Bateman Seidel

MEMORANDUM

TO: City of Oregon City Commission

FROM: Carrie Richter, Deputy City Attorney

DATE: October 12, 2016

RE: The Prohibition on Outdoor Cultivation of Marijuana for Personal Use

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Introduction

The City Commission is considering the adoption of Ordinance 16-1010, which would amend the Oregon City Municipal Code to make the outdoor cultivation of marijuana, for personal or commercial use, a nuisance. A question has been raised about whether a city can regulate the cultivation of marijuana for personal use at all. As with all issues dealing with marijuana regulation, the answers are not certain, but, based on the analysis set forth below, it is possible that the legislature intended to preempt local governments from further regulating personal cultivation of marijuana beyond what is provided for in state law. The Commission should consider the importance of this regulation in light of the potential litigation that may result from adopting such a measure.

Background Facts

When marijuana was "legalized" in Oregon, Measure 91 imposed a number of limitations on the cultivation and sale of marijuana. Among other things, the Measure exempted the following activity from the permit and licensing authorizations contained therein:

> [T]he production, processing, keeping, or storage of homegrown marijuana at a household by one or more persons 21 years of age and older if the total of homegrown marijuana at the household does not exceed four marijuana plants and eight ounces of usable marijuana at a given time. ORS 475B.245(1).

The Measure went on to restrict where marijuana for personal use can be grown. It provides:

> No person may produce, process, keep, or store homegrown marijuana or homemade marijuana products if the homegrown marijuana or homemade marijuana products can be readily seen by normal unaided vision from a public place.[1] ORS 475B.250(1).

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[1] Measure 91 defined the terms "homegrown" or "homemade" to mean "grown or made by a person 21 years of age or older for noncommercial purposes."

In 2015, the legislature adopted HB 3400, authorizing local government to adopt time, place and manner regulations for marijuana businesses. HB 3400 made no mention of regulating non-commercial production. This was the statutory backdrop when city staff began working on draft time, place and manner restrictions for permitting marijuana-related activities within the City.

In 2016, the Legislature adopted a number of additions and clarifications to the marijuana laws. Section 33 of HB 4014 provides in relevant part:

> (2) A city or county may not adopt an ordinance, by referral or otherwise, that prohibits or otherwise limits:
>
> (a) The privileges described in ORS 475B.245;

ORS 475B.245 is the provision that allows the cultivation of marijuana for non-commercial use.

Analysis

As the Commission is aware, the City has broad home rule authority that allows it to adopt ordinances to protect the health, safety and welfare of its citizens. It is pursuant to this authority that the City's business license ordinance prohibits the issuance of a business license to a business that will violate federal law.

The City is authorized to restrict behavior that it deems a nuisance pursuant to this same home rule authority. For example, the storage or operation of machinery on private property in such a manner as to "attract the public" is a nuisance and therefore, is prohibited. OCMC 8.08.040(L). This same attractive nuisance concern was raised with the cultivation of marijuana outdoors for personal use – even the marijuana was not visible from the street, the odor could encourage trespass or other criminal activity that could result in harm. For this reason, City staff proposed limiting marijuana production outdoors and require marijuana cultivation to occur within a structure.

The question in this case is whether the use of the term "limit" as used in Section 33 of the 2016 amendment, was intended to preempt a local government from imposing any manner regulations upon homegrown marijuana authorized by state law or whether the term "limit" simply deprives a local government from reducing the number of personal use plants or prohibiting noncommercial cultivation entirely. The answer to that is not entirely clear. Measure 91 itself imposed some manner regulation in that the activity cannot be located so as to be "readily seen by normal unaided vision from a public place," which suggests some intent to provide a manner restriction and not to allow local governments to "limit" that activity further. However, the local government prohibition is limited to "the privileges described in ORS 475B.245" and not the manner restriction – not visible from a public place – which is contained in ORS 475B.250(1), a different provision.

Staff has tried to confer with counsel from other jurisdictions as well as the League of Oregon Cities for further advice on this issue. Although other jurisdictions have restricted personal cultivation to indoor

only, no one had any greater certainty on this issue. For example, the City of Grants Pass has required that all cultivation of marijuana, including for personal use, occur indoors. This decision has been challenged on preemption grounds citing state laws regulating seeds and nursery stock. A circuit court ruled that "home grows" are not covered by state statutes protecting the propagation of seeds and nursery plants used to further the state's agricultural industry. This case has been appealed to the Court of Appeals and a decision is expected in the next few months. Although this case deals with local government manner restrictions on personal cultivation, the Grants Pass ordinance was adopted before 2016 HB 4014 was adopted and as a result, does not resolve the question raised here. The City of Medford has placed a measure on the ballot that would ban residents from growing marijuana outdoors as well as create an enforcement for processing complaints about the smell of neighbors growing pot indoors. The Cities of Pendleton and Eagle Point have adopted ordinances deeming the smell of marijuana a nuisance. All of these efforts pre-date the adoption of HB 4014 so they are not instructive on how a court would consider a challenge to Ordinance 16-1010.

Conclusion

The legalization of marijuana is a new area of law and, as with many questions in this area, the answer is not certain. The Commission may consider a number of different courses, including adopting the ordinance as proposed and risking the potential for litigation or the Commission could abandon this effort and rely on state law. Alternatively, the Commission could revise the language in Ordinance 16-1010 further to make it clear that no more than four plants are allowed and that they must not be visible from a public place, re-stating state law requirements.

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