

**Advance Packet for the  
March 14, 2016 City Council Meeting**

1. Ordinance 16-O-753, Imposing A Three Percent Tax On The Sale Of Marijuana Items By A Marijuana Retailer; Amending Chapter 3.20 Of The Brookings Municipal Code In Its Entirety; And Directing Staff To Prepare A Resolution Referring Said Tax To The Electors Of The City Of Brookings.

Documents: [MARIJUANA TAX CAR.PDF](#), [MARIJUANA TAX.ATT.A.ORDINANCE.PDF](#),  
[MARIJUANA TAX.ATT.B.AMENDMENTS.PDF](#), [MARIJUANA TAX.ATT.C.MEMO.PDF](#),  
[MARIJUANA TAX.ATT.D.HB 3400.PDF](#)

2. Public Notice

Documents: [3-14-16 PN ORD BY TITLE ONLY.PDF](#)

\*Obtain [Public Comment Forms](#) on this website or at City Hall prior to the meeting. Return completed forms to the City Recorder before the start of meeting or during regular business hours.

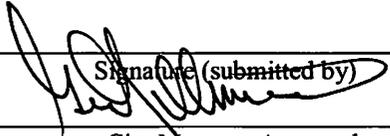
All public meetings are held in accessible locations. Auxiliary aids will be provided upon request with 14 days advance notification. Please contact 469-1102 if you have any questions regarding this notice.

# CITY OF BROOKINGS

## COUNCIL AGENDA REPORT

Meeting Date: March 14, 2016

Originating Dept: City Manager

  
\_\_\_\_\_  
Signature (submitted by)  
\_\_\_\_\_  
City Manager Approval

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**Subject:** Ordinance 16-O-753, imposing a three percent (3%) tax on the sale of marijuana items, amending the Brookings Municipal Code and directing staff to prepare a referring resolution.

**Recommended Motion:**

Motion to adopt Ordinance 16-O-753, imposing a three percent (3%) tax on the sale of marijuana items, amending Chapter 3.20 of the Brookings Municipal Code and directing staff to prepare a resolution referring the tax to the electors of the City of Brookings.

**Financial Impact:**

Unknown amount of new revenue.

**Background/Discussion:**

Please see the attached memorandum from City Attorney Martha Rice.

The City Council previously discussed implementing a tax on recreational marijuana and in October 2014, enacted an Ordinance authorizing a tax of up to 10.0 per cent. Approximately 20 cities and counties took similar action. This action was taken in anticipation of the approval of Measure 91, which legalized the sale of recreational marijuana and was approved by the voters in November 2014. Measure 91 provided the Legislature with the option of “grandfathering-in” the locally enacted taxes or preempting the local taxing authority.

Through the adoption of House Bill 3400, the Legislature chose to preempt local authority and provide that local agencies seeking to enact a tax on the sale of recreational marijuana secure voter approval, and that the amount of tax be limited to 3.0 per cent. Under HB 3400, a local Measure to enact the tax can only be submitted to the voters at a statewide general election. The next statewide general election is in November, 2016.

The City Attorney has prepared Ordinance 16-O-753, imposing a 3.0 percent tax on the sale of recreational marijuana items, amending Chapter 3.20 Tax on Sale of Marijuana and Marijuana-Infused Products, in the Brookings Municipal Code to incorporate changes in state regulations and directing staff to prepare a resolution referring the imposed tax to the electors of the City of Brookings.

Staff recommends that the City Council adopt Ordinance 16-O-753.

**Attachment(s):**

- a. Ordinance 16-O-753
- b. Chapter 3.20 text revisions
- c. City Attorney memorandum.
- d. Excerpts from HB 3400.

**IN AND FOR THE CITY OF BROOKINGS**

**STATE OF OREGON**

**ORDINANCE 16-O-753**

**IN THE MATTER OF ORDINANCE 16-O-753, AN ORDINANCE OF THE CITY OF BROOKINGS IMPOSING A THREE PERCENT TAX ON THE SALE OF MARIJUANA ITEMS BY A MARIJUANA RETAILER; AMENDING CHAPTER 3.20 OF THE BROOKINGS MUNICIPAL CODE IN ITS ENTIRETY; AND DIRECTING STAFF TO PREPARE A RESOLUTION REFERRING SAID TAX TO THE ELECTORS OF THE CITY OF BROOKINGS.**

**Whereas**, section 34a of House Bill 3400 (2015) provides that a city council may adopt an ordinance to be referred to the voters imposing up to a three percent tax or fee on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city; and

**Whereas**, the City Council of the City of Brookings wants to impose a tax on the sale of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the City of Brookings;

**Now, therefore**, based on the foregoing, the City Council of the City of Brookings hereby ordains as follows:

1.0 DEFINITIONS.

- (a) "Marijuana item" has the meaning given that term in Oregon Laws 2015, chapter 614, section 1.
- (b) "Marijuana retailer" means a person who sells marijuana items to a consumer in this state.
- (c) "Retail sale price" means the price paid for a marijuana item, excluding tax, to a marijuana retailer by or on behalf of a consumer of the marijuana item.

2.0 TAX IMPOSED. As described in section 34a of House Bill 3400 (2015), the City of Brookings hereby imposes a tax of three percent on the retail sale price of marijuana items by a marijuana retailer in the area subject to the jurisdiction of the city.

3.0 COLLECTION. The tax shall be collected at the point of sale of a marijuana item by a marijuana retailer at the time at which the retail sale occurs and remitted by each marijuana retailer that engages in the retail sale of marijuana items.

4.0 REFERRAL. The tax imposed shall be referred to the electors of the City of Brookings at the next statewide general election on Tuesday, November 8, 2016 upon adoption of the referring resolution.

5.0 CODE AMENDMENT. Chapter 3.20, Tax on Sale of Marijuana and Marijuana-Infused Products, of the Brookings Municipal Code is hereby amended in its entirety to read as follows:

## Chapter 3.20

### TAX ON SALE OF MARIJUANA

#### 3.20.010 Purpose.

For the purposes of this chapter, every person who sells marijuana items in the city of Brookings is exercising a taxable privilege. The purpose of this chapter is to impose a tax upon the retail sale of marijuana items as authorized by State law.

#### 3.20.020 Definitions.

When not clearly otherwise indicated by the context, the following words and phrases as used in this chapter shall have the following meanings:

- A. "Director" means the finance and human resource services director for the city of Brookings or his/her designee.
- B. "Gross taxable sales" means the total amount received in money, credits, property or other consideration from the sale of marijuana items that are subject to the tax imposed by this chapter.
- C. "Marijuana item" has the meaning given that term in Oregon Laws 2015, chapter 614, section 1.
- D. "Marijuana retailer" means a person who sells marijuana items to a consumer in this state.
- E. "Person" means a 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.
- F. "Purchase or sale" means the retail acquisition or furnishing for consideration of any marijuana item by any person within the city and does not include the acquisition or furnishing of marijuana by a grower or processor to a seller.
- G. "Retail sale price" means the price paid for a marijuana item, excluding tax, to a marijuana retailer by or on behalf of a consumer of the marijuana item.
- H. "Retail sale" means the transfer of goods or services in exchange for any valuable consideration and does not include the transfer or exchange of goods or services between a grower or processor and a seller.
- I. "Seller" means the same as "marijuana retailer."

- J. "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.
- K. "Taxpayer" means any person obligated to account to the director for taxes collected, or to be collected, or from whom a tax is due, under the terms of this chapter.

3.20.030 Levy of tax.

There is hereby levied and shall be paid a three percent tax on the retail sale price of any marijuana item by every seller exercising the taxable privilege of selling marijuana items as defined herein.

3.20.040 Deductions.

The following deductions shall be allowed against sales received by the seller providing marijuana items:

- 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 items and does not include any adjustments for other services furnished by a seller.

3.20.050 Seller responsible for payment of tax.

The seller is responsible for reporting and paying all taxes due as follows:

- A. Every seller shall file a return on forms provided by the city.
- B. The due date for filing a return with the city is the fifteenth day of each month for the preceding month. A return shall not be considered filed until it is actually received by the director.
- C. Returns and the full amount of tax collected shall be remitted to the director by the due date and shall specify the total sales subject to this chapter, the amount of tax collected under this chapter, and other relevant information as specified on the form.
- D. A payment is delinquent on the last day of the month in which the payment is due.
- E. 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.

- F. Nondesignated 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.
- G. 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/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.
- H. 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.
- I. Returns and payments are due immediately upon cessation of business for any reason.
- J. 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.
- K. Every seller must keep and preserve for a period of three years, in an accounting format established by the director, records of all sales made by the dispensary, to include books, accounts, invoices and other such records as may be required by the director. Seller shall make all such records available to the director for inspection at all reasonable times.

#### 3.20.060 Penalties and interest.

- A. Original Delinquency. Any seller who fails to remit any portion of any tax imposed by this chapter prior to delinquency shall pay, in addition to the amount of the tax, a penalty of 10 percent of the amount of the delinquent tax.
- B. Continued Delinquency. On or before a period of 30 days following the date on which the remittance first became delinquent, any seller who fails to remit any delinquent remittance shall pay a second delinquency penalty of 15 percent of the amount of the delinquent tax in addition to the amount of the tax and the penalty first imposed.
- C. Fraud. If the director determines that the nonpayment of any remittance due under this chapter is due to fraud, a penalty of 25 percent of the amount of the delinquent tax shall be added thereto in addition to the penalties stated in subsections (A) and (B) of this section.
- D. Interest. Any seller who fails to remit any tax imposed by this chapter shall pay, in addition to any penalties imposed, interest at the rate of one percent per month, or fraction thereof, on

the amount of tax owed, exclusive of penalties and without proration for portions of a month, from the date on which the remittance first became delinquent until paid.

- E. Penalties Merged with Tax. 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.
- F. Petition for Waiver. Any seller who fails to remit any portion of any tax imposed by this chapter prior to delinquency shall pay the penalties as provided herein; however, the seller may petition the Brookings city council for waiver and refund of the penalty or any portion thereof and the Brookings city council may, if a good and sufficient reason is shown, waive and direct a refund of the penalty or any portion thereof.

#### 3.20.070 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. The director shall, upon determining the estimate of tax due from the seller, assess said tax against the seller to include any interest and penalties provided for under this chapter. When such determination is made, the director shall give notice of the amount so assessed by having it served personally, or by depositing it in the United States mail, postage prepaid, and addressed to the seller so assessed at the last known address. Such seller may make an appeal of such determination as provided in BMC 3.20.080. If no appeal is filed, the director's determination is final and the amount thereby is immediately due and payable.

#### 3.20.080 Appeal.

- A. Any person aggrieved by the decision of the director may make written request for an informal hearing with the city manager in the following manner:
  - 1. Written notice shall be provided to the city manager any time within 15 days of the date upon which the director provided written notice of determination to the aggrieved person.
  - 2. The city manager shall, upon receipt of the written request for hearing, schedule an informal hearing to be held at City Hall within 15 days of receipt of the request, at which hearing the person aggrieved shall be given the opportunity to present evidence to support his/her position.
  - 3. The city manager shall take evidence from the director as to the reasonableness, fairness, and validity of the determination, and shall render his decision within 24 hours after closing the hearing and shall notify the complainant of his decision.
- B. Any person aggrieved by the decision of the city manager may appeal to the city council by filing notice of appeal with the city recorder in the following manner:

1. The aggrieved shall provide written notice to the city recorder within 20 days of the serving or the mailing of the notice of the decision given by the city manager.
2. The city council shall give the appellant not less than 20 days' written notice of the time and place of hearing of said appeal.
3. Action by the city council on appeals shall be final, and shall be decided by a majority of the members of the city council present at the meeting where such appeal is considered.

### 3.20.090 Refunds.

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 based upon the following provisions:

- A. A written claim, stating under penalty of perjury the specific grounds upon which the claim is founded, must be filed with the director within one year of the date of payment. The claim shall be made on forms furnished by the director.
- B. The director shall have 20 calendar days from the date of receipt of a claim to review the claim and make a determination in writing as to the claim's validity. Notice of the director's determination shall be provided to claimant in writing. Such notice shall be mailed to the address provided by claimant on the claim form.
- C. In the event a claim is determined by the director to be valid, a seller may, in a manner prescribed by the director, collect the amount of such claim as a refund or as credit against taxes collected. The seller shall notify the director of claimant's choice no later than 15 days following the date the director mailed the determination. In the event the claimant has not notified the director of claimant's choice within the 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.
- D. No refund shall be paid under the provisions of this section unless the claimant has established the right by written records showing entitlement to such refund and the director has acknowledged the validity of such claim.

### 3.20.100 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 Brookings for the recovery of such amount. In lieu of

filing an action for the recovery, the city may, when taxes due are more than 30 days delinquent, submit any outstanding tax to a collection agency. 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 fee, so long as the fee does not exceed the limits as set by state statute and the city complies with the provisions set forth in ORS 697.105.

### 3.20.110 Violations.

It is unlawful for any seller or other person so required to fail or refuse to register as required herein, or to furnish any return required to be made, or fail or refuse to furnish a supplemental return or other pertinent information required by the director, or to render a false or fraudulent return. No person required to make, render, sign or verify any report shall make any false or fraudulent report with intent to defeat or evade the determination of any amount due as required by this chapter.

### 3.20.120 General penalty.

Violations will be fined as provided under Chapter 1.05 BMC, General Penalty.

### 3.20.130 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:

- A. The disclosure of the names and addresses of any person who is operating a licensed establishment from which marijuana items are sold or provided; or
- B. The disclosure of general statistics in a form which would not reveal an individual seller's financial information; or
- C. 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
- D. The disclosure of information when such disclosure of conditionally exempt information is ordered under public records law procedures; or
- E. The disclosure of records related to the failure of a seller to report and remit the tax when the report or tax is in arrears for over six months or the tax exceeds \$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).

### 3.20.140 Audit of books, records or persons.

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 returns, 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. If any taxpayer refuses to voluntarily furnish any of the foregoing information when requested, the director may immediately seek a subpoena from the Brookings 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.

### 3.20.150 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:

- A. A form of report on sales and purchases to be supplied to all marijuana retailers; and
- B. The records which marijuana retailers are to keep concerning the tax imposed by this chapter.

## TEXT AMENDMENT

Additions are in ***bold italics***.

Deletions are in ~~strikethrough~~.

### Chapter 3.20

#### TAX ON SALE OF MARIJUANA AND MARIJUANA-INFUSED PRODUCTS

##### 3.20.010 Purpose.

For the purposes of this chapter, every person who sells marijuana ~~items, medical marijuana or marijuana-infused products~~ in the city of Brookings is exercising a taxable privilege. The purpose of this chapter is to impose a tax upon the retail sale of marijuana ***items as authorized by State law.***, ~~medical marijuana, and marijuana-infused products.~~

##### 3.20.020 Definitions.

When not clearly otherwise indicated by the context, the following words and phrases as used in this chapter shall have the following meanings:

- A. "Director" means the finance and human resource services director for the city of Brookings or his/her designee.
- B. "Gross taxable sales" means the total amount received in money, credits, property or other consideration from the sale of marijuana ~~items, medical marijuana and marijuana-infused products~~ that is ***are*** subject to the tax imposed by this chapter.
- C. ~~"Marijuana" means all parts of the plant of the genus Cannabis as defined under ORS 475.005(16).~~  
***C. "Marijuana item" has the meaning given that term in Oregon Laws 2015, chapter 614, section 1.***
- D. ~~"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.~~
- D. ***"Marijuana retailer" means a person who sells marijuana items to a consumer in this state.***
- E. "Person" means a 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.

F. "Purchase or sale" means the retail acquisition or furnishing for consideration of **any** marijuana **item** by any person within the city and does not include the acquisition or furnishing of marijuana by a grower or processor to a seller.

~~G. "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.~~

**G. "Retail sale price" means the price paid for a marijuana item, excluding tax, to a marijuana retailer by or on behalf of a consumer of the marijuana item.**

H. "Retail sale" means the transfer of goods or services in exchange for any valuable consideration and does not include the transfer or exchange of goods or services between a grower or processor and a seller.

~~I. "Seller" means the same as "marijuana retailer." means any person who is required to be licensed or has been licensed by the state of Oregon to provide marijuana, medical marijuana or marijuana infused products to purchasers for money, credit, property or other consideration.~~

J. "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.

K. "Taxpayer" means any person obligated to account to the director for taxes collected, or to be collected, or from whom a tax is due, under the terms of this chapter.

### 3.20.030 Levy of tax.

~~A. There is hereby levied and shall be paid a **three percent** tax **on the retail sale price of any marijuana item** by every seller exercising the taxable privilege of selling marijuana **items** as defined herein.~~

~~B. The amount of tax levied shall be established by city council resolution, at amounts not to exceed five percent for medical marijuana, and 15 percent for recreational marijuana.~~

### 3.20.040 Deductions.

The following deductions shall be allowed against sales received by the seller providing marijuana **items**:

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 **items** and does not include any adjustments for other services furnished by a seller.

### 3.20.050 Seller responsible for payment of tax.

The seller is responsible for reporting and paying all taxes due as follows:

- A. Every seller shall file a return on forms provided by the city.
- B. The due date for filing a return with the city is the fifteenth day of each month for the preceding month. A return shall not be considered filed until it is actually received by the director.
- C. Returns and the full amount of tax collected shall be remitted to the director by the due date and shall specify the total sales subject to this chapter, the amount of tax collected under this chapter, and other relevant information as specified on the form.
- D. A payment is delinquent on the last day of the month in which the payment is due.
- E. 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.
- F. Nondesignated 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.
- G. 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/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.
- H. 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.
- I. Returns and payments are due immediately upon cessation of business for any reason.
- J. 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.
- K. Every seller must keep and preserve for a period of three years, in an accounting format established by the director, records of all sales made by the dispensary, to include books, accounts, invoices and other such records as may be required by the director. Seller shall make all such records available to the director for inspection at all reasonable times.

### 3.20.060 Penalties and interest.

A. Original Delinquency. Any seller who fails to remit any portion of any tax imposed by this chapter prior to delinquency shall pay, in addition to the amount of the tax, a penalty of 10 percent of the amount of the **delinquent** tax.

B. Continued Delinquency. On or before a period of 30 days following the date on which the remittance first became delinquent, any seller who fails to remit any delinquent remittance shall pay a second delinquency penalty of 15 percent of the amount of the **delinquent** tax in addition to the amount of the tax and the penalty first imposed.

C. Fraud. If the director determines that the nonpayment of any remittance due under this chapter is due to fraud, a penalty of 25 percent of the amount of the **delinquent** tax shall be added thereto in addition to the penalties stated in subsections (A) and (B) of this section.

D. Interest. Any seller who fails to remit any tax imposed by this chapter shall pay, in addition to any penalties imposed, interest at the rate of one percent per month, or fraction thereof, on the amount of tax owed, exclusive of penalties and without proration for portions of a month, from the date on which the remittance first became delinquent until paid.

E. Penalties Merged with Tax. 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.

F. Petition for Waiver. Any seller who fails to remit any portion of any tax imposed by this chapter prior to delinquency shall pay the penalties as provided herein; however, the seller may petition the Brookings city council for waiver and refund of the penalty or any portion thereof and the Brookings city council may, if a good and sufficient reason is shown, waive and direct a refund of the penalty or any portion thereof.

### 3.20.070 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. The director shall, upon determining the estimate of tax due from the seller, assess said tax against the seller to include any interest and penalties provided for under this chapter. When such determination is made, the director shall give notice of the amount so assessed by having it served personally, or by depositing it in the United States mail, postage prepaid, and 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 BMC 3.20.080. If no appeal is filed, the director's determination is final and the amount thereby is immediately due and payable.

### 3.20.080 Appeal.

A. Any person aggrieved by the decision of the director may make written request for an informal hearing with the city manager in the following manner:

1. Written notice shall be provided to the city manager any time within 15 days of the date upon which the director provided written notice of determination to the aggrieved person.
2. The city manager shall, upon receipt of the written request for hearing, schedule an informal hearing to be held at City Hall within 15 days of receipt of the request, at which hearing the person aggrieved shall be given the opportunity to present evidence to support his/her position.
3. The city manager shall take evidence from the director as to the reasonableness, fairness, and validity of the determination, and shall render his decision within 24 hours after closing the hearing and shall notify the complainant of his decision.

B. Any person aggrieved by the decision of the city manager may appeal to the city council by filing notice of appeal with the city recorder in the following manner:

1. The aggrieved shall provide written notice to the city recorder within 20 days of the serving or the mailing of the notice of the decision given by the city manager.
2. The city council shall give the appellant not less than 20 days' written notice of the time and place of hearing of said appeal.
3. Action by the city council on appeals shall be final, and shall be decided by a majority of the members of the city council present at the meeting where such appeal is considered.

### 3.20.090 Refunds.

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 based upon the following provisions:

- A. A written claim, stating under penalty of perjury the specific grounds upon which the claim is founded, must be filed with the director within one year of the date of payment. The claim shall be made on forms furnished by the director.
- B. The director shall have 20 calendar days from the date of receipt of a claim to review the claim and make a determination in writing as to the claim's validity. Notice of the director's determination shall be provided to claimant in writing. Such notice shall be mailed to the address provided by claimant on the claim form.

C. In the event a claim is determined by the director to be valid, a seller may, in a manner prescribed by the director, collect the amount of such claim as a refund or as credit against taxes collected. The seller shall notify the director of claimant's choice no later than 15 days following the date the director mailed the determination. In the event the claimant has not notified the director of claimant's choice within the 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.

D. No refund shall be paid under the provisions of this section unless the claimant has established the right by written records showing entitlement to such refund and the director has acknowledged the validity of such claim.

#### 3.20.100 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 Brookings for the recovery of such amount. In lieu of filing an action for the recovery, the city may, when taxes due are more than 30 days delinquent, submit any outstanding tax to a collection agency. 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 fee, so long as the fee does not to exceed the limits as set by state statute and the city complies with the provisions set forth in ORS 697.105.

#### 3.20.110 Violations.

It is unlawful for any seller or other person so required to fail or refuse to register as required herein, or to furnish any return required to be made, or fail or refuse to furnish a supplemental return or other pertinent information required by the director, or to render a false or fraudulent return. No person required to make, render, sign or verify any report shall make any false or fraudulent report with intent to defeat or evade the determination of any amount due as required by this chapter.

#### 3.20.120 General penalty.

Violations will be fined as provided under Chapter 1.05 BMC, General Penalty.

### 3.20.130 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:

- A. The disclosure of the names and addresses of any person who is operating a licensed establishment from which marijuana **items are** ~~is~~ sold or provided; or
- B. The disclosure of general statistics in a form which would not reveal an individual seller's financial information; or
- C. 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
- D. The disclosure of information when such disclosure of conditionally exempt information is ordered under public records law procedures; or
- E. The disclosure of records related to the failure of a seller to report and remit the tax when the report or tax is in arrears for over six months or the tax exceeds \$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).

### 3.20.140 Audit of books, records or persons.

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 returns, 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. If any taxpayer refuses to voluntarily furnish any of the foregoing information when requested, the director may immediately seek a subpoena from the Brookings 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.

### 3.20.150 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:

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

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## LEGAL MEMORANDUM

TO: Mayor Ron Hedenskog and all Brookings City Council Members;  
Gary Milliman, City Manager

FR: Martha D. Rice, City Attorney *MR*

DT: January 8, 2016

RE: City of Brookings Local Sales Tax on Marijuana

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### ➤ Local Taxation Movement

In anticipation of the passage of Measure 91, a measure to legalize recreational marijuana use and sales in the State of Oregon, the Brookings City Council adopted an ordinance authorizing the City to levy a local tax on the sale of recreational marijuana. The City of Brookings joined approximately 20 other Oregon cities and counties that adopted similar local sales taxes. The movement to adopt a local taxation ordinance was prompted by the reasoning that if local governments do nothing they will be out of taxation loop. However, if local governments had a taxation ordinance in place prior to the passage of Measure 91, then a few different scenarios could play out that would allow the local taxes to remain valid: (1) a court could rule that such ordinances in existence prior to the passage of Measure 91 are not preempted by the language of Measure 91; (2) the legislature may choose to “grandfather in” existing ordinances; or (3) the legislature may choose to repeal the prohibition on local taxation entirely. Measure 91 was approved by Oregon voters on November 4, 2014.

### ➤ Preemption by State Law

The first scenario that I mentioned above is the possibility that if tasked with the question, an Oregon court could rule that local taxation ordinances are not preempted by the new state law. In my opinion, this is not a likely outcome. Oregon is a “home rule” state, which means that cities have the inherent authority to pass laws on any subject matter unless specifically preempted by State law. A local law is preempted by State law if the two laws are incompatible because either (1) both cannot operate concurrently, or (2) because the Legislature meant its law to be exclusive. *LaGrande/Astoria v. PERB* (1978) 281 OR 137, 148-149. When

the Legislature intends to be the exclusive authority on a subject, the law must be clear and unambiguous.

Measure 91 that was passed by the voters in 2015 contained the following language concerning local taxation:

- Section 58: “Sections 3 to 70 of this Act, designed to operate uniformly throughout the state shall be paramount and superior to and shall fully replace and supersede any and all municipal charter enactments or local ordinances inconsistent with it. Such charters and ordinances are hereby repealed.”

A nearly identical clause contained in the Liquor Control Act (ORS Section 471.045) has been interpreted by the Oregon Court of Appeals to indicate that the legislature did not intend to retain “exclusive regulatory power in the field of liquor control.” *Portland v. Sunseri* (1983) 66 Or. App. 261, 265. There must be a specific incompatible provision, not just a general regulatory scheme.

- Section 42: “No county or city of this state shall impose any fee or tax, including occupancy taxes, privilege taxes and inspection fees in connection with the purchase, sale, production, processing, transportation, and delivery of marijuana items.”

Again, a nearly identical clause is contained in the Liquor Control Act (ORS Section 473.190). The latter was held by the Oregon appellate courts to preempt local laws, but not in every instance. *See Portland Distributing Co. v. Dept. of Revenue* (1988) 307 Or. 94, 100 (upheld local business income tax as applied to a wholesale beer distributor; *City of Coos Bay v. Aerie No. 538 of Fraternal Order of Eagles* (1946) 179 Or. 83, 101-102 (upheld an annual occupation tax on clubs, night clubs, and service establishments where liquor was served). Therefore, when there is no direct conflict, the court will uphold a local government’s tax.

In this specific instance, however, the language of Measure 91 clearly prohibits local taxes on the purchase and sale of marijuana items. In addition, the Legislature has passed further legislation since the approval of Measure 91 that even more squarely places state law in direct conflict with the Brookings ordinance.

➤ Action by Legislature

One of the potential outcomes of the local taxation movement was that the Legislature would modify the language of Measure 91 to grandfather in existing taxation ordinances or to expressly allow local governments to impose a tax. The Legislature passed HB 3400 on June 30, 2015. Section 34a (Local Option Tax) of HB 3400 states that “except as authorized by this section, the authority to impose a tax or fee on the production, processing or sale of marijuana items in this state is vested solely in the Legislative Assembly.” Section 34a then goes on to

authorize the imposition of (up to) a 3% local sales tax upon approval of the voters. Therefore, the City's ordinance and the state law are now directly in conflict with each other.

➤ Summary Conclusion

If the City were to collect local sales taxes on marijuana under its current ordinance and a court was to determine at some point in the future that the ordinance is invalid, then the City would need to return all of that tax revenue to the retailers who paid it over to the City. If, however, the City refers a local taxation ordinance to the voters for approval, then the City will not have to worry about the "what-if's" and can begin collecting a valid tax and spending the revenues accordingly.

It is my opinion that a court will (more likely than not) find that these pre-Measure 91 local taxation ordinances have been preempted by state law. Therefore, I recommend not collecting sales tax at this time and presenting the voters with a 3% local taxation ordinance.

HB 3400

(Local Option Tax)

SECTION 34a.

- (1) (a) Except as expressly authorized by this section, the authority to impose a tax or fee on the production, processing or sale of marijuana items in this state is vested solely in the Legislative Assembly.  
  
(b) Except as expressly authorized by this section, a county, city or other municipal corporation or district may not adopt or enact ordinances imposing a tax or fee on the production, processing or sale of marijuana items in this state.
- (2) Subject to subsection (4) of this section, the governing body of a city or county may adopt an ordinance to be referred to the electors of the city or county as described in subsection of this section that imposes a tax or a fee on the sale of marijuana items that are sold in the area subject to the jurisdiction of the city or the unincorporated area subject to the jurisdiction of a county by a person that holds a license under section 22, chapter 1, Oregon Laws 2015.
- (3) If the governing body of a city or county adopts an ordinance under this section, the governing body shall refer the measure of the ordinance to the electors of the city or county for approval at the next statewide general election.
- (4) An ordinance adopted under this section may not impose a tax or fee in excess of 3 percent.



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Legal

Publish: March 9, 2016

## **Public Notice**

NOTICE IS HEREBY GIVEN that on March 14, 2016, at 7:00 PM in City Hall Council Chambers, 898 Elk Drive, during a regular Common Council meeting, Brookings City Council will consider for adoption, by title only, the following:

- In the matter of Ordinance 16-O-753, an ordinance of the City of Brookings imposing a three percent tax on the sale of marijuana items by a marijuana retailer; amending Chapter 3.20 of the Brookings Municipal Code in its entirety; and directing staff to prepare a resolution referring said tax to the electors of the City of Brookings.

All persons wishing to address these matters may do so in person at the meeting, or by submitting written evidence to the City Manager, Brookings City Hall, 898 Elk Drive, Brookings, 97415, prior to the meeting. Copies of the ordinance and associated staff report are available for inspection at City Hall, on the City's website at [www.brookings.or.us](http://www.brookings.or.us), and at the Chetco Community Public library. Copies of the documents may also be purchased.

All public meetings are held in accessible locations. Auxiliary aids will be provided upon request with at least 10 days advance notification. Please contact 469-1102 if you have any questions regarding this notice.