



PUBLIC HEARING

Agenda Item # 9

AGENDA REPORT SUMMARY

Meeting Date: September 25, 2018

Subject: Ordinance No. 2018-451: Cannabis Prohibition

Prepared by: Jon Biggs, Community Development Director

Approved by: Chris Jordan, City Manager

Attachment(s):

1. Draft Ordinance

Initiated by:

City Council

Previous Council Consideration:

November 28, 2017; January 9, 2018; and May 8, 2018

Fiscal Impact:

None anticipated

Environmental Review:

This Ordinance is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act (“CEQA”) Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. The City Council further finds, under CEQA Guidelines, Section 15061(b)(3), that this Ordinance is exempt from environmental review under the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment. This ordinance maintains the status quo by prohibiting all medical and adult-use commercial cannabis uses from establishing within the City of Los Altos. In addition, to the extent delivery services originating from outside city limits would be allowed, such delivery services would be subject to the discretionary review of the local jurisdiction where the retailer is physically established and to state licensing requirements, thus, this ordinance is also exempt from further CEQA review pursuant to Business and Professions Code, Section 26055(h).

Policy Question(s) for Council Consideration:

- Does the City Council wish to prohibit all medical and adult-use commercial cannabis activities and limit cultivation of cannabis for personal use in Los Altos?

Summary:

The City Council is considering a draft ordinance that, if introduced and later adopted, will provide for the regulation of medical and adult-use commercial cannabis activities and cultivation of cannabis for personal use



Subject: Ordinance No. 2018-451: Cannabis Prohibition

Staff Recommendation:

Introduce and waive further reading of Ordinance 2018-451 clarifying the prohibition on all medical and adult-use commercial cannabis activities and limit cultivation for personal use in Los Altos



Subject: Ordinance No. 2018-451: Cannabis Prohibition

Purpose

This is a zoning ordinance amendment to establish regulations on the establishment, creation, or expansion of all medical and adult-use commercial cannabis uses, with exceptions for personal cannabis cultivation.

Background

On January 26, 2016, the City Council adopted Ordinance No. 2016-418, which prohibits marijuana cultivation, marijuana processing, marijuana delivery, and marijuana dispensaries in the City as provided in Los Altos Code, Chapter 14.82. This Ordinance was created under, and in reference to, the state statutory framework of the (now repealed) Medical Marijuana Regulation and Safety Act (MMRSA).

On November 8, 2016, voters approved Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act (“AUMA”), which legalized the non-medical use of marijuana by adults over 21 years of age and provides for state licensing of the adult-use marijuana businesses. Senate Bill 94 (“SB 94”) quickly followed on June 27, 2017, repealing the MMRSA, and amending AUMA to consolidate the state licensing scheme applicable to both medical and adult-use commercial marijuana/cannabis activity under a new law entitled the Medicinal and Adult-Use Cannabis Regulation and Safety Act (“MAUCRSA”). MAUCRSA adopted new state licensing categories and definitions related to commercial cannabis activities than previously existed under the MMRSA.

MAUCRSA preserves local control over commercial cannabis uses. It allows local governments to ban all cannabis-related businesses outright, including dispensaries/retailers, delivery services and any other commercial cannabis use. Further, MAUCRSA prohibits the State licensing authorities from approving an application for a state cannabis license if it would violate the provisions of any local ordinance or regulation. However, the prevailing view is that cities and counties must have ordinances in place, either affirmatively allowing or prohibiting commercial cannabis activities, for this restriction to apply.

On November 28, 2017 the City Council adopted an urgency interim ordinance establishing a moratorium in all zoning districts on the establishment, creation or expansion of any and all medical and adult use commercial cannabis activities, with exceptions for personal cannabis cultivation. This urgency interim ordinance was extended on January 9, 2018 and remains in effect until November 27, 2018.

Discussion/Analysis

MAUCRSA adopted different state licensing categories and definitions related to commercial cannabis activities, than those that existed under MMRSA and were utilized by the City’s Ordinance No. 2016-418.



Subject: Ordinance No. 2018-451: Cannabis Prohibition

This Ordinance would clarify and affirm that all adult-use commercial cannabis businesses are prohibited and expands the City’s prohibition so that it reflects the full range of commercial activities recognized by MAUCRSA. For example, Los Altos Code defines “marijuana processing” to include drying, cleaning, curing, packaging and extraction, but does not expressly cover chemical synthesis allowed under the cannabis manufacturer license type. In addition, the urgency ordinance adds to the list of prohibited activities:

- Cannabis distribution, which refers to the procurement, sale and transport of cannabis and cannabis products as well as cannabis storage, quality control, collection of state cannabis taxes; and
- Cannabis testing laboratories, which test cannabis and cannabis products.

Personal Cultivation.

Regarding personal cultivation, MAUCRSA allows local governments to:

- Ban outdoor cultivation of cannabis for personal use, unless the California Attorney General determines cannabis is no longer illegal under federal law. (If cannabis is federally legalized, outdoor cultivation could be regulated, but not prohibited.)
- Reasonably regulate indoor cultivation in private residences and accessory structures for personal use but not ban it outright. Individuals have the right to grow up to six (6) cannabis plants in their home and to possess all the cannabis those plants provide.

The draft Ordinance provides for the regulation of personal cannabis cultivation. Outdoor cultivation is prohibited in all zone districts and indoor cultivation is prohibited except in compliance with certain requirements listed in the ordinance. The requirements are:

1. Cannabis cultivation shall only occur indoors at a private residence, or inside an accessory structure located upon the grounds of a private residence.
2. Cannabis cultivation shall be limited to six (6) plants total per residence, whether immature or mature, regardless of how many residents reside at the private residence.
3. Persons engaging in indoor cultivation must comply with all state and local laws regarding fire safety, water use, electrical wiring, buildings, and indoor cultivation, including without limitation, Health and Safety Code Sections 11362.1 and 11362.2.
4. The use of gas products (CO₂, butane, propane, natural gas, etc.) or generators for cultivation of cannabis is prohibited. Use of gas products shall be limited to those allowed by the California Building, Electrical, and Fire Codes as adopted and amended by the City of Los Altos.



Subject: Ordinance No. 2018-451: Cannabis Prohibition

5. The residence shall maintain fully functional and usable kitchen, bathroom, and bedroom areas for their intended use by the resident(s), and the premises shall not be used primarily or exclusively for cannabis cultivation.
6. All areas used for cannabis cultivation shall be located within a fully enclosed and secure structure. “Fully enclosed and secure structure” means a space within a building, greenhouse or other structure which has a complete roof enclosure supported by connecting walls extending from the ground to the roof, which is secure against unauthorized entry, provides complete visual screening, and which is accessible only through one or more lockable doors and inaccessible to minors.

Planning Commission Review

The Planning Commission considered the draft ordinance at its meeting of September 6, 2018. Following a discussion, the Commission voted 6 – 1, to recommend that the City Council introduce and adopt the draft ordinance without modification. In voting no, the dissenting Commissioner noted that there should be no prohibition on the outdoor cultivation of a limited number of cannabis plants for personal use.

Options

- 1) Introduce and waive further reading of Ordinance 2018-451

Advantages: Provides for the regulation (prohibition) of commercial cannabis activities and allows for the indoor cultivation of cannabis for personal use

Disadvantages: None identified

- 2) Decline introduction of ordinance

Advantages: None identified

Disadvantages: Would not provide for the regulation (prohibition) of commercial cannabis activities and would not provide rules concerning the cultivation of cannabis for personal use

Recommendation

Staff recommends option 1.

ORDINANCE NO. 2018- 451

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LOS ALTOS,
AMENDING LOS ALTOS MUNICIPAL CODE, CHAPTER 14.02 AND CHAPTER 14.82
RELATED TO MEDICAL AND ADULT-USE COMMERCIAL CANNABIS
ACTIVITIES**

WHEREAS, the City of Los Altos, California (the “City”) is a municipal corporation, duly organized under the constitution and laws of the State of California; and

WHEREAS, in 2015, the California Legislature enacted the Medical Cannabis Regulation and Safety Act (“MCRSA”), which for the first time in the State’s history adopted comprehensive regulations and licensing for the medical cannabis industry; and

WHEREAS, on January 26, 2016, the City Council of the City of Los Altos adopted Ordinance No. 2016-418, prohibiting marijuana cultivation, processing, delivery and dispensary uses in the City of Los Altos; and

WHEREAS, on November 8, 2016, voters approved Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act (“AUMA”), which legalized the non-medical use of marijuana by adults over 21 years of age and provides for state licensing of adult-use marijuana businesses; and

WHEREAS, Senate Bill 94 (“SB 94”), a budget trailer bill made effective on June 27, 2017, repealed the MCRSA, and amended AUMA to consolidate the state licensing scheme applicable to both medical and adult-use commercial cannabis activity under a new law entitled the Medicinal and Adult-Use Cannabis Regulation and Safety Act (“MAUCRSA”); and

WHEREAS, the MAUCRSA adopted different state licensing categories and definitions related to commercial cannabis activities than those that existed under MCRSA and were utilized by the City’s Ordinance No. 2016-418; and

WHEREAS, MAUCRSA recognizes, preserves and does not supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances that regulate licensed cannabis businesses, including, but not limited to, completely prohibiting the establishment or operation of one or more types of businesses licensed under MAUCRSA within the local jurisdiction (Business and Professions Code, § 26200); and

WHEREAS, on November 28, 2017, the City Council adopted Ordinance No. 2017-438 establishing, and extending for one full year via Ordinance No. 2018-439 on January 9, 2018, a moratorium in all Zoning Districts on the establishment, creation or expansion of any and all commercial cannabis uses pending study and adoption of permanent commercial cannabis regulations; and

WHEREAS, after having completed study of the issue, the purpose of this Ordinance is to prohibit the physical establishment and operation of all medical and adult-use commercial cannabis businesses within Los Altos, including all commercial cultivators, manufacturers, testing lab oratories, retailers/dispensaries, distributors and microbusinesses with the exception that cannabis retailers, microbusinesses, licensed nonprofits or other entities legally established and located outside of the City of Los Altos may provide delivery services to customers in Los Altos, subject to the reasonable regulations stated herein; and

WHEREAS, AUMA, as amended by SB 94, legalizes cultivation of not more than six living cannabis plants by persons 21 years of age or older for personal use; and

WHEREAS, AUMA, as amended by SB 94, provides that a city shall not completely prohibit personal cultivation of cannabis inside a private residence or inside an accessory structure to a private residence that is fully enclosed and secure, but that a city may completely prohibit personal cultivation of cannabis outdoors (Health and Safety Code, § 11362.2); and

WHEREAS, this Ordinance is also intended to regulate indoor cannabis cultivation, and to prohibit all outdoor cultivation, for personal use, including by qualified patients and primary caregivers; and

WHEREAS, the Los Altos City Council has reviewed all written evidence and oral testimony presented to date on this matter.

NOW, THEREFORE, the City Council of the City of Los Altos does hereby ordain as follows:

SECTION 1. The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. AMENDMENT OF CODE, CHAPTER 14.02, SECTION 14.02.070. Los Altos Municipal Code, Section 14.02.070, entitled “Definitions” is hereby amended to revise the definitions of marijuana, marijuana cultivation, marijuana dispensary, marijuana processing as shown in underline/strike-out, and to add the following definitions for cannabis delivery, cannabis distribution, cannabis manufacture, cannabis product, cannabis retailer, cannabis testing laboratory and commercial cannabis use, as set forth below.

"~~Marijuana~~Cannabis" means any or all parts of the plant Cannabis sativa Linnaeus, Cannabis indica, or Cannabis ruderalis, whether growing or not; the seeds thereof; the resin or separated resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin, ~~including cannabis/marijuana infused in foodstuff or any other ingestible or consumable product containing cannabis/marijuana.~~ The term "~~marijuanacannabis~~" shall also include "medical marijuana" as such phrase is used in the August 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, as may be amended from time to time, that was issued by the office of the Attorney General for the State of California or subject to the provisions of the California Health and Safety Code Section 11362.5 (Compassionate Use Act of 1996) or California Health and Safety Code Sections 11362.7 to 11362.83 (Medical Marijuana Program Act). "Cannabis" includes marijuana as defined by Section 11018 of the Health and Safety Code, and includes "cannabis" as defined in Business and Professions Code, Section 26001. For purposes of this code, the terms "marijuana" and "cannabis" may be used interchangeably.

"~~Marijuana~~ Cannabis cultivation" means growing, planting, harvesting, drying, curing, grading, trimming, or processing of ~~marijuanacannabis~~, regardless of whether there is an intent to produce, distribute, or sell the resulting product commercially. ~~Marijuana cultivation shall not include cultivation by an individual qualified patient.~~

"Cannabis delivery" means the commercial transfer of cannabis or cannabis products to a customer. "Delivery" also includes the use by a cannabis retailer of any technology platform that

enables customers to arrange for or facilitate the commercial transfer by a licensed retailer of cannabis or cannabis products.

“Cannabis distribution” means the procurement, sale, and transport of cannabis and cannabis products and any other activity allowed under the state distributor license(s), including, but not limited to, cannabis storage, packaging, quality control and collection of state cannabis taxes.

~~"Marijuana dispensary" or "Marijuana dispensaries" means any business, office, store, facility, location, retail or wholesale component of any establishment, cooperative or collective that delivers (as defined in Business & Professions Code section 19300.5(m) or any successor statute thereto) whether mobile or otherwise, dispenses, distributes, exchanges, transmits, transports, sells or provides marijuana to any person for any reason, including members of any medical marijuana cooperative or collective consistent with the August 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, as may be amended from time to time, that was issued by the office of the Attorney General for the State of California or subject to the provisions of the California Health and Safety Code Section 11362.5 (Compassionate Use Act of 1996) or California Health and Safety Code Sections 11362.7 to 11362.83 (Medical Marijuana Program Act).~~

“Cannabis manufacture” means to compound, blend, extract, infuse, or otherwise make or prepare a cannabis product. Cannabis manufacture includes the production, preparation, propagation, or compounding of manufactured cannabis, or cannabis products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis at a fixed location that packages or repackages medical cannabis or cannabis products or labels or relabels its container.

~~"Marijuana processing" means any method used to prepare marijuana or its byproducts for commercial retail and/or wholesale, including but not limited to: drying, cleaning, curing, packaging, and extraction of active ingredients to create marijuana related products and concentrates.~~

“Cannabis products” means cannabis that has undergone a process whereby the plant material has been transformed into a concentrate, including, but not limited to, concentrated cannabis, or an edible or topical product containing cannabis or concentrated cannabis and other ingredients. Cannabis products include “cannabis products” as defined in Business and Professions Code, Section 26001.

“Cannabis retailer” means a facility where cannabis or cannabis products are offered, either individually or in any combination, for retail sale to customers, including an establishment that delivers cannabis and cannabis products as part of a retail sale or conducts sales exclusively by delivery. For purposes of this code, the term “cannabis retailer” includes microbusinesses, nonprofits licensed under Business and Professions Code, Section 26070.5, and any other state license designation that authorizes distribution, whether for free or in exchange for any consideration, of cannabis and/or cannabis products to individual customers. For purposes of this code, “cannabis retailer” also includes medical cannabis dispensaries, patient collectives and cooperatives operating, or proposing to operate, pursuant to the Compassionate Use Act (Health and Safety Code, § 11362.5) and/or the Medical Marijuana Program (Health and Safety Code, § 11362.7 et seq.), as may be amended.

“Cannabis testing laboratory” means a facility, entity, or site in the state that offers or performs tests of cannabis or cannabis products and that is both accredited by an accrediting body that is

independent from all other persons involved in the medical cannabis industry in the state and licensed by the Bureau of Cannabis Control.

“Commercial cannabis use” includes all cannabis cultivation, cannabis manufacture, cannabis distribution, cannabis testing laboratories, cannabis retailers, cannabis delivery, and sale of cannabis and/or cannabis products, whether intended for medical or adult-use, and whether or not such activities are carried out for profit. “Commercial cannabis use” includes “commercial cannabis activity” as defined in Business and Professions Code, Section 26001, and includes any activity that requires a license from a state licensing authority pursuant to the Medicinal and Adult-Use Cannabis Regulation and Safety Act, Business and Professions Code, Division 10, as may be amended. “Commercial cannabis use” does not include possession or indoor cultivation of cannabis for personal use that is not sold and in strict accordance with Health and Safety Code, Section 11362.1 et seq.

SECTION 3. AMENDMENT OF CODE, CHAPTER 14.82. Los Altos Municipal Code, Chapter 14.82, entitled “Prohibition of Marijuana Cultivation, Processing, Delivery, and Dispensary Uses” is hereby amended and restated as set forth in Exhibit A, attached hereto and incorporated herein by this reference.

SECTION 4. CEQA. This Ordinance is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act (“CEQA”) Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. The City Council further finds, under CEQA Guidelines, Section 15061(b)(3), that this Ordinance is exempt from environmental review under the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. This ordinance maintains the status quo by prohibiting all medical and adult-use commercial cannabis uses from establishing within the City of Los Altos. In addition, to the extent delivery services originating from outside city limits would be allowed, such delivery services would be subject to the discretionary review of the local jurisdiction where the retailer is physically established and TO state licensing requirements, thus, this ordinance is also exempt from further CEQA review pursuant to Business and Professions Code, Section 26055(h). The City Council, therefore, directs that a Notice of Exemption be filed with the County Clerk of the County of Santa Clara in accordance with CEQA Guidelines.

SECTION 5. SEVERABILITY. If any section, subsection, sentence, clause, or phrase of this Ordinance, or the application thereof to any person or circumstances, is held to be unconstitutional or to be otherwise invalid by any court competent jurisdiction, such invalidity shall not affect other provisions or clauses of this Ordinance or application thereof which can be implemented without the invalid provisions, clause, or application, and to this end such provisions and clauses of the Ordinance are declared to be severable.

SECTION 6. CUSTODIAN OF RECORDS. The documents and materials that constitute the record of proceedings on which this Ordinance is based are located at the City Clerk’s office located at Los Altos City Hall, 1 North San Antonio Road, Los Altos, CA 94022. The custodian of these records is the City Clerk.

SECTION 7. RESTATEMENT OF EXISTING LAW. Neither the adoption of this ordinance nor the repeal of any other ordinance of this City shall in any manner affect the prosecution for violations of ordinances, which violations were committed prior to the effective date hereof, nor be construed as a waiver of any license or penalty or the penal provisions applicable to any violation thereof. The provisions of this ordinance, insofar as they are substantially the same as ordinance

provisions previously adopted by the City relating to the same subject matter or relating to the enumeration of permitted uses under the City's zoning code, shall be construed as restatements and continuations, and not as new enactments.

SECTION 8. PUBLICATION. This ordinance shall be published as provided in California Government Code Section 36933.

SECTION 9. FILING WITH STATE BUREAU OF CANNABIS CONTROL. The City Clerk shall submit a copy of this ordinance to the Bureau of Cannabis Control as provided by Business and Professions Code, Section 26055.

SECTION 10. EFFECTIVE DATE. This ordinance shall be effective upon the thirty-first day following the adoption date.

The foregoing ordinance was duly and properly introduced at a regular meeting of the City Council of the City of Los Altos held on _____ and was thereafter, at a regular meeting held on _____ passed and adopted by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Jean Mordo, Mayor

Attest:

Jon Maginot, City Clerk

EXHIBIT A

Chapter 14.82 - MEDICAL AND ADULT-USE CANNABIS REGULATIONS

Sections:

14.82.010 - Legislative findings and statement of purpose.

- A. The City Council finds that the prohibitions on medical and adult-use commercial cannabis uses are necessary for the preservation and protection of the public peace, health, safety, and welfare for the City and its community. It is also the intent of this Chapter to regulate indoor cannabis cultivation, and to prohibit all outdoor cultivation, for personal use, including by qualified patients and primary caregivers. The City Council's prohibition of such activities is within the authority conferred upon the City Council by the California Constitution and other state law.
- B. The City Council finds that this chapter: (1) exercises its local authority to enact and enforce local regulations and ordinances, including those regarding the zoning, permitting, licensing, or other entitlement of the activities prohibited by this chapter; and (2) exercises its police power to enact and enforce regulations for the public benefit, safety and welfare of the City and its community.

14.82.020 - Medical and Adult-Use Commercial Cannabis Uses.

- A. Commercial Cannabis Uses Prohibited. All medical and adult use commercial cannabis uses as defined in Section 14.02.070 are prohibited from establishing or operating within the City of Los Altos. No use permit, variance, building permit, or any other entitlement or permit, whether administrative or discretionary, shall be approved or issued for the establishment or operation of a commercial cannabis use in any zoning district, and no person shall otherwise establish such businesses or operations in any zoning district.
- B. Exception for Cannabis Deliveries. Cannabis retailers and other cannabis delivery services are prohibited from physically locating or establishing in the City. However, state-licensed cannabis retailers, as defined in Section 14.02.070 that are legally established and located outside City limits may provide cannabis deliveries to medical or adult-use customers within Los Altos, under the following conditions:
 1. The cannabis retailer must be licensed under the Medicinal and Adult-Use Cannabis Regulation and Safety Act (Business and Professions Code, Division 10) to provide cannabis deliveries.
 2. The cannabis delivery service must operate in compliance with the applicable laws and regulations of the local jurisdiction in which the delivery service is physically located and state law.
- C. This section shall not be construed to prohibit use of the public roads pursuant to Business and Professions Code, Section 26090 or those activities allowed by Section 26054, subdivisions (c) or (d).

14.82.30 - Cultivation of Cannabis for Personal Use.

- A. Indoor Cultivation. The indoor cultivation of cannabis for personal use, including cannabis cultivation for personal medical use by a qualified patient or primary caregiver, is prohibited except in compliance with the following:
 1. Cannabis cultivation shall only occur indoors at a private residence, or inside an accessory structure located upon the grounds of a private residence.
 2. Cannabis cultivation shall be limited to six (6) plants total per residence, whether immature or mature, regardless of how many residents reside at the private residence.

3. Persons engaging in indoor cultivation must comply with all state and local laws regarding fire safety, water use, electrical wiring, buildings and indoor cultivation, including without limitation, Health and Safety Code Sections 11362.1 and 11362.2.
 4. The use of gas products (CO2, butane, propane, natural gas, etc.) or generators for cultivation of cannabis is prohibited. Use of gas products shall be limited to those allowed by the California Building, Electrical, and Fire Codes as adopted and amended by the City of Los Altos.
 5. The residence shall maintain fully functional and usable kitchen, bathroom, and bedroom areas for their intended use by the resident(s), and the premises shall not be used primarily or exclusively for cannabis cultivation.
 6. All areas used for cannabis cultivation shall be located within a fully enclosed and secure structure. "Fully enclosed and secure structure" means a space within a building, greenhouse or other structure which has a complete roof enclosure supported by connecting walls extending from the ground to the roof, which is secure against unauthorized entry, provides complete visual screening, and which is accessible only through one or more lockable doors and inaccessible to minors.
- B. Outdoor Cultivation Prohibited. Outdoor cultivation of cannabis, including cannabis cultivation for personal medical use by a qualified patient or primary caregiver, personal adult-use, or commercial purposes, is prohibited in all zoning districts in the City of Los Altos.

14.82.040 - Public nuisance.

Any violation of this chapter is hereby declared to be a public nuisance.

14.82.050 - Violations.

Any violation of this chapter may be enforced through civil or administrative remedies or any other remedy as provided for by the law. In the event of any conflict between the penalties enumerated under this code, and any penalties set forth in state law, the maximum penalties allowable under state law shall govern.