ORDINANCE NO. 797

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX ADDING A NEW ARTICLE III ('MEDICAL MARIJUANA CULTIVATION') TO CHAPTER 17.138 ('REGULATIONS APPLYING IN MULTIPLE DISTRICTS') OF TITLE 17 ('ZONING') OF THE FAIRFAX TOWN CODE

WHEREAS, in 1996, California voters enacted "The Compassionate Use Act" through passage of Proposition 215 (codified at Health & Safety Code § 11362.5, *et seq.*) to allow eligible patients to cultivate, possess, and use medical marijuana without fear of prosecution under enumerated state laws; and

WHEREAS, seven years later, in 2003, the California Legislature adopted and the Governor signed into law "The Medical Marijuana Program" through Senate Bill 420 (codified at Health & Safety Code § 11362.7, *et seq.*), which established a system of collectives and cooperatives for the purposes of cultivating medical marijuana for consumption by eligible patients; and

WHEREAS, neither the Compassionate Use Act nor the Medical Marijuana Program limit the police power of the Town of Fairfax to regulate the use of land within the Town's municipal boundaries; and

WHEREAS, in June 2011, the Town Council of the Town of Fairfax adopted Ordinance No. 759 ("Medical Marijuana Dispensaries," codified at Fairfax Town Code Chapter 5.52) to regulate the review process and development standards applicable to the operation of medical marijuana dispensaries in Town, but was silent on the cultivation of medical marijuana;

WHEREAS, in October 2015, Governor Edmund Brown signed into law a trio of legislation, Assembly Bill 266 (Bonta, Cooley, Jones-Sawyer, Lackey, Wood), Assembly Bill 243 (Wood) and Senate Bill 643 (McGuire), that establish a new state regulatory framework regarding medical marijuana ("The Medical Marijuana Regulation and Safety Act" or the "Act"); and

WHEREAS, in February 2016, Governor Edmund Brown signed into law AB 21 (Wood), thereby amending the Act to delete a provision granting the California Department of Food and Agriculture, beginning March 1, 2016, the sole licensing authority for medical marijuana cultivation applicants in any city or county that lacked land use regulations or ordinances regulating or prohibiting the cultivation of marijuana; and

WHEREAS, AB 21 likewise clarified the limits of an exemption that the Act grants to qualified patients or primary caregivers who cultivate medical marijuana pursuant to the Compassionate Use Act. It did so by deleting language stating that the exemption does not limit or prevent a city, county, or city and county from regulating or banning the cultivation, storage, manufacture, transport, provision, or other activity by the exempt person, or impair the enforcement of that regulation or ban, and adding language stating that the exemption does not limit or prevent a city or county from exercising its police power recognized in the California constitution; and

WHEREAS, among other provisions, the Medical Marijuana Regulation and Safety Act establishes a system whereby individuals wishing to conduct commercial cannabis activity, which

includes the cultivation of medical marijuana, must seek a license to permit such activity. These licenses will be issued by the State, as well as cities, provided cities elect to permit such cultivation within their municipal boundaries and establish their own licensing system through the adoption of a local ordinance to that effect. Cities retain their police power to prohibit or otherwise limit the cultivation of medical marijuana within their borders; and

WHEREAS, new Section 11362.777(g) of the Health & Safety Code also provides that:

"[S]ection [11362.777] does not apply to a qualified patient cultivating marijuana pursuant to Section 11362.5 if the area he or she uses to cultivate marijuana does not exceed 100 square feet and he or she cultivates marijuana for his or her personal medical use and does not sell, distribute, donate, or provide marijuana to any other person or entity. This section does not apply to a primary caregiver cultivating marijuana pursuant to Section 11362.5 if the area he or she uses to cultivate marijuana does not exceed 500 square feet and he or she cultivates marijuana exclusively for the personal medical use of no more than five specified qualified patients for whom he or she is the primary caregiver within the meaning of Section 11362.7 and does not receive remuneration for these activities, except for compensation provided in full compliance with subdivision (c) of Section 11362.765. For purposes of this section, the area used to cultivate marijuana shall be measured by the aggregate area of vegetative growth of live marijuana plants on the premises. Exemption from the requirements of this section does not limit or prevent a city, county, or city and county from exercising its police authority under Section 7 of Article XI of the California Constitution;" and

WHEREAS, Section 7 of Article XI of the California Constitution states that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws;" and

WHEREAS, the Town Council of the Town of Fairfax desires to ban all cultivation of medical marijuana within the Town's boundaries, except for very limited personal cultivation that falls within subdivision (g) of Health & Safety Code § 11362.777; and

WHEREAS, the Town Council of the Town of Fairfax adopts this Ordinance in order to effect land use regulations regulating the cultivation of marijuana as an exercise of its police authority, as contemplated by Health & Safety Code § 11362.777.

NOW, THEREFORE, the Town Council of the Town of Fairfax does ordain as follows:

SECTION 1. The Town Council hereby finds that all of the foregoing recitals are true and correct and are hereby incorporated and adopted as findings of the Town Council as if fully set forth herein.

SECTION 2. Title 17 (Zoning'), Chapter 17.138 ('Regulations Applying in Multiple Districts') shall be amended to add the following:

"ARTICLE III: MEDICAL MARIJUANA CULTIVATION

17.138.310 PURPOSE.
It is the purpose of this Article to regulate the cultivation of marijuana within the Town of Fairfax; to require that the indoor cultivation of marijuana occur only in appropriately secured, enclosed, and ventilated structures so as not to be visible to the general public; to provide for the health, safety and welfare of the public; to prevent odor created by marijuana plants from impacting adjacent properties; and to ensure that marijuana grown for medical purposes remains secure and does not find its way to nonpatients or illicit markets. Nothing in this Article is intended to impair any defenses available to qualified patients or primary caregivers under the applicable state law or require such patients to receive a local license to cultivate. Nothing in this Article is intended to authorize the cultivation, possession, or use of marijuana in violation of state or federal law.

17.138.320 DEFINITIONS
As used in this Article, the following definitions shall apply:

AREA USED TO CULTIVATE MARIJUANA. The aggregate area of vegetative growth of live marijuana plants on the premises, pursuant to Health & Safety Code 11362.777(g).

CULTIVATION. The planting, growing, harvesting, drying, or processing of marijuana plants or any part thereof.

FULLY ENCLOSED AND SECURE STRUCTURE. A space within a dwelling unit that complies with the California Building Code, as adopted in the Town ("CBC"); or, if exempt from the permit requirements of the CBC, an accessory structure, on a lot or site containing a dwelling unit, having a complete roof and enclosure supported by connecting walls extending from the ground to the roof, a foundation, slab or equivalent base to which the floor is secured by bolts or similar attachments, is secure against unauthorized entry, and is accessible only through one or more lockable doors. In order to qualify as a fully enclosed and secure structure, the walls and roofs must be constructed of solid materials that cannot be easily broken through, such as two-inch by four-inch or thicker studs overlaid with three-eighths inch or thicker plywood or the equivalent. Plastic sheeting, regardless of gauge, or similar products, are not considered solid materials.

INDOORS. Within a fully enclosed and secure structure.

OUTDOOR. Any location exposed to the open air not within an enclosed structure or building.

PRIMARY CAREGIVER. A "primary caregiver" as defined in Health and Safety Code Section 11362.7, as amended.

QUALIFIED PATIENT. A "qualified patient" or a "person with an identification card" as defined in Health and Safety Code Section 11362.7, as amended.

TOWN. The Town of Fairfax.

17.138.330 CULTIVATION OF MARIJUANA.

(A) Outdoor Cultivation. Except as may otherwise be provided by this Ordinance, it is hereby declared to be unlawful and a public nuisance for any person owning, leasing, occupying, or having charge or possession of any lot or site within any zoning district in the Town to cause or allow such lot or site to be used for the outdoor cultivation of more than eighteen (18) mature marijuana plants.

(B) Indoor Cultivation. Except as may otherwise be provided by this Ordinance, it is hereby declared to be unlawful and a public nuisance for any person owning, leasing, occupying, or having charge or possession of any dwelling unit within any zoning district in the Town to cause or allow for the indoor cultivation of marijuana plants. When authorized by this Ordinance, indoor cultivation may only occur within a fully enclosed and secure structure.

(C) Only qualified patients or primary caregivers shall be permitted to cultivate marijuana under this Article.

(D "Any marijuana cultivation that would require a license or permit from the State of California per the Medical Marijuana Regulation and Safety Act of 2015 is prohibited within the Town of Fairfax. Nothing in this Ordinance is intended to abrogate any existing section of Town Code including, but not limited to, Section 5.52 Medical Marijuana Dispensaries.

17.138.340 STANDARDS FOR CULTIVATION OF MARIJUANA.

(A) Outdoor marijuana plants shall be located a minimum of five feet from property lines.

(B) Outdoor marijuana plants shall be located only in the rear and side yards of a lot or site, and are not permitted to be located in front yards of any lot or site.

(C) Outdoor marijuana plants shall be screened from public view as follows:

(1) No marijuana plants cultivated under this Article shall be visible from a public right-of-way.

(2) No marijuana plants cultivated under this Article shall exceed seven feet in height.

(3) Any lot or site upon which marijuana plants are cultivated under this Article shall have fencing of no more than six feet in height surrounding the lot or site or that portion of the lot or site upon which the plants are cultivated. In no event shall netting or plastic screening be used in conjunction with marijuana cultivation.

(D) Indoor grow lights shall not exceed 1,200 watts and comply with the California Building, Electrical, Plumbing and Fire Codes as adopted by the Town. Gas products (CO_2, butane, propane, natural gas, kerosene, etc.) or generators may not be used indoors or outdoors.

(E) All electrical equipment used in the cultivation or processing of medical marijuana (e.g. lighting and ventilation) shall be plugged directly into a wall outlet or otherwise hardwired; the use of extension cords to supply power to electrical equipment used in the cultivation or processing of medical marijuana is prohibited.

(F) A qualified patient cultivating marijuana pursuant to this Article shall limit the area of cultivation of any premises used to 100 square feet or less; shall cultivate only for his or her personal

medical use; and shall not sell, distribute, donate, or provide marijuana to any other person or entity, per Health & Safety Code § 11362.777(g).

(G) A primary caregiver cultivating medical marijuana pursuant to this Article shall limit the area of cultivation of any premises used to 500 square feet or less, subject to no more than 100 square feet or less per qualified patient; cultivate medical marijuana exclusively for the personal medical use of no more than five specified qualified patients for whom he or she is the primary caregiver (within the meaning of Health & Safety Code 11362.7), and shall not receive remuneration for such cultivation, except for compensation provided in full compliance with Health & Safety Code § 11362.765(c), per Health & Safety Code § 11362.777(g).

(H) Medical marijuana cultivation by a qualified patient or primary caregiver shall only occur on a parcel within a zoning district that permits residential uses and upon which an occupied dwelling exists. Either the qualified patient or primary caregiver shall reside in the residence where any medical marijuana cultivation occurs. Outdoor cultivation is prohibited on parcels within 200 feet of any public or private preschool, elementary, or middle school.

(I) Except as may otherwise be authorized in Section 17.138.350 below, an individual qualified patient shall only be allowed to cultivate medical marijuana at his or her private residence, and a primary caregiver shall cultivate medical marijuana only at the residence of a qualified patient for whom he or she is the primary caregiver, or at the primary caregiver's residence.

(1) If cultivation or processing is to be conducted by a primary caregiver, documentation of the legally-required relationship shall be maintained at the cultivation premises.

(2) A copy of documentation of qualified patient status must be maintained at any location at which medical marijuana cultivation occurs.

(3) No primary caregiver shall cultivate medical marijuana for any qualified patient who is also cultivating medical marijuana at his or her private residence.

(J) Any residence at which medical marijuana is cultivated under this Article shall maintain kitchen, bathrooms, and bedrooms for their intended use and not be used primarily for medical marijuana cultivation.

(K) All medical marijuana cultivation areas shall be in compliance with the current, adopted edition of the California Building Code as regards Mechanical Ventilation;

(L) No medical marijuana cultivation area shall be maintained or operated in such a way as to:

(1) adversely affect the health or safety of the nearby residents in any manner, including but not limited to by creating dust, glare, heat, noise, noxious gasses, odor, smoke, traffic, vibration, or other impacts, or be hazardous due to use or storage of materials, processes, products or wastes; or

(2) adversely affect the health or safety of the occupants of the residence or users of the accessory building in which it is cultivated, or occupants or users of nearby properties in any manner, including but not limited to creation of mold or mildew.

17.138.350 EXCEPTIONS.
(A) Any qualified patient or primary caregiver may seek a Medical Marijuana Administrative Exception to sections 17.138.340 and 17.138.330 of this Article, except for sections 17.138.340(F) or (G), from which no exceptions shall be granted.

(B) Any request for an exception to this Article shall be submitted to the Town Manager, along with documentation, such as a physician's recommendation, information regarding space limitations, or verification of more than one qualified patient living in the residence, demonstrating why a standard required by this Article is not feasible.

(C) The Town Manager who may grant a Medical Marijuana Administrative Exception only if the following findings can be made:

(1) The requested exception is not to section 17.138.340(F) or (G);

(2) The individual requesting the exception can demonstrate a medical need for the exception, as evidenced by the written recommendation of a treating physician;

(3) The requested exception shall not constitute a public nuisance, as set forth in 17.138.360.

(4) At a minimum, any interior medical marijuana cultivation area shall be constructed with a 1-hour firewall assembly if required by the Building Official.

(5) For indoor cultivation, the Building Official may require additional specific standards to meet the California Building Code and Fire Code, including but not limited to installation of fire suppression sprinklers and code-compliant electrical systems.

(6) The indoor cultivation of no more than six (6) mature marijuana plants shall be authorized through a Medical Marijuana Administrative Exception.

(C) The Town Manager, or his or her designee, shall prepare a written approval or denial of any request for an exception within ten business days of its submission to the Town. Approval of the requested exception may be made subject to conditions designed to lessen the impact of the exception on neighboring uses and the community generally.

(D) Any exception granted under this section shall be personal to the party to whom such exception was granted and shall not run with the land or otherwise be transferable.

(E) Notwithstanding any other provision of the Town Code, any person aggrieved by the decision of the Town Manager, or his or her designee, with respect to an exception requested under this Section 17.138.350 may appeal said decision within ten days of the date of the decision to the Planning Commission. Upon review, the Planning Commission shall issue the requested exception if it meets the requirements of Subsections (A) and (B) above, and subject to any conditions imposed per Subsection (C) above.

17.138.360 PUBLIC NUISANCE PROHIBITED.
It is hereby declared to be unlawful and a public nuisance for any person owning, leasing, occupying, or having charge or possession of any lot, site, dwelling unit, and/or fully enclosed and

secure structure within the Town to create a public nuisance in the course of cultivating marijuana plants or any part thereof in any location, indoor or outdoor. A public nuisance may be deemed to exist, if such activity produces: (a) odors which are disturbing to people of normal sensitivity residing or present on adjacent or nearby property or areas open to the public, (b) repeated responses to the parcel from law enforcement officers, (c) repeated disruption to the free passage of persons or vehicles in the neighborhood, (d) excessive noise which is disturbing to people of normal sensitivity on adjacent or nearby property or areas open to the public, or (e) any other impacts on the neighborhood which are disruptive of normal activity in the area.

17.138.370 ENFORCEMENT.

(A) Public Nuisance. The violation of this section is hereby declared to be a public nuisance and may be enforced pursuant to the provisions of Chapter 1.12 of the Fairfax Town Code.

(B) Seizure and Destruction of Marijuana. Except as otherwise expressly stated in this section, all marijuana seized by the Town police in the enforcement of this article shall be seized, retained and destroyed in the same manner and subject to the same procedures as are provided in California Health and Safety Code Sections 11472 through 11479, for marijuana possessed in violation of Division 10 of the Health and Safety Code.

(C) Right of Entry. The code enforcement officer, building official, planning director, chief of police, fire inspector, or a designee is authorized to enter upon and inspect private properties to ensure compliance with the provisions of this section. Reasonable advance notice of any such entry and inspection shall be provided and, before entry, consent shall be obtained in writing from the owner or other person in lawful possession of the property. If consent cannot for any reason be obtained, an inspection warrant shall be obtained from a court of law prior to any such entry and inspection. In those cases where consent is denied, the Town may seek to recover the costs it incurs in obtaining a warrant from the property owner and/or person in lawful possession of the property.

(D) Abatement. The Town attorney, in the name of and on behalf of the Town and/or the people of the Town, may bring a civil action in a court of competent jurisdiction to enforce any provision of this section, or to restrain or abate any violation of the provisions of this section as a public nuisance pursuant to the procedures set forth in Chapter 1.12 of the Fairfax Town Code.

(E) Violation. Cultivation of marijuana that does not comply with this section constitutes a violation of the zoning ordinance and is subject to the penalties and enforcement as provided in Chapter 17.004 of the Fairfax Town Code.

(F) Penalties Not Exclusive. The remedies and penalties provided herein are cumulative, alternative and nonexclusive. The use of one does not prevent the use of any others and none of these penalties and remedies prevent the Town from using any other remedy at law or in equity which may be available to enforce this section or to abate a public nuisance.

17.138.380 LIABILITY.

The provisions of this Article shall not be construed to protect the property owner(s) of record for property associated with the cultivation of marijuana, or their lessees, tenants or participants in the cultivation of marijuana, from prosecution pursuant to any laws that prohibit the cultivation, sale and/or possession of marijuana. In particular, the possession or cultivation of marijuana remains illegal under any circumstances pursuant to the laws of the United States, and this section is not

intended to protect the above-described persons from arrest or prosecution pursuant to the laws of the United States. The property owner(s) of record for property associated with the cultivation of marijuana, or their lessees, tenants and other participants in the cultivation of marijuana, assumes any and all risk and all liability that may arise or result under state and federal criminal laws from the cultivation of marijuana."

SECTION 3. The adoption of the ordinance is exempt from the California Environmental Quality Act (codified at California Public Resources Code §§ 21000, *et seq.*, and 14 California Code of Regulations §§ 15000, *et seq.*, collectively, "CEQA") because it is covered by the general rule set forth in 14 C.C.R. § 15061(b)(3) that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Here, the adoption of an ordinance regulating the cultivation of medical marijuana has no potential to cause a significant effect on the environment and is thus not subject to CEQA. In addition, even if the ordinance was subject to CEQA, it would be categorically exempt from further review per 14 C.C.R. §§ 15307 and 15308, as it is an action taken by a regulatory agency for the protection of natural resources and the environment.

SECTION 4. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance, or the application thereof to any person or place, is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remainder of this Ordinance. The Town Council hereby declares that it would have adopted this Ordinance, and each and every 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 5. This Ordinance shall be effective 30 days following its adoption by the Town Council. Copies of this Ordinance shall be posted within fifteen days after its passage and adoption in three public places in the Town of Fairfax, to wit: 1. Bulletin Board, Town Hall Offices; 2. Bulletin Board, Fairfax Post Office; and 3. Bulletin Board, Fairfax Women's Club Building, located at 46 Park.

The foregoing Ordinance was introduced at a meeting of the Town Council on the 1st day of June 2016, and duly adopted at the next regular meeting of the Town Council on the 3rd day of August 2016, by the following vote, to wit:

AYES: COLER, GODDARD, LACQUES, REED, WEINSOFF
NOES: None
ABSENT: None
ABSTAIN: None

Renée Goddard, Mayor

Attest: Michele Gardner, Town Clerk

8/04/16
Date