



CITY OF HAYWARD

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Cover Memo

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DATE: June 14, 2016

TO: Mayor and City Council

FROM: City Manager and City Attorney

SUBJECT

Discussion of Possible Options Regarding Recreational Marijuana and Medical Marijuana

SUMMARY

The purpose of this report is to advise the City Council of the recreational marijuana initiative measure that will likely appear on the November 8, 2016 statewide ballot and to identify possible actions the City might take in anticipation that such initiative measure passes.

With approximately 365,000 valid signatures needed to qualify, the proponents of the measure have submitted over 600,000 signatures. If the state Secretary of State certifies the measure by June 30, it will appear on the November 8, 2016 ballot and will require a simple majority of votes cast to become law. With reputable polls indicating 55% percent of California voters support the legalization of recreational use of marijuana, the Council may wish to consider a number of options at this time rather than waiting until after the measure passes. A link to the initiative measure can be found [here](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf) [<https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20\(Marijuana\)_1.pdf>](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf).

BACKGROUND

Marijuana-related issues have been presented to California voters for more than forty years. In 1972, voters defeated an initiative measure (Proposition 19) that would have decriminalized marijuana offenses (66.5% against). Attitudes had changed significantly by 1996, when voters approved Proposition 215 (55% in favor), allowing medicinal use of marijuana. Proposition 215 was not fully implemented across the state because marijuana remained a controlled substance under federal law. For 2016, however, the state Legislature enacted, and the governor signed, comprehensive medical marijuana regulations without resistance from the federal government. Though now legal under state law, medical marijuana retail sales are prohibited in Hayward because of exclusionary zoning regulations, meaning because such use is not specifically listed as allowed, it is prohibited unless it is determined that the use is similar to and not more objectionable or intensive than the uses listed.

California voters defeated a recreational marijuana initiative measure in 2010 (Proposition 19(53% against). In the last few years, recreational marijuana measures have been approved in Colorado, Washington, Alaska, and Oregon. In California over the last few months, at least ten different

proposed initiative measures have been circulating for signatures in order to qualify for the November, 2016 statewide election. Only one such measure is likely to qualify: “the Control, Regulate and Tax Adult Use of Marijuana Act (also known as ‘the Adult Use of Marijuana Act’).” Despite the defeat of the 2010 measure, reputable polls have found that 55% of likely voters in California favor full legalization. This is even more likely given the composition of the voting population expected in the November election. The recreational marijuana initiative is opposed by the California Association of Chiefs of Police.

If the recreational use initiative is approved by a simple majority of voters in November, cities and counties will face significant challenges in responding to its approval - whether to prohibit sales or to permit sales with both land use and tax measures in place to avoid state preemption.

Section 34021. (a)(J) of the proposed initiative states “*The taxes imposed by this Part shall be in addition to any other tax imposed by a city, county, or city and county.*” Section 34021.5 goes on to define how and what a County can do related to taxation, but remains vague related to the rights and options of cities. 34021.5 (3) further states “*The board of supervisors shall specify whether the tax applies throughout the entire county or within the unincorporated area of the county.*” Section 34021.5(4)(c) goes on to say “*This section shall not be construed as a limitation upon the taxing authority of a county as provided by law*” but makes no such statement regarding cities. And, in fact, makes no further statements about the taxing rights of cities other than the brief statement reflected above as taken from Section 34021(a)(1).

Therefore, the purpose of bringing this matter to Council for consideration now is to assure that local fee, licensing, and taxation regulations and authorities are in place to protect local control and to guard against State pre-emption should the ballot initiative pass; and should the City Council choose at any time to allow recreational or medicinal marijuana production or sales within the community.

DISCUSSION

OPTIONS FOR COUNCIL CONSIDERATION

Staff recommends that Council consider the following four options and provide guidance to staff for any further actions on this matter:

1. Adopt regulations expressly prohibiting the cultivation, processing, distribution and sale of recreational marijuana and medical marijuana
 2. Take no action at this time and consider the November election results in December, 2016
 3. Direct staff to prepare a proposed ordinance permitting and taxing the entire supply chain of recreational marijuana, and submitting such measure to Hayward voters at the November 8, 2016 election
 4. Refer possible recreational marijuana revenue options to the Budget and Finance Committee for a report back no later than July 12, 2016, including submission of revenue measures at the November 8, 2016 election or a subsequent special election or mailed ballot election.
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1. **Prohibition**: If the Council prefers to prohibit the cultivation, processing, distribution and sale of

recreational and medical marijuana, the initiative measure specifically permits such action. The Council could take such action prior to November 8, 2016, or the Council could wait for the outcome of the November election. If the initiative measure is defeated, no action by the Council would be required.

The Council may also recall that comprehensive medical marijuana legislation was enacted in 2015 and made effective January 1, 2016. Based on the City's exclusionary zoning regulations, medical marijuana sales in Hayward have not been, and are not now, permitted. Medical marijuana sales are permitted in surrounding jurisdictions, however, such as Oakland, Berkeley, and unincorporated Alameda County. Although it is not necessary that the City adopt an express prohibition on the sale of medical marijuana, the Council may wish to do so in tandem with an express prohibition on recreational marijuana.

In prohibiting both recreational and medical marijuana, the City would avoid a wide range of administrative, land use, law enforcement and other challenges that go hand in hand with allowing such activities. To the extent the City would be able to tax such operations, revenue from such operations would in all likelihood not mitigate against the burden of licensing and regulating such activities with current City staffing levels, unless the taxing and fee levels were established at significantly high levels. The City of Berkeley, for example, has had to close down certain of its medical marijuana vendors due to related crime and nuisance activities, and the City of Oakland requires at least two armed security officers to be visibly present anytime any of its medical marijuana vendors are open.

2. **No Action:** Given the extremely tight time constraints on deciding whether to submit a tax measure, the Council could take no action and wait for the outcome of the November 8, 2016 election. If the initiative fails, the Council might then decide no further action is necessary. On the other hand, if the initiative measure passes, the Council might decide to prohibit recreational marijuana or to develop tax measures for consideration in 2017 or 2018. The most prudent course of action, if the initiative passes, would be to prohibit both recreational marijuana and medical marijuana until such time as a full analysis of regulatory, fiscal and land use impacts could be developed.
3. **Ballot Measure:** The Council could take the precautionary step of submitting a tax measure to the City's voters at the November 8, 2016 election. The tax measure would take effect only if the initiative measure passes. The City would then be required to adopt a strong regulatory framework that complements the state's complex regulatory and taxing bureaucracy. Here is an example of a ballot question that could be submitted:

“Shall the City Council adopt an ordinance to establish general municipal purpose taxes on the sale, cultivation, packaging, processing, distribution, or sale of recreational marijuana in the City of Hayward of not more than X% at any single point in the supply chain if recreational marijuana sales are legalized and the City amends land use regulations to authorize marijuana businesses within City limits, and which will continue until repealed by City voters or City Council?”

This example of a ballot question is simply to generate discussion. The Council could consider a tax based on the square footage of a facility where recreational marijuana is cultivated or processed or from which it is distributed. This type of tax would be in addition to the gross receipts tax. To avoid a

requirement of two-thirds approval of voters voting on the question, such taxes should be general municipal purpose taxes that are deposited in the City's General Fund to be used for any lawful purpose as determined by the City Council.

A few cities in the state currently tax marijuana businesses, including both medical marijuana and, in the event it becomes legal, recreational marijuana. One such city imposes a 15% tax on every dollar of gross receipts. The tax applies to all marijuana sellers, including such activities as planting, cultivating, harvesting, transporting, dispensing, and/or delivering any part of the marijuana plant for medical purposes. Another city has two taxes that apply in the event recreational use of marijuana is legalized or decriminalized. One of the taxes is an annual tax of \$25 per square foot for the first 3,000 square feet and then \$10 per square foot for the remaining space utilized in connection with the cultivation of marijuana for recreational use. In addition, there is a monthly tax of 10% of gross receipts from the sales of recreational marijuana.

4. Referral to Council Committee: The Council could refer the matter to its Budget and Finance Committee with direction to return to the full Council by July 12, 2016 with specific recommendations on marijuana-related taxes to be submitted to Hayward voters at the November 8, 2016 election. Referral to this committee would allow more thorough discussion of how best to tax marijuana-related businesses, though time constraints remain and would require the Committee to move quickly

ELECTION PROCEDURES

As required by Proposition 218, adopted by the voters in 1996, and as reinforced by Proposition 26 that was adopted by the voters in 2010, any new taxes must be approved by the voters. General taxes require a simple majority of voters, and special taxes require two-thirds approval of voters.

Due to the special timing requirements of Proposition 218, proposed taxes ordinarily would appear on the same ballot as candidates running for the offices of mayor and city council, and it only requires a simple majority of the Council to submit such tax measures at such election. There is also an option of submitting tax measures at a special election, as long as the Council unanimously consents to submission of such tax measures at that special election.

As an example of the timing requirements of Proposition 218, the utilities users tax known as Measure A was submitted to Hayward voters at a special municipal election that was consolidated with a statewide special election on May 19, 2009 -- and all seven members of the Council were required to approve the submission of Measure A to the voters. By contrast, the sales and use tax measure known as Measure C was submitted to Hayward voters in June 2014, at a regularly-scheduled general municipal election where the seats of the mayor and two council members were to be selected. This measure could be submitted by a vote of a majority of Council Members (although in that case the Council also unanimously consented to submit the measure to the voters).

Based on these guidelines, the Council could call a special municipal election on November 8, 2016, to be consolidated with the statewide election -- as long as there is unanimous consent to do so. Doing so means the proposed Hayward tax would appear near the bottom of an otherwise long ballot. The cost to the City of such special municipal election would be approximately \$165,000. Alternatively, the Council could wait until the next general municipal election in 2018. The cost would be approximately \$260,000.

Although the City has not used a mailed ballot option, a special municipal election could be called and voters would cast ballots by mail after November 8, 2016 and prior to 2018. The cost of doing so is approximately \$428,000. There is no experience as to the turnout of this type of election.

A conventional stand-alone special municipal election could cost \$733,000.

FISCAL IMPACT

Some cities have decided to submit tax measures to their voters as early as June 7, 2016, in anticipation of the initiative measure's approval in November 2016. Attached are ballot questions presented to the voters in the cities of Sacramento, Davis, and Alturas on June 7, 2016. The Sacramento measure proposed a special tax for youth services; it failed to achieve two-thirds approval. The Davis and Alturas measures proposed general taxes; they were both approved.

It is difficult to project how much revenue such taxes and fees might generate, just as it is difficult to project the regulatory costs of implementing recreational and medical marijuana businesses at the local level.

As noted above, there are significant cost implications of submitting a tax measure at the November 8, 2016 statewide election, or a Hayward-specific tax measure election in 2017. The next general municipal election will be in 2018. Clearly, the most direct option would be to wait until such time as the City Council might want to move forward with the legalization of marijuana production and sales in Hayward before establishing any possible tax or fee structure; at which time much information would likely be more robust and clear. However, there is no guarantee that local governments, particularly cities, will retain that option through the State's implementation process.

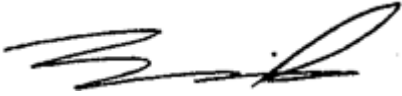
CONCLUSION/NEXT STEPS

Based on the information currently available, the prudent step would be for the City to await the fate of the recreational marijuana initiative in November 2016. If the initiative passes, the Council at that time could adopt policies prohibiting recreational marijuana and medical marijuana business in the City. Alternatively, the Council could adopt such policies in advance of the November 2016 election to better protect local control and options.

If the Council wishes to present tax options to Hayward voters in November, which may be construed by some as support of the statewide initiative, it is recommended that staff be directed to prepare proposed legislation and to return with specific revenue recommendations no later than July 12, 2016. If the Council's preference is to include the Council Budget and Finance Committee in that process, said Committee would have to hold special meetings to allow staff to meet the July 12 deadline.

Prepared and Recommended by: Fran David, City Manager
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Approved by:



Fran David, City Manager

Attachments:

Attachment I

Sacramento, Davis, and Alturas Ballot Questions