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*City Attorney's Office*  
510-284-4030

January 5, 2016

To: Fred Diaz, City Manager

From: Prasanna Rasiah, Senior Deputy City Attorney

Subject: Item 5.A – MEDICAL MARIJUANA CULTIVATION AND DELIVERY -  
Citywide - PLN2016-00176

A handwritten signature in black ink, appearing to be "Prasanna Rasiah", is written over the "From:" line of the memorandum.

Attached are draft minutes from the December 10, 2015 Planning Commission meeting at which this item was heard. The minutes were not ready for distribution prior to the agenda packet being generated.

**DRAFT MINUTES  
FREMONT PLANNING COMMISSION  
REGULAR MEETING OF DECEMBER 10, 2015**

- Item 5. **MEDICAL MARIJUANA CULTIVATION AND DELIVERY - Citywide - PLN2016-00176** – To consider a city-initiated Zoning Text Amendment to Title 18, Planning and Zoning, of the Fremont Municipal Code prohibiting all cultivation and delivery of medical marijuana in all zoning districts, and to consider an exemption from the requirements of the California Environmental Quality Act (CEQA) per Section 15061(b)(3) of the CEQA Guidelines, in that it is not an activity which would have the potential to cause a significant effect on the environment.

Notes and Corrections

On December 1, 2015, the California Court of Appeal in *Kirby v. County of Fresno* held that the State of California has largely preempted local governments from classifying medical marijuana-related offenses as crimes. The court noted however that failing to abate a public nuisance regarding medical marijuana cultivation could be prosecuted as a misdemeanor. Accordingly, staff requests that the following corrections be included in the Staff Report and Draft Ordinance:

Staff Report: Page 4, under "Project Description":

2. Revise FMC Section 18.190.095 to prohibit all cultivation of medical marijuana and provide for a short period of time (six months) to eliminate what would become a legal non-conforming use (an amortization period). The revision would also provide that violations would constitute a public nuisance and would also be subject to civil enforcement remedies ~~eliminate language that currently limits enforcement to civil remedies in the event that a criminal prosecution is appropriate for a significant cultivation operation.~~
3. Add FMC Sections 18.25.1874 and 18.190.098 to provide a definition of medical marijuana delivery that would correspond to state law and enact a prohibition on such deliveries. Section 18.190.098 would also provide that violations of that section would be limited to civil enforcement remedies.

Draft Ordinance:

**Sec. 18.190.095. Cultivation of medical marijuana a prohibited use; amortization.**

(a) [Proposed text unchanged]

(b) Violations of this section shall be a public nuisance but shall not otherwise be deemed a misdemeanor, infraction, or crime of any kind. Any violation of this section shall also be subject to civil enforcement remedies available by law, at the discretion of the city.

[Remaining sections to be re-lettered as (c) – (f)]

**Sec. 18.190.098. Delivery of medical marijuana a prohibited use.**

~~(a)~~All medical marijuana delivery as defined in Section 18.25.1874 is prohibited in all zones. Violations of this section shall not be deemed a misdemeanor, infraction, or crime of any kind. Any violation of this section shall also be subject to civil enforcement remedies available by law, at the discretion of the city.

**Sr. Deputy Attorney Rasiah** gave a brief overview of the current laws that pertain to medical marijuana:

- Illegal under Federal law, the Controlled Substances Act, since 1970.
- In 1996, California voters passed Proposition 215, the Compassionate Use Act, which created limited exceptions from criminal liability for specified medical purposes.
- In 2004, legislature passed the Medical Marijuana Program Act, which clarified the scope of the Compassionate Use Act and created the Medical Marijuana Identification Card Program and implemented by counties.
- In 2006, the City banned medical marijuana dispensaries.
- In 2014, the City banned all outdoor marijuana cultivation as well as indoor cultivation where it would be visible from public places, which was the current ordinance and was being amended.

Brief background on court decisions issued:

- In 2013, California Supreme Court indicated that neither the Compassionate Use Act nor the Medical Marijuana Program Act limited local land use regulation of marijuana. Neither statutory scheme created a right to unfettered use of medical marijuana.
- The regulation of medical marijuana at the local level did not conflict with either the Proposition or the State legislation.
- The City, under the Case Law, also had the authority to ban all cultivation of marijuana. The City chose at that time not to ban all cultivation.
- State and Federal Courts recognize that illegal marijuana use created substantial local concerns.

Recent State legislation known, collectively, as the Medical Marijuana Regulation and Safety Act, were three separate bills that had been joined together and signed by the Governor on October 9, 2016. It created a licensing structure which required both a State license and a local license or permit. One could not apply for a State license without getting permission at the local level. If cultivation or dispensaries were banned at the local level, one could not obtain a State license or permit. Cities that did not have an ordinance in place by March 1, 2015, that regulated or prohibited cultivation would lose the authority to do so within the city limits. That date was driving the discussion to move forward at this time. However, it could be changed or eliminated by future legislation. This new State statutory scheme would authorize the cities to enact a complete ban on cultivation, as well as delivery.

**Police Chief Richard Lucero** stated that he was joined by Captain Sean Washington and Investigations Division Commander Sgt. Eric Tang, the Supervisor of the City's Street Crime Unit, and acting Special Agent Supervisor Mike Mattson from the Department of Justice.

Since the current version of the City's ordinance had been in place, a persistent problem of dangerous conditions related to marijuana cultivation had continued in the neighborhoods. City data showed:

- In 2014, over 1,000 plants and 68 lbs. of marijuana dispersed across three cases, which did not include an additional 35 lbs. of marijuana seized that year prior to the ordinance becoming effective.
- In 2015, over 2,000 plants and five cases.

He displayed photos showing:

- A “meaningful grow” on an industrial property and currency seized during the investigation that resulted of the seizure of that grow.
- A smaller residential grow with unsafe wiring which was ripe for any kind of accident or fire hazard connected with faulty building conditions. Ballasts were stacked among a jumble of cables leading into the grow room.
- An accumulation of dangerous chemicals, waste disposal, etc., that was of concern in the residential neighborhoods. The large, blue vat was used to mix various toxic chemicals.
- Maintenance records taken from one of the grows showing references of the mix and the comments about spraying to control mold.
- Guns, such as shown in the photo, a cut-down shotgun and hand gun with a high capacity magazine designed to extend the rate of fire that were connected to the profit motive and the value of the crops, were involved in the violence that was connected to protecting the crops, to disputes that arose out of transactions.

These grows brought issues to the neighborhoods, such as the immediacy of the grow, the odor of the growing marijuana or the odor of the consumption of the marijuana, who came and went from a grow site, the anger and division among the nearby residents and a well-founded fear of correlated crimes, along with the possibility of driving under the influence, disturbances or any kind of violence connected to the grow, such as a robbery or violence among co-conspirators. For all of these reasons, staff was recommending complete prohibition of cultivation in the City.

**Sr. Deputy Attorney Rasiah** added that the proposed Zoning Text Amendment would match the City's current zoning code regarding medical marijuana to State law by providing definitions that would match the new legislation; it would add a definition of medical marijuana delivery, which pertained to commercial deliveries by dispensaries, as well as through a technology platform, such as a social media app. The ordinance would also prohibit all medical marijuana cultivation and delivery within the City, thus extending the current ban on cultivation to those locations that were indoors and not visible from the public places. This proposed ordinance would extend the ban to those locations. Violations would be subject to civil enforcement remedies, as was currently, and violations of the cultivation ban would also be treated as a public nuisance and prosecuted criminally.

The Gold Sheet changes, above, were precipitated by a new case, the California Court of Appeal on December 1, 2015.

**Chairperson Bonaccorsi** asked **Chief Lucero** if the Department of Justice representative was from the State or Federal and why was he in attendance.

**Chief Lucero** replied that he was with the State and he was here because he was the Regional Task Force Commander.

**Commissioner Pentaleri** asked:

- Were the photos of the grows shown tonight legal under existing ordinances?  
*Chief Lucero stated that they were not prohibited under the City's current ordinances, which was why they were here.*
- Was there any enforcement basis?  
*In those cases, they were seized as part of a criminal investigation for cultivation. The whole marijuana issue was that the cultivation and sale were all prohibited offences and Compassionate Use was an affirmative defense to those charges.*
- The Supreme Court ruling allowed the City to ban cultivation through local ordinances, which was part of the rationale for proposing this Amendment. Much reference was made in the Staff Report of concerns of crimes associated with what may otherwise be legitimate under the Compassionate Use Act or people abusing those laws.
- *He saw the essence of medicinal marijuana, or medicinal anything, as proof of medical effectiveness, recommendations for specific conditions and understanding of side effects. In most cases, the intoxicating components were supposed to have been refined out before it was used in a medicinal setting, but that had not been his experience. Rationales had been flat feet, asthma, stress from possessing marijuana. The litany of false justifications went on and on. This Ordinance would get the City out of that debate. The merits of whether the defense for a marijuana cultivation was appropriate did not have to be assessed; the cultivation would simply not be permitted under a land use decision. Adolescent use was one of the very profound concerns he had. Use within the last 30 days was probably the best way of assessing a person's level of jeopardy from any particular drug. From the early '70s to the early '90s, use had dropped among 12<sup>th</sup> graders to about 12 percent. At this time, in Alameda County, use was about 22 percent of 11<sup>th</sup> graders who reported one or more uses within the last 30 days. Some had reported as much as 20 to 30 uses.*
- Why ban delivery? Had he see abuse or was it just because of the March deadline and "we can?"  
*Sr. Deputy Attorney Rasiah stated that the deadline pertained to cultivation not delivery, but "we can" ban delivery under State law. Even with limited experience with delivery, it didn't mean that the City should wait for a problem to arise before addressing it.*
- He would like to see a more direct connection between the proposed ordinance and some hope that it would be effective. This conversation was held two years ago when photos of an outdoor cultivation showed plants reaching the ridgeline of a residence and it was decided that outdoor cultivation needed to be banned. He believed that it could have been enforced as a nuisance. So, outdoor cultivation was banned, but allowed indoors, even though the indoor hazards were known. Being less visible caused a greater enforcement problem. The Staff Report indicated that the problem had grown and demanded more police resources, so let's do even more of the same and have a complete ban. He had not

heard that the proposed ordinance would help to close the gap in existing laws. Laws to enforce all of the examples given were already available.

*Chief Lucero said Health and Safety Code sections governed illicit sales of marijuana, but it was confounded by the whole issue of fraudulent and ridiculous medical justifications. It was limited by the reach of the affirmative defense. The City had experienced being able to do nothing about a large grow in a neighborhood, which included angry neighbors and dangerous conditions and accumulating chemicals. The same dangers, such as, carrying firearms, moving currency, risk of robbery, risk of violence surrounding disputes was a part of mobile trafficking, as well.*

*Sr. Deputy Attorney Rasiah stated that the current ordinance had a gap that allowed indoor cultivation where it was not visible from the street or from public places. The photos shown had been taken at locations that fell within that gap. Staff hoped to close that gap by prohibiting those types of grows.*

- What had been shown tonight had nothing to do with legitimate grow operations. They were enforceable under the City's Building Code enforcement.

*Chief Lucero said that they had had to walk away from some grow operations, which was that gap.*

**Commissioner Reed** concurred with many of **Commissioner Pentaleri's** questions and comments. He agreed that the outdoor grow on Thane's Court that could be seen by children walking by was ridiculous and irresponsible. A person with a legitimate claim should be able to grow indoors and use his medicine, accordingly. He didn't want to see people who needed their medicine to lose it. He appreciated the Police Department's service, because this was a very tough spot and he knew that they saw illegitimate grows that should be taken down. He asked:

- How would someone with a legitimate medical claim grow marijuana, if this Amendment were passed?

*Chief Lucero replied that the ordinance would not pertain to possession, so it would not impact the ability of a person to possess marijuana. It would apply only the ability to grow it. It would be an absolute prohibition.*

- If someone was prohibited from growing and had to purchase marijuana, wouldn't that introduce an element of criminality, because of a possible illegal purchase?

*It would depend upon where that person chose to go.*

- He agreed, but some people would "chose the wrong way."

*Sr. Deputy Attorney Rasiah added that this ordinance would not prohibit a person who had an ID card from obtaining medical marijuana from a dispensary elsewhere for either himself or as a Primary Caregiver and using or possessing medical marijuana.*

- It could force them to have additional costs to buy it rather than growing it themselves.

*It would lead to some cost in purchasing medical marijuana from a legitimate dispensary.*

- He did not see a gap that was being covered. He knew of a child who took marijuana to help her with her epileptic seizures. He would not want to take that away from her.

*Chief Lucero added that in child seizure marijuana therapy, the hallucinogenic and intoxicating components were refined out of it, so it was not something that was grown in a warehouse and guarded with a shotgun.*

- If he were a huge grower, he'd be on the City's side; he wouldn't want the guns and criminality. He wasn't sure that the Planning Commission could solve the problem, because he wasn't sure this was the way to go. There must be compassion for those who grow within the proper limits and who need marijuana compared with those who have taken advantage of the laws.

**Commissioner Leung** questions were:

- If this recommendation were approved, could it be modified after March 1, 2016?  
*Sr. Deputy Attorney Rasiah* replied that it could certainly be modified after the ban was enacted.
- Did the Chief have the number of existing legitimate users of marijuana in the City at this time?  
*Chief Lucero* said that the uses they had encountered were fictitious, whatever they had used to obtain their marijuana card. No data base or records that they could go to existed for that type of information.
- How many dispensaries were licensed to sell medical marijuana in the City?  
*Dispensaries were not allowed.*
- Oh, yes, they're banned. With commercial delivery banned, what would happen to a licensed user who had obtained marijuana on the black market?  
*Sr. Deputy Attorney Rasiah* stated that delivery whether or not for profit could only be accomplished by dispensaries or through a technology platform either operated by the dispensary or independently licensed. The black market would be a different situation from a legally operated dispensary and it would fall outside the scope of the State legislation. A qualified patient or a primary caregiver who travelled outside the City to a licensed dispensary, obtained medical marijuana and returned to Fremont was not intended to fall within the scope of this delivery ban. The delivery ban pertained to commercial for-profit delivery of medical marijuana.
- If approval were recommended, what would happen to all of the existing cultivation?  
*A provision in the Draft Ordinance, called the Amortization Clause, would provide a grace period that would allow indoor cultivation that was not visible from the street to become legal nonconforming. No new use would be allowed after the date that the Ordinance was passed. The preexisting uses would be for a six-month period after the effective date of the Ordinance. A mechanism would be available by which those users could request an extension on a case-by-case basis and a process would allow for a smaller, truncated hearing to consider that person's individual factors.*
- Would one apply through the City, locally, for the extension?  
*Yes, through the City.*

**Commissioner Dorsey's** questions were:

- Under Compassionate Use, was the amount of plants limited if one had a card?  
*Sr. Deputy Attorney Rasiah* replied that the Compassionate Use Act didn't have a plant limit; however, a "safe harbor" had been created to allow six mature plants or 12 immature plants to be grown by qualified patients or their primary caregivers. After that provision was enacted, the courts decided that limitation was an unlawful amendment to

- the Compassionate Use Act, because it created a limitation on the number of plants that a qualified patient or primary caregiver could use when the Compassionate Use Act had no such limit. The six mature/12 immature limit had been left in place, since it still had some legal significance. Different cities had taken different approaches. Some cities, like Fremont, had banned dispensaries, others had enacted a quite detailed regulatory scheme to govern dispensaries, as was the same for cultivation.*
- How was the law not violated with the data showing that 2,177 plants were seized in 2015, which obviously exceeded the limit?  
*The law did not specify a limit. The six mature/12 immature-plant safe harbor was the defense for a qualified patient. Anything more was a grey area.*
  - Could the City limit the number of plants?  
*He was not recommending this, but the City could allow qualified patients or caregivers to have a certain number of plants or to cultivate within a certain square footage area in their residences, which would avoid the State from becoming the sole licensing authority. There were two different concepts: the ordinance before the Commission was a local land use regulation and under State law, the 6 plant/12 plant limit allowed the ability to assert a defense to a criminal prosecution.*
  - The bigger elephant in the room, which could not be solved by the Planning Commission, was that people were obtaining these cards for fraudulent reasons and using them for profit.
  - Legal marijuana use in the State would be coming on the ballot within the foreseeable future, as had happened in other states. Were statistics available about uses in Colorado, for instance, among youths? Had it increased since marijuana had been legalized there?  
*Chief Lucero replied that a lot of data was coming from Colorado. His greatest fear surrounding this whole topic was for the future of the adolescent population and the current 22 percent use. Toxicity levels had been between 1/2 and 4 percent THCs in the '60s when the marijuana urban lore began. Currently, it was at about mid-20s percent from plants grown in Alameda County and he had heard it was as high as the 30s. In Colorado, according to the extraction labs, it was in the 90s. Drug-based suspensions, expulsions and hospitalizations were up.*
  - People who were going to grow marijuana, would continue, regardless of the law. Would this amendment give the Police Department more of a leg to stand on?  
*This would be a way to bring that conduct to a stop without the need to prove that it was illegitimate or even getting into that debate.*

**Commissioner Karipineni** stated that the obvious choice seemed to be to limit the amount of marijuana that would be allowed to grow. Her questions were:

- Why wasn't it being recommended?  
*Chief Lucero replied that, to some degree, it was the slippery slope discussion. An indoor-grown plant yielded one to two pounds at maturity with one pound being 454 grams, two doses. Twelve plants would equal thousands and thousands of doses with a retail value worth \$2,500 to \$3,000 per pound when sold in bulk. It was a very meaningful presence.*
- Was there a way to limit it? Or was there some number at which limiting it would make sense? What if the number were one? A number that would allow people to grow it for

their own use at home, but not enough to sell it or use it in ways that created all of these other problems?

*He did not believe there was room to work under that scenario. He would have no practical way to oversee any of that, as was true at this time.*

**Chairperson Bonaccorsi** asked:

- Concerning delivery, would a service like Uber or Lyft not be allowed to be used for delivery from a dispensary outside the City limits?

*Sr. Deputy Attorney Rasiah replied, "Yes, exactly right."*

- What about someone who may be a qualified patient and had a valid ID who was homebound and did not have a primary caregiver? Someone who could not drive out of the City limits to obtain legal marijuana?

*A primary caregiver could go to a legitimate dispensary and bring back marijuana to that individual.*

- What about someone who did not have a primary caregiver?

*Commercial delivery would be prohibited, but not an individual or a friend, picking it up for a qualified patient.*

- The genesis of this urgency legislation by the City Council, and this evening's recommendation, was the concern that under the October 2015 State law, if a regulatory scheme by the City was not in place, then the State would be the sole licensing authority.

*Correct. The State law stated that if a City did not have land use regulations or ordinances regulating or prohibiting the cultivation of marijuana, commencing on March 1, 2016, the State would become the sole licensing authority for medical marijuana applicants in the City. The current ordinance permitted cultivation indoors where it was not visible from the street or public places. The question is, was that enough of a regulation to avoid the State becoming the sole licensing authority? The answer was probably, but it was not clear. If the City wished to ban cultivation completely, it should be done now before March 1, 2016, when someone might argue that the State was the sole licensing authority for the City.*

- The issue of licensing was for cultivation. No one would argue the dispensary issue, since it had been embedded into the City's local codes since 2006. Neither was he talking about delivery. Did the licensing requirements, under State law, dealt with commercial cultivation for-sale medical marijuana?

*Correct, in some respects. It also reached beyond commercial cultivation by authorizing cities to ban cultivation altogether. It did create this regulatory scheme with various State agencies having oversight over commercial cultivation.*

- On one end, the State law involved many areas of regulation, such as how to get a license, what could be done with the license, primarily for commercial use and at the other end was the issue of personal use. Correct?

*To clarify, it was primarily aimed at commercial cultivation, but it didn't entirely distinguish between for-profit and nonprofit cultivation, either. Qualified patients, who cultivated marijuana within a 100 sq. ft. space in their residence, were not required to obtain a State license, along with those primary caregivers who cultivated marijuana for no more than five patients in up to 500 sq. ft. In spite of that, the City could still ban cultivation. With this "carving out" the legislature was not as concerned with the small-scale cultivators of personal medical marijuana.*

- The March deadline was really an issue about how to adequately license use within the City, either through a complete ban or something short of that, so that the City did not forfeit as a local jurisdiction or delegate back to the State the sole licensing authority. Under Question No. 3 from the list of Frequently Asked Questions from the League of Cities, specifically AB243, Health and Safety Code, 11362.777 subdivision G, which was cited above, this section regarding licensing did not apply to “a qualified patient cultivating marijuana if the area he/she uses to cultivate marijuana does not exceed 100 sq. ft. and he/she cultivates marijuana for his/her personal medical use and does not sell, distribute, donate or provide marijuana to any other person or entity.” He suggested going to the full extent of the law that was needed, but carving out this personal use exception so that the March deadline could come and go, because it would never apply, anyway.

*If the City Council enacted a regulatory scheme where a qualified patient had some specific number of plants or a specific space to cultivate marijuana, which would be enough, according to the League, for the City to avoid forfeiting its local control.*

- That would allow time to evaluate something between a 100 percent ban and something even less, perhaps, than 100 sq. ft. as to personal use that everyone could agree upon. *He was right. It would not foreclose future amendments to the City’s land use regulations.*

**Chairperson Bonaccorsi** opened the Public Hearing.

**Denise Martelacy**, Alameda County Brownie Mary Democratic Club President, stated that Cal Normal had said that three to five percent of the population were cannabis patients. State regulations for personal use allowed a 10 ft. by 10 ft. grow area for personal use. Everyone was concerned about access by children to medical cannabis. If it gets on the ballot, the number one criteria was to keep it away from kids. The League of Cities had gone to every city in the State asking them to implement these laws. Today, she had attended the Alameda County Board of Supervisors’ meeting for the exact same reason. Surprisingly, everyone embraced it with licensing and regulations for the two dispensaries in the unincorporated area. She was a patient and she understood the effort it took to drive out of the area to Oakland for her medicine. People here in Fremont had to drive to San Jose or to Oakland. Banning it would not keep it out of one’s neighborhoods. It was better to have access to regulated cannabis with no pesticides. The new regulations would also control what type of pesticides could be used, which should help people to feel safer.

**Commissioner Pentaleri** asked her to finish her comments.

**Ms. Martelacy** continued that it would be important to people who could bring their medicine to them. Under current law, the delivery person would be tied to a dispensary, fingerprinted and would undergo a thorough background check. They would carry a manifest to allow them to verify that the receiver was the exact patient who was supposed to be receiving that medicine.

**Chairperson Bonaccorsi** asked if the Board of Supervisors had recommended a complete ban?

**Ms. Martelacy** replied that not at all. In the unincorporated area, they had been allowed to use flowers as medicine, only. No edibles or salves, etc. Delivery from dispensaries had been embraced. They would also be allowed edibles and concentrates. This was the first time, in ten years, that she had walked away from a meeting with a smile on her face. Everyone should feel comfortable, now, with State regulation.

**Rick Twellinger** stated that he was the Vice President of the Alameda County Brownie Mary Democratic Club. His daughter had epilepsy and he had bad arthritis and a bad back. Their medicine was delivered once a week from a delivery service in the business. His daughter couldn't drive because of her epilepsy. Some patients needed larger amounts and grew their own, which allowed them to know all about how it was grown. A few plants indoors out of site didn't hurt anyone. Cannabis was expensive, because of limited sources, which was the major factor behind the decision to grow it. So many people died from horrible side effects of pharmaceuticals, but no one died from cannabis. People needed to be able to grow it on their own.

**Larry Wing** stated that he lived on Thane Street, not Thane Court, next door to that major marijuana grower where the photos were taken. In his neighborhood, the plants were 12 to 15 ft. tall and 12 to 15 ft. in diameter. They were not grown for personal use. No one wants to stop a child with epilepsy from using the medicine that worked for her, but he supported **Chief Lucero's** position, because of the people who abuse the law and scam the system for the profit. His neighborhood was a residential community with families and children that he had lived in for 36 years. This marijuana grower was across the street from his house, along with a daycare center and a church. Since outdoor growing was no longer legal in the City, this grower had converted his large outbuilding at the rear of his property to year-round marijuana growing. Outdoors allowed for one season of growing. Indoors allowed many crops throughout the year. He had a guard dog and had retrofitted the building with high capacity electrical. His property was surrounded with dozens of security cameras and flood lights to protect his home and crop. It had done nothing for the community. When he was growing outdoors, the speaker's wife had witnessed intruders stealing his marijuana and fighting with the dogs, since their home was next door just ten feet from the plants. In the Bay Area, similar robberies were committed, along with home invasion robberies at gunpoint and fires had occurred. The grower on his street had told the Police that he was part of a co-op to supply dispensaries and was not growing for his own use. The City of Fremont did not allow dispensaries, but did allow the growers who supplied the dispensaries. That was wrong. The dispensaries were actually a benefit to San Jose, because they created tax revenue and they were regulated. They weren't allowed to locate next to schools and churches and neighborhoods and were restricted to certain areas.

**Commissioner Pentaleri** asked the speaker to take some extra time to share more of his insights.

**Mr. Wing** finished with stating that it was ironic that dispensaries that would produce tax revenue were not allowed, would be out in the open, have security and would be located only in certain areas, yet outdoor growing was allowed in neighborhoods that did nothing good. With the building located just 20 feet from his bedroom, they could hear motors and exhaust

fans and air conditioners and noise all the time. He was speaking for his neighbors, also, who were still afraid for their safety. It really hadn't changed from two years ago. It had just gone indoors.

Questions to the speaker were:

- **Chairperson Bonaccorsi** asked the speaker if safety was worse, because it was now indoors, as opposed to the outdoor growth. Did he support having dispensaries in the City?  
*Mr. Wing stated that it had not changed; it was the same. He wasn't sure about the dispensaries. He wasn't against someone who had medicine that helped him. He agreed with Chief Lucero about people being able to obtain a card by making up stories. He had heard that the grower next to him had offered the neighbor on the other side of the grower's property \$100,000 for the use of his property for growing marijuana.*
- **Commissioner Pentaleri** recalled this issue on Thane Street from two years ago. He had been amazed that the odors couldn't be addressed through existing nuisance ordinances. Had his community been down that path?  
*Mr. Wing agreed. He believed that it was difficult to get ordinances enforced. Noise, also, seemed difficult to be enforced.*
- **Commissioner Pentaleri** asked if he was suggesting that this issue should be regulated like the City of San Jose did with constraints on appropriate land use, like regulating any other land use. To his knowledge, had building inspectors looked at this operation?  
*Mr. Wing felt that neighborhoods should feel safe and keep large capacity, industrial sized growers from being near where people live. Yes, they had and everything was up to code.*

**Chairperson Bonaccorsi** closed the Public Hearing.

**Commissioner Pentaleri** stated that he was struggling with going to the extreme of banning marijuana where this was really a land-use problem. He couldn't think of any other instance where prohibition on a land use had occurred as opposed to just regulating it. There should be a middle ground.

**Sr. Deputy Attorney Rasiah** agreed that a middle ground could be had if cultivation were limited to a certain number of plants or a certain area within a home. That would be enough to avoid the State from becoming a sole licensing authority. However, a complete ban would stop the effect on neighborhoods and attracting criminal activity.

**Commissioner Pentaleri** stated that Land use could be regulated. For example, if an applicant wanted to put a multiuse building up on a piece of property, it could not exceed a specific height if it couldn't have a setback of at least 50 feet from the property line. Cultivations could be prohibited in a residential neighborhood.

**Sr. Deputy Attorney Rasiah** replied that underlying all of this is the fact that marijuana was still illegal under Federal law and had a high market value and attracted criminal activity, as a result. If an initiative was passed on the November 2016 ballot making recreational

marijuana use legal under State law, things could change in some respects. We'll have to wait and see.

**Chief Lucero** stated that a number of issues were imbedded within the conversation taking place. The implied question was about dealing with this grow on Thane Avenue. The City had invested hundreds of hours in trying to mitigate the problem there. He was very sympathetic with the residents and concerned about how upsetting the whole situation was. They were stuck with it. Efforts had been made to apply building code and make site inspections, along with consultations with the prosecutor's office were to no avail. The issues about personal use, 100 sq. ft., all turned on the illusive "for personal use." There would be no oversight for that, because a basis was not available to say it was for personal use or not for personal use. That was why he believed the ban was the right response.

**Commissioner Reed** appreciated the tough situation that the Police Department was in and thanked them for their outstanding service.

- He asked if the problem would have been alleviated on Thane Street if the cultivation had been limited to the 6/12 plants.  
*Trying to label something by the number of plants was pretty ambiguous.*
- What about square footage?  
*It wouldn't eliminate the problem, but it would be a defined limit.*
- Wouldn't the noise be less if the cultivation was smaller?  
*Yes, the scope affected the magnitude of the problem.*
- If the 6/12 plants rule was in effect, couldn't the grower be told he'd go to jail if he had more?  
*No, a land use ordinance would allow only abating the problem. At best, it would require someone to reduce their grow.*
- Would that help the neighbor's issues and lower the problems?  
*It would be incremental, but it would not eliminate the problem.*
- Was he overreaching when he assumed a much smaller grow area on Thane Street wouldn't have the same problem?  
*Obviously, the size of the grow would affect the scope of the problem.*
- He believed that having a specific number of plants or using a certain amount of space would allow the City to enforce adherence by a marijuana cultivator.  
*His opinion was that would not eliminate the problem.*
- If there was no ambiguity and the number of plants was clear and concise, would that eliminate the problem?  
*The number of plants was not a useful reference when how big the plant could grow, along with other considerations, was not answerable.*

The discussion went on for some time without an agreement being reached.

**Commissioner Karipineni** also expressed her appreciation of those who were working together to solve these problems. Based upon what she had read about what was going on in other communities, this was not a problem that could be solved. "People are going to do this." Creating a strict land-use policy would allow for an additional and different kind of

tool by which it could be regulated, but it won't ever be eliminated. So long as marijuana was expensive, people would want to grow it and they will find ways to do it. It did not mean that everything possible should not be done to protect people. She was inclined to try to find a way to allow people to grow a certain amount of marijuana for their personal use. It would be a real shame to take this away from people who truly needed marijuana and could force them to look to the black market for medications that might be unsafe. She agreed that an argument could be made for a slippery slope.

She proposed a motion that would allow the cultivation of medical marijuana indoors and away from windows within an area of no more than 50 sq. ft. by people who had a medical identification card. She was open to amendments.

**Commissioner Leung** stated that she might be the only person on the Commission who fully supported the staff recommendation. A tiny, little, hairline gap would allow a licensed user to grow a limited amount of marijuana. It could also allow the chance for a small, hairline gap to become a canal. The families and neighborhoods in Fremont would be further protected by this recommendation, along with minimizing the possibility of criminal activities through the cultivation of marijuana. It would also avoid adding an unnecessary load to the law enforcement capacity in the City of Fremont.

**Sr. Deputy Attorney Rasiah** pointed out that four votes would be required to move the positive recommendation to City Council.

**Chairperson Bonaccorsi** shared **Chief Lucero's** concern in keeping the citizens of Fremont safe, along with the backdoor intrusion to the City's adolescents. His model was more a regulatory licensing model rather than a law enforcement model. The State legislation had provided cities with the opportunity to follow a regulatory licensing model rather than a criminal enforcement. He was prepared to support a model that was far more conservative and restrained than what the City could do if the State legislation were followed.

Not debated was that one of the advantages of this legislation was that local jurisdictions would have the power to tax. He thought dispensaries should be allowed, because he had enormous respect for the City's law enforcement, which had some of the highest caliber of police officers in the state. He'd like to see the City be in the forefront of making this legislation work in a safe, reliable way. The City could create a model of how dispensaries work, how to license, and how to regulate. He would not support tonight's recommendation.

**Commissioner Karipineni's** motion was just a personal use exemption that would not trigger the March 1, 2016, deadline. One of the things about AB 243 was that the California Department of Food and Agriculture would develop all of the regulations that dealt with toxicity, water, electricity, all of the health and safety concerns the Chief had raised.

He suggested a Friendly Amendment that would take the actual language of the exemption under State law so that it was absolutely clear that the personal use would apply, not exceeding 50 sq. ft., and that he/she would cultivate medical marijuana for his/her own personal medical use and would not sell, distribute, donate or provide marijuana to any other person or entity.

Accepted by both **Commissioners Karipineni** and **Reed**.

If the Chief received a complaint that people were coming up to the door, even at 45 feet or 30 feet, buying it or it was going to a co-op, that would violate the ordinance that he was suggesting. It could be measured; it would be pretty objective. Was it 51 sq. ft.? Now, the Chief may have some prosecutorial problems. Looking at 11362.5 of the Health and Safety Code, it found in 1996 that “to insure that seriously ill, Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana in the treatment of cancer, anorexia, aids, chronic pain, spasticity, glaucoma, arthritis, and other things that marijuana will give a relief.” He would whole heartedly support the motion.

**Commissioner Pentaleri** agreed with other speakers comments that were directed towards **Chief Lucero** and his team. He lived in a neighborhood where there was “bad stuff happening over there and I see your team, basically, on daily basis.” He also appreciated **Mr. Wing**’s comments, because that was where the rubber hit the road. Although well intentioned, the proposed ordinance (sic) would be regressive and wrong-headed for the same reasons the original ordinance was deeply flawed. As part of the justification for the proposed ordinances, staff report page 339 said, “There’s also a general concern that many individuals who cultivate marijuana may not be qualified patients, caregivers, cooperatives or collectives in compliance with State guidelines and, thus, are engaged in activity that is illegal under both California and Federal law.” He was struggling to see if this ordinance would do anything to enhance enforceability or public safety.

Where else was activity, land uses or products proposed to be prohibited because of a general concern that many individuals may not comply with already existing laws or ordinances. Were the sales of automobiles banned as a result of this kind of concern? Or alcohol? Or firearms? Or Kitchen cutlery? Unreasonable prohibitions, like the one being proposed tonight, created the economic force that had led to the greatest hazard in the community. According to the Staff Report, the 2014 ordinance had not had the effect of reducing drug-related problems in the City nor had it made the existing laws more enforceable.

He shared two stories that involved the positive use of medical marijuana. He asked for advice on proposing another Friendly Amendment.

Both **Commissioner Karipineni** and **Commissioner Reed** were willing to hear it.

**Chairperson Bonaccorsi** asked if his Friendly Amendment was to suggest a personal use exception through a technical platform through delivery.

**Commissioner Pentaleri** stated, “Yes, precisely.” Another public speaker had spoken about how access to delivery services was important. He wanted to see a well-regulated marketplace that included delivery.

**Chairperson Bonaccorsi** then suggested that staff consider a local license along with a State license to allow that kind of limited delivery.

**Commissioner Karipineni** stated that although she was open to the Friendly Amendment, the devil was in the details and she was unable to articulate what it would look like as part of this particular motion.

**Chairperson Bonaccorsi** suggested a way to cover the gap, potentially, under State licensing laws, would be to allow for delivery for personal use, only, from outside the City from a licensed dispensary that complied with local and State law in terms of licensing.

**Commissioner Karipineni** still was not comfortable without specific conditions.

**Chairperson Bonaccorsi** suggested that the Friendly Amendment would direct staff to look or explore the possibility of licensed delivery for personal use.

Both **Commissioner Karipineni** and **Commissioner Reed** agreed.

**Sr. Deputy Attorney Rasiah** stated that Deliveries already had its own requirements. In light of further State regulations, he suggested that from the Planning Commission's point of view, to decline to recommend the ban on deliveries rather than directions to staff that were difficult to articulate, because the law was still developing. He suggested that banning deliveries be removed from the Amendment. If it did not ban deliveries, then they would still be governed by the new State legislation and by subsequent regulations.

**Sr. Deputy Attorney Rasiah** restated the motion: Staff recommendation, which includes CEQA finding, except to allow medical marijuana cultivation indoors and not visible from the street, sidewalk or public places, as currently specified in the Municipal Code. For personal use, no more than 50 sq. ft. and where that person cannot sell, distribute, donate, or provide marijuana to any other person or entity. Recommend that the City Council not enact a ban on delivery of medical marijuana to a person who was a qualified patient and had an identification card or was a primary caregiver.

Both **Commissioner Karipineni** and **Commissioner Reed** agreed.

**Commissioner Dorsey** asked about being a certain distance from schools.

**Sr. Deputy Attorney Rasiah** stated that an existing State Statute prohibited cooperatives, collectives and dispensaries from locating within 600 feet of schools. It did not relate to personal cultivation.

**Commissioner Dorsey** asked how it could be limited to be a safe distance from daycare facilities or where young children would be outside on a regular basis.

**Sr. Deputy Attorney Rasiah** suggested adding "and also to limit these cultivation activities within a certain distance from a daycare facility or schools."

**Commissioner Karipineni** doubted that a licensed daycare facility would have marijuana growing on the property. So she didn't think that amendment was necessary.

After some discussion, it was decided to not include **Commissioner Dorsey's** suggestion.

IT WAS MOVED (KARIPINENI/REED) AND CARRIED BY THE FOLLOWING VOTE (6-1-0-0-0) THE PLANNING COMMISSION – FOUND THAT THIS PROJECT IS EXEMPT FROM THE REQUIREMENTS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) PER SECTION 15061(B)(3) OF THE CEQA GUIDELINES IN THAT IT IS NOT A PROJECT WHICH HAS THE POTENTIAL TO CAUSE A SIGNIFICANT EFFECT ON THE ENVIRONMENT;

AND

FOUND THAT THE PROPOSED ZONING TEXT AMENDMENT IS CONSISTENT WITH THE GENERAL PLAN IN THAT GENERAL PLAN LAND USE POLICY 2-2.5 ENCOURAGES USING ZONING REGULATIONS TO IMPROVE FREMONT'S QUALITY OF LIFE, REDUCE NUISANCES, ACHIEVE COMPATIBILITY BETWEEN ADJACENT USES, AND PROTECT THE HEALTH AND SAFETY OF RESIDENTS, VISITORS, AND WORKERS;

AND

FOUND THAT THE PROPOSED AMENDMENT FURTHERS THE PUBLIC INTEREST, CONVENIENCE, AND GENERAL WELFARE OF THE CITY BECAUSE IT WOULD REDUCE NEGATIVE IMPACTS RESULTING FROM MEDICAL MARIJUANA CULTIVATION AND DELIVERY, THEREBY IMPROVING NEIGHBORHOOD QUALITY OF LIFE AND REDUCING HEALTH AND SAFETY CONCERNS;

AND

RECOMMENDED THAT THE CITY COUNCIL INTRODUCE AN ORDINANCE APPROVING THE PROPOSED ZONING TEXT AMENDMENT AS SHOWN ON EXHIBIT "A" EXCEPT TO ALLOW MEDICAL MARIJUANA CULTIVATION INDOORS AND NOT VISIBLE FROM THE STREET, SIDEWALK OR PUBLIC PLACES, AS CURRENTLY SPECIFIED IN THE MUNICIPAL CODE, ONLY FOR PERSONAL USE, IN AN AREA OF NO MORE THAN 50 SQ. FEET, AND THAT PERSON COULD NOT SELL, DISTRIBUTE, DONATE, OR PROVIDE MARIJUANA TO ANY OTHER PERSON OR ENTITY.

AND

RECOMMEND THAT THE CITY COUNCIL NOT ENACT A BAN ON DELIVERY OF MEDICAL MARIJUANA TO A PERSON WHO WAS A QUALIFIED PATIENT AND HAD AN IDENTIFICATION CARD OR WAS A PRIMARY CAREGIVER.

The motion carried by the following vote:

AYES: 6 – Bonaccorsi, Dorsey, Karipineni, Pentaleri, Reed, Salwan  
NOES: 1 – Leung  
ABSTAIN: 0  
ABSENT: 0  
RECUSE: 0