



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** Closure of Businesses for  
Failure to Pay City Taxes

**DATE:** October 5, 2012

## SUPPLEMENTAL MEMO

### BACKGROUND

One of the proposals to be considered at the City Council's Priority Setting Special Meeting on October 9, 2012 is direction to this Office to amend Title 4 of the San José Municipal Code to provide for the City's revocation of the business license certificates issued pursuant to Chapter 4.76 and injunctive relief from the courts to close marijuana businesses for their failure to pay the City's Marijuana Business Tax set forth in Chapter 4.66. Further, in the event this proposal cannot be limited to marijuana businesses, the proposed direction is to expand it to all businesses that fail to pay City's business taxes.

Set forth below, in question and answer format, is our legal advice regarding implementation of this proposal.

### ANALYSIS

Question 1. May the Municipal Code be amended to provide for the revocation of a business's business license certificate for its failure to pay either the City's Business License Tax or the Marijuana Business Tax?

Answer: No. The Business License Tax is for **revenue purposes only**. In this regard, the business license certificate is issued by the City annually as evidence of the taxpayer's payment of the Business License Tax. It is not a license to do business in San José. Additionally, the Municipal Code is clear that the City does not regulate the conduct of the businesses through the Business License Tax. Accordingly, revocation of a business license certificate has no consequence with respect to a business's ability to conduct business legally in the City.

Question 2. When may the City initiate legal action against a taxpayer for failing to pay the City's Business License Tax or Marijuana Business Tax?

October 5, 2012

**Subject: Closure of Businesses for Failure to Pay City Taxes**

Page 2

Answer: Legal action related to nonpayment of either the Marijuana Business Tax or the Business License Tax cannot commence until the City first completes an administrative tax assessment process.

Both the Marijuana Business Tax and the Business License Tax require the Director of Finance to initiate an administrative process in the event the business fails to pay the tax or underpays the tax. Generally, this process provides for notice to the delinquent taxpayer of the City's assessment of the tax due and an opportunity for the taxpayer to have a hearing before the Director of Finance or the Director's designee. In the event that the taxpayer does not request a hearing, then the tax assessment becomes final and the amount assessed is due and payable by the taxpayer. If the taxpayer requests a hearing, then the Director holds a hearing and following the hearing issues a decision on the amount of the tax, if any, due to the City. The Director of Finance's decision is final.

California courts have held that a city may not proceed with a collection action until the City completes the administrative process. In other words, **no tax is deemed due to the City** until the administrative process is completed. This means that the City would not be able to file a court action to collect delinquent taxes or seek injunctive relief related to the nonpayment of delinquent taxes until the administrative process is complete.

Question 3: Assuming that the City has completed the administrative tax assessment process and the Director of Finance has determined that taxes are owed, may the City seek injunctive relief from the court to close the business that failed to pay the Marijuana Business Tax?

Answer: Yes, although the ultimate decision rests with the court. The basis for the City to seek closure of a business is that the operation of the business constitutes a public nuisance. Under State law, a public nuisance is the use or condition of private property that is "injurious to health" so as to affect the use of property by the community or a considerable number of persons. See California Civil Code Sections 3479 and 3480.

Under the Government Code and the State Constitution, the City may declare the type of conditions that constitute a public nuisance. The City has done so in Municipal Code Section 1.08.050(F) which provides that any violation of the Municipal Code constitutes a public nuisance:

Any condition existing in violation of any of the provisions of any state or federal law or regulation or of this Code or any other city ordinance shall be deemed a public nuisance and may be abated by the city. Nuisance shall include, but is not limited to, the factors in Section 1.13.050.

The factors listed in Section 1.13.050 are those that the courts historically have viewed as public nuisances, such as illegal drug and gambling activity and prostitution, among others. If the City desires to pursue closure of businesses for failing to pay City taxes,

October 5, 2012

**Subject: Closure of Businesses for Failure to Pay City Taxes**

Page 3

then Section 1.13.050 should be amended to make clear that this also is a ground for declaring a public nuisance.

If the City Council wishes to move forward with amending Section 1.13.050 to include failure to pay City taxes, we would recommend that the amendment not be limited to failure to pay the Marijuana Business Tax. We don't see any basis for distinguishing nonpayment of the Marijuana Business Tax from other taxes that the City imposes on businesses.

RICHARD DOYLE

City Attorney

By

  
DANIELLE KENEALEY

Chief Deputy City Attorney

cc: Debra Figone  
Ed Shikada  
Julia Cooper