COUNCIL AGENDA: 11/2/10
AGENDA ITEM: 3.2

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Deanna J. Santana

SUBJECT: SEE BELOW

DATE: October 22, 2010

Approved

Date 10/22/10

SUBJECT: TEMPORARY MORATORIUM ON NON-MEDICAL MARIJUANA IF PROPOSITION 19 PASSES

RECOMMENDATION:

(a) Adopt a urgency interim ordinance of the City of San Jose implementing a moratorium on commercial uses that involve the cultivation, dispensation or distribution of non-medical marijuana should State Proposition 19 (Proposition 19 and entitled, "Legalizes Marijuana Under California But Not Federal Law. Permits Local Governments to Regulate and Tax Commercial Production, Distribution, and Sale of Marijuana. Initiative Statue.") pass; and,

(b) Approve a regular interim ordinance of the City of San Jose implementing a moratorium on commercial uses that involve the cultivation, dispensation or distribution of non-medical marijuana should State Proposition 19 (Proposition 19 and entitled, "Legalizes Marijuana Under California But Not Federal Law. Permits Local Governments to Regulate and Tax Commercial Production, Distribution, and Sale of Marijuana. Initiative Statue.") pass.

OUTCOME

If Proposition 19 were to be approved statewide by a majority vote on November 2, 2010, **the Proposition would take effect the day after the election: that is, November 3, 2010**. Proposition 19, if passed, would legalize various recreational marijuana-related activities, allow local governments to regulate these activities, permit local governments to impose and collect marijuana-related fees and taxes and authorize various criminal and civil penalties. Since the City Council has not made any determination on whether it would like for the City to regulate non-medical marijuana should Proposition 19 pass, nor has it considered any regulatory framework, this proposed temporary moratorium action preserves the status quo for the City while the City Council examines these issues. A temporary moratorium will prevent the potential proliferation of non-medical marijuana commercial uses that businesses might believe are authorized by Proposition 19 and avoid potential public health and safety impacts that may be associated with these uses while the City makes determinations on how it would like to proceed.

While this ordinance would establish a temporary moratorium on commercial activities that could be allowed under Proposition 19, (i.e. recreational marijuana uses) it in no way legalizes existing activities in connection with the use, cultivation, distribution and transportation of marijuana for any other purpose that are unlawful under existing law.

BACKGROUND

On the November 2, 2010 General Election ballot there is a State Proposition, known as Proposition 19, that would legalize certain activities with respect to marijuana that, if passed, would take effect on November 3, 2010. Particularly Proposition 19, if passed, would:

- Change state law to allow people 21 years old or older to possess, cultivate, or transport marijuana for personal use;
- Permit local governments to regulate and tax commercial production and sale of marijuana to people 21 years old or older and would prohibit people from possessing marijuana on school grounds, using it in public, smoking it while minors are present, or providing it to anyone under 21 years old; and,
- Maintains the current prohibitions against driving while impaired.

According to the Legislative Analyst's Office, while these changes would be made to state law, the above stated marijuana-related activities would continue to be prohibited under federal law and would still be enforced by federal agencies. As noted in the adopted City of San Jose Legislative Positions (City Council Agenda, October 5, 2010, Item 2.11), the passage of Proposition 19 would have a number of impacts in the following areas: good government policy setting and local control; revenue generation; public safety; and, workplace/employer mandates under the Federal Drug-Free Workplace Act of 1988. See this link for more information: www.sanjoseca.gov/clerk/Agenda/20101005/20101005_0211.pdf. Attachment A provides the effects of Proposition 19 as according to the State of California analysis. [1]

ANALYSIS

Approval of the urgency interim ordinance and approval of the regular interim ordinance would establish a temporary moratorium prohibiting the implementation of any commercial uses that involve the cultivation, dispensation or distribution of marijuana for recreational use should State Proposition 19 pass, until such time that the City Council decides whether it will allow and regulate marijuana under the terms established by Proposition 19, and those terms are fully approved by the City Council, and ready for implementation by City staff.

This temporary moratorium would not impact the separate effort underway by the City to establish local regulations pertaining to use of marijuana for medicinal purposes, other than any later determined impacts resulting from Proposition 26, if passed, or any other unanticipated issues that arise as more analysis is gathered regarding Proposition 19. A Special City Council Meeting has been scheduled for December 13, 2010 to discuss the policy options of regulating medical marijuana uses in the City, as well as the policy options of Proposition 19 should it pass. It is expected that this will be the first of several discussions related to the impacts of such uses on the City and its residents. The proposed Special City Council Meetings allows for the City Council to take action, if it deems necessary, and certainly more discussion on these complex policy issues can be scheduled. The remainder of this section of the report discusses the: (1) City Council's legislative process for advancing a temporary moratorium and (2) establishes the basis for the immediate threat to public health and safety.

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[1] http://ballotpedia.org/wiki/index.php/California_Marijuana_Legalization_Initiative_%282010%29

Temporary Moratorium of Proposition 19 (If Passed)

Staff is recommending the adoption of a temporary moratorium, passed by urgency ordinance, in accordance with the provisions of State law that allow for such an ordinance. Below is some discussion of the process to achieve a temporary moratorium without any gaps in time of when it would be in effect, specifically recommendation (a) of staff's report requires:

(1) California Government Code Section 65858 allows for a legislative body to protect the public safety, health, and welfare by adopting urgency measures on an interim basis that prohibit any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body is considering or studying or intends to study within a reasonable time. In June 2010, the City Council requested a Study Session following the November General Election to evaluate the outcome of Proposition 19 and the related policy implications for it to consider.

(2) For an urgency ordinance to be in place, it requires approval by at least 8 members of the City Council.

(3) In general, upon establishing that there is a current and immediate threat to public health and safety, the City is allowed to put a temporary moratorium in place for 45 days to decide what it would like to do regarding the issue or establish a further need for an extension of the moratorium.

Recommendation (b) of this staff report is to approve the regular ordinance that would keep the temporary moratorium in place upon the expiration of the urgency ordinance after 45 days if the City Council approves the urgency ordinance with this action. As stated, approving both temporary moratorium ordinances ensures that there are no gaps in time when the moratorium is not in place and allows the City Council some time and flexibility with deliberating policy options. In short, the regular ordinance provides for a 45 day moratorium and allows the City Council to extend at one time the moratorium for a period of 22 months and 15 days. The regular ordinance requires two readings and the passage of 30 days before it is in effect.

During the period of the proposed Temporary Moratorium, in the event that Proposition 19 passes, there are two policy options that the City Council would need to decide between: (1) Regulate Recreational Marijuana or (2) Ban Commercial Uses of Recreational Marijuana. The December 13 Special City Council Meeting on Marijuana Policy Options is timely in that it falls within the first 45 days of the temporary moratorium and sets a forum for the City Council to begin to discuss these two options, should Proposition 19 pass. With the approval of a Temporary Moratorium, the City Council affords itself the time to deliberate on this very important policy without being impacted by concurrently addressing unregulated commercial implementation of Proposition 19, if passed.

Table 1 below provides the timeline for each of the proposed ordinances and schedule for policy development.

Table 1: Urgency Ordinance/Regular Ordinance Timeline

Date	Milestone
November 2	• Adoption of an urgency ordinance to establish a temporary moratorium on marijuana, should Proposition 19 pass. • First Reading of 45 day Moratorium Ordinance (Regular Ordinance)
November 9	• Second Reading of 45 day Moratorium Ordinance • First Reading of Regular Ordinance to Extend Moratorium for up to 22 months and 15 days

December 13	City Special Council Meeting Marijuana Policy Options. By December 14, and ideally at this Special City Council meeting, the City Council has to accept/issue a report on what steps have been taken to alleviate the conditions that led to the moratorium in the first place.
Beginning on December 17 –	Moratorium could be rescinded upon City Council action to either (a) Regulate Marijuana or (b) Ban Marijuana during the 22 months and 15 days that the Moratorium, passed by Regular Ordinance, is in place.
December 17	Temporary Moratorium Expires
December 24	Extension Ordinance is effective at expiration of regular 45-day ordinance
TBD	Additional City Council Meetings on Marijuana Policy Options and Regulatory Framework

Current and Immediate Threat to Public Health, Safety or Welfare

California Government Code Section 65858 allows the adoption of this proposed urgency and regular ordinance when the City Council finds that there is a current and immediate threat to the public safety, health, or welfare, and that the approval of additional permits or applicable entitlements for use which is required in order to comply with a zoning ordinance would results in a threat to public health, safety, or welfare. Additionally, the City Charter, Section 605, establishes similar requirements for adopting urgency ordinances. The City Charter, Section 605(d), states that "An ordinance adopted as and declared by the Council to be an urgency measure necessary for the immediate preservation of the public peace, health or safety, [shall contain] a statement of the facts constituting such urgency…" Based on the fact that Proposition 19 would become effective on November 3, 2010, if passed, the following issues establish the current and immediate concerns and threats regarding public safety, health, or welfare of the community for the purposes of state law and the City Charter:

(1) There is a total lack of public health regulations regarding quality controls for use of marijuana;

(2) Recent violence, crimes and armed robberies at medical marijuana dispensaries have been occurring even while these uses are in no way allowed by state law or the City;

(3) Recent residential fires at "grow homes," that involved over 3,000 marijuana plants and utilize unsafe electrical wiring/connections have occurred even in the absence of any state law or City actions that could arguably allow such uses;

(4) There exists a significant potential for incompatible uses of land with respect to commercial retail, cultivation, and/or distribution of marijuana that requires further study;

(5) Recent City experience with the rapid growth of medical marijuana establishments in the absence of regulations demonstrates a very real possibility of a similar pattern of uncontrolled growth should Proposition 19 pass. The high number of medical marijuana dispensaries that have opened since December 2009 in the absence of any City regulations allowing such uses evidences significant confusion by these businesses as to what constitutes legal behavior in the City; for example, in December 2009 there were about 7-10 dispensaries, by June 2010 the number of dispensaries grew to 25 to 30, and as of September 2010 there are approximately 80 dispensaries.

(6) The existing confusion in state of law with regard to medical marijuana regulation will be exacerbated if medical marijuana providers make recreational marijuana available to the general public citing the provisions of Proposition 19. The risk that the existing 81 dispensaries may make non-medical marijuana available through their commercial storefronts under the defense of making it available per Proposition 19 (if passed), even though that behavior would not be allowed. Given that the existing medical marijuana dispensaries already operate in a manner that exceeds the law, any potential expansion to providing non-medical marijuana that businesses would incorrectly

argue is allowed per Proposition 19 presents risk and immediate threat to public safety, health and welfare of the community;

(7) The Department of Planning, Building, and Code Enforcement has received numerous complaints of public nuisance related to unregulated medical marijuana facilities since 2009 and Code Enforcement actions have been commenced against illegally operating and unregulated medical marijuana establishments;

(8) Attorney General Eric Holder recent statement that the Department of Justice intends to prosecute marijuana laws in California aggressively even if state voters approve an initiative on the November 2 ballot to legalize the drug under state law; and,

(9) Uncertainty of the outcome related to various legislative items and how each corresponds to one another regarding legal recreational marijuana and/or medical marijuana. There are a number of bills, recent laws, measures, propositions, etc. that need to be sorted out to understand the legal and policy options available to City (Attachment B).

PUBLIC OUTREACH

This memorandum was posted to the City's website. Some discussion of Proposition 19 and staff's concerns took place by the City Council on October 5, 2010 when the City Council considered an "oppose" legislative position regarding state propositions.

COORDINATION

This staff report has been coordinated with the City Attorney's Office and the following Departments: Police; Fire; Finance; and, Planning, Building, and Code Enforcement.

CONCLUSION

It should be noted that this action would not result in a ban on Proposition 19, if passed. In fact, if Proposition 19 passes, the City Council would need to take a series of steps to enable it to become a legal activity within San Jose. First, the City Council would need to determine that it would like to regulate marijuana per provisions in Proposition 19. Second, the City Council would need to establish regulations for marijuana activity per Proposition 19. If regulations are adopted, the City Council should also establish a cost recovery fee program and related staffing plan to ensure that this new initiative is well resourced. (Note: The options surrounding a cost recovery program are contingent on the outcome of Measure U [a ballot measure that would allow a tax rate on medical and non-marijuana businesses for up to 10%] and Proposition 26 which, if passed, requires further legal analysis with respect to whether regulatory fees would be subject to voter approval. Last, City staff would train/transition staff to implement the adopted regulations. Since Proposition 19, if passed, would take effect on November 3, 2010, there is no time to complete this process.

Deanna J. Santana
Deputy City Manager

ATTACHMENT A

Analysis on Effects of Proposition 19
Source: California Legislative Analyst's Office

Category	Effect(s)
Legalization	▪ Persons over the age of 21 may possess up to one ounce of marijuana for personal consumption. ▪ May use cannabis in a non-public place such as a residence or a public establishment licensed for on site marijuana consumption. ▪ May grow marijuana at a private residence in a space of up to 25 square feet for personal use.
Local Government Regulation	▪ Local government may authorize the retail sale of up to 1 ounce of marijuana per transaction, and regulate the hours and location of the business. ▪ Local government may authorize larger amounts of marijuana for personal possession and cultivation, or for commercial cultivation, transportation, and sale. ▪ Allows for the transportation of marijuana from a licensed premises in one city or county to a licensed premises in another city or county, without regard to local laws of intermediate localities to the contrary.
Local Taxes and Fees	Allows the collection of taxes specifically to allow local governments to raise revenue or to offset any costs associated with marijuana regulation.
Criminal and Civil Penalties	▪ Maintains existing laws against selling drugs to a minor and driving under the influence. ▪ Maintains an employer's right to address consumption of cannabis that affects an employee's job performance. ▪ Maintains existing laws against interstate or international transportation of cannabis. ▪ Any person who is licensed, permitted or authorized to sell cannabis, who knowingly sells or gives away cannabis to someone under the age of 21 results in them being banned from owning, operating, or being employed by a licensed cannabis establishment for one year. ▪ Any person who is licensed, permitted or authorized to sell cannabis, who knowingly sells or gives away cannabis to someone older than the age of 18 but younger than 21, shall be imprisoned in county jail for up to six months and fined up to $1,000 per offense. ▪ Any person who is licensed, permitted or authorized to sell cannabis, who knowingly sells or gives away cannabis to someone age 14 to 17, shall be imprisoned in state prison for a period of three, four, or five years. ▪ Any person who is licensed, permitted or authorized to sell cannabis, who knowingly sells or gives away cannabis to someone under the age of 14, shall be imprisoned in state prison for a period of three, five, or seven years.

ATTACHMENT B

The following is a bills, recent laws, measures, propositions, etc. that need to be sorted out to understand the policy making options available to City:

(a) **Measure U**—Allows the City Council to impose a business tax of up to 10% on marijuana businesses in San Jose.

(b) **Proposition 26**—If passed, it may require that certain local fees be approved by two-thirds of voters. The Legislative Analyst states that there are three broad categories of fees and charges: User Fees; Regulatory Fees; and, Property Charges. Additional analysis is needed regarding the applicability to fees with respect to regulating legal recreation and/or medical marijuana.

(c) **Assembly Bill x6 No. 9**—Assembly Member Ammiano recently initiated Assembly Bill x6 No.9 (AB 9), "Marijuana Control and Regulation Act of 2010," which seeks to provide State regulatory oversight should Proposition 19 pass by providing for regulation by the Department of Alcoholic Beverage Control (ABC) of the possession, cultivation, and other conduct relating to marijuana and its derivatives, not including medical marijuana, by persons 21 years of age and older. AB 9 would become operative only if Proposition 19 is adopted; <u>however, further analysis is needed to determine whether a State legislative action can initiate state regulatory authority/control when the ballot measure specifically does not assign the State as the regulatory body, rather local municipalities. In short, the question of whether an Assembly Bill can change what has been enacted by the voters of California requires response.</u>

(d) **Assembly Bill 2650**—During the week of September 27, 2010, the Governor signed a bill into law that will further inform the City's regulatory approach with respect to medical marijuana. The Governor signed Assembly Bill No. 2650, which states:

> This bill would provide that no medical marijuana cooperative, collective, dispensary, operator, establishment, or provider authorized by law to possess, cultivate, or distribute medical marijuana that has a storefront or mobile retail outlet which ordinarily requires a local business license shall be located within a 600-foot radius of any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, except as specified. This bill would provide that local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of these medical marijuana establishments would not be preempted by its provisions; and that nothing in the bill shall prohibit a city, county or city and county from adopting ordinances that further restrict the location or establishment of these medical marijuana establishments.

(e) **Senate Bill 1449**—During the week of September 27, 2010, the Governor signed a bill into law that will further inform the City's regulatory approach. The Governor signed Senate Bill No. 1449 (SB 1449), which states:

> Existing law provides with respect to these offenses (*possession not more than 28.5 grams of marijuana, other than concentrated cannabis)* that, under specified conditions, (1) the court shall divert and refer the defendant for education, treatment, or rehabilitation, as specified, and (2) an arrested person who gives satisfactory evidenced of identity and a written promise to appear in court shall not be subject to booking.
>
> This bill would provide that any person who commits any of the above offenses is instead guilty of an infraction punishable by a fine of not more than $100. This bill would eliminate the above-described provisions relating to booking and to diversion and referral for education, treatment, or rehabilitation.