

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CUPERTINO
ADDING CHAPTER 10.84 TITLED ``MEDICINAL AND ADULT USE OF
MARIJUANA'' TO TITLE 10 OF THE CUPERTINO MUNICIPAL CODE;
AMENDING SECTION 19.08.030 TO REPEAL DEFINITIONS RELATED TO
MARIJUANA; AND AMENDING CHAPTER 19.98 TO REFERENCE THE NEWLY
ADOPTED ORDINANCE**

WHEREAS, in 1970, Congress enacted the Controlled Substances Act (CSA) which, among other things, makes it illegal to import, manufacture, distribute, possess or use marijuana in the United States.; and

WHEREAS, under the Federal Controlled Substances Act, 21 U.S.C. § 801 et seq., the use, possession, and cultivation of marijuana for both medical and recreational uses are currently unlawful and subject to federal prosecution; and

WHEREAS, in 1972, California added Chapter 6 to the state Uniform Controlled Substances Act, commencing at Health and Safety Code section 11350, which established the state's prohibition, penalties, and punishments for the possession, cultivation, transportation, and distribution of marijuana; and

WHEREAS, in 1996, California voters approved Proposition 215 ("CUA"), codified in Health and Safety Code Section 11362.5 et seq., which created a limited exception from criminal liability for seriously ill persons who need marijuana for medical purposes. In January 2004, the state Legislature enacted the "Medical Marijuana Program" (MMP), Health and Safety Code sections 11362.7 to 11362.83, to clarify the scope of the CUA, establish a voluntary program for identification cards issued by counties for qualified patients and primary caregivers, and provide criminal immunity to qualified patients and primary caregivers for certain activities involving medical marijuana, including the collective or cooperative cultivation of medical marijuana; and

WHEREAS, in January 2016, the legislature passed AB 266, AB 243, and SB 643, collectively known as the Medical Cannabis Regulation and Safety Act ("MCRSA"), which govern cultivation, processing, transporting, testing, and distribution of medical marijuana to qualified patients. MCRSA expressly preserves local control over medical marijuana facilities and land uses, including the authority to prohibit all medical marijuana businesses and cultivation completely, newly-added Health & Safety Code section 11362.777(c)(4) provides that if a city does not have a land use regulation or ordinance regulating or prohibiting marijuana cultivation, either expressly or otherwise

under principles of permissive zoning, or chooses not to administer a conditional permit program under that section, then commencing March 1, 2016, the state Department of Food and Agriculture will become the sole licensing authority for marijuana cultivation in that jurisdiction; and

WHEREAS, on February 2, 2016, the City Council adopted Ordinance Number 16-2140, clarifying the City of Cupertino's longstanding prohibition on cultivation, distribution, sale, and delivery of medical marijuana in the City to ensure that the City maintained local control of these issues after passage of the MCRSA; and

WHEREAS, California voters on November 8, 2016 approved the Control, Regulate and Tax Adult Use of Marijuana Act ("the AUMA"), which legalizes possession, use, and cultivation of non-medical marijuana for adults. Under this law, cities retained local control to prohibit or regulate adult-use marijuana through local ordinances, zoning and land use requirements, and the state will not issue a state license in violation of local laws; and

WHEREAS, while medical marijuana cultivation and all commercial medical marijuana uses are prohibited under the City's current zoning regulations, the Cupertino Municipal Code does not address cultivation and delivery of non-medical marijuana within its jurisdiction; moreover, the prohibition against transportation of marijuana through City of Cupertino is not consistent with AUMA; and

WHEREAS, SB 94, the Medicinal and Adult-Use Cannabis Regulation and Safety Act (the "MAUCRSA,") signed into law in June 2017, made significant changes to California's commercial cannabis regulatory structure. SB 94 in effect repealed the MCRSA (medical marijuana regulations) and incorporated some of its provisions into the licensing provisions of AUMA. MAUCRSA effectively set up a new hybrid regulatory structure and created more operator-friendly standards than under MCRSA;

WHEREAS, many California communities that have legalized recreational or medical marijuana uses have experienced and reported adverse impacts and negative secondary effects from marijuana establishments, cultivation sites, processing and distribution activities including hazardous construction, unsafe electrical wiring, noxious odors and fumes affecting neighboring properties and businesses, illegal sales and distribution of marijuana, trespassing, theft, violent robberies and robbery attempts, fire hazards, and problems associated with mold, fungus, and pests, and the diversion of medical marijuana to minors; and

WHEREAS, the Santa Clara County District Attorney's Office issued a May 2014

memorandum entitled “Issues Surrounding Marijuana in Santa Clara County,” which outlined many of the negative secondary effects resulting from marijuana cultivation; a copy of this memorandum is attached to the staff report presented to the City Council with this ordinance and on file with the City Clerk; and

WHEREAS, it is reasonable to conclude that medical marijuana dispensaries, marijuana cultivation facilities, commercial cannabis activities, including marijuana processing could cause similar adverse impacts on the public health, safety, and welfare in Cupertino; and

WHEREAS, marijuana plants produce a strong odor, offensive to many people, that may be detectable far beyond property boundaries if grown outdoors. This condition also creates an attractive nuisance, by alerting persons to the location of the plants, and creating a risk of burglary, robbery or armed robbery; and

WHEREAS, when marijuana is grown and/or processed indoors, growing and processing equipment can have the potential to cause harm to persons or property by creating fire hazards. Many cities in the state have reported or responded to fires resulting from marijuana activity. Indoor cultivation operations are frequently unattended and utilize high wattage grow lamps, generators, or other equipment, or may be illegally wired to allow such equipment to function. This excessive energy use can overload electrical systems and cause fires; and

WHEREAS, state marijuana laws do not confer a land use right or the right to create or maintain a public nuisance. However, under MAUCRSA the city must adopt an ordinance establishing laws and regulations on marijuana facilities and activities otherwise the State may become the licensing authority. The MAUCRSA also requires delivery services to be expressly prohibited by local ordinance, if the City desires to prohibit delivery. Similarly, the cities have explicit authority to adopt and enforce local ordinances, including zoning and land use requirements, to regulate marijuana businesses or to completely prohibit the establishment or operation of such businesses within the city’s jurisdiction. No State license will be approved for a business that violates local ordinances; and

WHEREAS, the City Council desires to update the marijuana regulations in the Cupertino Municipal Code to maintain the City’s existing prohibition on commercial marijuana activities, and expressly make clear, in light of passage of the AUMA, that all such uses (whether medical or recreational) continue to be prohibited in all zones

throughout the City, preserve local control over such uses, and protect the public from the health and safety risks described above; and

WHEREAS, the City Council has determined that express Municipal Code provision regarding medical marijuana dispensaries, marijuana cultivation facilities, and commercial cannabis activities will benefit the public by providing clear guidelines regarding the scope of prohibited conduct and minimize the potential for confusion regarding the City's policies, and

WHEREAS, the Planning Commission held a duly noticed public hearing on November 14, 2017, at which time it considered all evidence presented, both written and oral, and at the end of the hearing recommended that the Council adopt the recommended changes to the City's zoning code; and

WHEREAS, the City Council held a duly noticed public hearing on this ordinance on December 21, 2017, at which time it considered all evidence presented, both written and oral;

WHEREAS, the City Council of the City of Cupertino is the decision-making body for this Ordinance; and

WHEREAS, in order to protect the public health, safety, and welfare of Cupertino residents and to minimize the negative impacts from commercial marijuana activities, including the personal cultivation of marijuana, the City Council desires to add Cupertino Municipal Code Chapter 10.84 and to amend Chapters 19.08 and 19.98 to prohibit, in express terms, most commercial cannabis activities including medical marijuana dispensaries, commercial cultivation of marijuana and outdoor cultivation of marijuana for personal use and to regulate deliveries, transportation, and indoor cultivation of marijuana for personal use; and

WHEREAS, the City has analyzed the actions taken with this proposed Ordinance and determined that it is not a project within the meaning of section 15378 of the California Environmental Quality Act ("CEQA") Guidelines because it has no potential for resulting in physical change in the environment, either directly or indirectly; and

WHEREAS, in the event that the actions taken with this proposed Ordinance are found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines section 15061(b)(3) because it can be seen with certainty to have no possibility of a significant effect on the environment; and

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

SECTION 1. Chapter 10.48, Medicinal and Adult Use of Marijuana, is adopted and established in Title 10, Public Peace, Safety and Morals, of the Cupertino Municipal Code to read as follows:

CHAPTER 10.84: MEDICINAL AND ADULT USE OF MARIJUANA

Section

10.84.010 Purpose.

10.84.020 Definitions.

10.84.030 Commercial Marijuana Activities Prohibited.

10.84.040 Possession, Delivery, Distribution, and Indoor Cultivation of Marijuana.

10.84.050 Enforcement, Remedies and Declaration of Public Nuisance.

10.84.010 Purpose.

The purpose of this Chapter is for the City Council to exercise its police and regulatory powers derived from Section 7 of Article XI of the California Constitution and state law to promote the health, safety and general welfare of the residents and businesses of the City of Cupertino and preserve the City's land use powers, by prohibiting all commercial marijuana activity within the City's jurisdictional limits, unless preempted by state law or authorized by this Chapter. Nothing in this Chapter is intended to circumvent compliance with state law.

10.84.020 Definitions.

For purposes of this Chapter, the terms and words in this Section are defined as follows and in accordance with the relevant provisions of state law, as amended from time to time.

"Accessory Structures" shall have the meaning set forth in Chapter 19.08, Definitions, of the Cupertino Municipal Code.

"Commercial cannabis activity" shall have the same meaning set forth in California Business and Professions Code section 26001(k).

"Cultivation" shall have the same meaning as set forth in California Business and Professions Code section 26001(l).

"Delivery" shall have the same meaning as set forth in California Business and Professions Code section 26001(p).

“Distribution” shall mean the procurement, sale, and transport of cannabis and cannabis products between licensees, as defined in California Business and Professions Code 26001(r).

“Identification Card” shall have the same meaning as set forth in state law, including California Health and Safety Code sections 11362.7(g).

"Marijuana or cannabis" shall have the meaning set forth in California Business and Professions Code section 26001(f). Marijuana and cannabis are used interchangeably in this Code. The term “marijuana” shall also include “medical marijuana,” “medicinal marijuana product” and “cannabis product” as defined in Business and Professions Code section 26001.

“Marijuana accessories” shall have the same meaning as set forth in California Business and Professions Code section 26001(g).

“Marijuana cultivation” shall have the same meaning as set forth in California Business and Professions Code section 26001(l).

“Marijuana cultivation site” shall have the same meaning as set forth in California Business and Professions Code section 26001(m).

“Marijuana delivery” shall have the meaning set forth in California Business and Professions Code section 26001(p).

“Marijuana dispensary” means any business, office, store, facility, location, retail storefront, or wholesale component of any establishment, cooperative or collective that delivers, whether mobile or otherwise, dispenses, distributes, exchanges, transmits, transports, sells or provides marijuana to any person for any reason, including members of any medical marijuana cooperative or collective consistent the purposes set forth in California Health and Safety Code section 11362.5.

“Medicinal marijuana” and “medicinal marijuana products” shall have the same meaning set forth in California Business and Professions Code section 26001(ai).

"Medicinal marijuana dispensary" means any business, facility, use, establishment, property, or location, whether fixed or mobile, where medicinal marijuana or medicinal marijuana product, is sold, made available, and/or distributed. A "medicinal marijuana dispensary" does not include the following facilities that provide medical care and supportive services to a qualified patient, person with an identification card, or employs a primary caregiver providing services to a qualified patient or person with an identification card at that facility:

- a. A clinic licensed pursuant to Chapter 1 of Division 2 of the Health and Safety Code;

- b. A health care facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code;
- c. A residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 of Division 2 of the Health and Safety Code;
- d. A residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the Health and Safety Code; or
- e. A residential hospice, or a home health agency licensed pursuant to Chapter 8 of Division 2 of the Health and Safety Code.

“Marijuana products” shall have the same meaning as set forth in California Business and Professions Code section 26001(i).

“Operation” shall have the same meaning set forth in California Business and Professions Code section 26001(ak).

“Outdoors” means any location that is not within a fully enclosed and secure structure.

“Person” includes any individual, firm, co-partnership, joint venture, association, corporation, limited liability company, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit.

“Primary caregiver” shall have the same meaning as set forth in the California Health and Safety Code section 11362.7.

“Private residence” means a legal, house, apartment unit, accessory dwelling unit or other similar residential dwelling.

“Qualified patient” shall have the same meaning as set forth in Health and Safety Code section 11362.7.

“Sale” “Sell,” “sale,” and “to sell” shall have the same meaning as set forth in California Business and Professions Code section 26001(as).

10.84.030 Commercial Marijuana Activities Prohibited.

Except as provided in Section 10.84.040, all commercial activities involving marijuana and all outdoor cultivation of marijuana (both commercial and for personal use), whether or not they require a state or local license, are prohibited in all zones in the City. The City will not issue any permit, license or other entitlement for any commercial marijuana activity or outdoor cultivation of marijuana.

10.84.040 Possession, Delivery, Distribution, and Indoor Cultivation of Marijuana.

Notwithstanding the prohibitions in Section 10.84.030 above, the following activities are allowed:

- A. Possession of marijuana for personal use is allowed to the limited extent authorized

under Health and Safety Code section 11357 and 11362.5.

- B. Delivery of marijuana is allowed in accordance with the following restrictions:
 - 1. Only by Licensees operating with a valid state license and in compliance with laws and regulations of the local jurisdiction where the Licensee is physically located or obtained the license; and
 - 2. Only deliveries to the City of Cupertino are allowed; deliveries may not originate within the City; and
 - 3. Deliveries to a qualified patient or by a primary caregiver to his or her qualified patient are allowed, to the extent allowed by California Business and Professions Code section 26033.
- C. The use of the City's public roads by Licensees transporting marijuana or marijuana products to the limited extent authorized by California Business and Professions Code sections 26080(b).
- D. Indoor marijuana cultivation for personal use is permitted only in a Private Residence, to the limited extent authorized under California Health and Safety Code sections 11362.1 and 11362.2 and subject to the following regulations:
 - 1. The cultivation activity shall be incidental to the primary use of the Private Residence as a dwelling;
 - 2. The property shall be the primary residence of the Person cultivating the marijuana, and the Person shall not participate in cultivation in any other location within the City;
 - 3. If the Private Residence is rental property, written authorization must be obtained from the landlord, property owner or property manager prior to commencement of cultivation. Nothing in this section prohibits a landlord or property owner from imposing more stringent standards than those outlined in this section. No marijuana cultivation may occur in violation of a lease or rental agreement;
 - 4. Any structure used for indoor cultivation must be fully enclosed, secure, and locked, as required by state law;
 - 5. The cultivation area must be within a Private Residence, or an accessory structure to a Private Residence located entirely on property owned or legally in possession of the Person doing the cultivation;
 - 6. Not more than six (6) mature or immature plants are permitted per Private Residence, regardless of the number of residents occupying the property;
 - 7. The cultivation area must be a single designated area not exceeding 36 square feet measured by canopy or ten (10) linear feet in height;
 - 8. The display or any exterior evidence of marijuana cultivation, including but not limited to marijuana plants, storage of marijuana accessories or pesticides, or

processing and curing equipment is strictly prohibited;

9. The use, alterations and additions to the Private Residence, garage, and accessory structures, must comply with all applicable building, fire, plumbing, electrical, housing and zoning codes, including regulations related to lot coverage, set back, height and parking requirements;
 10. The use of gas products, including but not limited to, CO₂ and butane, CO₂ and ozone generators, or other flammable solvents for cultivation or processing is prohibited;
 11. Lighting for cultivation shall be energy efficient lighting, such as, light-emitting diodes (LEDs), compact fluorescent lamps (CFLs), or fluorescent lighting and shall not create a fire or safety hazard;
 12. A ventilation and filtration system that meets minimum requirements of the adopted edition of the California Building Standards Code or its equivalent(s), is required. It must be designed to ensure that odors from cultivation are not detectable beyond the Private Residence or accessory structure where cultivation occurs, must prevent mold and humidity/moisture, and otherwise protect the health and safety of the occupants and the neighborhood;
 13. Cultivation shall not adversely affect the health or safety of the occupants or nearby residents by creating dust, glare, excessive light, heat, noise, noxious gases, odor, smoke, traffic, vibration, or other impacts, and shall not be hazardous due to use, storage or disposal of chemicals, materials, processes, products or wastes.
- E. Nothing contained in this Section shall be deemed to permit or authorize any use or activity which is otherwise prohibited by state law.

10.84.050 Enforcement, Remedies and Declaration of Public Nuisance.

- A. Enforcement: This Chapter shall be enforced in accordance with and consistent with the enforcement of public health and safety laws, pursuant to Chapter 10 of the Cupertino Municipal Code.
- B. Remedies: Violations of this Chapter are subject to administrative, civil, and criminal remedies available under state law and the Cupertino Municipal Code, which at the discretion of the City may be pursued concurrently, including without limitation the fines, penalties, abatement orders and other administrative and civil remedies provided under Chapter 1.10 and 1.12 of the Cupertino Municipal Code.

Violations of this chapter are subject to criminal citations and prosecution under state law. Notwithstanding the penalties set forth above, no provision authorizes a criminal prosecution, arrest or penalty inconsistent with or prohibited under California Health and Safety Code Section 11362.5.

In the event of any conflict between the penalties enumerated in this section of the Cupertino Municipal Code and any penalties set forth in state law, the maximum penalties allowable under state law shall govern.

SECTION 2. Cupertino Municipal Code, Chapter 19.08 of Title 19 is amended to delete the following definitions:

“Commercial cannabis activity” shall have the meaning set forth in California Business and Professions Code section 19300.5(k).

“Cultivation” means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of marijuana.

“Identification Card” shall have the same meaning as set forth in state law, including Health and Safety Code Sections 11352.5, 11362.7, and following, or as may be amended.

"Marijuana" means all parts of the plant Cannabis, 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 includes marijuana infused in foodstuff, and concentrated cannabis and the separated resin, whether crude or petrified, obtained from marijuana. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except resin extracted therefrom), fiber, oil, or cake, or the sterilized seeds of the plant that are incapable of germination.

"Medical marijuana" is marijuana used for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of acquired immune deficiency syndrome ("AIDS"), anorexia, arthritis, cancer, chronic pain, glaucoma, migraine, spasticity, or any other serious medical condition for which marijuana is deemed to provide relief as defined in subsection (h) of Health and Safety Code § 11362.7.

“Marijuana cultivation facility” means any business, facility, use, establishment, property, or location where the cultivation of marijuana occurs. A “marijuana cultivation facility” does not include a “qualified patient’s” primary residence provided such cultivation of medical marijuana is for his or her personal use.

"Medical marijuana dispensary" means any business, facility, use, establishment, property, or location, whether fixed or mobile, where medical marijuana is sold, made available, delivered, transported, and/or distributed. A "medical marijuana dispensary" does not include the following uses:

- a. A “qualified patient” transporting “medical marijuana” for his or her personal use;
- b. A “primary caregiver” delivering or transporting “medical marijuana” to a “qualified patient;”
- c. A clinic licensed pursuant to Chapter 1 of Division 2 of the Health and Safety Code;
- d. A health care facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code;
- e. A residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 of Division 2 of the Health and Safety Code;
- f. A residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the Health and Safety Code; or
- g. A residential hospice, or a home health agency licensed pursuant to Chapter 8 of Division 2 of the Health and Safety Code.

“Primary caregiver” shall have the same meaning as set forth in state law, including Health and Safety Code Sections 11352.5, 11362.7, and following, or as may be amended.

“Qualified patient” shall have the same meaning as set forth in state law, including Health and Safety Code Sections 11352.5, 11362.7, and following, or as may be amended.

SECTION 3. Chapter 19.98, “Medical Marijuana,” is repealed in its entirety. The new provision of Chapter 19.98 is retitled “Marijuana” and hereby adopted to reference the new municipal provisions regulating marijuana under Chapter 10.84 of the Cupertino Municipal Code as follows:

CHAPTER 19.98: MARIJUANA

19.98.010 Marijuana.

All commercial cannabis activities including marijuana cultivation, as defined in Chapter 10.84, are prohibited uses in all zoning districts in the City of Cupertino, except to the extent permitted by state law and Chapter 10.84 of the Cupertino Municipal Code.

SECTION 4. FINDINGS. The following findings are made under Cupertino Municipal Code section 19.152.030(D):

- (1) The proposed Ordinance conforms with the latest adopted general plan for the City in that a prohibition against marijuana cultivation facilities, medical marijuana dispensaries, and commercial cannabis activities, does not conflict with any allowable uses in the land use element and does not conflict with any policies or programs in any other element of the general plan.
- (2) The proposed Ordinance will protect the public health, safety, and welfare and promote the orderly development of the City in that prohibiting marijuana cultivation

facilities, medical marijuana dispensaries, and commercial cannabis activities will protect the City from the adverse impacts and negative secondary effects connected with these activities.

(3) The proposed Ordinance is consistent with Municipal Code Title 19, which currently bans marijuana cultivation facilities, medical marijuana dispensaries, and commercial cannabis activities under principles of permissive zoning.

(4) The proposed Ordinance is not a project within the meaning of section 15378 of the California Environmental Quality Act ("CEQA") Guidelines because it has no potential for resulting in physical change in the environment, either directly or ultimately. In the event that this Ordinance is found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines section 15061(b)(3) because it can be seen with certainty to have no possibility of a significant effect on the environment.

SECTION 5. SEVERABILITY. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

SECTION 6. EFFECTIVE DATE. This Ordinance shall take effect and be in force thirty (30) days from and after adoption as provided by Government Code Section 36937.

SECTION 7. CERTIFICATION. The City Clerk shall certify the adoption of this Ordinance and shall give notice of its adoption as required by law. Pursuant to Government Code Section 36933, a summary of this Ordinance may be published and posted in lieu of publication and posting of the entire text.

INTRODUCED at a regular meeting of the City Council of the City of Cupertino the 19th day of January, 2016 and ENACTED at a regular meeting of the City Council of the City of Cupertino the ____ of _____ 2016, by the following vote:

Vote: Members of the City Council

Ayes:

Noes:

Absent:

Abstain:

ATTEST:

City Clerk

APPROVED:

Mayor, City of Cupertino