CITY COUNCIL AGENDA REPORT

MEETING DATE: November 18, 2014

ATTACHMENT 3

SUBJECT: TWO MEDICAL MARIJUANA INITIATIVE PETITIONS QUALIFYING FOR BALLOT; CONSIDERATION OF ADOPTING NEW ORDINANCE, ORDERING ELECTION OR ORDERING REPORT; CONSIDERATION OF CITY MEDICAL MARIJUANA MEASURE(S)

DATE: NOVEMBER 11, 2014

FROM: CITY ATTORNEY'S OFFICE; CITY CLERK'S OFFICE

PRESENTATION BY: CHRIS F. NEUMEYER, DEPUTY CITY ATTORNEY; BRENDA GREEN, CITY CLERK

FOR FURTHER INFORMATION CONTACT: RICK FRANCIS, ASSISTANT CEO, 714-754-5688

RECOMMENDATION:

A. It is recommended that the City Council:

1. Accept the Certificate of Sufficiency issued by the County of Orange Registrar of Voters regarding: An Initiative to Allow Operation of Up to Eight Medical Marijuana (Cannabis) Businesses in the City of Costa Mesa; and

2. Accept the Certificate of Sufficiency issued by the County of Orange Registrar of Voters regarding: An Initiative to Allow Operation of up to Four Licensed Medical Marijuana Businesses in City of Costa Mesa.

B. Further, it is recommended that the City Council approve (for each initiative) one of the following options:

1. Adopt the ordinance (for either initiative), without alteration, at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented (authorized by the Election Code, yet not recommended, see "Taxation Issues" below); or

2. Order a special election (for either initiative), to be held pursuant to subdivision (a) of Election Code § 1405 [which states that the election for a municipal initiative that qualifies shall be held not less than 88 nor more than 103 days after the date of the order of election], at which the ordinance, without alteration, shall be submitted to a vote of the voters of the city; or

3. Order a regular election (for either initiative), to be consolidated with the next "regularly scheduled general election for members of the governing body of the local government," pursuant to Art XIII C § 2(b) of the California Constitution, which would be November 8, 2016; or

4. Order a report pursuant to Election Code § 9212 (for either initiative) at the regular meeting at which the certification of the petition is presented.

OPTIONAL ADDITIONAL ACTION:

The City Council may consider taking action on the City Measure to Establish Regulation of Medical Marijuana Dispensaries and Regulation of Medical Marijuana Cultivation as proposed on August 5, 2014, or an amended version of that prior Measure.

BACKGROUND:

Two initiative petitions, each with the intent of authorizing the operation of medical marijuana businesses within the City of Costa Mesa, have been recently gathering signatures for placement on the local ballot.

Pursuant to the Election Code, both of these initiatives have now qualified for placement on the local ballot at a special election.

Elections Code § 9215 provides that an initiative petition qualifies for placement on the local ballot at a regular election if not less than 10% of the registered voters of the City have signed the petition. Elections Code § 9214 provides that an initiative petition qualifies for placement on the local ballot at a special election if not less than 15% of the registered voters of the City have signed the petition and the initiative petition itself asks for a special election.

Both of the medical marijuana initiative petitions requested a special election. The number of registered voters in the City of Costa Mesa last reported by the County of Orange election official to the Secretary of State was 49,237 registered voters. Fifteen percent of this total number of registered voters is 7,385, thus being the number of verified signatures required for one of these initiative petitions to qualify for a special election.

The first initiative, "Allow Operation of Up to Eight Medical Marijuana (Cannabis) Businesses in the City of Costa Mesa", was entitled by the City Attorney's Office (and named "Medical Cannabis Control Act" by its proponents) was submitted by proponents Robert Taft, Jr. and Kevin Gardner (with the counsel of attorney Randall T. Longwith) to the City Clerk's Office on September 16, 2014 with 11,080 signatures (hereinafter referred to as "Ordinance No. 1"). This initiative was promptly delivered to the Orange County Registrar of Voters for verification of the signatures. Refer to Attachment No. 1 for the full text of the proposed Ordinance No. 1.

The second initiative, "Allow Operation of Up to Four Licensed Medical Marijuana Businesses in the City of Costa Mesa", was entitled by the City Attorney's Office (and named "An Initiative to Provide Revenue to Costa Mesa Citizens" by its proponents) was submitted by proponents Taylor Webster and Michael Levesque (with the counsel of attorney David Welch) to the City Clerk's Office on October 9, 2014 with 10,904 signatures (hereinafter referred to as "Ordinance No. 2"). This initiative was promptly delivered to the Orange County Registrar of Voters for verification of the signatures. Refer to Attachment No. 2 for the full text of the proposed Ordinance No. 2.

The Orange County Registrar of Voters has examined the records of voter registration for the City of Costa Mesa and has determined that both of the initiative petitions have been signed by no less than fifteen percent of City of Costa Mesa registered voters.

Therefore both of the initiative petitions are sufficient to be certified to the City Council. The Election Code requires the City Clerk to certify to the City Council any initiative petition which qualifies for an election. (Elections Code §§ 9211, 9114). Refer to Attachments Nos. 3 & 4 for Certifications.

ANALYSIS:

Pursuant to Elections Code § 9214, ["Duty of legislative body regarding initiative petition signed by certain percent of voters with request to submit ordinance to vote at special election"] if an initiative petition is signed by not less than 15 percent of the registered voters of a city, and contains a request that the ordinance be submitted immediately to a vote of the people at a special election, the legislative body shall do one of the following:

a) Adopt the ordinance, without alteration, at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented; or

b) Immediately order a special election, to be held pursuant to subdivision (a) of Section1405 [which states that the election for a municipal initiative that qualifies shall be held not less than 88 nor more than 103 days after the date of the order of election], at which the ordinance, without alteration, shall be submitted to a vote of the voters of the city; or

c) Order a report pursuant to Section 9212 at the regular meeting at which the certification of the petition is presented. When the report is presented to the legislative body, the legislative body shall either adopt the ordinance within 10 days or order an election pursuant to subdivision (b).

Elections Code § 9212 ["Referral of proposed initiative measure to city agency for report"] provides that the City Council may refer the proposed initiative measure to any city agency or agencies for a report on any matter the City Council requests to be in the report, including but not limited to:

1. Its fiscal impact; and/or

2. Its effect on the internal consistency of the city's general and specific plans, including the housing element, the consistency between planning and zoning, and the limitations on city actions under Section 65008 of the Government Code and Chapters 4.2 (commencing with Section 65913) and 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code; and/or

3. Its effect on the use of land, the impact on the availability and location of housing, and the ability of the city to meet its regional housing needs; and/or

4. Its impact on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks, and open space. The report may also discuss whether the measure would be likely to result in increased infrastructure costs or savings, including the costs of infrastructure maintenance, to current residents and businesses; and/or

5. Its impact on the community's ability to attract and retain business and employment; and/or

6. Its impact on the uses of vacant parcels of land; and/or

7. Its impact on agricultural lands, open space, traffic congestion, existing business districts, and developed areas designated for revitalization.

The report(s) shall be presented to the City Council no later than 30 days after the elections official certifies to the legislative body the sufficiency of the initiative petitions.

Because the November 18, 2014 meeting is when certification of the initiative petitions will occur, any reports requested shall be returned to the City Council no later than December 18, 2014.

Given the upcoming schedule of regular City Council meetings, the reports would need to be returned at the December 2, 2014 meeting.

At the subsequent City Council meeting when the report(s) are presented, the City Council shall then pursuant to Elections Code § 9214 either, as previously stated, adopt the ordinances or order a special election.

BRIEF SUMMARY OF TWO PROPOSED ORDINANCES

The two initiative petitions differ in the details on how they each propose to authorize and regulate medical marijuana businesses within the City of Costa Mesa. Some key differences to note include:

1. Amendment – Although both measures cannot be repealed except by another vote of the electorate, Ordinance No. 1 furthermore cannot be amended at all except by a vote of the electorate, whereas Ordinance No. 2 allows amendment by the City Council to further the purposes of the ordinance.

2. Application Fees – Ordinance No. 1 caps application fees for cost recovery at $500, whereas Ordinance No. 2 allows the City Council to pass a fee resolution for cost recovery.

3. Permits – Ordinance No. 1 requires only a business license, whereas Ordinance No. 2 requires in addition to a business license both a separate dispensary permit as well as operator permits.

4. Minimum Number of Dispensaries – Ordinance No. 1 authorizes a minimum of eight dispensaries, whereas Ordinance No. 2 authorizes a minimum of four dispensaries.

5. See attached matrix (Attachment No. 5) that further compares Ordinances No. 1 and 2 along with a proposed City Medical Marijuana Ordinance, previously considered by the City Council on August 5, 2014.

TAXATION ISSUES

Both of the initiative petitions include new taxes.

Ordinance No. 1 and Ordinance No. 2 each propose a six percent tax on medical marijuana businesses.

Ordinance No. 1 proposes a sales tax of one percent "on the sale of all other tangible personal property at retail." Presently the City already has a one percent local sales tax. Raising the local sales tax above one percent likely will lead to sales tax collection issues with the Board of Equalization, which will not collect a locally mandated sales tax above one percent.

Other issues may present themselves with collection of these taxes. Significant and atypical election issues also present themselves because of the proposed tax increases.

The California Constitution in Art XIII C § 2(b), as amended by Proposition 218 in 1996, provides in full that "No local government may impose, extend, or increase any general tax **unless and until that tax is submitted to the electorate and approved by a majority vote**. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. **The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government**, except in cases of emergency declared by a unanimous vote of the governing body." (Emphasis added).

1. Voter Approval for New General Taxes

As required by the California Constitution in Art XIII C § 2(b), new general taxes imposed by a local government must be approved by the voters. (The tax measures in the two initiatives are general taxes and are not special taxes.)

Even if the City Council were to adopt one of the ordinances (which normally is an option under Elections Code § 9214 when an initiative petition qualifies for a special election), there would remain the matter of voter approval of the new general taxes being imposed.

California law in Elections Code § 9214 also prohibits the City Council from altering an ordinance proposed by initiative petition.

Thus, the City Council may not split up the proposed ordinances by adopting the non-tax provisions and then separately sending just the tax provisions to the voters.

Government Code section 53723 (added by Proposition 62 in 1986) further provides in full that "No local government, or district, whether or not authorized to levy a property tax, may impose any general tax unless and until such general tax is submitted to the electorate of the local government, or district and approved by a majority vote of the voters voting in an election on the issue."

2. Regular Election (Not Special Election) for Voter Approval for New General Taxes

As referenced above, Art XIII C § 2(b) of the California Constitution provides that an election on general tax increases "shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body."

Thus, new general taxes imposed by a local government which are to be sent to the voters, should not be presented at a special election, unless the City Council unanimously declares a fiscal emergency.

Rather, new general taxes imposed by a local government should be presented to the voters at "a regularly scheduled general election for members of the governing body of the local government."

The next such election which meets those conditions is November 8, 2016.

ELECTION DATES

Elections Code § 1405, pursuant to Election Code § 9214, provides that the election for a municipal initiative that qualifies for a special election shall be held not less than 88 nor more than 103 days after the date of the order of election.

Thus, if the City Council orders a special election at the November 18, 2014 meeting, then the window during which a special election would need to be held is between February 14, 2015 and March 1, 2015.

If the City Council requests reports from City agencies/departments on the ordinances, the reports would need to be returned at the only regularly scheduled City Council meeting for the month of December, being December 2, 2014.

If the City Council orders a special election at the December 2, 2014 meeting, then the window during which a special election would need to be held is between February 28, 2015 and March 14, 2015

If the City Council orders pursuant to the California Constitution in Art XIII C § 2(b), as amended by Proposition 218 in 1996, that the initiative petitions be sent to the voters at the next "regularly scheduled general election for members of the governing body of the local government," then the election would be held on November 8, 2016.

OPTIONAL ADDITIONAL ACTION TO CONSIDER:

At the August 5, 2014 City Council meeting consideration was given to submitting to the voters a Measure to Establish Regulation of Medical Marijuana Dispensaries and Regulation of Medical Marijuana Cultivation ("Measure") which would add a new Chapter VI to Title 9.

At the October 21, 2014 City Council meeting the City Attorney's Office received direction to bring back the proposed City's Medical Marijuana Ordinance for the City Council to address for review and possible revisions.

Please refer to attachments for the language of the proposed Chapter VI (Attachment No. 6), an outline of the proposed Chapter VI (Attachment No. 7), and a chart (Attachment No. 5) which compares the proposed City's Ordinance (also referred to as Ordinance No. 3) with the two citizen-backed ordinances.

Election Code section 9222 ["Proposition for repeal, amendment, or enactment of ordinance; Time of election"] provides that the City Council may submit to the voters without a petition, a proposition for the enactment of any ordinance, to be voted upon at any succeeding regular or special city election; and, that the election shall be held not less than 88 days after the date of the order of election.

The City Council by resolution may thus place a competing medical marijuana ballot measure before the voters at the same election when the two citizen initiative measures are to be considered by the voters.

Election Code section 9221 ["Conflicting provisions in two or more ordinances"] provides in full that "[i]f the provisions of two or more ordinances adopted at the same election conflict, the ordinance receiving the highest number of affirmative votes shall control." Both of the citizen initiative petitions also provide that if two or more competing medical marijuana measures are approved by the voters, then only the measure with the greatest number of affirmative votes shall become the new law.

Thus, if the City places its own medical marijuana measure on the ballot with the two citizen backed measures, the one receiving the most votes (if more than one passes) shall become the local law (the City should also place a similar "only one measure wins" section in any City backed measure).

At the outset, it must be noted that the anticipated passage of SB 1262 (which would have imposed statewide regulations related to health and safety, oversight, security and local control) has failed to materialize. On August 14, 2014 the Assembly Appropriations Committee failed to pass SB 1262, effectively killing the bill for this year. In January there may or may not be a resurrection of SB 1262.

Significant differences between the proposed City's Ordinance and the two citizen-backed ordinances include the following requirements in the proposed City's Ordinance not contained in the other two:

1. Security. Requires 24/7 security camera tapes which are accessible to law enforcement and the City.

2. Record keeping. Requires maintenance of a substantially greater amount of records detailing the operation (business, transaction, delivery, employee, etc.)

3. Priority to Old Businesses. Does not provide priority registration to old businesses.

4. Inspections. City CEO authorized to conduct reasonable inspections.

5. Taxes. Does not propose new taxes.

6. On-Site Recommendations. Does not allow on-site recommendations.

7. Employee Training. Required.

8. Limit Sales to Medical Marijuana Related Items. Yes.

9. Non-Concentration of Stores. No.

The following are significant issues that may warrant further discussion concerning details in the City Medical Marijuana Ordinance based upon comments at the August 5, 2014 City Council meeting:

1. Number of dispensaries. No limit to the number of dispensaries.

2. Hours/Days of Operations. 7:00 am to 10:00 p.m. any day of the week. *Section 9-500(q)*

3. City Office of Cultivation Standards and Qualify Control. New optional City department created to conduct regular inspection of cultivation practices and procedures, as well as to test medical marijuana. *Section 9-501*

4. Sunset Clause. Does not contain one (though allows amendment by Council to further purposes).

5. Background checks. Felonies substantially related to qualifications, functions or duties of an employee of a medical marijuana business (such as felony conviction for distribution of controlled substances, money laundering, racketeering, etc.). *Section 9-500(d)(ii)*

6. Security Guards. Prohibited from carrying firearms. *Section 9-500(a)(i)*

7. Non-Concentration of Stores. No restrictions on locating near other dispensaries.

8. Labeling. Does not require warning about not operating heavy machinery.

9. Smoking restrictions. Prohibited within 20 feet of dispensary. *Section 9-500(r)*

10. Liability Insurance. $1 million general policy minimum. *Section 9-500(u)*

11. Fire Sprinklers. Does not have requirements specific to medical marijuana industry.

12. Edibles. Products requiring refrigeration or hot-holding shall not be manufactured for sale or distribution at dispensary. *Section 9-500(m)(i)*

FISCAL REVIEW:

The fiscal impact of placing the two medical marijuana initiatives on the ballot is multifold. There are the costs of a special election (or consolidation with a general election, see "Taxation Issues" in this Report) as well as the cost of implementing the proposed ordinances. Furthermore, there is the potential revenue generated by the taxes in each ordinance.

1. Estimated special election costs to the City of Costa Mesa are as follows:

    a. Stand Alone Special Election for One Ballot Measure: $234,067 - $261,790.

    b. Stand Alone Special Election for Up to Four Ballot Measures: $252,980 - $280,703.

    c. Consolidated General Election for One Ballot Measure: $15,000.

    d. Consolidated General Election for Up to Four Ballot Measures: $15,000 - $60,000.

2. At present the estimated costs of implementing either of the ordinances is indeterminate.

LEGAL REVIEW:

The City Attorney's office has prepared this report with its legal analysis, and the City Attorney's Office has reviewed the attached resolutions.

RECOMMENDATIONS FOR OPTIONAL ADDITIONAL ACTION:

It is recommended in regards to the proposed City Medical Marijuana Ordinance previously considered by the City Council:

1. Order the City Medical Marijuana Ordinance be sent to the voters at the same election at which the two initiative petitions are sent to the voters, with accompanying resolutions calling for written arguments, rebuttals and the drafting by the City Attorney's Office of an impartial analysis; or

2. Provide direction to the City Attorney's Office for revisions to the proposed City Medical Marijuana Ordinance to be brought back to the City Council; or

3. Take no action on the proposed City Medical Marijuana Ordinance.

THOMAS P. DUARTE
City Attorney

BRENDA GREEN
City Clerk

RICK FRANCIS
Assistant CEO

ATTACHMENTS: refer to List