Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

April 15, 2022

Darren Musselwhite
Mayor, City of Southaven
8710 Northwest Drive
Southaven, Mississippi 38671

Re: Municipal Regulatory Authority under the Mississippi Medical Cannabis Act

Dear Mr. Musselwhite:

The Office of the Attorney General has received your request for an official opinion.

Background

According to your request, as well as subsequent communications, the City of Southaven (the "City") is contemplating opting out of allowing cultivation, processing, sale and/or distribution of medical cannabis and cannabis products within the City in accordance with the recently enacted Mississippi Medical Cannabis Act. Senate Bill 2095, 2022 Regular Session ("S.B. 2095"). You ask several questions regarding the City's authority to regulate medical cannabis establishments in various zoning districts. As of the date your request was received, the City has approximately nine different types of commercial zones, including neighborhood commercial districts, general commercial districts, planned commercial districts, office districts, planned business park districts, and light industrial districts. Your request suggests that Section 19(3) of S.B. 2095 could be interpreted to conflict with other sections of S.B. 2095 and/or limit the authority of municipalities and counties to enact zoning ordinances or otherwise regulate medical cannabis establishments.

Issues Presented

1. Does the City have the authority to prohibit a "dispensary, cannabis research facility or cannabis testing facility" from locating in a commercial zone within the City?

2. If commercial use is not prohibited or already exists in a certain zone within the City, could the City prohibit a "dispensary, cannabis research facility or cannabis testing facility" from being located within that zone?

3. Could the City legally limit or restrict where those establishments are located within its various zoning districts or the manner in which they operate?

550 HIGH STREET • SUITE 1200 • JACKSON, MISSISSIPPI 39201
POST OFFICE BOX 220 • JACKSON, MISSISSIPPI 39205
TELEPHONE (601) 359-3680

4. May the City allow for medical cannabis dispensaries to operate in some commercial zones but restrict them from operating in other commercial zones? For example, may the City create a "medical commercial zone" which allows for the sale of medical cannabis but prohibit it from being sold in other commercial zones located within the City?

5. Assuming any regulation and/or ordinance approved by the City would not make a dispensary's operation impracticable, does the City's authority under the "time, place, and manner" restrictions allow the City to regulate medical cannabis dispensary locations to be at a greater distance than the "one-thousand-five-hundred-feet radius from the main point of entry of the dispensary to the main point of entry of another medical cannabis dispensary" as set forth in S.B. 2095?

Brief Response

1. The City may designate specific types of commercial zones in which dispensaries, cannabis research facilities, or cannabis testing facilities may operate through lawfully enacted ordinances or regulations adopted in accordance with a comprehensive zoning plan. However, these ordinances or regulations cannot have the purpose or effect of prohibiting or making impracticable the operation of such establishments within the City.

2. The City may designate specific types of zones for which commercial use is otherwise authorized or not prohibited in which dispensaries, cannabis research facilities, or cannabis testing facilities may operate through lawfully enacted ordinances or regulations adopted in accordance with a comprehensive zoning plan. However, these ordinances or regulations cannot have the purpose or effect of prohibiting or making impracticable the operation of such establishments within the City.

3. Yes. The City may restrict or limit the location of medical cannabis establishments and the manner in which they operate through ordinances or regulations governing the time, place, and manner of medical cannabis establishments adopted in accordance with a comprehensive zoning plan.

4. Yes. The City may enact local zoning ordinances that accord with its comprehensive zoning plan designating specific types of commercial zones, such as a medical commercial zone, in which medical cannabis dispensaries may operate.

5. Yes. Section 19(5) of S.B. 2095 does not preempt the City's authority to adopt an ordinance or regulation with a minimum distance greater than one-thousand-five-hundred-feet between cannabis dispensaries so long as the ordinance or regulation does not prohibit or make impracticable the operation of dispensaries within the City.

Applicable Law and Discussion

Section 30(1) of S.B. 2095 provides:

> The cultivation, processing, sale and distribution of medical cannabis and cannabis products, as performed in accordance to the provisions of this chapter, shall be legal in every county and municipality of this state unless a county or municipality opts out through a vote by the board of supervisors of the county or governing authority of the municipality, as applicable, within ninety (90) days after the effective date of this act. . . .

Assuming the City does not opt out in accordance with Section 30 of S.B. 2095, the City may enact ordinances regulating medical cannabis establishments pursuant to Section 19 of S.B. 2095.

With respect to your first four questions, Section 19 of S.B. 2095 states, in part:

> (1) A municipality or county may enact ordinances or regulations not in conflict with this chapter, or with regulations enacted under this chapter, governing the time, place, and manner of medical cannabis establishment operations in the locality. . . .
>
> * * *
>
> (2) No municipality or county may prohibit dispensaries either expressly or through the enactment of ordinances or regulations that make their operation impracticable in the jurisdiction. . . .
>
> * * *
>
> (3) A dispensary, cannabis research facility or cannabis testing facility may be located in any area in a municipality or county that is zoned as commercial or for which commercial use is otherwise authorized or not prohibited, provided that it being located there does not violate any other provisions of this chapter. A cannabis cultivation facility and/or cannabis processing facility may be located in any area in a municipality or county that is zoned as agricultural or industrial or for which agricultural or industrial use is otherwise authorized or not prohibited, provided that it being there does not violate any other provision of this chapter. A cannabis cultivation facility and/or cannabis processing facility may be located in any area in a municipality or county that is zoned as commercial or for which commercial use is otherwise authorized or not prohibited, provided that the municipality or county has authorized the entity to be located in such area and that it being there does not violate any other provision of this chapter. The municipality or county may authorize this by granting a variance to an existing zoning ordinance or by adopting a change in the zoning ordinance that allows for those entities to be located in specific commercial areas.

Although the Mississippi Department of Health has the authority for oversight of the administration of the medical cannabis program, the Legislature expressly reserved limited regulatory power in municipalities and counties. S.B. 2095 §§ 4, 19. Your request suggests that Section 19(3) of S.B. 2095 limits the authority of municipalities and counties to enact zoning ordinances or otherwise regulate medical cannabis establishments. However, this subsection appears to simply distinguish between the types of medical cannabis establishments that may be located in a commercial zone as opposed to an agricultural or industrial use zone. Based on the plain language of the statute, a municipality has the authority to enact ordinances or regulations governing the time, place, and manner of medical cannabis establishment operations, as long as the ordinances and regulations do not conflict with S.B. 2095. S.B. 2095 § 19(1). Any zoning regulations must be made in accordance with a local government's comprehensive zoning plan. Miss. Code Ann. § 17-1-9. *See also Freelance Entm't, L.L.C. v. Sanders*, 280 F. Supp. 2d 533, 546 (N.D. Miss. 2003).

Municipalities and counties generally have the authority to adopt zoning ordinances in accordance with Title 17, Chapter 1 of the Mississippi Code. Section 17-1-7 provides for the division of municipalities and counties into zones "of such number, shape and area as may be deemed best suited to carry out the purposes of Sections 17-1-1 through 17-1-27, inclusive." Within those zones, subject to certain restrictions on farm buildings and agricultural lands, the governing authorities may restrict and regulate, among other things, the use of buildings, structures, or land. Miss. Code Ann. § 17-1-7. While regulations may vary from zone to zone, throughout each particular zone, "[a]ll regulations shall be uniform for each class or kind of buildings. . . ." *Id.*

Zoning, however, may not be done in isolation but rather, as mandated by Section 17-1-9. "Zoning regulations shall be made in accordance with a comprehensive plan" with the goals of reducing traffic congestion, providing safety from fire and other dangers, preventing overcrowding and undue concentrations of people, providing adequate air and light, and providing such public necessities as water, sewer, transportation, and schools. Miss. Code Ann. § 17-1-19. "Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings, and encouraging the most appropriate use of land throughout such municipality." *Id.*

This office was previously asked about a municipality's authority to regulate gambling where gambling activities had been legalized in accordance with the Mississippi Gaming Control Act. In MS AG Op., *Rafferty* at *2 (Sept. 24, 1991), we opined:

> In sum, while local governing authorities cannot enact any zoning ordinance or classification affecting gaming establishments which is inconsistent with the general law of the state, they may pass reasonable zoning regulations consistent with the general law of the state. In other words, in jurisdictions where gaming has been legalized, local governing authorities cannot enact zoning laws which have the purpose or effect of prohibiting gaming, but they may enact reasonable zoning ordinances restricting the permissible locations of casinos, subject to the regulations promulgated under the Gaming Control Act.

Similarly, a municipality that has not opted out of allowing cultivation, processing, sale or distribution of medical cannabis and cannabis products cannot adopt zoning ordinances that would prohibit medical cannabis establishment operations in the municipality. However, it may enact ordinances that regulate the time, place, and manner of operations in the delineated zones, keeping in mind this office has previously opined that state zoning laws make no provision for a local zoning plan that applies to only a certain part of the county. *Id.* "While the county has authority to adopt county wide zoning ordinances as part of a plan, to adopt a county ordinance applicable to one limited area of the county would be contrary to legal authority." MS AG Op., *Williamson* at *1 (Apr. 27, 2001). Also, in response to whether a county can enact a zoning ordinance applicable to only one type of business, this office replied that any zoning ordinance regulating a particular business must be in compliance with a comprehensive plan. MS AG Op., *Creekmore* at *1 (Aug. 16, 1996). To allow otherwise would result in piece-meal zoning that singles out property owners. MS AG Op., *Scafide* at *1-2 (June 10, 1986).

Accordingly, the City may designate specific types of commercial zones in which medical cannabis establishments may operate, and the City's local zoning ordinances may regulate the time, place, and manner of operation, so long as the ordinances are in line with the mandates of S.B. 2095 and Mississippi Code Annotated Sections 17-1-1 *et seq.* and do not prohibit the operation of such facilities in the City.

With respect to your fifth question, Section 19(5) of S.B. 2095 provides, in part: "No medical cannabis dispensary may be located within a one-thousand-five-hundred-feet radius from the main point of entry of the dispensary to the main point of entry of another medical cannabis dispensary."

As a general rule, municipalities and counties may not regulate activity that has been preempted by state law. *Delphi Oil, Inc. v. Forrest Cnty Bd. of Sup'rs*, 114 So. 3d 719, 722 (Miss. 2013). The "Court resolves the issue of whether state law preempts local law by considering the express language of a statute to determine whether there is a direct conflict between the state statute and the local ordinance." *Id.* at 723. "[T]he relevant inquiry [is] whether the state statute prohibit[s] the local ordinance, or whether the local ordinance [is] an additional regulation not inconsistent with state law." *Id.* (Internal citation omitted.) A local ordinance that is "merely supplementary" to the state statute is not preempted by state law. *Id*. "Another method of examining the preemption question is to consider whether the proposed ordinance allows what state law prohibits, or prohibits what state law allows." MS AG Op., *O'Reilly-Evans* (Mar. 4, 1992).

Pursuant to the express language of Section 19(5) of S.B. 2095, a municipality may not allow dispensaries to be located less than one-thousand-five-hundred-feet of each other as such a rule would directly conflict with the statutory mandates. The one-thousand-five-hundred-feet distance operates as a baseline or a minimum distance between dispensaries. For example, a municipality cannot enact a regulation allowing medical cannabis dispensaries to be located within one thousand feet of each other. However, a local ordinance or regulation requiring a minimum distance greater than one-thousand-five-hundred-feet between cannabis dispensaries would not directly conflict with the language of Section 19(5) of S.B. 2095. Thus, Section 19(5) of S.B. 2095 does not preempt the City's authority to adopt an ordinance or regulation with a greater minimum distance than one-thousand-five-hundred-feet between cannabis dispensaries. As you noted in your request, the ordinance or regulation cannot make the operation of the dispensary impracticable in the

jurisdiction. Section 19(2) of S.B. 2095. Ultimately, as this office has previously stated, "it is for a court of competent jurisdiction to determine the validity of a particular ordinance." MS AG Op., *Martin* at *2 (July 1, 2016); MS AG Op., *Williams* at *1 (Jan. 23, 2009); MS AG Op., *Rutledge* at *2 (June 5, 1998).

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Beebe Garrard*

Beebe Garrard
Special Assistant Attorney General