File #: 16-609, **Version:** 1 **Item #:** A-1.

CC - (1) Discussion of Options Available to City under 2015 Medical Cannabis Regulation and Safety Act (MCRSA) and 2016 Adult Use of Marijuana Act (AUMA); and (2) Direction to City Manager as Deemed Appropriate.

Meeting Date: February 13, 2017

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Fiscal Impact: Yes [] No [X] **General Fund:** Yes [] No [X]

Public Hearing: [] **Action Item:** [X] **Attachments:** Yes [X] No []

Commission Action Required: Yes [] No [X]
Commission Name:

Public Notification: (E-Mail) Meetings and Agendas - City Council (02/07/17); Posted on City's Public Notification webpage (02/06/17); Culver City News (02/02/17); GovDelivery subscribers Chamber of Commerce, City Council, Committee on Permits and Licenses, Culver City Unified School District, Finance Authority, Fiscal and Budget Issues, Planning, Planning Commission, Press Organizations (02/06/17).

Department Approval: John Nachbar (02/07/17); Carol Schwab (02/07/17); Sol Blumenfeld (01/31/17)

RECOMMENDATION

Staff recommends the City Council discuss options available to the City under the 2015 Medical Cannabis Regulation and Safety Act (MCRSA) and the 2016 Adult Use of Marijuana Act (AUMA) and provide direction to the City Manager as deemed appropriate.

BACKGROUND

This report analyzes Culver City's land use regulations in light of the Medical Cannabis Regulation and Safety Act ("MCRSA")[1] , adopted by the California Legislature and signed by Governor Brown in

November 2015; and Proposition 64, which is known as the "Control, Regulate and Tax Adult Use of Marijuana Act" ("AUMA") and was approved by voters on November 8, 2016. Under these state laws, a variety of medical and non-medical marijuana businesses may legally operate if authorized by local jurisdictions and subject to local ordinances. In addition, individuals may cultivate marijuana for their own personal medical or recreational uses, provided they comply with local regulations.

California State Laws and Federal Law

In order to understand what AUMA and MCRSA would accomplish and how they would work, it is important to place these laws in the context of existing federal and state marijuana laws. All marijuana activities remain illegal under federal law, which classifies marijuana as a Schedule I controlled substance, with no medical value.
The federal government's approach toward enforcement against marijuana establishments has shifted multiple times. In 2009, the Justice Department issued a memorandum to federal prosecutors in the states that allowed marijuana for medical purposes; the memorandum said that the Justice Department was committed to the "efficient and rational use" of its resources and that prosecuting patients and distributors who are in "clear and unambiguous compliance" with state laws did not meet that standard. In 2011, the four United States Attorneys in California initiated a coordinated enforcement strategy targeting the "illegal operations of the commercial marijuana industry," primarily in communities that had tried to prohibit such activities. This enforcement strategy included both criminal prosecutions against marijuana distributors and civil forfeiture actions against property owners. This mirrored a more aggressive enforcement strategy nationwide with regarding to marijuana businesses. In 2013, the federal government again changed course and ended its enforcement strategy against businesses operating pursuant to state laws. With that change in policy, federal raids on marijuana dispensaries and civil forfeiture actions against property owners mostly ceased.

It is uncertain what impact the recent change in administration in Washington, D.C., will have on marijuana businesses operating under state laws. There are currently eight states that have legalized recreational marijuana and 28 states with some form of medical marijuana (although not all states have implemented the new laws). As noted above, federal agents have the authority under the Controlled Substances Act to shut down marijuana facilities and if they believe the circumstances warrant it. The federal government may also seize private property used for marijuana facilities. There is uncertainty about whether such enforcement efforts would also target local officials involved in approving local regulatory schemes or issuing and administering permits for marijuana businesses. Although we are not aware of any such prosecution taking place in states that allow marijuana businesses, one U.S. Attorney raised this as a possibility in a 2011 letter to the State of Washington.

Previously, state law prohibited marijuana activities, and the Compassionate Use Act (CUA) (passed by California voters in 1996) and the Medical Marijuana Program Act (MMPA) (adopted by the State Legislature in 2003) provided limited exceptions from the general state law, where qualified patients and their primary caregivers could engage in specified marijuana activities for medical use only. The 2015 MCRSA supplements the CUA and MMPA by providing a regulatory framework for the cultivation, possession, manufacture, processing, storing, laboratory testing, labeling, transporting, distribution, or sale of medical cannabis or a medical cannabis product. Under MCRSA, all medical marijuana businesses, or commercial cannabis activities, must have a state license and a local permit, license, or other authorization in order to operate lawfully within California. The state of California Bureau of Medical Cannabis Regulation (renamed the Bureau of Marijuana Control (BMC)

in the AUMA) states on its website that it anticipates completing its regulations in time to begin issuing licenses to medical marijuana businesses in January, 2018. The MCRSA is not specific as to the start date, except to state that businesses in good standing with their local jurisdiction may apply for state licensing in 2018.

On November 8, 2016, California voters approved AUMA, which now allows individuals to possess, use, and cultivate recreational marijuana in certain amounts. An individual may possess up to 28.5 grams of non-concentrated marijuana or eight grams of marijuana in a concentrated form (e.g., marijuana edibles). In addition, an individual may cultivate up to six marijuana plants at his or her private residence provided that no more than six plants are being cultivated on the property at one time. AUMA also establishes a regulatory system for commercial businesses that is very similar to the medical marijuana regulatory system under MCRSA. Under AUMA, recreational marijuana cultivators, manufacturers, distributors, retailers, and testing laboratories may operate lawfully, if they obtain a state license and comply with local ordinances. The AUMA provides that the state shall begin issuing licenses under AUMA on January 1, 2018. However, it is uncertain at this time if the BMC will have the two different regulatory schemes in place (one under the MCRSA and one under the AUMA) to issue licenses by January 1.

Neither MCRSA nor AUMA limits local police power authority over commercial marijuana business and land uses. As such, cities may completely prohibit such businesses from operating if they so choose, including prohibiting deliveries of marijuana or marijuana products within the local jurisdiction. If cities choose to allow such businesses, they have the authority to restrict the number that may operate within the city, as well as the location.

With regard to *private* cultivation, however, there is one important limitation on local police power set forth in AUMA. Cities may ban private outdoor marijuana cultivation, but they may not completely ban private indoor cultivation of six marijuana plants or less. AUMA provides that private indoor cultivation of six marijuana plants or less is lawful under both state and local law and is only subject to “reasonable” local regulations.

Current Culver City Municipal Code Provisions and Options for Potential Amendments

Currently, the Culver City Municipal Code (CCMC) section 11.01.075 prohibits the issuance of a business tax certificate for any use or activity that is illegal or unlawful under federal, state or City laws or regulations. Many cities have a similar provision. If the City determines to permit some type of marijuana land use, this section would have to be amended to make an exception for marijuana facilities. The CCMC is silent regarding specific marijuana land uses. Under Municipal Code section 17.110.005 and 17.200.020(B), land uses that are not listed in the Zoning Code as either permitted or conditionally-permitted land uses are prohibited. Under such *permissive zoning* principles, the omission of any particular land use from local zoning regulations is the equivalent of an express ban. The only exception would be if the Community Development Director or other designated official finds that the proposed use is substantially the same in character and intensity as those land uses listed in the Code. If a city can make this finding, such a use is subject to the permit process and zoning requirements which govern the land use category in which it falls.

In the past, medical marijuana establishments have argued that they fall within various land use categories and descriptions, such as pharmacies, retail sales, nurseries, and agriculture. Based on the unique nature of most medical marijuana activities and the potential for negative secondary

effects, cities have been successful in defeating these types of use arguments. Courts have held that "medical marijuana dispensaries and pharmacies are not 'similarly situated' for public health and safety purposes and therefore need not be treated equally." California courts have also concluded that medical marijuana collectives do 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." California courts have also rejected arguments that medical marijuana dispensaries were substantially similar to listed commercial use classifications for personal services, retail sales, pharmacies and medical supplies.

Under MCRSA, once the state regulations are in place, all medical marijuana businesses must have both a state license and a local permit, license or authorization before the business may lawfully operate in California. With the passage of AUMA, however, experts are advising cities to no longer rely on permissive zoning to prohibit any commercial marijuana land use. As more and more people desire to enter the potentially lucrative marijuana industry, cities relying on permissive zoning may see repeated requests for similar use determinations. This would affect City staff resources administering a new AUMA or MCRSA approval process (if enacted) and could impact the type and distribution of various land uses seeking to locate within certain desirable commercial districts.

Unlike MCRSA, there is no requirement under AUMA that a recreational marijuana business obtain a local permit, license or approval. However, state licensing authorities may not issue state licenses if the approval of the state license will violate the provisions of any local ordinance or regulation. AUMA specifically describes recreational marijuana dispensaries as "retailers." (Bus. & Prof. Code § 26070.) This may create confusion in light of zoning code provisions that allow various retail uses in the City. For these reasons, it is advisable that Culver City consider adopting express regulations as to both medical and non-medical marijuana businesses.

In order to ensure that the City maintains local control over all marijuana land uses to the fullest extent possible, there are various CCMC amendments the City Council may wish to consider. These recommended amendments include the following:

- Amending the CCMC to address medical and non-medical marijuana commercial businesses in express terms. Unless a city has clear regulations regarding commercial marijuana businesses, the State could issue a license to an establishment not authorized by the local jurisdiction. Furthermore, if a city does not have express commercial marijuana business regulations, it may be more difficult to bring enforcement actions against violators.

- Adopt regulations regarding private (non-commercial) marijuana cultivation. Under AUMA, local governments may not completely prohibit the private indoor cultivation of six plants or less at a residential dwelling, but they may reasonably regulate such cultivation. (Local governments may prohibit all other forms of marijuana cultivation, including private *outdoor* cultivation). The City will need to determine the scope of any regulations on private indoor cultivation and the extent to which it wants to allow, regulate, or prohibit other forms of marijuana cultivation.

- The City should consider express regulations regarding marijuana delivery services to and from destinations within the City. The MCRSA and AUMA each have slightly different provisions regarding permissible deliveries; the MCRSA states that deliveries may only be made by a dispensary, and in a city or county that does not explicitly prohibit deliveries. The

AUMA allows deliveries by retailers and possibly non-profit organizations if the state determines to create a licensing class for non-profits. A local jurisdiction cannot prevent deliveries that "pass through" their jurisdiction (on public roads) by a state licensee in compliance with AUMA. The details of the state's regulations on deliveries are not known at this time.

- If the City Council determines to allow MCRSA or AUMA businesses, amending the Zoning Code to allow MCRSA or AUMA businesses to locate only within certain commercial districts subject to conditional use permit approval.

With these amendments, Culver City's marijuana regulations will be better positioned to address the unique challenges posed by marijuana land uses, which are likely to become more prevalent following AUMA's passage.

DISCUSSION

Recommended Actions and Regulatory Options

Issue #1 -Commercial Marijuana Activities

As a first step, the City Council should determine how it wants to address commercial marijuana businesses. MCRSA includes three separate provisions that protect local police power authority over medical marijuana establishments, which includes the authority to prohibit such businesses. Business and Professions Code section 26200, which is part of AUMA, provides that cities may "completely prohibit the establishment or operation of one or more types of businesses licensed under" AUMA. Therefore, cities have a wide range of regulatory options under MCRSA and AUMA to deal with marijuana land uses:

● The City could adopt a prohibition against the medical marijuana businesses recognized under MCRSA and the non-medical marijuana businesses recognized under AUMA. Under this option, the City would prohibit all commercial marijuana businesses throughout the City. This approach could take the form of either a zoning ordinance that would be codified in the Municipal Code or a temporary moratorium ordinance under Government Code section 65858. A temporary moratorium on commercial marijuana businesses could remain in effect for up to two years and would give the City time to evaluate ongoing issues, including any policy direction implemented by the federal government and the scope of marijuana business safety regulations adopted by the state licensing authorities.

● The City could allow all or some of the marijuana businesses recognized under MCRSA and/or AUMA. If the City Council decides to allow marijuana businesses under a regulatory scheme, it should consider the following additional issues/questions:

1. ***Medical v. Non-Medical:*** Does the City want to only allow medical marijuana businesses or both medical and non-medical marijuana businesses?

2. ***Types of Marijuana Businesses Allowed:*** Which types of marijuana businesses

does the City want to allow? For example, under MCRSA there are 17 different types of licenses: 10 for cultivation (indoor, outdoor and by size and type), 2 for manufacturing, 2 different licenses for dispensaries, plus distribution and transportation. Under AUMA, there are 19 different types of licenses that the State plans to issue: 13 for marijuana cultivation (indoor, outdoor and by size), 2 different types of manufacturing, plus testing, retail sales, distributors and "microbusinesses" which is a hybrid business with several functions. If dispensaries and retailers are allowed, will the City permit deliveries of medical marijuana, recreational marijuana, or both?

3. ***Zoning and Operating Restrictions:*** What type of restrictions should apply to marijuana land uses? Some possible restrictions include: locational restrictions, which designate certain zoning districts as permissible locations; separation requirements to avoid clustering of marijuana land uses; limitations on the number of marijuana establishment permits issued; and operating requirements, which can be extensive and include the use of licensed security guards, designated hours of operation, prohibition against on-site marijuana consumption, installation of adequate odor control devices and ventilation systems, and limitations on access to minors.

4. ***Types of Permits:*** What type of permit or permits will be required? Some cities have imposed conditional use permit requirements for marijuana land uses, while others have required annual renewable regulatory permits. A conditional use permit is a one-time discretionary land use permit that requires a Planning Commission **hearing** in order to determine if the proposed use is **necessary or desirable to the neighborhood**, whether it may potentially have a negative impact on the surrounding neighborhood, and other considerations. **Conditional use authorizations are entitlements that run with the property, not the operator.** A regulatory permit is renewed annually and is not a land use entitlement that "runs with the land."

5. ***Permit Processing/Procedures:*** How will the City process marijuana land use applications? A city could take a number of approaches for processing applications: (1) first come, first served; (2) lottery; and/or (3) scoring system. Under a lottery system, pre-qualified applicants are selected through a random lottery to apply for the required marijuana land use permit. Under a scoring system model, applicants would receive a score based on a review of their applications and, in some instances, an interview. Those applicants who receive the highest scores would then be recommended for approval to the decision making authority. If this selection method is used, it is important to ensure that objective scoring criteria be used, and it may be preferable to use a neutral outside consultant to review the applications, conduct interviews, and make recommendations.

6. ***Taxes:*** What type of local taxes should the City impose? If the City Council decides to enact a regulatory scheme for marijuana, it should also consider corresponding taxation provisions. The City's options include a tax on gross receipts for marijuana sales and a tax on marijuana cultivation sites based on the square footage of the facility used for medical marijuana purposes. This type of tax would be considered a general tax and would require approval by a simple majority of voters. The revenue could then be deposited in the City's general fund. City Council considered taxation as a topic in the 5-Year Strategic Plan discussions. If the City

Council determines to permit the operation of dispensaries and/or retailers in the City, the Strategic Plan, adopted by the City Council in November, 2016, contemplates that the City Council would consider a marijuana tax for placement on the ballot during the April 2018 municipal election. In conjunction, the City Council would seek analysis by and recommendations from the Finance Advisory Committee (FAC) on a marijuana tax by the end of 2017.

Note that the AUMA establishes a marijuana excise tax on all purchases of marijuana and marijuana products at the rate of 15% gross receipts of any retail sale, and a cultivation tax on harvested marijuana that enters the market, based on dry weight. Additionally, recreational marijuana will be subject to state and local sales and uses taxes; medical marijuana will not.

Issue # 2 - Personal Cultivation

In considering regulations for personal cultivation, the City should consider the following issues:

● What type of personal cultivation *must* a city allow? As noted above, cities cannot ban the private indoor cultivation of six marijuana plants or less at a private residence. The six-plant limitation is per private residence, not per person. (A group of people cannot live together and each grow their own six plants without triggering state licensing requirements). Cities, however, may reasonably regulate such cultivation, by requiring the owner of the property to give consent to tenants, and require that the building complies with all applicable Building Code requirements, and that there is no use of gas products (CO2, butane, propane, natural gas, etc.) on the property for purposes of marijuana cultivation, and that the cultivation complies with state law.

Some cities that have addressed private indoor marijuana cultivation have imposed local permit and safety inspection requirements. Safety concerns include the lighting, ventilation, and electrical connections used to facilitate the growing of marijuana. So long as such requirements do not effectively ban private indoor cultivation, courts would probably consider them to be reasonable regulations and therefore permissible under AUMA. The issue is whether city staff members have the time and resources to implement a private marijuana cultivation permit and inspection program. Many cities have decided based on local circumstances that the burden and expense of local permit and inspection requirements for private indoor cultivation outweigh the potential benefits of the added regulations.

● How much personal cultivation *can* a city allow? In theory, a city could allow private individuals to cultivate as much marijuana as they want with or without local regulations, subject to the following state licensing requirements and criminal rules:

- Under AUMA, people can cultivate no more than six marijuana plants per private residence for non-medical purposes. Any non-medical marijuana cultivation beyond the six-plant per residence limit would require a state cultivation license. Without a state license, non-medical marijuana cultivation beyond the six-plant per residence limit would be subject to state law criminal sanctions.

- Under MCRSA and the Medical Marijuana Program Act (the “MMPA”), no state

medical marijuana cultivation license is required for a qualified patient if the cultivation area is 100 square feet or less, the cultivation is for the patient's personal medical use only, and the patient does not distribute the marijuana to any other person. Similarly, no state cultivation license is required for a primary caregiver if his or her cultivation area is 500 square feet or less, the cultivation is for no more than five qualified patients, and the caregiver does not receive payment except for reimbursement of actual costs. Any medical marijuana cultivation by patients or caregivers that extends beyond these limits would require a state license or the person would be in violation of state law.

- Under MMPA, qualified patients and primary caregivers may maintain up to six mature or 12 immature marijuana plants per qualified patient without violating state law. Patients and caregivers who stay within this limit will have a defense to any criminal prosecution under state law. Upon a doctor's recommendation, a qualified patient or primary caregiver could lawfully possess a greater amount consistent with a patient's medical needs.

Personal marijuana cultivation that exceeds these threshold amounts could trigger state licensing requirements and could possibly subject the cultivator to state criminal sanctions.

Issue #3 - Marijuana Deliveries

Under both MCRSA and AUMA, a city retains the police power authority to prohibit marijuana deliveries that begin or end within the city's boundaries. A city, however, 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.
Thus, it is recommended that the City Council decide whether it wants to prohibit or allow marijuana deliveries and whether it wants to impose any regulations on marijuana deliveries. Under state law, marijuana deliveries may only be made by licensed dispensaries (medical marijuana) or retailers (recreational marijuana). The State is working on the implementing regulations, which may further explain how medical and recreational marijuana deliveries will occur. It will be up to the Department of Consumer Affairs to determine how much marijuana can be transported during the delivery process. This is an important question because a small amount of marijuana can have a significant street value, making it an attractive criminal target. Any health and safety regulations developed by the State for marijuana deliveries will represent the minimum state-wide standards.

CONCLUSION

The explicit local control language in MCRSA and AUMA provide local governments with broad discretion to deal with marijuana land uses. In order to ensure that the City may exercise that authority fully, staff recommends the City Council consider amendments to the CCMC to address the various marijuana activities that are recognized under both MCRSA and AUMA.

FISCAL ANALYSIS

There is no fiscal impact to the discussion of these issues. However, if the City determines to allow some type of marijuana facilities in the City, a fee schedule should be established for cost recovery of

staff time needed to review applications, investigate and issue permits. Revenues from taxing the activities are difficult to determine since it would vary based on the number and type of businesses permitted.

ATTACHMENT

1. Menu of Options for Potential CCMC Amendment

RECOMMENDED MOTIONS

That the City Council:

1. Discuss options available to the City under the Medical Cannabis Regulation and Safety Act (MCRSA) and the Adult Use in Marijuana Act (AUMA) (see Attachment 1);

2. Provide direction to the City Manager as deemed appropriate.

NOTES

[1] Senate Bill 837, signed by Governor Brown on June 27, 2016, changed the name of the Medical Marijuana Regulation and Safety Act to the Medical Cannabis Regulation and Safety Act.