



City of Chula Vista

Staff Report

File#: 16-0427, **Item#:** 11.

CONSIDERATION OF AMENDING THE CHULA VISTA MUNICIPAL CODE TO REMOVE THE CIVIL PENALTIES CAP AND TO PERMIT CRIMINAL ENFORCEMENT FOR VIOLATIONS OF CHAPTER 5.66

ORDINANCE OF THE CITY OF CHULA VISTA AMENDING CHULA VISTA MUNICIPAL CODE SECTION 1.41.110 TO REMOVE THE EXISTING CIVIL PENALTIES CAP AND DELETING CHULA VISTA MUNICIPAL CODE SECTION 5.66.030 TO PERMIT CRIMINAL ENFORCEMENT FOR VIOLATION OF CHAPTER 5.66 (FIRST READING)

RECOMMENDED ACTION

Council place the ordinance on first reading.

SUMMARY

Staff recommends adoption of an ordinance that will amend Chula Vista Municipal Code section 1.41.110 and chapter 5.66 to provide the City with more robust and diverse code enforcement tools, particularly for use in the case of persistent code violators. The proposed ordinance would eliminate the cap on civil penalty assessment (currently set at \$100,000) for all violations of the Municipal Code, and would permit the City to prosecute violations of the City's ban on medical marijuana dispensaries as criminal misdemeanors.

ENVIRONMENTAL REVIEW

Environmental Notice

This activity is not a "Project" as defined under Section 15378 of the California Environmental Quality Act State Guidelines; therefore, pursuant to State Guidelines Section 15060(c)(3) no environmental review is required.

Environmental Determination

The proposed activity has been reviewed for compliance with the California Environmental Quality Act (CEQA) and it has been determined that the activity is not a "Project" as defined under Section 15378 of the state CEQA Guidelines because it will not result in a physical change in the environment; therefore, pursuant to Section 15060(c)(3) of the State CEQA Guidelines, the activity is not subject to the CEQA.

BOARD/COMMISSION RECOMMENDATION

Not Applicable

DISCUSSION

The proposed ordinance would amend both section 1.41.110 and chapter 5.66 of the Chula Vista

Municipal Code ("CVMC"). Chapter 5.66 of the CVMC was enacted in September of 2011. This chapter prohibits the operation of medical marijuana dispensaries throughout the City of Chula Vista and declares that violation of the chapter is a public nuisance subject to available legal remedies. Despite a clear prohibition against marijuana dispensaries in the CVMC, such businesses open and operate in the City in defiance of local law. The City's Code Enforcement and Police Departments have worked diligently to identify such businesses; Code Enforcement has issued Notices of Violation and assessed administrative civil penalties against property owners who permit such violations on their land.

The City is not alone in its effort to address the proliferation of unlawful marijuana dispensaries. In San Diego County, the cities of Vista, El Cajon, National City, Lemon Grove, Poway, Oceanside, and Carlsbad, among others, all work to shut down the operation of unlawful dispensaries in their respective jurisdictions. The City of San Diego, despite permitting some dispensaries, continues to direct substantial resources and effort toward civil and criminal enforcement against a large number of unlawful dispensaries. The Chula Vista City Attorney's Office actively works with other jurisdictions to share best practices and information in addressing the operation of these unpermitted businesses.

While the City of Chula Vista's Code Enforcement Division, with assistance from the Police Department, have successfully shut down some dispensaries without need for further enforcement action, some marijuana businesses continue to operate despite notice of the violation and the assessment of administrative civil penalties in amounts of up to \$100,000. As a result, beginning in February, 2015, the City Attorney's Office began filing civil lawsuits against unlawful medical marijuana dispensaries and the property owners upon whose land the dispensaries operate. These civil lawsuits seek court orders prohibiting the operation of the unlawful dispensaries and request further civil penalties, fees, and costs against the dispensaries and property owners. Any civil penalties awarded by the Court must be in accordance with the CVMC, including any limitations contained therein.

Removal of the \$100,000 Civil Penalties Cap

Civil penalties are authorized by the CVMC in section 1.41.110. Section 1.41.110 currently permits penalties in an amount of up to \$1,000 per day, for a maximum of \$100,000 per structure on a parcel of property. The City of Chula Vista is unique in placing a cap on the amount of civil penalties that can be assessed, and the genesis of this cap is uncertain. Staff has been unable to identify any other local jurisdiction with a similar maximum civil penalty amount or any legal basis for why such a cap would be required.

Regardless of the presence or absence of a civil penalties cap, the United States and California constitutions provide protection against excessive penalties. California case law dictates that the amount of fines imposed must bear a proportional relationship to the penalty's deterrent purpose and the nature of the misconduct. Accordingly, fines in excess of \$100,000 have been upheld as lawful when warranted by the facts and circumstances surrounding the assessment.

Civil penalties can be an effective deterrent against unlawful dispensaries when the cost of violating the law becomes greater than the cost of doing business. Judges in San Diego Superior Court have awarded penalties in excess of \$100,000 in several publicized marijuana dispensary cases. However, when Judges of the San Diego Superior Court assess penalties in cases involving violation of the CVMC, they are hamstrung by the penalty cap codified in CVMC section 1.41.110.

Staff recommends that the penalty cap language currently contained in section 1.41.110 of the CVMC be deleted to permit the City and/or the Courts to assess fines in excess of \$100,000 when warranted. Federal and state constitutional protections against any potential excessive fines will remain in place.

Allowing for Prosecution of Violations of City's Dispensary Ban as Criminal Misdemeanors

In addition to removing the penalty cap, Staff recommends that section 5.66.030 be deleted to provide the City with an additional enforcement tool against unlawful dispensaries. Section 5.66.030 currently prohibits the use of criminal enforcement remedies against persons found to be in violation of chapter 5.66. When section 5.66.030 was enacted in 2011, California courts had not yet affirmed that municipalities could criminally prosecute municipal code violations related to medical marijuana in California. As enacted, section 5.66.030 was intended to protect the City's ordinance from a challenge on the basis of state law preemption. Cities' authority in these areas has since been clarified.

Other cities, including the cities of Los Angeles, San Diego, and Vista, use criminal prosecution as one tool in a multi-faceted approach to shut down unlawful dispensaries. Such criminal prosecution is based on a person's failure to abate a public nuisance (in this case, their violation of the municipal code) and not on the person's individual use or possession of medical marijuana. The California Court of appeals in *Kirby v. County of Fresno* affirmed that state law does not preclude criminal prosecution for failure to abate a public nuisance regarding commercial marijuana activity. Accordingly, Staff recommends that section 5.66.030 be deleted from the Municipal Code to permit the City to criminally prosecute violations of chapter 5.66. Such prosecution would be permitted in 5.66.040 subject to the extent expressly and validly preempted by state or federal law.

It is important to note that the proposed amendments to the CVMC are not a panacea in the enforcement effort against unlawful marijuana businesses. While the City of Vista initially had success using criminal prosecution for violations of their dispensary ban, they have since had a resurgence of dispensary violators and are now looking to add civil lawsuits (similar to those currently filed by the City of Chula Vista) to their enforcement toolkit. Staff anticipates that criminal enforcement will only be used in the most serious and egregious cases, and that such enforcement would likely require additional staff and resources. However, the criminal legal process typically moves much more quickly than the civil process, and the possibility of a criminal conviction can persuade some responsible parties to cease their unlawful conduct or, perhaps, refuse to open or rent to an unlawful dispensary in the first place.

Conclusion/Recommendations

State and federal laws involving medical marijuana have rapidly changed and expanded over the past several years. The Adult Use of Marijuana Act, which proposes to legalize the use and possession of recreational marijuana, will be on the ballot in California this November, but will not eliminate the right of a local jurisdiction to prohibit and/or regulate commercial marijuana activities. The proliferation of marijuana dispensaries has required local governments to remain vigilant and agile, adapting to the new challenges and demands these profit-oriented businesses present. Staff recommends that the Municipal Code be amended to both remove the civil penalty cap and to permit criminal prosecution against unlawful dispensaries. These amendments will provide the City with additional enforcement tools against entities who intentionally disregard local law and violate the Municipal Code despite both notice and the opportunity to abate such violation.

DECISION-MAKER CONFLICT

Staff has reviewed the decision contemplated by this action and has determined that it is not site-specific and consequently, the 500-foot rule found in California Code of Regulations Title 2, section 18702.2(a)(11), is not applicable to this decision for purposes of determining a disqualifying real property-related financial conflict of interest under the Political Reform Act (Cal. Gov't Code § 87100, et seq.).

Staff is not independently aware, and has not been informed by any City Council member, of any other fact that may constitute a basis for a decision maker conflict of interest in this matter.

LINK TO STRATEGIC GOALS

The City's Strategic Plan has five major goals: Operational Excellence, Economic Vitality, Healthy Community, Strong and Secure Neighborhoods and a Connected Community. The amendments to section 1.41.110 and chapter 5.66 support the City's Strong and Secure Neighborhoods goal, as they provide for more effective enforcement of the City's Municipal Code provisions.

CURRENT YEAR FISCAL IMPACT

The subject amendments to section 1.41.110 and chapter 5.66 result in no current year fiscal impact to the City.

ONGOING FISCAL IMPACT

The subject amendments to section 1.41.110 and chapter 5.66 result in no ongoing fiscal impact to the City.

ATTACHMENTS

1. Proposed amended CVMC 1.41.110 with strikeout underline text
2. Proposed amended CVMC 5.66 with strikeout underline text
3. Ordinance No. XXXX

Staff Contact: Glen Googins; Megan McClurg

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