Agenda Item: ID#15-267 (1-M)
Date: 4/9/15

FRESNO CITY COUNCIL

City of FRESNO

Supplemental Information Packet

Agenda Related Item(s) – ID#15-267

Contents of Supplement: Letter from Michael Green

Item(s)

***BILL NO. B-8– (Intro. 3/26/15) (For adoption) – Amending Section 12-2103 by amending Subsection (c) and adding Subsection (g), amending Section 12-2104 and adding Sections 12-2104.1 and 12-2108 to the Fresno Municipal Code relating to medical marijuana cultivation – Council Subcommittee on medical marijuana – Council President Baines, Councilmember Olivier and former Councilmember Xiong

Supplemental Information:

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April 7, 2015

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CITY CLERK, FRESNO CA

To: Fresno City Council

From: Michael S. Green

Re: Bill No. B-8 - Amending Sections 12-2103 and 12-2104; adding Sections 12-2104.1 and 12-2108 to the Fresno Municipal Code relating to medical marijuana cultivation

Environmental Assessment No. EA-15-009 - Environmental Finding of No Possibility of Significant Effect

Honorable council members:

This letter is to express my opposition to the above-titled ordinance, which would continue the city's previous bans on cultivation of sun-grown medical cannabis. This is unfair to qualified patients who cannot afford the expense and difficulty of growing cannabis indoors, among other serious concerns. Banning the use of natural soil and sunlight to grow plants is not sustainable, practically or legally.

The ordinance impacts qualified patients who have been authorized to cultivate medical cannabis since Proposition 215 was enacted in 1996. Under the Medical Marijuana Program Act (SB 420), six (6) mature plants and 12 immature plants *per patient* is the minimum baseline; cities and counties may adopt ordinances permitting more plants per patient, but not fewer. Bottom line, the city's latest plan to allow only four plants *per parcel*, with no provision for greater numbers of immature plants, nor for multi-grower households and patient collectives, is simplistic and does not comply with California law.

The proposed environmental findings in Environmental Assessment No. EA-15-009 are also inadequate. Forcing all cannabis to be grown indoors in a city with more than 500,000 residents can and will impact the environment through a significant increase in electrical consumption and air emissions; increased risk of structure fires from faulty wiring in older homes and/or overloaded electrical circuits; potential discharge of plant nutrients and other chemicals to wastewater and storm drainage systems; potential hazards to first responders including electrical shock and exposure to hazardous chemicals; increased blight in neighborhoods with large numbers of vacant housing units; and other significant impacts. **An initial study of Bill No. B-8 is required under the California Environmental Quality Act.**

Procedurally, the Fresno Planning Commission has not reviewed the bill or environmental assessment, even though such review is mandatory for text amendments to the Fresno Municipal Code. The Planning Commission has not reviewed a land-use ordinance involving medical cannabis since 2011, when Text Amendment 11-001 was proposed and enacted. No explanation has been provided why the proposed ordinance, along with its 2012 and 2014 predecessors, is not subject to commission review.

Of special concern is parity with Fresno County's cultivation ban, a concern that is shared by county supervisors and law enforcement. Even though the new city ordinance limits indoor cultivation to four plants, and only with special permits, the "message" will be that Fresno now allows indoor growing. There is substantial evidence in the lengthy history of the city/county ordinances that some patients will move or set up small-scale grow sites in the local jurisdiction with the ordinance perceived as most permissive. The same phenomenon has been documented with local ordinances banning collectives and dispensaries. It is reasonable to assume that a) the number of indoor grow sites within the city limits will increase substantially after this ordinance is passed, regardless of permit requirements, and b) that the creation and operation of such grow sites can and will have cumulatively considerable impacts.

SUSTAINABLE CULTIVATION USING NATURAL SUNLIGHT

Lockable greenhouses up to 10x20 sq. ft. should be defined as a "fully enclosed and secure structure" in Section 12-2103(g) of the ordinance. This provision will reduce cost and energy consumption for many patients, and it would eliminate the proposed requirement to use residential buildings for cultivation. Both factors would likely weigh as positives when an initial environmental study is conducted.

INDOOR-ONLY CULTIVATION POSES UNIQUE RISKS

The Fresno City Council made specific findings regarding indoor cultivation in Ordinance 2014-20, which established the total growing ban now in place. Although not couched in environmental terms, those findings described several potential environmental impacts associated with indoor cultivation:

> "WHEREAS, the Council hereby finds that the cultivation of marijuana significantly impacts, or has the potential to significantly impact, the city's jurisdiction. These impacts include damage to buildings in which cultivation occurs, including improper and dangerous electrical alterations and use, inadequate ventilation, increased occurrences of home-invasion robberies and similar crimes and nuisance impacts to neighboring properties from the strong and potentially noxious odors from the plants, and increased crime ..."

The amended ordinance would leave these findings in place, even though they clearly do not favor a land-use policy where ALL cannabis cultivation occurs in dwellings within residential zone districts. Police Chief Jerry Dyer told the council about "severe damage" to buildings on March 20, 2014.

> "And what happens when we get called in and we locate some of these indoor marijuana grows is that there's a significant restructuring, oftentimes walls, interior walls, that are moved. There is severe damage to the residence, especially within large indoor grows, carpets removed, they have large grow lamps that are suspended from the ceiling."

Although small-scale indoor cultivation can be done safely, even smaller gardens typically require artificial lighting systems, fans, pumps and/or air conditioning to control temperature and humidity. Inexperienced growers can easily overload electrical circuits, creating increased fire risk in older homes. The Fresno Fire Department has provided no input or evidence regarding the frequency and severity of structure fires, electrical hazards and other emergency reponses associated with indoor cultivation.

INDOOR-ONLY CULTIVATION IS ENERGY-INTENSIVE

Indoor cannabis cultivation is not like growing house plants, despite the city's claim in EA-15-009. Artificial growing systems typically include high-pressure sodium or metal halide lights, each one ranging from 600 to 1,200 watts, electrical ballasts, timers, fans, and air conditioning. Some growers may also utilize pumps and drainage systems (hydroponics), odor-control systems and/or dehumidifiers, and all of this added equipment requires electricity to operate.

A 2011 study of energy consumption related to cannabis cultivation was compiled by Evan Mills, an energy analyst and staff scientist at the Lawrence Berkeley National Laboratory.

> "In California, the top-producing state (of marijuana), indoor cultivation is responsible for about 3% of all electricity use or 8% of household use .... This corresponds to the electricity use of 1 million average California homes, greenhouse-gas emissions equal to those from 1 million average cars, and energy expenditures of $3 billion per year."
>
> http://evan-mills.com/energy-associates/Indoor_files/cannabis-carbon-footprint.pdf

As noted on Central Valley Energy Tune-Up, a website co-sponsored by the City of Fresno:

> "The City of Fresno is the fifth-largest city and largest inland city in California with a population of over 500,000. ... In 2009, the city of Fresno as a community spent over $866 million on electricity and natural gas with 40%, or $346 million, spent by residential households and 60%, or $520 million, spent by commercial/industrial users. ..."
>
> https://www.cvetu.com/partners

Indoor-only plant cultivation will substantially increase energy consumption in the City of Fresno, where energy use and affiliated carbon and air-quality impacts are already substantial concerns:

> "With the growth of the [San Joaquin] Valley's population and economy over the past decade, the use of and demand for energy has been steadily increasing. Between 2000 and 2010, while California's total electricity consumption (residential, commercial and industrial) grew by 3.5 percent, **the Valley's consumption increased by more than 20 percent.**"
>
> San Joaquin Valley Regional Industry Cluster Action Plan, citing state and federal energy data

As California's fifth-largest city, it is reasonable to assume that Fresno accounts for its proportionate share of electrical consumption devoted to cannabis cultivation. It is also reasonable to assume that population growth could further expand indoor medical cannabis cultivation under the ordinance.

> "It is estimated that the City of Fresno will need to accommodate roughly 425,000 more residents by 2050, an increase of more than eighty percent of our 2013 estimated population of 509,924."
>
> Sustainable Agricultural Land Strategy Grant Application, City of Fresno

A small-scale outdoor garden with adequate fencing, reasonable setbacks and visual screening is more sustainable and energy-efficient than an indoor garden of the same size. Reasonable limits on the size of permitted cultivation areas will reduce neighbor complaints and mitigate environmental impacts.

SPECIAL PERMITS SHOULD NOT BE REQUIRED

Section 12-2103(g) of the ordinance would require qualified patients and primary caregivers to obtain a "special permit" for their four-plant, indoor gardens. If one accepts the claim that cannabis cultivation is akin to growing house plants, there is no reasonable justification for requiring special permits.

On a practical level, there are overhead costs associated with city-issued cultivation permits, including staff time for permit processing and property inspections. These costs have not been detailed.

On the legal front, city-issued cultivation permits raise several concerns. For qualified patients, they unlawfully require patients to waive their medical privacy rights and/or Fourth Amendment right against unreasonable search and seizure. For the city, issuing permits to cultivate medical marijuana would arguably violate the federal Controlled Substances Act, which could expose the city to federal litigation. Additional litigation seems likely when patients are cited for growing without a permit, since it is reasonably foreseeable that many, if not most, patients will grow their plants without notice to the city.

THE CITY MUST FOLLOW THE STATE CULTIVATION GUIDELINES

The Medical Marijuana Program Act (SB 420) establishes a minimum threshold of six (6) mature cannabis plants, or 12 immature plants. (Health and Safety Code Sec. 11362.77) This is necessary so that the immature plants can be sex-selected for the female plants that will be grown to maturity. The Legislature also provided limited immunity to qualified patients and primary caregivers who grow and possess a reasonable number of plants, whether on an individual basis (H&S §11362.765) or as part of a patient collective (H&S §11362.775).

Based on my own observations and research, and my discussions with other medical cannabis patients, doctors and support businesses, my belief is that several thousand qualified patients reside within the City of Fresno, and that number could easily reach the tens of thousands. It is reasonable to assume that personal cultivation will become the primary means for those qualified patients to grow and obtain their own cannabis where state-authorized collectives and dispensaries are banned, as they are in Fresno.

FINES AND SUMMARY ABATEMENT PROCEDURES SHOULD BE AMENDED

The proposed ordinance does nothing to change or reduce the $1,000/plant fine for violations. These excessive fines are unlawfully punitive in nature and do not follow the city's administrative process.

The administrative and enforcement procedures utilized by the city attorney should either be expressly tied to the Public Nuisance Abatement Ordinance procedures (FMC 10-601 et seq.), or the "civil enforcement process" in Section 12-2105(a) of Ordinance 2014-20 should be described in more detail.

The purported "administrative citation penalty" in Section 12-2105(b) should be amended. Fines should be imposed per violation, not per plant, and those fines must be reasonable and not punitive in nature.

The summary abatement provision in Section 12-2105(c) should be repealed in its entirety. Notice to abate violations should be provided, as it is during code enforcement of other city statutes. Summary abatement cannot be the standing policy, since state law does not permit it. Summary abatement is authorized only where a threat to public health and safety exists, as documented by the enforcing officer.

ENVIRONMENTAL ASSESSMENT EA-15-009

The California Environmental Quality Act exempts certain projects from environmental review provided they meet the appropriate criteria. The city does not claim that EA-15-009 is entitled to a categorical exemption from CEQA, but instead that it qualifies for the so-called "common sense" exemption: "Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." (CCR §15061(b)(3))

EA-15-009 attempts to establish that there is no possibility of environmental impact by claiming indoor cultivation is similar to growing house plants, a ridiculous assertion that has no basis in fact. It further suggests that vehicle-trips "could be reduced" because qualified patients would not have to travel outside the City of Fresno to obtain their cannabis, but no data is provided in support. Even if environmental benefits are claimed, the ordinance still must be reviewed for possible negative impacts.

In legal terms, the claims made in EA-15-009, and any conclusions or findings made in reliance upon such statements, are "speculative, conclusory and unsupported by substantial evidence." Should the Fresno City Council adopt the staff-recommended findings stating there is "no possibility" of significant environmental impacts, such action could and would constitute a prejudicial abuse of discretion.

CEQA compliance is not an academic argument. The CEQA findings for the city's growing ban are under challenge in Fresno County Superior Court Case No. 14 CECG 01316, with trial set for May 15. While adopting the proposed ordinance could conceivably impact some of the legal issues in that case, the new ordinance falls under the exact same CEQA requirements as Ordinance 2014-20 did.

At the very minimum, the city should conduct an initial study pursuant to Calif. Code of Regulations §15002(k)(2), rather than adopt findings based upon a fatally flawed environmental assessment. That would be the most prudent course of action, and it also would allow Fresno County to weigh in.

Respectfully submitted,

Michael S. Green
Fresno, Calif.