



**CITY COUNCIL
WORK SESSION AGENDA
July 12, 2021, at 7:00 p.m.**

City Hall Council Chambers, 201 First Avenue East

The public can participate in person in the council chambers or via videoconferencing.

Register to join the video conference at:

https://us02web.zoom.us/webinar/register/WN_oHamofDVRg-eGRLm0Ibew.

Public comment can also be provided via email to publiccomment@kalispell.com.

A. CALL TO ORDER

B. DISCUSSION ITEMS

1. Montana Marijuana Regulation and Taxation Act

C. PUBLIC COMMENT

Persons wishing to address the council are asked to do so at this time. Public comment can be provided in person, verbally during the online meeting, or via email to publiccomment@kalispell.com

D. CITY MANAGER, COUNCIL, AND MAYOR REPORTS

E. ADJOURNMENT

UPCOMING SCHEDULE / FOR YOUR INFORMATION

Next Regular Meeting – July 19, 2021, at 7:00 p.m. – Council Chambers

Next Work Session – July 26, 2021, at 7:00 p.m. – Council Chambers

Watch City Council sessions live on Charter Cable Channel 190 or online at the [Meetings on Demand](#) tab at www.kalispell.com.



City of Kalispell

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MEMORANDUM

To: Honorable Mayor Johnson and City Council
From: Doug Russell, City Manager
Re: Montana Marijuana Regulation and Taxation Act
Meeting Date: July 12, 2021

BACKGROUND: At a previous work session, the Council reviewed the “Montana Marijuana Regulation and Taxation Act” (HB 701) which was signed into law. Attached to this memo is a breakdown of the Act and how it impacts local governments.

The discussion at the previous meeting also reviewed components for the City of Kalispell to address related to zoning within municipal limits as the City of Kalispell currently does not have provisions for this type of commercial activity within our zoning code. As described at the meeting and in the attachment, there are various approaches the Council can consider for the zoning of this industry within the municipal limits. It was agreed to resume this discussion at a future date in order to provide further direction so we can begin preparing the appropriate ordinance changes required to comply with the Act.

RECOMMENDATION: It is recommended that the City Council review the materials provided, engage in further discussion, and provide guidance to staff for appropriate changes within the zoning code.

City of Kalispell

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MEMORANDUM

To: Doug Russell, City Manager

From: Johnna Preble, Assistant City Attorney
PJ Sorensen, Senior Planner

Subject: Marijuana Dispensaries/Retail Stores

Meeting Date: June 28, 2021 (Work Session)

I. Background

On May 18, 2021, Governor Greg Gianforte signed House Bill 701 (“HB 701”) legalizing adult use of marijuana in the State of Montana. HB 701, now entitled the “Montana Marijuana Regulation and Taxation Act” (“Act”), has since been codified under Title 16, Chapter 12 of the Montana Code Annotated (“MCA”).

The Act provides that, effective October 1, 2021, the Department of Revenue (“Department”) shall issue licenses for “adult-use dispensaries established by adult-use providers or adult-use marijuana-infused products providers.”¹ Under the Act, “[a] person who obtains an ... adult-use dispensary license or an employee of a licensed adult-use provider or marijuana-infused products provider is authorized to cultivate, manufacture, possess, sell, and transport marijuana as allowed by [the Act].”

The Act gives local governments the authority to regulate adult-use providers and adult-use marijuana-infused product providers that operate within the local government’s jurisdictional area.

The Department must start accepting applications for licenses on or before January 1, 2022. Importantly, the Act explicitly encourages local governments to begin the process to approve any or all marijuana business categories beginning on July 1, 2021. The City of

¹ An “adult-use provider” is “a person licensed by the [D]epartment to cultivate and process marijuana for consumers as allowed by [the Act].” An “adult-use marijuana-infused products provider” is “a person licensed by the [D]epartment to manufacture and provide marijuana-infused products for consumers as allowed by [the Act].”

Kalispell will likely see providers intending to open marijuana dispensaries licensed by the Department as early as January 31, 2022.²

II. Zoning Questions Regarding Marijuana Dispensaries

Currently, Section 27.03.010(8) of the Zoning Ordinance states that “No use of land shall be permitted or conditionally permitted within the City of Kalispell that is in violation of federal, state, or local law.” That section currently prevents marijuana dispensaries, cultivation, and processing within the city. With the recent changes in state law, that should be revisited. There are a couple different approaches we could take:

- (1) While dispensaries are not listed as a specific use, Section 27.02.030 allows the Zoning Administrator to classify a use with the closest listed use. A dispensary in many senses is a retail business, just like a liquor store or pharmacy, for example. Both of those uses are permitted in all of the business and health care zones. We could allow it as a permitted use without restrictions under the current ordinance by considering it as a retail use. There certainly would be concerns about how they would fit into the community, but it is an option.
- (2) Similarly, cultivation is not a listed use within the ordinance, but could be considered to fall under “greenhouse, nursery centers and landscaping materials” by its definition or an “agricultural or horticultural” use. Processing might be considered to be accessory to those uses, or could fall under a manufacturing/industrial category. As with dispensaries, simply using existing categories may not adequately address how to best fit the use within the community.
- (3) Casinos were discussed at the Council level several years ago. In that context, the Council limited the zones where casinos could operate and placed certain criteria on them, such as distances from churches, schools, parks, city residential zones, federal highways and other casinos. They created an “accessory casino” classification for casinos that did not meet the buffer requirements. Design criteria were added to provide a separation from the primary use (eg a bar or restaurant) and generally shield it from view both externally and internally.

We could create categories for marijuana dispensaries, cultivation, and processing, and attach criteria that would mitigate some of the impacts. Those criteria could include a conditional use permit or an administrative conditional use permit, buffers from certain types of uses, or other design standards. Whether or not a conditional use permit is helpful in this situation would be something to discuss, as would be

² HB 701 provides that for the first 18 months only medical marijuana providers approved by the State by November 3, 2020, will be licensed by the Department. New providers may apply for licenses beginning July 1, 2023.

what other criteria would be appropriate. We also could simply limit them to certain zones (eg industrial) with or without criteria.

SUMMARY OF POTENTIAL ZONING APPROACHES

For discussion by the Council, there are a couple general directions that could be taken in how the City should approach these uses as we look to integrate the new state legislation into the zoning ordinance:

- (1) We could create separate use categories for dispensaries, cultivation, and processing, and place each as a permitted use within an appropriate zoning district. The allowed districts may include all or most commercial/industrial zones (B-1, B-2, B-3, B-4, B-5, H-1, I-1, and I-2), or could be restricted to a more limited scope. Casinos (as opposed to accessory casinos connected with a bar or restaurant, for example), are limited to only the B-5 with a conditional use permit. Similarly, sexually oriented businesses are only allowed in the I-1 and I-2 industrial zones with a conditional use permit. Marijuana related businesses could be similarly restricted to certain zones.
- (2) Along with creating use categories and placing them within certain zoning districts, the Council also could consider certain standard criteria for each use. Criteria could include buffers from other marijuana establishments and residential zones, as well as schools and churches (although there is already a buffer from those uses under the state statute).³ The Council also should consider whether a conditional use or administrative conditional use permit should be necessary.

III. Legal Issues Regarding Marijuana Dispensaries

A. Election

Under the Act, qualified electors of a municipality or of a county may request an election on whether to prohibit by ordinance any or all marijuana business categories from being located within the jurisdiction. An election pursuant to this section may be held in conjunction with a regular election of the governing body, general election, or a regular local or special election.

B. Limits on Ordinances and Regulations of Local Governments

While the Act allows local governments to create regulations and ordinances regarding marijuana dispensaries, it also places limits on that power. First, the Act states that any ordinance or regulation must be set in place “[t]o protect the public health, safety, or welfare.” While the Act’s language is broad, it would be crucial that the city articulate a clear health, safety, or welfare purpose behind any regulation or ordinance adopted and provide a detailed explanation of how the regulation or ordinance is narrowly tailored to address that purpose.

³ HB 701 requires that a marijuana business not be within 500 feet of a school or place of worship. Additionally, the bill states that municipalities may not reduce the 500-foot spacing between a marijuana business and a place of worship or school. This has not made it into the MCA, yet.

Additionally, a discrepancy exists between the language of HB 701 and the Act as codified in the MCA. Section 16-12-201(1)(b), MCA, states that “a local government may not adopt ordinances or regulations that are unduly burdensome.” “Unduly Burdensome” is defined in § 16-12-102, MCA, as “requiring such a high investment of money, time, or any other resource or asset to achieve compliance that a reasonably prudent businessperson would not operate.” However, HB 701 struck both the restriction on local governments and the definition of “Unduly Burdensome.” It remains unclear whether the discrepancy is merely an error and what the State will ultimately do to fix it. At this point, the “unduly burdensome” language is broad and will likely result in litigation. Therefore, the City would benefit from erring on the side of caution with any ordinance or regulation adopted, especially prior to any guidance that might come from the Department in October as described in Section E below.

Finally, HB 701 requires license applicants to comply with local ordinances and regulations to obtain licenses. Thus, the City should send certified copies of any ordinance or regulation to the Department once adopted.

C. Local Government Taxing Authority

HB 701 states that the qualified electors of a *county* may authorize their *county* to impose a local-option marijuana excise tax within the corporate boundary of the *county*. The Act states, “The rate of the local option marijuana excise tax must be established by the election petition or resolution ... and the rate may not exceed 3% [of the retail value of all marijuana and marijuana products sold at an adult use dispensary or medical marijuana dispensary].” If the tax is imposed by the county, 50% of the resulting tax revenue must be retained by the county and 45% must be apportioned to the municipalities on the basis of the ratio of the population of the city or town to the total county population. The remaining 5% must be retained by the Department and deposited into the state special revenue account.

HB 701 allows for broad use of the tax revenue, stating:

Unless otherwise restricted, a county or municipality may appropriate and expend revenue derived from a local-option marijuana excise tax for any activity, undertaking, or administrative service that the municipality is authorized by law to perform, including costs resulting from the imposition of the tax or due to administrative burdens imposed on the municipality as a result of licensing or regulatory requirements imposed in this chapter.

In summary, should Flathead County impose the excise tax, the City of Kalispell would receive a portion of 45% of the tax revenue based on the population as compared to other municipalities in the county, but the City could use that portion for any lawful purpose.⁴

⁴ As an example of an appropriate use of the tax revenue, the City could use the revenue to both employ and train a Drug Recognition Expert through the Kalispell Police Department to address issues in the prosecution of marijuana and other drug DUI cases.

D. Advertising and Signage

HB 701 prohibits persons with licenses from advertising marijuana or marijuana products in any medium, including electric media.⁵

E. Guidance from Department of Revenue

The MCA requires the Department to “promulgate rules and regulations to administer and enforce [the Act]” “[n]o later than October 1, 2021.”⁶ The MCA states that the rules provided by the Department “may not be unduly burdensome.”⁷ *Id.* The Department may provide more guidance to local governments through the new rules and regulations.

⁵ Another discrepancy between HB 701 and the MCA exists in this section. Section 16-12-211 states that persons with licenses may not advertise “marijuana or marijuana-*related* products in any medium, including electronic media.” (Emphasis added.) It remains unclear whether marijuana dispensaries/stores will use this as a loophole to advertise paraphernalia or other items for sale.

⁶ Yet another discrepancy between HB 701 and the MCA. HB 701 struck language requiring the Department to have rules out by October 1. However, the Department’s website states, “The Department of Revenue is currently evaluating what rules and processes are necessary for about these topics.”

⁷ As stated above, HB 701 removed the language defining “unduly burdensome.”