

Memorandum

To: Nick Green, City Manager

From: City Attorney's Office, Bryant, Lovlien & Jarvis, P.C.

Date: November 3, 2020

Re: John Day Marijuana Regulations

This memorandum discusses the regulation of marijuana businesses in City of John Day ("City"). Our understanding is that City desires to (a) permit certain marijuana businesses within City's incorporated limits, and (b) tax the sale of certain marijuana products. As of the date of this memorandum, City currently prohibits (bans) all marijuana businesses within City. After reviewing the current marijuana regulations within City, this memorandum identifies recommended steps to regulate marijuana businesses if City desires to allow such businesses.

City's Current Regulations

1. On October 28, 2014, the John Day City Council (the "Council") adopted Ordinance No. 14-162-03 (the "Tax Ordinance") pursuant to which City adopted a tax on the sale of marijuana. The tax rate is set by resolution. The Tax Ordinance is codified in Title 3, Chapter 6 of the John Day Municipal Code (the "Code"). Pursuant to Resolution No. 14-730-16, City imposes a five percent (5%) tax on the sale of medical marijuana and ten percent (10%) tax on all other marijuana sales (i.e., recreational).
2. On April 28, 2015, the Council adopted Ordinance No. 15-163-01 (the "MMJ TPM Ordinance"), which ordinance imposes time, place, and manner restrictions on medical marijuana dispensaries in City.
3. On August 11, 2015, the Council adopted Ordinance No. 15-164-02 (the "Banning Ordinance") pursuant to which City prohibited the establishment of medical marijuana dispensaries and processing sites and recreational marijuana producers, processors, wholesalers, and retailers. The Banning Ordinance was adopted in accordance with a provision in House Bill 3400 (now codified at ORS 475B.968) allowing a city to prohibit various marijuana establishments. The Banning Ordinance is codified in Title 8, Chapter 5 of the Code.
4. Based on our review of the Code, City has not adopted any regulations governing the operation of recreational marijuana establishments (e.g., time, place, and manner restrictions applicable to recreational marijuana businesses). In addition, it does not appear that City adopted any land use regulations concerning marijuana businesses. In other words, City currently prohibits all establishments within City's incorporated limits.

Authority to Regulate Marijuana Operations and Marijuana Taxes

1. Under the Oregon Constitution, City has home rule authority to adopt regulations relating to marijuana businesses and City may impose additional restrictions on marijuana activities not described under state law, including, without limitation, reasonable time, place, and manner restrictions. Also, under ORS 475B.486 and 475B.928, the governing body of a city may adopt an ordinance imposing

reasonable regulations on the operation of marijuana businesses, including, without limitation, regulations addressing, among other things, sight, sound, smell, size/scale, location, access, operating standards, and other impacts associated with marijuana uses. City's regulations may extend to those areas subject to City's jurisdiction. Marijuana businesses must operate in compliance with City's regulations, including, without limitation, any land use and/or operational regulations and conditions adopted by City.

2. In addition to adopting reasonable regulations on the operation of marijuana establishments, City may tax the retail sale of marijuana. Per ORS 475B.491, the authority to impose a tax on the production, processing, or sale of marijuana is vested solely in the Legislative Assembly. The statute, however, provides that a city may adopt an ordinance imposing a tax up to three percent (3%) on the sale of marijuana items by a retail licensee (i.e., a recreational marijuana retailer). Such an ordinance must be referred to the voters at the next general statewide election (e.g., a November election in an even-numbered year).

3. Of note, City adopted the Tax Ordinance prior to the state's adoption of ORS 475B.491. If City desires to impose and collect any tax(es) pursuant to the Tax Ordinance, City needs to be prepared to defend the ability to do so against a legal challenge. City may rely on its home rule authority to impose the tax. However, this position is not without risk; imposing a tax under the Tax Ordinance presents a two-fold legal risk to City. First, as discussed above, state law purports to preempt a local government from taxing the sale of medical marijuana. Since Measure 91's passage, the state has amended ORS Chapter 475B to clarify that taxes on medical marijuana are prohibited. Second, state law purports to preempt a local government's authority to impose a tax on the sale of recreational marijuana unless the tax is approved by the voters and not more than three percent (3%).

4. To this end, if City repeals the Banning Ordinance and desires to impose a tax on marijuana sales, it should refer a measure to the voters in accordance with ORS 475B.491.

5. Finally, a city that repeals an ordinance prohibiting marijuana establishments as provided in ORS 475B.496 is eligible to a share of the state tax revenues under ORS 475B.759. (Note that Council may adopt an ordinance to repeal the Banning Ordinance pursuant to ORS 457B.496.)

Next Steps

If City desires to allow marijuana businesses to operate within City, City should adhere to the following steps:

a. Prepare ordinances to (a) repeal the Banning Ordinance, and (b) repeal the Tax Ordinance. Once City repeals the banning ordinance, it must send a copy of the repealing ordinance to OLCC and OHA—this is a step that allows City to begin receiving a share of the state tax revenue.

b. Prepare time, place, and manner restrictions (and land use restrictions) applicable to recreational marijuana to take effect upon the effective date of the ordinance repealing the Banning Ordinance. Amend the medical regulations as necessary.

c. Prepare an ordinance to be referred to the voters to adopt a tax on the sale of recreational marijuana. This tax must go to the voters at the next statewide general election.