ORDINANCE NO. 2017-03

URGENCY INTERIM ORDINANCE PROHIBITING THE CULTIVATION AND DELIVERY OF MARIJUANA IN THE UNINCORPORATED AREA OF CONTRA COSTA COUNTY

The Contra Costa County Board of Supervisors ordains as follows:

**SECTION I. FINDINGS AND PURPOSE.**

A. In 1996, California voters approved Proposition 215, the Compassionate Use Act. The purpose of the Compassionate Use Act is to enable persons who are in need of marijuana for specified medical purposes to obtain and use marijuana under limited circumstances. The Compassionate Use Act (Health and Safety Code (HSC) § 11362.5) established a limited defense for qualified patients and their primary caregivers to the crimes of possessing or cultivating marijuana.

B. In 2003, the Legislature enacted the Medical Marijuana Program. The Medical Marijuana Program (HSC §§ 11362.7-11362.83) established regulations and procedures regarding the issuance of identification cards to patients qualified to use medical marijuana, and clarifies what is a "reasonable" amount of marijuana for personal medical use. The Medical Marijuana Program also established a defense to criminal liability for the collective or cooperative cultivation of marijuana. (HSC § 11362.775.) Medical marijuana dispensaries began opening throughout the state as medical marijuana collectives under the Compassionate Use Act and the Medical Marijuana Program.

C. In 2008, the Board of Supervisors adopted Ordinance No. 2008-05 to prohibit the establishment of medical marijuana dispensaries in the unincorporated area of Contra Costa County.

D. The federal Controlled Substances Act (Title 21, United States Code § 801 et seq.) prohibits, except for certain research purposes, the possession, distribution, and manufacture of marijuana, and there is no medical necessity exception to prosecution and conviction under the Controlled Substances Act.

E. The California Supreme Court in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, held that neither the Compassionate Use Act nor the Medical Marijuana Program expressly or impliedly preempt the authority of California counties and cities, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana.

F. The Medical Marijuana Regulation and Safety Act (MMRSA) was signed by the Governor on October 9, 2015. The MMRSA consisted of three bills: Assembly Bill 243, Assembly Bill 266, and Senate Bill 643. The purpose of the MMRSA is to regulate the cultivation, dispensing, manufacturing, distribution, and transportation of medical marijuana.

G. The MMRSA affirmed the authority of counties and cities to regulate the following commercial medical marijuana activities through the adoption of land use ordinances:

1. Deliveries. Deliveries by dispensaries are permitted with a State license unless a city or county explicitly prohibits delivery of medical marijuana and medical marijuana products. (Business and Professions Code (BPC) §§ 19340(a), 19340(b)(1).)

2. Other Commercial Activities. Under the MMRSA, in order to obtain a State license for commercial cultivation, dispensing, distribution, transport, or manufacturing activities, a person must also have a local license. If there is no local license or permit, or ordinance providing for such, then a marijuana business may not obtain a State license, and may not operate a business performing commercial cannabis activity. (BPC § 19320(a).)

H. Under the MMRSA, there are exemptions to the State's commercial licensing requirements for qualified patients and primary caregivers.

1. A qualified patient who cultivates, possesses, stores, manufactures or transports marijuana exclusively for his or her personal medical use is exempt from the State's commercial licensing requirements. (BPC, § 19319.) A "qualified patient" is a person who possesses or cultivates marijuana for his or her personal medical purposes upon the written or oral recommendation or approval of a physician.

2. A primary caregiver who cultivates, possesses, stores, manufactures or transports marijuana exclusively for the personal medical purposes of no more than five specified qualified patients is also exempt from the State's commercial licensing requirements. (BPC, § 19319.) A "primary caregiver" is the individual designated by a qualified patient who has consistently assumed responsibility for the housing, health, or safety of that qualified patient. A primary caregiver is authorized to possess or cultivate marijuana for the personal medical purposes of a qualified patient upon the written or oral recommendation or approval of a physician.

I. Under the MMRSA, if a qualified patient or primary caregiver intends to cultivate medical marijuana but is exempt from the State's commercial licensing requirements, the qualified patient or primary caregiver will be required to obtain a State license under the State's Medical Cannabis Cultivation Program. (HSC § 11362.777(b).) Under the MMRSA, in order to obtain a State license under the Medical Cannabis Cultivation Program, a person must also have a local license, permit, or other entitlement. If a person does not obtain a local license, permit, or other entitlement, the person may not cultivate medical marijuana.

J. The Medical Cannabis Cultivation Program licensing requirement does not apply to a qualified patient if the area he or she uses to cultivate medical marijuana for his or her personal medical use does not exceed 100 square feet, and does not apply to a primary caregiver if the area he or she uses to cultivate medical marijuana for the personal medical use of no more than five specified qualified patients does not exceed 500 square feet. (HSC, § 11362.777(g).) Under the MMRSA, if a person is exempt from the Medical Cannabis Cultivation Program licensing requirement, the person is also exempt from the requirement to obtain a local license, permit, or other entitlement. (HSC, § 11362.777(g).)

K. On February 2, 2016, the Board of Supervisors adopted Ordinance No. 2016-04, an interim urgency ordinance prohibiting the cultivation and delivery of medical marijuana.

L. On February 3, 2016, Assembly Bill 21 went into effect. AB 21 provides that an exemption from State medical marijuana licensing requirements does not limit or prevent a county or city from exercising its police power authority under the California Constitution. AB 21 authorized the County to regulate or ban all categories of cultivation, dispensing, manufacturing, distribution, and transportation of medical marijuana.

M. On March 15, 2016, the Board of Supervisors adopted Ordinance No. 2016-10, to extend interim urgency Ordinance No. 2016-04 for an additional 10 months and 15 days, through January 30, 2017.

N. On November 8, 2016, the voters of the State of California adopted Proposition 64, which enacted the Control, Regulate, and Tax Adult Use of Marijuana Act (the "AUMA"). The AUMA took effect November 9, 2016. The AUMA makes it legal under California law for anyone 21 years of age or older to possess, plant, cultivate, harvest, dry, and process up to six marijuana plants per private residence for personal use (the "Personal Use Grows"), subject to certain restrictions. (HSC, §§ 11362.2 & 11362.3.) The AUMA also makes it legal under California law for anyone 21 years of age or older to do all of the following (collectively, the "Personal Use Exceptions"):

1. Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of marijuana not in the form of concentrated cannabis;

2. Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than eight grams of marijuana in the form of concentrated cannabis, including as contained in marijuana products;

3. Smoke, except where smoking is prohibited, and ingest marijuana and marijuana products; and

4. Possess, transport, purchase, obtain, use, manufacture or give away marijuana accessories to persons 21 years of age or older without any compensation whatsoever. (HSC, § 11362.1.)

O. Under state law, living plants of Personal Use Grows, and marijuana from those plants in excess of 28.5 grams, must be kept in a locked space, enclosed, and must not be visible by normal unaided vision form a public place. (HSC, § 11362.2(a).) Cities and counties also may enact and enforce reasonable regulations to regulate Personal Use Grows, and they may prohibit Personal Use Grows outdoors. (HSC, § 11362.2(a)(1), (b)(1) & (b)(3).) The AUMA contains several other limitations related to the possession and use of marijuana and marijuana products, including those for personal use. (See HSC, § 11362.3(a)(1)-(8); see also BPC, § 26200(d).)

P. The AUMA establishes a framework for state and local regulation of nonmedical marijuana businesses. The State of California must establish, by January 1, 2018, a regulatory and licensing program, under the oversight of the Bureau of Marijuana Control (formerly, Bureau of Medical Cannabis Regulation), to license commercial cultivation, testing, and distribution of nonmedical marijuana, and the manufacturing of nonmedical marijuana products. (See BPC, §§ 26010, 26012, 26013.) Cities and counties retain local authority to license, regulate, limit, or completely ban nonmedical marijuana businesses within their jurisdictions. (BPC, § 26200.) A state license will not be issued to a business if the business cannot lawfully be established in the city or county in which it intends to locate. (BPC, § 26055(e).

Q. Without sufficient regulations that are enforceable through an adopted ordinance, there is a current and immediate threat to the public health, safety, and welfare from unregulated medical and nonmedical marijuana cultivation, manufacturing, and deliveries, including the following harmful impacts:

1. Several California jurisdictions have reported negative impacts of unregulated marijuana cultivation and delivery uses, including offensive odors, illegal sales and distribution of marijuana, trespassing, theft, robberies and robbery attempts, fire hazards, and problems associated with mold, fungus, and pests.

2. Marijuana plants, as they begin to flower and for a period of two months or more, can produce a strong odor that may be offensive to many people. If the smell of marijuana is detectable beyond property boundaries, the smell can create an attractive nuisance, alerting persons to the location of the valuable plants, and creating a risk of burglary or robbery.

3. The potential for burglary or robbery is high because marijuana plants are valuable. The U.S. Drug Enforcement Agency reports that each marijuana plant under various planting conditions may yield an average of between one-half to two pounds in its lifetime. Prices for domestically produced high-grade marijuana sold illegally within Northern California can reach $2,000 to $5,000 per pound.

4. Harmful effects at unregulated outdoor and indoor cultivation facilities have included an increase in criminal activity because of the high monetary value of the marijuana plants, adverse environmental impacts, interference with farming practices, fire danger from grow light systems, extensive energy consumption, and strong offensive odors, as reported by other California counties and cities.

5. The unregulated indoor cultivation of marijuana has potential adverse effects to the structural integrity of a building, and the use of high wattage grow lights and excessive use of electricity increases the risk of fire, which presents a clear danger to the building and its occupants.

6. The California Attorney General's August 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use recognizes that the cultivation or other concentration of marijuana in any location or premises without adequate security increases the risk that nearby homes or businesses may be negatively impacted by nuisance activity such as loitering or crime.

R. It is necessary to extend Ordinance No. 2016-04 to provide the County with additional time to consider regulations governing medical and nonmedical marijuana activities, and to determine the extent of these regulations. This additional extension of Ordinance No. 2016-04 is necessary to provide staff the time to analyze and provide a future report to the Board on various long-term options in response to the MMRSA and the AUMA. Absent the extension of this interim ordinance, commercial marijuana activities could arguably be located in residential areas or in close proximity to schools, churches, day care centers, and other sensitive uses incompatible with commercial marijuana activities.

**SECTION II. DEFINITIONS.** For purposes of this ordinance, the following words and phrases have the following meanings:

(a) "Cultivation" or "to cultivate" means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of marijuana.

(b) "Delivery" has both the meaning set forth in Business and Professions Code section 19300.5(m), and the meaning set forth in Business and Professions Code section 26001(h).

(c) "Marijuana" means both "marijuana," as defined in Health and Safety Code section 11018, and "marijuana products," as defined in Health and Safety Code section 11018.1.

(d) "Residence" has the same meaning as "private residence" in Health and Safety Code section 11362.2(b)(5).

**SECTION III. EXTENSION.** Ordinance No. 2016-04 is extended for an additional 12 months, through January 30, 2018.

**SECTION IV. PROHIBITED USES.** Subject only to the exemptions in this ordinance and as otherwise preempted by state law, the following uses are prohibited in all zoning districts of the County:

(a) The cultivation of marijuana.

(b) The delivery of marijuana.

(c) The establishment of a business that sells, distributes, dispenses, manufactures, or tests marijuana.

**SECTION V. EXEMPTIONS.**

(a) Six or fewer marijuana plants may be cultivated indoors at a residence if all of the following conditions are met:

(1) The residence, and all lighting, plumbing, and electrical components used for cultivation, must comply with all applicable zoning, building, electrical, and plumbing codes and permitting requirements.

(2) All living marijuana plants, and all marijuana in excess of 28.5 grams produced by those plants, must be kept in a locked room and may not be visible from an adjacent property, right-of-way, street, sidewalk, or other place accessible to the public.

(3) The residence must be lawfully occupied by the person who cultivates the marijuana plants within the residence. If the residence is not owner-occupied, written permission from the owner of the residence must be obtained before marijuana plants may be cultivated.

(4) No marijuana plants may be cultivated outdoors.

(b) It is not a violation of this ordinance for any person employed by a licensed marijuana delivery service to travel on a public road within the unincorporated area of the County for the purpose of delivering marijuana to persons located in a city or county where the delivery of marijuana is not prohibited.

**SECTION VI. ENFORCEMENT.** The County may seek compliance with this ordinance under the remedies authorized by Ordinance Code Chapter 14-6 (abatement) and Ordinance Code Chapter 14-12 (administrative penalties), and any other remedy allowed by law.

**SECTION VII. REPORTS.** In accordance with subdivision (d) of Government Code section 65858, ten days before the expiration of this ordinance or any extension of it, the Department of Conservation and Development shall file with the Clerk of this Board a written report describing the measures taken to alleviate the conditions that led to the adoption of this urgency interim ordinance.

**SECTION VIII. SEVERABILITY.** If any provision or clause of this ordinance or the application thereof to any person or circumstances is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other ordinance provisions or clauses or applications thereof that can be implemented without the invalid provision or clause or application, and to this end the provisions and clauses of this ordinance are declared to be severable.

**SECTION IX. DECLARATION OF URGENCY.** This ordinance is hereby declared to be an urgency ordinance for the immediate preservation of the public safety, health, and welfare of the County, and it shall take effect immediately upon its adoption. The facts constituting the urgency of this ordinance's adoption are set forth in Section I.

**SECTION X. EFFECTIVE PERIOD.** This ordinance becomes effective immediately upon passage by four-fifths vote of the Board and shall continue in effect for a period of 12 months,

through January 30, 2018, pursuant to Government Code section 65858. Within 15 days of passage, this ordinance shall be published once with the names of the supervisors voting for and against it in the Contra Costa Times, a newspaper published in this County.

PASSED ON January 17 2017 by the following vote:

AYES: Gioia, Andersen, Burgis, Glover
NOES: None
ABSENT: None
ABSTAIN: None

ATTEST: DAVID J. TWA,
Clerk of the Board of Supervisors
and County Administrator

Board Chair

By:
Deputy

[SEAL]

SMS:
H:\Client Matters\Cons & Dev\Ordinances\Marijuana\Ordinance Extending Interim Urgency Ordinance - Final 011117.wpd