



G A R V E Y S C H U B E R T B A R E R

MEMORANDUM

TO: Honorable Mayor Holladay and Oregon City Commission

CC: City Manager
Police Chief
Community Development Director

FROM: William K. Kabeiseman
City Attorney

DATE: August 25, 2015

RE: Marijuana Regulation

INTRODUCTION

Measure 91 was approved by the voters last November, but the 2015 legislature made some significant changes to the measure, and also legislated on a number of related topics. This memorandum and accompanying documents are intended to provide a comprehensive look at marijuana legalization in Oregon with a specific focus on what cities can, and cannot, do. Included with this memorandum are the following documents:

- 1) Summaries of the “Recreational Marijuana” and “Medical Marijuana” programs prepared by Garvey Schubert Barer; and
- 2) A Manual entitled “Local Regulation of Marijuana in Oregon” published by the League of Oregon Cities;

After reviewing this information, the City can take action to address the level of marijuana related businesses in Oregon City

DISCUSSION

Medical v. Recreational Marijuana and Types of Marijuana Businesses.

It is important to understand that, although the regulation of medical marijuana and recreational marijuana overlap to some degree, there are significant differences as well. For example, medical marijuana will be regulated by the Oregon Health Authority (“OHA”), but recreational marijuana will be regulated by the Oregon Liquor Control Commission (“OLCC”). Measure 91 only authorized

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recreational marijuana; medical marijuana had previously been authorized under other law. In addition, medical marijuana dispensaries are currently allowed under state law,¹ but recreational facilities are not currently allowed.² To the extent this memorandum does not differentiate, it is intended to apply to both medical and recreational marijuana.

In addition, House Bill 3400 (“HB 3400”), the most comprehensive of the marijuana bills that passed in the 2015 session, differentiates among several different types of business:

- (1) Medical Marijuana grow site
- (2) Medical marijuana processors;
- (3) Medical marijuana dispensaries;
- (4) Marijuana producers;
- (5) Marijuana processors;
- (6) Marijuana wholesalers; and
- (7) Marijuana retailers.

Some of the provisions in HB 3400 apply to all of the business types, but some apply only to specific business types. When this memorandum refers to “marijuana businesses” generally, without differentiating, it is referring all of the above business types.

Banning Marijuana.

As noted in the footnote below, there are no marijuana dispensaries in Oregon City because the City’s business license ordinance prohibits activities that are illegal under federal law and, because marijuana is still a schedule one drug under the Federal Controlled Substances Act, it is illegal to grow, possess or sell marijuana under federal law. This approach to banning marijuana would work not just for medical marijuana, but all marijuana businesses. Moreover, this approach was challenged earlier this year in a case out of Cave Junction, Oregon and the approach was upheld. That case is currently on appeal to the Oregon Court of Appeals and a decision is not expected for several months. To the extent the City wishes to continue to prohibit any marijuana businesses in the City, it can continue to rely on its business license ordinance until the Cave Junction case is decided or the City is challenged on a denial.

¹ None are currently located in Oregon City because the City’s business license ordinance prohibits the issuance of a business license to a business that will violate federal law. As discussed later in this memorandum, that approach has been upheld by an Oregon circuit court judge, but the decision is currently on appeal to the Oregon Court of Appeals.

² As discussed later in this memorandum, this will shift somewhat under Senate Bill 460, which authorizes medical marijuana dispensaries to sell some marijuana to anyone starting in October 1, 2015.

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In addition, HB 3400 also provides another avenue to prohibit both recreational and medical marijuana in the City. This approach may be useful should the Court of Appeals decide the Cave Junction appeal adversely. Because Oregon City is located in Clackamas County and the voters of Clackamas County did not oppose the measure by more than 55%, the City cannot simply adopt an ordinance banning marijuana businesses under HB 3400. Instead, the City may ban marijuana businesses only through the vote of the citizens of the City. The Commission can take that step by adopting an ordinance sending a ban to the vote of the citizens of Oregon City. The Commission may choose to ban all types of marijuana businesses, or only certain types of businesses. However, the election may only take place at a “statewide general election,” which next occurs in November 2016. Sending such a referral to the voters is also helpful in that, should the City do so, neither the OHA nor OLCC will issue any licenses to businesses located in the City until that vote occurs.

Finally, as noted in footnote two to this memorandum, Senate Bill 460 authorizes medical marijuana dispensaries to begin selling certain marijuana products (seeds, leaves, buds and plants) to anyone, not just persons with a medical marijuana card. To some extent, Senate Bill 460 should not have much of an effect in the City because the City has not allowed any dispensaries in the City pursuant to its business license ordinance. However, Senate Bill 460 did provide for the ability of a city to adopt an ordinance prohibiting this type of sale from medical marijuana dispensaries.

Regulating Marijuana.

Should the Commission decide not to ban marijuana businesses in the City, or should the voters decide not to adopt such a ban, the Commission may consider whether it wants to adopt regulations that would control marijuana businesses. H.B. 3400 adopted a few specific restrictions on marijuana businesses.³ For example, neither medical marijuana dispensaries nor marijuana retailers may be located in residential zones or within 1000 feet of a school. In addition, neither marijuana wholesalers nor marijuana processors may be located in residential zones, but HB 3400 says nothing about their proximity to schools. Finally, locational restrictions do not apply to marijuana producers or growers.

HB 3400 also authorizes the OLCC and the OHA to adopt additional rules, but those rules will likely not focus on locational restrictions. More importantly, HB 3400 authorizes the City to impose “reasonable regulations” on all recreational marijuana facilities (producers, processors, wholesalers and retailers). H.B. 3400 goes on to specifically define what constitutes “reasonable regulation”:

- The hours of operation of recreational marijuana retailers and medical marijuana grow sites, processing sites and dispensaries;
- The location of recreational marijuana producers, processors, wholesalers and retailers, as well as medical marijuana grow sites, processing sites and dispensaries, except that a city may not impose more than a 1,000-foot buffer between recreational marijuana retailers;

³ This memorandum is focusing solely on zoning type restrictions; HB 3400 also adopted a variety of other restrictions on marijuana businesses, such as prohibiting the involvement of minors, limits on the amount of marijuana that can be possessed, limitations on labelling, etc. . . .

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- The manner of operation of recreational marijuana producers, processors, wholesalers and retailers, as well as medical marijuana processors and dispensaries; and
- The public's access to the premises of recreational marijuana producers, processors, wholesalers and retailers, as well as medical marijuana grow sites, processing sites and dispensaries.

Taxes.

Measure 91 preempted any local taxes on marijuana businesses.⁴ HB 3400 changed that approach and authorized cities to adopt an ordinance, which must be referred to the voters, imposing a tax or fee of up to 3 percent on the sale of marijuana items by a retail licensee. The ordinance must be referred to the voters in a statewide general election, meaning an election in November of an even-numbered year. However, if a city has adopted an ordinance banning marijuana businesses in the city, the city may not impose a local tax under this provision of the legislation. Although HB 3400 provides that cities may impose a tax on sales by retail licensees, it remains unclear whether a city can tax medical marijuana.

SUMMARY

The City currently prohibits all marijuana businesses within the City through its business license ordinance. That approach has been approved in Josephine County, but that decision is currently under appeal. The City may want to consider using other approaches to address marijuana businesses in Oregon City. Some of those approaches could include the following:

- Adopting an ordinance banning medical marijuana dispensaries from the early sale of recreational marijuana under SB 460;
- Referring a measure to the voters banning one or more types of marijuana businesses in Oregon City;
- Adopting an ordinance placing time, place and manner restrictions on marijuana businesses in the City; and
- Adopting a tax of up to 3% on the sale of recreational marijuana retailers.

City staff remains available to assist the Commission in taking any or all of these actions.

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⁴ The City voted to impose a tax on marijuana businesses prior to the adoption of Measure 91. Arguably, because that tax was "adopt[ed] or enact[ed]" taxes prior to the effective date of HB 3400, it is grandfathered. However, that may be a fight for a later date.