



PLANNING COMMISSION AGENDA

Regular Meeting

7:00 P.M. on Tuesday, October 24, 2017

Hoyer Hall, Clayton Community Library, 6125 Clayton Road, Clayton, California

1. **CALL TO ORDER, ROLL CALL, PLEDGE TO THE FLAG**
2. **ADMINISTRATIVE**
 - 2.a. Review of agenda items.
 - 2.b. Declaration of Conflict of Interest.
 - 2.c. Chair Carl Wolfe to report at the City Council meeting of November 7, 2017 (alternate Commissioner William Gall).
3. **PUBLIC COMMENT**
4. **MINUTES**
 - 4.a. Approval of the minutes for the September 26, 2017 Planning Commission meeting.
5. **PUBLIC HEARINGS**
 - 5.a. **ZOA-06-17, City of Clayton.** The City of Clayton is requesting a public hearing to consider a City-initiated Ordinance to amend the Clayton Municipal Code to allow six-foot fences to be located within the required exterior side setback or at the public right-of-way line.

Staff Recommendation: Staff recommends that the Planning Commission consider all information provided and submitted, take and consider all public testimony, and, if determined to be appropriate, adopt Resolution 06-17, recommending City Council approval of an Ordinance to allow six-foot fences to be located within the required exterior side setback or at the public right-of-way line.
 - 5.b. **ZOA-10-16, City of Clayton.** The City of Clayton is requesting a public hearing to consider a City-initiated Ordinance amending Title 17 "Zoning" of the Clayton Municipal Code in order to continue to prohibit outdoor cannabis cultivation for personal use, and to prohibit all commercial cannabis activities except for cannabis deliveries originating outside of the City.

Staff Recommendation: Staff recommends that the Planning Commission consider all information provided and submitted, take and consider all public testimony, and, if determined to be appropriate, adopt Resolution No. 05-17, recommending City Council approval of an Ordinance in order to continue to prohibit outdoor cannabis cultivation for personal use, and to prohibit all commercial cannabis activities except for cannabis deliveries originating outside of the City.

6. OLD BUSINESS

None.

7. NEW BUSINESS

None.

8. COMMUNICATIONS

8.a. Staff.

8.b. Commission.

9. ADJOURNMENT

9.a. The next regular meeting of the Planning Commission is scheduled for **Tuesday, November 14, 2017.**

Most Planning Commission decisions are appealable to the City Council within ten (10) calendar days of the decision. Please contact Community Development Department staff for further information immediately following the decision. If the decision is appealed, the City Council will hold a public hearing and make a final decision. If you challenge a final decision of the City in court, you may be limited to raising only those issues you or someone else raised at the public hearing(s), either in oral testimony at the hearing(s) or in written correspondence delivered to the Community Development Department at or prior to the public hearing(s). Further, any court challenge must be made within 90 days of the final decision on the noticed matter. If you have a physical impairment that requires special accommodations to participate, please contact the Community Development Department at least 72 hours in advance of the meeting at 925-673-7340. An affirmative vote of the Planning Commission is required for approval. A tie vote (e.g., 2-2) is considered a denial. Therefore, applicants may wish to request a continuance to a later Commission meeting if only four Planning Commissioners are present.

Any writing or documents provided to the majority of the Planning Commission after distribution of the agenda packet regarding any item on this agenda will be made available for public inspection in the Community Development Department located at 6000 Heritage Trail during normal business hours.

Minutes
Clayton Planning Commission Meeting
Tuesday, September 26, 2017

1. CALL TO ORDER, ROLL CALL, PLEDGE TO THE FLAG

Chair Carl Wolfe called the meeting to order at 7:00 p.m. at Hoyer Hall, 6125 Clayton Road, Clayton, California.

Present: Chair Carl Wolfe
Vice Chair Bassam Altwal
Commissioner A.J. Chippero
Commissioner Peter Cloven
Commissioner William Gall

Absent: None

Staff: Community Development Director Mindy Gentry
Assistant Planner Milan Sikela, Jr.

2. ADMINISTRATIVE

- 2.a. Review of agenda items.
- 2.c. Declaration of Conflict of Interest.
- 2.d. Vice Chair Altwal will report at the City Council meeting of October 3, 2017.

3. PUBLIC COMMENT

None.

4. MINUTES

- 4.a. Approval of the minutes for the July 11, 2017 Planning Commission meeting.

Vice Chair Altwal moved and Commissioner Gall seconded a motion to approve the minutes, as submitted. The motion passed 5-0.

5. PUBLIC HEARINGS

- 5.a. **SPR-03-17, Site Plan Review Permit, Jamison Sinclair, 910 Kenston Drive, APN: 119-102-018.** A request for approval of a Site Plan Review Permit to allow the construction of a single-story addition measuring approximately 1,500 square feet in area and 18 feet in height on an existing single-story single-family residence.

The staff report was presented by Assistant Planner Sikela.

Vice Chair Altwal had the following questions:

- Has City staff checked the height of the chimney as it relates to the height of the roof? *Assistant Planner Sikela responded that, in terms of the City's regulations, chimneys which do not obstruct the light and ventilation of any adjoining parcel of land would be exempt from setback requirements per Section 17.36.030 of the Clayton Municipal Code.* Commissioner Altwal explained that his question was not about the setbacks of the chimney but instead was about compliance with fire safety-related requirements. *Director Gentry indicated that fire safety compliance would be handled at the building permit phase of the project and not this preliminary stage of review.*
- If the property owner proposed to enclose the exterior covered areas, would these areas be subject to the City's floor area requirements? *Assistant Planner Sikela described the permitting process and explained that, yes, the proposal would be subject to the City's floor area requirements.*
- To avoid the property owner enclosing these areas, should we add a condition of approval prohibiting enclosure of these exterior areas? *Director Gentry indicated that the regulations restricting the maximum floor area are already codified in the Clayton Municipal Code so adding a condition addressing this issue would be redundant.*

Commissioner Gall asked if staff had been contacted by any recipients of the public hearing notices that were mailed out for the project? *Assistant Planner Sikela responded that staff was contacted by two different parties. One party had a question about open storage regulations regarding storage of a recreational vehicle on the subject property. Staff analyzed the stored item, which complied with the City's open storage regulations, requiring that the vehicle is screened from public areas by a six-foot fence. The other contact staff received was regarding the drainage from the subject property and, after consulting with the City Engineer, it was determined that the project would be subject to the State's Stormwater C.3 requirements, which guides drainage during construction as well as post-construction drainage. The City monitors this issue through the Construction Activity Permit process overseen by the City Engineer and the requirement is contained in the advisory notes of the staff report.*

Commissioner Chippero asked if the modification of the existing 5:12 roof pitch to the proposed 6:12 roof pitch is compliant with the Code? *Assistant Planner Sikela responded that the increase in the roof pitch would not be related to Code compliance issues but, rather, would be a design option chosen by the applicant that would provide more visual interest and articulation for the project.*

Chair Wolfe asked, does the proposed 18-foot height of the residence comply with the City's residential height regulations? *Assistant Planner Sikela indicated, the proposed 18-foot height complies with the City's height regulations which allow a maximum residential height of 35 feet. However, the applicant proposed a single-story design instead of a two-story design in order to be sensitive to the visual impacts a taller two-story addition would create, even though there are already existing two-story residences in the neighborhood.*

The public hearing was opened.

Bob Galloway, 5895 Herriman Drive, indicated the following:

- I have concerns over the drainage during construction of the project, but I see that this issue has been addressed by the City Engineer.
- Although the proposed four-foot increase in the roof height from 14 feet to 18 feet is a small concern, it would not be a huge impact to our view and I would be supportive of the project

There being no further public comment, the public hearing was closed.

Commissioner Cloven had the following comments:

- The proposed modifications will be beneficial to the residence as well as to the properties in the cul-de-sac that the subject residence is located in.
- The four-foot increase in the roofline would not impact the views from neighboring properties.

Commissioner Gall indicated that the project would be a positive addition to the neighborhood.

Commissioner Chippero had the following comments:

- The project would be an enhancement to the surrounding neighborhood.
- When I conducted a field visit, I noticed the other two-story residences in the neighborhood. As a result, I feel that the applicant made a good effort in respecting the views of the adjacent property owners by proposing a single-story design.

Vice Chair Altwal indicated that the applicant complied with all applicable Clayton Municipal Code requirements and is proposing a design that will enhance the neighborhood.

Chair Wolfe indicated that he concurred with the comments provided by the other Planning Commissioners and was in support of approving the project.

Commissioner Cloven moved and Commissioner Gall seconded a motion to conditionally approve Site Plan Review Permit SPR-03-17 to allow the construction of a single-story addition measuring approximately 1,500 square feet in area and 18 feet in height on an existing single-story single-family residence at 910 Kenston Drive (APN: 119-102-018). The motion passed 5-0.

6. OLD BUSINESS

None.

7. NEW BUSINESS

None.

8. COMMUNICATIONS

8.a. Staff

Director Gentry indicated, at its meeting of September 19, 2017, the City Council approved the final maps for the Verna Way Residential Subdivision project and the St. John's Episcopal Church/Southbrook Drive Mixed Use Planned Development project and also did the second reading and adoption of the Ordinance adding Chapter 17.22 – Residential Density Calculations for Residential Parcels with Sensitive Land Areas to the Clayton Municipal Code, which will go into effect 30 days from the date of adoption.

8.b. Commission

None.

9. ADJOURNMENT

9.a. The meeting was adjourned at 7:27 p.m. to the regularly-scheduled meeting of the Planning Commission on October 10, 2017.

Submitted by
Mindy Gentry
Community Development Director


Approved by
Carl Wolfe
Chair

Community Development\Planning Commission\Minutes\2017\0926

PLANNING COMMISSION STAFF REPORT

Meeting Date: October 24, 2017

Item Number: 5.a

From: Mindy Gentry 
Community Development Director

Subject: Ordinance Amending the Fencing Standards (ZOA-06-17)

Applicant: City of Clayton

REQUEST

The City of Clayton is requesting a public hearing to consider a City-initiated Ordinance to amend the Clayton Municipal Code to allow six-foot fences to be located within the required exterior side setback or at the public right-of-way line (ZOA-06-17) (**Attachment A**).

PROJECT INFORMATION

Location: Citywide

Environmental: This Ordinance is exempt from review under the California Environmental Quality Act ("CEQA") (California Public Resources Code Section 21000 et seq.). Pursuant to State CEQA Guidelines section 15303 (14 Cal. Code Regs., § 15303), this Ordinance is covered by the Class 3 CEQA Categorical Exemption for construction of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure.

Public Notice: On October 13, 2017, a public hearing notice was published in the Contra Costa Times and a public hearing notice was posted at designated locations in the City.

BACKGROUND AND DISCUSSION

The Clayton Municipal Code (CMC) currently allows fences on an exterior side lot line to be a maximum of 30 inches in height within five feet of the property line and a maximum of six feet in height in the remaining portion of the exterior side setback (**Attachment B**). Prior to 2004, the CMC had ambiguous language regarding exterior side yard fencing regulations but, at that time, the regulations were being interpreted to restrict fences located on an exterior side yard to a maximum height of thirty (30) inches within ten (10) feet of the property line and then up to six (6) feet in height for the remainder of the setback (**Attachment C**). As part of an omnibus cleanup in 2004, the City Council amended the CMC to the existing regulations; however, staff could not find documentation explaining the reasoning for the change beyond the direction provided by the Planning Commission to staff to clarify the fencing requirements for exterior sides (**Attachment D**).

Staff sees the current fencing regulations for exterior side setbacks as a potential issue because a residential property owner either compromises privacy by having a fence only 30 inches in height at the exterior side property line or has to sacrifice usable land in order to have a six-foot fence. Further, the required five-foot setback from the property line creates a larger “no-man’s land” when coupled with the approximate five (5) foot public right-of-way directly behind the sidewalk on the exterior side yard. The typical location of the public right-of-way in the majority of neighborhoods is approximately five feet from the back of sidewalk; however the public right-of-way does vary throughout the City depending on the location.

The City of Clayton does not maintain landscaping within the public right-of-way and it is left up to or is the responsibility of the property owner and depending on property owner, he/she may or may not maintain the landscaping. If six-foot fences were allowed to be located within the required exterior side setback or at the public right-of-way line, it would then reduce the amount of space to be landscaped between the back of sidewalk and fence. Further, there are numerous instances in Clayton currently where fences are located on the property line or the public right-of-way line on the exterior side setback (**Attachment E**). By amending the Code it would not only create a smaller landscape area or “no-man’s land”, but it would also allow property owners to enjoy the full breadth of their property as well as reduce the number of illegal or legal non-conforming fences throughout the City.

This issue regarding fence placement came to light after City staff had initiated two code enforcement cases for retaining walls and fences placed in the public right-of-way. As staff started to research and look into these issues of encroachments and fence placement, it became clear there was an issue that needed to be addressed and staff sought policy direction from the City Council. At its meeting on October 3, 2017, the City Council directed staff to draft an Ordinance to amend the Code in order to consider allowing the placement of a six-foot fence within the required exterior side setback or at the public right-of-way line (**Attachment F**).

RECOMMENDATION

Staff recommends that the Planning Commission consider all information provided and submitted, take and consider all public testimony, and, if determined to be appropriate, adopt Resolution 06-17, recommending City Council approval of an Ordinance to allow six-foot fences to be placed at the property line or at the public right-of-way line for exterior side setbacks (**Attachment A**).

ATTACHMENTS

- A. Planning Commission Resolution 06-17, with attachment:
 - Exhibit A – Draft Ordinance Amending the Fencing Standards
- B. Clayton Municipal Code Section 17.36.075 – Fencing Standards
- C. 2004 Clayton Municipal Code Section 17.36.075 – Fencing Standards
- D. Excerpt of Staff Report from the January 6, 2004 City Council Meeting and Minutes from the January 13, 2004 Joint City Council and Planning Commission Meeting
- E. Examples of Existing Fences at the Exterior Side Setback
- F. Excerpt of Staff Report and Minutes from the October 3, 2017 City Council Meeting

ATTACHMENT A

CITY OF CLAYTON
PLANNING COMMISSION
RESOLUTION NO. 06-17

**RECOMMENDING CITY COUNCIL APPROVAL OF AN ORDINANCE AMENDING MUNICIPAL CODE
TITLE 17, "ZONING", CHAPTER 17.36.075 FENCING STANDARDS TO ALLOW SIX-FOOT FENCES
TO BE LOCATED WITHIN THE REQUIRED EXTERIOR SIDE SETBACK OR AT THE PUBLIC
RIGHT-OF-WAY LINE
(ZOA-06-17)**

WHEREAS, the City wishes to amend its fencing standards for exterior side setbacks to provide property owners of corner lots with additional useable side yard area while not compromising privacy as well as to minimize the distance between the back of sidewalk and the fence line ; and

WHEREAS, this Ordinance is exempt from review under the California Environmental Quality Act ("CEQA") (California Public Resources Code Section 21000 et seq.). Pursuant to State CEQA Guidelines section 15303 (14 Cal. Code Regs., § 15303), this Ordinance is covered by the Class 3 CEQA Categorical Exemption for construction of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. The adoption of this Ordinance will result in six-foot fences on exterior side setbacks to be placed at the property line.

WHEREAS, proper notice of this public hearing was given in all respects as required by law; and

WHEREAS, on October 24, 2017, the Clayton Planning Commission held a duly-noticed public hearing on the matter, and received and considered testimony, both oral and documentary and recommended approval to the City Council of the proposed Ordinance to amend the fencing standards to allow six-foot fences to be located within the required exterior side setback or at the public right-of-way line; and

WHEREAS, the Planning Commission has determined that the proposed amendments to the Clayton Municipal Code do not conflict with and are in general conformance with the City of Clayton General Plan.

NOW, THEREFORE, BE IT RESOLVED, that the Planning Commission of the City of Clayton, based on substantial evidence in the administrative record of proceedings and pursuant to its independent review and consideration, does hereby recommend City Council approval of the proposed Ordinance to amend the Clayton Municipal Code to allow six-foot fences to be located within the required exterior side setback or at the public right-of-way line, attached hereto as Exhibit A and incorporated herein by this reference.

PASSED AND ADOPTED by the Planning Commission of the City of Clayton at a regular meeting on the 24th day of October, 2017.

APPROVED:

ATTEST:

Carl Wolfe
Chair

Mindy Gentry
Community Development Director

ATTACHMENTS

Exhibit A – Draft Ordinance Amending the Fencing Standards

EXHIBIT A

ORDINANCE NO. 480

AN ORDINANCE AMENDING CHAPTER 17.36.075 OF THE CLAYTON MUNICIPAL CODE TO ALLOW SIX-FOOT FENCES TO BE LOCATED WITHIN THE REQUIRED EXTERIOR SIDE SETBACK OR AT THE PUBLIC RIGHT-OF-WAY LINE

**THE CITY COUNCIL
City of Clayton, California**

THE CITY COUNCIL OF THE CITY OF CLAYTON DOES HEREBY FIND AS FOLLOWS:

WHEREAS, the City wishes to amend its fencing standards for exterior side setbacks to provide property owners of corner lots with additional useable side yard area while not compromising privacy as well as to minimize the distance between the back of sidewalk and the fence line; and

WHEREAS, the Planning Commission on October 24, 2017 held a duly-noticed public hearing on the matter and recommended approval to the City Council; and

WHEREAS, proper notice of this public hearing was given in all respects as required by law; and

WHEREAS, the Clayton City Council has reviewed all written evidence and oral testimony presented to date on this matter.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF CLAYTON, CALIFORNIA DOES ORDAIN AS FOLLOWS:

Section 1. The above recitals are true and correct and are hereby incorporated into this Ordinance.

Section 2. **Amendment to Clayton Municipal Code Section 17.36.075.C.** Clayton Municipal Code Section 17.36.075.C is hereby amended to read in its entirety as follows:

C. Exterior Side Setbacks. Fences shall not exceed a maximum height of six (6) feet and may be placed within the required exterior side setback or at the public right-of-way line.

Section 3. **CEQA.** The City Council hereby determines this this Ordinance is exempt from review under the California Environmental Quality Act ("CEQA") (California Public Resources Code Section 21000 et seq.). Pursuant to State CEQA Guidelines section 15303 (14 Cal. Code Regs., § 15303), this Ordinance is covered by the Class 3 CEQA Categorical Exemption for construction of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. The adoption of this Ordinance will result in six-foot fences to be located in the required exterior side setback or at the public right-of-way line. The City Council hereby directs the City Manager or his designee to prepare and file a Notice of Exemption within five business days following adoption of this Ordinance.

Section 4. Severability. If any section, subsection, sentence, clause, or phrase of this Ordinance, or the application thereof to any person or circumstances, is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other provisions or clauses of this Ordinance or application thereof which can be implemented without the invalid provisions, clause, or application, and to this end such provisions and clauses of the Ordinance are declared to be severable.

Section 5. Conflicting Ordinances Repealed. Any Ordinance or part thereof, or regulations in conflict with the provisions of this Ordinance, are hereby repealed. The provisions of this Ordinance shall control with regard to any provision of the Clayton Municipal Code that may be inconsistent with the provisions of this Ordinance.

Section 6. Effective Date and Publication. This Ordinance shall become effective thirty (30) days from and after its passage. Within fifteen (15) days after the passage of the Ordinance, the City Clerk shall cause it to be posted in three (3) public places heretofore designated by resolution by the City Council for the posting of ordinances and public notices. Further, the City Clerk is directed to cause the amendments adopted in Section 2 of this Ordinance to be codified into the City of Clayton Municipal Code.

The foregoing Ordinance was introduced at a regular public meeting of the City Council of the City of Clayton, California held on November 7, 2017.

Passed, adopted, and ordered posted by the City Council of the City of Clayton, California at a regular public meeting thereof held on November 21, 2017 by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

THE CITY COUNCIL OF CLAYTON, CA

Jim Diaz, Mayor

ATTEST

Janet Brown, City Clerk

APPROVED AS TO FORM

APPROVED BY ADMINISTRATION

Malathy Subramanian, City Attorney

Gary A. Napper, City Manager

#

I hereby certify that the foregoing Ordinance was duly introduced at a regular public meeting of the City Council of the City of Clayton, California held on November 7, 2017 and was duly adopted, passed, and ordered posted at a regular public meeting of said City Council held on November 21, 2017.

Janet Brown, City Clerk

ATTACHMENT B

17.36.075 - Fencing Standards.

Fencing shall conform to the following standards:

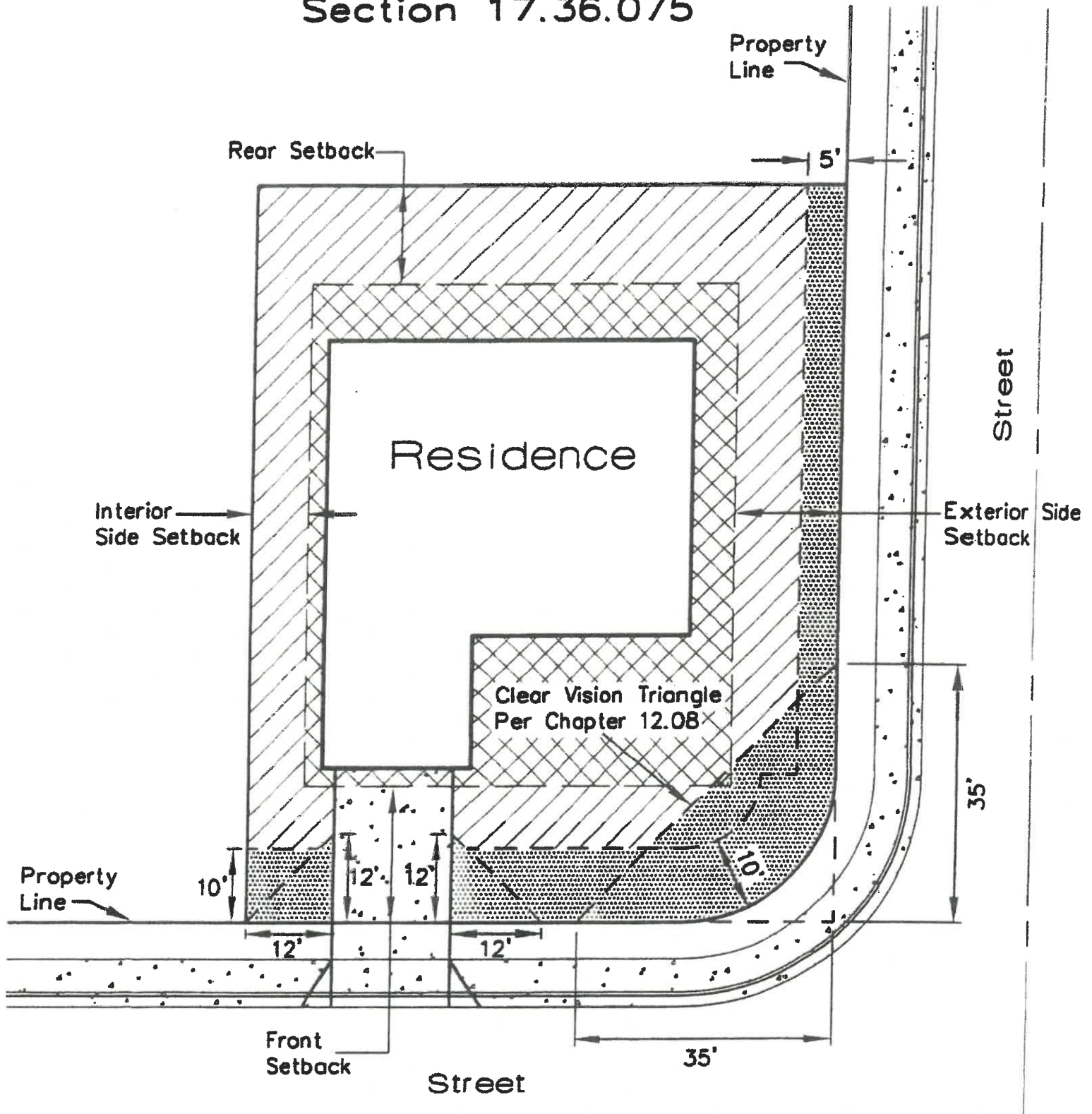
- A. **Front Setbacks.** Fences shall not exceed a maximum height of thirty (30) inches within ten (10) feet of the front property line and a maximum height of six (6) feet in the remaining portion of the front setback.
- B. **Interior Side Setbacks and Rear Setbacks.** Fences shall not exceed a maximum height of six (6) feet on the interior side and rear property lines or anywhere within the interior side and rear setbacks.
- C. **Exterior Side Setbacks.** Fences shall not exceed a maximum height of thirty (30) inches within five (5) feet of the exterior side property line and a maximum height of six (6) feet in the remaining portion of the exterior side setback.
- D. **Corner Lots.** Fences on corner lots shall conform with the restrictions on sight obstructions at intersections provided in Chapter 12.08.
- E. **Driveways.** Fences shall not exceed a maximum height of thirty (30) inches on either side of a driveway within the triangular areas formed by the edge of the driveway, the property line, and a line joining points on each of these twelve (12) feet from their intersection.
- F. **Main Building Area.** Fences shall not exceed a maximum height of eight (8) feet within an area in which a main building is permitted.
- G. **Measurement.** The height of fences shall be the average height of an eight-foot length of fence, measured from the lower of either the lowest adjacent ground level or the top of the footing of any retaining walls located within three (3) feet.
- H. **Safety Fences.** Safety fences and railings required by the Uniform Building Code are excluded from the height standards of this section.
- I. **Barbed Wire.** Barbed wire or other sharp materials shall not be used as a fencing material except on lands where agricultural grazing is actively conducted or where a use permit has been approved by the Planning Commission.
- J. **Hazardous Locations.** In no case shall any fence be located so as to cause a hazard to the movement of vehicles or pedestrians.
- K. **Height Exceptions.** The Director may issue an administrative use permit to allow a fence up to seven (7) feet in height in a rear setback or side setback of a lot in residential district. The Director may impose such conditions as the Director deems appropriate to mitigate any visual or other adverse impacts of the fence, including, but not limited to, requirements with respect to the height, design, and materials of the fence and landscape screening. Applications for an administrative use permit under this subsection shall be filed with the Director on such form as the Director prescribes, and shall be accompanied by a processing fee in such amount as established from time to time by resolution of the City Council. Prior to granting the administrative use permit, the applicant shall demonstrate and the Director shall find that:
 - 1. The issuance of such a permit is reasonably necessary by reason of unusual or special circumstances or conditions relating to the property, for the preservation of valuable property rights or the full use and enjoyment of the property;
 - 2. The fence will not create a safety hazard to pedestrians or vehicular traffic;
 - 3. The fence will not unreasonably interfere with access by police, fire, and emergency service personnel;




4. The appearance of the fence is compatible with the scale, mass, design, and appearance of other existing buildings and structures in the neighborhood;
5. The orientation and location of the fence is in proper relation to the physical characteristics of the property and neighborhood;
6. The applicant has obtained the written consent of the adjacent property owner, unless the fence is adjacent to public right-of-way, in which case written consent is not necessary; and
7. The fence will be of sound construction.

(Ord. 178, 1978; Ord. 197, 1979; Ord. 375, 2004)

FENCE HEIGHTS

Section 17.36.075



-  30" Maximum Fence Height
-  6'-0" Maximum Fence Height
-  8'-0" Maximum Fence Height

This diagram is for illustration purposes only and has not been adopted as part of the Zoning Ordinance.

ATTACHMENT C

17.36.075 Fencing requirements. Property and decorative fencing, walls, hedges, screen planting and shrubbery shall conform to the following standards:

A. Height Limitations.

1. Back Yards and Side Yards. Fences and walls shall not exceed a maximum of six feet high on rear and interior side property lines or anywhere within rear and interior side setback areas.
2. Front Yards and Street Side Yards. Fences and walls shall not exceed a maximum of thirty inches (30") high within ten feet of the front property line and a maximum of six feet (6') high within the remaining portion of the front yard. (see Figure 2)
3. Corner Lots. Fences, walls, shrubs and hedges on corner lots shall conform to the provisions of Chapter 12.08.
4. Driveways. Fences, walls, shrubs and hedges shall not exceed a maximum of thirty inches high on either side of a driveway within the triangular areas formed by the edge of the driveway, the property line, and a line joining points of each of these twelve feet from their intersection (See Figure 1 attached to and made a part of the Ordinance codified in this section and on file in the office of the City Clerk).
5. Main Building Area. Fences and walls may not exceed a maximum of eight feet high within an area in which a building is permitted.
6. How Measured. The height of fences, walls, shrubs and hedges shall be measured from ground level in accordance with direction in Exhibit A of Chapter 12.08.
7. Hazardous Locations. In no case shall any fence, wall, shrub or hedge be located so as to cause a hazard to the movement of vehicles or pedestrians.

ATTACHMENT D

Agricultural Structures and Activities (Section 17.16.130)

The wording of Section 17.16.130 regarding agricultural structures and activities was awkward and unclear. The Planning Commission and staff recommend the following modifications.

17.16.130 Equestrian or Agricultural Livestock Structures and Areas R-40-H. Any barn, stable, or shelter for equestrian or agricultural livestock shall be set back not less than one hundred (100) feet from the front property line and shall be not less than fifty (50) feet from any side or rear property line. Fenced pasture, paddocks, or other enclosed equestrian or agricultural livestock areas shall not be located nearer than ten (10) feet to any property line or nearest edge of street pavement, ~~unless. If the side or rear property line of any interior lot abuts permanently uninhabited land, equestrian riding areas either public or private, in which case, the side or the rear yard setback may be reduced to fifteen is five (5)~~ feet.

Building Height in PAO District (Section 17.32.040)

The building height regulations in Section 17.32.040 for the Professional Administrative Office (PAO) District are awkward and more restrictive than those for comparable districts. The Planning Commission and staff recommend the regulations be modified to as listed below. This would allow building heights in the PAO District to be comparable to those in the Multiple Family (MR) Residential District.

17.32.040 Building Height. No building or structure permitted in the P-A-O: district shall exceed ~~two and one-half stories or thirty-five (35)~~ feet in height; ~~except where an interior side yard abuts the rear yard of a single family residential district, in which case there shall be a one-story height limit except that when the PAO district abuts any single family residential district, then the building height maximum of the portion of the PAO district being within fifty (50) feet of the abutting single family residential district shall be twenty (20) feet.~~

Fencing Standards (Section 17.36.075)

Application of the fencing standards in Section 17.36.075 has brought to light several problematic issues that the Commission and staff have sought to address. These issues include:

- The height standards for fences in exterior side setbacks (a.k.a., street sides yards of corner lots);
- The height standards for fences within the rear or side setbacks (a.k.a., rear yard or side yard);
- Measurement of fence heights in areas outside of the "clear vision" area on corner lots;
- Inclusion of nearby retaining walls in the calculation of fence height;
- Clarification of the types of buildings referenced in subsection 17.36.075.A.5 (e.g., detached buildings, accessory buildings);
- Regulation of safety fences and railings installed pursuant to the Uniform Building Code;
- Regulation of barbed wire fences

As part of the discussion of these issues, Mayor Laurence submitted the attached letter to the Planning Commission (see **Exhibit B** on following page) which identifies several questions and considerations regarding fence heights, decorative latticework, and administrative approval of increased fence heights. Police Chief Peterson provided the attached memoranda (see **Exhibits C and D** on following pages) which address fence heights relative to the physical testing standards for police officers, ability of officers to observe break-ins and burglaries, and ability of officers to disengage the gate latches.

In light of these concerns, the Planning Commission and staff took the following actions with regard to the fencing standards.

Fence Heights Along Exterior Side Setbacks

The Commission directed staff to clarify the fencing requirements in exterior side setbacks. Staff conducted a brief field review of the location of fences in R-10 and R-12 neighborhoods. From this field review it appears that on approximately 2/3 of the lots, six-foot privacy fences along the exterior side setbacks have been constructed approximately 10 feet from the exterior side property line. On the remaining 1/3 of the lots, fences have been constructed approximately 5 feet from the exterior side property line. Therefore in order to avoid creating a large number of non-conforming exterior side setback privacy fences, the Commission determined that the fencing requirements be amended to stipulate that within 5 feet of the exterior side property line, fences can only be 30 inches high. Between 5 feet from the exterior side property line and the remainder of the exterior side setback, the fence can be up to 6 feet high. An option to require 6-foot fences to be setback 10 feet from the exterior side property line was not endorsed by the Commission.

Fence Height Exceptions

The current fence standards allow fences along rear and interior side property lines to be six feet high. This is the standard fence height allowed along rear and interior side property lines in most California communities and is consistent with the Police Department's concerns noted in Chief Peterson's memo. Six feet also affords adequate privacy for adjacent homeowners in most situations. The primary exception is the situation diagrammed in Example B of **Exhibit E** (on following page) where the property line is at the toe of the slope. This situation occurs infrequently, as the property line is typically at the top of the slope, as shown in Example A.

The Planning Commission determined that a procedure should be established which would allow staff to approve fences which exceed six feet in height. Since the Commission expressed interest in retaining six feet as the "standard" height for fences in recognition of the public safety concerns expressed by Police Chief Peterson, the criteria to be used by staff closely define the situations in which a fence up to seven feet in height would be allowed.

Measurement of Fence Height

The current wording of the fence standards does not allow any portion of a fence to exceed six feet in height. The Commission determined that wording should be added which would allow fence heights to be averaged over the typical 8-foot distance between fence posts. This would address situations where a fence on a slope "stair steps" down the slope instead of gradually

descending down the slope. Staff noted that this methodology complicates the measurement process by introducing a calculation into the fence height determination. The current wording is a more straight forward regulation that fences shall not exceed six feet and hence is easier to apply.

Retaining Walls

Frequently retaining walls are constructed near or as part of fences. The County Building Inspection Department, in administering the *Uniform Building Code* under contract with the City, requires a building permit if a retaining wall:

- Is higher than three feet;
- Supports a slope which exceeds 1:2; or
- Supports a fence within three feet of the back of the wall.

Based upon past staff interpretation and practice since the early 1990's, retaining walls in the vicinity of a fence have been included as part of the fence height calculation. **Exhibit E** provides examples of height calculations for different slope, fence, and retaining wall combinations. These height calculations are consistent with the definition of "Fence" and the application of the *Uniform Building Code* by the Building Inspection Department. Wording is included in subsection 17.36.075.G to clarify that retaining walls within three feet of a fence are included as part of the fence height calculation. This language avoids situations where a six-foot fence is located within one or two feet of a three-foot high retaining wall, effectively creating a nine-foot barrier.

Barbed Wire

The City currently has no regulations regarding the use of barbed wire, except the *Town Center Specific Plan* guidelines which do not allow "open wire" fences. Wording is included to prohibit barbed wire except on lands where agricultural grazing is actively conducted or where a use permit has been approved by the Planning Commission.

Safety Fences

The *Uniform Building Code* requires fences around pools to be five feet high. The Building Inspection Department enforces the five-foot requirement on all building permits within the City. Wording is included which excludes safety fences and railings required by the *Uniform Building Code* from the height standards. This clarification ensures that safety fences around pools will be constructed in accordance with the *Uniform Building Code* requirements.

Conclusion

The Planning Commission and staff recommend the revision of the Fencing Standards as listed below. The illustrative diagram (see **Exhibit F** on following page) will be included in the *Zoning Ordinance*, but not adopted.

MINUTES
CLAYTON CITY COUNCIL
AND
CLAYTON PLANNING COMMISSION

TUESDAY, January 13, 2004

1. CALL TO ORDER AND ROLL CALL

The meeting was called to order at 7:00 p.m. by Mayor Pierce and Planning Commission Chair Haydon in the Library Community Room, 6125 Clayton Road, Clayton, CA.

Clayton City Council – All Councilmembers were present.

Clayton Planning Commission – All Planning Commissioners were present.

Staff – City Manager, City Clerk, Community Development Director, City Attorney

2. PLEDGE OF ALLEGIANCE TO THE FLAG

3. PUBLIC COMMENT - None.

4. PUBLIC HEARINGS

- (a) *Continued Public Hearing on proposed ordinance amending, adding and deleting various land use regulation chapters and sections of the Clayton Municipal Code including: sign regulation enforcement, recreational vehicle storage, zoning definitions, fencing standards, residential floor area regulations, administrative discretion, etc. (ZOA 01-03 and 03-03) (Community Development Director)*

Community Development Director Graves gave a summary of the proposed amendments.

Councilmember Laurence said the Police Department's concerns are primarily fences over 6 feet at the front of the house, since Police would like to be able to reach over the fence and unlatch the gate.

City Manager Napper clarified the Police Chief would prefer the fence height to be 6 feet all the way around properties. Sometimes when a fence is above 6 feet in the rear yard, it requires the officer to go back to the front where the fence is 6 feet or below.

Planning Commissioner Miller said fences higher than 6 feet or 6 feet fences sitting on a 3-foot retaining wall puts the police officer in a dangerous situation.

Councilmember Laurence asked if a property owner could store items right next to the fence.

The Community Development Director said if the property owner has a solid 6-foot fence, the proposed changes allow items to be stored next to the fence. If the property owner does not have a solid 6-foot fence, items have to be stored at least 50 feet from the front property line and 25-feet from the rear and side property lines.

Mayor Pierce asked about planned developments versus straight zoning. All the regulations listed refer to specific zoning districts. For many Planned Developments, particularly those with smaller lot sizes, the proposed setbacks do not apply. There may be a development where even a small accessory structure building could not be constructed. She thought that perhaps a distinction needed to be made between the small accessory buildings (e.g. garden sheds) from larger buildings (e.g. cabanas)

Community Development Director Graves said when the individual Planned Developments are originally approved they typically established their own setbacks. According to the Uniform Building Code, a garden shed which is 120 sq. ft. or less; does not require a building permit; must be offset from the property line by 3 feet, unless it has a 1-hour fire rated wall; and must be less than 10 feet high.

Vice Mayor Manning had a concern that most of the accessory buildings in Clayton would be out of compliance. He walked through Easley Estates and found at least 25 accessory buildings will not meet the standards.

Councilmember Laurence wanted the standards to create a standard of safety, as well as aesthetically pleasing, but felt some of the standards might be too strict. He suggested the setback for an accessory building be 10 feet behind the front corner of the house.

Planning Commissioner Miller said the Planning Commission is only concerned with larger accessory buildings, with no intention of reviewing accessory buildings of 120 sq. ft. or less.

Mayor Pierce felt the difference between major accessory structures and small accessory buildings needs to be defined.

Councilmember Shuey handed out a landscaping plan for a property in Vintage Clayton. He asked if this landscaping plan had been reviewed by the Planning Commission or only staff. He asked if the arbor with the wall fountain would fall under the requirements for an accessory structure? If so, there is a problem because it is not 65 feet from the front property line. He asked what happens if a property owner constructs an accessory structure that does not require a building permit right next to the fence. He asked if the property owner could apply for a variance?

Community Development Director Graves said the arbor be subject to the requirements for accessory structures because it is 8 feet high. Variances are granted if the property topography or lot size does not allow the construction of the accessory structure within the regulations. He indicated the 65-foot setback has been in the Municipal Code for many years. The Commission and staff did not address the value of the 65-foot setback since they were looking at minimizing the number of changes to the Municipal Code.

Planning Commissioner Haydon said the Commission also looked at issues that the Commission has dealt with in the past. If an issue has never come up, then the Commission felt they should leave well enough alone.

Mayor Pierce requested staff to bring back language stating the setback for accessory structures should be ten feet behind the front corner of the house closest to the accessory structure and eliminate 12-foot distance from the principal structure. She said lots are getting smaller and smaller and people want to utilize the most of their property. She felt most people would not cram it accessory structures right next to the principal building unless they had to.

Planning Commissioner Miller said the consensus of the Planning Commission was to leave the 12-foot setback alone. The Commission felt the 12-foot setback was a reasonable distance to protect people's views.

Planning Commissioner Haydon said the idea was to keep detached buildings separate or have the buildings attached. The Commission did not want a solid wall of homes along a street.

There was discussion on how much separation there should be between the principal building and than accessory building. If the lot is large enough, then how close should the structure be and not be within the rear setback. If the lot is small then should the building be allowed to be constructed next to the fence and/or next to the principal building?

Mayor Pierce reopened the continued public hearing

Public Comments

Jason Barnes, 1470 Lydia Lane, had a question of the 20-foot exterior setback. He purchased the property in June with the intention of constructing an out building within the large side setback. Staff informed him the Planning Commission was reviewing the side setbacks and the side setbacks would probably be increased to 20 feet from 10 feet. The reasoning behind this change is to maintain an open and airy atmosphere. He wanted to know why, when 24 other homes in the area have 3 feet side setbacks. He has no neighbors on one side and is not on a main through fare.

Councilmember Walcutt asked if he would be able to get a variance.

Community Development Director Graves said if legal findings could be made the variance would be approved.

The Council suggested Mr. Barnes apply for a variance.

Steve Thomas, 7 Atchinson Stage Place, submitted a letter addressing his concerns: 1) definition of yard versus setback; 2) requirements for accessory buildings and structures; 3) livestock structures and areas (R-40H); 4) definition of slope; 5) open storage; and 6) building footprint.

Councilmember Laurence mentioned a home on Padera Court that built a new fence constructed on top of an existing retaining wall, which made the fence higher than 6 feet from the ground. A neighbor complained and the city investigated and determined the fence needed to be corrected. Couldn't there be a process that would allow a 6-foot fence to be built on top of the retaining wall.

Community Development Director Graves said the proposed ordinance includes a process, which allows staff to approve fence heights up to 7 feet including the retaining wall, if it meets certain criteria including written approval of the neighbor.

Councilmember Laurence asked if the number could be 9 feet.

Planning Commissioner Miller said if the number is set at 9, then the Commission would have no means to keep the height to 7 feet.

Vice Mayor Manning suggested leaving the number at 7 and if someone wants the height to 9 feet, they could apply for a variance and/or appeal to the City Council.

Councilmember Shuey asked who determines whether an application is reviewed and approved by the Planning Commission or staff. If the application is administratively approved, is there a check and balance process to protect the applicant.

City Manager Napper said the Commission could have a policy that the Community Development Director notifies the Planning Commission, by way of listing on their agenda, what has been administratively approved.

In response to Thomas letter it was the consensus of the Council to leave the ordinance as drafted, except for the changes listed below.

- Add language which exempts accessory buildings less than 120 sq. ft. and less than 10 feet high.
- Accessory buildings must be at least 5 feet from the main building
- If the accessory building is within 3 feet of the property line, it has to be at least 12 feet from the main building.
- Include language "unless the Planning Commission determines a wider distance is needed between the principal building and accessory building.
- Mention of vehicular access easement and emergency vehicle access needs to be the consistent throughout the ordinance.

- Attachment 4, Page 21, Section B.4, add “six foot” solid fence
- Attachment 2, Page 10, line12, change B2 – to read “antennas will ~~not be constructed in front or side yard (setback), but shall -~~ be constructed to the rear of the residence....

It was moved by Vice Mayor Manning, seconded by Councilmember Shuey to continue the public hearing to February 3, 2004 City Council/Planning Commission joint meeting starting at 6:00 p.m. (5-0)

(b) *Continued Public Hearing on proposed ordinance amending, adding, and deleting various chapters and sections of the Clayton Municipal Code including adding a new chapter entitled “Second Dwelling Units”, various zoning definitions, etc. (ZOA 02-03) (Community Development Director)*

Mayor Pierce reopened the continued public hearing. There were no public speakers.

It was moved by Vice Mayor Manning, seconded by Councilmember Walcutt to continue the public hearing to February 17, 2004 City Council/Planning Commission joint meeting starting at 6:00 p.m. (5-0)

5. **ADJOURN** – the meeting adjourned at 10:00 p.m.

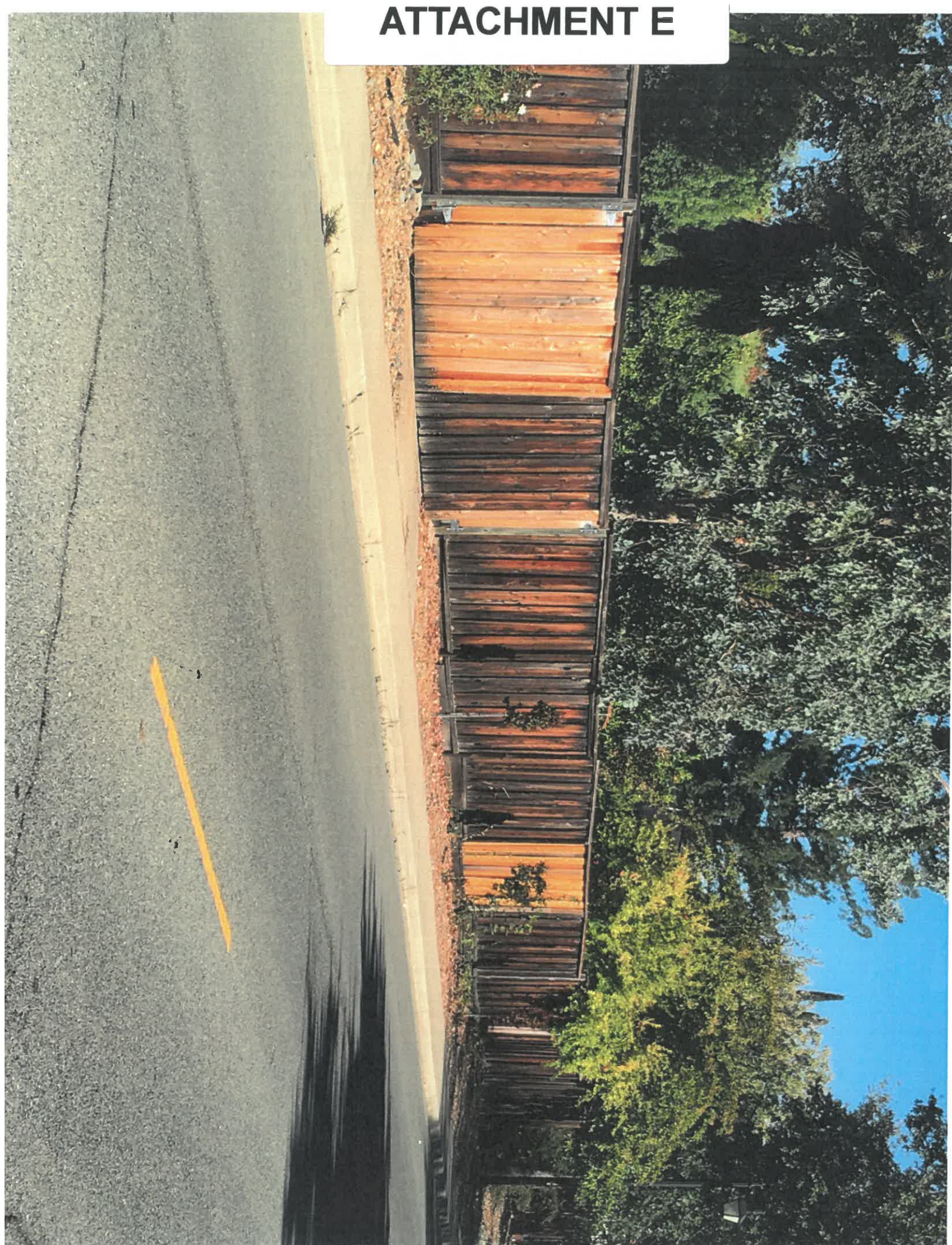
Respectfully submitted,

Rhonda Basore, City Clerk

Approved by Clayton City Council:

Julie K. Pierce, Mayor

ATTACHMENT E








ATTACHMENT F

Agenda Date: 10-03-2017


Agenda Item: 8a



Approved:

Gary A. Napper
City Manager

AGENDA REPORT

TO: HONORABLE MAYOR AND COUNCIL MEMBERS

FROM: SCOTT ALMAN, CITY ENGINEER
MINDY GENTRY, COMMUNITY DEVELOPMENT DIRECTOR 

DATE: OCTOBER 3, 2017

SUBJECT: POLICY DISCUSSION OF ENCROCHMENTS INTO THE PUBLIC RIGHT-OF-WAY AND FENCE LOCATIONS FOR EXTERIOR SIDE SETBACKS

RECOMMENDATION

It is recommended the City Council discuss and provide direction to staff on structures encroaching into the public right-of-way and fencing regulations for exterior side setbacks.

BACKGROUND

In the month of September 2017, City staff initiated two code enforcement cases regarding the construction of retaining walls and fencing in the public right-of-way and without building permits. One case consisted of a stacking block retaining wall, with a six-foot wooden fence on top of the wall, located on a corner lot at the intersection of Mountaire Parkway and Mt. Wilson Way, more specifically at 199 Mountaire Parkway (**Attachment 1**). The retaining wall and fence, built in the public right-of-way, run parallel to Mt. Wilson Way, along the side yard of the residence, and perpendicular to Mountaire Parkway.

The public right-of-way, which is reserved for streets, sidewalks, utilities, streetlights, etcetera, on Mt. Wilson Way is fifty-six (56) feet in width, which places the side yard property line for the residence at 199 Mountaire Parkway approximately five (5) feet six (6) inches behind the back of the sidewalk. Prior to the construction of the retaining wall, the side yard fence was located well into the subject property and there was a slight slope between the back of the sidewalk and the fence (**Attachment 2**). The property owner has not only constructed the retaining wall in the public right-of-way, but has also placed fill in the side

yard and in the public right-of-way to level out the slope and increase the size of his/her rear and side yards on property belonging to the City. The existing construction and design has allowed a homeowner to receive a private benefit from public land by allowing the encroachment into the public right-of-way.

Depending on the City Council's direction on this issue, there are a couple of options for consideration to achieve compliance. The first option would be to have the property owner remove the retaining wall from the public right-of-way and relocate it to the property line. If this option were selected, then the six-foot fence would then be required to be located five feet from the property line as required by the Clayton Municipal Code (CMC). This would result a five (5) foot six (6) inch area of public right-of-way between the back of sidewalk and the retaining wall and a five foot separation between the retaining wall and the fence. Staff is also seeking direction from the City Council regarding the placement of fences along exterior side yards, which will be discussed in further detail below.

A second option is to allow the existing encroachment of the retaining wall into the right-of-way to remain and if the Council decides this is acceptable; staff would urge the Council to consider placing conditions on the encroachment in order to best protect the City. These protections could include, but are not limited to, recording a document indemnifying the City of Clayton, requiring insurance in perpetuity, and the encroachment is revocable. These protections will also be discussed in further detail below. In this scenario, the six-foot fence would still be required to be located five (5) feet from the property line, creating a large separation between the retaining wall and the fence, approximately 8.5 feet. The retaining wall would be located approximately two feet behind the walk and then there would be eight feet between the fence and retaining wall.

In both of these options for compliance, it requires the placement of the six-foot fence to be at least five feet from the property line in conformance with the Clayton Municipal Code. Staff has concerns regarding the fence placement from the exterior side property line being so far back and would like to seek direction from the Council to consider amending the Clayton Municipal Code to allow exterior side yard fences to be located on the property line. However, the CMC would still require fences to be placed three feet from retaining walls in order to not have them be counted as one structure. This issue is also discussed in more detail below.

The second code enforcement case consists of a wood retaining wall, with a fence on top of the wall, located on the corner of El Molino Drive and Wright Court, more specifically at 401 Wright Court. This case is very similar to 199 Mountaire Parkway in that the retaining wall and fence are located on a corner lot and are encroaching into the public right-of-way (**Attachment 3**). The property owner in this case has moved the retaining wall and fence into the public right-of-way for similar reasons, to level out the slope in the backyard (**Attachment 4**). The options above in regards to compliance would be the same with this particular case as well.

The structures at 199 Mountaire Parkway and 401 Wright Court would both require building permits as they are currently constructed. The contractors for both structures never made contact with the City to apply for a building permit; therefore staff was unable to provide direction about the City's regulations and prevent these structures from occurring within the public right-of-way and with their current design. The block wall at 199 Mountaire Parkway is over three (3) feet in height and will require a building permit regardless if it is required to be relocated to the property line. At 401 Wright Court, if the fence is relocated to the appropriate distance on the exterior side lot then a building permit in this instance would not be required because the fence does not exceed seven (7) feet in height and the retaining wall does not exceed three (3) feet in height.

DISCUSSION

ISSUE #1: ENCROACHMENT INTO THE PUBLIC RIGHT-OF-WAY

Local government's public rights-of-way are an oft-forgotten asset that form the infrastructure backbone and skeleton of the city. Through this interconnected right-of-way network flows domestic water; information and communications; vehicular, pedestrian, and bicycle traffic; commerce; public safety and assistance; waste collection and disposal; as well as many other unseen facilities and pipelines that support the community's day-to-day lives, through the provision of fuel for our vehicles. These public rights-of-way also provide the opportunity for new or the expansion of existing necessary services when required.

The public rights-of-way are considered to be a planning tool and a "savings account" to help ensure the City is prepared for the future. As local governmental requirements increase in magnitude and difficulty, and as public demands for increased connectivity and data consumption continue to grow, there is an ever increasing request for space to be able to construct the infrastructure required to satisfy these increased requirements and demands.

When rights-of-way are required as a condition of development entitlement, they are intended to not only fulfill the current needs imposed by that development but also future needs that may come with increased demands from both the public and governmental oversight agencies.

Local governments, including Clayton, are currently faced with, or will be faced with in the near future, two such demands for additional space within the City's existing rights-of-way. The public demand for data and wireless connectivity has been steadily rising as more business is being conducted online as well as the change in entertainment consumption from cable to internet or wireless based. In order to meet those demands, requests are being made of the City and will continue to be made for the foreseeable future to provide additional underground space for the placement of fiber optic, and other communications related facilities. These demands have already begun with wireless companies such as Zayo and Mobilitie requesting space in the public right-of-way and it is anticipated more of these requests will be forthcoming due to bills such as SB 649, which if signed into law, will make it easier for wireless telecommunication facilities to be placed in the public right-of-

way. These requests are a cause for concern as more linear facilities are being placed into the limitedly available right-of-way.

Additionally, the ever increasing requirements of the Regional Water Quality Control Board (RWQCB) through the City's Municipal Regional Stormwater Permit for green infrastructure and the treatment of stormwater from city streets are becoming very onerous and the only real opportunity available to meet these ever-increasing requirements is within the City's existing rights-of-way. The requirement for the treatment of stormwater from city streets is starting to become prevalent with new developments and will more than likely become an eventuality for all streets as cities repave them and as indicated above, the stormwater treatment facilities will have to be located in the public right-of-way.

By allowing private structures to be constructed within public rights-of-way, the City could be severely limiting its ability to prepare for the future and could be pushing this issue off onto future generations instead of preventing them from occurring now. The City does have the ability through the Clayton Municipal Code (CMC Section 12.04.360) to require the owner of any encroachments that necessitate removal, relocation, or abandonment to be done so at the cost of the owner (**Attachment 5**). While, the City does have this option, it raises a myriad of possible logistical matters for a city with limited staff and resources. These issues include additional timing on a necessary City project due to the relocation of these structures, additional paperwork to memorialize the encroachment, as well as coordination with the property owner on the construction and removal of these structures, amongst others. Further, if the property owner does not have the funds to remove these structures, then the City is in the position of removing them, outlying public funds to do so, and then recouping those costs at a later date by placing a lien the property.

Given the aforementioned issues, staff is strongly recommending any further unauthorized encroachments into the City's rights-of-way not be tolerated and require them to be removed or alternatively require a recorded document with conditions to best protect the City.

If City Council desires to permit non-typical encroachments within the City's rights-of-way, the City Engineer recommends, at a minimum, the following conditions of approval to be enacted for each encroachment:

1. The permitted encroachment is only allowed under a revocable permit at the sole discretion of the City;
2. The permittee, its successors and assigns shall be solely liable and responsible for the encroachment and its maintenance in perpetuity;
3. The permittee indemnifies the City, in perpetuity, for the encroachment and any liability arising from the encroachment;
4. The permittee provides liability insurance naming the City as an additional insured on the policy covering the encroachment;
5. All costs for the removal of the encroachment shall be borne solely by permittee;

6. All City costs and expenses incurred due to management and/or removal of the encroachment shall be compensated, in full, to the City and may become a lien on the permittee's adjacent property.

POLICY QUESTIONS: Does the City Council want to allow encroachments into the public right-of-way?

If so, what conditions, if any, does the City Council want to impose on these encroachments to best protect the City?

ISSUE #2: EXTERIOR SIDE SETBACK FENCING REGULATIONS

The Clayton Municipal Code currently allows fences on an exterior side lot line to be a maximum of 30 inches in height within five feet of the property line and a maximum of six feet in height in the remaining portion of the exterior side setback (**Attachment 6**). Prior to 2004, the CMC had ambiguous language regarding exterior side fencing regulations, but was being interpreted to restrict fences on an exterior side at a maximum height of thirty (30) inches within ten (10) feet of the property line and then up to six feet in height for the remainder of the setback. As part of an omnibus cleanup in 2004, the City Council amended the CMC to the existing regulations; however staff could not find documentation explaining the reasoning for the change beyond the direction provided to staff to clarify the fencing requirements for exterior sides.

Staff sees the current fencing regulations for exterior side lots as a potential issue because a residential property owner either compromises privacy by having a fence only 30 inches in height at the exterior side property line or has to sacrifice usable land in order to have a six-foot fence. Further, the required five-foot setback from the property line creates a larger "no-man's land" when coupled with the approximate five (5) foot public right-of-way directly behind the sidewalk on the exterior side yard. The City of Clayton does not maintain landscaping within the public right-of-way and it is left up to or is the responsibility of the property owner and depending on property owner, he/she may or may not maintain the landscaping. If six-foot fences were allowed to be located on the property line, it would then reduce the amount of space to be landscaped between the back of sidewalk and fence. Further, there are numerous instances in Clayton currently where fences are located on the property line on exterior side lot (**Attachment 7**). By amending the code it would not only create a smaller landscape area or "no-man's land", but it would also allow property owners to enjoy the full breadth of their property as well as reduce the number of illegal or legal non-conforming fences around the City.

A good example showing the discrepancy of fence locations is along El Molino Drive where there are fences encroaching in the public right-of-way, fences along the property lines, and fences meeting the current Municipal Code requirements, which are located five from the property line (**Attachment 8**). Staff is recommending the City Council consider changing the Clayton Municipal Code to allow exterior side yard fences to be located on the property

line as long as they are not located in the front setback or create a visual obstacle by encroaching into the intersection's sight triangle.

POLICY QUESTION: Does the City Council want staff to research and analyze allowing exterior side setback fences at the property line?

ISSUE #3: CODE ENFORCEMENT

While attempting to achieve compliance with the two aforementioned code enforcement cases, it became apparent to staff that this issue of unauthorized encroachments into the public right-of-way was much more prevalent than these two occurrences. **Attachment 9** only shows a small representative sample of the countless number of unauthorized encroachments into the public right-of-way. Staff is seeking direction from the City Council on how to approach these violations to achieve compliance.

Historically, Code Enforcement has been reactive to complaints from the community and not proactively seeking out violations. This issue has raised the question, since the City has initiated the two aforementioned cases and the City is now aware of the existing encroachments, should the City be seeking compliance from all the property owners that have unauthorized encroachments? Some of the issues that arise are the allocation of staff time and resources, which are already limited, to address this wide spread issue as well as fairness of enforcement. The enforcement of the two subject properties raises the question of, should the others that are in violation also be compelled to comply?

The City is not required to enforce its Municipal Code and courts have recognized that due to limited resources, some violations of a city's ordinance will go uncited and that absent deliberate or intentional discrimination, such selective enforcement is legal. Alternatively, the City could enforce prospectively on either a proactive or reactionary basis; however it raises the question of staff trying to determine when the construction of these structures occurred unless the structure is currently under construction.

POLICY QUESTIONS: Does the City Council want Code Enforcement to be proactive and seek compliance for all unauthorized encroachments into the public right-of-way?

Or, does the Council want to City staff to enforce prospectively and is that enforcement proactive or reactive?

ISSUE #4: PUBLIC EDUCATION

Lastly, to help circumvent these unauthorized encroachments from becoming code enforcement cases, a public education effort to help get the word out to the community would be beneficial. Currently, the City's fencing requirements are located in the Citizen's Guide and within the Clayton Municipal Code. Other possibilities would be mailing out

notifications to Homeowners Associations and fencing contractors, posting on the City's website, and an article in the Clayton Pioneer.

FISCAL IMPACTS

The Council's direction regarding these issues would dictate and determine the costs. To address all of the unauthorized encroachments would take a significant, but unknown, amount of staff time and those costs would only be recoverable if the property owner sought a City permit to keep the unauthorized encroachment. However, there may be long term financial benefits to addressing the issue now, rather than undertaking the issue when it becomes a problem in the future.

There would be staff time associated with amending the Municipal Code pertaining to fence locations along the exterior side lot line.

Depending on the level of public education effort put forward, would determine the costs. The notification of the HOAs would be nominal, but notification of fencing contractors, which would not necessarily be include, could be more intensive.

ATTACHMENTS

1. 199 Mountaire Parkway Current Photos [3 pp.]
2. 199 Mountaire Parkway 2011 Google Street View [3 pp.]
3. 401 Wright Court Current Photos [3 pp.]
4. 401 Wright Court 2011 Google Street View [3 pp.]
5. Clayton Municipal Code Section 12.04 – Street Encroachments [12 pp.]
6. Clayton Municipal Code Section 17.36.075 – Fencing Standards [3 pp.]
7. Fences at Exterior Side Property Line [2 pp.]
8. Fences along El Molino Drive [4 pp.]
9. Pictures of Encroachments into the Public Right-of-Way [14 pp.]

homes or service providers or if these uses were to be located near sensitive uses such as parks or schools. The County's Community Supervision Program, including parolee homes are not defined in the Clayton Municipal Code.

Councilmember Catalano inquired on when it is anticipated for this item to be brought back to City Council?

Ms. Gentry advised this item will be brought back in spring 2018 for City Council consideration.

Mayor Diaz asked if there has been any interest in anyone wanting to open up a Parolee residence?

Ms. Gentry advised there was one inquiry back in November 2016, however there has not been any other interest or follow up from that provider or any other providers.

Mayor Diaz opened the Public Hearing; no comments were offered. Mayor Diaz then closed the Public Hearing.

It was moved by Vice Mayor Haydon, seconded by Councilmember Pierce, to have the City Clerk read Ordinance No. 479, by title and number only and waive further reading. (Passed; 5-0 vote).

The City Clerk read Ordinance No. 479 by title and number only.

It was moved by Vice Mayor Haydon, seconded by Councilmember Pierce, to approve Ordinance No. 479 for Introduction with findings the Ordinance is not subject to the California Environmental Quality Act because this activity is not considered to be a project and it can be seen with certainty that it will not have a significant effect or physical change to the environment. (Passed; 5-0 vote).

8. ACTION ITEMS

- (a) Policy discussion of encroachments into the public right-of-way and fence locations for exterior side setbacks.
(Community Development Director)

Community Development Director Mindy Gentry noted in the month of September city staff initiated two code enforcement cases regarding the construction of retaining walls and fencing in the public right-of-way and were constructed without building permits. The right-of-way at 199 Mountaire Parkway is approximately 5 feet 6 inches from the back of the sidewalk; the unpermitted retaining wall that was constructed is approximately 2 feet from the back of the sidewalk and exceeds 36 inches in height, requiring a building permit. A wooden fence was also placed on top of the retaining wall, exceeding the six foot total height requirement, wall plus fence, and the fence does not comply with the setback requirement of 5 feet from the property line.

Ms. Gentry noted the second code enforcement case is located at 401 Wright Court with a violation of a fence located on top of a retaining wall with total height exceeding the six foot height requirement; violation of setback location requirements; the wall and fence are located within the public right-of-way; and was constructed without building permits.

Ms. Gentry noted the components of these two cases have brought to light violations occurring citywide with discussion needed to address encroachments into the public

right-of-way; exterior side setback fencing regulations; code enforcement and public education.

Ms. Gentry advised when right-of-way is determined; it is based on current and possible future needs that may come with increased demands from both the public and governmental oversight agencies. Locally, Clayton may be faced with two such demands for additional space for data and wireless connectivity and from the Regional Water Control Board for storm water treatment of the city streets. By allowing private structures to be constructed within the public rights-of-way, the City could be severely limiting its ability to prepare for the future and could be pushing this issue off onto future generations rather preventing them now. The city does have the ability to require the owner of any encroachments that necessitate removal, relocation, or abandonment to be done so at the cost of the owner. However, this option raises possible logistical matters, including limited staffing and resources, adverse impacts to timing on necessary City projects due to enforcing relocation of these structures, additional paperwork to memorialize the encroachment as well as coordination with the property owners on the construction and removal of these structures.

Ms. Gentry advised the second issue is the exterior side setback fencing regulations, which currently allow a maximum of 30 inches in height within five feet of the property line and a maximum of six feet in height in the remaining portion of the exterior side setback. Staff opines the current fencing regulations for exterior side lots compromises privacy or sacrifices usable land in order to have a six foot fence. The City of Clayton does not maintain landscaping within the public right of way and is the responsibility of the property owner. If six foot fences were allowed on the property line, it would reduce the amount of space to be landscaped between the back of sidewalk and the fence. On neighborhood streets, the different placement of the fences can create an inconsistent visual appearance.

Ms. Gentry noted the third issue of code enforcement being reactive to complaints from the community and not proactively seeking out violations. Currently, staff time and resources are limited to address this community wide issue and also brings the question of fairness of enforcement. The City is not required to enforce its Municipal Code as courts have recognized due to limited resources, some violations of a city's ordinance will go uncited and that absent deliberate or intentional discrimination, such selective enforcement is legal.

Ms. Gentry concluded with the fourth issue, a Public Education effort to help get the word out to the community, which would be beneficial. Although fencing requirements are currently addressed in the Citizen's Guide and within the *Clayton Municipal Code* both available at City Hall, Library and on the city's website, more outreach could be done. A notification could be prepared for Homeowners Associations, fencing contractors, the homepage of the city's website and an article in the *Clayton Pioneer*.

Councilmember Shuey inquired in the event if the City allows a known problem, that was not properly constructed and a utility requires access to the public right-of-way, what is the potential impact on the city and the property owner at that time the utility needs to get into that space?

Ms. Gentry advised within the *Clayton Municipal Code* the city has the ability to remove any authorized or unauthorized structures for utilities to have access. The property owner would first be notified, if they are uncooperative to remove those structures, the City has the ability to remove the structures and place a lien on the property to recover the public funds used for the removal.

Councilmember Catalano inquired if the public right-of-way width is typically more than the concrete portion? Is it obvious to a resident where their property line is located?

Ms. Gentry advised there is not a set distance and this distance varies in certain parts of the community, in some areas there is a monolithic sidewalk and some that are detached. Typically, there are 6 inches of curb and 5 feet of sidewalk and usually 5 feet of public right-of-way behind the sidewalk; however for a property owner to obtain an accurate location of their property lines, they must hire a surveyor to mark them out.

Councilmember Pierce added the property line locations behind the sidewalk or curb if no sidewalks vary in each subdivision based on the location of public utilities. Councilmember Pierce requested clarification if a permit is required and had been requested prior to construction, would these requirements have been provided to homeowner or contractor.

Ms. Gentry advised if permits were sought prior to construction, the City would provide the regulations and information to the applicant, on the two cases presented this evening, they would not have been approved as they would not have met the requirements for height and location.

Mayor Diaz opened matter for public comments.

Robert Brenneman, a neighbor of 199 Mountaire Parkway, advised the retaining wall and fence is aesthetically very pleasing, prior to the retaining wall, there were overgrown junipers and difficult to see when leaving the driveway. The visibility has improved and would like to see the project continue.

Greg Roberts, a neighbor of 199 Mountaire Parkway, who also represents the contractor who installed the retaining wall and current improvements, believed the retaining was less than the height requiring a building permit. The current wall is just over 3 feet tall, built to the manufacturers specifications, compacted layers, base rock, drainage system, and anchored to the hillside, making it structurally sound.

Councilmember Shuey inquired on how Mr. Roberts thought the structure met regulations?

Mr. Roberts advised as he understood in most jurisdictions, a retaining wall is allowable up to 4 feet without a permit.

Councilmember Shuey inquired on who the contractor is on this project?

Mr. Roberts advised Viking Pavers constructed the retaining wall and is doing the current work in the backyard.

Mrs. Kalt advised A & J Fencing built and installed the fencing on top of the retaining wall.

Councilmember Pierce inquired if A & J Fencing currently holds a Clayton Business License?

Ms. Gentry advised A & J Fencing currently does not have a Clayton Business License and has been notified several times by the City that a business license is required to perform work in the City of Clayton. Ms. Gentry advised shortly after the stop work order was issued, Viking Pavers obtained a Clayton Business License.

Mr. Roberts advised the retaining wall was constructed over a year ago and the second phase of the project recently started for a patio.

Aaron Kalt, 199 Mountaire Parkway, added there will be an addition of a gate to the fence , setback approximately one foot to close off the backyard with the remaining installation of the pavers, AstroTurf, and drought tolerant landscape. Mr. Kalt advised he and his wife moved into the residence about 4 years ago and found the junipers to be an eyesore to the neighborhood and wanted to make improvements. Mr. Kalt spoke to neighbors about the improvements they wanted to make and then presented them to the Homeowners Association for approval. Once the improvements were approved, Mr. Kalt hired the most reputable contractors in the area for construction of the project; thinking he was going about the project appropriately.

Mayor Diaz, a former Dana Hills resident, inquired if the Homeowners Association provided any feedback on this project?

Mr. Kalt advised that the Homeowners Association provided favorable feedback on the removal of the junipers and making the property visually appealing. On May 26, 2016 Mr. Kalt received a letter from the Homeowners Association approving his plans.

Councilmember Shuey requested to review the letter Mr. Kalt received from the Home Owners Association.

Councilmember Catalano noticed a fire hydrant located on the corner of the property and inquired if there is sufficient accessibility to it by the Fire Department if it were needed in an emergency.

Mr. Kalt advised an adjacent neighbor had a fire about 6 months ago and this particular fire hydrant was used to put out the roof fire with no known issues.

City Engineer Scott Allman added Contra Costa Fire Protection was contacted regarding the clearance around the fire hydrant and was advised a three-foot minimum clearance is required and this property looks to meet the requirements.

Councilmember Shuey advised the approval from the Homeowners Association notes that Mr. Kalt is responsible to obtain the necessary permits and building inspection services required from the City for this project.

Mr. Kalt advised he assumed the contractors he hired would obtain the necessary permits needed. Mr. Kalt would like fair and equitable treatment in regards to retaining walls that are already in place and is willing to go through the necessary steps to rectify the situation and complete the project.

Councilmember Pierce advised the City Council is not ruling on his particular property, but is establishing a policy for current and future structure violations and how to protect the public right-of-way of the City and for the installation of future utilities and Regional Water Control Board needs.

Councilmember Shuey added this issue has come up before and the contractors Mr. Kalt hired had an obligation to inform Mr. Kalt of the requirements needed to complete his project. Mr. Shuey advised a policy decision on encroachments needs to be made for consistency purposes throughout the community and if the desire is to allow encroachments, there needs to be indemnification to protect the city that can be prepared by the City staff and the City Attorney.

Ms. Gentry added, wooden fences need to be moved 10 feet from the back of sidewalk to be compliant in the *Clayton Municipal Code* as the Code requires it to be 5 feet from the property line and in this case the property line is 5 feet behind the sidewalk.

Mayor Diaz closed public comments.

By general consensus, City Council provided direction to staff to create a revocable encroachment agreement with indemnification language to protect the city, including appropriate insurance for the encroaching structures; to draft an ordinance to allow a six-foot fence at the property line for exterior side lots, with all other current requirements to remain; to pursue code enforcement cases if the City is aware a violation; and to conduct a public education effort regarding the regulations for the construction of fences.

- (b) Discussion of staff recommendations for various local policy issues arising from the California voters' passage of Proposition 64 and the State legislature's passage of SB 94 – the Medical and Adult Use Cannabis Regulation and Safety Act (MAUCRSA) regarding local regulation of cannabis.
(Community Development Director)

Community Development Director Mindy Gentry provided a brief background noting on December 20, 2016 the City Council passed an Urgency Ordinance banning the personal outdoor cultivation of cannabis and staff requested direction regarding Proposition 64 - the Control, Regulation, and Tax of Adult Use of Marijuana Act (AUMA). The City Council directed staff to not regulate the indoor cultivation for the personal use of marijuana; add provisions to the Clayton Municipal Code to treat marijuana similarly to alcohol with no consumption allowed in public; further address marijuana in 2017 to allow more time for legal clarification and to determine what actions neighboring jurisdictions have taken.

Ms. Gentry noted there have been no changes to the federal Controlled Substances Act; however a bill has been introduced to change marijuana from a Schedule I narcotic to another controlled substances schedule. On June 26, 2017, Governor Brown signed into law SB 94 – Medical and Adult Use Cannabis Regulation and Safety Act (MAUCRSA); combining the medical and adult use of cannabis systems into one licensing structure with the same regulatory framework governing both medical and adult use facilities. The most notable change is vertical integration is now allowed, as it pertains to cannabis businesses. On September 16, 2017, AB 133 was signed into law noting technical fixes or changes to MAUCRSA.


Ms. Gentry noted Clayton's local regulations mostly pertain to medical purposes with the *Clayton Municipal Code* being silent on the recreational or adult use of marijuana. The City of Clayton has prohibited medical marijuana dispensaries; testing laboratories; facilities that store or maintain marijuana as part of their operations; and outdoor cultivation or production of cannabis; and some indoor cultivation. The City Council did not prohibit the delivery of medical marijuana due to accessibility concerns for patients within the community.

Ms. Gentry further noted the neighboring communities of Antioch, Brentwood, Pittsburg, Danville, and Orinda have banned all commercial cannabis businesses for both medical and adult use. The City of Concord has directed staff to draft an ordinance to put a ban in place; however will revisit the issue once more clarity has been provided by the State. Contra Costa County has prepared a permanent ordinance to prohibit all commercial uses until an ordinance to fully regulate all aspects of cannabis is completed. The City of Pleasant Hill Planning Commission has recommended to its City Council to allow retail medical cannabis. The City of Walnut Creek has placed a moratorium for all

PLANNING COMMISSION STAFF REPORT

Meeting Date: October 24, 2017

Item Number: 5.b.

From: Mindy Gentry 
Community Development Director

Subject: Ordinance Addressing Medical and Adult-Use Cannabis Regulations

Applicant: City of Clayton

REQUEST

The City of Clayton is requesting a public hearing to consider a City-initiated Ordinance amending Title 17 “Zoning” of the Clayton Municipal Code in order to continue to prohibit outdoor cannabis cultivation for personal use, and to prohibit all commercial cannabis activities except for cannabis deliveries originating outside of the City (ZOA-10-16) (**Attachment A**).

PROJECT INFORMATION

Location: Citywide

Environmental: This Ordinance is not a project within the meaning of Section 15378 and is exempt under Section 15061(b)(3) of the State of California Environmental Quality Act (“CEQA”) Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. In addition, to the extent delivery services originating from outside city limits would be allowed subject to the regulations and discretionary review of the local jurisdiction where the retailer is physically established and state licensing requirements, this Ordinance is exempt from environmental review pursuant to Business and Professions Code, Section 26055(h). Accordingly, this Ordinance is categorically exempt and statutorily exempt from further CEQA review.

Public Notice: On October 13, 2017, a public hearing notice was published in the Contra Costa Times and a public hearing notice was posted at designated locations in the City.

BACKGROUND

Following the passage of Proposition 64 – the Control, Regulate, and Tax Adult Use of Marijuana Act (AUMA), staff requested policy direction from the City Council at its December 20, 2016 and October 3, 2017 meetings (**Attachments B and C**). The direction from the City Council to staff was to prohibit all commercial cannabis uses, except for deliveries of medical and adult-use cannabis originating outside of the city limits. The City Council expressed concerns about allowing these types of uses not only due to concerns over public safety, but also due to the lack of complete industry regulations from the State of California as well as the new and untested nature of commercial cannabis businesses.

FEDERAL ENFORCEMENT - CONTROLLED SUBSTANCES ACT AND THE COLE MEMO

In 1970, Congress passed the Controlled Substances Act (CSA), which is the federal government's drug policy under which the use, manufacture, importation, possession, and distribution of marijuana is illegal. According to the CSA, marijuana is classified as a Schedule 1 narcotic, which means it is defined as a drug with no currently accepted medical use and has a high potential for abuse. On January 27, 2017, a bill, H.R. 715, was introduced to change marijuana from a Schedule I narcotic to another controlled substances schedule. The bill is currently at the committee level.

Further, the Trump Administration and Attorney General Jeff Sessions have not made any changes at the federal level in regards to cannabis enforcement and the Cole Memo issued by Attorney General James M. Cole during the Obama Administration is still relevant. The Cole Memo essentially conveys that states that have legalized marijuana should have a robust regulatory system in place and demonstrate the willingness of enforcement of such regulations. Further, the Memo hints that prosecuting state legal marijuana enterprises are probably not an efficient use of federal resources. Attorney General Sessions has been an avowed opponent to marijuana legalization and his office has commented publicly about cannabis reform; however the Trump Administration has not yet decided whether to reverse the direction provided by Cole Memo.

PROPOSITION 64 AND MAUCRSA

On November 8, 2016, voters approved Proposition 64 – the Control, Regulate, and Tax Adult Use of Marijuana Act (AUMA). The State of California passed Proposition 64 with 57.1% in favor. Locally, Contra Costa County voted 60.72% in favor and Clayton voted 53.8% in favor. AUMA legalized possession, transport, purchase, use, and transfer of recreational marijuana for individuals 21 years of age or older. Proposition 64 took effect immediately following its passage; however, some of these issues will not be in effect until January 1, 2018 when the State of California starts to issue licenses for the commercial sale, distribution, and cultivation of marijuana. Some aspects of the law that went into immediate effect were the personal use and cultivation of cannabis.

On June 26, 2017, Governor Brown signed into law Senate Bill (SB) 94 – Medicinal and Adult Use Cannabis Regulation and Safety Act (MAUCRSA), a budget trailer bill that made significant changes to the regulatory scheme of cannabis. The new law, SB 94 (MAUCRSA), amended AUMA by combining the medical and adult-use of cannabis systems into one licensing structure with the same regulatory framework governing both medical and adult-use facilities.

Some of the highlights of AUMA, as amended by MAUCRSA, are as follows:

- Cities retain full regulatory authority over ALL commercial cannabis businesses – both medical and adult-use, which includes the ability to ban;
- Cities must allow indoor cultivation for personal use, but it can be reasonably regulated (six plants per residence);
- Emergency regulations at the state level for both medical and adult-use are expected to be released in November 2017;
- Sales tax on medical cannabis is prohibited, but to qualify, the purchaser must have a State-approved, County-issued identification card;
- The State cannot issue a license if it is in violation of local ordinances; and
- Adults can possess up to 28.5 grams of marijuana, up to 8 grams of marijuana in the form of concentrated cannabis, which may be present in cannabis products such as edibles.

EXISTING MARIJUANA REGULATIONS IN CLAYTON

Currently, the City of Clayton laws referencing marijuana mostly pertain to medical purposes and the Municipal Code is silent on the recreational or adult-use of marijuana. Per Section 17.36.080 of the

Clayton Municipal Code (CMC), the City has prohibited: medical marijuana dispensaries; testing laboratories; facilities that store or maintain marijuana as part of their operations; and outdoor cultivation or production of cannabis; and some indoor cultivation (**Attachment D and E**). The CMC allows for the indoor cultivation of medical marijuana within residential zones within a detached, fully enclosed and secure secondary structure or within a primary residential structure at a location inhabited by a qualified patient or primary caregiver. In March of 2016, the City Council allowed for the delivery of medical marijuana due to accessibility concerns for community patients.

For a more in depth overview on the regulation of cannabis at the federal, State, and local levels, see **Attachments B and C**.

On December 20, 2016, the City Council passed an Urgency Ordinance prohibiting the outdoor cultivation of cannabis for personal use due to concerns for public safety because it could be visible from public areas and easily accessible to youth and children; attracting those looking to steal cannabis; the odorous nature of the plants; potential for broader growth; and the plants being less secure.

DISCUSSION

The State of California will begin issuing a variety of license types, for the various aspects of the industry, to cannabis businesses on January 2, 2018. Clayton does not legally have to have an ordinance in place by January 1, 2018, but cities will only have sixty days to respond to the State once notified of an application to open a business in the jurisdiction. Further, under SB 94, if a local jurisdiction does not have an ordinance enacted to address the licensed activity, the State can unilaterally issue a license for that business. The State is only prohibited from issuing a license if the business activity would violate local ordinances and, if there is no applicable ordinance, then there is no violation.

The local regulation of medical and adult-use cannabis does not have to be consistent with one another and can be regulated differently; however, staff is recommending the CMC be amended in such a manner that thoroughly addresses both medical and adult-use cannabis. This recommendation is based on the legal direction that, if the CMC does not explicitly address or is silent on the matter, it could be interpreted that the City allows all types of cannabis uses within the jurisdiction or the City could be legally challenged for denying a permit if an ordinance does not cover the activity. The challenge may or may not have merit, but it would mean litigation costs for the City regardless. Additionally, a moratorium may not be valid from the State's point of view because it is not a permanent or a bona fide ordinance fully addressing cannabis. The State will be looking to local jurisdictions to determine if cannabis uses are allowed and it is recommended the City establishes an ordinance that affirmatively regulates or affirmatively prohibits commercial cannabis businesses.

Based on the direction received from the City Council, the proposed Ordinance continues the prohibition on outdoor cultivation for personal use and bans all commercial cannabis activities except for deliveries originating outside of the city limits. The commercial activities include retail sales, indoor/outdoor cultivation, distribution, testing, and manufacturing. The City Council recommendations were based on concerns regarding security and public safety as well as a lack of complete industry regulations from the State of California as well as the new and untested nature of commercial cannabis businesses.

RETAIL SALES

Retail sales could mean a variety of different scenarios, considering vertical integration is allowed. A retail location could have a traditional storefront and a delivery component; operate as a non-storefront location (i.e. closed to the public), such as warehouses making deliveries; or operate a "microbusiness" with a combination of licensed activities. The City has the ability through its local police powers to be as stringent or as flexible as it desires within the bound of State law regarding what it will allow or prohibit

as it pertains to cannabis. For example, the City could allow medical retail cannabis only and prohibit adult use or the City could prohibit or allow both.

CITY COUNCIL DIRECTION: Prohibit all retail cannabis, both medical and adult-use.

INDOOR/OUTDOOR COMMERCIAL CULTIVATION

While Clayton does not have large areas of land dedicated to agricultural uses or industrial buildings that could be utilized for the indoor cultivation of cannabis, there are still opportunities where commercial cultivation could conceivably be proposed.

CITY COUNCIL DIRECTION: Prohibit both the indoor and outdoor commercial cultivation of medical and adult-use cannabis.

It should be noted, the City Council, at its December 20, 2016, meeting prohibited the outdoor cultivation of cannabis for personal use; however, State law allows indoor cultivation that local jurisdictions must allow, but can reasonably regulate, which is limited to six plants per residence. The proposed Ordinance continues the prohibition on outdoor cultivation for personal use and, per the City Council's direction, does not further regulate the indoor cultivation beyond compliance with State law.

DISTRIBUTION

Again, Clayton does not have land use designations or existing facilities that are typically used or zoned for the warehousing and the distribution of products, but there could still be available opportunities for this type of use. Distributors of cannabis cannot deliver directly to consumers; they can only distribute from licensee to licensee and perform the transport, verify quality control, and collect the State tax; however, this has become more ambiguous after the passage of SB 94, which allows for vertical integration.

CITY COUNCIL DIRECTION: Prohibit the distribution and warehousing of medical and adult-use cannabis.

DELIVERY

At the State level, deliveries are no longer a separately licensed activity. Instead, delivery services would fall under the State retailer license. The CMC currently does not prohibit the delivery of medical cannabis; however, the Code is silent on this issue. The City Council, at its March 15, 2016 meeting, did not prohibit, but did not expressly allow for, deliveries of medical cannabis. The City Council did express concern regarding patient accessibility to medical cannabis and were supportive of allowing deliveries that did not originate in the municipal limits, but changes to the Ordinance to expressly allow deliveries were not made. Given the City Council's historical support of medical cannabis deliveries originating outside the jurisdiction, the proposed Ordinance now clearly indicates that deliveries originating outside of the City limits are allowable within the Municipal Code and any ambiguity regarding allowable or prohibited uses and activities were removed.

Proposition 64 received 53.8% support of the voters in Clayton and adult-use cannabis deliveries would provide access to a product that the majority of Clayton voters supported and would not have the same impacts and permanence that a retail storefront could create. Allowing deliveries could easily be modified in the future without residual nonconforming land uses (e.g. no grandfathering).

CITY COUNCIL DIRECTION: Allow deliveries of medical and adult-use cannabis that originate outside of the municipal limits.

The proposed Ordinance would allow deliveries for both medical and adult-use cannabis originating outside of the city limits from licensed cannabis retailers; subject to the following restrictions:

- All employees of a cannabis retailer making deliveries of cannabis or cannabis products will have to carry: 1) copy of the licensee's current state license, 2) a government-issued driver's license, 3) an employee identification card containing a name and picture, and 4) a City of Clayton business license.
- No cannabis can be stored in the City.
- All deliveries will require a signature and proof of identification; no porch drop-offs.
- Deliveries to physical residential addresses only.

TESTING

Cannabis testing is a key component for all cannabis businesses because all are subjected to this requirement. Testing will determine the purity, potency, concentration, and cannabinoid ratios. Some of the State regulations include verified methods of sampling, ISO/IEC 17025 accreditation, destruction of the remains of sample cannabis, and disposal of waste byproducts resulting from their operations. From a land use perspective, testing can be located in an office or lab type environment.

CITY COUNCIL DIRECTION: Prohibit cannabis testing facilities for both medical and adult-use cannabis.

MANUFACTURING

The manufacturing component of the cannabis industry is probably the widest ranging component due to the vast business types. Manufacturing would include, but are not limited to, bakeries, extraction facilities, and the creation of personal products such as lotions and salves. These facilities could range from large facilities to home-based businesses. Manufacturing is also governed by AB 2679, which codified a legal form of extraction that includes regulations such as the use of a solvent-less process or non-flammable, non-toxic solvents as well as a closed loop system and equipment certified by a licensed engineer as being safe. While some of these manufacturing processes may be benign, some could require extensive oversight and regulation due to their extraction techniques.

CITY COUNCIL DIRECTION: Prohibit all cannabis manufacturing, including extraction, for both medical and adult-use cannabis products.

RECOMMENDATION

Staff recommends that the Planning Commission consider all information provided and submitted, take and consider all public testimony, and, if determined to be appropriate, adopt Resolution No. 05-17, recommending City Council approval of an Ordinance in order to continue to prohibit outdoor cannabis cultivation for personal use, and to prohibit all commercial cannabis activities except for cannabis deliveries originating outside of the City (**Attachment A**).

ATTACHMENTS

- A. Planning Commission Resolution No. 05-17, with attachment:
Exhibit 1 – Draft Ordinance Regulating Medical and Adult-Use Cannabis
- B. Excerpt of the City Council Staff Report and Minutes from December 20, 2016
- C. Excerpt of the City Council Staff Report and Minutes from October 3, 2017
- D. CMC Section 17.04.138 – Medical Cannabis Uses
- E. CMC Section 17.36.080 – Prohibited Uses and Activities

ATTACHMENT A

CITY OF CLAYTON PLANNING COMMISSION RESOLUTION NO. 05-17

RECOMMENDING CITY COUNCIL APPROVAL OF AN ORDINANCE AMENDING TITLE 17 "ZONING" OF THE CLAYTON MUNICIPAL CODE IN ORDER TO CONTINUE TO PROHIBIT OUTDOOR CANNABIS CULTIVATION FOR PERSONAL USE, AND TO PROHIBIT ALL COMMERCIAL CANNABIS ACTIVITIES EXCEPT FOR CANNABIS DELIVERIES ORIGINATING OUTSIDE OF THE CITY (ZOA-10-16)

WHEREAS, voters of the State of California approved the Compassionate Use Act of 1996 ("CUA") (codified as Health and Safety Code, § 11362.5 et seq.) to enable seriously ill Californians to legally possess, use, and cultivate marijuana for personal medical use free from prosecution under enumerated provisions of state law; and

WHEREAS, in 2003, the California Legislature adopted the Medical Marijuana Program Act ("MMP") (codified as Health and Safety Code, § 11362.7 et seq.), which permits qualified patients and their primary caregivers to associate collectively or cooperatively to cultivate marijuana for medical purposes without being subject to criminal prosecution under state law; and

WHEREAS, in 2013, the California Supreme Court issued its decision in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal. 4th 729, holding that nothing in the CUA or MMP preempted cities' authority to regulate or ban outright medical marijuana land uses; and

WHEREAS, in 2015, the California Legislature enacted the Medical Cannabis Regulation and Safety Act (MCRSA) which, for the first time in the State's history, adopted comprehensive regulations and licensing for medical marijuana businesses; and

WHEREAS, in 2016, California voters approved Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), which legalized the non-medical use of marijuana by adults over 21 years of age, and provides for state licensing of adult-use marijuana businesses; and

WHEREAS, Senate Bill 94 ("SB 94"), signed by the Governor on June 27, 2017 to take effect immediately, repealed the MCRSA, and amended AUMA to consolidate the state licensing scheme applicable to both medical and adult-use commercial cannabis activity under a new law entitled the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA); and

WHEREAS, AUMA, as amended by MAUCRSA, recognizes, preserves and does not supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances that regulate licensed cannabis businesses, including, but not limited to, completely prohibiting the establishment or operation of one or more types of businesses licensed under MAUCRSA within the local jurisdiction (Business and Professions Code, § 26200); and

WHEREAS, under the federal Controlled Substances Act (codified in 21 U.S.C. § 801 et seq.), the use, possession, and cultivation of marijuana/cannabis are unlawful and subject to federal prosecution without regard to a claimed medical need. As a result, access to banking services for commercial cannabis businesses remains limited; and

WHEREAS, commercial cannabis land uses pose certain threats to public health, safety, and welfare. In particular, cannabis businesses largely operate on a cash basis because of their inability to obtain banking services. This characteristic makes cannabis businesses unusually attractive for robbery, burglary, and other theft offenses; and

WHEREAS, permitting the establishment of commercial cannabis businesses within the City may increase cannabis consumption and availability within the City, and may increase youth exposure to and use of cannabis; and

WHEREAS, allowing cannabis deliveries from licensed cannabis retailers, microbusinesses, and licensed nonprofits that are physically located outside of the City limits to retail customers within the City balances individuals' access to cannabis, particularly for medical use by seriously ill residents of Clayton, with the public health and safety concerns of the City posed by commercial cannabis businesses; and

WHEREAS, AUMA, as amended by MAUCRSA, legalizes cultivation of not more than six living cannabis plants by persons 21 years of age or older for personal use; and

WHEREAS, AUMA, as amended by MAUCRSA, provides that a city shall not completely prohibit personal cultivation of cannabis inside a private residence or inside an accessory structure to a private residence that is fully enclosed and secure, but that a city may completely prohibit personal cultivation of cannabis outdoors (Health and Safety Code, § 11362.2); and

WHEREAS, outdoor cannabis cultivation poses additional threats to public health, safety, and welfare, including strong odors, the risk of criminal activity due to the "attractive nuisance" characteristics of cannabis (which may be visible from neighboring properties or recognizable from public spaces due to odors), and the risk of fires and environmental degradation; and

WHEREAS, in accordance with Section 26200 of the Business and Professions Code, this Ordinance effects zoning limitations that prohibit the physical establishment and operation of all commercial cannabis businesses within Clayton, including all commercial cultivators, manufacturers, testing laboratories, retailers, distributors, and microbusinesses that are or will be licensed by the State of California pursuant to the MAUCRSA, with the exception that cannabis retailers, microbusinesses, and licensed nonprofits legally established and located outside of the City of Clayton may provide delivery services to customers in Clayton, subject to the reasonable regulations stated herein; and

WHEREAS, this Ordinance is not a project within the meaning of Section 15378 and is exempt under Section 15061(b)(3) of the State of California Environmental Quality Act ("CEQA") Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. In addition, to the extent delivery services originating from outside City limits would be allowed subject to the regulations and discretionary review of the local jurisdiction where the retailer is physically established and state licensing requirements, this Ordinance is exempt from environmental review pursuant to Section 26055(h) of the Business and Professions Code. Accordingly, this Ordinance is categorically exempt and statutorily exempt from further CEQA review; and

WHEREAS, proper notice of this public hearing was given in all respects as required by law; and

WHEREAS, on October 24, 2017, the Clayton Planning Commission held a duly-noticed public hearing on the matter, and received and considered testimony, both oral and documentary, and recommended approval to the City Council of the proposed Ordinance to amend the Clayton Municipal Code to continue to prohibit outdoor cannabis cultivation for personal use, and to prohibit all commercial cannabis activities except for cannabis deliveries originating outside of the City; and

WHEREAS, the Planning Commission has determined that the proposed amendments to the Clayton Municipal Code do not conflict with and are in general conformance with the City of Clayton General Plan.

NOW, THEREFORE, BE IT RESOLVED, that the Planning Commission of the City of Clayton, based on substantial evidence in the administrative record of proceedings and pursuant to its independent review and consideration, does hereby recommend City Council approval of the proposed Ordinance to amend the Clayton Municipal Code to continue to prohibit outdoor cannabis cultivation for personal use, and to prohibit all commercial cannabis activities except for cannabis deliveries originating outside of the City, attached hereto as Exhibit 1 and incorporated herein by this reference.

PASSED AND ADOPTED by the Planning Commission of the City of Clayton at a regular meeting on the 24th day of October, 2017.

APPROVED:

ATTEST:

Carl Wolfe
Chair

Mindy Gentry
Community Development Director

ATTACHMENTS

Exhibit 1 – Draft Ordinance Regulating Medical and Adult-Use Cannabis with an Exhibit:
A: Chapter 17.95 – Medical and Adult-Use Cannabis Regulations

EXHIBIT 1

ORDINANCE NO. 479

AN ORDINANCE AMENDING SECTIONS 17.04.138, 17.36.080, 17.71.020 AND 17.71.030 OF THE CLAYTON MUNICIPAL CODE AND ADDING CHAPTER 17.95 ENTITLED “MEDICAL AND ADULT-USE CANNABIS REGULATIONS” TO CONTINUE TO PROHIBIT OUTDOOR CANNABIS CULTIVATION FOR PERSONAL USE, AND TO PROHIBIT ALL COMMERCIAL CANNABIS ACTIVITIES, AS DEFINED, EXCEPT FOR CANNABIS DELIVERIES ORIGINATING OUTSIDE OF THE CITY

**THE CITY COUNCIL
City of Clayton, California**

THE CITY COUNCIL OF THE CITY OF CLAYTON DOES HEREBY FIND AS FOLLOWS:

WHEREAS, voters of the State of California approved the Compassionate Use Act of 1996 (“CUA”) (codified as Health and Safety Code, § 11362.5 et seq.) to enable seriously ill Californians to legally possess, use, and cultivate marijuana for personal medical use free from prosecution under enumerated provisions of state law; and

WHEREAS, in 2003, the California Legislature adopted the Medical Marijuana Program Act (“MMP”) (codified as Health and Safety Code, § 11362.7 et seq.), which permits qualified patients and their primary caregivers to associate collectively or cooperatively to cultivate marijuana for medical purposes without being subject to criminal prosecution under state law; and

WHEREAS, in 2013, the California Supreme Court issued its decision in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal. 4th 729, holding that nothing in the CUA or MMP preempted cities’ authority to regulate or ban outright medical marijuana land uses; and

WHEREAS, in 2015, the California Legislature enacted the Medical Cannabis Regulation and Safety Act (MCRSA) which, for the first time in the State’s history, adopted comprehensive regulations and licensing for medical marijuana businesses; and

WHEREAS, in 2016, California voters approved Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), which legalized the non-medical use of marijuana by adults over 21 years of age, and provides for state licensing of adult-use marijuana businesses; and

WHEREAS, Senate Bill 94 (“SB 94”), signed by the Governor on June 27, 2017 to take effect immediately, repealed the MCRSA, and amended AUMA to consolidate the state licensing scheme applicable to both medical and adult-use commercial cannabis activity under a new law entitled the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA); and

WHEREAS, AUMA, as amended by MAUCRSA, recognizes, preserves and does not supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances that regulate licensed cannabis businesses, including, but not limited to, completely prohibiting the establishment or operation of one or more types of businesses licensed under MAUCRSA within the local jurisdiction (Business and Professions Code, § 26200); and

WHEREAS, under the federal Controlled Substances Act (codified in 21 U.S.C. § 801 et seq.), the use, possession, and cultivation of marijuana/cannabis are unlawful and subject to federal prosecution without regard to a claimed medical need. As a result, access to banking services for commercial cannabis businesses remains limited; and

WHEREAS, commercial cannabis land uses pose certain threats to public health, safety, and welfare. In particular, cannabis businesses largely operate on a cash basis because of their inability to obtain banking services. This characteristic makes cannabis businesses unusually attractive for robbery, burglary, and other theft offenses; and

WHEREAS, permitting the establishment of commercial cannabis businesses within the city may increase cannabis consumption and availability within the city, and may increase youth exposure to and use of cannabis; and

WHEREAS, allowing cannabis deliveries from licensed cannabis retailers, microbusinesses, and licensed nonprofits that are physically located outside of city limits to retail customers within the city balances individuals' access to cannabis, particularly for medical use by seriously ill residents of Clayton, with the public health and safety concerns of the City posed by commercial cannabis businesses; and

WHEREAS, AUMA, as amended by MAUCRSA, legalizes cultivation of not more than six living cannabis plants by persons 21 years of age or older for personal use; and

WHEREAS, AUMA, as amended by MAUCRSA, provides that a city shall not completely prohibit personal cultivation of cannabis inside a private residence or inside an accessory structure to a private residence that is fully enclosed and secure, but that a city may completely prohibit personal cultivation of cannabis outdoors (Health and Safety Code, § 11362.2); and

WHEREAS, outdoor cannabis cultivation poses additional threats to public health, safety, and welfare, including strong odors, the risk of criminal activity due to the "attractive nuisance" characteristics of cannabis (which may be visible from neighboring properties or recognizable from public spaces due to odors), and the risk of fires and environmental degradation; and

WHEREAS, in accordance with Business and Professions Code, Section 26200, this ordinance effects zoning limitations that prohibit the physical establishment and operation of all commercial cannabis businesses within Clayton, including all commercial cultivators, manufacturers, testing laboratories, retailers, distributors and microbusinesses that are or will be licensed by the state of California pursuant to the MAUCRSA, with the exception that cannabis

retailers, microbusinesses, and licensed nonprofits legally established and located outside of the City of Clayton may provide delivery services to customers in Clayton, subject to the reasonable regulations stated herein.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF CLAYTON DOES ORDAIN AS FOLLOWS:

Section 1. **Incorporation of Recitals.** The above recitals are true and correct and are hereby incorporated into this Ordinance.

Section 2. **Amendment to Clayton Municipal Code Section 17.04.138.** Clayton Municipal Code Section 17.04.138 is hereby amended and restated to read in its entirety as follows:

“17.04.138 Medical and Adult-Use Cannabis Uses.

For purposes of this code, medical and adult-use cannabis uses and related terms shall be as defined in Section 17.95.010.”

Section 3. **Amendment to Clayton Municipal Code Section 17.36.080.** Clayton Municipal Code Section 17.36.080 is hereby amended and restated to read in its entirety as follows:

“17.36.080 Prohibited Uses and Activities. The following uses and activities are prohibited in all zoning districts:

- A. Any use or activity which is prohibited by local, regional, state, or federal law unless expressly and affirmatively authorized by this code.
- B. Outdoor cannabis cultivation. See Section 17.95.020.
- C. Commercial cannabis uses, as described in Section 17.95.030.
- D. Reserved.
- E. Reserved.
- F. Other uses or activities as may be determined by the Planning Commission to be of the same general character as those specifically prohibited.”

Section 4. **Amendment to Clayton Municipal Code Section 17.71.020.** Clayton Municipal Code Section 17.71.020, Subsection (B), related to the standards of approval for administrative review of home occupation permits, is hereby amended and restated to read in its entirety as follows:

“B. Standards of Approval. Home occupation permits approved by the Community Development Director shall meet the following standards at all times.

- 1. The home occupation shall be subordinate and incidental to the primary use of the dwelling unit for residential-purposes.
- 2. The home occupation shall be compatible with and not change the character of adjacent residential areas.

3. The dwelling unit shall be located in an Agricultural, Residential, or Planned Development (Residential) District.

4. The home occupation shall not use more than one (1) room, or twenty-five percent (25%) of the habitable floor area of the principle structure, whichever is greater. Garage areas and living areas within accessory structures and secondary dwelling units shall not be considered as part of the habitable floor area of the principal structure.

5. No persons shall be employed, except the applicant and members of the resident family, in the conduct of the home occupation.

6. There shall be no merchandise or services for sale, except that produced or made on the premises, and which can be shipped directly, electronically, or sold at another location.

7. There shall be no signage or exterior indication of the home occupation.

8. There shall be no outside display or storage of goods or materials.

9. The home occupation shall not create any noise, odor, dust, fumes, vibrations, electrical interference, or other interference with the residential use of adjacent areas.

10. There shall be no use of utilities or community facilities beyond that normal to the residential use of the property.

11. The home occupation shall not decrease the number or size of parking spaces below that needed to meet the minimum off-street parking requirements for the residence.

12. Delivery vehicles shall be limited to those types of vehicles, which typically make deliveries to residential neighborhoods, such as postal service, parcel deliveries, pickup trucks, and light vans. A maximum of four deliveries per day is allowed.

13. The home occupation shall not generate client/student traffic to the residence.

14. Any chemicals or hazardous materials used or stored on the property shall not exceed that associated with normal household activities or hobby uses.

15. Any use of materials or mechanical equipment shall not exceed that associated with normal household activities or hobby uses.

16. No home occupation permit may authorize or approve any commercial cannabis uses, as defined in Section 17.95.010, including but not limited to, the operation of a cannabis retailer, manufacturing of cannabis products, cannabis delivery service and/or the storage of cannabis in excess of those amounts permitted for personal use pursuant to Health and Safety Code Section 11362.1.”

All other provisions contained in Section 17.71.020 of the Clayton Municipal Code shall remain in full force and effect.

Section 5. Amendment to Clayton Municipal Code Section 17.71.030. Clayton Municipal Code Section 17.71.030, Subsection (B)(1), related to the standards of approval for Planning Commission review of home occupation permits, is hereby amended and restated to read in its entirety as follows:

“1. Standards listed in subsection 17.71.020.B.1 through 17.71.020.B.12 and 17.71.020.B.16.”

All other provisions contained in Section 17.71.030 of the Clayton Municipal Code shall remain in full force and effect.

Section 6. Clayton Municipal Code Chapter 17.95 Adopted. Clayton Municipal Code, Chapter 17.95, entitled “Medical and Adult-Use Cannabis Regulations” is hereby added and adopted as fully set forth in Exhibit “A” attached hereto and incorporated herein by reference.

Section 7. CEQA. This Ordinance is not a project within the meaning of Section 15378 and is exempt under Section 15061(b)(3) of the State of California Environmental Quality Act (“CEQA”) Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. The Ordinance prohibits commercial cannabis businesses and outdoor cannabis cultivation from establishing or occurring in the City and therefore will maintain the status quo. In addition, to the extent delivery services originating from outside city limits would be allowed subject to the regulations and discretionary review of the local jurisdiction where the retailer is physically established and state licensing requirements, this ordinance is exempt from environmental review pursuant to Business and Professions Code, Section 26055(h). Accordingly, the City Council finds that this Ordinance is categorically exempt and statutorily exempt from further CEQA review.

Section 8. Severability. If any section, subsection, sentence, clause, or phrase of this Ordinance, or the application thereof to any person or circumstances, is held to be unconstitutional or to be otherwise invalid by any court competent jurisdiction, such invalidity shall not affect other provisions or clauses of this Ordinance or application thereof which can be implemented without the invalid provisions, clause, or application, and to this end such provisions and clauses of the Ordinance are declared to be severable.

Section 9. Effective Date and Publication. This Ordinance shall become effective thirty (30) days from and after its passage. Within fifteen (15) days after the passage of the Ordinance, the City Clerk shall cause it to be posted in three (3) public places heretofore designated by resolution by the City Council for the posting of ordinances and public notices. Further, the City Clerk is directed to cause the amendments adopted in Sections 2 through 6 of this Ordinance to be entered into the City of Clayton Municipal Code.

The foregoing Ordinance was introduced at a regular public meeting of the City Council of the City of Clayton, California, held on November 7, 2017.

Passed, adopted, and ordered posted by the City Council of the City of Clayton, California, at a regular public meeting thereof held on November 21, 2017 by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

THE CITY COUNCIL OF CLAYTON, CA

Jim Diaz, Mayor

ATTEST

Janet Brown, City Clerk

APPROVED AS TO FORM

APPROVED BY ADMINISTRATION

Malathy Subramanian, City Attorney

Gary A. Napper, City Manager

I hereby certify that the foregoing Ordinance was duly adopted, passed, and ordered posted at a regular meeting of the City Council held on November 21, 2017.

Janet Brown, City Clerk

EXHIBIT “A”

Chapter 17.95

MEDICAL AND ADULT-USE CANNABIS REGULATIONS

Sections:

- 17.95.010 Definitions
- 17.95.020 Cultivation of Cannabis for Personal Use
- 17.95.030 Medical and Adult-Use Commercial Cannabis Uses

17.95.010 Definitions.

For purposes of this code, the following definitions shall apply.

- (A) “Cannabis” means all parts of the plant *Cannabis sativa* Linnaeus, *Cannabis indica*, or *Cannabis ruderalis*, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. “Cannabis” also means the separated resin, whether crude or purified, obtained from marijuana. “Cannabis” also includes marijuana as defined by Section 11018 of the Health and Safety Code. Cannabis also includes “cannabis” as defined in Business and Professions Code, Section 26001, as may be amended from time to time.
- (B) “Cannabis cultivation” means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of cannabis.
- (C) “Cannabis delivery” means the commercial transfer of cannabis or cannabis products to a customer. “Delivery” also includes the use by a cannabis retailer of any technology platform that enables customers to arrange for or facilitate the commercial transfer by a licensed retailer of cannabis or cannabis products.
- (D) “Cannabis distribution” means the procurement, sale, and transport of cannabis and cannabis products and any other activity allowed under the state distributor license(s), including, but not limited to, cannabis storage, quality control and collection of state cannabis taxes.
- (E) “Cannabis manufacture” means to compound, blend, extract, infuse, or otherwise make or prepare a cannabis product. Cannabis manufacture includes the production, preparation, propagation, or compounding of manufactured cannabis, or cannabis products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis at a fixed location that packages or repackages medical cannabis or cannabis products or labels or relabels its container.
- (F) “Cannabis products” means cannabis that has undergone a process whereby the plant material has been transformed into a concentrate, including, but not limited to, concentrated cannabis, or an edible or topical product containing cannabis or

concentrated cannabis and other ingredients. Cannabis products include “cannabis products” as defined in Business and Professions Code, Section 26001, as may be amended from time to time.

- (G) “Cannabis retailer” means a facility where cannabis or cannabis products are offered, either individually or in any combination, for retail sale, including an establishment that delivers cannabis and cannabis products as part of a retail sale or conducts sales exclusively by delivery. For purposes of this code, the term “cannabis retailer” includes microbusinesses as well as nonprofits licensed under Business and Professions Code, Section 26070.5. For purposes of this code, “cannabis retailer” also includes medical cannabis dispensaries, patient collectives and cooperatives operating, or proposing to operate, pursuant to Health and Safety Code Sections 11362.5 and/or 11362.775, as may be amended.
- (H) “Cannabis testing laboratory” means a facility, entity, or site in the state that offers or performs tests of cannabis or cannabis products and that is both of the following:
 - (1) Accredited by an accrediting body that is independent from all other persons involved in commercial cannabis activity in the state; and
 - (2) Licensed by the Bureau of Cannabis Control.
- (I) “Commercial cannabis uses” includes all cannabis cultivation, cannabis manufacture, cannabis distribution, cannabis testing laboratories, cannabis retailers, cannabis delivery, and sale of cannabis and/or cannabis products, whether intended for medical or adult-use, and whether or not such activities are carried out for profit. Commercial cannabis uses includes “commercial cannabis activity” as defined in Business and Professions Code, Section 26001, as may be amended from time to time, and includes any activity that requires a license from a state licensing authority pursuant to the Medicinal and Adult-Use Cannabis Regulation and Safety Act, as may be amended from time to time. Commercial cannabis activity does not include possession or indoor cultivation of cannabis for personal use that is not sold and in strict accordance with Health and Safety Code, Section 11362.1 et seq.
- (J) “Indoor” means any location that is totally contained within a fully enclosed and secure private residence or accessory building located on the grounds of the private residence.
- (K) “Outdoor” means any location that is not totally contained within a fully enclosed and secure accessory building or primary residence.
- (L) “Private residence” means a house, an apartment unit, accessory dwelling unit, a mobile home, or other similar dwelling occupied for residential purposes.

17.95.020 Cultivation of Cannabis for Personal Use.

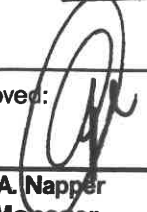
- A. Outdoor cultivation of cannabis, including cannabis cultivation for personal medical use, personal adult-use, or commercial purposes is prohibited in all zoning districts in the City of Clayton.

- B. The indoor cultivation of cannabis is prohibited except to the extent that state law permits the indoor cultivation of up to six marijuana plants for personal use per private residence. Persons engaging in indoor cultivation must comply with all state and local laws regarding fire safety, water use, electrical wiring, buildings, and indoor cultivation and personal use of cannabis.

17.95.030 Medical and Adult-Use Commercial Cannabis Uses.

- A. All commercial cannabis uses, as defined in Section 17.95.010, are prohibited from establishing or operating within the City of Clayton.
1. Exception for deliveries from licensed cannabis retailers. Cannabis retailers, whether medical or adult-use, are prohibited in the City; however, delivery of cannabis and cannabis products from cannabis retailers located outside of the City of Clayton is allowed, subject to the following restrictions:
 - a. Only cannabis retailers that are licensed under the applicable laws of the state of California to provide cannabis deliveries, including but not limited to, the Medicinal and Adult-Use Cannabis Regulation and Safety Act (Business and Professions Code, Section 26000 et seq.), and operating in compliance with the applicable laws and regulations of the local jurisdiction in which the cannabis retailer is physically located may provide or provide for delivery of cannabis or cannabis products to customers in the City of Clayton.
 - b. All employees of a cannabis retailer delivering cannabis or cannabis products shall carry a copy of the licensee's current state license, a government-issued driver's license, an employee identification card containing a name and picture, and City of Clayton business license issued pursuant to Chapter 5.04 of this Code. Delivery drivers shall also carry a copy of the delivery request and the delivery request shall comply with state and federal law regarding the protection of confidential medical information.
 - c. No cannabis or cannabis products may be stored in the City.
 - d. All cannabis or cannabis products' deliveries require signature and proof of identification for the individual signing for it. Porch drop offs are not allowed.
 - e. Residential deliveries to a physical address only.



Approved: 
Gary A. Napper
City Manager

AGENDA REPORT

TO: HONORABLE MAYOR AND COUNCIL MEMBERS
FROM: MALA SUBRAMANIAN, CITY ATTORNEY
MINDY GENTRY, COMMUNITY DEVELOPMENT DIRECTOR *MG*
DATE: DECEMBER 20, 2016
SUBJECT: DISCUSSION OF POTENTIAL RECREATIONAL MARIJUANA
REGULATIONS – PROPOSITION 64

RECOMMENDATIONS

It is recommended the City Council:

- 1a. Motion to have the City Clerk read the Urgency Ordinance No. 473 by title and number only and waive further reading; and
- 1b. Following the City Clerk’s reading; by motion adopt Urgency Ordinance No. 473 to prohibit the personal use of outdoor cultivation of marijuana (**Attachment 1**); and
2. Discuss and provide direction to staff on the various issues regarding the potential prohibition and/or regulation of recreational marijuana following the passage of Proposition 64.

BACKGROUND

CONTROLLED SUBSTANCES ACT

In 1970, Congress passed the Controlled Substances Act (CSA), which is the federal government’s drug policy under which the manufacture, importation, possession, use and distribution of marijuana is illegal. According to the CSA, marijuana is classified as a Schedule 1 narcotic, which means it is defined as a drug with no currently accepted medical use and has a high potential for abuse.

PROPOSITION 215: THE COMPASSIONATE CARE ACT

In 1996 California voters passed Proposition 215 exempting patients and defined caregivers who possess or cultivate marijuana for medical treatment recommended by a physician from criminal laws, which otherwise prohibit possession or cultivation of marijuana.

COLE MEMO

In 2009, the federal government announced it would effectively end the raids on distributors of marijuana. These marijuana enforcement guidelines were updated in June of 2011 and most recently in August of 2013, which are known as the Cole Memo. The Cole Memo issued updated guidelines to federal prosecutors concerning marijuana under the Controlled Substances Act and set the priorities of the Department of Justice. The Cole Memo essentially conveys that states that have legalized marijuana should have a robust regulatory system in place and demonstrate the willingness of enforcement of such regulations. Further, the Memo hints that prosecuting state legal marijuana enterprises are probably not an efficient use of federal resources.

This guidance regarding marijuana enforcement occurred under the Obama Administration and given a new administration with a possibly less lenient stance on marijuana usage will be taking office on January 20, 2017 this could possibly change the Department of Justice guidelines for state's that have legalized marijuana.

MEDICAL MARIJUANA REGULATION AND SAFETY ACT (MMRSA)

In September of 2015, the State of California passed three separate bills: AB 266, AB 243, and AB 643, which are collectively known as the Medical Marijuana Regulation and Safety Act (MMRSA). These bills effectively created a comprehensive state licensing system for the commercial cultivation, manufacture, retail sale, transport, distribution, delivery, and testing of medical marijuana. While the law went into effect January 1, 2016, the state will not begin issuing licenses until January 1, 2018.

PROPOSITION 64

On November 8, 2016, voters approved Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA"). The State of California passed Proposition 64 with 57.1% in favor. Locally, Contra Costa County voted 60.72% in favor and Clayton voted 53.8% in favor. AUMA legalized possession, transport, purchase, use, and transfer of recreational marijuana for individuals 21 years of age or older. Under AUMA, adults can possess up to 28.5 grams of marijuana, up to 8 grams of marijuana in the form of concentrated cannabis, which may be present in marijuana products such as edibles, and up to six living marijuana plants, and any marijuana produced by those plants. It would also legalize the cultivation of marijuana, marijuana delivery services, and recreational marijuana retail services. Proposition 64 took effect immediately following its passage and while some of these issues will not be in effect until January 1, 2018 when the State of California starts to issue licenses for the commercial sale, distribution, and cultivation of marijuana; there are

some aspects of the law that went into immediate effect such as the personal use and cultivation of marijuana.

AUMA allows for local control of marijuana uses. It allows local governments to:

- Ban all marijuana-related businesses outright, including marijuana dispensaries, delivery services, and any recreational marijuana retail services.
- Ban the outdoor cultivation of marijuana, unless the California Attorney General determines marijuana is no longer illegal under federal law (If marijuana is federally legalized, outdoor cultivation could be regulated, but not prohibited).
- Reasonably regulate indoor cultivation in private residences, but not ban it outright. AUMA would allow individuals to grow up to six marijuana plants in their home, and to possess all of the marijuana those plants provide.

EXISTING MARIJUANA REGULATIONS IN CLAYTON

Currently, the City of Clayton laws referencing marijuana mostly pertain to medical purposes and the Municipal Code is silent on the recreational use of marijuana. Per Section 17.36.080 of the Clayton Municipal Code, the City has prohibited: medical marijuana dispensaries; testing laboratories; facilities that store or maintain marijuana as part of their operations; and outdoor cultivation or production of cannabis; and some indoor cultivation (**Attachment 2 and 3**). The CMC does allow for the indoor cultivation of medical marijuana within residential zones within a detached, fully enclosed and secure secondary structure or within a primary residential structure at a location inhabited by a qualified patient or primary caregiver. In March of 2016, the City Council allowed for the delivery of medical marijuana due to accessibility concerns for community patients.

Additionally, the regulation of medical and recreational marijuana does not have to be consistent with one another and can be regulated differently.

STATUS OF RECREATIONAL MARIJUANA IN NEIGHBORING JURISDICTIONS

Since this issue is extremely new, staff researched the policies and status for recreational marijuana in neighboring jurisdictions:

- Concord – Ban on outdoor cultivation and is waiting on providing further direction until additional information is made available.
- Walnut Creek – Provided direction to staff to address the various issues, but have not acted on any aspects of Proposition 64 thus far.

DISCUSSION

Under AUMA, recreational use of marijuana is legal, as is recreational possession of marijuana and some level of indoor cultivation. Staff suggests the adoption of an Urgency Ordinance to ban the outdoor cultivation of marijuana, which is discussed in further detail below, as it is consistent with City Council previous action to ban the outdoor cultivation of

medicinal marijuana plants. In addition, staff is looking for direction from the City Council on the following policy issues: 1. Commercial retail sale; 2. Cultivation; 3. Delivery; 4. Testing; and 5. Personal use of marijuana. Based on the direction given regarding these policy issues, staff will return with additional information and proposed ordinances at a later date for Council consideration.

ISSUE #1: OUTDOOR/INDOOR CULTIVATION FOR PERSONAL USE

As stated previously, AUMA allows for the keeping of up to six marijuana plants for those over 21 years or older for personal use which can be cultivated either indoors or outdoors. Cities can regulate the cultivation of marijuana by banning or regulating the outdoor cultivation and “reasonably regulating” the indoor cultivation.

Given the City’s Council’s previous position prohibiting the outdoor cultivation of medical marijuana and staff’s immediate concerns regarding the outdoor cultivation of recreational marijuana such as marijuana cultivation sites being clearly visible from public areas and easily accessible by the public, including youth and children; attraction to those looking to steal marijuana; the odorous nature of the plants; the potential for broader growth due to a larger space; and is less secure. Further, it is conceivable under the AUMA one could grow up to six plants in one’s front yard unless local regulation prohibits it. These concerns raise an immediate threat to the public health, safety, and welfare in the City due to the negative effects created by the outdoor cultivation of marijuana. Due to these concerns and the Council’s previous position on banning the outdoor cultivation of medical marijuana, staff is recommending the City Council adopt an Urgency Ordinance 473, pursuant to California Government Code Sections 36934, 36937, and 65858, placing an immediate ban on the outdoor cultivation of marijuana.

While AUMA allows for the prohibition of outdoor cultivation, local jurisdictions cannot prohibit the indoor cultivation but can “reasonably regulate”. The Clayton Municipal Code allows for the indoor cultivation of medical marijuana but does not provide any regulations beyond those established by State law (**Attachment 2 and 3**).

- **POLICY QUESTION:** Does the City Council wish to reasonably regulate the indoor cultivation of marijuana? These regulations could range from a robust permitting system, including inspections by code enforcement, to a registration requirement system or no requirements beyond compliance with existing State law.

ISSUE #2: INDOOR/OUTDOOR COMMERCIAL CULTIVATION

Proposition 64 establishes a regulatory framework for commercial recreational marijuana operations. Local jurisdictions retain local land use and zoning authority over these operations; therefore jurisdictions may elect to allow or to prohibit the commercial outdoor and commercial indoor cultivation. A state license would be required for commercial indoor or outdoor cultivation of marijuana and the state would not issue a license unless the local jurisdiction permitted the operation of such business.

- **POLICY QUESTION:** Does the City Council wish to allow the indoor or outdoor commercial cultivation of marijuana?
- If the Council allows commercial cultivation; how does the Council foresee regulating these activities? These regulations could include a permit process, land use applications, security measures, and/or codified restrictions on locations and operating procedures.

ISSUE #3: COMMERCIAL MARIJUANA ACTIVITIES

Under AUMA, the creation of a variety of new commercial marijuana ventures, including recreational retail services, is forthcoming. The following is a list of possible commercial activities that could occur around recreational marijuana: commercial delivery, commercial manufacturing, commercial testing, and any commercial dispensaries or recreational retailers. This list is not comprehensive and there could conceivably be commercial recreational marijuana operations that have not been established or thought of yet. The City Council could ban all commercial uses or allow some or all of these commercial uses with appropriate regulations. Staff is seeking direction on the following policy issues:

- **POLICY QUESTIONS:** Allow or prohibit commercial marijuana activities within the City of Clayton?
- If the Council would allow the operation of commercial marijuana uses, identify which uses the Council would prohibit and which ones it would allow.
- If the Council allows commercial marijuana activities, please specify the general parameters of how the Council would like to regulate these activities. These regulations could include a permit process, land use applications, security measures, and/or codified restrictions on locations and operating procedures.
- If the Council wishes to allow commercial recreational marijuana uses does the Council wish to explore the fees and taxes to be imposed on these types of uses?
- Shall the City allow for recreational marijuana deliveries that begin or end within the City's boundaries? AUMA allows for the prohibition of deliveries but cannot prevent a delivery service from using public roads to pass through its jurisdiction. The City currently allows medical marijuana to be delivered in its municipal limits.

ISSUE #4: REGULATION OF PERSONAL MARIJUANA USE LOCATIONS

As indicated above, AUMA legalizes recreational use of marijuana. This means the City can no longer ban the use of marijuana by an individual in their own home. AUMA does not allow the smoking or ingesting of marijuana or marijuana products in any public place, absent local enabling legislation allowing use of marijuana or marijuana products in some public places. While AUMA does not define "public place," it does limit the smoking of marijuana to places where tobacco is permitted, which would be subject to the Clayton Municipal Code's smoking regulations (**Attachment 4**). Therefore anyone smoking in a blatantly public place without a local ordinance allowing so would be in violation of AUMA

and guilty of an infraction. However, the City's smoking ordinance does not explicitly mention marijuana. Note that medical marijuana is governed under a separate state statutory scheme and may be subject to different enforcement protocols. In addition, if the City Council opts to revise the smoking regulations to include marijuana, the Council may want to also expand the smoking ordinance to prohibit smoking in quasi-public spaces. These quasi-public spaces could include front yards, parking lots, and shopping centers.

- **POLICY QUESTION:** Does the City Council wish to modify the smoking ordinance to include marijuana?
- Does the Council wish to limit the scope of the allowable smoking locations?

OTHER ISSUES

Since Proposition 64 is so new, the City Council may wish to consider waiting on providing policy directions to staff to see how legal interpretations may change over time. However, staff recommends at least acting on the outdoor cultivation aspect as this element is the most pressing issue. The other issues can wait to be addressed in 2017 because the State of California will not start issuing licenses for commercial operations until January 1, 2018.

Further, the City Council may want to delay direction and base its decision on what neighboring jurisdictions will adopt. For example if Concord allows commercial retail sales, this could negatively impact the City of Clayton from these uses but the City will not be privy to any of the associated revenue. Any decision made by the City Council can also be revised at a later date if there is a change of sentiment or if additional information arises.

OPTIONS

The City Council can also consider the following options:

- 1) Not adopt Urgency Ordinance 473 prohibiting the outdoor cultivation of recreational marijuana. Should that be the City Council's preferred directive, a corollary question arises whether the City's current prohibition on outdoor cultivation for medicinal marijuana, presently in place, should be lifted by a subsequent ordinance at its next public meeting.
- 2) Adopt an Urgency Ordinance placing a temporary moratorium on the outdoor cultivation of recreational marijuana and direct staff to explore regulating the outdoor cultivation of both recreational and medical marijuana for personal use.

FISCAL IMPACTS

Due to the increased enforcement and regulatory costs, the passage of Proposition 64 will likely result in a number of financial impacts to the City and depending on the direction of the City Council in response to Proposition 64 these costs may be more or less impactful.

If the City Council chooses to adopt an outdoor personal cultivation ban and/or regulations governing indoor/outdoor cultivation, such regulations will likely lead to an increase in administrative and code enforcement costs.

If the City Council adopts a commercial marijuana ban, such regulations will likely lead to an increase in administrative and enforcement costs. Alternatively, if the City Council adopts business regulations to govern marijuana businesses, such regulations will likely lead to an increase in administrative and enforcement costs, but may also lead to increased revenue due to the imposition of new business license fees and taxes. Any new taxes must be adopted pursuant to a vote of the electorate in accordance with Proposition 218. Furthermore, any general tax ballot measure would likely have to be consolidated with a regularly scheduled City Council election.

If the City Council chooses to adopt changes to the City's smoking regulations this could increase the costs of enforcement and regulation.

ATTACHMENTS

1. Urgency Ordinance 473 [pp. 5]
2. CMC Section 17.36.080 – Prohibited Uses and Activities [pp. 1]
3. CMC Section 17.04.138 – Medical Cannabis Uses [pp. 1]
4. CMC Section 8.14 – Regulation of Smoking [pp. 6]

Max Kahn, Northgate High School student, added our nation is led by egregious levels of income inequality, specifically in the Bay Area; it is imperative Congress act in any way to reduce and curtail gaps between the “haves and the have nots” in our society. Like Portland, Senator DeSaulnier proposed a similar measure when he was in the California State Senate with a corporate tax imposed based on a CEO earning over 100 times the amount of the median salary of the average worker. He would like to see the City of Clayton curtail the inequality of income in its community and do the same.

7. PUBLIC HEARINGS

- (a) Public Hearing to consider the adoption of Urgency Ordinance No. 473 to prohibit outdoor cultivation of recreational marijuana plants, and discussion of various local policy issues arising from the California voters’ passage of Prop 64 regarding local regulation of legal recreational marijuana.

[Councilmember David Shuey arrived – 7:14 p.m.]

Community Development Director Mindy Gentry advised she would summarize prevailing federal, state and local laws on this subject before addressing the local policy questions. She provided background regarding marijuana regulation per federal law: in 1970 Congress passed the Controlled Substances Act declaring marijuana as a Schedule 1 narcotic, defined as a drug with no currently accepted medical use and has a high potential for abuse. That Act declares the manufacture, importation, possession, use and distribution of marijuana is illegal. In 2013, the U.S. Department of Justice under the Obama Administration issued a memo providing guidance on marijuana enforcement; with the recent Presidential Election, this DOJ enforcement abeyance may change under new administration taking place January 20, 2017.

Ms. Gentry noted in 1996 voters passed state law entitled the Compassionate Care Act (Prop 215) allowing patients and caregivers who possess or cultivate marijuana for medical treatment recommended by a physician from prosecution under criminal laws, which otherwise prohibit possession or cultivation of marijuana. In 2015 three bills were passed by State legislation to license the commercial cultivation, manufacture, retail sale, transport, distribution and delivery of medical marijuana but with no licenses to be issued until January 1, 2018.

Ms. Gentry advised Clayton’s Municipal Code addresses medical marijuana regulation but is silent on recreational/personal use. The Code does prohibit outdoor cultivation, dispensaries, and testing facilities, however, it allows limited indoor cultivation for patients and caregivers under physician orders and medical marijuana deliveries due to concerns with patient access.

Ms. Gentry added State Proposition 64 recently passed with Clayton voting 53.8% in favor; effective immediately, personal use and personal cultivation is allowed but no issuance of commercial licensing until January 1, 2018. The legalization allows possession, transport, purchase, use and transfer for those 21 years of age or older with no more than 28.5 grams or 8 grams in concentrate and cultivation of up to six plants for personal use. Proposition 64 further allows some local control in the areas of banning marijuana-related commercial businesses, all outdoor cultivation, and for regulation of indoor cultivation in private residences without banning it outright.

Ms. Gentry reviewed the recommended policy option for Council to adopt an Urgency Ordinance to place a similar ban on outdoor personal-use cultivation due to concerns of the plants being seen from public areas which would attract easy access by the public, including youth and children, possible theft and odor and broader growth due to larger

spaces, and the plants being less secure. These concerns raise an immediate threat to public safety and health and are negative effects of allowing outdoor cultivation.

Ms. Gentry concluded her presentation with policy questions to the City Council to consider regarding local regulations on Indoor/Outdoor Cultivation, Commercial Marijuana Activities, Regulation of Personal Marijuana Use locations and other issues, and with options to wait and see if the legal interpretations change over time or see what other neighboring jurisdictions adopt before embarking on local policies.

Mayor Diaz opened the Public Hearing for public comment.

Dylan Kupsh recommended the City Council not regulate indoor cultivation of marijuana as it is private property and the government should not interfere within private property as the smell will not affect surrounding neighbors.

Max Kahn considers it obscene to regulate the indoor cultivation of marijuana and thinks the police force and City resources could be better used in other areas.

Mayor Diaz closed the Public Hearing.

Councilmember Shuey offered he does not feel that indoor cultivation needs regulation and he would like the smoking of marijuana to be included within Clayton's smoking policy.

Vice Mayor Haydon would like to allow the indoor cultivation of marijuana for personal use without regulation by City staff. He also had some concerns on the smoking restrictions in regards to workers and patrons who are required to go outside to smoke tobacco; he is hesitant to allow the smoking of marijuana in those same places as cigarettes. Vice Mayor Haydon preferred marijuana restrictions be included under the City's alcohol ordinances; alcohol cannot be consumed out in public or on public streets, and he would like further staff research as this is a brand new law that has just been passed.

Councilmember Catalano inquired on commercial sales as a state license is required which will not be issued until January 2018, and asked what happens in the interim with other cities that allow medical dispensaries: are they able to sell recreational marijuana prior to January 1, 2018? Ms. Gentry responded the passage of Prop 64 left medical marijuana regulations in place for which state-issued commercial licenses are slated for issuance in January 2018. Currently there is a ban on marijuana dispensaries in the City of Clayton; if someone were to come into the city to open a dispensary, the City would rely on the Municipal Code which states it is still against federal law and therefore issuance of a local City business license to operate in town would be unlawful.

Councilmember Catalano asked since Prop 64 passed it still allows local jurisdictions to do some regulation; in terms of the cities enacting some regulation based on health and safety, is that allowed within the Adult Use of Marijuana Act? Acting City Attorney Katy Wisinski advised the City is authorized to regulate or ban outdoor cultivation or personal marijuana use and if the City opts to ban, it that is fine; if the City opts to regulate it in some fashion then it becomes a land-use decision and we would apply the same land-use principles as are used with any other proposed use.

Councilmember Catalano indicated she is in favor of the outdoor cultivation ban and would like to explore this item further in 2017 so far as brick and mortar sales in commercial sites.

Mayor Diaz wished to wait and see what develops following the passage of Prop 64; he has heard some surrounding communities who authorized commercial marijuana sales have had some problems as it is presently a federal illegal matter. Those businesses must operate on a cash-only basis as banks cannot accept monetary transactions from

these types of businesses without jeopardizing its FDIC standing. Cash-only businesses also become enhanced targets for ensuing criminal activities.

City Manager Napper added the only item for immediate attention this evening is the Urgency Ordinance as it would be difficult at this time for a police officer to differentiate between marijuana plants for medical or personal use. The remainder of the policy items raised by staff can wait for a full City Council to discuss in the new year.

It was moved by Vice Mayor Haydon, seconded by Councilmember Shuey, to have the City Clerk read Urgency Ordinance No. 473 by title and number only and waive further reading. (Passed; 4-0 vote).

The City Clerk read Urgency Ordinance No. 473 by title and number only.

It was moved by Vice Mayor Haydon, seconded by Councilmember Shuey, to adopt Urgency Ordinance No. 473 with the finding the action does not constitute a project under CEQA. (Passed; 4-0 vote).

8. ACTION ITEMS

- (a) Consider the Second Reading and Adoption of Ordinance No. 471 amending the Clayton Zoning Map from Agricultural District (A) to Planned Development District (PD) for 2.77 Acres that comprise the St. John's Church/Southbrook Drive Mixed Use Planned Development Project.

Community Development Director Mindy Gentry provided a brief background including the subject Ordinance's introduction back on December 6, 2016 to rezone the 2.77-acre St. John's Episcopal Church/Southbrook Drive Mixed Use Planned Development project site from Agricultural District (A) to Planned Development District (PD). No changes were made to the introduced Ordinance, the approval of a corresponding general plan amendment, rezone, and lot split for two single-family homes.

Mayor Diaz opened the item for Public Comment on this item; no comments were offered and Mayor Diaz then closed Public Comment.

It was moved by Vice Mayor Haydon, seconded by Councilmember Shuey, to have the City Clerk read Ordinance No. 471, by title and number only and waive further reading. (Passed; 4-0 vote).

The City Clerk read Ordinance No. 471 by title and number only.

[Maintenance Supervisor John Johnston arrived – 7:42 p.m.]

It was moved by Vice Mayor Haydon, seconded by Councilmember Shuey, to adopt Ordinance No. 471 with the finding the project will not have a significant effect on the environment as outlined in the City Council-adopted St. John's Church/Southbrook Drive Mixed Use Planned Development Project Final Initial Study/Mitigated Negative Declaration (IS/MND). (Passed; 4-0 vote).

- (b) Continued consideration of a proposal to share the cost for installation of fencing and related field improvements and storage by Clayton Valley Little League (CVLL) involving permanently fixed outfield baseball fence on Sports Field No. 3 at Clayton Community Park.

ATTACHMENT C

Agenda Date: 10-13-2017

Agenda Item: 8b



AGENDA REPORT

TO: HONORABLE MAYOR AND COUNCIL MEMBERS

FROM: MINDY GENTRY, COMMUNITY DEVELOPMENT DIRECTOR *MG*

DATE: OCTOBER 3, 2017

SUBJECT: CONTINUED DISCUSSION OF LOCAL CANNABIS REGULATIONS – PROPOSITION 64 AND SB 94

RECOMMENDATION

It is recommended the City Council discuss and provide direction on the various staff recommendations regarding the potential prohibition and/or regulation of medical and adult use cannabis following the passage of Proposition 64 and SB 94.

BACKGROUND

On December 20, 2016, the City Council passed an Urgency Ordinance banning the personal outdoor cultivation of cannabis, which is limited to six plants per residence, and staff made a presentation requesting direction from the Council regarding Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA") (Attachment 1). Following staff's presentation, the City Council provided direction to staff to not regulate the indoor cultivation for the personal use of marijuana; add provisions in the Clayton Municipal Code to treat marijuana similarly to alcohol with no consumption in public; further address marijuana in 2017 to allow more time for legal clarification; and lastly determine what actions neighboring jurisdictions have taken. Staff is now bringing this discussion back to the City Council with updated information on recent legislation and the status of cannabis in neighboring jurisdictions. Following, the Council's direction, staff will draft the appropriate ordinance, which is recommended to be enacted prior to the State issuing licenses on January 2, 2018.

- The state cannot issue a license if it is in violation of local ordinances. Therefore, the best local practice is to either clearly deny the use or to have a regulatory structure in place. Moratoriums on cannabis related uses may not be valid from the state's point of view due to them being temporary in nature.

AB 133 was signed into law by Governor Brown on September 16, 2017, which made a few technical fixes or changes to MAUCRSA. The most notable changes eliminated the requirement that potential licenses have separate and distinct premises and the bill increased the amount of possession of concentrated cannabis from 4 to 8 grams.

EXISTING MARIJUANA REGULATIONS IN CLAYTON

Currently, the City of Clayton laws referencing marijuana mostly pertain to medical purposes and the Municipal Code is silent on the recreational use or adult use of marijuana. Per Section 17.36.080 of the Clayton Municipal Code, the City has prohibited: medical marijuana dispensaries; testing laboratories; facilities that store or maintain marijuana as part of their operations; and outdoor cultivation or production of cannabis; and some indoor cultivation (**Attachment 2 and 3**). The CMC does allow for the indoor cultivation of medical marijuana within residential zones within a detached, fully enclosed and secure secondary structure or within a primary residential structure at a location inhabited by a qualified patient or primary caregiver. In March of 2016, the City Council did not prohibit the delivery of medical marijuana due to accessibility concerns for community patients.

STATUS OF RECREATIONAL CANNABIS IN NEIGHBORING JURISDICTIONS

The policies and status for recreational marijuana in neighboring jurisdictions are as follows:

- Antioch, Brentwood, Pittsburg, and Danville – These cities have City Council banned the sale, cultivation, and deliveries of both medical and adult use cannabis.
- Concord – On July 25, 2017, the City of Concord adopted an ordinance that allows delivery of medical cannabis to qualified patients and primary caregivers by dispensaries located outside of Concord upon registration with the Concord Police Department. City Council has directed staff to draft an ordinance for a complete prohibition and ban on both the sale and cultivation of medical and adult use cannabis, except for deliveries for medical cannabis. The Concord City Council has publicly stated that the issue will be revisited when additional information is made available and the State has fully addressed the regulations.
- Contra Costa County – Directed staff to prepare a permanent ordinance to prohibit all commercial uses and prohibit personal cultivation except for indoor grows until an ordinance to regulate the cultivation, delivery, manufacturing, and dispensing of medical and recreational cannabis is completed. Also directed staff to research and develop land use and health ordinances with recommendations of zoning districts and the appropriate types of industries (cultivation, distribution, manufacturing, testing, retail sales).

will be looking to local jurisdictions to determine if cannabis uses are allowed and it is recommended the City has an ordinance that affirmatively regulates or affirmatively prohibits commercial cannabis businesses.

Given the aforementioned, staff is looking for direction from the City Council on recommendations on the following policy issues for both medical and adult use cannabis: 1) retail sales; 2) commercial cultivation; 3) distribution 4) delivery; 5) testing; and 6) manufacturing. Based on the direction given regarding staff's recommendations, a proposed ordinance will be brought back to the Council at a later date for consideration for enactment prior to January 2, 2018.

RETAIL SALES

Following the passage of MAUCRSA, vertical integration is now allowed within the cannabis industry, except for testing due to a conflict of interest, but was previously prohibited under AUMA. Therefore, retail sales could mean a variety of different scenarios, considering vertical integration is allowed. A retail location could have a traditional storefront and a delivery component; operate as a non-storefront location (i.e. closed to the public), such as warehouses making deliveries; or operate a "microbusiness" with a combination of licensed activities. The City has the ability through its local police powers to be as stringent or as flexible as it desires within the bound of state law regarding what it will allow or prohibit as it pertains to cannabis. For example, the City could allow medical retail cannabis only and prohibit adult use or the City could prohibit or allow both.

Staff does have concerns: the cannabis industry is new and untested; the State of California is lacking complete industry regulations; and Clayton is a small city with limited resources to be on the forefront of these issues. Staff's recommends a prohibition, which would allow time to see how these areas evolve and the City could readjust its ordinances at a later date.

STAFF RECOMMENDATION: Prohibit all retail cannabis, both medical and adult use.

INDOOR/OUTDOOR COMMERCIAL CULTIVATION

While Clayton does not have large areas of land dedicated to agricultural uses or industrial buildings that could be utilized for the indoor cultivation of cannabis, there are still opportunities where commercial cultivation could conceivably be proposed. The aforementioned legal recommendation regarding having an ordinance that affirmatively prohibits or affirmatively regulates coupled with staff's previous concerns regarding the untested waters of this new industry, staff is advising that commercial cultivation should be addressed in an ordinance. Staff does have concerns regarding security and impacts to public safety if commercial cultivation were to occur within Clayton.

STAFF RECOMMENDATION: Prohibit both the indoor and outdoor commercial cultivation of medical and adult use cannabis.

business license tax provisions, CMC Section 5.04; however a ballot measure would need to be passed to collect any new type of excise or use tax.

STAFF RECOMMENDATION: Allow deliveries of medical and adult use cannabis that originate outside of the municipal limits and send letters to all businesses serving the City of Clayton indicating they need to apply for a business license in order to conduct business within the City.

TESTING

Cannabis testing is a key component for all cannabis businesses because all are subjected to this requirement. Testing will determine the purity, potency, concentration, and cannabinoid ratios. Some of the state regulations include verified methods of sampling, ISO/IEC 17025 accreditation, destruction of the remains of sample cannabis, and disposal of waste byproducts resulting from their operations. From a land use perspective, testing can be located in an office or lab type environment; however staff has concerns regarding odors and safety due to the storage and keeping of cannabis products within the business location.

STAFF RECOMMENDATION: Prohibit cannabis testing facilities for both medical and adult use cannabis.

MANUFACTURING

The manufacturing component of the cannabis industry is probably the widest ranging component due to the vast business types. Manufacturing would include, but are not limited to, bakeries, extraction facilities, and the creation of personal products such as lotions and salves. These facilities could range from large facilities to home-based businesses. Manufacturing is also governed by AB 2679, which codified a legal form of extraction which includes regulations such as the use of a solvent-less process or non-flammable, non-toxic solvents, closed loop system, and equipment certified by a licensed engineer as safe. While some of these manufacturing processes maybe benign, some could require extensive oversight and regulation due to their extraction techniques. As stated earlier, due to the newness of the cannabis industry, staff has concerns about allowing manufacturing to occur within Clayton.

STAFF RECOMMENDATION: Prohibit all cannabis manufacturing, including extraction, for both medical and adult use cannabis products.

OTHER ISSUES

If the Council is interested in allowing any cannabis uses in the future, staff would recommend placing a tax measure on the ballot to provide the opportunity for additional tax revenue to address any enforcement issues related to cannabis as well as to create a financial benefit to the City for the provision of facilities and services. Additionally, if the Council decides to allow these uses, staff would recommend, in addition to the ballot

Ms. Gentry added, wooden fences need to be moved 10 feet from the back of sidewalk to be compliant in the *Clayton Municipal Code* as the Code requires it to be 5 feet from the property line and in this case the property line is 5 feet behind the sidewalk.

Mayor Diaz closed public comments.

By general consensus, City Council provided direction to staff to create a revocable encroachment agreement with indemnification language to protect the city, including appropriate insurance for the encroaching structures; to draft an ordinance to allow a six-foot fence at the property line for exterior side lots, with all other current requirements to remain; to pursue code enforcement cases if the City is aware a violation; and to conduct a public education effort regarding the regulations for the construction of fences.

- (b) Discussion of staff recommendations for various local policy issues arising from the California voters' passage of Proposition 64 and the State legislature's passage of SB 94 – the Medical and Adult Use Cannabis Regulation and Safety Act (MAUCRSA) regarding local regulation of cannabis.
(Community Development Director)

Community Development Director Mindy Gentry provided a brief background noting on December 20, 2016 the City Council passed an Urgency Ordinance banning the personal outdoor cultivation of cannabis and staff requested direction regarding Proposition 64 - the Control, Regulation, and Tax of Adult Use of Marijuana Act (AUMA). The City Council directed staff to not regulate the indoor cultivation for the personal use of marijuana; add provisions to the Clayton Municipal Code to treat marijuana similarly to alcohol with no consumption allowed in public; further address marijuana in 2017 to allow more time for legal clarification and to determine what actions neighboring jurisdictions have taken.

Ms. Gentry noted there have been no changes to the federal Controlled Substances Act; however a bill has been introduced to change marijuana from a Schedule I narcotic to another controlled substances schedule. On June 26, 2017, Governor Brown signed into law SB 94 – Medical and Adult Use Cannabis Regulation and Safety Act (MAUCRSA); combining the medical and adult use of cannabis systems into one licensing structure with the same regulatory framework governing both medical and adult use facilities. The most notable change is vertical integration is now allowed, as it pertains to cannabis businesses. On September 16, 2017, AB 133 was signed into law noting technical fixes or changes to MAUCRSA.

Ms. Gentry noted Clayton's local regulations mostly pertain to medical purposes with the *Clayton Municipal Code* being silent on the recreational or adult use of marijuana. The City of Clayton has prohibited medical marijuana dispensaries; testing laboratories; facilities that store or maintain marijuana as part of their operations; and outdoor cultivation or production of cannabis; and some indoor cultivation. The City Council did not prohibit the delivery of medical marijuana due to accessibility concerns for patients within the community.

Ms. Gentry further noted the neighboring communities of Antioch, Brentwood, Pittsburg, Danville, and Orinda have banned all commercial cannabis businesses for both medical and adult use. The City of Concord has directed staff to draft an ordinance to put a ban in place; however will revisit the issue once more clarity has been provided by the State. Contra Costa County has prepared a permanent ordinance to prohibit all commercial uses until an ordinance to fully regulate all aspects of cannabis is completed. The City of Pleasant Hill Planning Commission has recommended to its City Council to allow retail medical cannabis. The City of Walnut Creek has placed a moratorium for all

commercial cannabis, however their staff will be returning in the next two months with additional information for its City Council to consider and provide further direction to its staff.

Ms. Gentry advised the City of Clayton is not required to have an ordinance in place by January 1, 2018, however cities only have sixty days to respond to the State once notified of an application to open a business in the jurisdiction. Further, under SB 94, if a local jurisdiction does not have an ordinance enacted to address the licensed activity, the State can unilaterally issue a license for that business. The State is only prohibited from issuing a license if the business would violate local ordinances. If there is not an applicable local ordinance, then there is no violation. The local regulation of medical and recreational cannabis does not have to be consistent with one another; however staff is recommending the Clayton Municipal Code be amended to thoroughly to address both medical and adult use cannabis. If it only addresses one area it can create an interpretation issue that could be legally challenged for denying a permit if an ordinance does not cover the activity.

Ms. Gentry concluded that staff was seeking direction from Council on retail sales; indoor/outdoor cultivation; distribution; adult use delivery; testing; and manufacturing.

Councilmember Catalano inquired on the prohibition of the regulation of personal indoor cultivation and asked about the regulation of outdoor cultivation should this be included?

Ms. Gentry advised back in December 2016 the City Council passed an urgency ordinance prohibiting the outdoor grow for personal use, and staff was not recommending any change. Personal indoor is allowed under SB 94 up to 6 plants per home – not per person.

Councilmember Catalano inquired on the issuance of Home Occupancy permits in regards to the edibles and resale. Should this also be included?

Ms. Gentry advised the City Council could provide further direction on this as there is a cottage food industry that has special state regulations; however, further research would need to be done. Staff is recommending a blanket prohibition of any home based cannabis businesses.

Vice Mayor Haydon inquired on the definition of commercial cultivation?

Ms. Gentry noted commercial cultivation is anything beyond the six (6) allowable plants per residence as defined in the State law.

Mayor Diaz opened matter for public comments; no comments were offered.

By general consensus, City Council provided direction to staff to prepare an ordinance that would prohibit the retail sales of cannabis; testing laboratories; manufacturing; distribution facilities, any businesses that store or maintain cannabis as part of their operations; and outdoor cultivation or production of cannabis. The City Council directed staff to allow delivery of adult use cannabis to a residence from a location outside of the City. The adult use delivery would be consistent with the current allowable medical delivery.

9. **COUNCIL ITEMS** – None.

10. **CLOSED SESSION** – None.

17.04.138 - Medical Cannabis Uses.

A facility or location where marijuana is made available for medical purposes in accordance with Health and Safety Code § 11362.5 (Proposition 215).

- A. "Cannabis" means all parts of the plant *Cannabis sativa* Linnaeus, *Cannabis indica*, or *Cannabis ruderalis*, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. "Cannabis" also means the separated resin, whether crude or purified, obtained from marijuana. "Cannabis" also means marijuana as defined by Health and Safety Code § 11018 as enacted by Chapter 1407 of the Statutes of 1972.
- B. "Cannabis dispensary" means a facility where cannabis, cannabis products, or devices for the use of cannabis or cannabis products are offered, wither individually or in any combination, for retail sale, including an establishment that delivers cannabis and cannabis products as part of retail sale.
- C. "Cannabis manufacturer" means a person that conducts the production, preparation, propagation, or compounding of manufactured cannabis, or cannabis products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis at a fixed location that packages or repackages medical cannabis products or labels or relabels its container.
- D. "Cultivation" means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of cannabis.
- E. "Testing laboratory" means a facility, entity, or site in the state that offers or performs tests of medical cannabis or medical cannabis products and that is both of the following:
 - (1) Accredited by an accrediting body that is independent from all other persons involved in the medical cannabis industry in the state; and
 - (2) Registered with the State Department of Public Health.

(Ord. 448, 2013; Ord. 461, 2016)

17.36.080 - Prohibited Uses and Activities.

The following uses and activities in all zoning districts;

- A. Any use or activity which is prohibited by local, regional, state, or federal law;
- B. Establishment or operation of cannabis dispensaries, as defined in Section 17.04.138;
- C. Outdoor cultivation or production of cannabis, as defined in Section 17.04.138, or marijuana;
 - 1. "Cultivation" means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of marijuana.
 - 2. "Marijuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include:
 - a. Industrial hemp, as defined in California Health and Safety Code § 11018.5; or
 - b. The weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other product.
- D. Cannabis manufacturers as defined in Section 17.04.138;
- E. Cannabis testing laboratories, as defined in Section 17.04.138, or other facilities that store or maintain marijuana as part of their operations, whether commercial or non-commercial; and
- F. Other use or activities as may be determined by the Planning Commission to be of the same general character as those specifically prohibited.

(Ord. 448, 2013; Ord. 461, 2016)