

CITY OF MERCED
Planning & Permitting Division

STAFF REPORT: #15-23

AGENDA ITEM: 4.2

FROM & Kim Espinosa,
PREPARED BY: Planning Manager

PLANNING COMMISSION
MEETING DATE: Dec. 9, 2015

CITY COUNCIL
MEETING DATE: January 4, 2016
(Tentative)

SUBJECT: **Zoning Ordinance Amendment #15-01**, initiated by the City of Merced. This application involves changes to the Merced Zoning Ordinance (Title 20 of the Merced Municipal Code) which would add Chapter 20.84, "Medical Marijuana and Cultivation" to the Merced Municipal Code prohibiting all commercial medical marijuana/cannabis uses and activities, including delivery, in all zones and all specific plan areas in the City of Merced and prohibiting the cultivation of any amount of marijuana/cannabis for medical use by a qualified patient or primary caregiver in all zones and specific plan areas in the City of Merced.
PUBLIC HEARING

ACTION: PLANNING COMMISSION:

Recommendation to City Council

- 1) Environmental Review #15-33 (Categorical Exemption)
- 2) Zoning Ordinance Amendment #15-01

CITY COUNCIL:

Approve/Disapprove/Modify

- 1) Environmental Review #15-33 (Categorical Exemption)
- 2) Zoning Ordinance Amendment #15-01

SUMMARY

Due to recent changes in State Law (AB 243, AB 266, and AB 643), the City Attorney's office has prepared an amendment to the Zoning Ordinance to add Chapter 20.84, "Medical Marijuana and Cultivation."

The proposed zoning ordinance amendment would do the following:

- a) Prohibit all commercial medical marijuana/cannabis uses and activities, including delivery, in all zones and all specific plan areas in the City of Merced; and,
- b) Prohibit the cultivation of any amount of marijuana/cannabis for medical use by a qualified patient or primary caregiver in all zones and specific plan areas in the City of Merced.

RECOMMENDATION

Planning staff recommends that the Planning Commission recommend approval to the City Council of a Categorical Exemption (#15-33—Attachment B) and Zoning Ordinance Amendment #15-01 (including the adoption of the Resolution at Attachment C) as described in Attachment A.

PROJECT DESCRIPTION

This application involves adding Chapter 20.84, “Medical Marijuana and Cultivation” (Attachment A) to the Zoning Ordinance prohibiting all commercial medical marijuana/cannabis uses and activities, including delivery, in all zones and all specific plan areas in the City of Merced and prohibiting the cultivation of any amount of marijuana/cannabis for medical use by a qualified patient or primary caregiver in all zones and specific plan areas in the City of Merced.

BACKGROUND

In 1996, California voters adopted the Compassionate Use Act (“CUA”) as a ballot initiative, codified at Health and Safety Code Section 11362.5. The CUA provides a limited defense from prosecution for cultivation and possession of marijuana. In 2003, the Legislature adopted the Medical Marijuana Program Act (“MMP”), codified at Health and Safety Code sections 11362.5 to 11362.83. The MMP provides qualified persons, primary caregivers, and holders of valid identification cards a defense to certain enumerated marijuana-related state crimes.

The California courts have found that neither the CUA nor the MMP provide medical marijuana patients with an unfettered right to obtain, cultivate, or dispense marijuana for medical purposes. Rather, the statutes set up limited defenses to state criminal prosecution. The manufacture, distribution, or possession of marijuana remains unlawful and a federal crime under the Federal Controlled Substance Act.

In 2013, the California Supreme Court confirmed a city’s ability to prohibit medical marijuana dispensaries within its boundaries. The court found that the CUA and MMP do not preempt a city’s local regulatory authority.

On November 26, 2013, the Court of Appeal decided and published its decision in the case of *Maral v. City of Live Oak*, 221 Cal.App.4th 975 (2013). *Maral* held that cities have authority to prohibit cultivation of all medical marijuana city-wide. Like the Supreme Court’s decision in *City of Riverside*, the *Maral* court similarly found that the CUA and MMP do not preempt a city’s regulatory authority to prohibit all cultivation in the city, if the city so chooses.

On December 1, 2015, the 5th Appellate District published a decision in *Kirby v. County of Fresno* in which the Court upheld the County’s ban on marijuana dispensaries, cultivation, and storage of medical marijuana because the CUA did not expressly restrict local government’s authority to regulate land use.

This year, the Legislature introduced three bills comprising the Medical Marijuana Regulation and Safety Act (MMRSA). These bills are designed to impose additional regulatory mechanisms related to medical marijuana. For example, there will be a dual licensing structure which requires a state and local license or permit in order to cultivate, dispense, or transport medical marijuana. Cities that wish to ban these land use activities are allowed to do so; however, there are critical time constraints.

Assembly Bill 266 established a dual licensing structure requiring state and local licenses or permits to establish marijuana businesses. However, if there is no local licensing requirement, the State Department of Food and Agriculture becomes the sole licensing authority. Assembly Bill 643 established criteria for the licensing of medical marijuana businesses, regulating physicians, and recognizing local authority to levy taxes and fees.

Assembly Bill 243 includes a provision stating that cities that do not have an ordinance regulating or prohibiting cultivation by March 1, 2016, will lose the authority to regulate or ban cultivation within their city limits.

The City of Merced currently has a provision in the Zoning Code, MMC 20.06.050(E), which states *“No use that is prohibited, unlawful, violates or is inconsistent with federal or state law, or any provision in this code, shall be allowed or permitted in any district under this title.”* Based on this Code provision, the City has not allowed any medical marijuana businesses to be established in Merced because they would violate federal law. However, per the terms of AB 243 above, by March 1, 2016, the City of Merced must specifically prohibit medical marijuana cultivation and delivery in order to retain the right to ban it within the City of Merced.

FINDINGS/CONSIDERATIONS:

General Plan Policies Related to This Application

- A) The proposed zoning ordinance amendments would make changes in response to recent changes in State Law ((AB 243, AB 266, and AB 643) described in the “Background” section above. General Plan Implementing Action L-2.3.d calls for the City to review and update the Zoning Ordinance as needed.

Proposed Changes to the Zoning Ordinance

- B) The proposed zoning ordinance amendment (Attachment A) would do the following:
- 1) Commercial cannabis activities of all types are expressly prohibited in all zones and specific plan areas of the City. No person shall establish, operate, conduct, or allow a commercial cannabis activity anywhere in the City.
 - 2) All deliveries of medical cannabis are expressly prohibited in the City of Merced. No person shall conduct any deliveries that either originate or terminate within the City.
 - 3) All activities which require a state license under the Medical Marijuana Regulation and Safety Act (MMRSA) are prohibited in the City.
 - 4) Cultivation of cannabis for non-commercial purposes, including cultivation by a qualified patient or a primary caregiver, is expressly prohibited in all zones and specific plan areas of the City. No person, including a qualified patient or primary caregiver, shall cultivate any amount of cannabis in the City, even for medical purposes.
 - 5) Any use in violation of these provisions shall be considered a “public nuisance” and could involve civil penalties.

- C) This proposed ordinance will be considered by the Planning Commission at a public hearing on December 9, 2015. A public hearing before the City Council will be scheduled for January 4, 2016, with a second reading on January 19, 2016. The ordinance, if approved, would become effective 30 days after that or on February 20, 2016. This would meet the March 1, 2016, deadline in AB 243.

Impacts on Existing Businesses

- D) The City of Merced currently has a provision in the Zoning Code, MMC 20.06.050(E), which states “*No use that is prohibited, unlawful, violates or is inconsistent with federal or state law, or any provision in this code, shall be allowed or permitted in any district under this title.*” Based on this Code provision, the City has not allowed any medical marijuana businesses to be established in Merced because federal law does not allow it. Therefore, this new Ordinance would not have any effect on any existing businesses in the City.

Environmental Clearance

- E) The Planning staff has conducted an environmental review (#15-33) of the project in accordance with the requirements of the California Environmental Quality Act (CEQA), and a Categorical Exemption is being recommended (see Attachment B).

Attachments:

- A) Proposed Ordinance with Changes to the Zoning Ordinance
- B) Categorical Exemption #15-33
- C) Draft Planning Commission Resolution