

CITY OF TOLEDO

ORDINANCE NO. 1363

AN ORDINANCE AMENDING CHAPTER 5.20 OF THE TOLEDO MUNICIPAL CODE RELATING TO THE LICENSING AND REGULATION OF MEDICAL MARIJUANA DISPENSARIES, AND ADDING THE REGULATION OF RECREATIONAL MARIJUANA FACILITIES; AND, DECLARING AN EMERGENCY.

WHEREAS, Chapter 5.04 of the Toledo Municipal Code, establishing business licenses, was adopted by the City Council on March 6, 1995; and

WHEREAS, Chapter 5.20 of the Toledo Municipal Code, establishing business license standards for the operation of medical marijuana facilities, was adopted by the City Council on November 19, 2014; and

WHEREAS, in November, 2014, Oregon voters adopted Measure 91, legalizing the growing, distribution, possession and use of marijuana in certain amounts for non-medical personal use, and directed the Oregon Liquor Control Commission (OLCC) to administer a licensing system for the production, processing, wholesale, and retail sale of non-medical marijuana; and

WHEREAS, the Oregon legislature made comprehensive reforms to Measure 91 when it enacted House Bill 3400, HB 2041, SB 460, and SB 844 in 2015, which provide guidance to cities and counties as to what actions can be taken regarding the regulation of recreational marijuana; and

WHEREAS, the Oregon legislature enacted House Bill 3400 (2015), which expressly authorizes a city to adopt ordinances that impose reasonable restrictions on time, place and manner as to the operation of recreational marijuana facilities; and

WHEREAS, Oregon's laws on medical and recreational marijuana do not, and cannot, provide immunity from federal prosecution under the Controlled Substances Act ("CSA") which Congress passed in 1970; and

WHEREAS, under the CSA, drugs are classified under one of five schedules (I-V), depending on their medicinal value, potential for abuse, and psychological and physical effects on the body; and

WHEREAS, Congress has placed marijuana on schedule I, the most severely restricted category, based on the determination that marijuana had no accepted medical use and a high potential for abuse, so the use, possession and sale of marijuana remains illegal under federal law; and

WHEREAS, this conflict between state and federal laws creates uncertainty about cities' ability to regulate marijuana dispensaries within their boundaries in compliance with both state and federal law; and

WHEREAS, though the federal law surely preempts some state law, its preemptive reach is not as broad as it could be because Congress has disavowed any intent to occupy the entire field of drug regulation, so to the extent this ordinance conflicts in the future with state or federal law, the City Council intends this ordinance to first occupy the area under its home rule authority; and

WHEREAS, pursuant to Article XI, Section 2 of the Oregon Constitution and the Toledo City Charter, the City of Toledo is a home rule municipality with all the powers that the constitutions, statutes, and common law of the United States and the State of Oregon expressly or impliedly grant or allow the City; and

WHEREAS, the implementation of the ordinance as soon as possible is in the public interest and necessary for the peace, health, convenience, and safety of the inhabitants of the City of Toledo.

NOW THEREFORE, THE CITY OF TOLEDO ORDAINS AS FOLLOWS:

SECTION 1.

Sections 2 through 24 this Ordinance are added to and made a part of the Toledo Municipal Code, Chapter 5.20, as indicated.

SECTION 2.

§5.20.010(A), (B), is amended, and (C) is added, to read as follows:

5.20.010 Findings and Purpose.

A. The purpose of this ordinance is to minimize any adverse public safety and public health impacts that may result from allowing a medical marijuana facility or recreational marijuana facility in the City by adopting particular time, place and manner requirements and a permitting process; and to ensure that this type of business is complying with city ordinances, state and federal laws.

B. The City Council makes findings that the City of Toledo is an Oregon home rule municipal corporation with a City Charter that grants it all the powers and authority that the constitutions, statutes and common law of the United States and this State expressly or impliedly grant or allow as though each such powers were specifically enumerated.

C. This chapter is not intended to regulate the possession, cultivation or personal-use of marijuana at a registered marijuana grow site or by anyone who is a medical marijuana registry identification cardholder under State law.

SECTION 3.

§5.20.020(A), (B), (C) and (D) of the Toledo Municipal Code is deleted, and replaced with definitions, to be organized alphabetically, as follows:

5.20.020 Definitions.

Except as the context otherwise specifically requires, for the purposes of this chapter, the following mean:

"Applicant" means a person or entity to whom the Oregon Health Authority ("OHA") has granted a license to operate a medical marijuana facility, or alternatively, to whom the Oregon Liquor Control Commission ("OLCC") has granted a license to operate a recreational marijuana facility, or both. In this chapter, the term **"Licensee"** is interchangeable.

"Business License" means the written form of permission required in order to operate a business as required by this chapter, which is not intended to be an endorsement of a particular business or vocation or licensee.

"Entity" means any corporation, non-profit corporation, limited liability company, partnership, family limited partnership, association, or any other type of business entity doing business in the City.

"Medical marijuana facility" means a medical marijuana facility registered with the Oregon Health Authority under ORS 475B.400 et. seq. In this ordinance, the definition "medical marijuana facility" specifically includes a "medical marijuana dispensary facility" and "marijuana processing site," as those terms are defined under the Oregon Medical Marijuana Act. A "facility" includes all premises, buildings, curtilage, or other structures used to accomplish the storage, distribution and dissemination of marijuana.

"Person" means a natural person, whether he or she is acting for himself or herself, or as the employee or agent of another.

"Recreational marijuana facility" means any recreational marijuana facility registered with the Oregon Liquor Control Commission, including as a marijuana producer, marijuana processor, marijuana wholesaler, marijuana retailer, and marijuana laboratory. A "facility" includes all premises, buildings, curtilage, or other structures used to accomplish the storage, distribution and dissemination of marijuana.

"State Regulatory Authority" means both of the state agencies regulating marijuana, the Oregon Health Authority ("OHA") and the Oregon Liquor Control Commission ("OLCC"), unless the context requires otherwise.

SECTION 4.

§5.20.030 is deleted, and replaced with §5.20.030, to read as follows:

§5.20.030 Rulemaking authority.

The City Manager, or designee, shall administer and enforce the provisions of this chapter, and shall have the authority to render written and oral interpretations, and to adopt administrative rules and procedures necessary for its proper administration and enforcement. The chief of police may investigate any applicant for a license, or where the premises is located, to ensure compliance with the requirements of this chapter.

SECTION 5.

§5.20.040 of the Toledo Municipal Code is deleted, and replaced with §5.20.040, to read as follows:

5.20.040 Business license required.

A business license issued as set forth in Section 5.04.030 shall be required for any person or entity engaging in the operation of a medical marijuana facility or recreational marijuana facility.

SECTION 6.

§5.20.050 of the Toledo Municipal Code is amended, to read as follows:

5.20.050 Application for business license.

An application for a business license as set forth in Section 5.04.050 applies to any person or entity engaging in the operation of a medical marijuana facility or recreational marijuana facility, and must be submitted, in addition to the following requirements of this chapter:

- A. The license fee as set forth in Section 5.04.080 is applicable;
- B. In order to determine whether or not to issue a business license, the applicant must provide written confirmation to the planning department that all owners, officers, managers, employees, agents, partners, and volunteers of the business identified in this section have passed a criminal background check performed by the chief of police pursuant to OAR 257-010-0025(1)(a);

C. Written authorization for any state regulatory agency to disclose information to the City about the business and the applicant in conjunction with any license issued by a state regulatory agency;

D. As a quid pro quo for the City agreeing to issue a business license, the applicant agrees to waive liability against the City and any of its elected officials, officers, employees or agents for any claims arising out of the revocation of or refusal to grant a license; for any claims resulting from reporting or other actions taken that is required of the City by state law; for any claims alleging a taking or inverse condemnation due to revocation of or refusal to license a particular location or relocation of a permitted facility for failing to satisfy all the requirements of a license; or for any other claims for damages based upon actions taken or not taken by the City pursuant to a license.

E. As a quid pro quo for the City agreeing to issue a license, the applicant agrees to waive liability against the City and any of its elected officials, officers, employees or agents for any claims for any lawful arrest or prosecution of the applicant or any employees, clients or customers for a violation of federal or state criminal laws; and

F. Any other information the City considers reasonably necessary for the purpose of the business license to protect the health, safety, and welfare of the general public.

G. Upon request, at any time, the applicant agrees to sign and provide to the City any written documentation required by this section, including liability waivers required in (C) and (D) of this section.

H. An applicant shall inform the city within 10 days of any changes occurring to the information submitted in the application.

SECTION 7.

§5.20.060 of the Toledo Municipal Code is deleted, and replaced with §5.20.060, to read as follows:

5.20.060 Display of license.

The licensee shall have a conspicuous display of the business license required under this chapter at all times within the business premises.

SECTION 8.

The title and introductory paragraph of §5.20.070 of the Toledo Municipal Code is amended, subsections (D), (E), (F) and (J) are amended, subsections (C), (G), (H) and (I) are deleted, and subsections (A) and (B) remain unchanged, to read as follows:

5.20.070 Standards of operation.

A person or entity having or required to obtain a business license for a business that is a medical marijuana facility or recreational marijuana facility shall comply with the following regulations:

- A. A person or entity shall comply with all building code and zoning requirements applicable to the property on which the business is located.
- B. Except to the extent that marijuana is classified as a Schedule I controlled substance under federal law, the person or entity shall comply with all federal, state, and local laws applicable to the business. A business license under this chapter does not protect a person or entity from possible criminal prosecution under federal law.
- C. The business shall make available to the chief of police all video surveillance and recordings upon request for the purpose of ensuring compliance with ORS 475B.450, state rules, and this code.
- D. In order to determine whether or not to issue a business license, the applicant agrees that all employees and volunteers of the business must submit to a criminal background check by the chief of police pursuant to OAR 257-010-0025(1)(a). It shall be a violation of this ordinance if an employee or volunteer has been convicted of the manufacture or delivery of a controlled substance in Schedule I or Schedule II within five years of the date of the criminal background check; has been convicted more than once of the manufacture or delivery of a controlled substance in Schedule I or Schedule II at any time; or has been convicted of any of the following crimes at any time: criminal mistreatment based upon the unlawful manufacture of a controlled substance, racketeering, use of minor in controlled substance offense, manufacture or delivery of hydrocodone within 1000 feet of a school, manufacture or delivery of a controlled substance within 1000 feet of a school, causing another to ingest a controlled substance, application of a controlled substance to the body of another person, falsifying business records, issuing a false financial statement, obtaining execution of documents by deception, forgery, criminal possession of a forged instrument, criminal possession of a forgery device, fraudulently obtaining a signature, fraudulent use of a credit card, negotiating a bad check, unlawful factoring of payment card transactions, identity theft, laundering a monetary instrument, engaging in a financial transaction in property derived from unlawful activity, or felony driving under the influence of intoxicants.
- E. The person or entity shall keep all real and personal property tax accounts current for the business for which it is a taxpayer, and shall make available to the chief of police upon request such records maintained by the person or entity for the purpose of ensuring compliance with ORS 475B.450, state rules, and this code.
- F. The business may only operate between the hours of 9:00 a.m. to 9:00 p.m. daily.

SECTION 9.

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§5.20.080 is deleted, and replaced with §5.20.080, to read as follows:

5.20.080 Criteria for denial, suspension or revocation.

Upon a determination that grounds for denial, suspension or revocation of a license exists in Section 5.20.090, the factors to be considered in determining whether to deny, suspend or revoke the license must include:

- A. The nature of the conduct constituting the grounds for denial, suspend or revocation.
- B. The frequency of the conduct;
- C. The effect the conduct has upon the enjoyment of life, health and property of members of the community;
- D. The efforts of the person or entity responsible for the medical marijuana facility or recreational marijuana facility to prevent, mitigate or eliminate the conduct;
- E. The actual results of any actions taken by the person or entity responsible for the medical marijuana facility or recreational marijuana facility to prevent, mitigate or eliminate the conduct;
- F. The license history of the medical marijuana facility, or recreational marijuana facility, and the person or entity responsible for the medical marijuana facility or recreational marijuana facility;
- G. The cost to the City of investigating the conduct, including bringing the proceeding.

SECTION 10.

§5.20.090 of the Toledo Municipal Code is deleted, and replaced with §5.20.090, to read as follows:

5.20.090 Grounds for approval, denial, revocation, or suspension of license.

A. The approval, denial, suspension or revocation of a license as set forth in Section 5.04.060 applies to any person or entity engaging in the operation of a medical marijuana facility or recreational marijuana facility, except an applicant must also comply with the requirements of this chapter for approval of a business license. As to a medical marijuana facility and to a recreational marijuana facility, Section 5.04.060(B) is modified by this chapter to provide that the City may also deny, suspend or revoke a business license upon a finding that:

1. The licensee has failed to comply with, meet the requirements of, or is doing business in violation of this chapter, any other applicable city ordinance, state law, federal law, or administrative rule, except the City will not deny, suspend or revoke a license solely because marijuana is illegal under federal law;
2. OHA or OLCC has denied, suspended or revoked the authority of the licensee to operate a medical marijuana facility or recreational marijuana facility;
3. The licensee has failed to comply with the advertising requirements of any applicable state regulatory agency; or
4. The licensee knowingly makes a material false statement or omission in connection with the issuance or renewal of a license, or in connection with the City's criminal background check form;
5. The licensee has an outstanding warrant for his or her arrest; or
6. The licensee has maintained or conducted the licensed business or vocation in a manner contrary to the terms of the existing license or contrary to any provision of this chapter.

B. In addition to the other grounds for denial, suspension or revocation in this section, the chief of police may recommend denial of a renewal application for a specific location that is the subject of a renewal application that has a documented history of law enforcement contacts during the time that the specific location has been licensed under this chapter. In the event that the chief of police recommends denial of a renewal application, the chief of police shall forward the recommendation to the planning department. The planning department may issue a notice of denial based upon the chief of police's recommendation. Denial of a renewal application based upon the chief of police's recommendation may be reviewed pursuant to Section 5.04.070.

C. Any proceeding under this section shall be substantially in accord with the procedure provided in Section 5.04.060(C) and (D).

SECTION 11.

§5.20.100 of the Toledo Municipal Code is deleted, and replaced with §5.20.100, to read as follows:

5.20.100 License Surrender.

A licensee may surrender a medical marijuana facility or recreational marijuana facility business license by delivering written notice to the City that the licensee thereby surrenders the license. A

licensee's surrender of a license under this section does not affect the licensee's civil or criminal liability for acts the licensee committed before surrendering the license.

SECTION 12.

§5.20.110 of the Toledo Municipal Code is deleted, and replaced with §5.20.110, to read as follows:

5.20.110 Violations – generally; penalty.

A. A violation of any provision of this chapter shall constitute a Class A infraction. Violations of separate provisions are separate offenses, and each day that a violation occurs or continues is a separate offense.

B. Any penalty or remedy imposed pursuant to this chapter is in addition to, and not in lieu of, any other civil, criminal or administrative penalty, sanction or remedy otherwise authorized by law. The abatement of a nuisance under this chapter does not prejudice the right of any person or entity to recover damages for its past existence.

SECTION 13.

§5.20.120 of the Toledo Municipal Code is deleted, and replaced with §5.20.120, to read as follows:

5.20.120 Unlawful Failure to Obtain License.

A. It shall be unlawful for a person or entity to engage in any business or vocation for which a license is required by this chapter without first obtaining a license therefor.

B. A violation of this section is an A violation.

C. Upon conviction for the above offense, the court may in addition to any other sanction or condition imposed that is authorized by law, may prohibit the defendant from operating, being employed, volunteering or having a financial interest in a medical marijuana facility or recreational marijuana facility.

SECTION 14.

§5.20.130 of the Toledo Municipal Code is deleted, and replaced with §5.20.130, to read as follows:

5.20.130 Unlawful Activity by Licensee.

A. It shall be unlawful for a licensee to engage in a licensed activity, or to allow or permit the licensee's employees or agents to engage in the licensed activity, in violation of any applicable standard in the chapter, or of any license issued pursuant to this chapter.

B. A violation of this section is an A violation.

C. Upon conviction for the above offense, the court may in addition to any other sanction or condition imposed that is authorized by law, may prohibit the defendant from operating, being employed, volunteering or having a financial interest in a medical marijuana facility or recreational marijuana facility.

SECTION 15.

§5.20.140 of the Toledo Municipal Code is deleted, and replaced with §5.20.140, to read as follows:

5.20.140 Unlawful Engaging in Licensed Activity While License is Suspended or Revoked.

A. It shall be unlawful for a licensee to knowingly engage in a licensed activity, or to allow the licensee's employees or agents to engage in a licensed activity, when the license has been suspended or revoked pursuant to this chapter.

B. A violation of this section is an A violation.

C. Upon conviction for the above offense, the court may in addition to any other sanction or condition imposed that is authorized by law, may prohibit the defendant from operating, being employed, volunteering or having a financial interest in a medical marijuana facility or recreational marijuana facility.

SECTION 16.

§5.20.150 of the Toledo Municipal Code is amended, to read as follows:

5.20.150 Appeal.

Except as provided otherwise in this section, the decision pursuant to this chapter to deny a new license, or to deny an application for the renewal of an existing license, or to suspend or revoke a license, may be appealed pursuant to Section 5.04.070. Section 5.04.070 is modified by this chapter to provide that a decision by the council on such appeal is not final and conclusive. Rather, the appeal of a council's final decision shall be by writ of review to the Circuit Court of Lincoln County, Oregon, as provided by law.

SECTION 17.

§5.20.160 of the Toledo Municipal Code is amended, to read as follows:

5.20.160 Closure During Pendency of Action; Emergency Closures.

The City may institute an action for a temporary restraining order or preliminary injunction pursuant to ORCP 78 if a threatened or existing nuisance under this chapter creates an emergency that requires immediate action to protect public health, safety or welfare. In such instances, the notice requirements of Section 5.04.060(C) need not be satisfied.

SECTION 18.

§5.20.170 of the Toledo Municipal Code is amended, to read as follows:

5.20.170 Enforcement of Closure Order; Costs.

The court may authorize the City to physically secure the medical marijuana facility or recreational marijuana facility against use or occupancy in the event that the owner or person or entity in charge of the facility fails to do so within the time specified by the court. In the event that the City is authorized to secure the premises, all costs incurred by the City to effect a closure shall be allowed and recovered as provided under ORCP 68. As used in this section, “costs” include those reasonable and necessary expenses incurred by the City for the physical securing of the premises.

SECTION 19.

§5.20.180 of the Toledo Municipal Code is amended, to read as follows:

5.20.180 No Vested or Nonconforming Rights.

Neither this chapter nor any other provision of the Toledo Municipal Code, or any action, failure to act, statement, representation, certificate, approval, or permit issued shall create, confer or convey any vested or nonconforming right or benefit regarding any medical marijuana business, medical marijuana facility, recreational marijuana facility, or other facility that is prohibited by this chapter.

SECTION 20.

§5.20.190 of the Toledo Municipal Code is amended, to read as follows:

5.20.190 Public Nuisance Declared.

Operation of any medical marijuana facility or recreational marijuana facility within the City in violation of the provisions of the Toledo Municipal Code is hereby declared a public nuisance and shall be abated pursuant to all available remedies.

SECTION 21.

§5.20.200 of the Toledo Municipal Code is amended, to read as follows:

5.20.200 Chapter 5.04, business licenses generally, is applicable.

Except for the definition of “person” in Section 5.04.020, the exemption in Section 5.04.120(F), the classification of a violation in Section 5.04.130, and as otherwise provided in this chapter, all requirements as set forth in Chapter 5.04 are applicable to both the operation of a medical marijuana facility and a recreational marijuana facility. Where the provisions of Toledo Municipal Code Chapters 5.04 and 5.20 conflict, the provisions of 5.20 shall apply.

SECTION 22.

§5.20.210 of the Toledo Municipal Code is amended, to read as follows:

5.20.210 Fees.

Fees specified in this chapter shall be set by City resolution.

SECTION 23.

§5.20.220 of the Toledo Municipal Code is amended, to read as follows:

5.20.220 Severability.

The sections and subsections of this chapter are severable. If any part of this chapter is held unconstitutional or otherwise invalid, the remaining parts shall remain in force unless:

A. The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional or invalid part that it is apparent that the remaining parts would not have been enacted without the unconstitutional or invalid part; or

B. The remaining parts, standing alone, are incomplete and incapable of being executed according to the legislative intent.

SECTION 24.

§5.20.230 of the Toledo Municipal Code is amended, to read as follows:

5.20.230 Confidentiality.

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

1. The disclosure of licensee names and facility addresses.
2. The disclosure of general statistics in a form which would prevent identification of financial information regarding a facility.
3. The presentation of evidence to a court, or other tribunal having jurisdiction in the prosecution of any criminal or civil claim, by the City.
4. The disclosure of information upon request of a local, state, or federal law enforcement official.
5. The disclosure of information under the Oregon Public Records Law.

SECTION 24.

This Ordinance being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist and this Ordinance shall take effect upon its passage.

APPROVED AND ADOPTED by the City Council of the City of Toledo, Oregon on this ____ day of _____, 2016.

APPROVED by the Mayor of the City of Toledo, Oregon, on this ____ day of _____, 2016.

APPROVED:

Billie Jo Smith, Mayor

ATTEST:

Nancy Bryant, City Recorder

