

ORDINANCE NO. NS-300.917

AN UNCODIFIED INTERIM ORDINANCE OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CLARA EXTENDING A TEMPORARY MORATORIUM ON COMMERCIAL CANNABIS ACTIVITY WITHIN THE UNINCORPORATED AREA OF SANTA CLARA COUNTY AND DECLARING THE URGENCY THEREOF

THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CLARA ORDAINS AS FOLLOWS:

SECTION 1. Findings and Purpose.

In accordance with California Government Code section 65858, the Board of Supervisors finds and declares that this Ordinance is deemed necessary for the following reasons:

1. In 1997 and 1998, pursuant to California Health and Safety Code section 11362.5 (the Compassionate Use Act) and the County's police power as granted broadly under article XI, section 7 of the California Constitution, the Board of Supervisors of the County of Santa Clara adopted Ordinance Numbers NS-300.599, NS-300.619, and NS 1200.291, which added Division B26 to Title B of the County of Santa Clara Ordinance Code and amended the Zoning Ordinance of the County of Santa Clara to regulate medicinal cannabis dispensaries within certain zoning districts of the county subject to a use permit and clearance from the Public Health Department and Sheriff.

2. After the adoption of these ordinances, Senate Bill 420 (SB 420), the Medical Marijuana Program Act (Health & Saf. Code, § 11362.7 *et seq.*), became law on January 1, 2004. This bill established a statewide, voluntary registry identification card system for patients authorized to use medical cannabis and their primary caregivers. SB 420, as amended, recognizes that qualified patients, persons with valid identification cards, and designated primary caregivers may collectively or cooperatively cultivate cannabis. However, the California Supreme Court, in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, held that nothing in the Compassionate Use Act or the Medical Marijuana Program Act expressly or impliedly preempts local ordinances declaring medical cannabis collectives, cooperatives, or dispensaries a prohibited use in a local jurisdiction.

3. In August 2014, the Board of Supervisors adopted Ordinance No. NS-300.378, which repealed the prior Division B26 of the County of Santa Clara Ordinance Code and replaced it with a prohibition on the establishment or operation of any medicinal cannabis dispensary in the unincorporated area of the county. The Board also adopted Ordinance No. NS-1200.347, amending the Zoning Ordinance to eliminate medicinal cannabis dispensaries as a use classification in the Zoning Ordinance.
4. On October 20, 2015, the Board of Supervisors adopted Ordinance No. NS-300.378, adding Division B26.5 to Title B of the County of Santa Clara Ordinance Code, to regulate medicinal cannabis cultivation by qualified patients and primary caregivers and prohibit all other cultivation.
5. Since the County's adoption of Ordinance No. NS-300.378 relating to medicinal cannabis cultivation, state laws have been enacted to provide a regulatory framework for medical cannabis, the Medical Marijuana Regulation and Safety Act (MMRSA), and nonmedical cannabis, the Control, Regulate, and Tax Adult Use of Marijuana Act (AUMA).
6. MMRSA, which is comprised of Assembly Bill 243, Assembly Bill 266, and Senate Bill 643, became effective on January 1, 2016. MMRSA provided for a statewide regulatory scheme for medical marijuana while authorizing local governments to permit, regulate, or ban medical marijuana businesses within their jurisdictions.
7. On November 8, 2016, California voters approved Proposition 64, which enacted AUMA. AUMA legalizes limited personal use of cannabis and provides a framework for state and local regulation of commercial cannabis activity. The personal use provision makes it legal under California law for anyone 21 years of age or older to possess, cultivate, and process up to six cannabis plants per private residence for personal use.¹ AUMA also establishes a state licensing system for commercial cultivation, testing, and distribution of nonmedical cannabis, and the manufacturing of nonmedical cannabis products, with a deadline of January 1, 2018 for the State to begin issuing licenses.² State licensing authorities, however, cannot issue a state license if the commercial cannabis activity for which an applicant seeks a license would violate any local ordinance or regulation.³ AUMA

¹ Health & Saf. Code, § 11362.2.

² Bus. & Prof. Code, §§ 26012 & 26013, amended by Stats. 2017, ch. 27, §§ 11 & 12.

³ Bus. & Prof. Code, § 26055, subd. (d), amended by Stats. 2017, ch. 27, § 41.

imposes no limitation on the ability of local jurisdictions to adopt and enforce local ordinances to regulate commercial cannabis businesses, including but not limited to the ability to completely prohibit the establishment or operation of one or more types of commercial cannabis activities that the State would otherwise license under AUMA.⁴

8. On June 27, 2017, the Governor approved Senate Bill 94 (SB 94), which repealed MMRSA and includes certain provisions of MMRSA in the licensing provisions of AUMA. These licensing requirements do not apply to qualified patients who cultivate, possess, store, manufacture, or transport cannabis exclusively for their own personal use.⁵ Nor do the licensing requirements apply to primary caregivers who cultivate, possess, store, manufacture, or transport cannabis exclusively for the personal medical purposes of no more than five specified qualified patients.⁶ SB 94 also consistently replaced the term “marijuana” with “cannabis” in state law, although the definition remains the same. For consistency with state law as revised by SB 94, the County adopted the term “cannabis” in place of “marijuana” in this Ordinance. The adoption of the term “cannabis” herein, however, shall not invalidate references to “marijuana” in any County ordinance, policy, or regulation. The two terms share the same meaning and are used interchangeably in the County Code of Ordinances.

9. Although MMRSA and AUMA outlined state regulatory frameworks, which the State aims to align under one regulatory framework in SB 94, the State has yet to fully establish its regulatory scheme for commercial cannabis activity. On April 28 and May 5, 2017, the Bureau of Marijuana Regulation (the Bureau (now known as the Bureau of Cannabis Control)) issued draft proposed medical cannabis regulations for public review and comment. The State withdrew these proposed medical cannabis regulations on September 29, 2017, and the State has yet to release draft regulations for nonmedical commercial cannabis activity. SB 94, however, preserves local authority to regulate medical and nonmedical cannabis and requires state licensing authorities to contact local jurisdictions for confirmation of an applicant’s local license or authorization before issuing any state license for commercial cannabis activity.⁷

⁴ Bus. & Prof. Code, § 26200, amended by Stats. 2017, ch. 27, § 102.

⁵ Bus. & Prof. Code, § 26033, subd. (a), repealed and added by Stats. 2017, ch. 27, § 20.

⁶ Bus. & Prof. Code, § 26033, subd. (b), repealed and added by Stats. 2017, ch. 27, § 20.

⁷ Bus. & Prof. Code, § 26055, subd. (d), amended by Stats. 2017, ch. 27, § 41.

10. Although SB 94 authorizes licensing authorities to issue rules and regulations on commercial cannabis activity and permits licensing authorities to adopt emergency regulations, the State has yet to propose any additional regulations.⁸ On September 6, 2017, the Bureau, as lead agency under the California Environmental Quality Act (CEQA), issued an Initial Study notice and a plan to adopt a proposed negative declaration for its commercial cannabis business licensing. The Bureau has yet to issue any formal notice of proposed rulemaking for the cannabis business licensing program.

11. Until the state regulations are finally adopted and enforceable, commercial cannabis activity will be insufficiently regulated and poses a current, immediate and continuing threat to the public health, safety, and welfare, including the following potential effects:

a. *Increased criminal activity.* A number of factors, including the high monetary value of cannabis plants and the reliance of commercial cannabis establishments on cash transactions, can result in increased crime from commercial cannabis activity. The U.S. Drug Enforcement Agency reports that each cannabis plant may yield an average of one-half to two pounds in its lifetime. The per-pound price of domestically produced high-grade cannabis can reach \$2,000 to \$5,000. The strong odor of cannabis creates an attractive nuisance, alerting persons to the location of valuable plants, and increasing the risk of burglary, armed robbery, or other violent crimes. Experts have also found that employees and customers of commercial cannabis establishments are disproportionately targeted for crime because of the reliance of cannabis businesses on cash transactions, which can result in large amounts of cash on hand. The California Attorney General's August 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use confirmed that the cultivation or other concentration of cannabis in any location or premises without adequate security increases the risk that nearby homes or businesses may be negatively impacted by nuisance activities such as crime or loitering.

The potential for increased crime from unregulated commercial cannabis activity is not limited to retail establishments. At least one city in Santa Clara County has reported a rise in cannabis-related arrests for illegal laboratories. The City of Mountain View Police Department arrested suspects during eight drug lab investigations from 2012 to 2016. Seven of the eight lab investigations involved Butane Honey Oil (BHO) extraction, which is closely associated to cannabis cultivation as the leftover cannabis plant cuttings are primarily used in BHO labs.

⁸ Bus. & Prof. Code, § 26013, subds. (a) & (b), amended by Stats. 2017, ch. 27, § 12.

A wide variety of solvents are used for BHO extraction, many of which are highly flammable and have resulted in explosions, fires, severe injuries, and death. The Mountain View Police Department had not encountered any illicit drug labs in the city prior to 2012.

b. *Adolescent cannabis use.* The establishment of commercial cannabis activity is also associated with increased cannabis use in adolescents. A study on adolescent cannabis use found that the percentage of adolescents using cannabis in states with legalized recreational and medical cannabis use was higher than in states that either did not legalize any cannabis or only legalized medical cannabis: 11.31 percent of adolescents used cannabis in states legalizing both recreational and medicinal cannabis, compared to 8.52 percent of adolescents in states that only legalized medicinal cannabis and an even lower percentage, 5.99 percent, of adolescents used cannabis in states that did not legalize any cannabis. Locally, the Office of the Public Defender conducted an analysis that appears to link the proliferation and proximity of cannabis dispensaries in San José to increased substance-related suspensions in East Side Union High School District. During the 2011-2012 school year, the District experienced a 106 percent increase in substance-related suspensions (administering 614 substance-related suspensions compared to 297 the previous school year), while overall suspensions decreased 28.36 percent over the same time period. This increase in substance-related suspensions coincided with the number of cannabis dispensaries in San José reaching approximately 100.

Studies have shown that adolescent cannabis use can have harmful short- and long-term effects. The County's Department of Alcohol and Drug Services prepared a policy brief in which it cited studies finding that cannabis is unique in its impact on adolescents and young adults because of the lasting effects it has on memory and executive functioning. At least one study found that adolescents who use cannabis have a greater likelihood of developing an addiction than adults. According to the study, 17 percent of youth who begin using before age 18 become addicted, while only 9 percent of users generally become addicted.⁹ Additionally, an article in *The New England Journal of Medicine* concluded that repeated use of cannabis, especially in adolescents, may result in "long-lasting changes in brain function that can jeopardize educational, professional, and social achievements." The article goes on to predict that a policy shift towards legalization of cannabis will likely result in an increase in the number of persons who suffer from negative health consequences.

⁹ Presentation by Sue Nelson, Behavioral Health Services, to the Health Advisory Commission (October 19, 2016) (on file with the Clerk of the Board).

c. *Adverse environmental impacts.* The Office of the District Attorney, Narcotics Prosecution Team, prepared an analysis documenting the volume of local illegal indoor and outdoor cannabis grows. From 2011-2014, the Sheriff's Marijuana Eradication Team (MET) removed 355,005 cannabis plants and seized 1,838 pounds of processed cannabis bud derived mostly from outdoor grow locations. For 2016, MET reported the removal of 98,354 cannabis plants and the seizure of 1,006 pounds of processed cannabis. MET enforcement actions in 2016 resulted in 22 arrests, including six arrests involving weapons possession. Thus far in 2017, MET has eradicated 17 illegal grows. The illegal grows create profound environmental damage because the growers divert water from waterways, deforest sensitive habitats, cut terraces into hillsides causing runoff and instability, use high levels of unregulated pesticides (some of which are banned in the U.S.) that contaminate the soil and water, and leave vast amounts of garbage and human waste. Cannabis cultivation can also lead to immediate and severe consequences due to fire hazards associated with cannabis cultivation. In Santa Clara County, near the area of Casa Loma Road in Santa Cruz, a fire lasting from September 26, 2016 to October 12, 2016 related to a portable generator used in a cannabis cultivation operation burned approximately 4,474 acres and destroyed 28 structures, including 12 homes.

12. A number of California cities and counties have reported these and other adverse impacts and negative secondary effects from medical cannabis dispensaries and cultivation sites, including hazardous construction, unsafe electrical wiring, noxious odors, and fumes affecting neighboring properties and businesses, and increased crime in and around cultivation sites and dispensaries.

13. Cannabis continues to be listed as a Schedule 1 drug under the Federal Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, and it is illegal to manufacture, distribute, or possess a Schedule 1 drug under federal law. Drugs listed on Schedule 1 are considered the most dangerous due to a high potential for abuse and potentially severe psychological and/or physical dependence. It remains unclear the extent to which the Trump Administration will enforce federal law in states that have legalized cannabis use for medicinal and nonmedicinal use or for medicinal use only. A July 24, 2017 letter from U.S. Attorney General Jeff Sessions to the State of Washington affirmed the validity of the Cole Memo (a 2013 memorandum to U.S. Attorney's Offices from then-U.S. Attorney General James M. Cole), which outlined limited enforcement priorities in states with legalized cannabis, while simultaneously raising the possibility of broader federal

enforcement.¹⁰ In the letter, Attorney General Sessions clarified that nothing in the Cole Memorandum precluded enforcement of the Controlled Substances Act when prosecution would serve an important federal interest.¹¹ The Attorney General's letter also cited findings from the Northwest High Intensity Drug Trafficking Area that questioned the efficacy of the State of Washington's regulatory structure.¹²

14. As a result of the continuing conflict between state and federal laws and the unsettled state regulatory framework for commercial cannabis activity, coupled with the evidence demonstrating the public health, safety, and welfare threat that insufficiently regulated cannabis presents to the public, including negative and harmful secondary effects associated with commercial cannabis activity, and the inadequate regulations in the Ordinance Code and Zoning Ordinance to effectively address the negative secondary impacts associated with commercial cannabis activity, the Board finds that commercial cannabis activity presents a current and immediate threat to the public health, safety, and welfare. The establishment of commercial cannabis activity in the unincorporated county is a current and immediate threat because of the public health and safety risks created if commercial cannabis businesses are set up in advance of, and after the start of, the issuance of state licenses, beginning in January 2018, without adequate state and local regulations to mitigate for the adverse impacts on the public health, safety, and welfare of the community surrounding the commercial cannabis activity. The Board further finds that a temporary moratorium on the establishment of commercial cannabis businesses in unincorporated Santa Clara County is warranted so the Board of Supervisors may review and consider possible amendments to the County's Zoning Ordinance to address this threat on a permanent basis.

SECTION 2. Extension of Moratorium.

This Ordinance extends the prohibition imposed by Ordinance No. NS-300.914 on the establishment, maintenance, and/or operation of any commercial cannabis activity in the unincorporated area of Santa Clara County.

¹⁰ Attorney General Sessions, Letter to Governor Jay Inslee and Attorney General Robert Ferguson of the State of Washington (July 24, 2017)

<<https://s3.amazonaws.com/big.assets.huffingtonpost.com/LtrfromSessions.pdf>> [as of September 27, 2017].

¹¹ Attorney General Sessions, Letter to Governor Jay Inslee and Attorney General Robert Ferguson of the State of Washington, *supra*.

¹² Attorney General Sessions, Letter to Governor Jay Inslee and Attorney General Robert Ferguson of the State of Washington, *supra*.

SECTION 3. Compliance with the California Environmental Quality Act.

The Board of Supervisors finds that this Ordinance is not subject to the California Environmental Quality Act (CEQA) because the activity is not a project as defined by Section 15378 of the CEQA guidelines. The Ordinance has no potential for resulting in physical change to the environment either directly or indirectly. Furthermore, pursuant to Section 15060(c)(2) of the CEQA Guidelines, the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment because this Ordinance prevents changes in the environment pending the contemplated review of Zoning Ordinance amendments applicable to commercial cannabis activity.

SECTION 4. Effective Date.

This Ordinance is an extension of Ordinance No. NS-300.914, an urgency measure adopted pursuant to Government Code section 65858. As set forth in the findings above, this Ordinance is necessary for preserving public safety, health, and welfare. Pursuant to Government Code section 65858, this Ordinance is effective immediately and shall be in full force and effect until the earlier of the following:

- (i) The completion of a study, evaluation, consideration, and legislative action to amend the County's Ordinance Code to address commercial cannabis activity.
- (ii) 10 months and 15 days beyond October 27, 2017.

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SECTION 5. 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, the provisions of this Ordinance are severable. The Board of Supervisors 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 will be held unconstitutional, invalid, or unenforceable.

PASSED AND ADOPTED by the Board of Supervisors of the County of Santa Clara, State of California, on October 17, 2017, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

DAVE CORTESE, President
Board of Supervisors

ATTEST:

MEGAN DOYLE
Clerk of the Board of Supervisors

APPROVED AS TO FORM AND LEGALITY:



MARCELO QUIÑONES
Deputy County Counsel