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March 15, 2018

Councilor Hugh Dunn, Chairman
Committee on Ordinances
133 William Street
New Bedford, MA 02740

RE: PROPOSED ZONING ORDINANCE TEXT AMENDMENT
TEMPORARY MORATORIUM ON RECREATIONAL MARIJUANA ESTABLISHMENTS

Dear Chairman Dunn,

This is to advise you that the Planning Board met on Wednesday, March 14, 2018 to discuss the proposal to amend the city's Zoning Ordinance Chapter 9 Comprehensive Zoning, Section 5700 Planning Moratorium for the purpose of adding Section 5720 Temporary Moratorium on Recreational Marijuana Establishments, so as to allow for sufficient time to address the effects of such structures and uses in the City and to enact the zoning ordinance in a consistent manner.

Assistant City Solicitor Elizabeth Treadup Pio spoke in support of the moratorium and answered questions from the Board. She explained the temporary moratorium is being requested until September 30, 2018 or until such time as the city adopts a zoning ordinance relating to marijuana establishments, whichever occurs first. Attorney Pio confirmed other local communities have adopted moratoriums or are in the process of adopting them.

No one spoke in favor of the request nor asked to be recorded in favor of such; similarly, no one asked to be recorded or recognized as being in opposition to this request. Planning board members expressed support for the moratorium to provide the city time to review the regulations recently released by the Cannabis Control Commission yet also noted the need for local regulations to be developed expeditiously.

After closing the public hearing and without further deliberation, **a motion was made in the affirmative to recommend that the City Council approve the adoption of a Temporary Moratorium on Recreational Marijuana Establishments as proposed.** The motion passed unanimously on a vote of 4-0. As such the Planning Board sends a favorable recommendation for this proposal and includes a copy of the original Staff Report in this matter for the Council's convenience and reference.

Sincerely,

Kirsten Bryan
Acting City Planner

cc. John Mitchell, Mayor
Danny Romanowicz, Building Commissioner

Mikaela McDermott, City Solicitor
Dennis Farias, City Clerk



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STAFF REPORT

REPORT DATE

March 1, 2018

PLANNING BOARD MEETING

March 14, 2018

ZONING TEXT AMENDMENT : Temporary Moratorium on Recreational Marijuana Establishments

Proposal: Adoption by City Council of an amendment to Chapter 9, Comprehensive Zoning, Section 5700, inserting new sections (Sections 5720 – 5723) that would effectively establish a temporary moratorium on recreational marijuana establishments in the City of New Bedford. The Planning Board's recommendation in this matter is requested by the Council.

Overview: In the November 2016 general election, Massachusetts voters approved a law regulating the cultivation, processing, distribution, possession and use of marijuana for recreational purposes. Regulations governing the licensing of commercial activities for such purposes will be generated by the Commonwealth's "Cannabis Control Commission" (CCC). Cities have the right to enact zoning to regulate the time, place and manner of recreational marijuana under the existing law for themselves. However, there is no opportunity for cities like New Bedford to weigh-in with the CCC on the awarding of licenses, if the applicant is in compliance with local zoning.

At its April 12, 2017 meeting, the Planning Board was asked to consider a moratorium. In a unanimous vote, the Planning Board voted *"to recommend to the City Council that the City of New Bedford establish a temporary moratorium on recreational marijuana establishments."* Subsequent to this recommendation, however, the City Council did not vote to impose the temporary moratorium.

On December 21, 2017, the CCC filed a first draft of regulations for the purpose of implementing the legality of adult use of marijuana. The draft—935 CMR 500.000, is expected to be finalized on or before March 15, 2018, and it plans to have its procedures in place and begin licensing marijuana establishments (including marijuana retailers) as early as June 2018.

So why a temporary moratorium? The City of New Bedford's zoning ordinance does not specifically address non-medical marijuana land uses nor does it provide for facilities engaged in the production and/or sale of recreational marijuana. Because of this, and in light of the impending reality that such facilities may look to locate in New Bedford, it is important to decide the "where, how, and to what extent" such facilities will be allowed within the city. As the proposed Section 5721 notes, "the regulation of recreational marijuana introduces new legal, planning and public safety issues..." Such issues necessitate time to study and consider how the city might best "address these issues and the potential impact of State regulations on local zoning..." A temporary moratorium on recreational marijuana establishments will afford New Bedford the opportunity to appropriately plan for such uses for the long term.

Why not just draft a zoning amendment right now instead of adopting a temporary moratorium? Why wouldn't the City of New Bedford simply draft an ordinance right now so that it is adopted and in place by April of 2018? The draft regulations issued by the CCC are going through a public process and comments are being accepted that will be the tentative framework for the regulatory system in Massachusetts. These rules are subject to change based on public comments. A final set of regulations will then be filed with the Secretary of State in March.

Unfortunately, because final regulations have yet to be established by the Commonwealth and the draft regulations are subject to change, based on public comment, there remain questions with regard to the final form in which the regulations will be adopted. Therefore staff would argue that it would be a premature exercise to try and develop the city's own land use regulations at this point since there's no clarity on what might be coming before it once the licensing opens up. However, with a temporary moratorium in place, the city would be protected against having facilities come in without having first had the opportunity to enact appropriate land use measures.

What is being proposed? After significant research, meetings and due diligence with state officials as to the implications for the city given the results of the November 2016 referendum, the Mayor's Office and Solicitor's Office have proposed a zoning text amendment that would temporarily prohibit the establishment of any recreational marijuana facilities. This measure would serve as a "pause" button and allow the City time to study and consider whether to adopt additional regulations related to recreational marijuana. The prohibition would be temporary in nature, running only until September 30, 2018 or until the city adopts new ordinance language addressing this use, whichever comes first.

On establishing a moratorium...

Zoning moratoriums are a legal mechanism to prevent development until after a municipality has established rules. The United States Supreme Court has upheld the government's authority to implement temporary moratoria. In determining the reasonableness of a moratorium, courts typically review whether:

- the moratorium advances a legitimate governmental interest
- the governmental action represents diligence and good faith
- the moratorium is applied equally and fairly
- the moratorium does not deprive the property owner/s of all reasonable use for too long a time

With respect to the proposed moratorium: the city's interest in addressing land use and public safety considerations would be furthered, the action reflects a careful assessment of existing and anticipated conditions, the moratorium would apply city-wide and it would only be a temporary means to an end.

For these reasons, staff finds that the moratorium as proposed does meet these tests of reasonableness.

On the temporary nature of the moratorium...

Many courts have consistently held that temporary restraints of property rights are a valid exercise of police power. In this way, a temporary zoning moratorium is a valid stopgap or interim measure that the city can invoke to consider comprehensive zoning changes. The MA Attorney General's Office approved a temporary moratorium on recreational marijuana businesses as recently as this past January in the town of West Bridgewater, citing that the moratorium was "consistent with the Town's authority to impose reasonable time limitations on development so that the Town can engage in legitimate planning study."² In this proposal, the moratorium would end September 30, 2018 (or on the date a new zoning ordinance addressing recreational marijuana is adopted and effective if earlier), and will ensure that once the Commonwealth's "interim" licensing regulations are in place and a subsequent "final" licensing regulation is adopted (as is anticipated), the city will have sufficient time to properly develop its new zoning in a way that appropriately reflects state regulations.

For this reason, staff finds that the temporary nature of the moratorium to be within the scope allowed by the courts.

Staff recommendation: While the introduction of the sale of recreational marijuana has been decided by the Commonwealth's electorate, and the governance on the awarding of licensing for recreational marijuana establishments will be determined by the CCC, it is the City of New Bedford's responsibility to impose reasonable safeguards regulating the time, place and manner of such facilities. Doing so thoughtfully and retrospectively in light of final state regulations to be promulgated in March 2018, will afford the city the time it needs to comprehensively approach and adopt new zoning. As such, staff recommends that the Planning Board recommend the adoption of the proposed temporary moratorium to the City Council.

¹ (Tahoe-Sierra Preservation Council, Inc. et al. v. Tahoe Regional Planning Agency et al., 535 U.S. 302).

² MA Municipal Association (MMA) <https://www.mma.org/ag-ok%E2%80%99s-local-temporary-moratorium-recreational-marijuana-businesses>