

CITY OF BIGGS
CITY COUNCIL MEETING DATE: December 8, 2015

TO: Honorable Mayor and City Council

FROM: Greg Einhorn, City Attorney

SUBJECT: Medical Marijuana Cultivation and Medical Marijuana Delivery within the City of Biggs (Discussion/Direction)

1. Summary

While the City currently allows personal medical marijuana cultivation under limited conditions, the City has no medical marijuana cultivation permit process. The City has the authority to ban all medical marijuana cultivation.

Recently enacted state medical marijuana cultivation legislation provides for a state cultivation licensing program. The legislation also provides for local permitting of medical marijuana cultivation as well.

However, this legislation, as it currently reads, would apparently impose the state licensing program on any local entity that does not fully ban cultivation nor has a cultivation permit process in place. This is the City's current situation. As the law now reads, unless cultivation is fully banned, the state could become the sole licensing authority for medical marijuana cultivation in the City.

The City currently bans medical marijuana dispensaries through its zoning code. The new legislation refers to dispensaries but also defines medical marijuana "delivery." Delivery is a broader term. The City has the authority to bar all delivery.

2. Analysis

A. Medical Marijuana Cultivation

The City of Biggs currently permits the cultivation of medical marijuana in restrictive fashion. Cultivation is limited to residential parcels, barred within 500 feet of schools, churches, parks and other locations, limited to the qualified patient or primary caregiver, and permitted only in a secure detached accessory building, with specific requirements. The cultivation area

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cannot exceed 50 square feet. All cultivation is further limited by barring “sight and smell.” Biggs Municipal Code section 6.25.035.

Since the adoption of BMC section 6.25.035, the law regarding medical marijuana cultivation has become clear and well-settled. Because no person has the right to cultivate medical marijuana, the City may not only regulate cultivation, but may fully ban cultivation. Maral v. City of Live Oak (2013) 221 Cal. App. 4th 975 (petition for review and request for republishing denied by the California Supreme Court, March 26, 2014).

The recently adopted medical marijuana statutory regulations include provisions regulating medical marijuana cultivation. AB 243 provides that the Department of Food and Agriculture shall promulgate regulations governing the licensing of indoor and outdoor cultivation sites. Business and Profession Code section 19332. The DFA shall also establish and administer a Medical Cannabis Cultivation Program. Health & Safety Code section 11362.777.

The state regulations will provide specific rules and requirements for pesticide use, water quality, watershed protection, labelling, product identification (marking) and cultivator license type. AB 243 further provides that a local entity may also develop a medical marijuana cultivation conditional use permit process with requirements at least as stringent as the state’s licensing requirements. Health & Safety Code section 11362.777(b)(1)(A) and (c)(3).

AB 243 makes it clear that despite the development of the state cultivation/cultivator licensing program and the opportunity for local regulation and permitting, a city may fully ban all medical marijuana cultivation. A state cultivation license/permit will not be issued to cultivate in a jurisdiction that bans cultivation:

A person or entity shall not submit an application for a state license issued by the department pursuant to this section 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. Health and Safety Code section 11362.777(b)(3).

An additional provision confirms the City's authority to ban cultivation, but also provides that if the City wishes to do so, that action must be undertaken by January 29, 2016 so as to be effective March 1, 2016:

If a city, county, or city and county does not have land use regulations or ordinances regulating or prohibiting the cultivation of marijuana, either expressly or otherwise under principles of permissive zoning, or chooses not to administer a conditional permit program pursuant to this section, then commencing March 1, 2016, the [state] shall be the sole licensing authority for medical marijuana cultivation applicants in that city, county, or city and county. Health and Safety Code section 11362.777(c)(4).

Failure to act within this time frame could result in the state's assumption of the sole cultivation permitting authority. (While the author of AB 243 has pledged to repeal this provision, it is currently in place.)

It also must be noted that the disjunctive language of this subsection creates an ambiguity unless a full cultivation ban is in place. Specifically, this subsection provides for state licensing control unless there is a ban or the local entity "chooses not to administer a conditional permit program." This is precisely the situation now in Biggs. Medical marijuana cultivation is not fully banned nor is there in place a conditional permit program. According to the language as written, therefore, the absence of a City medical marijuana cultivation permit program would appear to result in the state's sole licensing authority in Biggs. This is likely not an intended result, but that is the way the provision could be read.

B. Medical Marijuana Delivery

The City defines a medical marijuana dispensary as "a facility or location which provides, makes available, or distributes medical marijuana to a primary caregiver, a qualified patient, or a person with an identification card issued in accordance with California Health and Safety Code Section 11362.5 et seq." (BMC 14.10.675.)

Medical marijuana dispensaries are prohibited land uses in all City zones: residential (14.75.050), commercial (14.120.025) and industrial (14.140.025).

The new legislation continues to use the term dispensary, defined as “a facility where medical cannabis, medical cannabis products, or devices for the use of medical cannabis or medical cannabis products are offered, either individually or in any combination, for retail sale, including an establishment that delivers, pursuant to express authorization by local ordinance, medical cannabis and medical cannabis products as part of a retail sale.” Business and Professions Code section 19300.5(n).

However, AB 266 also uses a new term that applies to “commercial transfer” of medical marijuana: “delivery.” “Delivery” is “the commercial transfer of medical cannabis or medical cannabis products from a dispensary, up to an amount determined by the bureau to a primary caregiver or qualified patient as defined in Section 11362.7 of the Health and Safety Code, or a testing laboratory. “Delivery” also includes the use by a dispensary of any technology platform owned and controlled by the dispensary, or independently licensed under this chapter, that enables qualified patients or primary caregivers to arrange for or facilitate the commercial transfer by a licensed dispensary of medical cannabis or medical cannabis products.” Business and Professions Code section 19300.5(m).

The City does have the authority to prohibit delivery of medical marijuana:

(a) Deliveries, as defined in this chapter, can only be made by a dispensary and in a city, county, or city and county that does not explicitly prohibit it by local ordinance.

(b) Upon approval of the licensing authority, a licensed dispensary that delivers medical cannabis or medical cannabis products shall comply with both of the following:

(1) The city, county, or city and county in which the licensed dispensary is located, and in which each delivery is made, do not explicitly by ordinance prohibit delivery, as defined in Section 19300.5. Business and Professions Code section 19340.

Therefore, while the City does have the authority to prohibit delivery, it must do so explicitly.

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3. Council Direction

If the Council wishes to move forward with a medical marijuana cultivation ban, direction to staff should be provided as follows:

1. Amend BMC 14.75.050, 14.120.025 and 14.140.025 to prohibit all medical marijuana cultivation in all zones.
2. Repeal BMC section 6.25.035.
3. Amend BMC section 6.25.055(1), which currently defines marijuana cultivation as a nuisance except if in compliance with all of the provisions of Section 6.25.035, and which provides for specific abatement procedures. Section 6.25.055 would be amended to define all medical marijuana cultivation as a nuisance.

If the Council wishes to move forward with a ban on all deliveries, staff should be directed to move forward with preparing that ordinance.

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