



Filner Plan to Tax Pot is in Uncharted Area

Ordinance to be considered by City Council includes state's first marijuana excise levy

By: Craig Gustafson – April 21, 2013

The City Council will once again consider an ordinance to regulate medical marijuana dispensaries in San Diego today after Mayor Bob Filner revived the issue this year following a failed proposal in 2011.

One of the key provisions of Filner's plan is to impose a 2 percent excise tax on all wholesale acquisitions by the dispensaries — new territory for a California city that could raise legal questions. In other words, the tax would be levied on the product going into the dispensaries, not on sales.

The increasing legalization of marijuana in states like Colorado and Washington has led many jurisdictions to consider taxing it in some way. The main argument for taxation is to help pay for regulation and any increase in public safety costs.

Taxing marijuana could lead to big bucks. A 2010 study by the Cato Institute said that if the nation legalized and taxed marijuana it would generate \$8.7 billion annually in state and federal tax revenue.

San Jose, where voters approved a 7 percent marijuana business tax in 2010, collected \$290,000 in tax revenue from 73 dispensaries in its first month. Colorado is considering a 15 percent excise tax on marijuana.

By comparison, Filner's 2 percent tax is modest although he is coupling it with a \$5,000 annual permit fee for dispensaries.

“What we call an excise tax of 2 percent on the sales of medical marijuana (is) to make sure that the increased enforcement and registration requirements we want to protect the public ... that we get the money to do that,” Filner told KPBS on April 8. “There is a provision in the (state) constitution for an excise tax. It's got to be collected through the city, the way we collect any sales tax, for example, or any tax on tourists. ... And have that 2 percent going to the enforcement actions that we need to do to keep our kids safe while we are providing the humane and compassionate treatment for those who need medical marijuana.”

The exact language Filner used to describe the tax in an April 9 executive summary was “a two-percent excise tax on all medical marijuana dispensary acquisitions from their dispensary members.”

The mayor doesn't believe the excise tax requires a public vote because Proposition 26, which requires that certain state and local fees be approved by a two-thirds majority of a legislative body, has exemptions for some license fees and cost-recovery efforts that would allow the City Council to approve his plan with a simple majority.

San Diego County Assessor-Recorder-Clerk Ernest Dronenburg, who served on the state Board of Equalization, said he's skeptical that Filner's proposal is legal. He said there's no local excise tax in the state of California and Filner could run afoul of the Board of Equalization, which could stop collecting sales taxes altogether for the city if it creates one.

"He can do it, but what he risks is that the state will stop collecting his sales tax for him and then the city will have to put in a city-administrated sales tax because he's outside of the law," Dronenburg said.

Lee Burdick, Filner's director of special projects and legal affairs, acknowledged the mayor's taxation plan is heading into uncharted territory and that the state board could take action against the city. But she said she informally ran the excise tax idea by the state board and is confident it will be viewed as sound public policy.

Burdick said the costs related to dispensaries are unique and require a unique solution if the city is to recover its costs. The excise tax allows the city to receive more money from larger dispensaries that sell larger volumes and need to be watched more closely by city officials and law enforcement.

Medical marijuana advocates are strongly in favor of the mayor's proposal.

"We want there to be access in San Diego city," said Ken Cole, president of the United Patients' Alliance, a trade association of medical cannabis distributors. "However, we also want operators to behave in a responsible manner, where the patients and public can feel safe and respected. Mayor Filner's proposal provides both access to patients and enhanced safety to the community."

Scott Chipman, with San Diegans for Safe Neighborhoods, a group that opposes marijuana dispensaries, said the mayor's proposal assumes that with proper regulation pot shops will comply with the law when there is evidence to the contrary. He pointed out that several shops have opened in the city since January even though they remain illegal.

"We urge the City Council to reject this proposal and any proposal that allows for retail sales and profiteering by drug dealers," Chipman said.

He added that a \$5,000 permit fee is "chump change" for dispensary owners who can make that much in half a day.

Filner renewed the medical marijuana debate in January when he halted city prosecutions of dispensaries by using his strong-mayor powers to direct police and code enforcement officers to stop forwarding cases to the City Attorney's Office.

The City Council reversed that decision Jan. 29 in closed session with Filner's approval. They agreed that enforcing the city's zoning laws, which don't allow for dispensaries,

would prevent new dispensaries from opening throughout the city ahead of a planned ordinance.

City Attorney Jan Goldsmith said enforcement is nonexistent despite that decision. He said he's forwarded 23 complaints of dispensaries operating illegally to the Neighborhood Code Compliance division since January and no enforcement actions have been taken.

Goldsmith said he doesn't have an opinion on how the city should proceed other than he wants strict enforcement of whatever rules are put in place.

"If there is an ordinance prepared and approved that limits them to one area, there should be considered an enforcement component for the other areas," he said. "Right now, we don't have anything as far as enforcement."

Goldsmith said he had not researched how the city could tax marijuana.

An excise tax like one Filner is proposing is used on a variety of products, including cigarettes and gasoline. It's considered an indirect form of taxation because the government does not directly apply the tax. The producer or merchant is charged and then must pay the tax to the government. Often the expense is passed on to the consumer in the form of higher prices.

So how much money would a 2 percent excise tax generate for San Diego?

In 2011, the Patient Care Association of California estimated that city dispensaries had a customer base of about 70,000 patients and annual sales of \$200 million. The wholesale price paid by dispensaries would be less than \$200 million, so it's difficult to say how much money a 2 percent excise tax would generate for city coffers.

Those figures were before more than 200 medical marijuana collectives were closed in San Diego and Imperial counties after U.S. Attorney Laura Duffy and her colleagues announced in 2011 enforcement actions aimed at distributors in California. The legal limbo for dispensaries dates to 1996 when state voters approved an initiative to allow people with recommendations from state-licensed physicians to possess and cultivate marijuana for personal use. Marijuana is illegal under federal law.

The City Council approved an ordinance two years ago that was later rescinded after a successful petition drive by medical marijuana proponents who considered it too restrictive. That plan required all of the city's collectives to shut down and apply for permits, and then limited them to some commercial and industrial zones.

The council won't approve an ordinance at its 2 p.m. meeting today but rather provide direction to the city attorney on what it should include. The council can make changes to Filner's plan, subject to a mayoral veto.