ability to regulate personal cultivation and to enact related ordinances at any time after the election. The only change the AUMA will make in this area is to prohibit local bans of indoor cultivation for personal use. No ordinance enacted prior to the election can prevent this change in the law.

\(^6\) Compare Health & Saf. Code § 11362.777(b)(3) [a “person or entity shall not submit an application for a state license . . . if the proposed cultivation of marijuana will violate the provisions of any local ordinance or regulation, or if medical marijuana is prohibited by the city, county, or city and county in which the cultivation is proposed to occur, either expressly or otherwise under principles of permissive zoning”] with Bus. & Prof Code § 26205(e) [“‘Licensing authorities shall not approve an application for a state license under this division if approval of the state license will violate the provisions of any local ordinance or regulation adopted in accordance with Section 26200.’”].

\(^6\) Bus. & Prof. Code § 26067(a).