

CITY OF WILSONVILLE

CITY COUNCIL MEETING MINUTES

A special meeting of the Wilsonville City Council was held at the Wilsonville City Hall beginning at 5:30 p.m. on Monday, September 29, 2014. Mayor Knapp called the meeting to order at 5:30 p.m., followed by roll call and the Pledge of Allegiance.

The following City Council members were present:

Mayor Knapp
Council President Starr
Councilor Goddard
Councilor Fitzgerald
Councilor Stevens

Staff present included:

Bryan Cosgrove, City Manager
Mike Kohlhoff, City Attorney
Sandra King, City Recorder
Jon Gale, Community Relations Coordinator

Motion to approve the order of the agenda.

Motion: Councilor Starr moved to approve the order of the agenda. Councilor Goddard seconded the motion.

Vote: Motion carried 5-0.

CONTINUING BUSINESS

A. **ORDINANCE NO. 748** – Second reading.

An Ordinance Of The City Of Wilsonville Establishing A Tax On The Sale Of Marijuana And Marijuana-Infused Products In The City Of Wilsonville And Adding A New Wilsonville Municipal Code Section. (staff – Kohlhoff)

Mr. Kohlhoff read the title of Ordinance No. 748 on second reading and stated at the first reading of the Ordinance, the public hearing had been held open to September 29, 2014 to allow any additional testimony or public comment to be submitted.

To provide clarity, an excerpt of the Staff Report prepared for Ordinance No. 748 is appended at the end of these minutes.

Mayor Knapp invited the public to testify, hearing nothing he closed the public hearing at 5:35 p.m.

Motion: Councilor Fitzgerald moved to adopt Ordinance No. 748 on second reading. Councilor Stevens seconded the motion.

Mr. Kohlhoff commented in the staff report there was mention of the proposed City of Ashland ordinance which showed that City had enacted a five percent gross sale amount to be paid by the seller or registry identification card holders; however at the last minute their council changed the tax rate from the five percent to zero percent.

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Mayor Knapp asked if any research had been done on the range of taxes being adopted by the cities that are enacting a similar ordinance, including Tigard, Tualatin, Hillsboro, and Gresham.

Mr. Kohlhoff indicated at the recent League of Oregon Cities conference the Oregon City Attorney's Association discussed this topic. The speakers said most cities were enacting either a five and 10 percent tax, or zero and ten percent tax.

The Mayor asked if all cities were allowing the establishments to keep a portion of the tax for administrative purposes.

Mr. Kohlhoff said retaining a portion of the tax for administrative purposes was standard and turns out to be five percent of the tax collected, similar to the collection of the hotel/motel tax.

Should Ballot Measure 91 pass in November the Mayor wanted to know whether cities would have the authority to alter the percentage amount of the tax.

Mr. Kohlhoff thought that would be in question, if a tax is imposed that gives the City the right to the tax imposed by the ordinance. They did not address the issue of collection of the tax. He suggested Council consider adding a percentage now that the Council felt is justified; and add language giving Council the ability, by resolution, to establish a different tax rate for the sale of such products in the future.

Councilor Starr explained he had not been at the Council meeting for the first vote, however, he has read the materials and feels confident he can make a decision. He asked if the ordinance would be jeopardized if the Council included the phrase "up to" so there is a moveable ceiling for the tax, but start the tax at 10 percent.

Mr. Kohlhoff thought that option was less defensible than if a rate was established along with the authority to change the rate in the future. It may be said the Council was imposing a different tax at a later date with a moveable rate. Mr. Kohlhoff suggested adding an additional Section 3 under Section 7.510 Levy of Tax which would read, "The City Council may by resolution establish a different tax rate for the sale of such products in the future." This language would allow changing the tax rate by resolution rather than by ordinance.

Councilor Starr asked whether the Council wanted to consider an adjustment to the tax rather than 10 percent, something more like 12 percent, to be in line with where most cities are but not quite the lowest number; more of a subtle discouragement to locating in Wilsonville.

Councilor Goddard commented Washington County entertained the idea of a tax but decided not to impose the tax, and asked if staff could explain the County's logic. He asked if there were other cities that did not impose a tax.

Mr. Kohlhoff responded the City of Roseburg thought Measure 91 would win and they didn't want to get involved in it. The City Attorney explained the League of Oregon Cities had taken two positions – the home rule issue; and that federal criminal law preempts the Oregon law.

Councilor Goddard commented he is not inclined to support the ordinance the way it has been laid out for the following reasons: first, the voters will decide in November whether they support this type of business or not; so it seems the City should let the voters decide whether they think these businesses should be legal businesses or not. He thought it was a matter for the state, and it was not a City issue, if the voters in the State are going to decide we ought to let them. Then the solution to that needs to be a State solution as well. He did not believe individual cities that are considering a tax ought to feel like

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they have to craft their own solution – we should be looking to the Attorney General’s office to help all cities decide how they are going to respond and what tools they have available to them to respond if they choose that these are businesses they do not want in their community.

Mr. Kohlhoff pointed out Ashland allows dispensaries, so they are taxing what they allow.

Councilor Goddard thought the issue also raises the question of what is the purpose of the ordinance. Is it to generate revenue? Or is it because we do not want these businesses in Wilsonville and we think this tax is a tool for shifting the businesses to an adjacent community. If the issue is one of revenue, then it raises a moral question, are we stating these businesses are bad and we don’t support them, but we are willing to look the other way if we can skim ten percent off the top of their sales and support the general fund. He felt that put the City in an awkward position of defending a business because the City has become accustomed to having the revenue in the general fund. If the issue is that we don’t want businesses of that type in Wilsonville then the City ought to just say those types of businesses are not welcome in the City of Wilsonville and be up front about it.

Mr. Cosgrove said the City has done what Council Goddard suggested with the Business License, but that is a hold status quo until the State determines what they will do with both medical marijuana and the general election will determine the outcome of recreational marijuana use.

Mr. Kohlhoff thought the issue was more one of uncertainty; should marijuana dispensaries become legitimate businesses under Federal law, and the recreational marijuana ballot measure passes, there is the question of administrative actions the City has to deal with and the social arena and whether or not a tax would be helpful to raise money to take care of that from an administrative point of view. Staff is proposing the tax to provide income to deal with future administrative issues, and the ordinance provides the option to that.

Councilor Goddard’s final argument was that in November, if the voters determine these are legal businesses does the City set a precedence of imposing arbitrary taxes on some legal businesses and not on tobacco or alcohol. He suggested the City should be having a discussion with the State regarding the taxation of tobacco and alcohol at the local level.

Councilor Starr thought the impact of the use of marijuana was not known and it was up to the Council to be proactive and set down some ground rules which may or may not be relevant depending on the results of the November vote. He thought Wilsonville should be consistent with other cities in the area that are instituting a tax and to a degree, make it less enticing to locate in Wilsonville by the amount of tax charged.

Councilor Stevens believed this was an opportunity to raise some revenue to aid in law enforcement issues that may be caused due to the legalization of marijuana. The proposed ordinance gave the City the ability to increase or decrease the fee as necessary.

Councilor Fitzgerald commented if Ballot Measure 91 passed, perhaps the Attorney General would find a way to give cities revenue to manage the burden; however, that is an unknown as well. One of the benefits of passing the ordinance is to give the City the option of imposing a tax, which may deter a marijuana business from locating in Wilsonville.

Mayor Knapp stated he believed citizens have the right to vote on the Ballot Measure; however, individual cities will be impacted, not just the State as a whole. Regulations contained in the ordinance about where the appropriate locations for marijuana outlets will require management that will fall to local municipalities. It is likely Wilsonville will be incurring costs for management and supervision and how

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interactions take place with students and children, general oversight and when necessary enforcement. All of these items cost money, personnel time and City resources and Wilsonville needs to be prepared to do what is responsible if Ballot Measure 91 is passed statewide. He thought it was responsible to have a structure prepared ahead of time. Wilsonville has a home rule charter and is responsible to uphold that charter in the strongest way we can and having Ordinance 748 on the books is a strong step to uphold the ability of Wilsonville to control its own destiny.

The Mayor thought charging a tax on marijuana was a responsible way to prepare for what potential costs may be. There are uncertainties but the City should prepare to be in the strongest position to handle any uncertainty and the ordinance will help to do so. The Mayor felt the City needed to be aware, ready, and position itself to handle the possible legalization. He thought establishing a 15% tax for recreational use and 7.5% for medical uses was reasonable and the wording suggested by Mr. Kohlhoff giving Council the authority to make adjustments to the tax with a resolution was appropriate.

A brief discussion on the penalties of not paying the City imposed tax followed, with staff noting sections of the ordinance that dealt with that issue, and that the penalties and interest were prescribed by City Code and State law.

Councilor Goddard asked if any analysis had been done on the increase in law enforcement costs and the amount of revenue that would be collected should Measure 91 pass.

Mr. Cosgrove responded no analysis had been done. When the ordinance was brought to Council on first reading it was explained there was a certain time in which frame to bring the ordinance to Council for adoption. Staff has no way of knowing how much, if any, additional law enforcement costs will be, or how much revenue will be generated. The purpose was to give Council a placeholder should Measure 91 pass so Council has it in place and was not preempted by State law.

Councilor Fitzgerald wanted to be sure the additional language about imposing a different rate in the future was fair and did not present an element of weakness to the ordinance.

Mr. Kohlhoff thought the fact that the Council is able to establish a different rate is something the Council can do with other fee structures in the City. He believed staff would come to Council with a proposed rate change, should it be necessary, and that Council would not act in an arbitrary or unreasonable way. The ordinance contains a provision stating if any part of the ordinance is deemed illegal or unconstitutional that portion would be severed, and the rest would remain.

Councilor Starr asked if the phrase 'a different rate' in Section 7.510(3) would jeopardize the entire section because it is ambiguous. Section 7.510(3) reads "Council can establish by resolution a different rate for the sale of such products in the future."

Mr. Kohlhoff explained putting it in now with a given rate and the ability to change is a better defensible position than not establishing a rate now.

Councilor Fitzgerald liked the concept of using the hotel/motel tax as a general guideline. She asked why cities would adopt a similar ordinance with a zero percent.

Mr. Kohlhoff thought there was an argument to be made that by putting in zero percent, they have imposed a tax that they can change later by resolution. But they have a placeholder, and zero is a placeholder.

Mayor Knapp asked Council if they wanted to make any amendments to the ordinance.

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Motion to amend Section 7.510(2)(b): Councilor Fitzgerald moved to amend Section 7.510(2)(b) to read Twelve (12%) percent rather than 10%. Councilor Starr seconded the motion.

Vote on motion to amend: Motion carried 4-1. Councilor Goddard voted no.

Motion to amend Section 7.510(2)(a): Councilor Starr moved to amend Section 7.510(2)(a) to read 7.5% rather than 5%. Councilor Fitzgerald seconded the motion.

Councilor Goddard reiterated his belief the tax was arbitrary and referred to the language in the proposed measure that would repeal conflicting charters and ordinances and if this tax were viewed to be conflicting it would get thrown out. He thought imposing a tax on an illegal product for the revenue was disingenuous, particularly if these businesses are not wanted in Wilsonville.

Councilor Fitzgerald stated if Council assumes Measure 91 passes and the City is allowed to impose the tax she did not agree imposing such a tax signals the City is welcoming the business. She noted it was uncertain whether the earlier ordinance adopted banning medical marijuana businesses in Wilsonville would be upheld overtime. If the sale of marijuana turns out to be a legal business in the State of Oregon and the City of Wilsonville has no power to prevent that business from locating in the City, then the Council is not welcoming or unwelcoming the business, the City is complying with State law. The discussion she supported is the reasonable taxing amount of the hotel/motel taxes does this send a signal that if the City is to allow having these businesses in Wilsonville, the City will be able to collect a small amount of revenue to help manage any negative or burdensome consequences.

Mayor Knapp offered if the City was in a situation where it could not prohibit and it is up to the City to manage these outlets, he was skeptical a medical registry sale will only take half the amount of supervision that a recreational sale might take. how do you judge dealing with the supervision, oversight, location factors, dealing with schools, those are all affected by the sale of marijuana, not just by the sale of recreational marijuana, I think there is a certain logic to say if the Council were to decide to implement taxes in order to offset those anticipated costs that anticipating some costs for medical marijuana is a reasonable corollary to that.

Councilor Stevens was concerned that taxing medical marijuana may be seen as punitive for someone who uses it as a medicine and she was more comfortable with the five percent tax. She thought there would be some costs incurred with the recreational marijuana use.

Vote on amendment: Motion carried 3-2. Councilors Goddard and Stevens voted no.

Motion to Amend: Councilor Starr moved to amend the Ordinance by creating Section 7.510(3) to read, "The City Council can by resolution a different rate for the sale of such products in the future." Councilor Stevens seconded the motion.

Mr. Kohlhoff suggested phrasing the Section as follows: "The City Council may by resolution establish a different rate for the sale of such products in the future."

Both Councilor Starr and Stevens agreed with the City Attorney's suggested language.

Vote on amendment: Motion carried 4-1. Councilor Goddard voted no.

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Vote on main motion as amended: Motion carried 4-1

Councilor Starr - Yes
Councilor Goddard - No
Councilor Fitzgerald - Yes
Councilor Stevens - Yes
Mayor Knapp - Yes

ADJOURN

The Mayor adjourned the Council meeting at 6:40 p.m.

Respectfully submitted,

Sandra C. King, MMC, City Recorder

ATTEST:

Tim Knapp, Mayor

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Excerpt of Staff Report

EXECUTIVE SUMMARY:

Oregon voters legalized medical marijuana via initiative petition in 1999. Shortly thereafter, medical marijuana dispensaries began opening around the state. These dispensaries essentially served as a middle-man for marijuana growers and medical marijuana patients. While these dispensaries were at least arguably legal, they were unregulated and the source of controversy in many communities.

The 2013 Oregon Legislature passed House Bill 3460, which created regulatory and licensing requirements for medical marijuana dispensaries. To date, there are approximately 198 approved and 115 provisionally approved dispensaries in Oregon. The City of Wilsonville passed Ordinance No. 740, which effectively bans medical marijuana dispensaries in Wilsonville during the legislatively allowed moratorium period, which ends May 1, 2015. Additionally, the City's business license Ordinance remains in effect and prohibits the operation of any business in Wilsonville that by its very nature violates federal law. This Ordinance therefore effectively bans all marijuana businesses from Wilsonville, with no sunset date, as long as sale and possession of marijuana remains illegal under federal law.

Signature-gathering is currently underway for a ballot measure that would legalize the sale of recreational marijuana in Oregon and prohibit local jurisdictions from taxing its sale. This measure is likely to appear on the November ballot. At this point in time, however, there is nothing in current Oregon law that prohibits a local government from taxing marijuana.

The Ordinance presented for Council consideration is a gross receipts tax on the sale of recreational marijuana, medical marijuana and marijuana-infused products. A gross receipts tax is applied to the total gross taxable revenues of a business. It is similar to a sales tax except that it is levied on the seller rather than the purchaser. The seller is responsible for maintaining accurate records of its gross revenues from taxable goods and services and then remitting a percentage to the taxing entity. Many businesses that are subject to a gross receipts tax will show the tax on the bill of sale they present to the customer, but it is nonetheless the business that is responsible for paying the tax.

Staff elected not to recommend a taxation scenario in which growers and processors are also taxed, for a number of reasons. First, under Oregon law, growers and grow sites must register with the state, but their locations and identities are confidential. City staff would have no way of identifying them in order to apply a tax. Further, City staff has no experience with administering a value added tax, which is essentially what this would be, and is reluctant to even attempt to create the administrative structure for such a tax. In addition, all taxes, regardless of where they are assessed in the supply chain, are ultimately passed on to the consumer. Therefore, the gross receipts of a business would reflect all of the costs incurred along the supply chain and a gross receipts tax would capture tax revenue from each of those elements. How to disperse that tax liability within the supply chain would be left to the growers, processors, and retailers, rather than to the City. Finally, the proposed ballot measure specifically prohibits a tax on growers. Thus, if our Ordinance contained a tax on growers, it would be in direct conflict with the enacted law and therefore more subject to challenge under the proposed measure's Section 58, which contains language repealing conflicting charters and ordinances.

As stated above, there is nothing in current Oregon law that prohibits the City from taxing marijuana, but it should be noted that the marijuana initiative most likely to be considered by the voters in November contains the following express language:

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“SECTION 42. State has exclusive right to tax marijuana. No county or City of this State shall impose any fee or tax, including occupation taxes, privilege taxes and inspection fees, in connection with the purchase, sale, production, processing, transportation, and delivery of marijuana items.”

Because the above language does not specifically repeal a local marijuana tax in effect at the time of the measure’s passage, and because this language could be interpreted to read “No county or City of this State shall [after the effective date of this measure] impose any fee or tax...” it can be argued that this language would not be in conflict with the ballot measure and that the ballot measure does not preempt this taxation Ordinance, if the Ordinance is adopted by the Council before passage of the ballot measure.

Alternatively, the language can be interpreted by the Legislature or Courts as “No county or City of this State shall [be allowed at any time to] impose any fee or tax...” As such, absent adjudication in a State court, there is no guarantee that a local tax imposed prior to passage of this initiative would survive beyond the effective date of the initiative, unless the initiative language is modified by the Legislature or the initiative fails.

EXPECTED RESULTS:

Taxing marijuana could limit the number of sellers in the Wilsonville area, with such sellers electing instead to operate in cities without such a tax. On the negative side, taxability has been argued to lead to more black market unlicensed sales and these sellers are harder to catch and tax.

TIMELINE:

Passage must occur before the November election to give the Ordinance a better chance of being upheld as not being in direct conflict with the ballot measure, should it become law.