

**CITY OF ALBANY
CITY COUNCIL AGENDA
STAFF REPORT**

Agenda Date: November 7, 2011
Reviewed by: RZ

SUBJECT: The Albany City Council will consider an Urgency Ordinance which would repeal the City's existing Medical Marijuana Ordinance. The proposed ordinance would prohibit medical marijuana dispensaries in the City of Albany. The proposed ordinance was prepared as a result of recent case law in California which restricts the City's ability to impose location and operational restrictions on medical marijuana dispensaries.

REPORT BY: **Anne Hersch, AICP, City Planner**
Jeff Bond, Community Development Director

STAFF RECOMMENDATION

That the City Council of the City of Albany waive first reading and adopt Urgency Ordinance 2011-08, prohibiting medical marijuana dispensaries in the City of Albany.

This action would allow the City to preserve the status quo. This item could be revisited at a future time if and when the legal ambiguities are clarified.

- If there are not four (4) votes to enact an urgency ordinance, then the ordinance maybe passed for first reading. This action requires three votes.
- If a ban is enacted, direct staff to report back to the City Council in six months with an informational staff report summarizing any new legal developments affecting medical marijuana dispensaries.

BACKGROUND

The issue of medical marijuana arose in Albany in 2005 in response to an inquiry from a potential dispensary. In order to provide time for the evaluation of the range of options, the City Council adopted a moratorium restricting the approval of the medical marijuana dispensaries and directed that the Planning and Zoning Commission review the issue and draft an ordinance for City Council consideration.

In spring 2006, the City Council discussed a proposed permitting and regulatory ordinance. Thereafter the Council decided to place an advisory measure on the November 2006 ballot, which was approved by the City voters with 54% of the vote. The non-binding advisory measure was worded as follows:

Do you support the establishment of a single medical marijuana dispensary in the City of Albany, to be subject to regulations that the City Council will incorporate into the Municipal Code prior to consideration of any permit for such a dispensary?

The City Council then enacted Chapter 20.20.110, Medical Marijuana Dispensaries, established by Ordinance 07-01. These code provisions created a conditional use permitting process for the creation of one medical marijuana dispensary within specific zones in Albany. The following are key elements:

- **Police Department Background Check** - As part of the application process, the Chief of Police conducts a confidential background check on applicants.
- **Prohibited Activities** - The objective of the City's ordinance is to provide a dispensary only. The dispensing of marijuana is not allowed as an accessory activity to other uses. In addition, sale of other goods and services, including alcohol and tobacco is not allowed. Further, marijuana is not to be cultivated on site, physicians are not to evaluate patients on site, and patients are not to consume marijuana on the premises.
- **Location Standards** – The primary location standard is that the dispensary shall be at least 1,000 feet from youth oriented facilities. In addition, the entrance to a dispensary is not allowed to be located within 95 feet of residential zoning district or 25 feet from the entrance to a multi-family residence.
- **Findings and Conditions of Approval** – In addition to conventional conditions of approval for a conditional use permit, the Planning and Zoning Code requires special findings for medical marijuana dispensaries.
- **Extension of Use Permit** - The initial term of the use permit is one year. After the first year, the Commission may consider extension of the use permit at annual intervals.
- **Performance Standards** - The ordinance includes performance standards required of a dispensary. Compliance with these performance standards would be one of the considerations the Commission could evaluate if an extension of the use permit is required.
- **Violations** - In addition to civil remedies and criminal penalties, the ordinance allows the City to close the dispensary if regulations have been violated or if the Chief of Police determines that the immediate closure of the dispensary is in order to protect the public peace or welfare.

Federal Law

The cultivation, distribution and sale of marijuana are violations of Federal law. In 2005, the U.S. Supreme Court established that regardless of state and local regulations, the Federal government could prosecute medical marijuana growers and users under the Controlled Substances Act. In October 2009, however, the US Attorney General's office issued a memorandum to US Attorneys authorizing prosecutors to limit investigations and prosecution of individuals who are in compliance with state and local medical marijuana regulations.

Recent Applications filed with the City of Albany

The City Council denied approval of a conditional use permit for a dispensary at 1019 Solano Ave. earlier this year. The applicants challenged the City's denial in Superior Court. The

Superior Court granted a demurrer filed by the City on the grounds that the applicants had not filed a timely lawsuit. The applicants have filed a notice of appeal and apparently intend to seek a reversal in the Court of Appeal.

A second use permit application was filed by a different applicant for a dispensary at 544 Cleveland Ave. The application was filed concurrently with the background check. The Police Department denied the application. The applicants appealed that determination. An independent hearing officer heard that appeal and upheld the Police Department's denial. Per Section 20.20.110 (G) (1) of the Albany Municipal Code, a report from the Chief of Police approving a business license investigation report is a requirement of the Use Permit application. Without the license investigation report, the application cannot be deemed complete and cannot continue to be processed.

ANALYSIS

Recent Case Law: Pack v. The City of Long Beach, CA

On October 4, 2011, the Second District Court of Appeals in Southern California issued a decision in the case of Pack v. The City of Long Beach. The Pack decision concluded the following:

- The City of Long Beach could not maintain a permitting ordinance as a means of screening dispensary applications
- The City of Long Beach could not create and impose discretionary conditions of approval for an application to open a medical marijuana dispensary

This decision restricts a jurisdiction's ability to impose land use and operating regulations for medical marijuana dispensaries. The key issue for the City of Albany to consider in this ruling is that a dispensary could open in the City at the present time without any Police or Planning Department review. A report prepared by the League of California Cities is attached to this report and explains the court decision in greater detail. (See Attachment 2).

The curtailing of permitting regulations by the Pack decision creates uncertainty about the current Albany permitting regulations. Given this ambiguous situation, a question arises whether the City wishes to significantly revise its present ordinance or to ban marijuana dispensaries from the city all together. If the City Council chose to enact a ban at this time, it could modify a ban once the legal situation is clarified and, in particular, the conflicting judicial decisions.

While several jurisdictions have been involved in litigation in various aspects of medical marijuana dispensaries, the Department of Justice has increased its efforts to prevent the opening of medical marijuana dispensaries. The Justice Department has been notifying landlords, clinics, and others doing business with clinics that it is a violation of Federal law for the clinics to operate and the Justice Department will not rule out prosecuting those who do business with dispensary operations.

Apart from the recent developments in the California courts and activities of the Department of Justice, another argument concerning the validity of permitting regulations may start to filter through the Court system. Government Code Section 37100 states that "The legislative body may pass ordinances not in conflict with the Constitution and laws of the State or United States."

This Government Code Section could effectively preclude a city from enacting permitting laws because the ordinance would be considered in conflict with Federal law.

To date the, City of Albany does not have any operating medical marijuana dispensaries within the City limits. Should the Council adopt the urgency ordinance, it would not create any legal non-conforming uses as there are no existing dispensary businesses.

SUSTAINABILITY IMPACT

There are no sustainability impacts associated with this ordinance proposal.

FINANCIAL IMPACT

If a ban was imposed the City would not have to expend resources processing applications nor policing any establishments. However, a ban has the potential to become the subject of a lawsuit. A ban might have a beneficial effect on the present litigation and may dissuade other dispensary businesses from attempting to locate in Albany.

On November 2, 2010, Albany voters approved Measure Q which approved a \$25 tax per \$1000 of gross receipts at for-profit dispensaries and \$25/ square foot at non-profit dispensaries. This ballot measure was crafted as a result of Proposition 19, the California Marijuana Legalization Initiative. The Measure Q tax was passed and intended to capture additional tax revenue from cannabis businesses operating in the City. Since the City does not currently have any operating cannabis operations, this tax has not been imposed and the City has not collected any related tax revenue.

OTHER COUNCIL OPTIONS

The City Council could chose to significantly modify the existing ordinance in an effort to conform to the views expressed by the Pack v. City of Long Beach decision. No review by the Police or Planning Departments could be required with this approach. This would entail rescinding the conditional use permit regulations contained in Section 20.20.110 of the Albany Municipal Code and establishing restrictions for business compliance.

Alternatively, the City Council could chose to leave Section 20.20.110 in its current state, though it has the potential to create regulatory problems. For example, a business might commence operations and resist any effort by the City to require a permit. The City would then have to file a lawsuit and the business would have grounds to argue that under Pack, the City's regulatory approach is invalid.

Attachments

1. Draft Ordinance 2011-08
2. California League of Cities Memo dated October 26, 2011 regarding Pack v. City of Long Beach