

City Council Workshop

Agenda Item #2

May 22, 2017

Question 1 Economic Potential
(Recreational Marijuana)

Councilor Rose has submitted a comprehensive proposal for dealing with the five categories of recreational marijuana that will eventually become eligible for licensure by the State of Maine as the result of the voters' passage of Question 1 last fall. As you know, there is a state-wide moratorium relative to this issue set to expire in February 2018 while state legislators grapple with the macro issues associated with legalized marijuana use. South Portland has its own moratoria on the zoning and licensure of retail marijuana, with the former set to expire on May 20th and the latter extended through November 2017.

The attached proposal is inextricably linked to the third item on your agenda. The third item – titled “Recreational Marijuana (Zoning & Licensing)” – was placed on your agenda for two reasons: 1) concerns were raised about the process (i.e. Council should see draft ordinance amendments before the Planning Board weighs in on them), and 2) concerns were raised about the draft document not reflecting the discussion had by Council at their workshop on this matter. As such, while we have included the draft ordinance in question in your meeting materials for reference, staff is not recommending its adoption *per se*. Rather, the intent of the next agenda item is to lay out specific questions for Council to address so staff can create a document that is in line with your intentions. However, Councilor Rose's proposal does appear to address most if not all of these questions, so depending on how you choose to proceed with this current agenda item, it may render moot parts or all of the discussion on your next item.

I envision that regardless of what Council decides to move forward with, another workshop would be held in the future with exact ordinance language to ensure it meets the satisfaction of the Council as a whole. It would then be brought forward to the Planning Board for their review.



City Manager



City Council

Workshop Proposal Form

Date Submitted: 4/5/2017

Title: Economic potential of home occupation under Q1;

Sponsored by Councilor(s) Eben Rose

Nature of Proposal: Information Exchange or Possible Council Action

If Possible Action: Resolve Order Ordinance

Summary/Description: This proposal acknowledges several detailed facts about Question 1 (ending prohibition of marijuana) and provides a regulatory framework in which local residents can benefit directly from this new market through cultivation as a home occupation and through secondary markets that home cultivation harbors.

Key points to consider are these:

- Q1 regulations govern retail cultivation in licensed "blocks" of 10' X 10' (=100 sq ft.) with the option for municipalities to further regulate retail activity. The proposal here is to permit no more than one single block per single family home.
- Retail cultivation is regulated so as to be secure and unnoticeable from outside the home; it is regulated to a greater degree than cultivation for personal use.
- Home cultivation for personal use cannot be regulated by municipalities and can occur in any private residence within the City.
- Entry into this market requires low capital investment and can yield significant returns.
- The single-block limitation favors small growers and allow local place-based economies to compete against large commercial operations that are not locally owned and operated.
- The "green rush" is coming regardless of personal proclivities; the concern here is whether and how South Portland inhabitants can benefit locally the most from this new economy.
- Well-crafted local regulation can influence policy makers in Augusta who are (somewhat paradoxically) looking to municipalities for timely creative leadership.

Is it time-sensitive? No Yes Deadline: concordant with timeline at State Legislature; This discussion should be folded into current efforts to craft zoning and licensing ordinance language.

Workshop Preparation Requested: Council discussion; copies of Q1 and Medical Marijuana law 10-144 CMR Ch. 122; possible guest speaker from industry and Rep. Hamann.

Estimated Time Required: (60+) minutes

Proposed Guidance for South Portland Zoning and Licensing Ordinances Pursuant to Q1

Offered for consideration by the Council
by E. Rose, Councilor, District 3
April 20, 2017

Introduction

Question 1 (Q1) set forth a detailed regulatory scheme for five categories of recreational marijuana as commercial enterprises eligible for licensing by the State of Maine, the details of which are being debated and deliberated currently in Augusta with a full rollout slated for February of 2018. A limited range of rule making and regulation is available to local municipalities above and beyond that which is within the purview of the State Legislature and under the constraints of Q1.

These rules are separate from the other part of Q1, which is the end of prohibition on marijuana use, possession, and cultivation for personal use. The current state of State law in the wake of Q1 is that an adult 21 years of age and older can possess 2.5 ounces of marijuana for personal use and grow up to six flowering plants as long as they are obscured from public view, are tagged, and are made inaccessible to minors. (See p. 26 of <https://www1.maine.gov/sos/cec/elec/upcoming/citizensguide2016.pdf>.)

Municipalities cannot change or supplement the "personal use" part of Q1, including home cultivation for personal use. This is important to understand and to digest because our society's long-held reaction to marijuana— even mention of the word "marijuana"— is visceral, and this impedes the rational considerations that should otherwise attend the crafting of thoughtful legislation. Our inherited feelings that marijuana is illegal and must be hidden away under threat of prosecution, that it is a public health threat, that is a scourge on righteous living, etc., must give way to the new reality that personal use is the law, and retail trade in marijuana is coming fast and will take some form whether the Council acts or not to shape that form. Our prerogative is to help shape that form within the space Q1 and the Maine State Legislature provides, and hopefully to do so to the greatest benefit of our inhabitants.

We have options. The tools of regulation that we as a municipality possess can be used to prohibit retail establishments of any or all 5 categories altogether, against the majority of voters' will. This is one option. Another option is to marginalize and isolate such establishments by imposing a suite of restrictions, such large buffer zones that treat such establishments as if they are radioactive waste dumps, that serve to discourage such establishments from locating in this City. A third option is to do nothing and allow market forces to govern the shape of the new economy. Realistic constraints, such as limits to available properties, may effectively prevent South Portland from being "taken over" by "big marijuana" with such a laissez-faire approach, but market forces alone may nevertheless direct the economic benefits away from locals and "the little guy". This is the central fear of local cultivators and medical caregivers already in the industry. The central proposal here is to use the few regulatory tools within the City's toolbox to

actively and creatively help shape the marketplace in such away as to help "the little guy"— local residents— realize some direct benefit from the emerging "green economy".

The centerpiece of this approach is the allocation of single "block" licenses for home cultivation (as a home occupation) within residential zones. (We must check our visceral reaction to this proposal and consider again the state of the law for personal use cultivation, the restrictive rules governing retail cultivation, and the looming potential for "big marijuana" to dominate the market with economic benefits going elsewhere.) The details of this proposal are described below.

Moreover, the primary aims of this proposal are to:

1. Provide guidance for ordinance construction regarding zoning and licensing for each of the 5 categories of retail marijuana businesses.
2. Describe a regulatory scheme for home cultivation in residential zones as an expansion of existing regulation that permits home occupation.
3. Describe in outline form the people-based economy intention of #2 above.

Why here, why now?

A first pass at construction of ordinance language by city staff earlier this spring received limited public audience and contained elements of construction that were a departure from initial Council direction. These elements were as follows: (1) there was no differentiation between the 5 categories of marijuana establishment in terms of public access or potential impact to neighbors or neighborhoods; (2) the draft ordinance included large buffer zones around these undifferentiated marijuana facilities and facilities designated as "special uses" including residences and residential zones; and (3) it prohibited any retail establishment from sharing a building with any non-marijuana-related use. The combination of these three elements left few areas of the City in which such establishments could possibly locate (see attached map), and within these areas, the limited possibility for occupying an available stand-alone building all but prohibited any establishment from locating within the City. Within these areas, the only options were to occupy all spaces within available multi-tenant complexes (if there were any available) or to build a new stand-alone building, and either of these options favored highly-capitalized "big marijuana" investors.

At a deeper level of detail, this first-pass ordinance identified retail establishments as "special exceptions" rather than "permitted uses". This distinction gets into the weeds a bit (no pun intended) regarding land use language appearing in the zoning chapter (Ch. 27) of the South Portland Code of Ordinances, but it is important to understand the differences between certain categories and classifications of activities, what standards apply that make them one category versus another, and the rational basis for, and consequences of, restrictive or permissive regulation.

No-one among City staff or the Council is an expert in this arena of land use and licensure. This is new territory. Some wisdom can be gleaned from the Colorado and Washington experiences, and much of this wisdom already informed the language of

Q1. We the Council are the lawmakers who are empowered to make these decisions. With hope, the discussion that will ensue during this workshop will reference specific parameters of action given our limited toolkit and apparent mandate from voters, and the thoughtful product of this discussion can then be used in Augusta to inform State Legislative efforts in the rollout of Q1.

Retail licensure categories and important distinctions between them

Cultivations – Strictly concealed from public view; secure from access by anyone; seed-to-product traceability; tested by "batch" for potency, pesticides, and dangerous contaminants. Can be additionally regulated to control odors. Allocated in "blocks" of 100 sq ft (10'X10') of plant canopy to a maximum of 30 "blocks" or 3,000 sq. ft. per license holder.

Cultivations (personal use) – Reasonably concealed from public view; secure from access by minors; up to 6 flowering plants and 12 undifferentiated flowering and non-flowering plants and unlimited seedlings.

Processing Plants – Concealed from public view; secure from access by anyone; must follow state health and safety regulations; mandatory testing for potency, pesticides, residual solvents, and dangerous contaminants.

Testing Labs – Samples limited to 8 lbs. on-site; limited access by anyone; samples must be disposed as biohazard; same analytic tools as used for soil, biological, and food product testing.

Retail Shops and Social Clubs – Public access for adults 21 and older. No alcohol served on premises. Cultivation allowable on-site for retail shops.

Recommendations for each of the 5 categories:

Cultivations:

Permitted use for Residential Districts and Mixed-use Commercial Districts:

No more than one "block" (10' X 10' = 100 square feet of plant canopy) is permitted for each single family detached dwelling and/or occupied accessory dwelling unit in accordance with the provision set forth in §27-201.

Cultivation must be secure from theft and access by minors and obscured from public view in accordance with state law. Odors from cultivation can be controlled by means of carbon filtration or other equally effective means; this can be part of licensure requirements, and recurring complaints of odors may be leveraged effectively against the threat of non-renewal or through code enforcement.

NOTE: Why should cultivation be allowed as "permitted use" instead of "special exemption use"? This is because the standards of review for special use are

constrained to evaluating whether the impact at the site under review would be greater than if the same use was located elsewhere in the same zoning district. Any rejection by the planning board on this basis can be nothing other than discriminatory between retail and personal cultivation. That is to say, it is not sufficient for the PB to reject an application "because we don't like it", or to ascribe impacts that would be greater than those which would attend cultivation for personal use as allowed under Q1.

Also note that the types of "special exceptions" categories relate to impacts such as increased traffic, signage, and runoff. These are not associated with retail cultivation that is in compliance with Q1.

Sec. 27-1405. Standards.

A special exception use is presumed to be permitted unless the Planning Board finds that the specific proposed use at the proposed location would have a greater adverse impact than would normally be associated with that use at other locations within the same zone. A special exception permit may be granted by the Planning Board only in the event that the applicant has established to the satisfaction of the Board that:

- (a) The proposed use meets all requirements of the site plan ordinance. Said site plan standards shall apply to all special exception uses notwithstanding their size.
- (b) The proposed use meets all special requirements of the Resource Protection district, if the use is proposed for such district and all requirements of the flood damage prevention ordinance, Sec. 5-101 through Sec. 5-153 of the Code, if proposed for location in areas designated as floodways.
- (c) The proposed use will not have a greater adverse impact than would normally be associated with that use at other locations within the same zone and meets all applicable performance standards set forth in this Article.

Should cultivations be permitted in larger than 1 block, such as in commercial or industrial districts? Prohibiting larger cultivations may help favor delocalization and smaller capital projects to promote place-based economy. At the same time, few spaces are available in South Portland for large-scale commercial cultivation. Perhaps market forces given these limitations are adequate to check the dominance of "big marijuana" in South Portland. This may be a point of discussion for the Council: should the single block limit extend city-wide or only to residential zones?

Processing Plants

Should conform to standard set forth by Q1 and health and safety regulations governed by state law and be classified as a fully permitted "light industrial use" for purposes of zoning.

Testing Facilities

Should conform to standards set by Q1, which includes ISO/IEC 17025 certification or other accreditation standard; should be classified with any food products safety, biomedical, or environmental testing lab for purposes of zoning as a fully permitted use.

Retail Shops and Social Clubs

Should conform to standards set by Q1 and otherwise follow similar restrictions as retail liquor stores and social clubs that offer wine and malt beverages and liquor. No stand-alone building requirements or buffers are necessary beyond that which applies to wine and malt beverages and liquor retail and social clubs.

Signage and parking may be given additional consideration as a "special exception", but the Planning Board should be held to the constraints set forth in 27-1405 with due consideration of parity between wine/malt/liquor retail establishments and clubs. Rejection of a license by the Planning Board or Council may anticipate appealability similar to that which governs liquor licensing under 28-A MRSA §653. *et seq.* as state law may follow its template with the rollout of Q1. Adjustments in local law will follow accordingly to the actual rollout of Q1.

Licensing

Licensing authority under Q1 (§2444) is vested in the State. This includes labeling, health and safety rules, and training of local officials (§2446). Local municipalities may limit the number and location of retail marijuana stores and social clubs (§2447(4)) and prohibit retail marijuana operations entirely.

License fees are determined by the State (§2448(10)). Municipalities share 50% of license fees collected by the State (§2449(3)).

Other licensing regulations may be imposed by the municipality regarding the "time, place, manner, and number of marijuana businesses" (§2449(4)). Vinous/malt/liquor establishments can provide guidance on how such facilities should be regulated.

Retail marijuana establishments and social clubs may (but are not required by Q1) to receive public hearing prior to issuance of the permit in accordance to §2448(5)(A).

Medical Marijuana

Existing local laws regarding medical marijuana should be brought into greater concordance with recreational marijuana with respect to buffer zones. The State Legislature is also working on reconciling these two regulatory schemes. Reconciling local medical marijuana laws to that of retail marijuana may be ripe for consideration at another time.

Buffer zones and mixed-purpose facilities

Buffer zones for retail stores and social clubs should follow the same rational basis as for vinous/malt/liquor stores and social clubs that serve vinous/malt/liquor.

Buffer zones for processing plants, cultivations, and testing labs are not necessary and must consider mixed-application and multi-use processing, cultivation, and testing operations. For example, a processing plant may extract essential oils from non-

cannabis plants as well as extract cannabidiol from cannabis plants, or bake non-cannabis items as well as cannabis-infused items. The choice to process cannabis is one that involves strict state regulations that would not apply to non-cannabis processing; the more restrictive regulations will apply to the portion of any operation that handles cannabis. Another example is a cultivation facility that grows produce within a shared space.

Mixed-use processing plants and cultivations should ensure that no cross-contamination occurs. This can be accomplished through clear partitioning of cannabis- and non-cannabis-containing operations. Food safety guidelines regarding alcohol-containing food products can offer additional guidance.

Testing labs are self-checking with respect to cross-contamination as long as they are in compliance with ISO/IEC 17025 (or other accreditation firm as enabled under §2445 and §2447(6)).

Market considerations: a people-based economy

Q1 passed with large majority support in South Portland. The "green economy" is poised to explode with the end of 80 years of prohibition. Our task as lawmakers is no longer to "just say no", as has been the case for decades, but to consider instead the question "how"; more specifically, how can this benefit South Portland residents the most while causing the least amount of harm?

Fortunately for us and our task, state regulations under Q1 regarding health and safety concerns have considered the 'harm' part thoroughly, thus alleviating most of that work for our local Council to consider. Outright bans and prohibitions are off the table for consideration if we are to respect the will of the voters. The remaining question, then, is how South Portland may benefit the most for this new "green economy". If we acknowledge that demand is here, then supply will come from somewhere. The question is where? From "big marijuana" grow houses, where capital flows from outside the City and out-of-state and revenues flow outside the city and out-of-state? There is an alternative.

Rare are the opportunities to help shape an entirely new market through forward-looking regulatory schemes. The proposed regulatory scheme of allowing small-scale (1 "block") home cultivation envisions several attractive attributes of this new market. Some of these attributes are listed below:

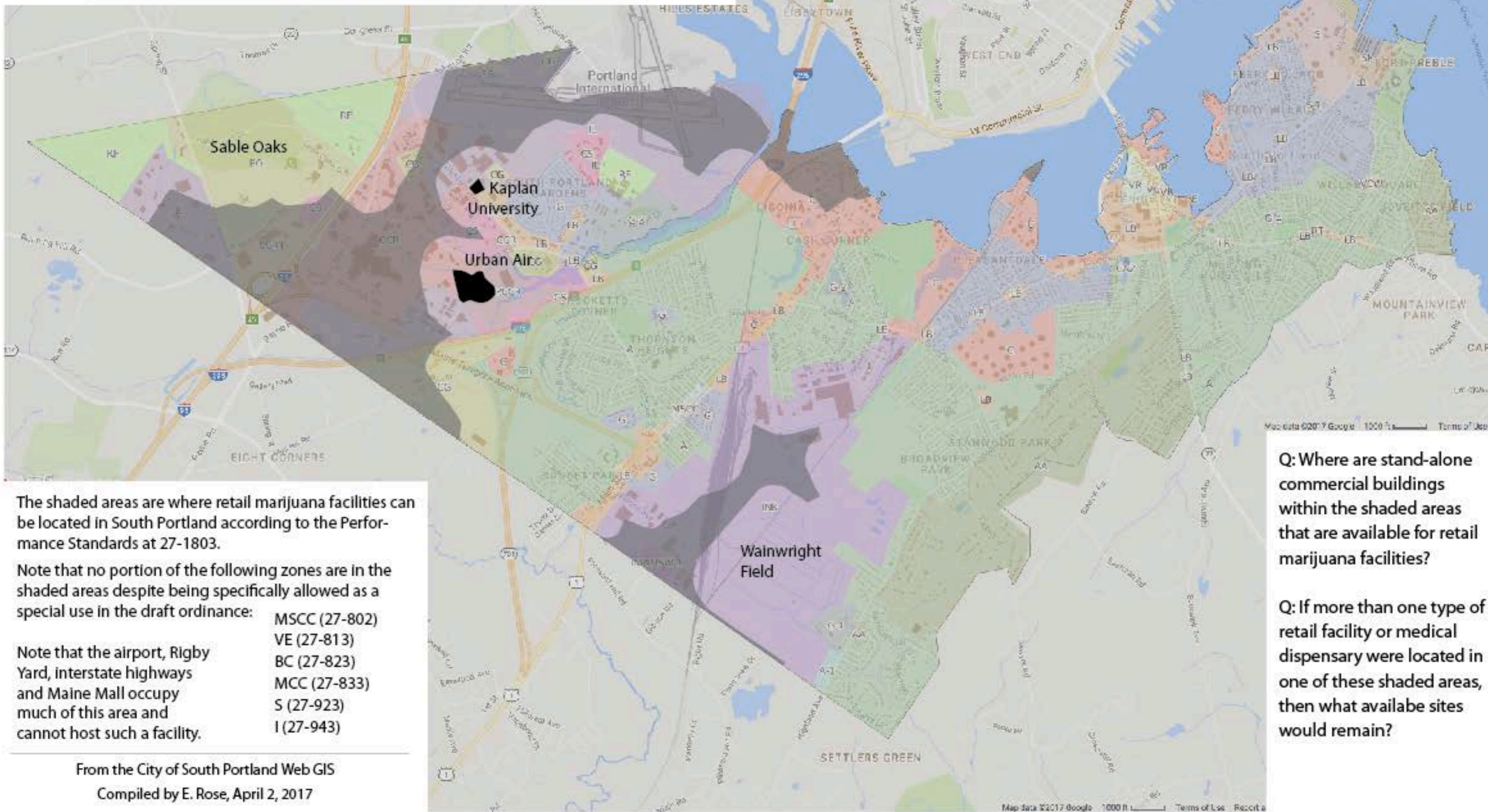
1. Home cultivation has low capital thresholds for new entrants.
2. Limiting home cultivation to 1 "block" prevents "grow houses" and interference with rental markets. Residents seeking supplemental income from an extra room may choose to take on a boarder, or to become a licensed home cultivation.
3. Realistic minimum yields of 8 oz. per 1-block "batch" can equate to >\$1000 per 50-60 day cycle. More efficient operations can yield much more. Efficient

techniques can be learned over time, and better technologies and equipment can be acquired incrementally from earned revenues.

4. This is an attractive side enterprise for anyone, including the homebound and elderly, empty-nesters, and anyone who has an extra room, basement, attic space, or greenhouse.
5. Recovery from a "bad batch" that is rejected by a retailer is 50-60 days; home cultivation operations are robust and adaptable.
6. Different specialty strains can be cultivated among many delocalized cultivators, creating a diverse market for retailers to offer consumers.
7. "Grow local" can be very much a selling point for retailers; this appeal may be quite valuable to consumers of this particular product.
8. Hand-trimmed product is often preferred over machine-trimmed product; this can favor the local smaller cultivator over larger operations.
9. Trimings can be sold to local processing facilities at market-driven prices.
10. Product can be sold to local retailers or elsewhere within the state. No product can be imported to the state, thus limiting competition from "big marijuana".
11. Horticultural skills can be transferred to home gardening, which aids in personal and community food security.
12. Horticultural skills possessed by a population can be an attractive asset for urban food-product agriculture firms to establish themselves in South Portland.
13. Demand will likely be sufficient to ensure that collegiality and cooperation among cultivators will emerge as a culture (akin to that enjoyed by the multitude of local craft brewers), rather than cutthroat competition.
14. Expertise can develop over time to expand the range and improve quality of products; this can be a signature point of local pride analogous to pride in our local craft breweries that are now of world renown.

Summarily, it may be a big adjustment to think about cannabis retail cultivation as a thriving legitimate market after 80 years of prohibition, but by embracing this regulatory scheme with home cultivation as its keystone, we can guide this emerging market away from out-of-state "big marijuana" dominance and towards a people-based economy that keep the benefits local.

Area where retail marijuana facilities can be located according to the draft ordinance from March 31, 2017



The shaded areas are where retail marijuana facilities can be located in South Portland according to the Performance Standards at 27-1803.

Note that no portion of the following zones are in the shaded areas despite being specifically allowed as a special use in the draft ordinance:

- MSCC (27-802)
- VE (27-813)
- BC (27-823)
- MCC (27-833)
- S (27-923)
- I (27-943)

Note that the airport, Rigby Yard, interstate highways and Maine Mall occupy much of this area and cannot host such a facility.

From the City of South Portland Web GIS
Compiled by E. Rose, April 2, 2017

Q: Where are stand-alone commercial buildings within the shaded areas that are available for retail marijuana facilities?

Q: If more than one type of retail facility or medical dispensary were located in one of these shaded areas, then what available sites would remain?