COMMENT FORM

OREGON CITY

*****PLEASE PRINT CLEARLY*****

- SPEAK INTO THE MICROPHONE AND STATE YOUR NAME AND RESIDING CITY
- Limit Comments to ***3 MINUTES***.
- Give to the Clerk in Chambers ***prior*** to the meeting.

Date of Meeting 8/11

Item Number From Agenda 3a LE-16-0001

NAME: Mario Mamone

ADDRESS: **Street:** 2305 Talone ST.

City, State, Zip: West Linn, OR 97068

PHONE NUMBER: 503 793-6976

E-MAIL ADDRESS:

SIGNATURE:

2

COMMENT FORM

PLEASE PRINT CLEARLY

- SPEAK INTO THE MICROPHONE AND STATE YOUR NAME AND RESIDING CITY
- Limit Comments to ***3 MINUTES***.
- Give to the Clerk in Chambers ***prior*** to the meeting.

Date of Meeting August 8, 2016

Item Number From Agenda 1 Marijuana Dispens. (3a) LE-16-0001

NAME: Doug Neeley, Oregon City Together

ADDRESS: **Street:** 11614 Parrish Road

City, State, Zip: Oregon City, Oregon 97045

PHONE NUMBER: 503-650-5035

E-MAIL ADDRESS: intstats@sbcglobal.net

SIGNATURE: Doug Neeley

(1)

EXHIBITS ENTERED INTO THE RECORD AT A HEARING

Community Development Department, 221 Molalla Avenue, Suite 200, P.O. Box 3040, Oregon City, OR 97045, (503) 722.3789
www.orcity.org

Hearing Date: 08. 08. 2016 PC

File Number: LE-16-0001: Marijuana Regulations

Exhibit Number:	Description of Exhibit:	Submitted By:
A	Oregonian Article on marijuana odor	Mario Mamone
B	Oregonian Article on Fairview lawsuit	" "
C	League of Oregon Cities "Local Govt. Reg. of Marijuana: 3rd Ed.	" "
D	Revised Location Maps (5)	Staff.
E	Staff PowerPoint Presentation	Staff

OREGON CITY
Community Development – Planning
221 Molalla Ave. Suite 200 | Oregon City OR 97045
Ph (503) 722-3789 | Fax (503) 722-3880

OREGON CITY PLANNING COMMISSION

Tally of Votes

Planning Commission Hearing Date: 08.08.2016

Board Members Present	Staff Present
Tom Geil	Walter
Denyse McGriff	Terway
Damon Mabee	Dirkes
Charles Kidwell	
Paul Espe	

Agenda Item: 3a. Marijuana Business Regulations

Decision: Approve with Conditions (Approve) Deny Continue to _____

	Motion:	Second:	Aye:	Nay:	Abstain:	Comments:
Commissioner Geil	1		✓			as amended
Commissioner McGriff			✓			bulleting amendment
Commissioner Mabee		2	✓			
~~Commissioner Henkin~~						
Commissioner Espe			✓			
~~Commissioner Mahoney~~						
Chair Kidwell					✓	

Agenda Item: May 18, 2015 Minutes

Decision: Approve with Conditions (Approve) Deny Continue to _____

	Motion:	Second:	Aye:	Nay:	Abstain:	Comments:
Commissioner Geil			1			
Commissioner McGriff	1		1			
Commissioner Mabee			1			
~~Commissioner Henkin~~						
Commissioner Espe		2	1			
~~Commissioner Mahoney~~						
Chair Kidwell			✓			

OREGON CITY

Community Development – Planning

221 Molalla Ave. Suite 200 | Oregon City OR 97045
Ph (503) 722-3789 | Fax (503) 722-3880

OREGON CITY PLANNING COMMISSION

Tally of Votes

Planning Commission Hearing Date: 08.08.2016

Board Members Present	Staff Present
Tom Geil	Waller
Denyse McGriff	Tierney
Damon Mabee	Richter
Charles Kidwell	
Paul Espe	

Agenda Item: June 8, 2015 Minutes

Decision: Approve with Conditions Approve Deny Continue to _____

	Motion:	Second:	Aye:	Nay:	Abstain:	Comments:
Commissioner Geil			✓			
Commissioner McGriff	1		✓			School district sites - disclosure
Commissioner Mabee		2	✓			
~~Commissioner Henkin~~						
Commissioner Espe			✓			
~~Commissioner Mahoney~~						
Chair Kidwell			✓			

Agenda Item: Aug 24, 2015 Minutes

Decision: Approve with Conditions Approve Deny Continue to _____

	Motion:	Second:	Aye:	Nay:	Abstain:	Comments:
Commissioner Geil			✓			
Commissioner McGriff		2	✓			
Commissioner Mabee	1		✓			
~~Commissioner Henkin~~						
Commissioner Espe			✓			
~~Commissioner Mahoney~~						
Chair Kidwell			✓			

OREGON CITY

Community Development – Planning

221 Molalla Ave. Suite 200 | Oregon City OR 97045
Ph (503) 722-3789 | Fax (503) 722-3880

OREGON CITY PLANNING COMMISSION

Tally of Votes

Planning Commission Hearing Date: 05 . 08 . 2016

Board Members Present	Staff Present
Tom Geil	Walter
Denyse McGriff	Tarnay
Damon Mabee	Durheim
Charles Kidwell	
Paul Espe	

Agenda Item: Sept 14, 2015 Minutes

Decision: Approve with Conditions Approve Deny Continue to _____

	Motion:	Second:	Aye:	Nay:	Abstain:	Comments:
Commissioner Geil			✓			
Commissioner McGriff		2	✓			
Commissioner Mabee			✓			
~~Commissioner Henkin~~						
Commissioner Espe	1		✓			
~~Commissioner Mahoney~~						
Chair Kidwell			✓			

Agenda Item: Sept. 28, 2015 Minutes

Decision: Approve with Conditions Approve Deny Continue to _____

	Motion:	Second:	Aye:	Nay:	Abstain:	Comments:
Commissioner Geil	1		✓			
Commissioner McGriff		2	✓			
Commissioner Mabee			✓			
~~Commissioner Henkin~~						
Commissioner Espe			✓			
~~Commissioner Mahoney~~						
Chair Kidwell			✓			

ITEMS ENTERED INTO RECORD
FILE: LE-16-0001
DATE: 8.08.2016
EXHIBIT: A
SUBMITTED BY: Mario Mamone

Odor of marijuana smoke wafting from neighbor's apartment not legally "offensive," appeals court rules

By **Aimee Green | The Oregonian/OregonLive**
Email the author | Follow on Twitter
on August 20, 2015 at 5:00 AM, updated August 21, 2015 at 12:39 PM

The Oregon Court of Appeals on Wednesday refused to declare the smell of marijuana smoke wafting into neighbors' homes "unpleasant."

The appeals court ruled that although rotten eggs or raw sewage are "physically offensive" odors to all, marijuana smoke isn't necessarily so.

"We are not prepared to declare that the odor of marijuana smoke is equivalent to the odor of garbage. Indeed, some people undoubtedly find the scent pleasing," the appeals court wrote in throwing out the second-degree criminal mischief convictions of a Philomath man whose home was searched in 2012 because of the aroma of pot drifting from it.

The ruling is sure to strike a chord with some Oregonians who involuntarily have become familiar with the smell of cannabis originating from neighboring houses or apartments with the legalization of recreational marijuana on July 1. Given the appeals court ruling, recreational users may rest assured that smoking pot at home shouldn't draw any hassles from police.

The appeals court considered the case of Jared William Lang. He was 34 in November 2012 when a Philomath police officer visited his apartment after neighbors on both sides reported the smell of marijuana coming from his unit. One person told the officer "that the smell was especially difficult for him because he was currently attending rehabilitation for drug abuse and the smell of marijuana was a 'trigger' for him," according to the appeals court summary of the case.

MARIJUANA NEWS

New York City cleaned up its mess; why not Portland? (Letters to the Editor)

Watch: Oakland Raiders LB Aldon Smith appears to livestream himself violating NFL's drug policy

Town hall on fuel tax, marijuana tax set for Aug. 3 at West Linn High School

County Board approves marijuana sales tax vote for November ballot

Portland air quality, marijuana and Steve Novick's diesel idea: Letters to the Editor

All Stories

Another neighbor said that he'd lived in his unit for eight years and that "the neighbors in the middle rental (had) gotten worse and worse," according to the summary. Two more neighbors said they smelled pot coming from Lang's unit two to three times per a week.

The officer noted that he could smell burnt marijuana upon arrival at Lang's apartment. The officer asked a Benton County judge for a search warrant of Lang's unit -- on the grounds that Lang might have committed second-degree disorderly conduct by creating a "physically offensive" smell.

The judge granted the warrant and the officer found evidence of a completely unrelated crime -- aerosol paint cans and stencils that indicated Lang had been spraying graffiti on street signs, walls, fences and other property in Philomath.

Lang was found guilty of three counts of misdemeanor second-degree criminal mischief after a trial in the vandalism case. He was fined $440 and sentenced to several months in jail.

Lang appealed the convictions, arguing that the grounds police used to search his home were bogus. The appeals court found that it couldn't declare the odor of marijuana smoke offensive -- or not -- to the average person. The appeals court ruled that depends on the "intensity, duration, or frequency" of the smoke.

At some point, the smell could be considered offensive to a reasonable neighbor, especially if the neighbor is in the sanctuary of his or her own home, the apeals court found.

But the court ruled that the officer who applied for the search warrant of Lang's home hadn't sufficiently described an intense, long or frequent odor of pot emanating from Lang's home.

"(A)n odor that is very intense and persistent could reasonably be regarded as offensive even if it ordinarily might be considered pleasant -- perfume, for example, or pungent spices," the appeals court wrote.

"Who determines whether a particular odor is offensive?" the appeals court added. "Although some odors are objectively unpleasant -- rotten eggs or raw sewage come to mind -- others are more subjective in nature."

The ruling was made by a three-judge panel of the appeals court: Timothy Sercombe, Erika Hadlock and Douglas Tookey. (**Read their opinion here**).

-- Aimee Green

agreen@oregonian.com

503-294-5119

o_aimee

Do you think the appeals court got its marijuana-smoke ruling right? (Poll Closed)

Yes. If the smell of pot smoke isn't continuously wafting over to the neighbor's unit for a prolonged amount of time, the complaining neighbors (and police) have no case. **69.51%** (1,908 votes)

No. How bad does the smell have to be before it's considered "physically offensive?" There were multiple neighbors unhappy about the odor, including a recovering drug addict. **30.49%** (837 votes)

Total Votes: **2,745**

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Ad Choices

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
JARED WILLIAM LANG,
Defendant-Appellant.

Benton County Circuit Court
CM1320460; A154498

David B. Connell, Judge.

Submitted January 27, 2015.

Peter Gartlan, Chief Defender, and Kyle Krohn, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Matthew J. Lysne, Senior Assistant Attorney General, filed the brief for respondent.

Before Sercombe, Presiding Judge, and Hadlock, Judge, and Tookey, Judge.

HADLOCK, J.

Reversed and remanded.

HADLOCK, J.

ORS 166.025 provides that a person commits second-degree disorderly conduct if the person creates a "hazardous or physically offensive condition by any act which the person is not licensed or privileged to do" with intent to cause, or recklessly creating a risk of causing, public inconvenience, annoyance, or alarm. Defendant's home was searched pursuant to a search warrant that a circuit court issued after finding probable cause to believe that evidence of second-degree disorderly conduct would be found there. A police officer applied for the warrant after receiving complaints that the odor of burnt marijuana had travelled from defendant's home, the middle unit in a triplex, into the neighboring units. The search revealed evidence that defendant was responsible for several instances of graffiti, and he was charged with criminal mischief. Before trial, defendant moved to suppress the evidence discovered in the search, arguing that the officer's search-warrant affidavit did not establish probable cause to believe that disorderly conduct had occurred. Specifically, defendant argued that the odor of burnt marijuana does not constitute a "hazardous or physically offensive condition" within the meaning of ORS 166.025. The trial court denied the motion, the evidence was introduced at trial, and defendant was convicted of three counts of criminal mischief. On appeal, he renews the contention that the warrant affidavit did not establish probable cause to believe that a physically offensive condition had been created at defendant's home. We agree and, accordingly, reverse and remand.

THE FACTS

The material facts are neither extensive nor disputed. Philomath Police Officer Moser applied for a search warrant and supported that application with an affidavit that set out the following facts. One of defendant's neighbors, D, called the police at 7:30 p.m. one evening and reported that marijuana smoke was coming into his home. Moser was dispatched to the triplex. When he arrived, he could smell marijuana smoke, which seemed to be coming from defendant's home. He knocked on defendant's door, but no one answered, so he left. About an hour and a quarter

later, D called the police and complained again, and Moser returned to the triplex. Two people were standing outside defendant's home. Moser told them that the neighbors were becoming irritated with the smell and asked them to put a fan in a window or do something else to remove the smoke. Moser did not smell any smoke at that time.

Moser then spoke with D and three other people in his residence. They each reported having smelled marijuana inside the residence at 7:30 p.m. D said that he called the police the second time after he "again began to smell the odor." D said that that had not been the first time marijuana odor had come into the home. He told Moser that he had lived there for eight years and that "the neighbors in the middle rental ha[d] gotten worse and worse." One of the other people told Moser that the smell was especially difficult for him because he was currently attending rehabilitation for drug abuse and the smell of marijuana was a "trigger" for him.

Moser next spoke with two people who lived in the third unit of the triplex. They told him that they smelled marijuana two or three times a week, that there was a lot of foot traffic at the middle unit, and that they believed that "meth [was] likely being smoked at the residence in addition to marijuana." Moser asked if that caused them any concern. They said that it did and that they had noticed that the "appeal of the neighborhood ha[d] diminished."

Moser returned to the police department and investigated further. He learned that no resident of the middle unit had a medical marijuana card and that the residence was not a registered site for growing medical marijuana. Moser concluded that the neighbors had been "subjected to a physically offensive condition by the residents of [the middle unit,] who did not have a license or privilege to do so." He submitted the search warrant affidavit to the circuit court, stating in it that he had probable cause to believe that a search of defendant's home would result in the discovery of evidence of second-degree disorderly conduct.[1]

---

[1] In his investigation, Moser also discovered that defendant's residence was located within 1000 feet of a school. The circuit court issued the warrant in part based on probable cause to believe that a search would reveal evidence of unlawful possession of marijuana within 1000 feet of a school, in violation of

The court issued a warrant to search defendant's home. The ensuing search revealed cans of spray paint and stencils that had been used to make graffiti on street signs, walls, fences, and other places around Philomath. Defendant was charged with four counts of criminal mischief. Before trial, he moved to suppress the evidence discovered in his home. The court denied the motion, and, after a jury trial, defendant was convicted of three of the counts.[2]

THE PARTIES' ARGUMENTS ON APPEAL

On appeal, defendant argues that Moser's affidavit did not establish probable cause to believe that disorderly conduct had occurred in his home. Specifically, defendant contends that the odor of burned marijuana is not a "hazardous or physically offensive condition" within the meaning of ORS 166.025. That statute provides, in part:

> "(1) A person commits the crime of disorderly conduct in the second degree if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, the person:
>
> "(a) Engages in fighting or in violent, tumultuous or threatening behavior;
>
> "(b) Makes unreasonable noise;
>
> "(c) Disturbs any lawful assembly of persons without lawful authority;
>
> "(d) Obstructs vehicular or pedestrian traffic on a public way;
>
> "(e) Initiates or circulates a report, knowing it to be false, concerning an alleged or impending fire, explosion, crime, catastrophe or other emergency; or

---

ORS 475.864(4) (2011), *amended by* Or Laws 2013, ch 591, § 2. In his motion to suppress, defendant also challenged that part of the warrant, asserting that ORS 475.864(4) (2011) applied only if marijuana was possessed in a public place and that the affidavit suggested only that marijuana had been possessed inside defendant's private residence. The state conceded the point, and the court did not consider that offense in determining whether the affidavit furnished probable cause to issue a warrant. That part of the court's decision is not at issue on appeal.

[2] The trial court granted the state's motion to dismiss one of the counts based on insufficiency of the evidence. That count is not involved in this appeal.

> "(f) Creates a hazardous or physically offensive condition by any act which the person is not licensed or privileged to do."

Paragraph (1)(f) is the only provision of the statute that potentially applies in this case. Defendant argues that the phrase "hazardous or physically offensive condition" does not include "trivial annoyances," citing our opinion in *State v. Clark*, 39 Or App 63, 67, 591 P2d 752, *rev den*, 286 Or 303 (1979), *overruled on other grounds by* State v. Willy, 155 Or App 279, 963 P2d 739 (1998). He further contends that, for a condition to be hazardous or physically offensive, it must create some physical harm or danger. In defendant's view, the facts set out in Moser's affidavit do not support an inference that the burnt-marijuana odor put anyone in physical danger.

The state responds that a physically offensive condition is one that induces pain or unpleasant sensations in the bodies of other persons. In the state's view, an unpleasant odor is physically offensive because it is "offensive to the sensory organs of the body—the nose." According to the state, the odor of burned marijuana is unpleasant to those who smell it. Indeed, the state asserts, "the 'odor of marijuana' is synonymous with the dictionary example of what is 'offensive' (the 'odor of garbage')." Thus, the state contends, the trial court correctly concluded that Moser's affidavit furnished probable cause to believe that second-degree disorderly conduct had been committed.

ANALYSIS

Article I, section 9, of the Oregon Constitution provides that "no warrant shall issue but upon probable cause ***." When a defendant challenges the sufficiency of a search warrant affidavit, a reviewing court must determine whether "a neutral and detached magistrate could conclude (1) that there is reason to believe that the facts stated are true; and (2) that the facts and circumstances disclosed by the affidavit are sufficient to establish probable cause to justify the search requested." State v. Castilleja, 345 Or 255, 264, 192 P3d 1283, adh'd to on recons, 345 Or 473, 198 P3d 937 (2008).

> "[T]o uphold the warrant, the reviewing court need only conclude that the issuing magistrate reasonably could conclude that the facts alleged, together with the reasonable inferences that fairly may be drawn from those facts, establish that seizable things *probably* will be found at the location to be searched."

Id. at 270-71 (emphasis in original).

Here, defendant has not sought to controvert the facts stated in Moser's affidavit. Accordingly, the question before us is whether those facts furnished probable cause. That probable-cause analysis presents a legal question. *Id.* at 264, 266. Nonetheless, because this case involves review of a search warrant, "we resolve doubtful or marginal cases in favor of the preference for warrants." *State v. Henderson*, 341 Or 219, 225, 142 P3d 58 (2006).

Before we address the parties' arguments, it is important to note that defendant's appeal is limited to challenging whether the affidavit furnished probable cause to believe that someone in his residence had created a physically offensive condition. He does not argue that the affidavit failed to describe evidence sufficient to establish a potential for *public* inconvenience, annoyance, or alarm. That is, he does not argue that the triplex—either the inside of the neighboring residences or the area outside the building—was not a sufficiently public location. Nor does he contend that, even if he created a physically offensive condition, he did not do so "by [an] act which [he was] not licensed or privileged to do." ORS 166.025(1)(f). Moreover, defendant does not argue that the affidavit failed to establish the requisite intent or recklessness. Finally, defendant does not contend that, even if the affidavit sufficiently established probable cause to believe that defendant had committed disorderly conduct, it did not establish probable cause to believe that evidence of that crime could be found in his home. Because defendant does not raise those issues, we assume, without deciding, that the affidavit was sufficient in those respects.

The parties' arguments about the meaning of the term "physically offensive" present a question of statutory interpretation. To determine the legislature's intent, we look to the text of ORS 166.025 in context as well as the

legislative history and, if necessary, to interpretive maxims. State v. Gaines, 346 Or 160, 171-72, 206 P3d 1042 (2009). We begin with the words of the statute themselves. Because the term "physically offensive" is not statutorily defined, we assume that the legislature intended the words to carry their ordinary meaning. "Physically" means "in respect to the body." *Webster's Third New Int'l Dictionary*, 1707 (unabridged ed 2002). "Physical," in turn, means "of or relating to the body <~ strength>—often opposed to *mental*." *Id.* at 1706. "Offensive" means "giving painful or unpleasant sensations" and is synonymous with "nauseous, obnoxious, [and] revolting." *Id.* at 1566. Those synonyms suggest that the word "offensive" implies a greater degree of displeasure or discomfort than the word "unpleasant" might, standing alone.

The wording of the statute undermines defendant's interpretation of "physically offensive" as encompassing only conditions that are dangerous. In making that argument, defendant relies on a definition of "offensive" that the dictionary itself identifies as obsolete: "causing injury or damage: harmful." *See id.* In the context of this statute, the definition of "offensive" noted in the above paragraph makes more sense. As noted, the statute proscribes creating a condition that is "hazardous or physically offensive." The modifiers "hazardous" and "physically offensive" are listed disjunctively. That is, a condition proscribed by the statute can be hazardous without being physically offensive, and vice versa. Thus, defining "physically offensive" as limited to harmful or injurious conditions would make it redundant to the proscription of creating hazardous conditions. We assume that the legislature intended each part of its enactments to have effect and that, when the legislature uses different words, it means different things. *See* ORS 174.010 ("In the construction of a statute, *** where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.").

The legislative history of ORS 165.025 also contradicts defendant's interpretation. The Criminal Law Revision Commission, which drafted ORS 165.025 in 1970 as part of an overhaul of the criminal code, stated that subsection (1)(f) is "a general provision designed to reach activity that

constitutes a public nuisance but that is not specifically proscribed under the other subsections." The commission noted that the provision was "necessitated by the impossibility of itemizing every kind of act properly punishable as disorderly conduct," and it gave one example of specific conduct that the statute was meant to reach: "use of stink bombs in public places." *Former* ORS 166.140(2) (1969), *repealed by* Or Laws 1971, ch 743, § 432, defined "stink bomb" to include any "article or device containing a chemical or substance of an offensive or noxious odor." Thus, while a stink bomb *could* be harmful or injurious (*i.e.*, noxious), it could also be merely offensive—that is, nauseous, obnoxious, or revolting. Accordingly, we reject defendant's proffered interpretation of the term "physically offensive."

The state's interpretation of "physically offensive" to mean a condition that induces unpleasant sensations, on the other hand, is consistent with the wording of the statute; it preserves the distinction between hazardous conditions and physically offensive conditions. It is also consistent with the legislative history; setting off a stink bomb in a public place would still be proscribed even if it did not create a physically harmful condition. Statutory context confirms the state's interpretation: ORS 166.025 was drawn almost verbatim from the Model Penal Code (MPC), so we look to that code for clues about how the legislature understood the term "physically offensive." The MPC was published by the American Law Institute (ALI) in 1962. At the 1961 ALI annual meeting, Professor Louis Schwartz, who was introduced as "the expert on disorderly conduct," explained to those in attendance, "'Physically offensive' is meant to distinguish between olfactory assault *** and conduct which is offensive by virtue of the ideas which the actor may be putting forward." American Law Institute, *Proceedings* 181 (1961). In other words, the inclusion of the word "physically" denotes that a condition must be offensive to the senses rather than morally or intellectually offensive.

Considering the statutory text, context, and legislative history, we conclude that, to constitute a physically offensive condition under ORS 166.025, an odor must be more than minimally unpleasant but need not be dangerous or harmful.

That conclusion raises another question: Who determines whether a particular odor is offensive? Although some odors are objectively unpleasant—rotten eggs and raw sewage come to mind—others are more subjective in nature. The answer lies in the opening clause of ORS 166.025, which sets out the mental state with which a person must engage in conduct set out in paragraphs (a) through (f) in order to violate the statute. The actor must either intend to cause, or recklessly risk causing, *public* inconvenience, annoyance, or alarm. To cause public inconvenience, annoyance, or alarm, an odor must be objectively offensive—that is, it must be offensive to an ordinary, reasonable person under the circumstances. *See People v. Baker*, 150 Misc 2d 713, 714, 569 NYS 2d 907, 908 (1991) (holding that New York's disorderly conduct statute, which was also drawn from the MPC and is materially identical to ORS 166.025 for present purposes, "imposes an objective standard of public inconvenience, annoyance and alarm as opposed to the subjective standard of private or individual annoyance[.]"); *see also People v. Schenck*, 154 Misc 2d 937, 939, 588 NYS 2d 519, 521 (1992) (addressing a challenge to the sufficiency of the factual allegations in a charging instrument: "If a reasonable person under the circumstances would be offended, annoyed or alarmed by the defendant's conduct, then the information is sufficient.").

Whether a reasonable person would find a particular odor offensive depends on several factors, including the nature of the odor, its intensity, duration, and frequency, whether it is continuous or intermittent, and the circumstances in which it is smelled. No single factor is dispositive. Even if an odor is objectively unpleasant in nature, a reasonable person might not regard a fleeting, faint whiff of the odor as offensive (*i.e.*, an "olfactory assault"), whereas an odor that is very intense and persistent could reasonably be regarded as offensive even if it ordinarily might be considered pleasant—perfume, for example, or pungent spices. Likewise, an odor that is only mildly unpleasant and that dissipates quickly might not be bothersome if it is smelled only occasionally, but a reasonable person could grow weary of it, to the point of finding it offensive, if it occurs frequently. Another pertinent circumstance is the location in which the odor is smelled. A reasonable person might not be offended

by the smell of animal manure in a livestock barn at a county fair but would find the same smell offensive in a restaurant. In short, whether an odor constitutes a physically offensive condition depends on the totality of the circumstances.

In light of the facts of this case—the odor in question is marijuana smoke—another observation is necessary: The odor must be *physically* offensive. That is, the smell itself must be unpleasant. Physical offensiveness is not established by the fact that the odor may be associated with substance abuse or criminal activity. Although a person could be offended as a result of those associations, that offense is moral or intellectual in nature, not physical.

With that understanding in mind, we turn to the ultimate question presented in this case: whether a reasonable magistrate could conclude that Moser's affidavit furnished probable cause to believe that someone had committed disorderly conduct in defendant's residence. More specifically, as framed and limited by defendant's arguments on appeal, the question is whether the facts set out in the affidavit establish that someone in defendant's residence had created a physically offensive condition. In answering that question, we "construe the affidavit in a commonsense, nontechnical and realistic fashion looking at the facts recited and the reasonable inferences that can be drawn from those." *State v. Prince*, 93 Or App 106, 112, 760 P2d 1356, *rev den*, 307 Or 246 (1988); *see also Henderson*, 341 Or at 224-25 (similar).

We begin with the nature of the odor. The affidavit establishes that the odor was that of marijuana smoke. We are not prepared to declare, as the state would have us, that the odor of marijuana smoke is equivalent to the odor of garbage. Indeed, some people undoubtedly find the scent pleasing. Nor can we say, however, that the odor is inoffensive as a matter of law. We could perhaps say with confidence that a fleeting whiff of marijuana smoke would not offend a reasonable person, but as the intensity, duration, or frequency of the odor increases, it stands to reason that it would become objectively offensive at some point, particularly depending on the location in which it is smelled. Accordingly, we conclude that the nature of the odor is a neutral factor in this case.

With regard to the intensity of the odor, the affidavit is nearly silent. Moser stated that he could smell marijuana outside defendant's residence when he arrived the first time, but nothing he said suggested how strong the odor was, such as how far away he was when he initially detected it. Nor did defendant's neighbors indicate how intense the odor had been on any given occasion, either inside or outside their residences. Rather, they testified merely that they could detect it. Thus, the affidavit does not establish that the intensity of the odor was anything more than minimal.

Likewise, the affidavit says almost nothing about how long the odor persisted on any given occasion. Although Moser smelled marijuana the first time he went to the triplex, he did not smell it again when he returned approximately an hour and a quarter later. D told Moser that he "first smelled the odor" around 7:30 p.m., when he called the police the first time, and "again began to smell the odor" when he called the second time, implying that the odor had not persisted the entire time between the two calls. Thus, the affidavit indicates that the odor persisted from the time that D and the others in his residence first smelled the odor until sometime after Moser initially responded, but it does not disclose how long it took Moser to respond or how long he remained at the triplex. Moreover, after D's second call, the odor had dissipated by the time Moser arrived. Accordingly, the affidavit establishes that the odor was more than fleeting on at least one occasion, but, otherwise, there is no indication as to how long the odor persisted on any given occasion.

The affidavit is also unclear regarding the frequency with which the odor occurred. One of defendant's other neighbors told Moser that she smelled marijuana coming from defendant's residence two or three times a week. She did not say how long it had been going on, but her statement implies that it had been, at a minimum, a few weeks.

The final pertinent circumstance that we consider is the location in which the odor was smelled—in and around the homes of defendant's neighbors. One would expect a reasonable person to be less tolerant of unwanted odors when they intrude into the person's home. *Cf. Mauri v. Smith*, 135 Or App 662, 676, 901 P2d 247 (1995), *rev'd in part on other*

grounds, 324 Or 476, 929 P2d 307 (1996) ("We speak not infrequently of the sanctity of one's home, as a haven for family. Thus, conduct that is tolerable—or, at least, must be tolerated—on the street, in the market place, or in the work place, may be intolerable at home."). That factor weighs in favor of concluding that the odor was offensive.

To summarize the totality of the circumstances established by Moser's affidavit: In and around their homes, two or three times a week, for at least a few weeks, defendant's neighbors were subjected to an odor that is not inherently unpleasant, that was of an unknown intensity, and that, at least one time, was more than fleeting. Again, the sole question before us—given the limited nature of defendant's arguments on appeal—is whether a reasonable magistrate could conclude, from those facts, that a physically offensive condition probably occurred at defendant's residence. *Castilleja*, 345 Or at 271.

The difficulty in this case is that Moser's affidavit is nearly silent regarding two of the factors that are important to determining whether an odor constitutes a physically offensive condition: the intensity and persistence of the odor. Accordingly, the affidavit provides no information from which a court could conclude that the odor was an "olfactory assault"—more than a mere whiff—that, perhaps only once, did not dissipate immediately. And the absence of information about those factors makes it impossible to assess whether, under the totality of the circumstances, the odor probably was more than minimally unpleasant, such that a reasonable person would find it physically offensive. We conclude, therefore, that no reasonable magistrate could determine that Moser's affidavit established probable cause to believe that the odor coming from defendant's residence constituted a physically offensive condition for purposes of ORS 166.025(1)(f).[3]

Reversed and remanded.

[3] We intend no criticism of the judge who reviewed the affidavit and signed the search warrant. Before this opinion issued, our case law provided no guidance on the factors relevant to the determination of whether an odor constitutes a physically offensive condition.

Fairview sued by industrial park for medical marijuana laws

An industrial park is suing Fairview for its laws prohibiting the production of medical marijuana. *(The Associated Press)*

By **Samantha Matsumoto**
Email the author
on July 06, 2016 at 10:43 AM, updated July 18, 2016 at 9:28 AM

An industrial park is suing Fairview over whether local governments that prohibit medical marijuana production are overstepping their authority under Oregon law.

MARIJUANA NEWS

The lawsuit, filed in Multnomah County on June 27, claims Eastwind Industrial Parks lawsuit lost revenue from medical marijuana growers who stopped renting at the park after Fairview city officials told them they could not grow on the property.

The city's codes prohibit medical marijuana grows regardless of whether the operation is registered with the state.

The lawsuit asks Fairview to issue an injunction against the enforcement of the city's law regarding the growth of medical marijuana.

ITEMS ENTERED INTO RECORD
FILE: LE-16-0001
DATE: 8/08/2016
EXHIBIT: B
SUBMITTED BY: Mario Mamone

Eastwind rented to four registered medical marijuana growers before March 2016, the lawsuit said. In early March, the city sent a letter to park owner Gary Troutner informing him the park was in violation of city code.

A few days later, Fairview employees inspected the park. On March 28, the city sent a letter demanding that all medical marijuana grows at the park be shut down, the lawsuit said.

Troutner instructed his tenants to stop growing. Three of four stopped renting, and Troutner expects the fourth to leave soon, the lawsuit said. Troutner has lost $3,290 a month in rent and will lose another $880 when the fourth tenant leaves, the lawsuit said.

Oregon law allows cities to prohibit recreational marijuana producers, processors and sales, as well as medical processors and dispensaries. Cities and counties can regulate medical marijuana production, including a grow's hours of operation, location, the public's access and how products are transported.

However, according to a **guide by the League of Oregon Cities**, state law does not specify whether a city can ban medical marijuana grows. The league advises that cities considering banning medical marijuana grows consult with their city attorney.

New York City cleaned up its mess; why not Portland? (Letters to the Editor)

Watch: Oakland Raiders LB Aldon Smith appears to livestream himself violating NFL's drug policy

Town hall on fuel tax, marijuana tax set for Aug. 3 at West Linn High School

County Board approves marijuana sales tax vote for November ballot

Portland air quality, marijuana and Steve Novick's diesel idea: Letters to the Editor

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The lawsuit claims Fairview is overstepping its authority.

"There's no authority from the state for a city to ban (on medical growing)," the park's lawyer Bear Wilner-Nugent said.

Fairview's city attorney Ashley Driscoll declined to comment on the lawsuit.

The issue of local control over marijuana has been controversial. **Lawmakers have struggled** over how much power to give to cities and counties to prohibit medical marijuana facilities and retail sales of the drug.

Under Measure 91, in most areas only voters can approve a ban if they collect enough signatures to put the issue on the ballot. In 15 eastern Oregon counties where at least 55 percent of voters opposed Measure 91, city councils and county commissions **can vote to prohibit any marijuana business**.

Many cities and counties have effectively banned medical marijuana dispensaries, and 19 counties and 81 cities have opted out of recreational marijuana sales. Many others have high local taxes to discourage recreational retailers -- including **Fairview, which has a 40 percent tax**.

There was no hearing scheduled for the lawsuit on Wednesday morning.

-- Samantha Matsumoto
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LEAGUE OF OREGON CITIES

LOCAL GOVERNMENT REGULATION OF MARIJUANA IN OREGON

THIRD EDITION

REVISED MAY 2016

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LEAGUE of Oregon CITIES

Published by the League of

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Introduction and a Word of Caution

The League of Oregon Cities (League) has prepared this guide to assist cities in evaluating local needs and concerns regarding medical and recreational marijuana, so that city councils can find solutions that are in the best interests of their community. The League does not take a position on which choices a city council should make. The League's mission is to protect the home rule authority of cities to make local decisions, and to assist city councils in implementing the decisions they make, whatever those decisions might be.

The League published the first edition of this guide in the spring of 2015. Its original focus was regulation of medical marijuana under the Oregon Medical Marijuana Act (OMMA). In November 2014, Oregon voters adopted Measure 91, legalizing the growing, distribution, possession and use of marijuana in certain amounts for recreational (*i.e.* non-medical) personal use. In 2015, the state Legislature passed four bills—HB 3400, HB 2041, SB 460 and SB 844—which made comprehensive reforms to Measure 91 and the OMMA and addressed issues of local control, taxation, and early sales, among other things. All of those changes are now codified in ORS 475B.

The law with regard to local government regulation of marijuana is complex because it involves the interplay of state and federal law, and the law continues to evolve. At press time, there were several court cases pending regarding the legal authority of local governments to regulate, up to and including prohibiting, the operation of medical marijuana facilities. The League will continue to update its members as the law in this area changes.

Since that time, the Oregon Liquor Control Commission (OLCC), the agency charged with implementing the recreational marijuana licensing process, and the Oregon Health Authority (OHA), the agency charged with implementing the OMMA, have engaged in rulemaking. In addition, in 2016, the Legislature once again amended Oregon's marijuana laws with the adoption of three additional pieces of legislation—HB 4014 (Or Laws 2016, ch 24), SB 1511 (Or Laws 2016, ch 83), and SB 1598 (Or Laws 2016, ch 23). Some of the changes made by those bills are discussed in more detail below.

All of those changes have made it difficult for local government officials to stay on top of this ever evolving regulatory landscape. Consequently, the League has prepared this third edition of the guide, revising its regulatory guidance to reflect the latest statutory and administrative rule changes, as well as providing sample ordinance wording for both medical and recreational marijuana facilities that is consistent with those changes. Because most experts believe that the medical marijuana and recreational marijuana systems will eventually merge, the sample ordinance provisions in this edition do not differentiate between medical marijuana or recreational marijuana businesses and treats both the same for purposes of regulating the time place and manner of those activities.

The sample ordinance provisions included in this guide are intended to be a starting point, not an ending point, for any jurisdiction considering taxing, regulating or prohibiting marijuana businesses.

This guide begins by providing an overview of the source of local government authority—Oregon's constitutional home rule provisions. The guide then provides a brief explanation of the status of marijuana under federal law, as well as a summary of Oregon's marijuana laws, before turning to a discussion of local control and options available for local governments. The guide concludes with sample ordinances to use as a starting point if a city decides it wants to tax, regulate or prohibit marijuana facilities.

It is important to note that this guide, although lengthy, is not intended to give exhaustive treatment of every issue that a city might face with respect to marijuana regulation. The regulation of marijuana is becoming increasingly complex as the industry grows and evolves and as the Legislature and state agencies adopt new laws and administrative rules. As such, this guide and the sample wording that is attached serves as a starting point (not and ending point) for local government officials to understand this topic so that eventually they can spot issues and further analyze and develop local solutions.

This guide is not a substitute for legal advice

City councils considering taxing, regulating or prohibiting marijuana businesses should not rely solely on this guide or the resources contained within it. Any city council considering any form of regulation of marijuana should consult with its city attorney regarding the advantages, disadvantages, risks and limitations of any given approach. Legal counsel can also assist a city in preparing an ordinance that is consistent with existing ordinances and with a city's charter, and advise on what process is needed to adopt the ordinance.

Home Rule in Oregon

Any discussion of a city's options for regulating anything that is also regulated by state law must begin with a discussion of the home rule provisions of the Oregon Constitution, from which cities derive their legal authority. Home rule is the power of a local government to set up its own system of governance and gives that local government the authority to adopt local ordinances without having to obtain permission from the state.

The concept of home rule stands in contrast to a corollary principle known as Dillon's Rule, which holds that municipal governments may engage only in activities expressly allowed by the state because municipal governments derive their authority and existence from the state.[1] Under Dillon's Rule, if there is a reasonable doubt about whether a power has been conferred to a local government, then the power has not been conferred. Although many states follow Dillon's Rule, Oregon does not.

Instead, a city government in Oregon derives its home rule authority through the adoption of a home rule charter by the voters of that community pursuant to Article XI, section 2, of the Oregon Constitution, which was added in 1906 by the people's initiative. Article XI, section 2, provides, in part, that:

> "The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation of any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

A home rule charter operates like a state constitution in that it vests all government power in the governing body of a municipality, except as expressly stated in that charter, or preempted by state or federal law. According to the League's records, all of Oregon's 242 incorporated cities have adopted home rule charters.

The leading court case interpreting Oregon's home rule amendment is *La Grande/Astoria v. PERB*, 281 Or 137, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173, 586 P2d 765 (1978). In that case, the Oregon Supreme Court said that home rule municipalities have authority to enact substantive policies, even on a topic also regulated by state statute, as long as the local enactment is not "incompatible" with state law, "either because both cannot operate concurrently or because the Legislature meant its law to be exclusive." In addition, the court said that where there is a local enactment and state enactment on the same subject, the courts should attempt to harmonize state statutes and local regulations whenever possible.[2]

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[1] *See* John F. Dillon, 1 The Law of Municipal Corporations § 9b, 93 (2d ed 1873).

[2] Criminal enactments are treated differently. Local criminal ordinances are presumed invalid, and that presumption cannot be overcome if the local enactment prohibits what state criminal law allows or allows what state criminal law prohibits. *See City of Portland v. Dollarhide*, 300 Or 490, 501, 714 P2d 220 (1986). Consequently, the Oregon Supreme Court's case law is clear that a local government may not recriminalize conduct for which state law provides criminal immunity. *See City of Portland v. Jackson*, 316 Or 143, 147-48, 850 P2d 1093 (1993) (explaining how to determine whether a state law permits what an ordinance prohibits, including where the Legislature expressly permits specified conduct).

In subsequent cases, the Oregon Supreme Court directed courts to presume that the state did not intend to displace a local ordinance in the absence of an apparent and unambiguous intent to do so.[3] Along the same lines, a local ordinance can operate concurrently with state law even if the local ordinance imposes greater or different requirements than the state law.[4]

Where the Legislature's intent to preempt local governments is not express, and where the local and state law can operate concurrently, there is no preemption and local governments retain their authority to regulate. As such, the Oregon Supreme Court has concluded that a negative inference that can be drawn from a statute is insufficient to preempt a local government's home rule authority.[5] For example, where legislation "authorizes" a local government to regulate in a particular manner, a court will not read into that legislation that the specific action authorized is to the exclusion of other regulatory alternatives, unless the Legislature makes it clear that the authorized regulatory form is to be the exclusive means of regulating.

[3] *See, e.g., State ex rel Haley v. City of Troutdale*, 281 Or 203, 210-11, 576 P2d 1238 (1978) (finding no manifest legislative intent to preempt local provisions that supplemented the state building code with more stringent restrictions).

[4] *See Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 454-55, 353 P3d 581 (2015); *see also Thunderbird Mobile Club v. City of Wilsonville*, 234 Or App 457, 474, 228 P3d 650, *rev den*, 348 Or 524 (2010) ("A local ordinance is not incompatible with state law simply because it imposes greater requirements than does the state, nor because the ordinance and state law deal with different aspects of the same subject." (internal quotations omitted)).

[5] *Rogue Valley Sewer Services*, 357 Or at 453-55 (concluding that explicit authorization for cities to regulate certain utilities did not, by negative implication, create a broad preemption of the field of utility regulation); *Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012) (explaining that even if a preemption based on a negative inference is plausible, if it is not the only inference that is plausible, it is "insufficient to constitute the unambiguous expression of preemptive intention" required under home rule cases).

Federal Law

Marijuana remains a Schedule I controlled substance under the federal Controlled Substances Act (CSA). Schedule I substances are those for which the federal government has made the following findings:

- The drug or other substance has a high potential for abuse;
- The drug or other substance has no currently accepted medical use in treatment in the United States; and
- There is a lack of accepted safety for use of the drug or other substance under medical supervision.

Recently, the federal government has started reexamining the status of marijuana. In December 2014, Congress directed the Department of Justice not to use any of its funding to prevent states like Oregon from implementing their medical marijuana laws. The effect of that appropriations bill is currently being litigated in federal court.

In addition, under the federal CSA, the attorney general may, by rule, transfer a drug between schedules or remove a drug from the schedules if certain requirements are met. The United States Drug Enforcement Agency (DEA) has indicated that it currently is reviewing marijuana's status as a Schedule I controlled substance and expects to release a final determination in the first half of 2016. The DEA has not, however, given any indication of whether it will reclassify or remove marijuana from the schedules. Should the DEA reclassify or remove marijuana from Schedule I, the League will update its members to address the implications of any reclassification.

Oregon's laws on medical and recreational marijuana do not, and cannot, provide immunity from federal prosecution. Consequently, state law does not protect marijuana plants from being seized or people from being prosecuted if the federal government chooses to take action under the CSA against those using marijuana in compliance with state law. Similarly, cities cannot provide immunity from federal prosecution.

An Overview of Oregon's Marijuana Laws

There are two separate laws and regulatory structures governing marijuana at the state level: the Oregon Medical Marijuana Act, which regulates medical marijuana, and the Control and Regulation of Marijuana Act, which regulates recreational marijuana. Since their adoption by the voters, the Legislature has made substantial changes to both acts.

Oregon Medical Marijuana Act

Oregon has had a medical marijuana program since 1998, when voters approved Ballot Measure 67, the Oregon Medical Marijuana Act (OMMA) (codified at ORS 475B.400 – ORS 475B.525). Since that time, the Legislature has amended the OMMA on a number of occasions. Generally, under the OMMA, a person suffering from a qualifying debilitating health condition must get a written statement from a physician that the medical use of marijuana may mitigate the symptoms or effects of that condition. The person may then obtain a medical marijuana card from the Oregon Health Authority, which is the agency charged with regulating medical marijuana. The patient may designate a caregiver and a grower if the patient decides not to grow his or her own marijuana, each of whom also get a medical marijuana card. Patients, caregivers and growers with medical marijuana cards, who act in compliance with the OMMA, are immune from state criminal prosecution for any criminal offense in which possession, delivery or manufacture of marijuana is an element. Those without medical marijuana cards may also claim immunity from state criminal prosecution if they are in compliance with the OMMA and, within 12 months prior to the arrest at issue, had received a diagnosis of a debilitating medical condition for which a physician had advised medical marijuana could mitigate the symptoms or effects. The OMMA also provides protection from state criminal prosecution for medical marijuana processors and medical marijuana dispensaries acting in compliance with the law.

The OMMA originally was envisioned as a system in which patients would grow for themselves the marijuana that they needed, or designate a small scale grower, and, as a result, the regulation was relatively minimal. The OMMA did not originally envision large-scale grow sites, processing sites, or dispensaries. However, as time went on, the Legislature saw a need to impose more restrictions on medical marijuana grows, create a system for registering processors, and create a system for state-registered facilities to lawfully transfer medical marijuana between growers and patients or caregivers.

Legislation in 2015 and 2016 addressed some of the local government concerns about the lack of regulation that had not been addressed in the original legislation. For example, a medical marijuana grow site now can have only a limited number of mature marijuana plants and a limited amount of usable marijuana harvested from those plants. In addition, medical marijuana is now classified as a farm crop, but the Legislature was careful to carve out local regulatory authority not available for other farm crops. The Legislature also added a new registration category for medical marijuana processors, and imposed greater restrictions on those facilities. Along similar lines, the Legislature also added further restrictions on where certain medical

marijuana facilities can locate, and imposed new testing, labeling, inspection and reporting requirements.

With the Legislature's more robust statutory scheme came more extensive administrative rules from the OHA. Those rules, found primarily in Oregon Administrative Rule 333-008, cover many of the gaps left by the Legislature, including setting out a detailed registration system and requirements for testing, reporting, background checks, security, and advertising, among other things.

Recreational Marijuana

In November 2014, Oregon voters approved Ballot Measure 91, which decriminalized the personal growing and use of certain amounts of recreational marijuana by persons 21 years of age or older. The OLCC is the agency charged with licensing and regulating the growing, processing, and sale of recreational marijuana. In particular, the OLCC has been tasked with administering a license program for producers, processors, wholesalers and retailers, and under that program, a person may hold more than one type of license.

Since the voters approved Measure 91, the Legislature has made notable changes to its structure, primarily increasing accountability and safety requirements. For example, the Legislature added testing, labeling, inspection and reporting requirements for licensees, required handlers permits for those working with marijuana, and charged the OLCC with licensing OHA-accredited laboratories to conduct the required testing. The Legislature also expanded the OLCC's rulemaking authority, tasking the agency with, among other things, developing and maintaining a seed-to-sale tracking system and adopting restrictions on the size of recreational marijuana grows. The Legislature also tasked the OLCC with certifying public and private marijuana researchers. As noted above, the Legislature has also tasked the OLCC with creating a system for transitioning medical marijuana registrants to OLCC recreational licensing, with the possibility for recreational licensees to register with the OLCC to engage in activities related to medical marijuana.

The OLCC has adopted temporary rules that begin to implement those legislative changes and to fill some of the gaps left by the Legislature. For example, the OLCC has imposed extensive security requirements for alarm systems, video surveillance, and a restriction on public access to certain facilities or areas within facilities. The OLCC has also imposed health and safety requirements, including sanitary requirements and restrictions on how marijuana is processed. In addition, the OLCC has addressed a number of other issues including testing, packaging, labeling, advertising, waste, and implementing a seed to sale tracking system. At the time this guide was published, the OLCC was in the process of adopting permanent rules.

State Taxation of Recreational Marijuana

Early sales of recreational marijuana from medical marijuana dispensaries are taxed at a rate of 25 percent. When sales from OLCC-licensed retailers begin later in 2016, the sale of marijuana items will be subject to a 17 percent state tax, to be collected by those retailers. However, in

2016, the Legislature clarified that medical marijuana cardholders and caregivers will not have to pay the state tax on the retail sale of marijuana items. (SB 1511, § 17)

Of that state tax revenue, 10 percent will be transferred to cities to "assist local law enforcement in performing its duties" under the Control and Regulation of Marijuana Act, *i.e.* the law regulating recreational marijuana.[6] That 10 percent will be distributed using different metrics before and after July 1, 2017. Before that date, tax revenues will be distributed proportionately to all Oregon cities based on their population. After July 1, 2017, those revenues will be distributed proportionately based on the number of licenses issued for premises located in each city. Fifty percent of revenues will be distributed based on the number of production, processor and wholesale licenses issued in the city, and the other 50 percent will be distributed based on the number of retail licenses issued in the city. However, if a city adopts an ordinance prohibiting the establishment of any registered or licensed marijuana activities, the city will not be eligible to receive state marijuana tax revenues.

Registration and License Types

Taking into consideration both the medical system and the retail system, there are 10 marijuana activities that require registration or a license from the state.[7] The table on the next page provides a summary of each type of activity and its registration/licensing requirements along with a citation to the laws that governs those activities.

[6] The remaining tax revenues will be distributed as follows: 40 percent to the Common School Fund; 20 percent to the Mental Health Alcoholism and Drug Services Account; 15 percent to the State Police Account; and 10 percent to counties.

[7] This guide focuses on regulation of those activities. In 2016, the Legislature preempted cities from prohibiting or otherwise limiting homegrown marijuana production, processing, and storage as described in ORS 475B.245 and a medical marijuana patient and caregiver's possession of seeds, plants, and usable marijuana as allowed under state law. (HB 4014, § 33).

Oregon's Ten Regulated Marijuana Activities

	Grow	Make Products	Wholesale	Transfer to User	Research & Testing*
Medical Regulated Activities	**Marijuana Grow Site:** Location for planting, cultivating, growing, trimming, or harvesting marijuana or drying marijuana leaves or flowers *Register with OHA* *ORS 475B.420; OAR 333-008-010 to 333-008-0750*	**Marijuana Processing Site:** Location for compounding or converting marijuana into medical products, concentrates or extracts *Register with OHA* *ORS 475B.435; OAR 333-008-1600 to 333-oo8-2200*	**Wholesaler:**** Purchase marijuana items for resale to a person other than a consumer. *License with OLCC* *SB 1511, §4 (2016)*	**Dispensary:** Transfer usable marijuana, immature marijuana plants, seed, and medical products, concentrates and extracts to patients and caregivers.*** *Register with OHA* *ORS 475B.450; OAR 333-008-1000 to OAR 333-008-1248*	**Laboratories:** Conducts testing of recreational and medical marijuana items. *Obtain license under ORS 475B.560 and OAR 845-025-5000 to 845-025-5075.* *Obtain accreditation from OHA* *ORS 475B.565*
Recreational Regulated Activities****	**Producers:** Manufacture, plant, cultivate, grow, harvest *Obtain license from OLCC* *ORS 475B.070; OAR 845-025-2000 to OAR 845-025-2080*	**Processors:** Process, compound or convert marijuana into products, concentrates or extracts, but does not include packaging or labeling *Obtain license from OLCC* *ORS 475B.090; OAR 845-025-3200 to OAR 845-025-3290*	**Wholesalers:** Purchase marijuana items for resale to a person other than a consumer *Obtain license from OLCC* *ORS 475B.100; OAR 845-025-3500*	**Retailers:** Sell marijuana items to a consumer *Obtain license from OLCC* *ORS 475B.110; OAR 845-025-2800 to OAR 845-025-2890*	**Researchers:** Public or private research of medical and recreational marijuana, including medical and agricultural research *Certification from OLCC* *ORS 475B.235 and OAR 845-025-5300 to 845-025-5350*

*These activities support both the recreational and medical marijuana systems.

**There is no means for obtaining a medical wholesale license from OHA. Legislation in 2016 allows an OLCC licensed recreational wholesaler to obtain authority from OLCC to also wholesale medical marijuana.

***Medical Marijuana Dispensaries can do limited retail sales until December 2016. OAR 333-008-1500

****In addition to the ten types of regulated activities, certain employees must also obtain an OLCC handlers permit. ORS 475B.215; OAR 845-025-5500 to OAR 845-025-5590.

Early Sales of Recreational Marijuana

Since July 1, 2015, people 21 years of age and older have been able to possess limited amounts of recreational marijuana under state law. Because the OLCC was not prepared to issue licenses for the retail sale of recreational marijuana at that same time, the Legislature authorized medical marijuana dispensaries to sell limited quantities of recreational marijuana between October 1, 2015 and December 31, 2016. By the time early sales end, recreational retailers are expected to be operating.

Under current law, medical marijuana dispensaries may sell the following to a person who is 21 or older and presents proof of age:

- One quarter of one ounce of dried marijuana leaves and flowers per person per day;
- Four marijuana plants that are not flowering; and
- Marijuana seeds.

Starting June 2, 2016, medical marijuana dispensaries also may sell the following to a person who is 21 or older and presents proof of age:

- Non-psychoactive medical cannabinoid products intended to be applied to the skin or hair;
- One single-serving, low-dose unit of cannabinoid edible per person per day; and
- One prefilled receptacle of cannabinoid extract per person per day.

Is a Consolidated System on the Horizon?

During the 2016 legislative session, the Legislature amended the recreational marijuana laws to begin shifting towards a consolidated system. In particular, the Legislature imposed a requirement on the OLCC to adopt rules governing the process of transitioning from medical registration with OHA to medical/recreational licensing with the OLCC. Specifically, one bill provides that the OLCC is to establish a program that allows medical registrants to convert to a retail license. HB 4014 §§ 24 and 25 (2016). In addition, another bill created new provisions allowing recreational licensees to register with the OLCC to engage in the same retail license activity for medical marijuana purposes, essentially allowing one licensee to engage in retail and as medical marijuana activities under the regulatory control of the OLCC. (SB 1511, §§ 1-6) At the time this guide was published, the OLCC has yet to issue rules as set out in that legislation. However, the upshot of those changes is that subject to the rules OLCC adopts, that legislation will enable co-location of both medical and recreational marijuana activities under the oversight of one agency.

Although oversight of marijuana activities may be consolidating into the OLCC, it's important to note that for now the recreational and medical programs continue to retain separate' characteristics and businesses operating within them will be subject to different rules. For example, in 2016 the Legislature added a separate description of what constitutes medical

marijuana, with a definition that suggests that medical products may carry a different potency than recreational marijuana. (SB 1511, § 11). Additionally, as discussed below, the spacing requirements remain different (for recreational retailers local governments can't require more than a 1,000 feet buffer, but medical marijuana under state law must be at least 1,000 feet from each other.) Thus a person licensed to conduct both retail and medical marijuana activities will still be operating under different sets of rule for each activity.

Local Government Options for Regulation of Marijuana

Any city wanting to regulate or prohibit marijuana activities should work closely with its legal counsel to survey existing state law, administrative rules, and local code; develop a means to implement and enforce any new ordinances; and then craft the necessary amendments to the city's code to accomplish the council's intent.

As set out in ORS 475B.340, ORS 475B.500, and under their home rule authority, cities have a number of options for regulating marijuana activities. Whether to regulate is a local choice. What follows is an overview of the options available to cities. However, before embarking on any form of regulation, cities should begin by examining the 10 types of marijuana activities authorized by state statute and the restrictions state law (including administrative regulations adopted by the OLCC [found in OAR chapter 845, division 25] and the OHA [found in OAR chapter 333, division 8]) places on each type of activity to determine whether a gap exists between what state law allows and what the community desires to further restrict.

State Restrictions on the Location of Medical and Recreational Marijuana Activities

Before regulating or prohibiting state-registered or licensed marijuana activities, cities should examine the restrictions in state law. It is important to know about any state restrictions that create a regulatory "floor." In other words, although the courts generally have upheld a city's authority to impose more stringent restrictions than those described in state law, a city likely cannot impose restrictions that are more lenient than those described in state law. So for example, when state law requires a 1,000-foot buffer between medical marijuana dispensaries, a city could not allow dispensaries to locate within 500 feet of each other. Moreover, some cities may determine that state regulation of marijuana activities is sufficient and that local regulation is therefore unnecessary.

For those cities interested in prohibiting any of the marijuana activities listed above, it is important to examine the state restrictions, particularly in smaller communities. Those restrictions effectively may preclude a person from becoming registered with or licensed by the state to engage in marijuana activities.

Medical Grow Sites and Recreational Producers

ORS 475B does not restrict where medical marijuana grow sites or recreational marijuana producers can locate. In fact, in 2016, the Legislature clarified that both medical and recreational marijuana are farm crops, allowing marijuana to be grown on land zoned for exclusive farm use. Nonetheless, such grows are still subject to local time place and manner restrictions.

However, the OLCC has adopted some restrictions on where recreational marijuana facilities generally can locate, and where recreational marijuana producers in particular can locate. (OAR

845-025-1115). All recreational marijuana facilities (including grows) are prohibited from locating:

- On federal property;
- At the same physical location or address as a medical marijuana facility that has maintained its medical registration with the OHA; or
- At the same physical location or address as a liquor licensee.

(OAR 845-025-1230) Recreational marijuana growers are additionally prohibited from locating on public land or on the same tax lot or parcel as another licensed grower under common ownership. (OAR 845-025-1115)

In addition to location restrictions, state law and rule places limitations on the number of plants that a medical marijuana grower can grow in residential zones on the size of recreational marijuana grow canopies. Generally, a medical marijuana grow site may have up to 12 mature plants if it is located in a residential zone, and up to 48 mature plants if it is located in any other zone. However, there are exceptions for certain grow sites that were in existence and had registered with the state by January 1, 2015. For those grow sites, the number of plants is limited to the number of plants that were at the grow site as of December 31, 2015, as long as that number does not exceed 24 mature plants per grow site in a residential zone and 96 mature plants per grow site in all other zones. A grower loses the right to claim those exceptions, however, if the grower's registration is currently suspended or revoked.

Those medical limits, however do not apply to grow sites that are converting to recreational grows under the provisions of SB 4014 and are reapplying through the OLCC to become a recreational and medical grow site.

Medical Processing Sites and Recreational Processors

Processors that produce medical marijuana extracts may not be located in an area zoned for residential use. The OHA has defined "zoned for residential use" to mean "the only primary use allowed outright in the designated zone is residential." (OAR 333-008-0010(64)).

Processors that make recreational marijuana extracts may not be located in an area zoned *exclusively* for residential use, and they are also subject to the general location restrictions in the OLCC rules outlined above.

Medical Marijuana Dispensaries

Under state law, medical marijuana dispensaries may not locate in residential zones, may not be located at the same address as a grow site, and may not be located within 1,000 feet of another dispensary.

In addition, dispensaries may not locate within 1,000 feet of a public elementary or secondary school for which attendance is compulsory under ORS 339.020, or a private or parochial

elementary or secondary school, teaching children as described in ORS 339.030(1)(a).[8] As a practical matter, that means that dispensaries cannot locate within 1,000 feet of most public and private elementary, middle and high schools. However, if a school is established within 1,000 feet of an existing dispensary, the dispensary may remain where it is unless the OHA revokes its registration. In addition, under the 2016 legislation, a city can allow a dispensary within 500 feet of a school under limited circumstances. (SB 1511, § 29).

Wholesalers and Recreational Retailers

Wholesale and retail licensees may not locate in an area that is zoned exclusively for residential use and are subject to the same general OLCC restrictions on location noted above. The same requirements that apply to medical marijuana dispensaries regarding their proximity to schools apply to retail licensees. As a practical matter, a retail licensee may not locate within 1,000 feet of most public and private elementary, middle and high schools. However, if a school is established within 1,000 feet of an existing retail licensee, the licensee may remain where it is unless the OLCC revokes its license. In addition, under the 2016 legislation, a city can allow a dispensary within 500 feet of a school under limited circumstances. (SB 1511).

State law does not impose a 1,000-foot buffer between retailers as it does for medical marijuana dispensaries. In fact, as discussed further under local government options, under state law, a city cannot prohibit a retailer from being located within a distance greater than 1,000 feet from another retailer. In other words, the maximum buffer that a city can impose between retailers is 1,000 feet.

Compatibility with Local Requirements - Land Use Compatibility Statement (LUCS)

In addition to express restrictions on the location of certain marijuana facilities, state law also requires certain marijuana facilities to obtain a land use compatibility statement (LUCS) from the local government before the state will issue a license. In particular, recreational producers, processors, wholesalers, and retailers must request a land use compatibility statement from a local government before the OLCC issues a license. A LUCS describes whether the proposed use is allowable in the zone requested, and must be issued within 21 days of:

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[8] ORS 339.020 provides, "Except as provided in ORS 339.030:

(1) Every person having control of a child between the ages of 7 and 18 years who has not completed the 12th grade is required to send the child to, and maintain the child in, regular attendance at a public full-time school during the entire school term.

(2) If a person has control of a child five or six years of age and has enrolled the child in a public school, the person is required to send the child to, and maintain the child in, regular attendance at the public school while the child is enrolled in the public school."

ORS 339.030(1)(a) provides, "In the following cases, children may not be required to attend public full-time schools: (a) Children being taught in a private or parochial school in the courses of study usually taught in grades 1 through 12 in the public schools and in attendance for a period equivalent to that required of children attending public schools in the 1994-1995 school year."

- Receipt of the request if the land use is allowable as an outright permitted use; or
- Final local permit approval, if the land use is allowable as a conditional use.

Certain small-scale medical marijuana growers outside of city limits do not have to request a LUCS when applying for a recreational marijuana license. (SB 1598, § 2).

A local government that has a ballot measure proposing to ban marijuana activities does not have to act on the LUCS while the ballot measure is pending.

Local Government Means of Regulation

In recent years, the Legislature has enacted several pieces of legislation that have encroached, but not entirely preempted, a city's home rule authority to regulate marijuana. What follows is a discussion of those various encroachments and the options that remain available for cities that may wish to regulate or prohibit marijuana activities.

Tax

The OMMA was silent on local authority to tax, meaning that local governments retained their home rule authority to tax medical marijuana. Measure 91, on the other hand, attempted to preempt local government authority to tax recreational marijuana, though there were significant questions regarding the effect and scope of that purported preemption.

In ORS 475B.345, adopted in 2015, the Legislature vested authority to "impose a tax or fee on the production, processing or sale of marijuana items" solely in the Legislative Assembly, except as provided by law. The Legislature also provided that a city may not "adopt or enact ordinances imposing a tax or fee on the production, processing or sale of marijuana items," except as provided by law. The Legislature went on to provide that cities may adopt an ordinance, which must be referred to the voters, imposing a tax or fee of up to 3 percent on the sale of marijuana items by a retail licensee. The ordinance must be referred to the voters in a statewide general election, meaning an election in November of an even-numbered year. However, if a city has adopted an ordinance prohibiting the establishment of any recreational marijuana licensees or any medical marijuana registrants in the city, the city may not impose a local tax under that provision. In addition, in 2016, the Legislature adopted an additional restriction on local governments by providing that a local tax may not be imposed on a medical marijuana patient or caregiver. (SB 1511, § 18).

ORS 475B.345 preempts local governments from imposing a tax on the production, processing or sale of recreational marijuana, except as provided by state law. State law provides that a city may impose up to a 3 percent tax on the sale of marijuana by an OLCC-licensed retailer, but an ordinance adopting such a tax must be referred to the voters at a statewide general election. In 2016, the Legislature attempted to expand the state preemption by providing that a local tax may not be imposed on a medical marijuana patient or caregiver. (SB 1511, § 18).

Cities that do impose a local tax may look to the state for help in administering that tax. Recognizing that cities, particularly smaller cities, may not have the resources to administer and

enforce a local marijuana tax, the 2016 Legislature clarified that local governments may contract with the Oregon Department of Revenue (DOR) to collect, enforce, administer, and distribute locally-imposed marijuana taxes. (HB 4014, § 32). The League is working to develop a sample contract that cities interested in contracting with DOR can use as a starting point in discussions with the agency.

For those cities that enacted taxes on medical or recreational marijuana prior to the Legislature's adoption of ORS 475B.345, the status of those taxes remains an open question. Arguably, cities that had "adopt[ed] or enact[ed]" taxes prior to the effective date of ORS 475B.345 are grandfathered in under the law. However, the issue is not free from doubt, and cities that decide to collect on pre-ORS 475B.345 taxes should be prepared to defend their ability to do so against legal challenge. Consequently, cities that plan to continue to collect taxes imposed prior to the passage of ORS 475B.345 should work closely with their city attorney to discuss the implications and risks of that approach.

Ban on Early Sales

On October 1, 2015, medical marijuana dispensaries began selling limited quantities of recreational marijuana. Cities may adopt an ordinance prohibiting those early sales without referring the ordinance to voters and likely without tax implications. Although a city adopting an ordinance "prohibiting the establishment" of certain marijuana activities is not eligible to receive state marijuana tax revenues, an ordinance prohibiting early sales would merely limit the activities at an existing medical marijuana dispensary. As a result, cities would likely remain eligible to receive state tax revenues.

However, cities likely cannot impose a local tax on early sales. Under ORS 475B.345, cities may not adopt or enact ordinances imposing a tax or fee on the production, processing or sale of marijuana items, except as provided in that legislation. ORS 475B.345 further stipulates that cities may refer an ordinance to voters imposing a tax of up to 3 percent on sales by a person that holds a retail license issued by the OLCC. Because early sales of recreational marijuana will be made by medical marijuana dispensaries, and not by a retail licensee, a city likely is preempted from imposing a tax on early sales of recreational marijuana. However, cities interested in imposing a local tax on early sales should consult their city attorney.

Ban on State-Registered and Licensed Activities

Under ORS 475B.800, cities may prohibit within the city the operation of recreational marijuana producers, processors, wholesalers and retailers, as well as medical marijuana processors and medical marijuana dispensaries. The law is silent on whether a city can ban medical marijuana growers, marijuana laboratories, and marijuana researchers from operating in the city. However, ORS 475B.800 does not indicate that the bill's process for banning marijuana activities is the exclusive means to do so. Cities considering banning medical marijuana grow sites, marijuana laboratories, or marijuana researchers should consult their city attorney about whether they can do so under either home rule, federal preemption or both legal theories.

Before December 24, 2015, cities located in counties that voted against Measure 91 by 55 percent or more (Baker, Crook, Gilliam, Grant, Harney, Jefferson, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa and Wheeler Counties) had the opportunity to enact a ban through council adoption of an ordinance prohibiting any of the six activities listed above. For cities that did not take that approach within the required timeline, and for cities not located in those counties, the city council may adopt an ordinance banning any of the six activities listed above, but that ordinance must be referred to the voters at a statewide general election, meaning an election in November of an even-numbered year. Medical marijuana dispensaries and medical marijuana processors that have registered with the state by the time their city adopts a prohibition ordinance are not subject to the ban if they have successfully completed a city or county land use application process.

Under either procedure, as soon as the city council adopts the ordinance, it must submit it to the OHA for medical bans and the OLCC for recreational bans, and those agencies will stop registering and licensing the banned facilities. In other words, for cities using the referral process, the council's adoption of an ordinance acts as a moratorium on new facilities until the election occurs.

For cities using the referral process, it is also important to note that once the elections official files the referral with the county election office, the ballot measure is certified to the ballot. At that point, the restrictions on public employees engaging in political activity will apply. Consequently, cities should consult the secretary of state and their city attorney to ensure that public employees are complying with state elections law in their communications about the pending measure.

If voters reject a ballot measure proposing to ban marijuana activities, the OHA and the OLCC will not begin registering and licensing marijuana facilities until the first business day of the January following the statewide general election. (HB 4014, § 31). That system will allow cities that want to regulate marijuana businesses time to adopt time, place, and manner ordinances after the ban is rejected and before new registrations or licenses are issued by the state.

In determining whether to prohibit any of the marijuana activities registered or licensed by the state, cities may want to consider the tax implications. Cities that enact a prohibition on any marijuana activity likely will not be eligible to receive state marijuana tax revenues or impose a local tax, even if the city bans only certain activities and allows others.

If a city that has imposed a ban decides to lift that ban, the governing body may repeal the ordinance, and must give notice of the change to the appropriate regulatory agency (either OHA or OLCC). (HB 4014, § 30).

It is also important to note that in 2016 the Legislature preempted cities from imposing restrictions on certain aspects of the personal possession of recreational and medical marijuana. (HB 4014 § 33). As a result, cities interested in enacting a ban on any aspect of personal use and growing of marijuana should consult with their city attorney to discuss the scope of the preemption, and whether the city can regulate or ban under either home rule, federal preemption or both legal theories.

Business License Ordinance

Although ORS 475B.800 provides an avenue for cities to ban certain marijuana activities, nothing in the statute makes that the exclusive means for prohibiting marijuana activities. As a result, some cities may not need to go through the procedures outlined in ORS 475B.800 to ban marijuana activities because they may already have laws in place that create an effective ban. However, cities relying on other avenues to ban should be prepared to defend their authority to do so.

A number of cities have imposed a ban through a local business license ordinance that provides that it is unlawful for any person to operate a business within the city without a business license, and further provides that the city will not issue a business license to any person operating a business that violates local, state or federal law. Indeed, cities that have a business license ordinance in place should review their existing codes to determine if such wording already exists. Additionally, whether adopting a new business license program or amending an existing one to provide that the city will not issue a business license to any person operating a business that violates local, state or federal law, a city should work with its legal counsel to ensure that its business license ordinance includes an enforcement mechanism to address a situation in which a person is operating a business without a business license.

In addition, cities that decide to enforce a business license ordinance instead of adopting a ban under ORS 475B.800 should consult their city attorney regarding *City of Cave Junction v. State of Oregon* (Josephine County Circuit Court Case #14CV0588; Court of Appeals Case #A158118) and *Providing All Patients Access v. City of Cave Junction* (Josephine County Circuit Court Case #14CV1246, Court of Appeals Case #A160044). At issue in those cases is whether the city of Cave Junction may enforce its business license ordinance, which prohibits issuance of a business license to a business operating in violation of local, state or federal law, to effectively prohibit medical marijuana dispensaries from operating. Two trial courts in Oregon have upheld the city's business license ordinance against challenges that it has been preempted by the OMMA (prior to its amendment by HB 3400). Both of those cases currently are on appeal before the Oregon Court of Appeals.

Development Code

Cities that desire to impose a prohibition on marijuana operations could also include in their development codes a provision stating that the city will not issue a development permit to any person operating a business that violates local, state or federal law. If not already defined, or if defined narrowly, the city will want to amend its code to provide that a development permit includes any permit needed to develop, improve or occupy land including, but not limited to, public works permits, building permits or occupancy permits.

Land Use Code

As noted previously, state law places restrictions on where certain marijuana activities can locate, including prohibiting certain processors, dispensaries and retail establishments from

locating in residential zones. In addition to those state requirements, cities can impose their own more stringent land use requirements and restrictions. Moreover, cities that desire to prohibit marijuana facilities altogether might also do so through amendments to their land use codes. Before considering this option, cities should work with their legal counsel to first determine if the wording of their zoning codes already prohibits marijuana operations, and if not, to identify the appropriate land use procedures and the amount of time it would take to comply with them. If the wording in a city's zoning codes does not prohibit marijuana operations, the city has different options. One option is to add wording such as "an allowed use is one that does not violate local, state or federal law" to the city's zoning code. Cities that adopt a prohibition that references federal law would then rely on existing mechanisms in their ordinances for addressing zoning violations.[9]

It is important to note that under ORS 475B.063 (as amended in HB 4014, section 11), a land use compatibility statement is required as part of the OLCC's licensing process. In particular, before issuing a producer, processor, wholesaler or retailer license, an applicant must request a statement from the city that the requested license is for a location where the proposed use of the land is a permitted or conditional use. If the proposed use is prohibited in the zone, the OLCC may not issue a license. A city has 21 days to act on the OLCC's request, but when that 21 days begins varies. If the land use is allowed as an outright permitted use, the city has 21 days from receipt of the request; if the land use is a conditional use, the city has 21 days from the final local permit approval. The city's response to the OLCC is not a land use decision, and the city need not act on a LUCS request while a measure proposing to ban marijuana facilities is pending.

Time, Place and Manner Regulations

ORS 475B.340 (recreational) and ORS 475B.500 (medical) provide that local governments may impose reasonable regulations on the time, place and manner of operation of marijuana facilities. The League believes that, under the home rule provisions of the Oregon Constitution, local governments do not need legislative authorization to impose time, place and manner restrictions, and that the Legislature's decision to expressly confirm local authority to impose certain restrictions does not foreclose cities from imposing other restrictions not described in state law.

ORS 475B.340 and ORS 475B.500 provide that cities may regulate marijuana facilities by imposing reasonable restrictions on:

[9] Under existing law, the League believes it is clear that a city may enforce civil regulations of general applicability (such as zoning codes, business licenses and the like) through the imposition of civil penalties. Although a city likely cannot directly recriminalize conduct allowed under state criminal law, it is a different legal question whether a city may impose criminal penalties for violating a requirement of general applicability when the conduct at issue is otherwise immune from prosecution under state law (i.e. whether a city may impose criminal penalties for operation of a medical marijuana dispensary in violation of a city's land use code). *Cf. State v. Babson*, 355 Or 383, 326 P3d 559 (2014) (explaining that generally applicable, facially neutral law, such as a rule prohibiting use of public property during certain hours, may be valid even if it burdens expressive conduct otherwise protected under Article I, section 8, of the Oregon Constitution). Consequently, a city should work closely with its city attorney before imposing criminal penalties against a person operating a medical marijuana facility in violation of a local civil code, such as a zoning, business license or development code.

- The hours of operation of recreational marijuana producers, processors, wholesalers, and retailers and medical marijuana grow sites, processing sites and dispensaries;
- The location of recreational marijuana producers, processors, wholesalers and retailers, as well as medical marijuana grow sites, processing sites and dispensaries, except that a city may not impose more than a 1,000-foot buffer between recreational marijuana retailers;
- The manner of operation of recreational marijuana producers, processors, wholesalers and retailers; production and processing by marijuana researchers; and medical marijuana grow sites, processing sites and dispensaries; and
- The public's access to the premises of recreational marijuana producers, processors, wholesalers and retailers, as well as medical marijuana grow sites, processing sites and dispensaries.

What regulations a city ultimately adopts will depend on community wants and needs, as well as on future changes to the law and to the rules adopted by the OHA and the OLCC. As a result, although cities may want to begin considering the types of regulations that they want to impose, cities should be aware that local needs may change with experience and as new laws and administrative rules go into effect.

Appendix A

Early Sales Opt Out

APPENDIX A

Early Sales Opt Out

As of July 1, 2015, people aged 21 and older may possess certain amounts of recreational marijuana under Oregon law. However, the Oregon Liquor Control Commission, which is the state agency charged with licensing the retail sale of recreational marijuana, does not expect to begin licensing retail stores until sometime in 2016. To address the gap between the date when people can possess recreational marijuana under Oregon law and the date when people will be able to purchase recreational marijuana from a retail store, the Legislature enacted Senate Bill 460 in 2015, as amended by SB 1511 in 2016, which allows for limited sales of recreational marijuana from medical marijuana dispensaries starting October 1, 2015. Under SB 460 and section 21 of SB 1511, cities can adopt an ordinance prohibiting those limited recreational sales. Although not required by the statute, the League recommends the city submit its early sales opt out ordinance to Oregon Health Authority so that they may aid in any enforcement of the ban.

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AN ORDINANCE OF THE CITY OF {NAME} DECLARING A BAN ON THE SALE OF RECREATIONAL MARIJUANA BY MEDICAL MARIJUANA DISPENSARIES, AND DECLARING AN EMERGENCY

Whereas, the Oregon Medical Marijuana Act created a system for the transfer of medical marijuana between growers and patients and caregivers through medical marijuana dispensaries;

Whereas, the voters adopted Measure 91 in November 2014, which provides criminal immunity for people aged 21 or older who possess certain amounts of marijuana and directs the Oregon Liquor Control Commission to license the retail sale of marijuana;

Whereas, the Oregon Liquor Control Commission has not yet licensed the retail sale of recreational marijuana;

Whereas, the Legislature enacted Senate Bill 460 (2015), as amended by Senate Bill 1511 (2016) to allow medical marijuana dispensaries to sell limited marijuana retail product starting October 1, 2015;

Whereas, Senate Bill 460 (2015), as amended, provides that a city may adopt ordinances prohibiting the sale of limited marijuana retail product from medical marijuana dispensaries;

Whereas, the City Council wants to prohibit the sale of marijuana retail products from medical marijuana dispensaries in the city to protect and benefit the public health, safety and welfare of existing and future residents and businesses in the city;

NOW THEREFORE, BASED ON THE FOREGOING, THE CITY OF {NAME} ORDAINS AS FOLLOWS:

BAN DECLARED. The City of {Name} hereby prohibits the sale of limited marijuana retail product in any area subject to the jurisdiction of City of {Name} as described in section 2 of Senate Bill 460 (2015), as amended.

DURATION OF BAN. The ban imposed by this ordinance will be effective until December 31, 2016, or until the Legislature ends sales of limited marijuana retail product by medical marijuana dispensaries, whichever comes later.

ENFORCEMENT. {Cities need to think about how to enforce a ban, with mechanisms such as revocation or suspension of a business license, revocation of a marijuana activities registration, injunction, or civil penalty. Cities that consider imposing a criminal penalty should work closely with their city attorney to assess their ability to do so under SB 460 and ORS chapter 475B.}

EMERGENCY. This ordinance being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this ordinance shall be in full force and effect on {date/passage}.

This document is not a substitute for legal advice. City councils considering prohibiting or taxing any marijuana facilities should not rely solely on this sample. Any city council considering any form of regulation of marijuana should consult with its city attorney regarding the advantages, disadvantages, risks and limitations of any given approach.

Legal counsel can also assist a city in preparing an ordinance that is consistent with local procedures, existing ordinances and a city's charter, and advise on what process is needed to adopt the ordinance.

The sample provided is intended to be a starting point, not an ending point, for any jurisdiction considering prohibiting or taxing marijuana.

Appendix B

Opt Out by Voter Referral

APPENDIX B

Opt Out by Voter Referral

Cities that are not in a county that voted no on Measure 91 by 55 percent or more, or cities that desire to ban certain marijuana activities after December 24, 2015, may do so only by referral at a statewide general election, meaning an election in November of an even-numbered year. Cities should consult the Secretary of State's referral manual and work with the city recorder or similar official to determine the procedures necessary to refer an ordinance to the voters.

Once adopted, the city must submit the ordinance to the Oregon Health Authority (if banning medical marijuana businesses) and/or the Oregon Liquor Control Commission (if banning recreational marijuana businesses), and those agencies will then stop registering and licensing the prohibited businesses until the next statewide general election. In other words, for cities using the referral process, the council's adoption of an ordinance acts as a moratorium on new facilities until the election. Each agency has a form for submitting the ordinances.

Medical marijuana dispensaries are grandfathered and are able to operate despite a ban if they: (1) have applied to be registered by July 1, 2015 or were registered prior to the date on which the ordinance is adopted by the city council, and (2) successfully completed the land use application process (if applicable). Medical marijuana processors are grandfathered and are able to operate despite a ban if they: (1) were registered under ORS 475.300 to 475.346 (now ORS 475B.400 to 475B.525) and were processing usable marijuana on or before July 1, 2015; or (2) are registered under section 85 of HB 3400 (now ORS 475B.435, as amended by HB 4014) prior to the date on which the ordinance is adopted by the governing bod; and (3) have successfully completed a local land use application process (if applicable).

Cities that adopt an ordinance prohibiting the establishment of medical or recreational marijuana businesses are not eligible to receive a distribution of state marijuana tax revenues or to impose a local tax under section ORS 475B.800.

In addition, it is important to note that once the elections official files the referral with the county election office, the ballot measure is certified to the ballot. At that point, the restrictions on public employees engaging in political activity will apply. Consequently, cities should consult the Secretary of State's manual *Restrictions on Political Campaigning by Public Employees* and their city attorney to ensure that public employees are complying with state elections law in their communications about the pending measure.

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AN ORDINANCE OF THE CITY OF {NAME} DECLARING A BAN ON {MEDICAL MARIJUANA PROCESSING SITES, MEDICAL MARIJUANA DISPENSARIES, RECREATIONAL MARIJUANA PRODUCERS, RECREATIONAL MARIJUANA PROCESSORS, RECREATIONAL MARIJUANA WHOLESALERS, AND/OR RECREATIONAL MARIJUANA RETAILERS}; REFERRING ORDINANCE; AND DECLARING AN EMERGENCY

Whereas, ORS 475B.400 to 475B.525 provides that the Oregon Health Authority will register medical marijuana processing sites and medical marijuana dispensaries;

Whereas, ORS 475B.005 to 475B.399 directs the Oregon Liquor Control Commission to license the production, processing, wholesale, and retail sale of recreational marijuana;

Whereas, ORS 475B.800 provides that a city council may adopt an ordinance to be referred to the electors of the city prohibiting the establishment of certain state-registered and state-licensed marijuana businesses in the area subject to the jurisdiction of the city;

Whereas, the city council wants to refer the question of whether to prohibit {recreational marijuana producers, processors, wholesalers, and/or retailers, as well as medical marijuana processors and/or medical marijuana dispensaries} to the voters of {City};

NOW THEREFORE, BASED ON THE FOREGOING, THE CITY OF {NAME} ORDAINS AS FOLLOWS:

DEFINITIONS.

Marijuana means the plant Cannabis family Cannabaceae, any part of the plant Cannabis family Cannabaceae and the seeds of the plant Cannabis family Cannabaceae.

Marijuana processing site means an entity registered with the Oregon Health Authority to process marijuana.

Marijuana processor means an entity licensed by the Oregon Liquor Control Commission to process marijuana.

Marijuana producer means an entity licensed by the Oregon Liquor Control Commission to manufacture, plant, cultivate, grow or harvest marijuana.

Marijuana retailer means an entity licensed by the Oregon Liquor Control Commission to sell marijuana items to a consumer in this state.

Marijuana wholesaler means an entity licensed by the Oregon Liquor Control Commission to purchase items in this state for resale to a person other than a consumer.

Medical marijuana dispensary means an entity registered with the Oregon Health Authority to transfer marijuana.

BAN DECLARED. As described in sectionORS475B.800, the City of {Name} hereby prohibits the establishment {and operation}[1] of the following in the area subject to the jurisdiction of the city {select desired options from the list below}:

(a) Marijuana processing sites;
(b) Medical marijuana dispensaries;
(c) Marijuana producers;

[1] Include this wording if (1) there are existing recreational licensees operating within the city and (2) the city does not wish to grandfather in those activities.

(d) Marijuana processors;
(e) Marijuana wholesalers;
(f) Marijuana retailers.

EXCEPTION. The prohibition set out in this ordinance does not apply to a marijuana processing site or medical marijuana dispensary that meets the conditions set out in ORS 475B.800(6).

REFERRAL. This ordinance shall be referred to the electors of the city of {name} at the next statewide general election on {date – Tuesday, November 8, 2016 is the next statewide general election}.

EMERGENCY. This ordinance being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this ordinance shall be in full force and effect on {date/passage}.

****

A RESOLUTION APPROVING REFERAL TO THE ELECTORS OF THE CITY OF {NAME} THE QUESTION OF BANNING {MEDICAL MARIJUANA PROCESSING SITES, MEDICAL MARIJUANA DISPENSARIES, RECREATIONAL MARIJUANA PRODUCERS, RECREATIONAL MARIJUANA PROCESSORS, RECREATIONAL MARIJUANA WHOLESALERS, AND/OR RECREATIONAL MARIJUANA RETAILERS} WITHIN THE CITY[2]

Whereas, section ORS 475B.800 provides that a city council may adopt an ordinance to be referred to the electors of the city prohibiting the establishment of certain state-registered and state-licensed marijuana businesses in the area subject to the jurisdiction of the city;

Whereas, the CITY OF {NAME} city council adopted Ordinance {number}, which prohibits the establishment of {list of marijuana activities) in the area subject to the jurisdiction of the city;

NOW, THEREFORE, THE CITY OF {NAME} RESOLVES AS FOLLOWS:

MEASURE. A measure election is hereby called for the purpose of submitting to the electors of the CITY OF {NAME} a measure prohibiting the establishment of certain marijuana activities in the area subject to the jurisdiction of the city, a copy of which is attached hereto as "Exhibit 1," and incorporated herein by reference.[3]

ELECTION CONDUCTED BY MAIL. The measure election shall be held in the CITY OF {NAME} on {date – November 8, 2016 for the next general election}. As required by ORS 254.465, the measure election shall be conducted by mail by the County Clerk of {county name} County, according to the procedures adopted by the Oregon Secretary of State.

DELEGATION. The CITY OF {NAME} authorizes the {City Manager, City Administrator, City Recorder, or other appropriate city official} or the {City Manager, City Administrator, City

[2] Some cities approve the ballot title, question, summary, and explanatory statement by adopting an ordinance, rather than by adopting a separate resolution.
[3] Exhibit 1 should include the question and summary.

Recorder, or other appropriate city official} designee, to act on behalf of the city and to take such further action as is necessary to carry out the intent and purposes set forth herein, in compliance with the applicable provisions of law.

PREPARATION OF BALLOT TITLE. The City Attorney is hereby directed to prepare the ballot title for the measure, and deposit the ballot title with the {city elections officer} within the times set forth by law.[4]

NOTICE OF BALLOT TITLE AND RIGHT TO APPEAL. Upon receiving the ballot title for this measure, the {city elections officer} shall publish in the next available edition of a newspaper of general circulation in the city a notice of receipt of the ballot title, including notice that an elector may file a petition for review of the ballot title.

EXPLANATORY STATEMENT. The explanatory statement for the measure, which is attached hereto as "Exhibit 2," and incorporated herein by reference, is hereby approved.

FILING WITH COUNTY ELECTIONS OFFICE. The {city elections officer} shall deliver the Notice of Measure Election to the county clerk for {name of county} County for inclusion on the ballot for the {date} election.[5]

EFFECTIVE DATE. This resolution is effective upon adoption.

****

As noted, the ballot title, question, summary, and explanatory statement may be approved by the council through ordinance or resolution.

BALLOT TITLE
A caption which reasonably identifies the subject of the measure
10-word limit under ORS 250.035(1)(a)

Prohibits certain marijuana registrants {and/or} licensees in {city}

QUESTION
A question which plainly phrases the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure
20-word limit under ORS 250.035(1)(b)

Shall {city} prohibit {medical marijuana processors, medical marijuana dispensaries, recreational marijuana producers, processors, wholesalers, and retailers} in {city}?

[4] Alternatively, the council may prepare the ballot title and attach it to the resolution for approval. In that case, this section might say, "The ballot title for the measure set forth as Exhibit {number} to this resolution is hereby adopted." A city's local rules may dictate who will prepare the ballot title.
[5] The Notice of Measure Election is a form provided by the Oregon Secretary of State where cities provide the ballot title, question, summary, and explanatory statement. The form can be found on the Secretary of State's website at www.sos.oregon.gov.

SUMMARY

A concise and impartial statement summarizing the measure and its major effect

17- word limit under ORS 250.035(1)(c)

**Note: This summary may need to be modified depending on which activities a city proposes to ban and whether it will grandfather in existing retail activities. By law, certain medical marijuana businesses can continue operating.*

State law allows operation of registered medical marijuana processors, medical marijuana dispensaries and licensed recreational marijuana producers, processors, wholesalers, and retailers. State law provides that a city council may adopt an ordinance to be referred to the voters to prohibit the establishment of any of those registered or licensed activities.

Approval of this measure would prohibit the establishment {and operation}[6] of {medical marijuana processors, medical marijuana dispensaries, recreational marijuana producers, processors, wholesalers, and retailers} within the area subject to the jurisdiction of the city {provided that state law allows for continued operation of medical marijuana processors and medical marijuana dispensaries already registered—or in some cases, that have applied to be registered—and that have successfully completed a local land use application process}.

If this measure is approved, the city will be ineligible to receive distributions of state marijuana tax revenues and will be unable to impose a local tax or fee on the production, processing or sale of marijuana or any product into which marijuana has been incorporated.

****

EXPLANATORY STATEMENT

An impartial, simple and understandable statement explaining the measure and its effect for use in the county voters' pamphlet

500-word limit under ORS 251.345 and OAR 165-022-0040(3)

Approval of this measure would prohibit the establishment {and operation}[7] of certain marijuana activities within the city.

ORS 475B.400 to 475B.525 provides that the Oregon Health Authority will register medical marijuana processors and medical marijuana dispensaries. Medical marijuana processors compound or convert marijuana into concentrates, extracts, edible products, and other products intended for human consumption and use. Medical marijuana dispensaries facilitate the transfer of marijuana and marijuana products between patients, caregivers, processors, and growers. ORS 475B.005 to 475B.399 provides that the Oregon Liquor Control Commission will license

[6] Include this wording if (1) there are existing recreational licensees operating within the city and (2) the city does not wish to grandfather in those activities.

[7] Include this wording if (1) there are existing recreational licensees operating within the city and (2) the city does not wish to grandfather in those activities.

recreational marijuana producers (those who manufacture, plant, cultivate, grow or harvest marijuana), processors, wholesalers, and retailers.

A city council may adopt an ordinance prohibiting the establishment of any of those entities within the city, but the council must refer the ordinance to the voters at a statewide general election. The CITY OF {NAME} city council has adopted an ordinance prohibiting the establishment of {list of marijuana activities to be banned} within the city and, as a result, has referred this measure to the voters.

If approved, this measure would prohibit {medical marijuana processors, medical marijuana dispensaries, and/or recreational marijuana producers, processors, wholesalers, and/or retailers} within the city. Medical marijuana processors and medical marijuana dispensaries that were registered with the state before the city council adopted the ordinance, and medical marijuana dispensaries that had applied to be registered on or before July 1, 2015, can continue operating in the city even if this measure is approved, if those entities have successfully completed a local land use application process.

Approval of this measure has revenue impacts. Currently, ten percent of state marijuana tax revenues will be distributed to cities to assist local law enforcement in performing their duties under ORS 475B.760(2). If approved, this measure would make the city ineligible to receive distributions of state marijuana tax revenues.

Currently, under ORS 475B.345, a city may impose up to a three percent tax on the sale of marijuana items by a marijuana retailer in the city. However, a city that adopts an ordinance prohibiting the establishment of medical marijuana processors, medical marijuana dispensaries, or recreational marijuana producers, processors, wholesalers, or retailers may not impose a local tax or fee on the production, processing or sale of marijuana or any product into which marijuana has been incorporated. Approval of this measure would therefore prevent a city from imposing a local tax on those activities.

This document is not a substitute for legal advice. City councils considering prohibiting or taxing any marijuana facilities should not rely solely on this sample. Any city council considering any form of regulation of marijuana should consult with its city attorney regarding the advantages, disadvantages, risks and limitations of any given approach.

Legal counsel can also assist a city in preparing an ordinance that is consistent with local procedures, existing ordinances and a city's charter, and advise on what process is needed to adopt the ordinance. The sample provided is intended to be a starting point, not an ending point, for any jurisdiction considering prohibiting or taxing marijuana.

Appendix C

Opt In by Voter Referral

APPENDIX C

Opt In by Voter Referral

Under sections 30 and 31 of HB 4014, cities may repeal an earlier ordinance prohibiting the establishment of marijuana businesses but may do so only by a new ordinance repealing the old ordinance and referral of the repeal ordinance to the city's voters at a statewide general election, meaning an election in November of an even-numbered year. Cities should consult the secretary of state's referral manual and work with the city recorder or similar official to determine the procedures necessary to refer an ordinance to the voters. The process will be similar to the referral process utilized to prohibit marijuana businesses described in Appendix B above.

Once adopted, the city must submit the ordinance to the Oregon Health Authority (if the ordinance being repealed relates to medical marijuana businesses) and/or the Oregon Liquor Control Commission (if the ordinance being repealed relates to recreational marijuana businesses). Each agency has a form for submitting the ordinances.

If the referral repealing the prohibition of marijuana businesses is approved by the voters, the Oregon Liquor Control Commission or the Oregon Health Authority (depending upon whether a recreational marijuana or medical marijuana business is involved) will begin licensing businesses on January 1 following the November election. This should provide cities with an opportunity to update its ordinances and codes to add any needed time, manner or place restrictions.

Any referral election to opt-in or opt-out must be held at the next statewide general election. For most cities and counties, this would be November 6, 2018. The model below uses this date. However, certain cities which are located in a county in which not less than 55 percent of votes cast were in opposition to Ballot Measure 91 and which were thereby able to enact a ban of marijuana businesses by council ordinance on or before December 24, 2015 may be able to opt-in at the November 8, 2016 general election. Consult your city attorney if this applies to you.

In addition, it is important to note that once the elections official files the referral with the county election office, the ballot measure is certified to the ballot. At that point, the restrictions on public employees engaging in political activity will apply. Consequently, cities should consult the Secretary of State's manual *Restrictions on Political Campaigning by Public Employees* and their city attorney to ensure that public employees are complying with state elections law in their communications about the pending measure.

****

AN ORDINANCE OF THE CITY OF {NAME} REPEALING A BAN ON {MEDICAL MARIJUANA PROCESSING SITES, MEDICAL MARIJUANA DISPENSARIES, RECREATIONAL MARIJUANA PRODUCERS, RECREATIONAL MARIJUANA PROCESSORS, RECREATIONAL MARIJUANA WHOLESALERS, AND/OR RECREATIONAL MARIJUANA RETAILERS}; REFERRING ORDINANCE; AND DECLARING AN EMERGENCY

Whereas, the city electors approved a ban on {medical marijuana processing sites, medical marijuana dispensaries, recreational marijuana producers, recreational marijuana processors, recreational marijuana wholesalers, and/or recreational marijuana retailers} on [_____];

Whereas, sections 30 and 31 of HB 4014 provide that a city council may adopt an ordinance to be referred to the electors of the city repealing ordinances that prohibit the establishment of marijuana related businesses in the area subject to the jurisdiction of the city;

Whereas, the city council wants to refer the question of whether to repeal the prohibition on{recreational marijuana producers, processors, wholesalers, and/or retailers, as well as medical marijuana processors and/or medical marijuana dispensaries} to the voters of {City};

NOW THEREFORE, BASED ON THE FOREGOING, THE CITY OF {NAME} ORDAINS AS FOLLOWS:

DEFINITIONS.

Marijuana means the plant Cannabis family Cannabaceae, any part of the plant Cannabis family Cannabaceae and the seeds of the plant Cannabis family Cannabaceae.

Marijuana processing site means an entity registered with the Oregon Health Authority to process marijuana.

Marijuana processor means an entity licensed by the Oregon Liquor Control Commission to process marijuana.

Marijuana producer means an entity licensed by the Oregon Liquor Control Commission to manufacture, plant, cultivate, grow or harvest marijuana.

Marijuana retailer means an entity licensed by the Oregon Liquor Control Commission to sell marijuana items to a consumer in this state.

Marijuana wholesaler means an entity licensed by the Oregon Liquor Control Commission to purchase items in this state for resale to a person other than a consumer.

Medical marijuana dispensary means an entity registered with the Oregon Health Authority to transfer marijuana.

BAN REPEALED. As described in sections 30 and 31 of House Bill 4014 (2016), the City of {Name} hereby repeals its ordinance{s} {list ordinance by name/number/date} prohibiting the establishment {and operation of the following in the area subject to the jurisdiction of the city {select desired options from the list below}:

(a) Marijuana processing sites;
(b) Medical marijuana dispensaries;
(c) Marijuana producers;
(d) Marijuana processors;
(e) Marijuana wholesalers;

(f) Marijuana retailers.

REFERRAL. This ordinance shall be referred to the electors of the city of {name} at the next statewide general election on {date – Tuesday, November 6, 2018 is the next statewide general election}.

EMERGENCY. This ordinance being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this ordinance shall be in full force and effect on {date/passage}.

****

A RESOLUTION APPROVING REFERAL TO THE ELECTORS OF THE CITY OF {NAME} THE QUESTION OF REPEALING ITS BAN ON {MEDICAL MARIJUANA PROCESSING SITES, MEDICAL MARIJUANA DISPENSARIES, RECREATIONAL MARIJUANA PRODUCERS, RECREATIONAL MARIJUANA PROCESSORS, RECREATIONAL MARIJUANA WHOLESALERS, AND/OR RECREATIONAL MARIJUANA RETAILERS} WITHIN THE CITY[1]

Whereas, sections 30 and 31 of HB 4014 provide that a city council may adopt an ordinance to be referred to the electors of the city repealing its ordinance prohibiting the establishment of certain state-registered and state-licensed marijuana businesses in the area subject to the jurisdiction of the city;

Whereas, the CITY OF {NAME} city council adopted Ordinance {number}, which repeals its earlier prohibition of the establishment of {list of marijuana activities) in the area subject to the jurisdiction of the city;

NOW, THEREFORE, THE CITY OF {NAME} RESOLVES AS FOLLOWS:

MEASURE. A measure election is hereby called for the purpose of submitting to the electors of the CITY OF {NAME} a measure repealing its ordinance prohibiting the establishment of certain marijuana activities in the area subject to the jurisdiction of the city, a copy of which is attached hereto as "Exhibit 1," and incorporated herein by reference.[2]

ELECTION CONDUCTED BY MAIL. The measure election shall be held in the CITY OF {NAME} on {date – November 6, 2018 or the next general election}. As required by ORS 254.465, the measure election shall be conducted by mail by the County Clerk of {county name} County, according to the procedures adopted by the Oregon Secretary of State.

DELEGATION. The CITY OF {NAME} authorizes the {City Manager, City Administrator, City Recorder, or other appropriate city official} or the {City Manager, City Administrator, City Recorder, or other appropriate city official} designee, to act on behalf of the city and to take such

[1] Some cities approve the ballot title, question, summary, and explanatory statement by adopting an ordinance, rather than by adopting a separate resolution.
[2] Exhibit 1 should include the question and summary.

further action as is necessary to carry out the intent and purposes set forth herein, in compliance with the applicable provisions of law.

PREPARATION OF BALLOT TITLE. The City Attorney is hereby directed to prepare the ballot title for the measure, and deposit the ballot title with the {city elections officer} within the times set forth by law.[3]

NOTICE OF BALLOT TITLE AND RIGHT TO APPEAL. Upon receiving the ballot title for this measure, the {city elections officer} shall publish in the next available edition of a newspaper of general circulation in the city a notice of receipt of the ballot title, including notice that an elector may file a petition for review of the ballot title.

EXPLANATORY STATEMENT. The explanatory statement for the measure, which is attached hereto as "Exhibit 2," and incorporated herein by reference, is hereby approved.

FILING WITH COUNTY ELECTIONS OFFICE. The {city elections officer} shall deliver the Notice of Measure Election to the county clerk for {name of county} County for inclusion on the ballot for the {date} election.[4]

EFFECTIVE DATE. This resolution is effective upon adoption.

****

As noted, the ballot title, question, summary, and explanatory statement may be approved by the council through ordinance or resolution.

BALLOT TITLE
A caption which reasonably identifies the subject of the measure
10-word limit under ORS 250.035(1)(a)

Repeals Marijuana Business Prohibitions

QUESTION
A question which plainly phrases the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure
20-word limit under ORS 250.035(1)(b)

Shall {city} repeal its prohibition of {medical marijuana processors, medical marijuana dispensaries, recreational marijuana producers, processors, wholesalers, retailers} in {city}?

[3] Alternatively, the council may prepare the ballot title and attach it to the resolution for approval. In that case, this section might say, "The ballot title for the measure set forth as Exhibit {number} to this resolution is hereby adopted." A city's local rules may dictate who will prepare the ballot title.
[4] The Notice of Measure Election is a form provided by the Oregon Secretary of State where cities provide the ballot title, question, summary, and explanatory statement. The form can be found on the Secretary of State's website at www.sos.oregon.gov.

SUMMARY

A concise and impartial statement summarizing the measure and its major effect

175-word limit under ORS 250.035(1)(c)

**Note: This summary may need to be modified depending on which activities a city proposes to allow or continue to ban and whether it will grandfather in existing retail activities. By law, certain medical marijuana businesses can continue operating.*

State law allows that a city council may adopt an ordinance to be referred to the voters to repeal a previously voter approved prohibition of registered medical marijuana processors, medical marijuana dispensaries and licensed recreational marijuana producers, processors, wholesalers, and retailers. Approval of this measure would repeal the city's ordinance which prohibits the establishment of {medical marijuana processors, medical marijuana dispensaries, recreational marijuana producers, processors, wholesalers, and retailers} within the area subject to the jurisdiction of the city {provided that state law allows for continued operation of medical marijuana processors and medical marijuana dispensaries already registered—or in some cases, that have applied to be registered—and that have successfully completed a local land use application process}.

If this measure is approved, the city will be eligible to receive distributions of state marijuana tax revenues and able to impose a local tax or fee on the production, processing or sale of marijuana or any product into which marijuana has been incorporated.

****

EXPLANATORY STATEMENT

An impartial, simple and understandable statement explaining the measure and its effect for use in the county voters' pamphlet

500-word limit under ORS 251.345 and OAR 165-022-0040(3)

Approval of this measure would repeal an existing prohibition on the establishment of certain marijuana activities within the city.

The Oregon Medical Marijuana Act, ORS chapter 475B, provides that the Oregon Health Authority will register medical marijuana processors and medical marijuana dispensaries. Medical marijuana processors compound or convert marijuana into concentrates, extracts, edible products, and other products intended for human consumption and use. Medical marijuana dispensaries facilitate the transfer of marijuana and marijuana products between patients, caregivers, processors, and growers. ORS chapter 475B further provides that the Oregon Liquor Control Commission will license recreational marijuana producers (those who manufacture, plant, cultivate, grow or harvest marijuana), processors, wholesalers and retailers.

Under Oregon law, a city council which has adopted an ordinance prohibiting the establishment of any of those activities within the city, referred the ordinance to the voters at a statewide general election, and received the approval of the voters for the prohibition, now allows cities to

repeal the ordinance prohibiting the activities described above. The CITY OF {NAME} city council has adopted an ordinance repealing the prohibition within the city and, as a result, has referred this measure to the voters.

If approved, this measure would repeal the city's prohibition of {medical marijuana processors, medical marijuana dispensaries, and/or recreational marijuana producers, processors, wholesalers, and/or retailers} within the city. If approved, the effect of the approval would be to allow {medical marijuana processors, medical marijuana dispensaries and/or recreational marijuana producers, processors, wholesalers, and/or retailers within the city. Approval of this measure has revenue impacts. Currently, ten percent of state marijuana tax revenues will be distributed to cities to assist local law enforcement in performing their duties under ORS chapter 475B. If approved, this measure would make the city eligible to receive distributions of state marijuana tax revenues.

ORS chapter 475B.345 provides that a city may impose up to a three percent tax on the sale of marijuana items by a marijuana retailer in the city upon the approval of city voters at a statewide general election. Approval of this measure would therefore allow the city to impose a local tax on those activities. This would require a separate ordinance, referral to and approval by city voters to improve the local tax.

This document is not a substitute for legal advice. City councils considering prohibiting or taxing any marijuana facilities should not rely solely on this sample. Any city council considering any form of regulation of marijuana should consult with its city attorney regarding the advantages, disadvantages, risks and limitations of any given approach.

Legal counsel can also assist a city in preparing an ordinance that is consistent with local procedures, existing ordinances and a city's charter, and advise on what process is needed to adopt the ordinance. The sample provided is intended to be a starting point, not an ending point, for any jurisdiction considering prohibiting or taxing marijuana.

Appendix D

Local Tax by Voter Referral

APPENDIX D

Local Tax by Voter Referral

ORS 475B.345 allows cities to impose up to a 3 percent tax on sales of marijuana items made by those with recreational retail licenses by referring an ordinance to the voters at a statewide general election, meaning an election in November of an even-numbered year.[1]

However, ORS 475B.800, which provides a mechanism for prohibiting the establishment of certain marijuana businesses, states that a city that adopts a prohibition under those sections may not impose a tax or fee on the production, processing or sale or marijuana or any product into which marijuana has been incorporated. As a result, if a city refers a local tax ordinance to the voters at the same election that it refers a prohibition ordinance to the voters, the city will want to consult its attorney regarding the effect of those two ordinances. The sample below includes wording for cities that put both ordinances on that same ballot. However, a city planning to refer both measures to the ballot should work closely with its city attorney on preparing those ordinances and referral documents.

It is important to note that once the elections official files the referral with the county election office, the ballot measure is certified to the ballot. At that point, the restrictions on public employees engaging in political activity will apply. Consequently, cities should consult the Secretary of State's manual *Restrictions on Political Campaigning by Public Employees* and their city attorney to ensure that public employees are complying with state elections law in their communications about the pending measure.

****

AN ORDINANCE OF THE CITY OF {NAME} IMPOSING A {UP TO THREE} PERCENT TAX {OR FEE} ON THE SALE OF MARIJUANA ITEMS BY A MARIJUANA RETAILER AND REFERRING ORDINANCE[2]

Whereas, ORS 475B.345 provides that a city council may adopt an ordinance to be referred to the voters that imposes up to a three percent tax or fee on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city;

Whereas, the city council wants to impose a tax {or fee} on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city;

[1] Cities that imposed marijuana taxes prior to the effective date of HB 3400 (2015) should talk to their city attorney about the status of those taxes.

[2] No emergency clause is included in this ordinance because a city may not include an emergency clause in an ordinance regarding taxation. *See Advance Resorts v. City of Wheeler*, 141 Or App 166, 178, 917 P2d 61, *rev den*, 324 Or 322 (1996) (holding that a city may not include an emergency clause in an ordinance regarding taxation).

NOW THEREFORE, BASED ON THE FOREGOING, THE CITY OF {NAME} ORDAINS AS FOLLOWS:

DEFINITIONS.

Marijuana item has the meaning given that term in ORS 475B.015(16).

Marijuana retailer means a person who sells marijuana items to a consumer in this state.

Retail sale price means the price paid for a marijuana item, excluding tax, to a marijuana retailer by or on behalf of a consumer of the marijuana item.

TAX IMPOSED. As described in ORS 475B.345 the City of {Name} hereby imposes a tax {or fee} of {up to three} percent on the retail sale price of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city.

COLLECTION. The tax shall be collected at the point of sale of a marijuana item by a marijuana retailer at the time at which the retail sale occurs and remitted by each marijuana retailer that engages in the retail sale of marijuana items.[3]

REFERRAL. This ordinance shall be referred to the electors of {city} at the next statewide general election on {date – Tuesday, November 8, 2016 is the next statewide general election}.

****

A RESOLUTION APPROVING REFERAL TO THE ELECTORS OF THE CITY OF {NAME} THE QUESTION OF IMPOSING A {UP TO THREE} PERCENT TAX {OR FEE} ON THE SALE OF MARIJUANA ITEMS BY A MARIJUANA RETAILER WITHIN THE CITY[4]

Whereas, ORS 475B.345 provides that a city council may adopt an ordinance to be referred to the voters that imposes up to a three percent tax or fee on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city;

Whereas, the city of {name} city council adopted Ordinance {number}, which imposes a tax of {up to three} percent on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city;

NOW, THEREFORE, THE CITY OF {NAME} RESOLVES AS FOLLOWS:

MEASURE. A measure election is hereby called for the purpose of submitting to the electors of the city of {name} a measure imposing a {up to three} percent tax on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city, a copy of which is attached hereto as "Exhibit 1," and incorporated herein by reference.[5]

[3] Cities may want to include information about where, how, and when the tax must be remitted.
[4] Some cities approve the ballot title, question, summary, and explanatory statement by adopting an ordinance, rather than by adopting a separate resolution.
[5] Exhibit 1 should include the question and summary.

ELECTION CONDUCTED BY MAIL. The measure election shall be held in the city of {name} on {date – November 8, 2016 for the next general election}. As required by ORS 254.465, the measure election shall be conducted by mail by the County Clerk of {county name} County, according to the procedures adopted by the Oregon Secretary of State.

DELEGATION. The city of {name} authorizes the City Manager, or the City Manager's designee, to act on behalf of the city and to take such further action as is necessary to carry out the intent and purposes set forth herein, in compliance with the applicable provisions of law.

PREPARATION OF BALLOT TITLE. The City Attorney is hereby directed to prepare the ballot title for the measure, and deposit the ballot title with the {city elections officer} within the times set forth by law.[6]

NOTICE OF BALLOT TITLE AND RIGHT TO APPEAL. Upon receiving the ballot title for this measure, the {city elections officer} shall publish in the next available edition of a newspaper of general circulation in the city a notice of receipt of the ballot title, including notice that an elector may file a petition for review of the ballot title.

EXPLANATORY STATEMENT. The explanatory statement for the measure, which is attached hereto as "Exhibit 2," and incorporated herein by reference, is hereby approved.

FILING WITH COUNTY ELECTIONS OFFICE. The {city elections officer} shall deliver the Notice of Measure Election to the county clerk for {name of county} County for inclusion on the ballot for the {date} election.[7]

EFFECTIVE DATE. This resolution is effective upon adoption.

****

BALLOT TITLE
A caption which reasonably identifies the subject of the measure
10-word limit under ORS 250.035(1)(a)

Imposes city tax on marijuana retailer's sale of marijuana items

QUESTION
A question which plainly phrases the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure
20-word limit under ORS 250.035(1)(b)

[6] Alternatively, the council may prepare the ballot title and attach it to the resolution for approval. In that case, this section might say, "The ballot title for the measure set forth as Exhibit {number} to this resolution is hereby adopted." A city's local rules may dictate who will prepare the ballot title.
[7] The Notice of Measure Election is a form provided by the Oregon Secretary of State where cities provide the ballot title, question, summary, and explanatory statement. The form can be found on the Secretary of State's website at www.sos.oregon.gov.

Shall City of {name} impose a {up to three percent} tax on the sale in the City of {city} of marijuana items by a marijuana retailer?

SUMMARY

A concise and impartial statement summarizing the measure and its major effect

175-word limit under ORS 250.035(1)(c)

Under state law, a city council may adopt an ordinance to be referred to the voters of the city imposing up to a three percent tax or fee on the sale of marijuana items in the city by a licensed marijuana retailer.

Approval of this measure would impose a {up to three} percent tax on the sale of marijuana items in the city by a licensed marijuana retailer. The tax would be collected at the point of sale and remitted by the marijuana retailer.

{Under state law, a city that adopts an ordinance that prohibits the establishment in the area subject to the jurisdiction of the city of a medical marijuana processor, medical marijuana dispensary, or recreational marijuana producer, processor, wholesaler, or retailer may not impose a tax or fee on the production, processing or sale of marijuana or any product into which marijuana has been incorporated. This measure would become operative only if the measure proposing to prohibit the establishment of any of those marijuana entities does not pass by a majority of votes.}[8]

****

EXPLANATORY STATEMENT

An impartial, simple and understandable statement explaining the measure and its effect for use in the county voters' pamphlet

500-word limit under ORS 251.345 and OAR 165-022-0040(3)

Approval of this measure would impose a {up to three} percent tax on the sale of marijuana items by a marijuana retailer within the city. There are no restrictions on how the city may use the revenues generated by this tax. {However, this measure will become operative only if the ballot measure prohibiting the establishment of certain marijuana registrants and licensees fails.}

Under Measure 91, adopted by Oregon voters in November 2014, codified in ORS chapter 475B and amended by the Legislature in 2016, the Oregon Liquor Control Commission must license the retail sale of recreational marijuana. ORS 475B.345 provides that a city council may adopt an ordinance imposing up to a three percent tax on the sale of marijuana items (which include marijuana concentrates, extracts, edibles, and other products intended for human consumption and use) by retail licensees in the city, but the council must refer that ordinance to the voters at a

[8] Cities that desire to provide voters with the most options may wish to put both a measure banning certain activities and a tax measure before the voters at the same time. Cities that elect to do so should include this wording explaining the effect of the vote.

statewide general election. The City of {name} city council has adopted an ordinance imposing a {up to three} percent tax on the sale of marijuana items by a retail licensee in the city, and, as a result, has referred this measure to the voters.

{However, this measure will become operative only if the ballot measure prohibiting the establishment of certain marijuana registrants and licensees fails. Under state law, a city that adopts an ordinance that prohibits the establishment in the area subject to the jurisdiction of the city of a medical marijuana processor, medical marijuana dispensary, or recreational marijuana producer, processor, wholesaler, or retailer may not impose a tax or fee on the production, processing or sale of marijuana or any product into which marijuana has been incorporated. As a result, if the voters pass a prohibition ordinance, this tax measure will not become operative, even if it also receives a majority of votes.}

This document is not a substitute for legal advice. City councils considering prohibiting or taxing any marijuana facilities should not rely solely on this sample. Any city council considering any form of regulation of marijuana should consult with its city attorney regarding the advantages, disadvantages, risks and limitations of any given approach.

Legal counsel can also assist a city in preparing an ordinance that is consistent with local procedures, existing ordinances and a city's charter, and advise on what process is needed to adopt the ordinance.

The sample provided is intended to be a starting point, not an ending point, for any jurisdiction considering prohibiting or taxing marijuana.

Appendix E

Sample Time, Place and Manner Restrictions on Marijuana Businesses

APPENDIX E

Sample Time, Place and Manner Restrictions on Marijuana Businesses

Scope

The sample wording below is designed to address both medical marijuana as well as recreational marijuana. It is based on the assumption that a city will treat both types of marijuana activities similarly. As Oregon moves towards a combined system, state law largely treats medical marijuana the same as recreational marijuana. The commentary below notes where there are differences (i.e. buffer requirements) or where a city might desire to treat medical marijuana differently from recreational marijuana activities

How to Use this Model

This document is not a substitute for legal advice.

This document is not intended to be a complete or comprehensive code chapter on marijuana businesses. A city should not adopt the sample wording in its entirety. Rather, this document, much like a restaurant menu, covers various subjects, which a city may or may not want to include in a marijuana time, place, and manner ordinance, and provides different options under each of those subjects. Consequently, this document is organized by subject area and includes a discussion of the subject followed by sample text on the following:

- Findings
- Definitions
- Rulemaking
- Licenses / Registration
    - License/Registration Required
    - License/Registration Application
    - Issuance of License/Registration
    - Fees
    - Display of License/Proof of Registration
    - Term, Renewal and Surrender
    - Transferability
    - Indemnification
- Criminal Background Checks
- Standards of Operation
    - Registration and Compliance with Administrative Rules

  - Compliance with Other Laws
  - Hours of Operation
  - Public View
  - Odors
  - Lighting
  - Sales
  - On-Site Use
  - On-Site Manufacturing
  - Outdoor Storage
  - Secure Disposal
  - Home Occupation
  - Drive-Through, Walk-Up
  - Labeling
  - Accounting Systems
  - Accounting Records
- Location
- Signs
- Examination of Books, Records and Premises
- Civil Enforcement
- Public Nuisance
- Criminal Enforcement
- Confidentiality
- Emergency Clause

Findings

Discussion

Findings provide the background and purpose of the legislation. Cities should consider how the sample findings below need to be modified to reflect their unique circumstances.

In preparing the findings, as well as other provisions of the ordinance, cities should keep in mind that marijuana remains an illegal drug under the federal Controlled Substances Act. To avoid allegations that city officials are violating federal law by authorizing the commission of a federal offense, the sample findings make clear that the authorization to operate a marijuana business comes from state law, and not local law. As such, the sample has been drafted in a manner to be restrictive rather than permissive. To illustrate that point, this sample includes wording for cities that desire to create a local licensing program as a way to implement their time, place and manner regulations. The sample's wording is drafted with care, however, to indicate that the source of authority to operate a marijuana business derives from state law and that the local license is a means to impose restrictions on the operator and is not intended to be a separate source of authority. Consequently, the wording of the following sample text carefully avoids terms that would affirmatively "allow" or "authorize" marijuana businesses.

ORS 475B now contains provisions relating to recreational marijuana businesses and medical marijuana dispensaries, processors and growers. The model ordinance relates to recreational marijuana businesses, of which there are several categories: producer, processor, wholesaler, retailer and laboratory. A city may choose to permit the operation of none, some or all of these categories within the city. The ordinance should be crafted to reflect this choice.

Sample Text

1. State law authorizes the operation of medical and recreational marijuana businesses and provides those businesses with immunity from state criminal prosecution.
2. Although the State of Oregon has passed legislation authorizing marijuana businesses and providing criminal immunity under state law, the operation of those businesses remains illegal under federal law.
3. The city council has home rule authority to decide whether, and under what conditions, certain commercial conduct should be regulated within the city and subject to the general and police powers of the city, except when local action has been clearly and unambiguously preempted by state statute.
4. Whether a certain business should operate within a local jurisdiction is a local government decision, and local governments may enforce that decision through the general and police powers of that jurisdiction.
5. [*If using an existing or creating a new license/registration system for a marijuana business*] The city's licensing [*or registration*] and regulatory system should not be construed to constitute an authorization to engage in any activity prohibited by law nor a waiver of any other license or regulatory requirement imposed by any other provisions of city ordinance or local, regional, state or federal law.
6. The city council wants to regulate the operation of marijuana businesses in the city in ways that protect and benefit the public health, safety and welfare of existing and future residents and businesses in the city.
7. The ordinance is intended to impose restrictions, not provide authorizations.

8. The ordinance is intended to apply only to recreational marijuana businesses, and not to medical marijuana businesses or to personal possession, growing or use of marijuana as authorized by the state in ORS 475B.245 to ORS 475B.255. [*Use this provision only if the city does not want to combine its medical marijuana ordinance with this ordinance or wants to address medical marijuana as part of a separate ordinance.]*

9. [*If the city intends to refer a local sales tax option to its citizens to approve a sales tax of up to 3 percent pursuant to ORS 475B.345, the following finding could be added.]* Upon approval of city voters, the city shall impose a local sales tax of ___% *[up to 3 percent]* on the sales of recreational marijuana by marijuana retailers in order to recover its costs incurred in connection with the city's recreational marijuana licensing program.

10. The operation of a marijuana business without proper authority from either the Oregon Liquor Control Commission or the Oregon Liquor Control Commission (OREGON LIQUOR CONTROL COMMISSION) is prohibited within the city.

Definitions

Discussion

Definitions should be used to clarify intent and avoid ambiguity. The specific terms defined in a marijuana ordinance will depend on the provisions of that ordinance. The terms listed here are offered as examples and cover some of the most commonly-used terms in state law relating to marijuana businesses. Recreational marijuana businesses can include producers, processors, wholesalers and retailers. A city may or may not allow all of these separate categories of marijuana business to operate within the city. The definitions need to reflect only those types of marijuana businesses permitted in a city. In addition, depending on the needs of a particular city, it may be useful or necessary to include additional definitions not listed below.

It is important to note that when interpreting ordinances that contain specific references to state law, the courts will use the version of the state statute that was in effect at the time that the ordinance was adopted. Put differently, if the Legislature amends a state statute, a city ordinance that references that statute is not automatically updated to reflect the legislative change. Consequently, if using statutory cites, the city will need to periodically review and update their ordinances if the city wants the benefit of the new statutory wording. As a result, the model ordinance does not refer to specific sections of the Oregon Revised Statutes.

Sample Text

1. Licensee means a person who holds a license issued by the city to engage in a marijuana business in accordance with this chapter.

2. Licensee representative means an owner, director, officer, manager, employee, agent or other representative of a licensee, to the extent that the person acts in a representative capacity.

3. Marijuana means all parts of the plant cannabis family moraceae, whether growing or not; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant or its resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative,

mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination.

4. Marijuana business means (1) any business licensed by the Oregon Liquor Control Commission to engage in the business of producing, processing, wholesaling, or selling marijuana or marijuana items, or (2) any business registered with the Oregon Health Authority for the growing, processing, or dispensing of marijuana or marijuana items.

   Alternative Approach: This model assumes similar treatment of both medical as well as recreational activities. If a city desires to set separate standards of operation either between medical and recreational businesses, or among license types within the medical or recreational system, then the city will need to separately define medical growers, medical processors, medical dispensaries, recreational producers, recreational processors, wholesalers, and recreational retailers. Both state law and the administrative rules provide a basis for creating such definitions

5. Marijuana items means marijuana, cannabinoid products, cannabinoid concentrates and cannabinoid extracts.

Rulemaking

Discussion

Depending on the size and structure of the city, a city may want to provide the city manager/administrator or that person's designee, or another appointed city official such as the chief of police, with authority to adopt administrative rules to implement and enforce the city's medical marijuana ordinances.

Sample Text

1. Rulemaking. The city manager [*administrator*] or the city manager's [*administrator's*] designee [*or some other designated public official, such as "chief of police"*] has authority to adopt administrative rules and procedures necessary for the proper administration and enforcement of this chapter [*or if not creating a new chapter, "ordinances relating to the operation of a marijuana business"*].

Licenses / Registration

License/Registration Required

Discussion

Cities that want to regulate marijuana businesses can do so in a number of ways. Many cities, particularly those with larger staffs, have decided to regulate marijuana businesses through a license or permit system. Even those cities that are using a licensing system are imposing differing levels of regulation, from basic registration and tracking to extensively restricting the activities of marijuana businesses. Because a licensing approach allows cities to both track and regulate marijuana businesses, with multiple enforcement mechanisms, the sample

wording provides for a licensing system. Although this sample only requires a marijuana business license, a city could also require the employees of marijuana businesses to get licenses.

As explained above, to avoid conflicts with federal law, the sample text is drafted to make clear that the authority for marijuana businesses to operate comes from state, and not local, law. Although the sample text uses the word "license," the text is intended to clarify that the license operates as a registration system, and not as a grant of authority to violate federal law. Cities that want to further emphasize that point may want to avoid the use of the word "license" and instead convert the sample text to "registration."

Cities that adopt a licensing/registration system will have to determine where to incorporate that system into their code. For example, cities with police protection licenses may want to add marijuana businesses to those licensing provisions.

Sample Text

1. Local License Required. Marijuana businesses must possess a valid license issued under this chapter to operate within the city. The license required by this chapter facilitates the registration and the city's oversight of a marijuana business. The license required by this chapter should not be construed to constitute an authorization to engage in any activity prohibited by law nor a waiver of any other regulatory or license requirement imposed by any other provision of city ordinance or local, regional, state or federal law.

2. State Registration Required. To be eligible to apply for a license under this chapter, marijuana businesses must be either registered with the Oregon Health Authority or licensed by the Oregon Liquor Control Commission and otherwise authorized by state law to operate a marijuana business.

License/Registration Application

Discussion

Cities using a licensing/registration system will have to decide what information to request in an application. The sample list of information provided below is a compilation of application requirements from different city ordinances. Cities may determine that they want to require less, more or different information from applicants.

In addition, although this sample requires the same information for both an initial and renewal application, cities may want to use a less intensive or otherwise different process for license renewals.

This sample also provides the city with the option to inspect the proposed licensed premises as part of the application process and thereafter. More information regarding inspections is found in the section "Civil Enforcement."

Sample Text

1. Application/Renewals. Applications for new and renewed licenses must be submitted to _____ [*designated public official or city department*] on a form provided by the city. A separate application must be submitted for each proposed marijuana business. The initial or renewal application must include the following information:

a. Certification that the proposed marijuana business is licensed at that location as a marijuana business with the Oregon Health Authority or the Oregon Liquor Control Commission.

b. The applicant's name, residence address, and date of birth. [*A city may want to require photo identification, such as a driver's license or other government-issued identification.*]

c. The names and residence addresses of:

   i. Any person or legal entity that has an ownership interest in the marijuana business, including all principals of the applicant;

   ii. Any person or legal entity with a financial interest that has loaned or given money or real or personal property to the applicant, or principal of the applicant, for use by the proposed marijuana business within the preceding year;

   iii. Any person or legal entity that has leased real property to the applicant for use by the marijuana business and any person who manages that property; and

   iv. Any person who is anticipated at the time of the application to be an employee or volunteer at the proposed facility.

d. The business name.

e. The address and telephone number of the proposed marijuana business.

f. The mailing address for correspondence about the license.

g. A detailed description of the type, nature and extent of the business, including a description of the category of marijuana business to be operated.

h. The proposed days and hours of operation.

i. A detailed description of the proposed accounting and inventory system of the marijuana business.

j. Certification that the licensed premises for the proposed marijuana business has met all applicable requirements of the city development and sign code.

k. Certification that all applicable taxes and fees have been paid.

l. A complete application for a criminal background check for the applicant, and all principals, persons with a financial interest, employees and volunteers of the proposed marijuana business.

   Alternative Sample Text on Criminal Background: A statement whether the applicant, principals, persons with a financial interest, employees or volunteers have been convicted of a misdemeanor within the past ____ [*time period*] that relates to _____, [*relevant crimes, such as fraud, theft, manufacture or delivery of a Schedule I controlled substance*] or have ever been convicted of a felony. (See below for a more full discussion on background checks.)

m. The names of at least three natural persons who can give an informed account of the marijuana business and moral character of the applicant and principals.

n. The signature, under penalty of perjury, of the applicant, if a natural person, or otherwise the signature of an authorized agent of the applicant, if the applicant is other than a natural person.

o. Other information deemed necessary by _____ [*designated public official*] to complete review of the application or renewal.

p. The city may inspect the proposed licensed premises prior to issuing a license and at any time during normal business hours following the issuance of a license. If, during the inspection, the city determines that the applicant or the licensed premises are not in compliance with this chapter or any other chapter of the city's building, development, zoning, nuisance or other city ordinance or code, the applicant will be provided with a notice of the failed inspection and that the requirements of this chapter have not been met. *[If the city chooses, a process for an additional inspection or hearing following a failed inspection could be added to this provision.]*

2. Continuing obligation to update information. All information provided in an initial or renewal application must be kept current at all times, including after a license is issued. Each licensee shall notify _____ [*designated public official or department*] in writing within _____ [*time period, such as ten business days*] of any change in the information provided to obtain the license.

Issuance of License/Registration

Discussion

Each city that adopts a licensing/registration system will have to determine the process for issuing licenses, the criteria for issuing or denying a license, and who within the city will apply those criteria. Cities may want to look to how other local licenses, such as business licenses, are issued in crafting a process for issuing medical marijuana facility licenses.

If a city wants to cap the number of licenses that it will issue, the city could address that issue in this section. If a city takes that approach, it should consider what method it will use to determine which applicants will receive licenses when the number of applications exceeds the cap.

Sample Text

1. Determination. Within ____ [*time period*] after receiving a complete [*initial or renewal*] application and license fee for a medical marijuana business license, the _____ [*designated public official or department*] will issue the license if _____ [*designated public official or department*] finds that the facility is licensed as a marijuana business with the Oregon Health Authority or the Oregon Liquor Control Commission and that all other requirements under this chapter have been met. The city license will list the specific category of marijuana business license being issued.

2. Denial. In addition to denial for failure to meet the requirements of this chapter, the _____ [*designated public official or department*] may deny a license if:

    a. The applicant made an untrue, misleading, or incomplete statement on, or in connection with, the application for the license or a previous application for a license;

    b. Notwithstanding the federal Controlled Substances Act, the applicant fails to meet all requirements of local, state, and federal laws and regulations, including, but not limited to, other permitting or licensing requirements and land use regulations; or

c. The _____ [*applicant, principals, employees, volunteers, persons with a financial interest in the facility*] have been convicted of _____ [*specified crimes*].

3. Notice of denial. The city shall issue a notice of denial to an applicant in writing specifying the reasons for the denial. *[The city may add any appeal or hearing rights it wishes to provide to an applicant or cross reference to another portion of the city code that relates to appeals and hearings.]*

Fees

Discussion

Cities adopting a licensing system may want to charge a one-time initial license application fee, an annual license fee, or both. Cities may want to look at how their other licensing fees are structured when setting the marijuana business license fee. Some cities prorate the license fee for licenses that are issued after a certain point in the licensing year. For example, if all licenses expire on December 31 each year, a city might prorate the fees for licenses issued after June 30 of that year. Some cities also provide that license fees are not refundable.

Sample Text

1. Fee. An initial license application or renewal application must be accompanied by a license fee. The fee amount will be established by _____ [*method for setting fees, commonly through council resolution; alternatively, fee amount may be set by ordinance*].

Display of License/Proof of Registration

Sample Text

1. Display. When requested, the licensee shall show the license issued under this chapter to any person with whom the licensee is dealing as part of the licensed activity or to _____ [*designated public official*].

Alternative Sample Text: The license issued under this chapter must be prominently displayed at all times in an easily visible location inside the licensed premises.

Term, Renewal and Surrender

Discussion

Cities with licensing/registration systems will need to set a term and create a renewal process. The two options in the first subsection below provide different means of tracking expiration and renewal. The first option would put all renewals at one time of year and the second option would put renewals on a rolling basis. Cities may want to consider schedules for other local license and renewal processes to determine whether to align

marijuana business licenses with those other processes. In addition, cities may want to provide a process for surrendering a license/registration.

Sample Text

1. Termination. A license terminates automatically _____ [*on month and day of each year/certain years or some time period from the date of issuance*], unless a license renewal application has been approved.
2. Renewal. A license may be renewed for additional _____ [*duration*] terms as provided by this chapter.
3. Renewal Application. Renewal applications shall be submitted, with the required license fee, to _____ [*designated public official or department*] not less than _____ [*days, months*] prior to the expiration date of the existing license.
4. Termination Due to Change in Law. A license terminates automatically if federal or state statutes, regulations or guidelines are modified, changed, or interpreted in such a way by state or federal law enforcement officials as to prohibit operation of the marijuana business under this ordinance.
5. Termination Due to Suspension, Revocation or Termination by State Authority. A license terminates automatically upon the suspension, revocation, surrender or termination of an Oregon Health Authority registry or an Oregon Liquor Control Commission issued marijuana business license for any reason.
6. Surrender. A licensee may surrender a marijuana business license by delivering written notice to the city that the licensee thereby surrenders the license. A licensee's surrender of a license under this section does not affect the licensee's civil or criminal liability for acts the licensee committed before surrendering the license.

Transferability

Discussion

Cities should consider whether they want to allow licensees to transfer their license, and, if so, the process for allowing such a transfer. For example, under certain circumstances, a city might allow the license to be transferred if the business is sold. The alternative sample text below provides for a license transfer. Cities that allow for transfer might consider creating a transfer application, which could require an accompanying fee, to ensure that the new licensee is eligible to hold the license. ORS chapter 475B does not specifically address the issue of transferability. ORS 475B allows the OLLC to issue temporary authority to operate a licensed marijuana business to a trustee, the receiver of an insolvent or bankrupt licensed business, the personal representative of a deceased licensee, or a person holding a security interest in the business for a reasonable period of time to allow an orderly disposition of the business.

Sample Text

1. Transferability. Licenses issued under this chapter shall not be transferred to any other person by operation of law or otherwise.

   Alternative Sample Text: Licenses issued under this chapter may be transferred to another person upon determination by _____ [*designated public official*] that the person receiving the license meets the requirements of this chapter for licensees.

Indemnification

Sample Text

1. Waiver. By accepting a marijuana business license issued under this chapter, the licensee waives and releases the city, its officers, elected officials, employees, volunteers and agents from any liability for injuries, damages or liabilities of any kind that result from any arrest or prosecution of a marijuana business owner or operator, principal, person or legal entity with a financial interest in the marijuana business, person or entity that has leased real property to the marijuana business, employee, volunteer, client or customer for a violation of federal, state or local laws and regulations.
2. Indemnification. By accepting a marijuana business or license issued under this chapter, the licensee(s), jointly and severally if there is more than one, agree to indemnify and hold harmless the city, its officers, elected officials, employees, volunteers, and agents, insurers, and self-insurance pool against all liability, claims, and demands on account of any injury, loss, or damage, including, without limitation, claims arising from bodily injury, personal injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever arising out of or in any manner connected with the operation of the marijuana business that is the subject of the license.

Criminal Background Checks

Discussion

Under ORS chapter 475B an individual may be required by the Oregon Health Authority and Oregon Liquor Control Commission to submit to a criminal background check. Generally speaking, persons convicted within the last two years of manufacture or deliver of a controlled substance, having more than one conviction of manufacture or delivery of a controlled substance, or (with respect to recreational licenses) any conviction or delivery of a control substance to a person under 21, are not eligible for state licensing or registration. Cities may want to require additional background checks for licensees, owners, employees, volunteers or other individuals associated with a marijuana business and may want to include additional disqualifying convictions. Alternatively, cities could require license applicants and others associated with licensed facilities to self-report that information as part of the application process, as provided in the License Application alternative sample text above.

Alternatively, some cities may want to use their licenses solely for tracking purposes, without limiting who is eligible to receive a license or work at a licensed facility. In that case, a city may not want to require criminal background checks.

Sample Text

1. Background Check Required / Disqualification. All _____ [*applicants, principals, employees, volunteers, persons with a financial interest in the marijuana business*] must submit to a criminal background check performed by _____ [*designated public official*] before _____ [*a license will be issued; beginning employment at a facility; etc.*]. A person who has been convicted of _____ [*specified crimes*] may not be _____ [*a licensee, employee, volunteer, etc.*].

Standards of Operation

Discussion

The topics covered in this section are examples of some of the many issues that a city may want to address in regulating medical marijuana facilities, but the list is not exhaustive. In drafting provisions for a section covering standards of operation, there are at least four considerations to keep in mind.

First, state law provides that time, place and manner regulations need to be "reasonable," however the statute does not define that term. As noted above, the preemptive effect of SB 1531(now codified in ORS 475B.340) is currently the subject of litigation. Nonetheless, until that litigation is resolved, regulations that exceed what others think are needed to meet public health, welfare and safety concerns could face legal challenge as being "unreasonable." Consequently, a city will be better positioned against a potential legal challenge if it makes specific findings as to why the regulations serve public health, welfare and safety concerns.

Second, as a reminder, a city should consider drafting ordinances to restrict, rather than authorize, certain activities in an effort to avoid conflicts with federal law. For example, rather than providing that a medical marijuana facility *may* operate between the hours of 8:00 a.m. and 5:00 p.m., the ordinance should provide that a facility *may not* operate between the hours of 5:00 p.m. and 8:00 a.m. If the city does not want to restrict activity, it should simply remain silent on that issue, rather than affirmatively authorizing conduct that is illegal under federal law.

Third, when deciding what restrictions to impose, cities should become familiar with the conditions the state is placing on marijuana businesses by reviewing the most recent version of OAR 845-025-1000 to OAR 845-025-8080. After reviewing those conditions, cities should consider whether they want to impose additional requirements or whether they want to include similar requirements in their code so that they can independently enforce those provisions of state law through local enforcement mechanisms.

Fourth, when considering operational restrictions, cities might consider drafting an ordinance that segregates the restrictions by the category of marijuana business. For example, certain restrictions might apply to processors and not producers, wholesalers or retailers. *[Consider adding a prefatory phrase such as, "For marijuana processors," followed by a list of operating restrictions that apply to processors.]*

Fifth, cities should consider what restrictions might already be in place based on existing zoning or other ordinances of general applicability. For example, because many cities have existing fencing, sign, and noise ordinances, those matters are not specifically addressed in this model. However, if a city wants to treat marijuana businesses differently than that of other businesses, it will need to specifically do so in this section. For example, "A marijuana business in a residential district shall not produce or emit a sound that is detectible at the property line. A marijuana business operating in any other zone shall comply with the city's noise ordinance at _____."

Finally, because this is an emerging industry with evolving technologies, cities are better served drafting ordinances to address the effects of the industry, rather than the means to achieve those effects. For example, rather than drafting an odor provision that requires a specific air cleaning technology, it is preferable to draft an ordinance that provides that requires the business to have an air filtration system certified by an engineer to ensure marijuana odor cannot be detected outside of the property lines or enclosed structure.

Sample Text

1. Registration and Compliance with State Law. The marijuana business's state license or authority must be in good standing with the Oregon Health Authority or Oregon Liquor Control Commission and the marijuana business must comply with all applicable laws and regulations administered by the respective state agency, including, without limitation those rules that relate to labeling, packaging, testing, security, waste management, food handling, and training.

2. Compliance with Other Laws. The facility must comply with all applicable laws and regulations, including, but not limited to, the development, land use, zoning, building and fire codes.

3. Hours of Operation. Operating hours for a marijuana business must be as follows: (i) for a business engaged in sales or transfer of marijuana or marijuana products to a consumer: no earlier than _____ and no later than _____ on the same day. *[consider using same time period as allowed under any applicable ordinance relating to liquor stores]*; for all other medical business activities: no earlier than _____ and no later than _____on the same day: for processor: no earlier than _____ and no later than _____ on the same day. *[Note, existing land use ordnances may already prohibit activities at certain times using same time period as allowed under any applicable ordinance relating to liquor stores]*

4. Public View. All doorways, windows and other openings shall be located, covered or screened in such a manner to prevent a view into the interior from any exterior public or semipublic area.

5. Odors. The marijuana business must use an air filtration and ventilation system which is certified by an Oregon Licensed mechanical engineer to ensure, to the greatest extent feasible, odor is confined all objectionable odors associated with the marijuana to the licensed premises. For the purposes of this provision, the standard for judging "objectionable odors" shall be that of an average, reasonable person with ordinary sensibilities after taking into consideration the character of the neighborhood in which the odor is made and the odor is detected.

6. Lighting. Facilities must maintain adequate outdoor lighting over each exterior exit.

7. Sales. Sales or any other transfers of marijuana must occur inside the licensed premises and must be conducted only between the marijuana business and individuals 21 years of age and older.

8. On-Site Use. Marijuana and tobacco products must not be smoked, ingested, consumed or otherwise used on the licensed premises.

9. On-Site Manufacturing. With the exception of marijuana processors, manufacturing or processing of any extracts, oils, resins or similar derivatives of marijuana is prohibited at any licensed premises. Marijuana processors may engage in processing in industrial zones only.

10. Outdoor Storage. Outdoor storage of merchandise, raw materials or other material associated with the marijuana business is prohibited.

11. Secure Disposal. The facility must provide for secure disposal of marijuana remnants or by-products; marijuana remnants or by-products shall not be placed within the marijuana business's exterior refuse containers.

12. Home Occupation. A marijuana business may not be operated as a home occupation.

13. Drive-Through, Walk-Up. A marijuana business may not have a walk-up window or a drive-through.

14. Labeling. All products containing marijuana intended to be ingested (i.e. edibles) must be labeled with the product's serving size and the amount of tetrahydrocannabinol in each serving in accordance with Oregon Health Authority and Oregon Liquor Control Commission rules.

15. Accounting Systems. The marijuana business must have an accounting system specifically designed for enterprises reliant on transactions conducted primarily in cash and sufficient to maintain detailed, auditable financial records. If the _____ *[designated public official]* finds the books and records of the facility are deficient in any way or if the marijuana business's accounting system is not auditable, the marijuana business must modify the accounting system to meet the requirements of the _____ *[designated public official].*

16. Accounting Records. Every marijuana business must keep and preserve, in an accounting format established by _____ *[designated public official]*, records of all sales made by the marijuana business and such other books or accounts as may be required by the _____ *[designated public official]*. Each marijuana business must keep and preserve for a period of at least _____ *[time period]* records containing at least the following information:

    a. Daily wholesale purchases (including grow receipts) if licensed as a marijuana wholesaler and retail sales, if licensed as a retailer, including a cash receipts and expenses journal;

    b. State and federal income tax returns;

    c. State quarterly sales tax returns for retail sales;

    d. True names and any aliases of any owner, operator, employee or volunteer of the marijuana business;

    e. True names and addresses and any aliases of persons that have, or have had within the preceding year, a financial interest in the marijuana business; and

    f. _____ *[designated public official]* may require additional information as he or she deems necessary.

Location

Discussion

A city can regulate the location of a marijuana business either through amendments to its zoning code, made in accordance with local and statutory land use procedures, or by imposing conditions on the marijuana business license. Cities should consult their city attorney to discuss the benefits, risks and timelines associated with each approach.

Keeping in mind that state law allows for the licensing of marijuana retailers, wholesalers, processors, producers and laboratories, cities may want to impose restrictions on where marijuana businesses and facilities can locate in relation to other zones or specified locations and based upon the specific type of marijuana business. For example, a city could impose limits on the distance of marijuana businesses or facilities from:

- A residential zone or a multi-use zone which includes residences;
- Places where children congregate;
- A public elementary, private elementary, secondary, or career school attended primarily by individuals under the age of 21;
- A public library;
- A public park, public playground, recreation center, or facility;
- A licensed child care facility;
- A public transit center;
- Any game arcade where admission is not restricted to persons aged 21 or older;
- Another licensed medical marijuana facility licensed by the Oregon Health Authority or a recreational marijuana facility licensed by the OREGON LIQUOR CONTROL COMMISSION;
- Any public property, not including the right of way; or
- Any combination of the above.

Cities that impose those types of distance restrictions should consider how those provisions will operate if one of the protected properties, such as a school, locates within a restricted area of an existing marijuana business. An ordinance could provide that the marijuana business may remain in place, that the license will be revoked, or that the license will no longer be eligible for renewal. Cities should work closely with their city attorney to evaluate the risks and benefits of those options. In addition, cities may want to look to the state regulations for guidance.

In addition, cities should consult their city attorney if they are imposing restrictions that are more stringent than those imposed under state law, by, for example, requiring facilities to locate 2,000 feet from other medical marijuana businesses. Note, however, that state law does restrict cities from imposing a buffer requirement on recreational retailers. Specifically, cities cannot restrict retailers from locating more than 1,000 feet from

another recreational retailer. See ORS 475B.340(2). Consequently, a standard buffer of 1,000 feet will work for both medical as well as recreational facilities. However, anything greater than a 1,000 feet requirement can only apply to Medical dispensaries. Although the courts have generally upheld local authority to impose more stringent requirements than those imposed by state law, a city should consult its city attorney regarding the risks associated with taking a more restrictive approach. That is true particularly if the regulations have the effect of prohibiting marijuana businesses within the city. However, a city that takes that route should work closely with its legal counsel to follow current court cases in this area and be prepared to defend its regulations against a legal challenge.

Cities that adopt distance restrictions will also need to consider how the distance will be measured. For example, one city provided that the distance would be measured in a straight line from the closest edge of each property line, while another city provided that the distance would be measured from the property line of the affected property, such as a school, to the closest point of space occupied by the medical marijuana facility. Another city provided that the distance would be measured between the closest points of the respective lot lines.

In addition to distance restrictions, some cities have imposed restrictions on what types of businesses can collocate with marijuana businesses. For example, some cities have prohibited collocation with tobacco smoking lounges, marijuana social clubs, and retail marijuana businesses. Some cities have also required marijuana businesses to be located at fixed, permanent locations. For example, an ordinance might provide, "A marijuana business or facility may not be located at a temporary or mobile site. No person shall locate, operate, own, allow to be operated or aid, abet or assist in the operation of any mobile marijuana business which transports or delivers, or arranges transportation or delivery, of marijuana to a person."

As noted above, restrictions may need to be segregated by the category of marijuana business involved. For example, restrictions that relate to marijuana producers might not apply to marijuana retailers, processors or wholesalers.

Sample Text

1. Restrictions on Location: Marijuana Dispensary or Retailer. A marijuana retailer shall not locate:
   a. Within a residence or mixed-use property that includes a residence.
   b. Within _____ zone(s).
   c. Within _____ [*distance*] of _____ [*certain zones, types of properties, schools, parks, licensed day care facilities, parks, public transit centers, game arcades no restricted to persons age 21 and older, any public property, any other recreational or medical marijuana facilities, etc.*]
   d. On the same property or within the same building with _____ [*other types of facilities, such as marijuana social clubs*].

2. Restrictions on Location: Marijuana Wholesaler. A marijuana wholesaler shall not locate:
   a. Within a residence or mixed-use property that includes a residence.
   b. Within _____ zone(s).
   c. Within _____ [*distance*] of _____ [*certain zones, types of properties, medical marijuana facilities, etc.*]

d. On the same property or within the same building with _____ [*other types of facilities,*].

3. Restrictions on Location: marijuana producer. A marijuana producer shall not locate:
   a. Within a residence or mixed-use property that includes a residence.
   b. Within _____ zone(s).
   c. Within _____ [*distance*] of _____ [*certain zones, types of properties, medical marijuana facilities, etc.*]
   d. On the same property or within the same building with _____ [*other types of marijuana businesses*].
4. Restrictions on Location: marijuana processor. A marijuana processor shall not locate:
   a. Within a residence or mixed-use property that includes a residence.
   b. Within _____ zone(s).
   c. Within _____ [*distance*] of _____ [*certain zones, types of properties, medical or recreational marijuana business, etc.*]
   d. On the same property or within the same building with _____ [*other types of marijuana businesses*].
5. Distances. For purposes of this section, all distances shall be measured _____ [*method for measuring distance*].

Signs

Discussion

No sample text is provided because cities that want to regulate the signs on marijuana businesses or facilities should consider applying their existing sign code. If a city does not have a sign code, the League has "A Guide for Drafting a Sign Code," which includes a sign code template, available in the Library on the League's website (www.orcities.org). Cities that want to impose sign restrictions on medical marijuana facilities other than those already in the city sign code should consult their city attorney about possible free speech implications.

Examination of Books, Records and Premises

Discussion

Cities regulating marijuana businesses and facilities should consider who will enforce those regulations and how. One aspect of that decision is whether a city will provide for inspections, and, if so, what those inspections will entail and who will conduct them. In addition, cities that provide for inspection of a licensed

premises and its records may want to specify which records a marijuana business or facility must keep, and for how long. Sample text on records retention is provided in the Standards of Operation section above.

Sample Text

1. Examination of Books, Records and Premises. To determine compliance with the requirements of this chapter and other chapters of _____ [*city's code*], a licensee shall allow _____ [*designated public official*] to examine or cause to be examined by an agent or representative designated by _____ [*designated public official*], at any reasonable time, the licensed premises, including wastewater from the facility, and any and all marijuana business financial, operational and licensed premises information, including books, papers, payroll reports, and state and federal income tax returns, and quarterly sales tax returns for marijuana retailers. Every licensee is directed and required to furnish to _____ [*designated public official*] the means, facilities and opportunity for making such examinations and investigations.

2. Compliance with Law Enforcement. As part of investigation of a crime or a violation of this chapter which law enforcement officials reasonably suspect has taken place on the facility's premises or in connection with the operation of the marijuana business, the _____ [*designated public official*] shall be allowed to view surveillance videotapes or digital recordings at any reasonable time. Without reducing or waiving any provisions of this chapter, the _____ [*law enforcement department*] shall have the same access to the licensed premises, its records and its operations as allowed to state inspectors.

   Alternative Sample Text: The marijuana business shall be open for inspection and examination by _____ [*public official charged with enforcement*] during all operating hours.

Civil Enforcement

Discussion

A licensing system allows a city multiple methods of enforcement. As included in the sample text below, the city can deny, suspend or revoke a license, but it may also impose penalties on a facility owner that does not comply with local ordinances.

If a city adopts a license suspension and revocation provision like the one listed below, a city may want to consider whether to address additional issues such as:

- Will the ordinance list all possible reasons for revocation, or will it include a more general revocation provision based on noncompliance with this chapter, as provided in the sample?
- Will the ordinance provide the form and timing of the suspension or revocation? For example, "Any denial, suspension or revocation under this section shall be in writing, including the reasons for the denial, suspension or revocation, and sent by first-class mail at least _____ [*time period*] prior to the effective date of the denial, suspension or revocation." If the licensee is given advanced notice of the pending suspension or revocation, as is the case in this sample language, the city may want to give the licensee a period of time within which to correct the problem to avoid suspension or revocation.

- Will the ordinance allow for an appeal, and, if so, can that decision be appealed? For example, "A denial, suspension, or revocation under this section may be appealed to _____ [*designated public official*]. The findings of _____ [*designated public official*] shall be final and conclusive." In addition, if the ordinance allows for an appeal, the city may want to include in the ordinance whether the appeal stays the pending enforcement action.
- Will the ordinance put limitations on how soon after revocation a person or entity can apply for a new license? For example, "A person or entity who has had a license revoked may not apply for a new license until _____ [*time period*] from the date of the revocation."

Cities may also want to review their existing city codes to see if there are other violation provisions that they want to incorporate by reference here.

Sample Text

1. Enforcement. _____ [*designated public official*] may deny, suspend or revoke a license issued under this chapter for failure to comply with this chapter [*and rules adopted under this chapter*], for submitting falsified information to the city or the OREGON LIQUOR CONTROL COMMISSION, or for noncompliance with any other city ordinances or state law.
2. Civil Penalty. In addition to the other remedies provided in this section, any person or entity, including any person who acts as the agent of, or otherwise assists, a person or entity who fails to comply with the requirements of this chapter or the terms of a license issued under this chapter, who undertakes an activity regulated by this chapter without first obtaining a license, who fails to comply with a cease and desist order issued pursuant to this chapter, or who fails to comply with state law shall be subject to a civil penalty not to exceed _____ [*amount*] per violation.
3. Other Remedies. In addition to the other remedies provided in this section, the city may institute any legal proceedings in circuit court necessary to enforce the provisions of this chapter. Proceedings may include, but are not limited to, injunctions to prohibit the continuance of a licensed activity, and any use or occupation of any building or structure used in violation of this chapter.
4. Remedies not Exclusive. The remedies provided in this section are not exclusive and shall not prevent the city from exercising any other remedy available under the law, nor shall the provisions of this chapter prohibit or restrict the city or other appropriate prosecutor from pursuing criminal charges under city ordinance or state law.

Public Nuisance

Discussion

Public nuisance ordinances provide a means for cities to take action to protect the public in general. Adding a public nuisance provision to a marijuana business or facility ordinance provides the city with another means of enforcing its local regulations. A city that has a municipal court might also consider working with its legal counsel to determine whether it can provide for private nuisance actions in municipal court.

Sample Text

1. Public Nuisance. Any premises, house, building, structure or place of any kind where marijuana is grown, processed, manufactured, sold, bartered, distributed or given away in violation of state law or this chapter, or any place where marijuana is kept or possessed for sale, barter, distribution or gift in violation of state law or this chapter, is a public nuisance.

2. Action to Remedy Public Nuisance. The city many institute an action in circuit court in the name of the city to abate, and to temporarily and permanently enjoin, such nuisance. The court has the right to make temporary and final orders as in other injunction proceedings. The city shall not be required to give bond in such an action.

Criminal Enforcement

Discussion

As noted, cities generally cannot criminalize what state law expressly allows. However, it is an open question whether a city can impose criminal penalties for violating a law of general applicability that reaches conduct expressly authorized under state law. For example, it is an open question whether a city can impose criminal penalties on a marijuana business that operates without a business license, in violation of local law, because state law does not expressly provide that a marijuana business is exempt from criminal prosecution for operating without a business license. Therefore, cities that want to impose criminal penalties should work closely with their city attorney to determine whether the city can impose criminal penalties for failure to comply with the city's licensing provisions or other provisions of general applicability.

Confidentiality

Sample Text

1. Confidentiality. Except as otherwise required by law, it shall be unlawful for the city, any officer, employee or agent to divulge, release or make known in any manner any financial or employee information submitted or disclosed to the city under the terms of this chapter. Nothing in this section shall prohibit the following:

   a. The disclosure of names and facility addresses of any licensee under this chapter or of _____ [*other individuals associated with a marijuana business, such as other owners*];

   b. The disclosure of general statistics in a form which would prevent identification of financial information regarding a business [*or marijuana business operator*];

   c. The presentation of evidence to a court, or other tribunal having jurisdiction in the prosecution of any criminal or civil claim by the city under this chapter;

   d. The disclosure of information to and upon request of a local, state or federal law enforcement official or by order of any state or federal court; or

e. The disclosure of information when such disclosure of conditionally exempt information is ordered under public records law procedures [*or when such disclosure is ordered under the Oregon Public Records Law*].

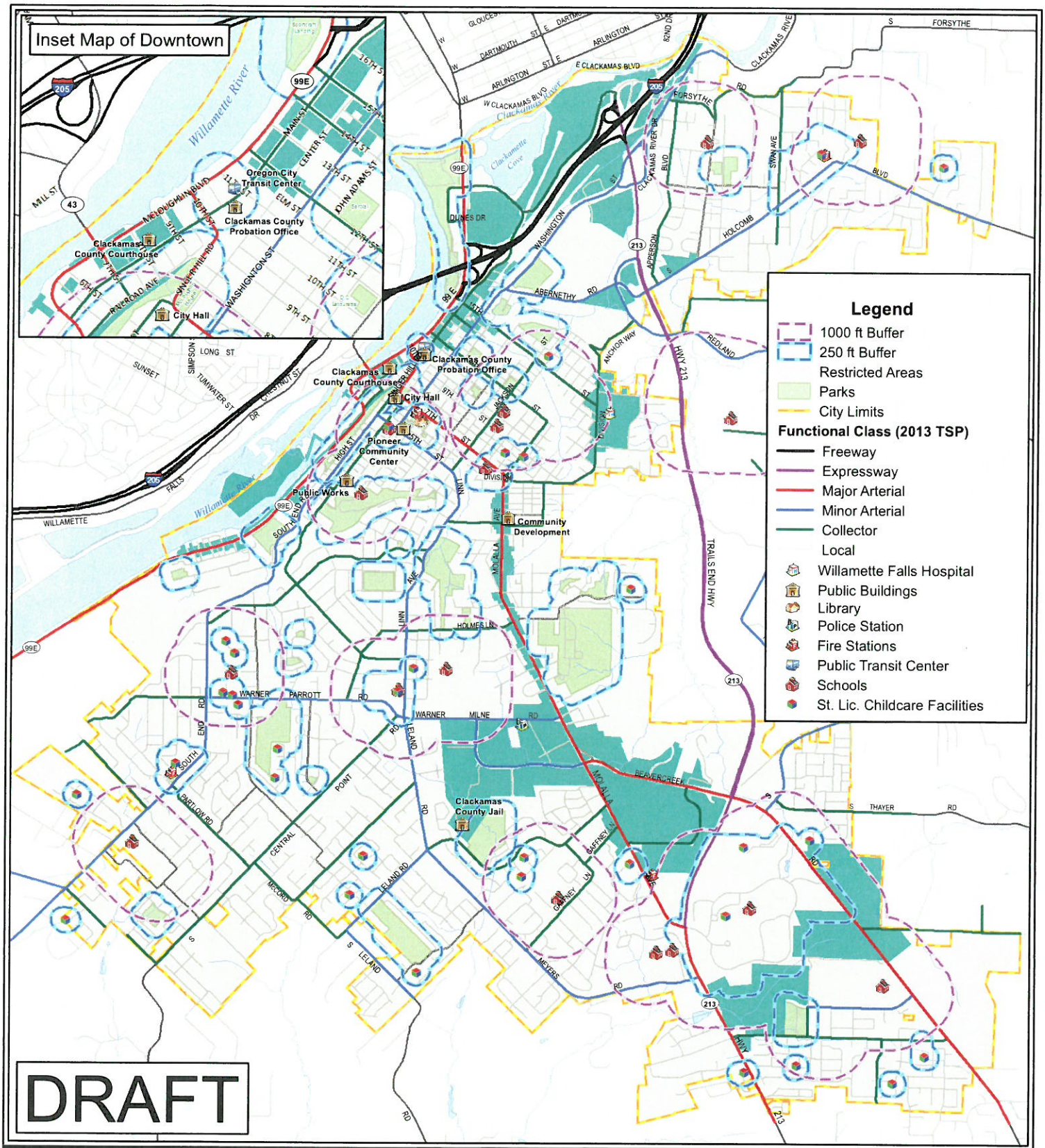
Emergency Clause

Discussion

The League's model charter, available on the Library page under Publications on the League's website (www.orcities.org), provides that ordinances normally take effect on the 30th day after adoption, or on a later day provided in the ordinance. The model charter provides an exception to that general rule and allows an ordinance to take effect as soon as adopted, or on another date less than 30 days after adoption, if it contains an emergency clause. Cities that want their ordinance to have immediate effect should review their charter and talk to their city attorney about whether an emergency clause is needed.

Sample Text

This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this ordinance shall be in full force and effect on _____ [*date*].



City of Oregon City

GEOGRAPHIC INFORMATION SYSTEM

Proposed Marijuana Business Regulation Map: Retailer*, Wholesaler, Producer & Processor Potential Locations with Buffers

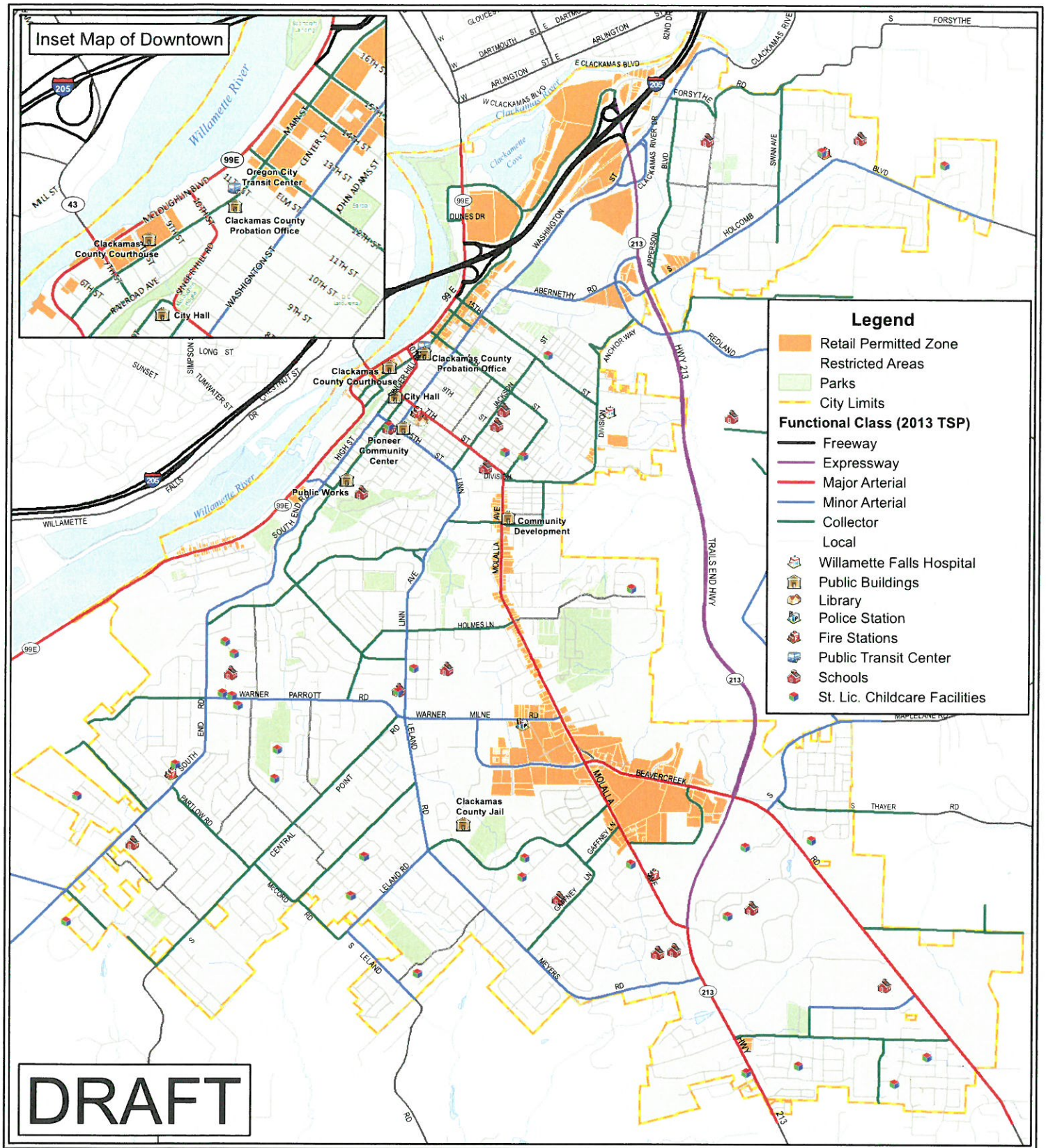
*Additional restrictions apply, see Retail Location Map for details

0 1,500 3,000 6,000 Feet

The City of Oregon City makes no representations, express or implied, as to the accuracy, completeness and timeliness of the information displayed. This map is not suitable for legal, engineering, or surveying purposes. Notification of any errors is appreciated.

Plot date: August 8, 2016; Plot name: Marijuana Business Regulation Map_with Buffers_8x10P_Draft_Copy_20160808.pdf; Map name: Marijuana Business Regulation Map_with Buffers_8x10P_Draft_Copy.mxd

ITEMS ENTERED INTO RECORD
FILE: LE 16-0001
DATE: 8.08.2016
EXHIBIT: D
SUBMITTED BY: STAFF



City of Oregon City

GEOGRAPHIC INFORMATION SYSTEM

Marijuana Business Regulation Map: Dispensary or Retailer Potential Locations

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503-657-6629 fax
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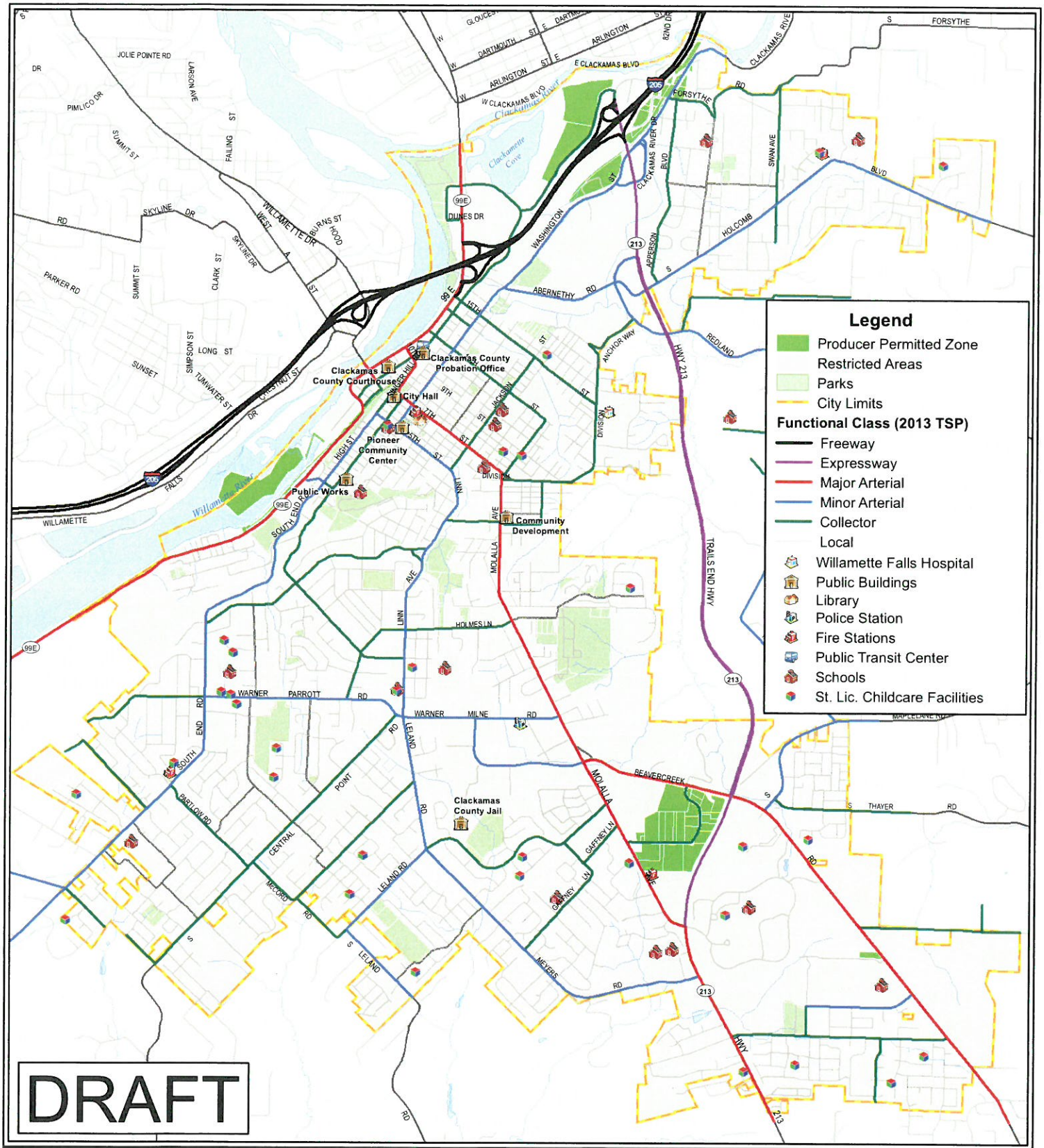
Plot date: August 8, 2016; Plot name: Marijuana Business Regulation Map_Potential Retailer_8x10P_Draft_Copy_20160808.pdf; Map name: Marijuana Business Regulation Map_8x10P_Draft_Copy.mxd



City of Oregon City

GEOGRAPHIC INFORMATION SYSTEM

Marijuana Business Regulation Map: Producer Potential Locations

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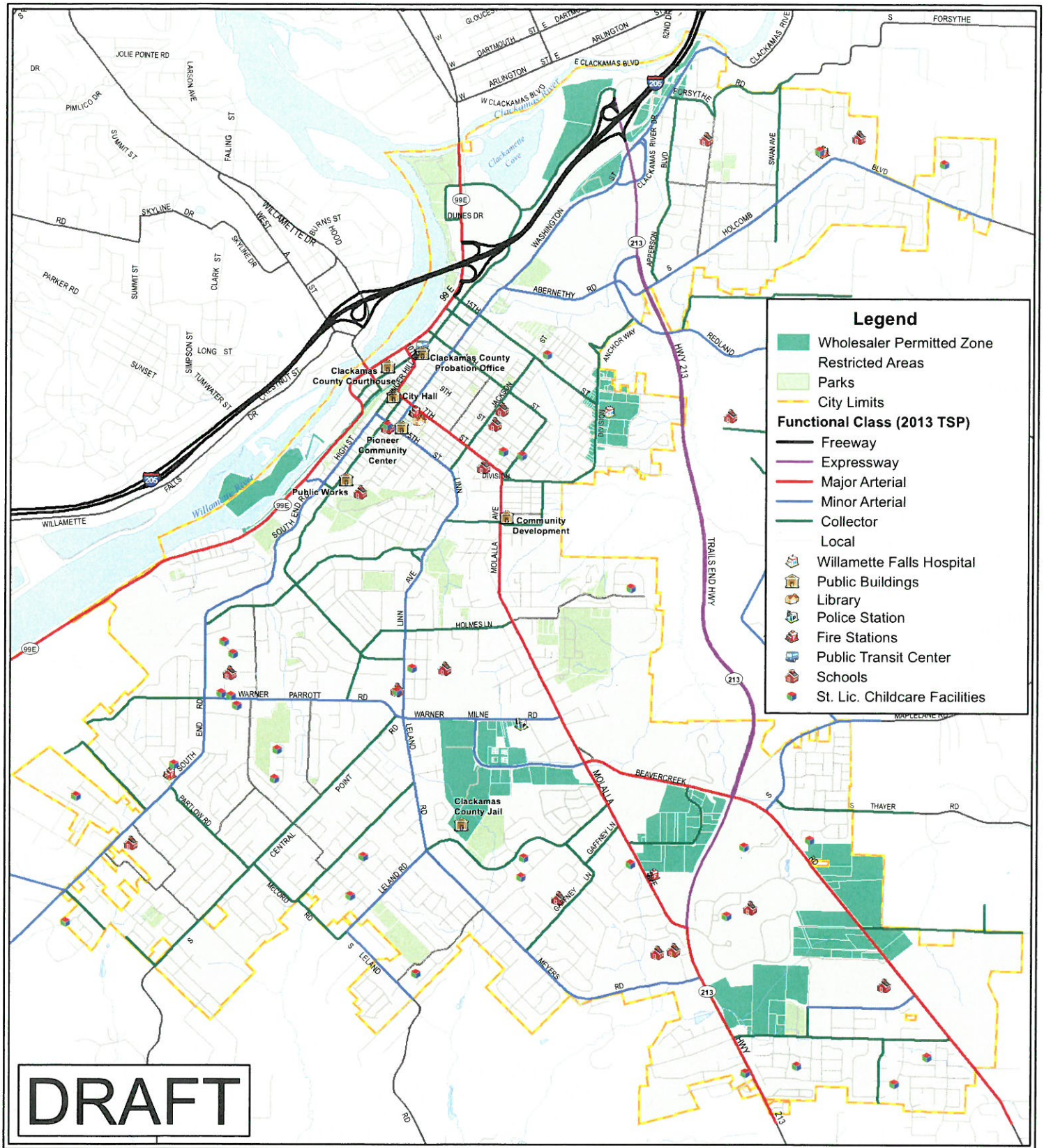

City of Oregon City

GEOGRAPHIC INFORMATION SYSTEM

Marijuana Business Regulation Map: Wholesaler Potential Locations

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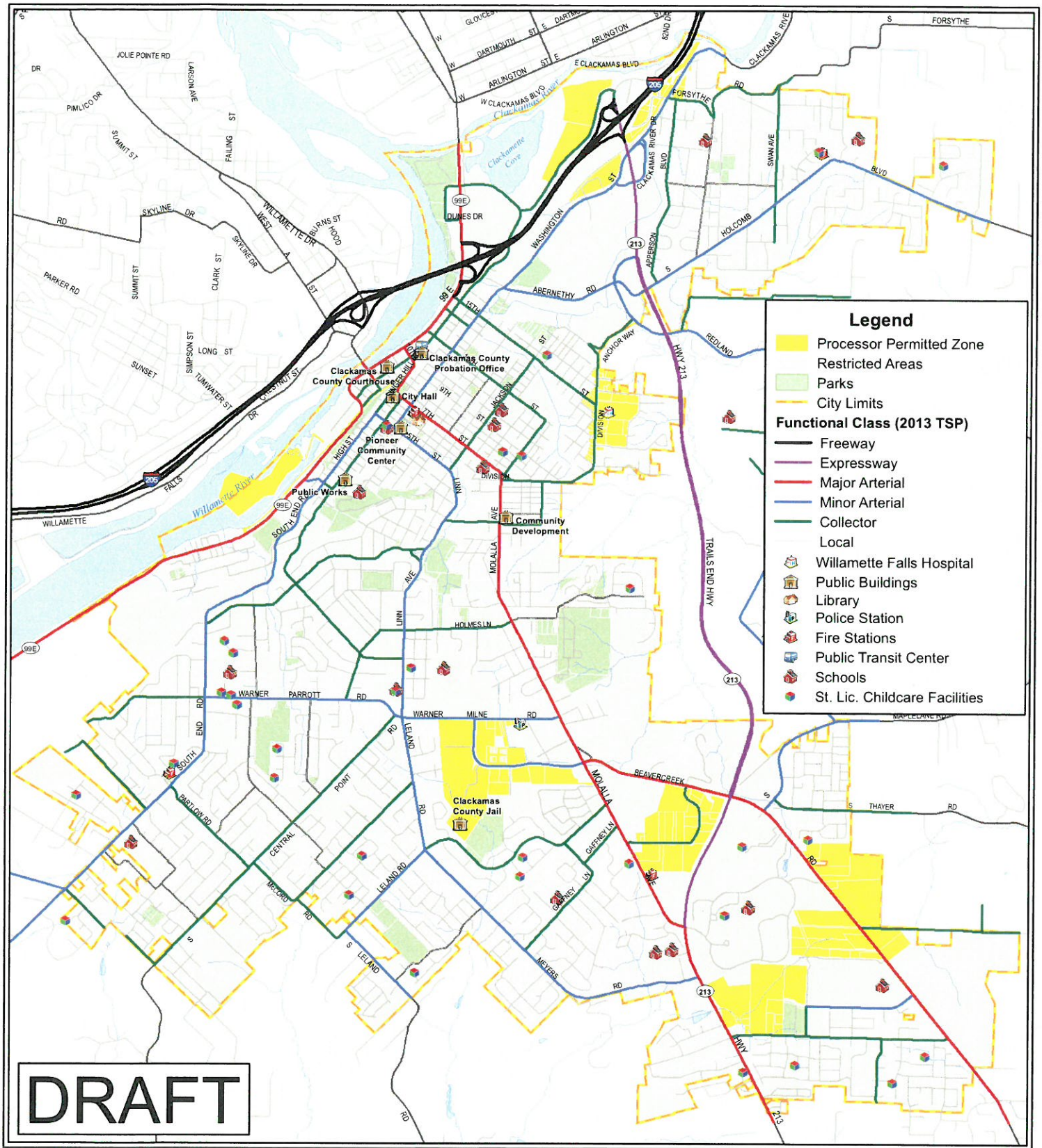

City of Oregon City

GEOGRAPHIC INFORMATION SYSTEM

Marijuana Business Regulation Map: Processor Potential Locations

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Plot date: August 8, 2016; Plot name: Marijuana Business Regulation Map_Potential Processor_8x10P_Draft_Copy_20160808.pdf; Map name: Marijuana Business Regulation Map_8x10P_Draft_Copy.mxd

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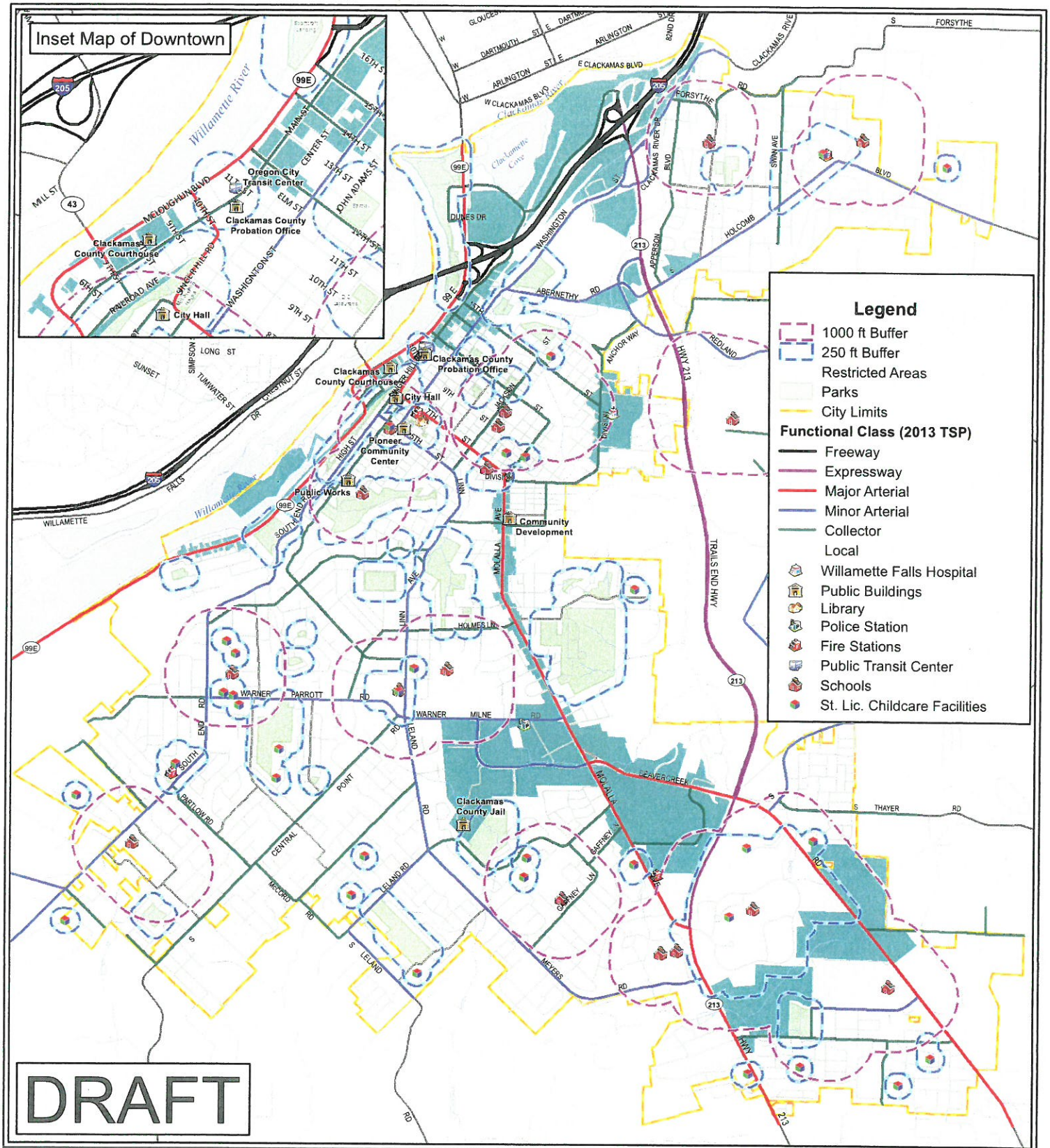

City of Oregon City

GEOGRAPHIC INFORMATION SYSTEM

Proposed Marijuana Business Regulation Map:
Retailer*, Wholesaler, Producer & Processor Potential Locations with Buffers

*Additional restrictions apply, see Retail Location Map for details

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Marijuana Business Regulations
LE-16-0001

ITEMS ENTERED INTO RECORD
FILE: LE-16-0001
DATE: 08.02.16
EXHIBIT: E
SUBMITTED BY: Staff

Second Planning Commission Public Hearing - August 8th, 2016

OREGON CITY

Re-Cap of Last Meeting

Reviewed:

- State laws, current city policy, and regulatory background
- Reviewed definitions
- Public process to date, surveys
- Proposed zoning regulations, maps and OLCC buffers
- Proposed standards of operation
- Heard testimony from four members of the public

Re-Cap of Last Meeting

New Issues Discussed:

- Personal outdoor cultivation w/ direction to draft regulations to allow (setbacks)
- Adding 1000' buffer around Clackamas Community College
- Questions regarding other jurisdictions

Personal Outdoor Cultivation

- Planning Commission Concerns
  - Sight, smell, trespass, theft, (Attractive nuisance)
  - Intent of state law, regulation of personal cultivation

- Proposal: allow personal outdoor cultivation (per state law, up to 4 plants per residence, out of public view), with 10' setback:
  - Code Language:
  - If grown outside, all portions of marijuana plants shall be setback a minimum of 10 feet from any property line. The setback shall not apply to the root system, or container in which it is planted.

Clackamas Community College

- Concerns
  - Students under 21 attend and live near college
  - City should apply same 1000' buffers as for elementary and secondary schools

- Proposed Code:

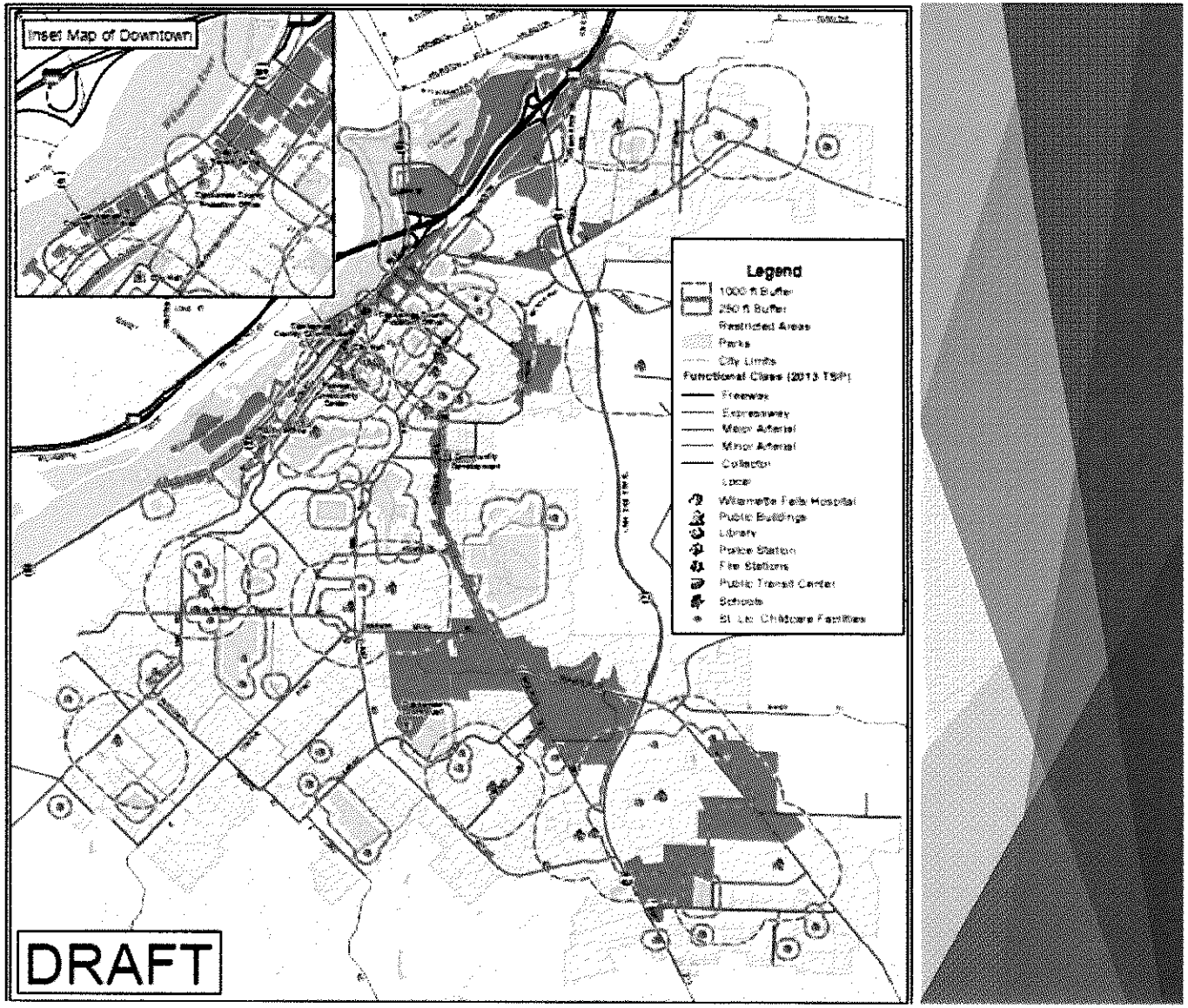
C. Restrictions on Location: Marijuana Dispensary or Retailer. A marijuana retailer shall not locate:

1. Within 250 feet of any public parks, licensed child care and day care facilities, and public transit centers.

2. Within 1000 feet of a public, private or parochial elementary and secondary school or the property located at Clackamas County Map 3-2E-09C, Tax Lot 800.

1000' buffers

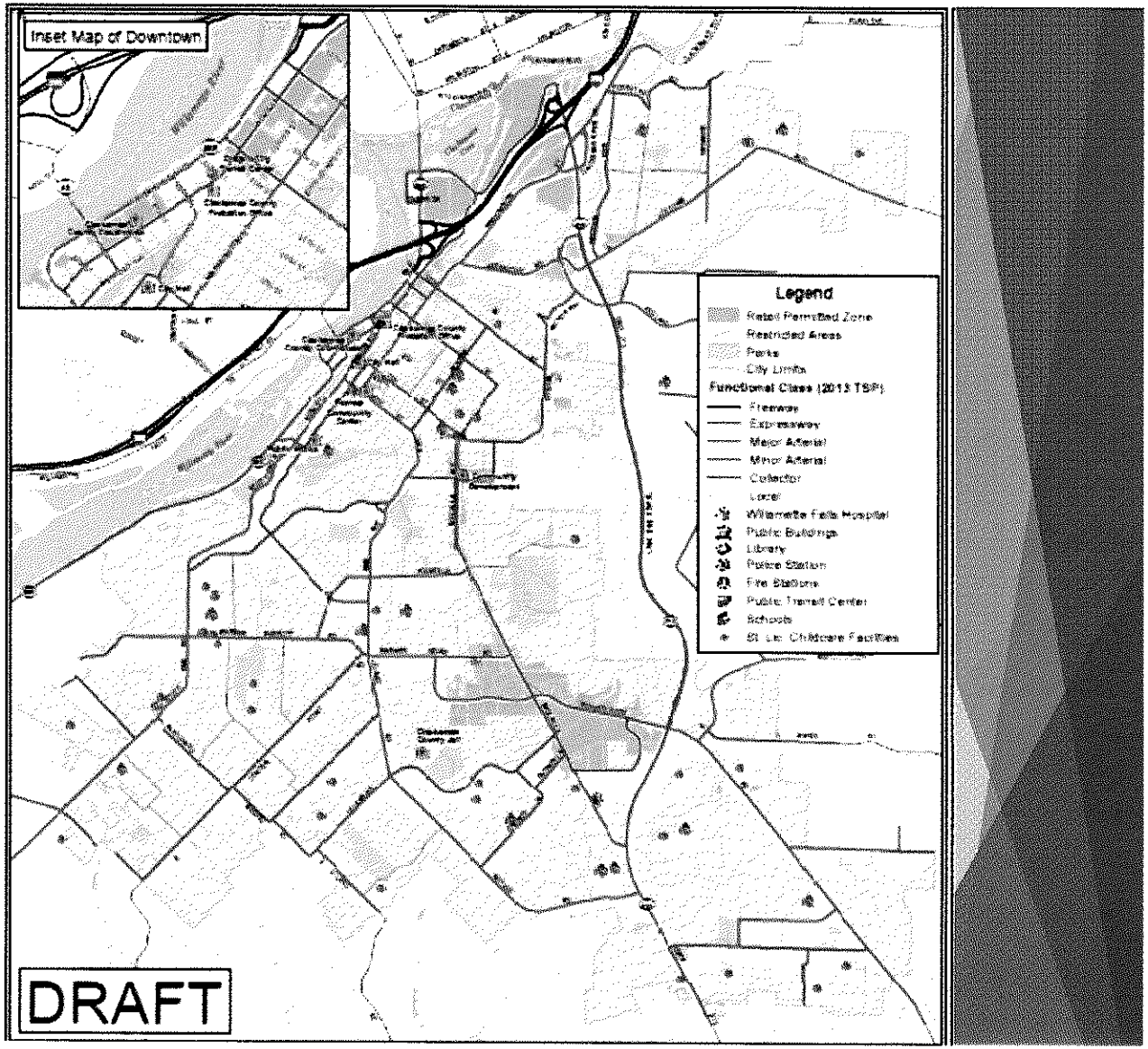
- Note:
- Map indicates all uses combined.
- Additional restrictions for retail apply. See retail map for details.



Retail / Dispensaries

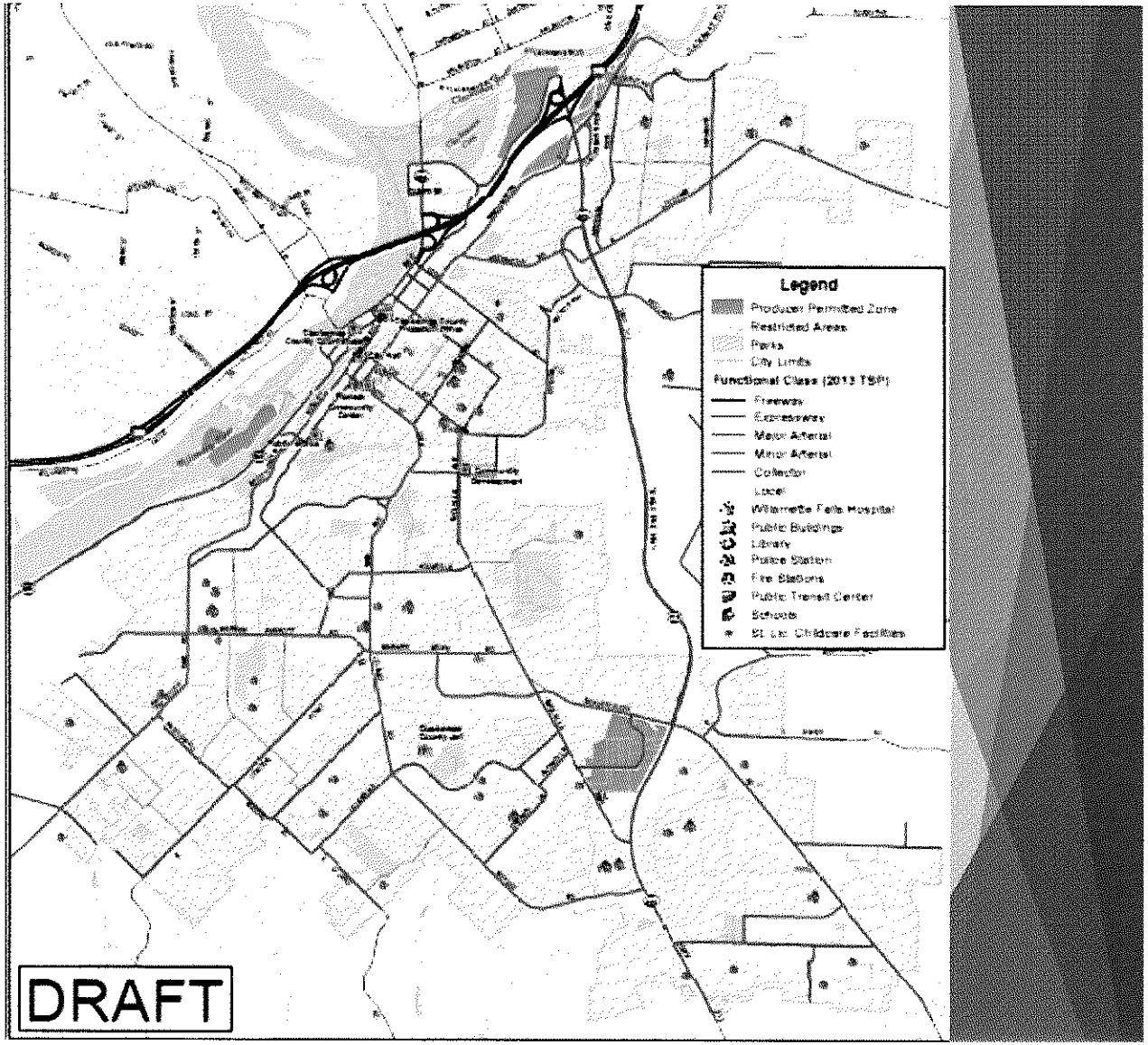
- Prohibited:
  - Any "R" residential zones
  - Abutting any residential zone unless located on a freeway, expressway, major arterial, minor arterial, or collector functional classification as shown on Figure 8, Multi-Modal Street System, of the Oregon City Transportation System Plan
  - Within 250 feet of any public parks, licensed child care and day care facilities, and public transit centers.
  - Within 1000 feet of a public, private or parochial elementary and secondary school.*
    - *Definition under state law: *A public elementary or secondary school for which attendance is compulsory under ORS 339.020, or a private or parochial elementary or secondary school, teaching children as described in ORS 339.030(1)(a)*
  - *Additional Requirement for CCC:* or the property located at Clackamas County Map 3-2E-09C, Tax Lot 800.

Retailer permitted areas



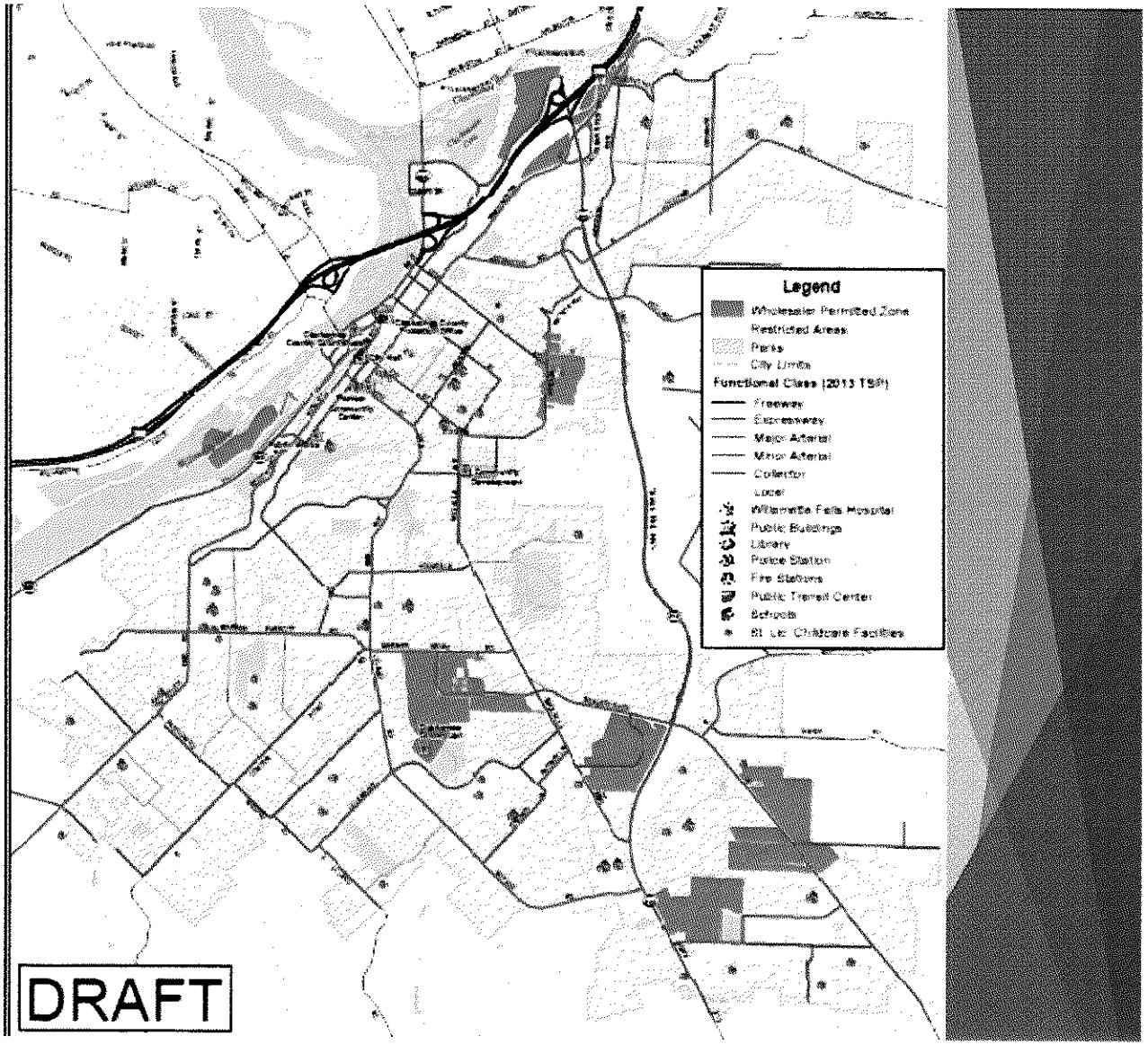
Producer permitted areas

- Prohibited:
  - All zones except for GI - General Industrial.
- Permitted:
  - In the GI - General Industrial zone.



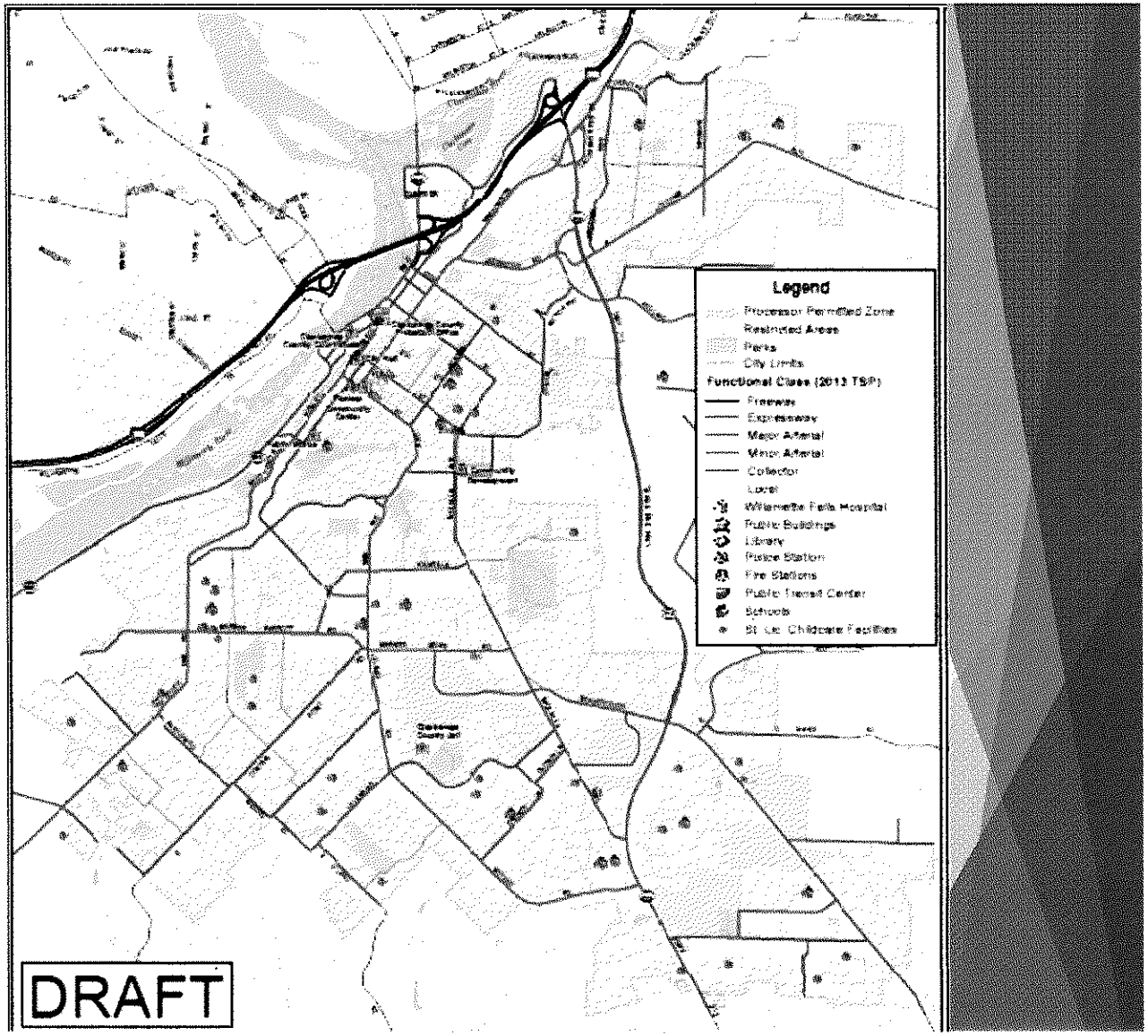
Wholesaler permitted areas

- Prohibited:
  - All "R" Residential zones
  - All Mixed Use Corridor and Commercial zones
- Permitted:
  - GI - General Industrial
  - MUE - Mixed Use Employment
  - CI - Campus Industrial



Processor permitted areas

- Prohibited:
  - All "R" Residential zones
  - All Mixed Use Corridor and Commercial zones
- Permitted:
  - GI - General Industrial
  - MUE - Mixed Use Employment
  - CI - Campus Industrial



Standards of Operation

1. **Compliance with Other Laws.** All marijuana businesses shall comply with all applicable laws and regulations, including, but not limited to, the development, land use, zoning, building and fire codes.

2. **Registration and Compliance with State Law.** The marijuana business's state license or authority shall be in good standing with the Oregon Health Authority or Oregon Liquor Control Commission and the marijuana business shall comply with all applicable laws and regulations administered by the respective state agency, including, without limitation those rules that relate to labeling, packaging, testing, security, waste management, food handling, and training.

3. **No portion of any marijuana business shall be conducted outside**, including but not limited to outdoor storage, production, processing, wholesaling, laboratories and retail sale.

4. **Hours of Operation.** Operating hours for a marijuana business shall be in accordance with the applicable license issued by the OLCC or OHA.

Standards of Operation - Continued

5. **Odors.** A marijuana business shall use an air filtration and ventilation system that is certified by an Oregon Licensed mechanical engineer to ensure that all odors associated with the marijuana is confined to the licensed premises to the extent practicable. For the purposes of this provision, the standard for judging "objectionable odors" shall be that of an average, reasonable person with ordinary sensibilities after taking into consideration the character of the neighborhood in which the odor is made and the odor is detected.
6. **Doors and windows shall remain closed,** except for the minimum length of time needed to allow people to ingress or egress the building.
7. **Secure Disposal.** The facility must provide for secure disposal of marijuana remnants or by-products; marijuana remnants or by-products shall not be placed within the marijuana business's exterior refuse containers.
8. **Drive-Through, Walk-Up.** A marijuana business may not have a walk-up window or a drive-through.
9. The facility shall maintain compliance with **all applicable security requirements of the OLCC** including alarm systems, video surveillance, and a restriction on public access to certain facilities or areas within facilities.

What are other jurisdictions doing?

Selected cities within the Urban Growth Boundary:

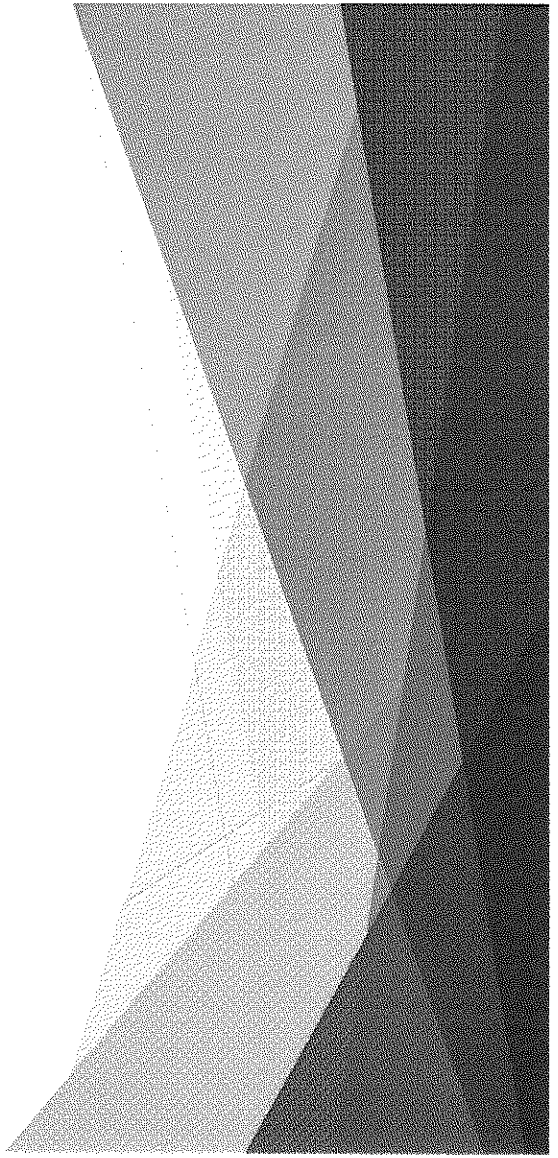
- Portland
- Gladstone
- Lake Oswego
- Milwaukie
- West Linn

Portland

- Portland has adopted a complete licensing and regulatory program in addition to the OLCC licensing process.
- This regulates business licensing, inspections, theft prevention, access restriction, security, control plans, neighborhood impact mitigation, bookkeeping, security plans, etc., in addition to zoning.
- Separate fee structure depending on type of license sought (e.g. retail, producer, processor etc.)
- Retail permitted in multiple zones, except for residential
- Portland allows retail uses to locate closer than 1000' from one another.
- Numerous other program elements, see Chapter 14B.130 of Portland Code.

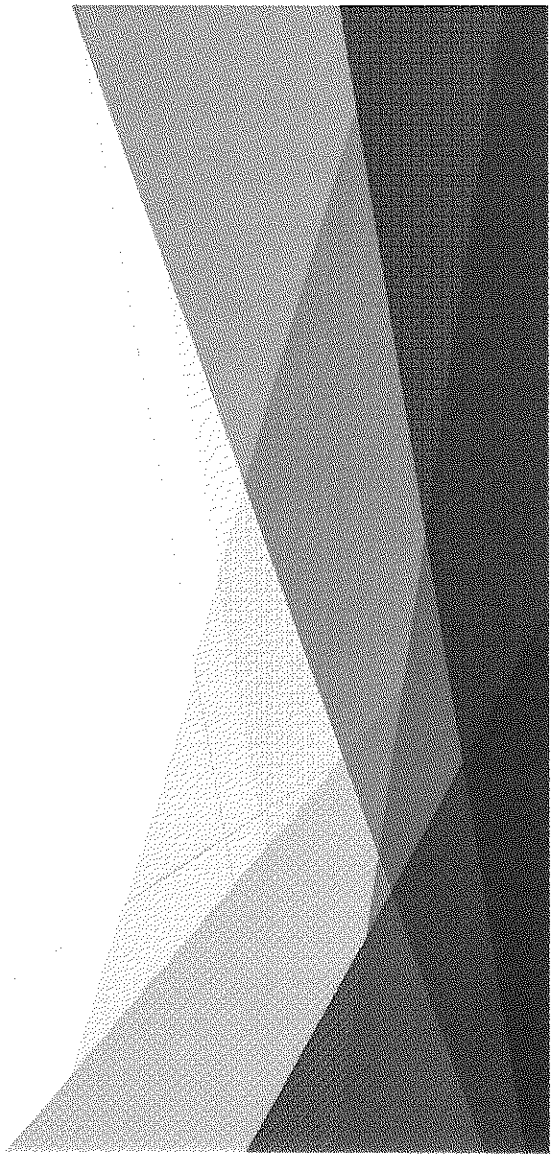
Gladstone

- Currently prohibits all marijuana facilities per their code.
- Has referred issue to voters on November ballot.
- More information pending...



West Linn

- Has referred issue to voters on November ballot.
- Waiting to hear from voters before drafting regulations.



Lake Oswego

- 1500' buffers arounds schools and active parks, libraries and community centers
- 500' buffers from licensed childcare uses
- Allow production, processing, wholesale, labs and retail in industrial zones
- Allow retail use in most commercial and mixed use zones, but prohibits retail in the Neighborhood Commercial zone
- Prohibits marijuana facilities as a home occupation

Milwaukie

- Already had medical dispensary regulations.
- Planning Commission has recommended approval - going to City Council soon.
- Allows retail stores in commercial areas provided they are 1000 feet from schools and other marijuana retail stores.
- Allows processing and warehousing in industrial areas.
- Allows testing and research in commercial and industrial areas.
- Limits outdoor grow sites in residential areas to amounts allowed under state law.
- Requires medical grow sites in residential areas to be indoors with ventilation and odor controls.
- Requires recreational and medical grow sites in industrial areas to be indoors and with ventilation and odor filters. Prohibits grow sites in the North Milwaukie Industrial Area (to preserve industrial space and buildings)
- Allows personal outdoor production

Recommendation

- Staff welcomes further input and testimony on the proposed regulations.
- Staff is recommending that the Planning Commission recommend approval of the Municipal Code text amendments to the City Commission as included in the Exhibits for their consideration.

Next:

- Website: http://www.orcity.org/planning/marijuana-regulation-oregon-city
- Work Session
  - **Tomorrow** - City Commission: August 9, 2016 - 5:30 pm
- Public Hearings:
  - Scheduled - City Commission: August 17, 2016 - 7:00 pm

Staff Contact: Pete Walter, AICP, Planner

Email: pwalter@orcity.org

Phone: (503) 496-1568

- Thank you!