



# City of Emeryville

CALIFORNIA

## MEMORANDUM

**DATE:** July 24, 2018

**TO:** Mayor and Members of the City Council

**FROM:** James N. Holgersson, Interim City Manager

**SUBJECT:** **Resolution Of The City Council Of The City Of Emeryville Ordering The Submission To The Qualified Electors Of The City Of Emeryville A Measure To Approve A Business License Tax On Cannabis Businesses At The General Municipal Election To Be Held On Tuesday, November 6, 2018; Requesting Consolidation By The Alameda County Board Of Supervisors Of The Election Regarding Said Measure With The General Election To Be Held On The Same Date And That Alameda County Provide Election Services With Full Reimbursement By The City Of Emeryville; Setting City Council Priority For Filing Written Argument; Directing The City Attorney To Prepare An Impartial Analysis; Authorizing The Filing Of Rebuttal Argument; CEQA Determination: Exempt Pursuant To CEQA Guidelines 15378(b)(4) And 15061(b)(3)**

## RECOMMENDATION

Staff recommends the City Council give direction and adopt the attached resolution submitting a cannabis business license tax measure to the voters for the November 6, 2018 election.

## BACKGROUND

The Federal Controlled Substances Act, 21 U.S.C. Section 801, *et. seq.*, was adopted in 1970, and prohibits the manufacture, cultivation, distribution and possession of cannabis, commonly referred to as marijuana. Although this prohibition continues, as public attitudes towards cannabis change, and states vote to legalize cannabis in some form, the enforcement of this federal prohibition has waned.<sup>1</sup>

In 1996, the California voters approved Proposition 215, "The Compassionate Use Act," which provides that qualified patients may obtain and use marijuana for medical purposes with a physician's recommendation and will not be subject to certain criminal penalties under state law. This was followed in 2003 by the state Legislature enacting Senate Bill 420, the "Medical Marijuana Program Act," as a supplement to The Compassionate Use Act, which allows cities to adopt and enforce rules consistent with the Medical Marijuana Program Act.

On October 9, 2015, Governor Brown approved a series of bills commonly referred to as the Medical Cannabis Regulation and Safety Act ("MCRSA"), effective January 1, 2016,

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<sup>1</sup> See, e.g., *United States v. McIntosh* (2016 9<sup>th</sup> Cir.) 833 F.3d 1163.

which established a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical cannabis, and which recognizes the authority of local jurisdictions to either impose additional restrictions or prohibit certain activities related to the cultivation, manufacture, transportation, storage, distribution, and sale of medical cannabis. This was followed in November 2016 by the voters of the State of California approval of Proposition 64, known as the “Control, Regulate and Tax Adult Use of Marijuana Act” (“AUMA”), which establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of recreational cannabis; and which recognizes the authority of local jurisdictions to either impose additional restrictions or prohibit certain activities related to the cultivation, manufacture, transportation, storage, distribution, and sale of medical cannabis. The State Legislature has subsequently amended the MCRSA to incorporate the AUMA to create one comprehensive framework regulating cannabis in California.

Under the authority of state law, on April 4, 2017, the City Council adopted the final reading of two ordinances to establish a local regulatory framework that would allow for commercial cannabis activity within the City. Ordinance No. 17-002 amended the City’s Planning Regulations to allow for all commercial cannabis activity, except commercial cultivation, subject to a conditional use permit from the City’s Planning Commission. The ordinance became effective on May 4, 2017. Ordinance No. 17-003 repealed and replaced Chapter 28 of Title 5 of the Emeryville Municipal Code, and requires all commercial cannabis businesses to obtain a permit from the Police Department prior to commencing operation. This ordinance became effective September 1, 2017. On September 5, 2017, the City Council adopted Resolution No. 17-135 establishing regulations governing the issuance of a permit to storefront dispensaries.

As part of developing a local regulatory framework for cannabis, the Council directed staff to research a possible cannabis tax. On July 10, 2018, the Council considered a report prepared by MuniServices, and other information presented by staff, and public comment, regarding a strategy for a cannabis tax. The City Council directed staff to prepare to place a cannabis business license tax measure on the November 2018 ballot. Council directed that the cannabis business license tax should have a maximum tax rate of 6% based on gross receipts, but that the Council would have the authority to levy taxes with differing rates for different segments of the cannabis industry. Furthermore, the Council was interested in having a future study session to discuss what the initial tax rate should be. The City Council also expressed interest in variations on amending the tax rate, as described in more detail below.

## **DISCUSSION**

Attached to this staff report is a draft resolution, which, if approved, would place the recommended Cannabis Business License Tax on the November 6, 2018 ballot. Attached to the resolution as Exhibit “A” is a draft of the Cannabis Business License Tax Ordinance that would be presented to the voters for their consideration. Note there are three versions of the Ordinance, based on Council’s direction on July 10, 2018. The versions are discussed in more detail below. Council is asked to select one of the three versions as the attachment to the resolution.

A local government's power to tax arises from the Constitution (for charter cities) or by statute (for counties, general law cities and special districts).<sup>2</sup> Under Article XIII, section 24 of the California Constitution, the Legislature may not impose taxes for local purposes but may authorize local governments to do so. Charter cities receive power directly in the California Constitution limited by any provisions of their respective charters.<sup>3</sup> The Legislature has provided general law cities<sup>4</sup> the power to tax equivalent to that of a charter city pursuant to Government Code § 37100.5.

1. *Cannabis Business License Tax Ordinance (3 Options) – Adding Section 3-1.129, “Cannabis Businesses” to Chapter 1 of Title 5 of the Municipal Code; And Amending Section 3-1.1.29*

The proposed ordinance adds a new Section 3-1.129, entitled “Cannabis Business”, to Chapter 1, “Business Taxes”, of Title 3, “Finance,” of the Emeryville Municipal Code. The proposed Cannabis Business License Tax Ordinance would impose an excise tax on the privilege of conducting business within the City of up to six percent (6%) of gross receipts on all cannabis businesses. This tax rate would remain in effect in perpetuity unless otherwise modified by the voters.

One of the concerns that has been raised in other jurisdictions that permit recreational cannabis is that they have set the tax rate too high and thus cannabis businesses are choosing not to operate in their jurisdictions and are locating elsewhere. High cumulative tax rates (resulting from the combination of local and state excise taxes) are also being blamed for persistence in unregulated cannabis market activity. Additionally, concerns have been raised that the differing segments of the cannabis industry perhaps should not be taxed at the same rate. Thus, in order to provide the City Council the greatest flexibility to establish appropriate tax rates, the proposed ordinance allows the Council to set the tax rate by resolution up to a maximum of six percent (6%) of gross receipts. The Council may also in its discretion establish lower tax rates for all cannabis businesses, or establish differing tax rates for different categories of cannabis businesses. The resolution to change the tax rate and to set the tax rate for different businesses would require a simple majority vote. This version of the Ordinance is labeled as Ordinance Option 1.

At the July 10, 2018 meeting, the City Council expressed interest in alternative methods for changing the tax rate. The City Council wished to consider an option in which the initial tax rate, up to the maximum 6% rate, is set by resolution adopted by a simple majority vote, and thereafter any rate change would require a supermajority vote of the entire Council. The draft ordinance proposes an initial term of five (5) years based on Council's discussion, although the City Council may dictate a different initial period. After the initial term, the City Council may raise or lower the tax rate, again up to the maximum 6% rate,

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<sup>2</sup> *Santa Clara Transportation Authority v. Guardino* (1995) 11 Cal. 4th 220, 247–249.

<sup>3</sup> Cal. Const. art. XI, § 5; *West Coast Adver. Co. v. City and County of San Francisco* (1939) 14 Cal. 2d. 516.

<sup>4</sup> Emeryville is a charter city. However, the charter explicitly provides that it operates as a general law city for all purposes except for the purpose of adopting a real estate transfer tax. Thus, for purposes of the proposed cannabis business license tax, Emeryville is a general law city.

but only by a supermajority vote of the total Council membership, i.e., a 4/5 vote. An ordinance arranged in this way provides additional certainty to cannabis business operators, which can assist with business planning. This version of the Ordinance is labeled as Ordinance Option 2.

The City Council also wished to consider a further alternate method of changing the tax rate. As described in the preceding paragraph, the initial tax rate would be set by simple majority vote of a resolution. The initial rate would also remain in effect for a prescribed number of years. As above, after the initial term, if the City Council wished to *raise* the tax rate, up to the maximum 6% rate, the action would require a supermajority vote of the total Council membership, i.e. a 4/5 vote. However, in this variation, in order to *lower* the tax rate, the Council would only need to adopt a resolution by a simple majority. Similar to Ordinance Option 2, this Ordinance also reduces uncertainty for cannabis business operators, but provides for an easier pathway to lower tax rates if economic pressures on the industry or other factors merit such an action. This version of the Ordinance is labeled as Ordinance Option 3. Staff requests the City Council select one of the three options to attach as Exhibit A to the resolution.

The Ordinance also amends Section 3-1.124 of the Emeryville. This section specifies whether a given business is taxed on gross receipts, and at what rate; or whether the business is taxed on a different basis. The proposed Ordinance amends Section 3-1.124 to add the new Section 3-1.129 regarding taxing cannabis businesses, as described above. The amendment also clarifies the tax rate for certain businesses not having gross receipts, as well as the tax rate for commercial property rentals. This latter amendment is a clean-up provision which clarifies the tax rate for those enumerated businesses.

Because this measure does not legally restrict the use of tax revenue to any specific purposes, it is classified as a “general tax,” not a “special tax.” Thus, the tax proceeds may be used for any unrestricted general revenue purposes including but not limited to maintaining and improving general city services and basic infrastructure needs such as repairing public facilities, reducing traffic congestion, and improving pedestrian and bicycle safety. As a general tax, the measure only requires approval of a majority vote of the voters. The tax would continue in existence until repealed by the voters.

## *2. Overview of Actions Taken by the Proposed Resolution*

The attached resolution accomplishes several actions, as follows.

- it places the Cannabis Business License Tax Ordinance on the ballot for the November 6, 2018 election and identifies the ballot question to be presented to the voters;
- it requests the Board of Supervisors of the County of Alameda to consolidate the election on the Cannabis Business License Tax Ordinance with the general election of November 6, 2018 and commits the City to reimburse the County for those expenses incurred for conducting the election;

- it authorizes the City Council as a body to author a single ballot argument; all arguments, either for or against the Cannabis Business License Tax Ordinance, may not exceed 300 words and must be submitted to the City Clerk by 5:00 p.m. on Monday, August 13, 2018;
  - it directs the City Clerk to forward the Cannabis Business License Tax Ordinance to the City Attorney to prepare an impartial analysis; the City Attorney's impartial analysis of the Cannabis Business License Tax Ordinance may not exceed 500 words and must be submitted to the City Clerk by 5:00 p.m. Thursday, August 9, 2018;
  - next, it authorizes the filing of rebuttal argument which is completely discretionary; if authorized, rebuttal arguments may not exceed 250 words and must be submitted to the City Clerk by 5:00 p.m. Thursday, August 23, 2018;
3. *Placing Measure on the Ballot; Ballot Question; Resolution Requires Two-Thirds Vote of Total City Council Membership*

As noted above, the resolution places before the electorate of the City of Emeryville the question of whether to authorize the Cannabis Business License Tax Ordinance. Further, the resolution authorizes the question to be presented to the voters as follows<sup>5</sup>:

"To protect essential municipal services, including repairing public facilities, reducing traffic congestion, and improving pedestrian and bicycle safety; and to support regulation of the cannabis industry, and preserve the City of Emeryville's long-term financial stability, shall the ordinance to impose a business tax of up to 6% of gross receipts on all cannabis businesses within Emeryville, thereby generating an estimated \$2,000,000 annually for unrestricted general revenue purposes, and which continues until repealed by the voters, be adopted?"

The resolution to present a general tax before the voters must be approved by a two-thirds vote of all members of the local legislative body<sup>6</sup>. Thus, the proposed resolution to place the Cannabis Business License Tax on the ballot must be adopted by a minimum of four-fifths (4/5) of the total City Council membership.

4. *Request to Consolidate Election on Measure with General Election*

In order to have Alameda County conduct the election on the proposed Cannabis Business License Tax Ordinance, the second "Resolved" clause within the body of the

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<sup>5</sup> Elections Code Section 13119(a) requires the form of the question to provide "[s]hall the ordinance (stating the nature thereof) be adopted?" Further, Elections Code Section 13119(b) provides that if the measure involves the imposition or increase of a tax, the question shall include the amount of money to be raised annually and the rate and duration of the tax to be levied. Finally, Elections Code Section 9051(b) provides the ballot question, or "ballot label" shall not exceed 75 words, as words are counted pursuant to Elections Code Section 9. The question set forth above complies with each of these rules.

<sup>6</sup> Government Code Sections 53723, 53724(b)

resolution requests the Board of Supervisors to allow for the consolidation of the election with the general election to be held on November 6, 2018, and the third “Resolved” clause obligates the City to reimburse the County for the provision of these election services.

#### *5. Author Ballot Argument – Discretionary*

The resolution authorizes the City Council to author a ballot argument<sup>7</sup>. If the City Council so authorizes, then the Council’s argument will receive priority for printing in the pamphlet that is distributed to voters<sup>8</sup>. The attached resolution assumes the City Council wishes to authorize itself to author a ballot argument, and that the Council will author a ballot argument as a body as opposed to authorizing arguments from individual Council members. Note that the fifth “Resolved” clause within the body of the resolution establishes 5:00 p.m., Monday, August 13, 2018, as the deadline to submit ballot arguments either in favor or against the proposed Cannabis Business License Tax Ordinance to the City Clerk, which argument may not exceed 300 words. If the City Council does not wish to author a ballot argument, then it should modify the resolution title to eliminate the language authorizing the ballot argument, and the fourth and fifth “Resolved” clauses of the resolution should be deleted.

Presuming the City Council will authorize an argument in favor of the proposed Cannabis Business License Tax Ordinance to be authored by the Council as a body, recognize that the Council can either: (i) consider and discuss amongst the Council the substance of the argument at its regular meeting of August 3, 2018, before the argument is due for submission to the City Clerk on August 13, 2018; or (ii) authorize up to two of its members to meet and prepare a ballot argument and submit it to the City Clerk on behalf of the City Council; once it is submitted to the City Clerk, the other members of the Council will be notified so they can sign the argument at the City offices.

#### *6. City Attorney Impartial Analysis - Discretionary*

The sixth “Resolved” clause within the body of the resolution directs the City Clerk to transmit the proposed Cannabis Business License Tax Ordinance to the City Attorney so that an impartial analysis can be prepared pursuant to Elections Code Section 9280 showing the effect of the measure on existing law and the operation of the measure. The City Attorney Impartial Analysis may not exceed 500 words and must also be submitted to the City Clerk by 5:00 p.m., Thursday, August 9, 2018. The impartial analysis is not a requirement; if the City Council does not wish for the City Attorney to prepare an impartial analysis, then it should modify the resolution title to eliminate the language indicating preparation of the impartial analysis, and the sixth “Resolved” clause of the resolution should be deleted.

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<sup>7</sup> Elections Code Section 9282(b)

<sup>8</sup> Elections Code Section 9287

### *7. Authorizing Rebuttal Argument - Discretionary*

The seventh “Resolved” clause within the body of the resolution authorizes the filing of rebuttal argument which is completely discretionary. Thus, if the Council files an argument in favor and someone files an argument against, then the Council has the right to file an argument rebutting the argument against<sup>9</sup>. Likewise, parties opposing the measure who file an argument against the measure will have the ability to file an argument to rebut the City’s argument in favor of the measure. If the Council does not want to provide for the filing of rebuttal argument then it should modify the resolution title to eliminate the language indicating that rebuttal argument and release of rebuttal argument are being authorized and remove the seventh “Resolved” clause from the body of the resolution, as well as the eighth “Resolved” clause.

### **FISCAL IMPACT**

Emeryville is home to seven cannabis businesses, and of these, six are currently in operation. The seven businesses include three manufacturers, two retailers, one distributor, and one delivery business. Demand for space for cannabis businesses is extraordinarily high, owing in part to the City’s reputation as a business-friendly locale that is supportive of the cannabis industry. Consequently, additional cannabis business activity is likely in the future.

Staff estimates that the seven existing businesses will generate approximately \$39M annually in sales when operating at full capacity. At the maximum rate of 6%, \$39M in gross receipts would generate \$2,340,000 in taxes. Consequently, \$2M is a conservative estimate of revenue that could be generated by the proposed cannabis tax.

Staff is aware of a number of cannabis businesses interested in locating in Emeryville that are awaiting certainty on the City’s approach to taxation. If the tax rates are set at a level that is attractive to industry, the City can expect additional cannabis businesses to establish a presence here, further enhancing revenues.

### **STAFF COMMUNICATION WITH THE PUBLIC**

On or about July 16, 2018, staff sent an informational mailer about the proposed cannabis business tax to all Emeryville residents. The mailer included information regarding the time and place of the City Council meeting and invited attendance. In addition, staff contacted cannabis businesses operating in Emeryville to invite them to the City Council meeting. Note that representatives from the cannabis industry operating in Emeryville submitted a position letter dated July 10, 2018 to the City Council at the Council meeting that evening.

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<sup>9</sup> Elections Code Section 9285

## **ENVIRONMENTAL REVIEW**

The proposed Cannabis Business License Tax Ordinance involves the creation of a government funding mechanism that does not involve any commitment to any specific project that may result in a potentially significant impact on the environment and thus is not a “project” subject to the requirements of the California Environmental Quality Act (Public Resources Code Section 21000, et seq.) (CEQA) pursuant to CEQA Guidelines Section 15378 (b)(4); additionally, it can be seen with certainty that there is no possibility the adoption and implementation of the ordinance may have a significant effect on the environment, and accordingly the adoption of the ordinance is exempt from the provisions of CEQA pursuant to the “general rule” at CEQA Guidelines Section 15061(b)(3).

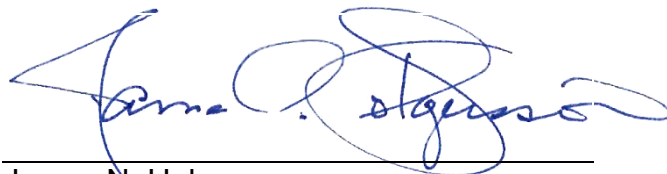
## **CONCLUSION**

Staff recommends the City Council consider the staff report, staff presentation, and public comments; thereafter provide direction on the version of the Cannabis Tax Ordinance the Council wishes to present to the voters; and adopt the enacting resolution.

## **PREPARED BY:**

Michael Guina, City Attorney  
Sheri Hartz, City Clerk  
Susan Hsieh, Finance Director  
Chadrick Smalley, Economic Development and Housing Manager

## **APPROVED AND FORWARDED TO THE CITY COUNCIL OF THE CITY OF EMERYVILLE:**



James N. Holgersson,  
Interim City Manager

## **ATTACHMENTS**

1. Resolution
  - a. Ex. A: Ordinance (Versions 1, 2, & 3)