

**ORDINANCE 2014 - 782**

**AN ORDINANCE OF THE CITY OF MILL CREEK, WASHINGTON, ESTABLISHING A NEW MILL CREEK MUNICIPAL CODE SECTION 17.22.140, EXPRESSLY PROHIBITING THE PRODUCTION, GROWTH, MANUFACTURE, PROCESSING, OR SALE OF, OR ACCEPTING DONATIONS FOR MARIJUANA OR MARIJUANA INFUSED PRODUCTS WITHIN THE CITY; ESTABLISHING AN EFFECTIVE DATE; AND TERMINATING THE EFFECTIVENESS OF MILL CREEK ORDINANCE NOS. 2013-767 AND 2014-775 UPON THIS ORDINANCE BECOMING EFFECTIVE**

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WHEREAS, since 1970, federal law has prohibited the manufacture, delivery and possession of marijuana as a Schedule I drug, based on the federal government's categorization of marijuana as having a "high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment." *Gonzales v. Raich*, 545 U.S. 1, 14 (2005), Controlled Substance Act (CSA), 84 Stat. 1242, 21 U.S.C. 801 et seq; and

WHEREAS, the voters of the state of Washington approved Initiative 692 (codified as RCW 69.51A in November 1998); and

WHEREAS, the intent of Initiative 692 was that qualifying "patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law," (RCW 69.51A.005), but that nothing in the law "shall be construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale or use of marijuana for non-medical purposes" (RCW 69.51A.020); and

WHEREAS, the Washington State Legislature passed ESSB 5073 in 2011, which provides that a qualifying patient or his/her designated care provider are presumed to be in compliance, and not subject to state imposed criminal consequences, if they possess no more than 15 cannabis plants, no more than 24 ounces of usable cannabis (other qualifications apply); and

WHEREAS, Washington’s Governor vetoed all of the provisions relevant to medical marijuana dispensaries in ESSB 5073 but left the provisions relating to cultivation of marijuana for medical use by qualified patients individually and in collective gardens; and

WHEREAS, the Governor’s veto referenced the position of the United States Department of Justice and multiple United States Attorneys that state employees who license or assist marijuana operations in becoming licensed would not be immune from federal criminal liability for assisting the applicants or conspiring to assist the applicants violate federal law; and

WHEREAS, the City Council believes that the Governor’s veto of the provisions in ESSB 5073 on the subject of medical marijuana dispensaries should be interpreted to mean that this use is prohibited by state law, and it is already prohibited under federal law; and

WHEREAS, RCW 69.51A.085 permits up to ten qualifying patients to share in the responsibility to plant, grow, and harvest up to forty-five marijuana plants that contain no more than twenty-four usable ounces per patient so long as no usable marijuana is delivered to anyone other than the [up to] ten qualifying patients that share responsibility for the collective garden; and

WHEREAS, throughout the state, businesses are known to call medical marijuana dispensaries “collective gardens” despite the fact that they are operating a retail sales location with no on-site growing operation, have far more than ten participating customers, and their participating customers do not share in any responsibility for planting, growing, or harvesting the marijuana plants; and

WHEREAS, RCW 69.51A.140 allows local jurisdictions to adopt zoning requirements, business license requirements, and health and safety requirements covering the production, processing or dispensing of cannabis or cannabis products; and

WHEREAS, Section 5.04.070 of the MCMC prevents the City from issuing business licenses to any person “who uses or occupies or proposes to use or occupy any real property or

otherwise conducts or proposes to conduct any business in violation of the provisions of [the MCMC], the statutes of the state of Washington or any other applicable law or regulation;” and

WHEREAS, MCMC 5.04.080 grants the City Manager authority to revoke any city business license whenever the licensee, or any officer or partner thereof violates any federal, state or city law or regulation in connection with the business; and

WHEREAS, MCMC 17.01.020 requires all land uses within the City to comply with all applicable federal, state, regional and city laws; and

WHEREAS, because all manufacturing and delivery of marijuana is strictly illegal under federal law, MCMC Sections 5.04.070, 5.04.080, and 17.01.020 effectively prohibit any business operation or land use that involves manufacturing or delivering marijuana; and

WHEREAS, even in the absence of federal law, MCMC Sections 5.04.070, 5.04.080, and 17.01.020, prohibit marijuana dispensaries and “collective gardens” that deliver product to individuals who do not share in the responsibility for planting, growing, and harvesting the marijuana plants; and

WHEREAS, issuance of licenses that authorize businesses to engage in business activities that violate the federal CSA, could subject the City and/or its employees to criminal penalties under the federal CSA; and

WHEREAS, the City Council finds that there are likely harmful secondary effects associated with medical marijuana production and distribution which include but are not limited to the increased risk of invasion of medical marijuana business facilities for purposes of theft, burglary, and robbery resulting from the cash and medical marijuana maintained on production and dispensary sites; and

WHEREAS, such secondary effects could unnecessarily place Mill Creek residents and others in danger of bodily harm, increase police enforcement risks and costs, and generally create undesirable liability exposure for the City; and

WHEREAS, in November 2012, Washington voters passed Initiative Measure No. 502, which has since been codified within Chapters 46.04, 46.20, 46.61, and 69.50 of the Revised Code of Washington;

WHEREAS, Initiative Measure No. 502 contemplates a system by which the State Liquor Control Board will issue licenses to marijuana producers, processors, and retailers; and

WHEREAS, Initiative Measure No. 502 directs the State Liquor Control Board to develop rules and regulations to:

1. Determine the number of producers, processors and retailers of marijuana by county;
2. Develop licensing and other regulatory measures;
3. Issue licenses to producers, processors, and retailers at locations which comply with the Initiative's distancing requirements prohibiting such uses within one thousand feet of schools, day cares, public parks, libraries, and other designated facilities; and
4. Establish a process for cities to comment prior to the issuance of such licenses; and

WHEREAS, the State Liquor Control Board adopted marijuana licensing rules and accepted license applications between November 18, 2013 and December 20, 2013; and

WHEREAS, because any production, processing, or retail sales of marijuana remain strictly illegal under federal law, Initiative Measure No. 502's licensing scheme may be legally preempted by the federal CSA; and

WHEREAS, while the United States Department of Justice ("DOJ") issued a letter on August 29, 2013, indicating that enforcement of marijuana related regulations in Washington should primarily rest with state and local law enforcement agencies, the DOJ also stated that if robust measures were ineffective to guard against certain identified harms or in the event of reluctance on the part of the state to ensure against the occurrence of identified harms, the federal government reserved the right to enforce federal laws despite the state's regulatory structure, and to challenge the state licensing structure itself. In a letter dated August 30, 2013, and in response

to the letter from the DOJ, the National Sheriff's Association, the International Association of Chiefs of Police, the National Narcotic Officers Associations' Coalition, the Major Cities Chiefs Police Association, and the Association of State Criminal Investigative Agencies expressed extreme disappointment in the position of the DOJ; and

WHEREAS, Initiative Measure No. 502 does not curtail cities' legal authority to regulate business licenses and land uses within the City. However, the State Liquor Control Board's licensing rules do not include any process for determining whether state license applicants' proposed uses comply with local zoning or business license requirements; and

WHEREAS, as a result of the current rules' silence as to local zoning and business license requirements, there is a risk that businesses will obtain state licenses to engage in business within the City of Mill Creek without regard for whether such businesses comply with City zoning and business licenses requirements; and

WHEREAS, although the City's zoning and business license requirements will continue to apply regardless of the existence of the state issued license, the conflicting state licenses could cause confusion and unnecessary expense if the City's laws do not explicitly address marijuana uses; and

WHEREAS, for the City to permit and/or license marijuana businesses to operate within the City while such activities violate federal law, the City would need to amend the Municipal Code in order to allow licensing and permitting of activities that violate federal law; and

WHEREAS, issuance of a City license or permit authorizing activities that violate the federal CSA could be deemed by the federal government to be violations of the federal CSA and potentially subject the City and/or its employees to liability, arrest, and/or federal prosecution; and

WHEREAS, On July 23, 2013, the City Council passed Ordinance 2013-767 establishing a moratorium on acceptance and processing of applications or approvals for building and land

use permits and/or business licenses associated with marijuana collective gardens or other marijuana businesses/activities, including but not limited to, marijuana production, processing and distribution within the City of Mill Creek to allow time for staff to work with the Planning Commission in a public process to prepare amendments to the development code relative to the City's approach to regulating marijuana-based businesses; and

WHEREAS, on January 14, 2014, the City Council passed Ordinance 2014-775 extending the moratorium on acceptance and processing of applications or approvals for building and land use permits and/or business licenses associated with marijuana collective gardens or other marijuana businesses/activities, including but not limited to, marijuana production, processing and distribution within the City of Mill Creek for an additional six months to provide sufficient time to finalize a zoning amendment; and

WHEREAS, in 2005, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the United States Supreme Court determined that intrastate regulation of marijuana by the federal government is a valid exercise of the power of Congress and that in the event of a conflict between a state law that permits marijuana production, processing, distribution and possession and the federal CSA, the federal CSA will be deemed supreme. Therefore, it is unlikely that a court will determine that a state law can require a city to permit a land use or license a business that constitutes a federal crime under the federal CSA; and

WHEREAS, as a non-charter code city, Mill Creek has specific authority to determine the appropriate uses of land through its zoning authority. Initiative Measure No. 502 contained no language specifically limiting the authority of cities to determine whether to permit marijuana land uses within city boundaries. In addition, the Liquor Control Board rules provide that the issuance of a state license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to, building and fire codes, zoning ordinances, and business licensing requirements; and

WHEREAS, the production, processing, and retail sale of marijuana, which remains illegal under federal law, has only recently become a permitted activity under Washington state

law. Colorado is the only other state that permits the retail production, processing and sale of marijuana. Thus, the land use impacts associated with state licensed production, processing and retail sale of marijuana have not been established and are not understood. However, medical marijuana businesses in this state and others have commonly been associated with increased crime, objectionable odors, and increased exposure to marijuana by children; and

WHEREAS, it is unknown whether the state of Washington's regulatory scheme for recreational marijuana will sufficiently protect the federal government's enforcement priorities so as to continue avoiding federal enforcement of the federal CSA against marijuana businesses and/or the state's regulatory scheme; and

WHEREAS, the City of Mill Creek is primarily residential in character, with a focus on creating pedestrian and child friendly areas in which businesses locate. With the land use impacts of allowing marijuana land uses largely unknown, it is not in the best interest of the City to allow marijuana businesses that could potentially disrupt the City's character and serve as a nuisance to City residents; and

WHEREAS, although MCMC Sections 5.04.070, 5.04.080, and 17.01.020 effectively prohibit any business operation or land use that involves manufacturing or delivering marijuana, to avoid any room for differing interpretations, it is in the best interest of the City to explicitly prohibit all marijuana related land uses and businesses within the City; and

WHEREAS, the City Council is charged with the responsibility of amending Mill Creek Municipal Code (MCMC) land use and development regulations as set forth in RCW Chapter 35A.63 and MCMC Chapter 14.03; and

WHEREAS, the Growth Management Act, RCW Chapter 36.70A (GMA), specifically RCW 36.70A.040 and RCW 36.70A.120, requires the City to adopt development and zoning regulations to implement the City's Comprehensive Plan; and

WHEREAS, the City Council, Planning Commission and City staff have the authority under MCMC Chapter 17.38 to initiate amendments to MCMC Titles 14 through 17 of the MCMC; and

WHEREAS, the development code amendment in this Ordinance was reviewed by the City Attorney and found to be consistent with the Comprehensive Plan, the Washington State Planning Enabling Act (RCW Chapter 35A.63), the Growth Management Act, other state and federal regulations, and Title 17 of the MCMC; and

WHEREAS, the proposed amendment is subject to the provisions of the State Environmental Policy Act, RCW Chapter 43.21C and MCMC Chapter 18.04 (collectively "SEPA"); and

WHEREAS, on January 9, 2014, the City issued a SEPA threshold Determination of Non-Significance for the proposed amendment to the development code; and

WHEREAS, on January 24, 2014, the comment period for the Determination of Non-Significance expired and no comments were received; and

WHEREAS, on January 9, 2014, the proposed amendment was submitted to the Washington State Department of Commerce for review, as required by RCW 36.70A.106. On January 9, 2014, notice was received from the Department of Commerce that the City of Mill Creek had met the Growth Management Act notice to state agency requirements; and

WHEREAS, on January 16, 2014, the Planning Commission held a public hearing on the proposed amendment to the development code; and

WHEREAS, the Planning Commission has considered any public testimony, the staff recommendation and presentation, and the proposed amendment to the MCMC and found that the proposed amendment is consistent with the City's Comprehensive Plan, the Growth



Management Act, Title 17 of the MCMC, and other applicable state and federal law, will implement the Comprehensive Plan, and will benefit the public health, safety, and welfare.

WHEREAS, at the public hearing, following review and consideration, the Planning Commission adopted Resolution No. 2014-157 recommending to the City Council approval of this Ordinance; and

WHEREAS, during a regular meeting on May 27, 2014, staff presented the Planning Commission recommendation to the City Council; and

WHEREAS, the City Council reviewed the materials described above and, after review and consideration, concurs with and adopts the findings and recommendations as contained in Planning Commission Resolution No. 2014-157; and

WHEREAS, the City Council finds that the proposed amendment is consistent with the City's Comprehensive Plan, the Growth Management Act, and other applicable state and federal laws; will implement the Comprehensive Plan; will benefit the public health, safety, and welfare; and should therefore be adopted as a final amendment to the MCMC; and

WHEREAS, this Ordinance is not intended to address or affect existing City, state and federal laws that apply to personal use and possession of marijuana;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MILL CREEK, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. The City Council hereby adopts and establishes a new Mill Creek Municipal Code Section 17.22.140 that reads as follows:

17.22.140 Marijuana

No person or entity may produce, grow, manufacture, process, accept donations for, or sell marijuana or marijuana infused products within the City.

Section 2. If any section, subsection, paragraph, sentence, clause or phrase of this ordinance or its application to any person, zoning district, or situation be declared


unconstitutional or invalid for any reason, such decision shall not affect the validity of the remaining portion of this ordinance or its application to any other person, zoning district, or circumstances. The City Council of the City of Mill Creek hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, portions, or applications thereof be declared invalid or unconstitutional as to one or more persons or classes of persons, zoning districts, or individual circumstances.

Section 3. This Ordinance, being an exercise of power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect five days after passage and publication of an approved summary thereof consisting of the title.

Section 4. The moratorium established in Ordinance No. 2013-767 and extended by Ordinance No. 2014 - 775 shall terminate upon this Ordinance taking effect.

Passed by the City Council this 27th day of May 2014, by a vote of 7 for, 0 against, and 0 abstaining.

APPROVED:

  
MAYOR PAM PRUITT

ATTEST/AUTHENTICATED:

  
KELLY M. CHELIN, CITY CLERK

APPROVED AS TO FORM:

  
SHANE MOLONEY, CITY ATTORNEY

FILED WITH THE CITY CLERK: 5/27/14  
PASSED BY THE CITY COUNCIL: 5/27/14  
PUBLISHED: 6/1/14  
EFFECTIVE DATE: 6/6/14  
ORDINANCE NO.: 2014-782