



# CITY OF TROUTDALE



## STAFF REPORT

**SUBJECT / ISSUE:** An Ordinance Adopting A New Chapter Of The Troutdale Municipal Code Chapter 3.35, "Marijuana Tax"

**MEETING TYPE:**  
City Council Regular Mtg.

**MEETING DATE:** September 30, 2014

**STAFF MEMBER:** Shelby Rihala  
**DEPARTMENT:** Legal

**ACTION REQUIRED**  
Ordinance - Adoption

**ADVISORY COMMITTEE/COMMISSION RECOMMENDATION:**  
Not Applicable

**PUBLIC HEARING**  
Yes

**Comments:**

**STAFF RECOMMENDATION:** Adopt the proposed Ordinance.

**EXHIBITS:** None

**Subject / Issue Relates To:**

Council Goals                       Legislative                       Other:

**Issue / Council Decision & Discussion Points:**

- ◆ Troutdale is a home rule City and desires to preserve the authority of the City to govern the City to the greatest extent allowed by the constitutions, statutes and common law of the United States and Oregon
- ◆ That Ballot Measure 91, scheduled for the November 4, 2014 general election, would, if approved by the voters, legalize recreational marijuana in Oregon, and specifically prohibits cities and counties from imposing their own taxes on the marijuana, giving exclusive taxing authority to the state.
- ◆ Adoption of an ordinance in effect prior to the effect of Measure 91 is necessary to preserve the City's ability to tax marijuana

Reviewed and Approved by <sup>Acting</sup> City Manager: 

## BACKGROUND:

Oregon Ballot Measure 91 has qualified for the November, 2014 ballot regarding whether or not to enact a state law "legalizing the recreational use of marijuana, based on regulation and taxation to be determined by the Oregon Liquor Control Commission."

**The Measure 91 Ballot Title** summary from the Secretary of State: *"Allows possession, manufacture, sale of marijuana by/to adults, subject to state licensing, regulation, taxation"*

**Summary:** Currently, cultivation, possession, delivery, sale of marijuana are unlawful, excepting regulated production, possession, use of medical marijuana. Measure allows production, processing, delivery, possession, sale of marijuana to adults, licensed, regulated by Oregon Liquor Control Commission (OLCC). Marijuana producer, processor, wholesaler may deliver "marijuana items" (defined) only to/on licensed retail premises. OLCC collects tax imposed on marijuana producer at different rates for marijuana flowers, leaves, immature plant. "Homegrown marijuana" (defined) not regulated, taxed. Tax revenues, fees fund OLCC suspense account, Oregon Marijuana Account distributed: 40% to Common School Fund; 20% for mental health/alcohol/drug services; 15% for state police; 20% for local law enforcement; 5% to Oregon Health Authority. "Marijuana paraphernalia" (defined) excluded from "drug paraphernalia" laws. Other provisions."

As the Mayor recently noted there are a number of cities which are enacting ordinances in advance of the November 4<sup>th</sup> election to allow for the local taxation of marijuana should Measure 91 pass. Cities that have or are in the process of adoption include Ashland, Dundee, Fairview, Forest Grove, Gresham, Hillsboro, Milwaukie, Oregon City, Scappoose, Tigard, and Wilsonville.

The draft ordinance on this agenda would impose a gross receipts tax on the sale of medical marijuana, recreational marijuana (should it be legalized by Oregon voters in November) and marijuana-infused products. The ordinance is modeled from the Milwaukie ordinance and imposes a lower tax on medical marijuana (5%) than that imposed on recreational marijuana (10%). The ordinance would apply to all state-licensed retailers of marijuana and medical marijuana; as well as all those who are required to be licensed by the state. The ordinance allows the seller to retain five percent (5%) of all taxes due to defray the costs of bookkeeping and remittance.

While no provisions in current Oregon law prohibit the City from taxing marijuana, Measure 91 contains the following language:

**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.

However there is no certainty that the state or others may not seek challenge a local marijuana tax upon adoption of Measure 91, nor how the courts may rule on any such challenge.

The ordinance before the City Council for consideration is a gross receipts tax on the sale of 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. A business subject to a gross receipts tax typically will show the tax on the bill of sale that it presents to the customer, but it is nonetheless the business that is responsible for paying it. A gross receipt tax has the administrative advantage of ease of collection and ease of auditing.

Given the uncertainty of a passage, potential locations of medical marijuana dispensaries and volume of recreational usage sale locations, no tax revenue projection can be reasonably estimated.

#### **Timing Issues & Adoption Process:**

The Mayor directed the City Attorney to present the draft ordinance for Council consideration to tax the sale or transfer of marijuana and marijuana-infused products within the City. Given the state preemption of taxing authority in Measure 91, the City ordinance must be in effect prior to the measure effective date:

**SECTION 84. This Act becomes effective 30 days after the day on which it is approved by a majority of the votes cast on it.**

The City charter generally requires ordinances be adopted only after public hearings at two separate Council meetings, and to be effective thirty days after adoption. Following the regular adoption process the ordinance was introduced September 23, 2014. The Council chose to schedule the second reading and consider adoption on September 30, 2014. If adopted tonight, the ordinance would be effective October 30, 2014.

While the Council "could" declare an emergency and adopt the ordinance with only 1 public hearing, however, due to the imposition of a tax, the 30 day referral period prior to becoming effective would still be required.

#### **SUMMARY:**

Taxing marijuana could limit the number of sellers in the Troutdale 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.

## **ORDINANCE NO.**

### **AN ORDINANCE ADOPTING A NEW CHAPTER OF THE TROUTDALE MUNICIPAL CODE CHAPTER 3.35, "MARIJUANA TAX".**

#### **THE TROUTDALE CITY COUNCIL FINDS AS FOLLOWS:**

1. That Troutdale is an Oregon home-rule municipal corporation having all powers which the constitutions, statutes, and the common law of the United States and this state expressly or impliedly grant or allow municipalities as full as though the charter specifically enumerated each of those powers; and
2. That the city's charter shall be liberally construed to the end that the city may have all powers necessary and convenient for the conduct of its municipal affairs, including all powers that cities may assume pursuant to state laws and to the municipal home rule provisions of the state constitution
3. That, except as otherwise provided, all powers of the City shall be vested in the City Council
4. That Ballot Measure 91, scheduled for the November 4, 2014 general election, would, if approved by the voters, legalize recreational marijuana in Oregon, and specifically prohibits cities and counties from imposing their own taxes on the marijuana, giving exclusive taxing authority to the state.
5. That the City Council wishes to exercise that power to tax the sale or transfer of marijuana and marijuana-infused products within the City.

#### **NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF TROUTDALE**

Section 1. Title 3 REVENUE AND FINANCE, of the Troutdale Municipal Code is amended to add a new chapter, 3.35, Marijuana Tax, to read as set forth in Attachment A, which is incorporated by reference herein.

Section 2. Severability. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are severable. This City Council hereby declares that it would have adopted this ordinance irrespective

of the invalidity of any particular portion thereof and intends that the invalid portions should be severed and the balance of the ordinance be enforced.

Section 3. This Ordinance shall be effective on the thirtieth day after its adoption.

**YEAS:**  
**NAYS:**  
**ABSTAINED:**

\_\_\_\_\_  
**Doug Daoust, Mayor**

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**Debbie Stickney, City Recorder**  
**Adopted:**

**Chapter 3.35                      MARIJUANA TAX**

- 3.35.010      Purpose**
- 3.35.015      Definitions**
- 3.35.020      Tax Imposed**
- 3.35.025      Amount and Payment, Exemption, Deductions**
- 3.35.030      Seller Responsible for Payment of Tax**
- 3.35.035      Penalties and Interest**
- 3.35.040      Failure to Report and Remit Tax – Determination of Tax by Director**
- 3.35.045      Appeal**
- 3.35.050      Refunds**
- 3.35.055      Actions to Collect**
- 3.35.060      Violation**
- 3.35.065      Confidentiality**
- 3.35.070      Audit of Books, Records, or Persons**
- 3.35.075      Forms and Regulations**

**3.35.010      Purpose**

For the purposes of this chapter, every person who sells marijuana, medical marijuana or marijuana-infused products in the City of Troutdale is exercising a taxable privilege. The purpose of this chapter is to impose a tax upon the retail sale of marijuana, medical marijuana, and marijuana-infused products.

**3.35.015      Definitions**

As used in this ordinance, unless the context requires otherwise:

1. "Director" means the Director of Finance for the City of Troutdale or his/her designee.
2. "Gross Sales" means the total amount received in money, credits, property or other consideration from sales of marijuana, medical marijuana and marijuana-infused products that is subject to the tax imposed by this chapter.
3. "Marijuana" means all parts of the plant of the Cannabis family Moraceae, whether growing or not; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its resin, as may be defined by Oregon Revised Statutes as they currently exist or may from time to time be amended. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted there from), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

4. "Oregon Medical Marijuana Program" means the office within the Oregon Health authority that administers the provisions of ORS 475.300 through 475.346, the Oregon Medical Marijuana Act, and all policies and procedures pertaining thereto.
5. "Person" means natural person, joint venture, joint stock company, partnership, association, club, company, corporation, business, trust, organization, or any group or combination acting as a unit, including the United States of America, the State of Oregon and any political subdivision thereof, or the manager, lessee, agent, servant, officer or employee of any of them.
6. "Purchase or Sale" means the acquisition or furnishing for consideration by any person of marijuana or marijuana-infused product within the City.
7. "Registry identification cardholder" means a person who has been diagnosed by an attending physician with a debilitating medical condition and for whom the use of medical marijuana may mitigate the symptoms or effects of the person's debilitating medical condition, and who has been issued a registry identification card by the Oregon Health Authority.
8. "Retail sale" means the transfer of goods or services in exchange for any valuable consideration.
9. "Seller" means any person who is required to be licensed or has been licensed by the State of Oregon to provide marijuana or marijuana-infused products to purchasers for money, credit, property or other consideration.
10. "Tax" means either the tax payable by the seller or the aggregate amount of taxes due from a seller during the period for which the seller is required to report collections under this chapter.
11. "Taxpayer" means any person obligated to account to the Director of Finance for taxes collected or to be collected, or from whom a tax is due, under the terms of this chapter.

**3.35.020 Tax Imposed**

A tax is hereby levied and shall be paid by every seller exercising the taxable privilege of selling marijuana and marijuana-infused products as defined in this chapter. The Director is authorized to exercise all supervisory and administrative powers with regard to the enforcement, collection, and administration of the marijuana tax.

**3.35.025 Amount and Payment, Exemption, Deductions**

1. In addition to any fees or taxes otherwise provided for by law, every seller engaged in the sale of marijuana and marijuana-infused products shall pay a tax of ten percent (10%) of the gross sale amount paid to the seller of marijuana and marijuana-infused products by individuals who are not registry identification cardholders purchasing marijuana or marijuana-infused products under the Oregon Medical Marijuana Program.
2. Sale of marijuana or marijuana-infused products to individuals who are registry identification cardholders purchasing marijuana or marijuana-infused products under the Oregon Medical Marijuana Program shall pay a tax of five percent (5%) of the gross sale amount paid to the seller of marijuana and marijuana-infused products.
3. The following deductions shall be allowed against sales received by the seller providing marijuana or marijuana-infused products:
  - a. Refunds of sales actually returned to any purchaser;
  - b. Any adjustments in sales which amount to a refund to a purchaser, providing such adjustment pertains to the actual sale of marijuana or marijuana-infused products and does not include any adjustments for other services furnished by a seller.

**3.35.030 Seller Responsible for Payment of Tax**

1. Every seller shall, on or before the last day of the month following the end of each calendar quarter (in the months of April, July, October and January) make a return to the Director, on forms provided by the City, specifying the total sales subject to this chapter and the amount of tax collected under this chapter. The seller may request or the Director may establish shorter reporting periods for any seller if the seller or Director deems it necessary in order to ensure collection of the tax and the Director may require further information in the return relevant to payment of the tax. A return shall not be considered filed until it is actually received by the Director.
2. At the time the return is filed, the full amount of the tax collected shall be remitted to the Director. Payments received by the Director for application against existing liabilities will be credited toward the period designated by the taxpayer under conditions that are not prejudicial to the interest of the City. A condition considered prejudicial is the imminent expiration of the statute of limitations for a period or periods.
3. Non-designated payments shall be applied in the order of the oldest liability first, with the payment credited first toward any accrued penalty, then to interest, then to the underlying tax until the payment is exhausted. Crediting of a payment toward a

specific reporting period will be first applied against any accrued penalty, then to interest, then to the underlying tax. If the Director, in his or her sole discretion, determines that an alternative order of payment application would be in the best interest of the City in a particular tax or factual situation, the Director may order such a change. The Director may establish shorter reporting periods for any seller if the Director deems it necessary in order to ensure collection of the tax. The Director also may require additional information in the return relevant to payment of the liability. When a shorter return period is required, penalties and interest shall be computed according to the shorter return period. Returns and payments are due immediately upon cessation of business for any reason. All taxes collected by sellers pursuant to this chapter shall be held in trust for the account of the City until payment is made to the Director. A separate trust bank account is not required in order to comply with this provision.

4. Every seller required to remit the tax imposed in this chapter shall be entitled to retain five percent (5%) of all taxes due to defray the costs of bookkeeping and remittance.
5. Every seller must keep and preserve in an accounting format established by the Director records of all sales made by the dispensary and such other books or accounts as may be required by the Director. Every seller must keep and preserve for a period of three (3) years all such books, invoices and other records. The Director shall have the right to inspect all such records at all reasonable times.

**3.35.035 Penalties and Interest**

1. Any seller who fails to remit any portion of any tax imposed by this chapter within the time required shall pay a penalty of ten percent (10%) of the amount of the tax, in addition to the amount of the tax.
2. Any seller who fails to remit any delinquent remittance on or before a period of 60 days following the date on which the remittance first became delinquent, shall pay a second delinquency penalty of ten percent (10%) of the amount of the tax in addition to the amount of the tax and the penalty first imposed.
3. If the Director determines that the nonpayment of any remittance due under this chapter is due to fraud, a penalty of twenty-five percent (25%) of the amount of the tax shall be added thereto in addition to the penalties stated in subparagraphs 1 and 2 of this section.
4. In addition to the penalties imposed, any seller who fails to remit any tax imposed by this chapter shall pay interest at the rate of one percent (1%) per month or fraction thereof on the amount of the tax, exclusive of penalties, from the date on which the remittance first became delinquent until paid.
5. Every penalty imposed, and such interest as accrues under the provisions of this section, shall become a part of the tax required to be paid.

6. All sums collected pursuant to the penalty provisions in subparagraphs 1 and 3 of this section shall be distributed to the City of Troutdale General Fund to offset the costs of auditing and enforcement of this tax.

**3.35.040 Failure to Report and Remit Tax – Determination of Tax by Director**

If any seller should fail to make, within the time provided in this chapter, any report of the tax required by this chapter, the Director shall proceed in such manner as deemed best to obtain facts and information on which to base the estimate of tax due. As soon as the Director shall procure such facts and information as is able to be obtained, upon which to base the assessment of any tax imposed by this chapter and payable by any seller, the Director shall proceed to determine and assess against such seller the tax, interest and penalties provided for by this chapter. In case such determination is made, the Director shall give a notice of the amount so assessed by having it served personally or by depositing it in the United States mail, postage prepaid, addressed to the seller so assessed at the last known place of address. Such seller may make an appeal of such determination as provided in section 3.35.045. If no appeal is filed, the Director's determination is final and the amount thereby is immediately due and payable.

**3.35.045 Appeal**

Any seller aggrieved by any decision of the Director with respect to the amount of such tax, interest and penalties, if any, may appeal pursuant to the City Council within thirty (30) days of the serving or mailing of the determination of tax due. The City Council shall hear and consider any records and evidence presented bearing upon the Director's determination of amount due, and make findings affirming, reversing or modifying the determination. The findings of the City Council shall be final and conclusive. Any amount found to be due shall be immediately due and payable upon the service of notice.

**3.35.050 Refunds**

1. Whenever the amount of any tax, interest or penalty has been overpaid or paid more than once, or has been erroneously collected or received by the City under this chapter, it may be refunded as provided in subparagraph 2 of this section, provided a claim in writing, stating under penalty of perjury the specific grounds upon which the claim is founded, is filed with the Director within one year of the date of payment. The claim shall be on forms furnished by the Director.
2. The Director shall have twenty (20) calendar days from the date of receipt of a claim to review the claim and make a determination in writing as to the validity of the claim. The Director shall notify the claimant in writing of the Director's determination. Such notice shall be mailed to the address provided by claimant on the claim form. In the event a claim is determined by the Director to be a valid claim, in a manner prescribed by the Director a seller may claim a refund, or take as credit against taxes collected and remitted, the amount overpaid, paid more than once or erroneously collected or received. The seller shall notify

Director of claimant's choice no later than fifteen (15) days following the date Director mailed the determination. In the event claimant has not notified the Director of claimant's choice within the fifteen (15) day period and the seller is still in business, a credit will be granted against the tax liability for the next reporting period. If the seller is no longer in business, a refund check will be mailed to claimant at the address provided in the claim form.

3. Any credit for erroneous overpayment of tax made by a seller taken on a subsequent return or any claim for refund of tax erroneously overpaid filed by a seller must be so taken or filed within three (3) years after the date on which the overpayment was made to the City.
4. No refund shall be paid under the provisions of this section unless the claimant established the right by written records showing entitlement to such refund and the Director acknowledged the validity of the claim.

**3.35.055      Actions to Collect**

Any tax required to be paid by any seller under the provisions of this chapter shall be deemed a debt owed by the seller to the City. Any such tax collected by a seller which has not been paid to the City shall be deemed a debt owed by the seller to the City. Any person owing money to the City under the provisions of this chapter shall be liable to an action brought in the name of the City of Troutdale for the recovery of such amount. In lieu of filing an action for the recovery, the City of Troutdale, when taxes due are more than 30 days delinquent, can submit any outstanding tax to a collection agency. So long as the City of Troutdale has complied with the provisions set forth in ORS 697.105, in the event the City turns over a delinquent tax account to a collection agency, it may add to the amount owing an amount equal to the collection agency fees, not to exceed the greater of fifty dollars (\$50.00) or fifty percent (50%) of the outstanding tax, penalties and interest owing.

**3.35.060      Violation**

1. A violation of this chapter shall be punishable by a mandatory fine not to exceed two hundred dollars (\$200.00). Each violation of a separate provision of this chapter shall constitute a separate offense and each day that a violation of this chapter is committed or permitted to continue shall constitute a separate offense. A violation of this chapter shall be processed pursuant to Chapter 1.08 of this code. It is a violation of this chapter for any seller or other person to:
  - a. Fail or refuse to comply as required herein;
  - b. Fail or refuse to furnish any return required to be made;
  - c. Fail or refuse to permit inspection of records;
  - d. Fail or refuse to furnish a supplemental return or other data required by the Director;

- e. Render a false or fraudulent return or claim; or
  - f. Fail, refuse or neglect to remit the tax to the city by the due date.
2. The remedies provided by this section are not exclusive and shall not prevent the City from exercising any other remedy available under the law, nor shall the provisions of this ordinance prohibit or restrict the City or other appropriate prosecutor from pursuing criminal charges under state law or City ordinance.

**3.35.065 Confidentiality**

Except as otherwise required by law, it shall be unlawful for the City, any officer, employee or agent to divulge, release or make known in any manner any financial information submitted or disclosed to the City under the terms of this chapter. Nothing in this section shall prohibit:

- 1. The disclosure of the names and addresses of any person who is operating a licensed establishment from which marijuana or marijuana-infused products are sold or provided; or
- 2. The disclosure of general statistics in a form which would not reveal an individual seller's financial information; or
- 3. Presentation of evidence to the court, or other tribunal having jurisdiction in the prosecution of any criminal or civil claim by the Director or an appeal from the Director for amount due the City under this chapter; or
- 4. The disclosure of information when such disclosure of conditionally exempt information is ordered under public records law procedures; or
- 5. The disclosure of records related to a business' failure to report and remit the tax when the report or tax is in arrears for over six (6) months or the tax exceeds five thousand dollars (\$5,000). The City Council expressly finds and determines that the public interest in disclosure of such records clearly outweighs the interest in confidentiality under ORS 192.501(5).

**3.35.070 Audit of Books, Records, or Persons**

- 1. The City, for the purpose of determining the correctness of any tax return, or for the purpose of an estimate of taxes due, may examine or may cause to be examined by an agent or representative designated by the City for that purpose, any books, papers, records, or memoranda, including copies of seller's state and federal income tax return, bearing upon the matter of the seller's tax return. All books, invoices, accounts and other records shall be made available within the City limits and be open at any time during regular business hours for examination by the Director or an authorized agent of the Director.

2. If the examinations or investigations disclose that any reports of sellers filed with the Director pursuant to the requirements herein have shown incorrectly the amount of tax accruing, the Director may make such changes in subsequent reports and payments, or make such refunds, as may be necessary to correct the errors disclosed by its examinations or investigations.
3. The seller shall reimburse the City for reasonable costs of the examination or investigation if the action disclosed that the seller paid 97 percent or less of the tax owing for the period of the examination or investigation. In the event that such examination or investigation results in an assessment by and an additional payment due to the City, such additional payment shall be subject to interest at the rate of 9 percent per year from the date the original tax payment was due.
4. If any taxpayer refuses to voluntarily furnish any of the foregoing information when requested, the Director may immediately seek a subpoena from the Troutdale Municipal Court to require that the taxpayer or a representative of the taxpayer attend a hearing or produce any such books, accounts and records for examination.
5. Every seller shall keep a record in such form as may be prescribed by the Director of all sales of marijuana and marijuana-infused products. The records shall at all times during the business hours of the day be subject to inspection by the Director or authorized officers or agents of the Director.
6. Every seller shall maintain and keep, for a period of three (3) years, all records of marijuana and marijuana-infused products sold.

**3.35.075 Forms and Regulations**

The Director is hereby authorized to prescribe forms and promulgate rules and regulations to aid in the making of returns, the ascertainment, assessment and collection of said marijuana tax and in particular and without limiting the general language of this chapter, to provide for:

1. A form of report on sales and purchases to be supplied to all vendors;
2. The records which sellers providing marijuana and marijuana-infused products are to keep concerning the tax imposed by this chapter.