



City of Alameda

Staff Report

File Number:2017-4638

City Council

Agenda Date: 9/5/2017

File Type: Regular Agenda Item

Agenda Number: 3-A

Workshop on a Proposed Ordinance Amending the Alameda Municipal Code by Repealing Section 30-5.15 (Medical Dispensaries and Cultivation) of the Alameda Municipal Code in its Entirety; Adding a New Article XVI (Cannabis Businesses); Adding a new Section 30-10 (Cannabis); and Amending Sections 24-11 (Smoking Prohibitions in Places of Employment and Unenclosed Public Places) and 24-12 (Smoking Prohibitions in Housing).

To: Honorable Mayor and
Members of the City Council

From: Jill Keimach
City Manager

Date: September 5, 2017

Re: Workshop on a Proposed Ordinance Amending the Alameda Municipal Code by Repealing Section 30-5.15 (Medical Dispensaries and Cultivation) of the Alameda Municipal Code in its Entirety; Adding a New Article XVI (Cannabis Businesses); Adding a new Section 30-10 (Cannabis); and Amending Sections 24-11 (Smoking Prohibitions in Places of Employment and Unenclosed Public Places) and 24-12 (Smoking Prohibitions in Housing)

BACKGROUND

On November 1, 2016, the City Council approved a referral directing staff to study updated regulations for, and potential taxation of, commercial cannabis activities. The referral specifically directed staff to look at conditionally allowing cultivation, manufacture, testing, distribution, transport, and dispensing medical cannabis and recreational cannabis (should Proposition 64 pass on November 8, 2016, which it did). In addition, the referral directed staff to analyze potential fees and taxes related to cannabis business activities. Over the past nine months, the State has been developing its regulations in response to the adoption of the trailer bill (SB 94) that the Governor signed earlier this summer. This regulatory framework has been helpful to communities drafting local ordinances in that it unifies under a single licensing framework separate licensing regimes for medicinal and recreational cannabis.

On July 5, 2017, a second referral related to cannabis business activities was approved by the City Council. The July 5, 2017 referral directed staff to propose regulations to permit convenient and safe

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cannabis businesses in Alameda including dispensaries, cultivation, manufacturing, purity and potency testing labs and quality control facilities, and other activities associated with the medicinal cannabis activities now legally permitted in California, including temporary licenses for recreational cannabis businesses.

The referral further stated that the proposed regulations should consider:

- Preferences for owner/operators who currently live in Alameda and have lived in Alameda for at least three years;
- Conditional zoning regulations (e.g., not within 600 feet of public and private schools) and potential appropriate locations (e.g., Alameda Point or other commercial districts); and
- Limiting the number of dispensaries and/or places/businesses where people can use cannabis products.

Based on City Council direction contained in the two referrals, staff has prepared a draft Ordinance that would conditionally permit medical and recreational cannabis business activity in the City, staff also researched potential fees and taxation associated with cannabis businesses. The draft Ordinance is attached as Exhibit 1.

The purpose of the September 5th workshop is to provide an overview of the rapidly evolving cannabis industry in California, present the draft ordinance, receive input from the community, and request direction from the City Council regarding a number of policy issues that are included in the draft Ordinance. Based on direction received at the workshop, staff will move forward with next steps outlined in the Discussion section of the staff report.

DISCUSSION

As part of implementing Council's direction, the City Manager convened a staff team to prepare the draft Ordinance and analyze associated issues. The team consisted of staff from the Community Development Department (Planning and Economic Development), Police Department, and City Attorney's Office. In addition, the City retained SCI Consulting Group (SCI) to assist staff in preparing the proposed regulations for cannabis business activities in the City. For the past three years, SCI has worked extensively in helping California cities and counties with regulating all administrative aspects of cannabis implementation within their communities. Neil Hall, SCI's Lead Cannabis Consultant, has visited dispensaries in Colorado, Oregon, Washington, and Vancouver. He has also participated in different seminars and workshops, as an observer and panelist, with leading cannabis experts in policy, retail, cultivation, manufacturing, delivery, monitoring, and testing. SCI's experience working with local agencies throughout the State, both large and small, has led to the development of a regulation matrix of over 50 examples of issues to consider when drafting health and safety ordinance in order to meet the priorities of the community. That expertise was invaluable in preparing the draft Ordinance. Lastly, the Finance, Fire, Base Reuse and Transportation Planning,

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and Public Works Departments and Alameda Municipal Power reviewed and commented on the draft Ordinance.

While the Council has expressed interest in having an Ordinance in place by January 1, 2018, when recreational (sometimes referred to as adult use) cannabis becomes legal, permitting cannabis businesses in Alameda is a relatively new idea. At this time, all cannabis business activities are prohibited except for cultivation of medicinal cannabis for personal use. The Mayor and Councilmember Jim Oddie hosted a town hall meeting on August 20, which provided an opportunity for those in attendance to ask questions and discuss issues related to permitting cannabis businesses in Alameda.

An important part of the September 5th workshop is to continue that discussion with Alameda residents and businesses. Therefore, staff requested that SCI provide its PowerPoint presentation that it has titled “Cannabis 101” to kick off the workshop (Exhibit 2). SCI’s research from other states that have legalized medicinal and recreational cannabis has allowed it to identify four main concerns of the cannabis industry within communities, and six steps of cannabis implementation. These points are addressed in the Cannabis 101 presentation to the Council this evening. Following SCI’s overview of the evolving cannabis landscape, staff will present the draft Ordinance and seek direction from the City Council on key policy questions that are discussed below.

Draft Ordinance

The proposed draft Ordinance is provided to facilitate feedback and direction from Council. Staff would need to return to Council for a first and second reading of the Ordinance after receiving input from the Planning Board for those amendments to the Zoning Ordinance.

The draft Ordinance amends several sections of the Alameda Municipal Code (AMC):

- It repeals the AMC Zoning Code section that currently prohibits dispensaries and cultivation and replaces it with new section that conditionally permits cannabis businesses and cannabis related uses (dispensaries, indoor cultivation, manufacturing) and regulates personal cultivation;
- It establishes a new section that requires an Regulatory Permit; and
- It amends the City’s smoking ordinance to include the same prohibitions on cannabis smoking that apply to tobacco smoking.

Staff is proposing an Ordinance with a dual permit structure: (1) a Conditional Use Permit (CUP) that regulates the land use and (2) an Operator’s permit that regulates business operations. This dual permit structure for cannabis businesses is very common in cities and counties throughout California, including San Leandro and Emeryville.

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Under the proposed Ordinance, an applicant would first need to obtain a CUP. The CUP is intended to mitigate against the potential land use impacts from cannabis activity. CUP conditions address items such as operating hours, odor control, indemnification, insurance requirements, and security measures to implement a Police Department-approved security plan, with discretion to add additional conditions as appropriate. This first step will ensure that a location has been secured for the proposed cannabis business activity and that the community has had an opportunity to weigh in on the proposed use at a specific location before a Regulatory Permit is considered.

After a CUP has been approved, the applicant would need to obtain a Regulatory Permit from the Police Department, which would look into various operational characteristics such as the applicant's background and proposed security plan.

The draft Ordinance does not distinguish between recreational and medicinal cannabis. Staff believes that the potential impacts from either recreational or medical cannabis are the same, and therefore, staff proposes one regulatory scheme to govern both. In the event that City Council decided to permit medicinal cannabis only, the Ordinance would be amended to remove recreational cannabis as a permitted business activity.

The proposed general regulatory structure would apply to the following commercial cannabis activities: indoor cultivation, manufacturing (including testing and research and development), distribution and delivery, and dispensaries. However, specific regulations differ by business activity type as different business activities generate different impacts and are governed by different regulations at the State level. The regulations applicable to each business activity are contained in the draft Ordinance. It should be noted that staff is proposing to prohibit outdoor commercial cultivation, on-site consumption, and to limit the number of dispensaries to no more than three, with a maximum of one on both Park and Webster Streets. These proposed policy issues are discussed in more detail below.

Co-Location

As drafted, the Ordinance does not distinguish between medicinal and recreational cannabis business activities. The original 2017 trailer bill proposed by the Governor's Office prohibited co-location of license types (e.g., a medicinal and recreational dispensary could not co-locate) and those with recreational cannabis licenses could only transact business with other recreational cannabis licensees and the same parity was required for medicinal cannabis licensees. There was opposition to the prohibition to the co-location on the basis that local agencies should be able to regulate co-location in their jurisdictions. The trailer bill was subsequently amended and approved by the Assembly. The amended trailer bill (SB 94) removed many of the provisions that implemented the prohibition on co-location. However, not all provisions prohibiting co-location have been removed, and thus, there is some ambiguity as to whether single premises can sell, cultivate or manufacture both recreational and medicinal cannabis. Many experts believe that this issue will be addressed during the State rule-making process and that co-location will be regulated at the local level.

The proposed draft Ordinance does not directly address co-location. However, staff recognizes that

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the issue of whether or not cannabis businesses can co-locate may not be resolved until the Legislature amends SB 94 or the State issues implementing regulations to allow for co-location. Accordingly, the proposed draft Ordinance requires that permittees comply with all State laws, which include implementing regulations issued by the State, regarding co-location.

Cannabis Business Locations

State law provides that no cannabis business activity shall be located within a 600-foot radius of certain sensitive uses primarily where children gather -- K-12 schools, day care centers, or youth centers -- that are in existence at the time the State issues its license. Cities can require a different, larger radius, if they so choose. The draft Ordinance adopts a 600-foot buffer zone around sensitive uses consistent with State law. The attached map (Exhibit3) shows all of the sensitive uses in the City along with a 600-foot radius within which cannabis business activity would be prohibited.

The map also generally depicts those areas where cannabis business activity could be located by business type. The areas shown in red would allow dispensaries in the retail zones on Park and Webster Streets and the City's shopping centers. The areas shown in grey would allow indoor cultivation and manufacturing uses in the manufacturing zones at Harbor Bay Business Park, Alameda Point Enterprise District, Marina Village Business Park and Alameda Point Adaptive Reuse District. If the Council supports these general areas for the proposed cannabis business activities, then staff will prepare the required Zoning text/map amendments for review and recommendation for approval by the Planning Board.

Cannabis Business Activities on Public Lands

The Federal Controlled Substances Act was adopted in 1970, and prohibits the manufacture, cultivation, distribution and possession of cannabis. While there has been some evolution in how the Federal government enforces this prohibition, cannabis remains a Schedule 1 drug under the Act, and violation of the Act is subject to serious criminal penalties. Therefore, in states, cities and counties that legalize medical and/or recreational cannabis there is legal uncertainty relative to Federal law that currently prohibits cannabis business activities and state and local laws that allow it.

The City, primarily at Alameda Point, has Federal lands that have not yet been conveyed to the City and City-owned property that has not yet been conveyed to private parties. Exhibit 4 is a map that shows public land ownership in Alameda. Most of the City-owned land that is not at Alameda Point is Tidelands or public parks/open space. The State-owned properties are Crab Cove and Crown Beach. None of these properties is appropriate for cannabis business activities. However, staff is recommending that Alameda Point be zoned to permit indoor cultivation and manufacturing in the event that such property transfers to private ownership.

Cannabis business activities are not permitted on Federal lands. Section 34 of the Lease in Furtherance of Conveyance (LIFOC) requires that the Lessee (City of Alameda) "comply with all Federal, State, and local laws, regulations and standards that are applicable or may become applicable to Lessee's or sublessee's activities on the Leased Premises." As noted above, the

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Federal government prohibits cannabis cultivation under the Controlled Substances Act. On August 29, 2013, the Department of Justice issued a guidance memorandum for prosecutors to determine current Federal enforcement priorities (commonly referred to as the “Cole Memo”). The memorandum instructs federal prosecutors to focus enforcement efforts and resources on persons or organizations that obstruct federal priorities. Those priorities include “preventing the growth of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands, and preventing marijuana possession or use on federal property.”

Staff believes, in an abundance of caution, that it would be prudent to prohibit such uses at this juncture on City-owned land given the uncertainty under Federal forfeiture and other laws. As land and buildings at Alameda Point are transferred to private ownership, these risks are somewhat abated. As noted above, staff is recommending that zoning be put in place at Alameda Point to allow indoor cultivation and manufacturing, but only on property that has been conveyed to private ownership.

Prohibited/Limited Activities

As noted above, the Ordinance would prohibit outdoor cultivation and on-site consumption. Alameda is a suburban city in the inner-East Bay and its land uses and development patterns do not lend itself to outdoor commercial cannabis cultivation. Outdoor cultivation is more appropriate in cities and counties with substantial agricultural lands and less dense population centers. Staff believes that it would be challenging to mitigate the land use impacts of outdoor cultivation, including odors, impacts on adjacent land uses, water quality control, etc. In addition, the Police Department has expressed concerns with law enforcement and public safety associated with outdoor cultivation. Therefore, staff is recommending a prohibition on outdoor commercial cultivation at this time.

Staff is also recommending a prohibition on on-site consumption in connection with cannabis business activities. As the Council may be aware, there is not currently a test, such as a field sobriety test for alcohol consumption, to determine if someone is under the influence of cannabis and unfit to drive a motor vehicle. The Police Department has raised a concern that on-site consumption could lead to an increase in the number of drivers operating a motor vehicle under the influence of cannabis with no proven way to enforce DUI laws. This could result in more car accidents, injuries and loss of life. While staff is initially recommending a prohibition on on-site consumption, as the laws mature and more is learned about DUI enforcement, it may be appropriate to amend the City's Ordinance at a later date to permit on-site consumption.

The draft Ordinance allows for retail dispensaries but proposes that the number of permitted dispensaries be capped at three. Most jurisdictions cap the allowable number of dispensaries, and the cap is often tied to population size. For example, Emeryville has capped the number of dispensaries at one and San Leandro has capped the number of dispensaries at three. Emeryville is much smaller than Alameda and San Leandro is slightly larger. Consistent with many other cities, staff recommends that the dispensary permits be awarded through a selection process that would be established by resolution of the City Council. Selection criteria and guidelines would be prepared by

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staff and approved by City Council following direction received at the September 5 workshop. City Council has already indicated an interest in providing a local preference when selecting a dispensary operator. This concept will be incorporated in development of the selection criteria and guidelines.

There is some discussion, based on the issue of co-location outlined above, as to whether or not the permitted retail dispensaries should be medical or non-medical/recreational dispensaries. There are pros and cons to each approach and it may be appropriate to provide for a combination of both types (e.g., one recreational dispensary and two medical dispensaries, etc.).

Personal Use and Cultivation

As noted above, currently, the only permitted cannabis activity in Alameda is cultivation for personal medical use. On November 8, 2016, Proposition 64 legalized personal cultivation, setting a limit of no more than six cannabis plants in any dwelling unit by any individual that is 21 years or older for recreational purposes. The draft Ordinance allows for indoor cultivation for personal use, but prohibits outdoor cultivation. While the Ordinance does not require a permit for cultivation for personal use, there is concern that, with the legalization of recreational cannabis, there will be an increase in the number of people cultivating cannabis for personal use. Therefore, there could be an increase in the amount of outdoor cultivation thereby creating an attractive nuisance and/or risk of theft/vandalism within the City's residential neighborhoods. As a result, staff is recommending that outdoor cultivation for personal use be prohibited at this time, but that outdoor cultivation could be revisited after the Ordinance has been in place for six to 12 months.

It should be noted that if the City bans outdoor cultivation for personal use it may be ineligible to apply for certain State grants that will be funded from the State's 15% excise tax on cannabis business activities. It is anticipated that those grants for which the City may be ineligible pertain to law enforcement, though the amount at risk is unknown at this time.

Regulatory Fees and Taxation

Staff has researched regulatory fees and State, sales and local taxes for a number of California cities that allow cannabis businesses. Generally speaking, regulatory fees are collected to offset actual costs incurred by the City (e.g. inspections, application reviews, background checks, etc.), while local taxes augment the general fund and bring new revenue to cities. Most cities that allow cannabis businesses collect both cannabis-related regulatory fees and cannabis-related taxes. The rates and structures of both the fees and local taxes vary widely from jurisdiction to jurisdiction.

Additionally, State taxes on cannabis will be 15% on gross receipt of retail products sold. There is also a State cultivation tax of \$9.25 per ounce for flowers, and \$2.75 per ounce for leaves, with exceptions for certain medical marijuana sales and cultivation. Sales taxes are assessed on non-medical cannabis at the rate set by the local jurisdiction. In Alameda, the sales tax rate is 9.25%. Medical cannabis is exempt from sales tax.

I. Regulatory Fees

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Fees must comply with Proposition 26, which mandates that the fees charged cannot exceed “reasonable costs” of providing the service or product. If the City allows cannabis business activities, staff recommends that the initial goal be full recovery of all costs incurred by the City associated with permitting and regulating the cannabis businesses. These fees are legally limited to recovery of actual expenditures and cannot contribute to the General Fund. Implementation of regulatory fees requires calculation and documentation of actual costs through a nexus, or fee, study. Staff is recommending that SCI be retained to prepare a fee study to determine the appropriate fees for permitting, regulating, monitoring and enforcing requirements related to the cannabis business activities to ensure full cost recovery. Once the fee study is completed and approved, the fees would be included in the Master Fee Schedule.

II. Local Taxes

Local taxes on cannabis business activities must be approved by the voters. Taxes on cannabis businesses have generally been well supported throughout California and most have been approved. However, the desire for increased revenue must be tempered with the need to stay competitive in the surrounding market and to balance all taxes charged (including the State’s taxes) with the goal of bringing cannabis business activities into the regulated market.

In order to approve a cannabis taxation measure where the revenue is for a specified use, called a “special tax”, 66.6% plus one of voters must approve the measure. Alternatively, in order to approve a cannabis business taxation measure where the revenue is for the General Fund and the use is not specified, called a “general tax”, only 50%, plus one of the voters is required.

Timing of ballot measures is also important. If the tax measure is put on a special election ballot it needs 66.6% plus one voter approval, whether or not the tax funds are “earmarked”. On a general election, such as November 2018, the proposed tax would only require a 50% plus one vote to take effect (assuming the revenue is for general use).

While it is recommended that local taxes be competitive with surrounding jurisdictions that allow cannabis businesses, the ballot measure should contain wording that allows taxes to be increased as needed, up to a specified maximum tax ceiling, without the need to seek further voter approval. For example, if the tax rate were approved by voters at a maximum tax ceiling of 15 percent, then taxes could be assessed at six percent in years one through three, then, increased to seven percent in years four through six, and so on, but never exceeding 15%.

Cannabis business-related local tax revenue is difficult to predict and can be affected by several factors such as local and regional competition, local demand for cannabis, etc. However, a standard “rule-of-thumb” recommended by SCI, and based upon typical local tax rates, is as follows:

Annual Tax Revenue = Population x (\$10 to \$20.)

Example: A city of 80,000 people should generate between \$800,000 and \$1.6 million in local cannabis business taxes per year.

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It should be noted that this “rule-of-thumb” is based primarily on taxes generated from dispensaries, but staff believes that the higher end of “population x \$20” would capture taxes from all cannabis business activities.

The City is currently conducting a *Quality of Life* survey that is asking the community about several possible funding measures to support a range of activities in the City. Cannabis business taxation is one of the survey questions. Because the survey has not yet been fully analyzed by staff, it is recommended that staff take feedback from the Council and community at the workshop and then prepare a staff report on taxation for Council consideration at a later date. This report would also make recommendations about the timing of a ballot measure to tax cannabis businesses.

Major Policy Issues Raised by the Draft Ordinance

As directed in the City Council referrals, staff has prepared a draft Ordinance regarding permitting cannabis business activities in the City. The Ordinance is being presented to the Council and community at a workshop so that staff may receive direction from Council and make any required changes to the Ordinance before it is introduced on first reading at a future Council meeting. The legalization of recreational cannabis is a complicated and quickly evolving area of law and staff has worked to capture previous Council direction in the draft Ordinance. However, staff is requesting feedback on several specific aspects of the Ordinance as follows:

- *What types of cannabis use should be permitted? Medical only or medical and recreational?* The draft Ordinance permits both medical and recreational cannabis.
- *What types of cannabis business activities should be permitted? Manufacturing (including testing and research and development), cultivation (indoor only or indoor and outdoor), dispensaries, distribution and delivery?* The draft Ordinance conditionally permits manufacturing and indoor cultivation in manufacturing zones described above and dispensaries in the retail zones described above. Distribution and delivery are permitted as ancillary uses.
- *Should there be a cap on the number of cannabis businesses permitted? No cap, cap on dispensaries only, or all businesses?* The draft Ordinance caps the number of dispensaries at three. It does not limit the number of manufacturing or indoor cultivation businesses.
- *If the number of dispensaries is capped, should staff prepare policies and procedures for a selection process for dispensary/retail permittees?* Staff proposes to recommend a selection process for Council consideration.
- *Should on-site consumption be permitted/prohibited?* The draft Ordinance prohibits on-site

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consumption.

- *Should cannabis business activity be permitted/prohibited on City-owned land?* Staff recommends that cannabis business activity be prohibited on City-owned land.
- *Should outdoor cultivation for personal recreational use be permitted/prohibited?* The draft Ordinance prohibits outdoor cultivation for personal recreational use.
- *Other comments or direction on the draft Ordinance?*

Next Steps

City Council has indicated that it would like to have a regulatory framework in place for cannabis business activities prior to January 1, 2018, as State licensing authorities are prohibited from issuing a license to a commercial cannabis business if the operation of the business violates a local ordinance of the jurisdiction in which the business will operate. The following is a list of next steps to meet that goal:

- Revise the Ordinance as necessary to reflect City Council input and direction.
- Prepare the required zoning text/map amendments for the Planning Board.
- Prepare the fee study and amend the Master Fee Schedule
- If the recommendation is to cap the number of dispensaries, prepare the policies/process for selecting dispensary/retail operators for Council approval by resolution.
- Bring revised Ordinance back to Council for 1st/2nd readings.
- Bring ordinance amending the Zoning Ordinance to Council for 1st/2nd readings.
- Prepare a staff report regarding taxation.

Once staff has received direction from the City Council it will move forward with the next steps outlined above.

FINANCIAL IMPACT

There could be a significant negative impact to the General Fund from adopting an ordinance that permits cannabis business activity in the City of Alameda if a fee schedule that ensures full cost recovery is not implemented. There are significant resources that would be devoted to permitting, regulating, monitoring and enforcing local requirements. Therefore, staff is recommending that a fee

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study be undertaken to fully identify and document those costs and that the Master Fee Schedule be amended to ensure full cost recovery.

There is also an opportunity to positively impact the City's General Fund through the imposition of an excise tax on cannabis business activities. Such a tax is subject to a vote of the people. It is generally estimated that taxing cannabis businesses could generate \$800,000 - \$1.6M annually. However, there is some uncertainty about how quickly a tax can be put in place, how quickly a maximum tax could be achieved, and how the industry will perform over time. Staff will be further analyzing the issue of taxation and will provide a follow up staff report to the City Council with its recommendations.

MUNICIPAL CODE/POLICY DOCUMENT CROSS REFERENCE

Any ordinance adopted related to cannabis business activity will be done in a manner consistent with the City's AMC. Based on City Council direction, certain provisions of the AMC will need to be deleted, along with numerous changes the AMC as reflected in the draft Ordinance.

ENVIRONMENTAL REVIEW

Adoption of an Ordinance relating to cannabis business activities and personal cultivation is exempt from the California Environmental Quality Act ("CEQA") pursuant to Business and Professions Code section 26055(h) as discretionary review and approval, which shall include any applicable environmental review pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code, shall be required in order to engage in commercial cannabis activity within the City of Alameda under such Ordinance. Adoption of this Ordinance is additionally exempt from CEQA pursuant to section 15061(b)(3) of the State CEQA Guidelines because it can be seen with certainty that there is no possibility that the adoption of this Ordinance may have a significant effect on the environment.

RECOMMENDATION

Provide direction on a proposed Ordinance Amending the Alameda Municipal Code by Repealing Section 30-5.15 (Medical Dispensaries and Cultivation) of the Alameda Municipal Code in its entirety; adding a New Article XVI (Cannabis Businesses); adding a new Section 30-10 (Cannabis); and amending Sections 24-11 (Smoking Prohibitions in Places of Employment and Unenclosed Public Places) and 24-12 (Smoking Prohibitions in Housing).

Respectfully submitted,
Debbie Potter, Community Development Director

Financial Impact section reviewed,
Elena Adair, Finance Director

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Exhibits:

1. Draft Cannabis Ordinance
2. Cannabis Business Locations
3. Government Owned Properties Map