TO:       Honorable Mayor and City Council
   Mark Orme, City Manager

FROM:     Andrew Jared, Assistant City Attorney
   Mark Murray, Deputy City Attorney

RE:       Consideration of Cannabis Advertising and Potency Regulations

REPORT IN BRIEF:

On November 26, 2019, the City Council directed staff to bring back revisions to an ordinance regulating commercial cannabis in January 2020. Such motion included requests to further evaluate the fee structure for the commercial cannabis permit, a discussion regarding limitation of the concentration of THC in cannabis sold in the City of Chico (“potency caps”), and options for enforcing stricter standards for advertising of cannabis prior to introduction of the proposed ordinance.

To assist staff with the process of analyzing the fee structure, the City Manager sought the assistance of the HdL Companies (“HdL”) who have experience in establishing cannabis licensure application and development. Through the review of the proposed ordinances and resolution, several recommendations by HdL regarding amendment to the proposed ordinances and resolution prior to establishing a fee structure are being made. Accordingly, the fee structure and proposed ordinance remains under development, in continued consultation with City departments and HdL.

At this time, the Office of the City Attorney presents this discussion of off-site advertising of commercial cannabis businesses, and potency caps.

RECOMMENDATION:

The City Council of the City of Chico consider and provide further direction regarding the local regulation of cannabis advertisement and cannabis potency limits.

FISCAL IMPACT:

None with this action.
BACKGROUND:

In November 2016, California voters approved Proposition 64, the Adult Use of Marijuana Act (AUMA). AUMA legalized the personal possession and consumption, and limited personal cultivation, of recreational cannabis by adults aged 21 or older. AUMA also established a framework for regulating commercial cannabis activity related to recreational cannabis, under which such activity would be lawful only if conducted under approvals at both the state and local levels. Consistent with AUMA's provisions regarding amendment by the Legislature, the Legislature later enacted the Medicinal and Adult Use Cannabis Regulation and Safety Act (MAUCRSA), which implemented this framework as to both medical and recreational cannabis.

On January 16, 2019, regulations adopted by the State Office of Administrative Law went into effect to address issues relating to state licensure across the entire cannabis supply chain. (See www. https://cannabis.ca.gov/cannabis-regulations/).

State cannabis regulations are enforced by the Bureau of Cannabis Control (licensure of retailers, distributors, testing laboratories, microbusinesses, and temporary cannabis events); the California Department of Food and Agriculture (cultivation, and track-and-trace system); and the California Department of Public Health—Manufactured Cannabis Safety Branch (manufacturer practices and products). The regulations provide that for a cannabis business to qualify for state licensure, it must show compliance with all local regulations (i.e., city codes and ordinances).

The City Council directed staff to draft local regulations of commercial cannabis activity within the City. Two aspects of these proposed regulations are discussed in this staff report for consideration by Council – cannabis advertising restrictions, and cannabis potency limits.

DISCUSSION:

Advertising Regulations

Cannabis uses in Chico would need to comply with both City sign code requirements and state regulations. The proposed ordinance does not provide for specific signage restrictions other than what is required under the Chico Municipal Code and state law.

- Current Signage/Advertising Regulations in Chico
Minimum standards of signs and sign structures are addressed in the Chico Municipal Code at Chapter 19.74, for all zones except the TND Zoning District, are addressed in Chapter 19.92. Two basic classes of signs exist: “on-site signs”, which identify a use, service, facility or product which is located, sold or manufactured on the same premises as the location of the sign; and “off-site signs” (commonly called a billboard), which identify a use, service, facility or product which is not located, sold or manufactured on the same premises as the location of the sign.

Sign standards vary by zoning district and type of sign (i.e., awning, monument, window, wall signs) as defined in Table 5-8 at CMC 19.74.140. Such regulations for a wall sign in the CC zone

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for instance establishes a limit of one sign per street frontage or public entrance, sets a limit of 200 sq. feet of signage, and requires that the sign be below the eave of the building. Other requirements apply for different types of signs and signs in different zoning districts.

While billboard off-site signs exist in Chico as non-conforming uses, no new off-site signs are allowed. Cannabis businesses would be allowed to advertise on such billboards, subject to state cannabis advertising regulations.

- **State Cannabis Advertising Regulations**

Advertising and marketing of cannabis products is governed by Business and Professions Code sections 26150 – 26156 and Regulations sections 5040 – 5041.1.

The Business and Professions code establishes that all advertisements, including internet-based advertisements and billboards, must identify the licensee responsible for its content by including at a minimum the licensee’s license number. (Bus. and Prof. sec. 26151). Any advertisement may only be directed at an audience via broadcast, cable, radio, print, and digital communications, that is comprised of at least 71.6% of persons who are reasonably expected to be 21 years of age or older. (Bus. and Prof. sec. 26151). All advertising must be truthful and appropriately substantiated. (Bus. and Prof. sec. 26151).

Advertising may not be done in a manner intended to encourage persons under 21 years of age to consume cannabis or cannabis products. (Bus. and Prof. sec. 26152(e)). Advertising may not be done in a manner that is attractive to children. (Bus. and Prof. sec. 26152(f)). The use, depiction or images of minors or anyone under 21 years of age, and the use of objects, toys, inflatables, movie characters, cartoon characters, or include any other display, depiction, or image designed in any manner likely to be appealing to minors or anyone under 21 years of age is prohibited. Regulations sec. 5040). Free cannabis goods or giveaways of any type of products, including non-cannabis products are prohibited, including buy-one-get-one free, free product with donation, or Contests/sweepstakes/raffles promotions.

The regulations also prohibit selling or transporting cannabis goods that are labeled as beer, wine, liquor, spirits, or any other term that may create a misleading impression that the product is an alcoholic beverage. (Regulations § 5040.1).

Any advertising or marketing from the licensee involving direct, individualized communication or dialogue by a licensee requires that the age of the recipient of the message is 21 years of age or older. (Regulations § 5041). Such individualized communication includes in-person communication, telephone, physical mail, or electronic communication.

Outdoor signs, including billboards, are required to be attached to a building or permanent structure, and must comply with the state Outdoor Advertising Act (if located in applicable locations). Advertising may not advertise or market cannabis or cannabis products on an
advertising sign within 1,000 feet of a day care center, school providing instruction in kindergarten or any grades 1 to 12, inclusive, playground, or youth center. (Bus. and Prof. sec. 26151(g)).

The use of billboards by cannabis businesses has significant hurdles regarding the “1,000-foot distance limitation” from any school, day care center, playground, or youth center, and the “directed audience” requirement whereby the advertiser must establish that the audience of the advertising message is comprised of at least 71.6% adults over the age of 21.

- Cannabis Advertising Regulations for Other Cities

Other cities or counties have proposed or enacted the following:
- Prohibit off-site signage altogether
- Establish distance requirement of off-site signage to any park, library, alcoholism or drug abuse recovery or treatment facility, day care center, and permanent supportive housing
- Prohibit advertising of cannabis on portable or sandwich signs in public right of way
- Prohibit advertising of cannabis on digital, spinner, monument, pole, marquee, roof, temporary, moving, or super graphic (entire side of building) signs (City of LA)
- Any image or depiction of a cannabis leaf

Cannabis Potency Limits

Cannabinoid potency data quantifies levels of plant cannabinoids, such as THC, present in cannabis products. The measurement may be based on the percentage of THC in comparison to the other ingredients, or as a total amount of THC.

Regulations enforced by the California Bureau of Cannabis Control and the California Department of Public Health establish THC limits for edibles and concentrates. Cannabis concentrates are allowed to have a THC limit of 1,000 milligrams per package for adult-use and 2,000 milligrams per package for medicinal use. Edible cannabis products can have no more than 10 milligrams of THC per serving and 100 milligrams per package for both medicinal and adult use. The state does not regulate the potency limits of cannabis flower.

No ordinance could be found within the State of California regulating the potency limits of cannabis flower.

Unlike alcohol, local cannabis regulations are not preempted by State laws or regulations. Article XX, section 22 of the California Constitution gives the state Department of Alcohol Beverage Control exclusive jurisdiction to regulate alcohol. Whereas, Business and Professions Code Section 26200 preserves local control over commercial cannabis activity.
From the outset, Section 26200 provides that state cannabis laws “shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate [cannabis] businesses.” Section 26200 contains no stated limit to this local regulatory authority: on the contrary, this local regulatory authority extends as far as the power “to completely prohibit’ the operation of a cannabis business.

The next sentence of Section 26200 confirms the breadth of local regulatory authority over commercial cannabis activity. Under that provision, state law “shall not be interpreted to supersede or limit existing local authority’ for, among other things, “enforcement of ... local ordinances, or enforcement of local license, permit, or other authorization requirements.” And, under the California Constitution, this existing local authority is limited only by the extent of any conflict with state law: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const., art. XI, § 7.) But Section 26200, by rebuffing any effort to “supersede or limit existing local authority,” specifically declines to create any such conflict. Read against the backdrop of the California Constitution, Section 26200 contains no obvious limit to the general reservation of local authority.

Furthermore, Business and Professions Code Section 26201 states, “Any standards, requirements, and regulations regarding health and safety … established by the state shall be the minimum standards for all licensees under this division statewide.” Here, the State has again provided explicit power to local jurisdictions to regulate cannabis businesses at a stricter level than the State.

The state regulations do not create a potency limit for cannabis flower to act as a minimum.

Accordingly, while a legal argument may exist that potency regulations may be imposed by local agencies, research has nevertheless turned up no jurisdiction in the State of California that has successfully regulated potency limits in cannabis flower.

DISTRIBUTION:

City Clerk (3)