

**BEN BARTLETT**

VICE MAYOR

ACTION CALENDAR

May 23, 2023

TO: Honorable Members of the City Council

FROM: Vice Mayor Ben Bartlett (Author) & Mayor Jesse Arreguin (Co-Sponsor)

SUBJECT: Adopting a temporary exemption from the collection of taxes under BMC Chapter 9.04.136(D): Tax Rate for Non-Medical and Medical Cannabis Businesses

RECOMMENDATION

1) Adopt a temporary exemption (per 9.04.136(D)) on the collection of the taxes for all non-medical and medical cannabis businesses, retroactive to January 2023 and ending July 2025; Waive any late penalties that may have accrued since January 2023; any and all tax payments already made to the City for Q1 2023 will apply as a credit against a future tax or fee payment to the City; and

2) Refer to the City Manager and Cannabis Commission and/or its successor, the Planning Commission, to analyze and develop an ordinance adjusting local cannabis business tax rates by February 2025 that are in balance with the state cannabis tax rates, with an eye to the ability for the cannabis industry to become a sustainable economic driver for the City of Berkeley.

3) Licensed cannabis businesses in Berkeley will pay the business license tax that applies to their respective area of the market during the moratorium, like retail, manufacturing, etc.

BACKGROUND

On November 8, 2016, California voters passed Proposition 64, the Adult Use of Marijuana Act (AUMA). This proposition legalized the use of cannabis for adults over 21 years old. Berkeley voted overwhelmingly for Proposition 64, with 85% approving the measure. The State of California developed state-wide regulations for recreational cannabis, allowing temporary licenses for adult-use businesses effective January 1, 2018.

In September 2017, the Berkeley City Council adopted amendments to B.M.C. Chapter 12.26 to permit temporary licenses for existing medical cannabis dispensaries, allowing them to sell adult-use cannabis in the City effective January 1, 2018. To date, five of the

six existing permitted dispensaries have received city and state licenses and are selling adult-use cannabis.

Since long-standing dispensaries began selling adult-use cannabis on January 1, 2018, there have been many questions regarding the local cannabis tax rate. In addition to State and sales taxes, local taxes have added significant costs to cannabis products and may discourage business, especially as other nearby cities adopt lower tax rates.

In 2018, the City set tax rates at 5% based on the best information possible at the time. Since then, the cannabis industry in California has seen its growth stall, and in the last year, the bottom has fallen out, leading to an industry-wide collapse.

- During the COVID pandemic, cannabis was deemed essential, yet was left out of the state and federal relief provided to other business owners, including but not limited to relief for wages paid to employees on leave for COVID-related workplace exclusions, the Paycheck Protection Program (PPP) loans, and Small Business Administration loans.
- The costs of compliance with state and local regulations for the cannabis business are extremely high.
- Nearly all of what would otherwise be considered a standard business tax deduction are not applicable because of Internal Revenue Code Section 280E, which disallows all ordinary business expenses and still unjustly applies to state legal tax businesses.
- The unlicensed market and organized cartels continue to thrive under this system, undercutting the legal market. Berkeley is not immune to this. In the first months of 2023, two unlicensed operations within the City were shut down. One facility had 14,000 plants and hundreds of pounds of cannabis concentrate on site.
- Licensed cannabis cannot compete.

The compounding effect of these added costs of doing business with the state and local taxes and fees and lack of access in much of the state drives the cannabis consumer to the unlicensed market, which is currently more than twice the size of the regulated one—and half the price.

Last year, the State had an opportunity to adjust the tax rates for cannabis businesses and provide relief for those struggling to make it into the legal market. Instead of providing that relief, the state shifted the tax burden to retailers and cannabis consumers and will likely increase those excise taxes in the future. This change in state tax collection had a

chilling effect on an already struggling industry, and the shift negatively impacted urban regions of the state that predominantly have retail cannabis as the main license type.

Berkeley wants to see its legal cannabis businesses thrive so they can continue providing high-wage jobs and access to safe, tested cannabis to the people of Berkeley and those who come to Berkeley.

Taxes Applicable to Non-Medical Cannabis Businesses

There are a number of taxes applicable to adult-use cannabis businesses, including:

- State Cannabis Excise Tax
 - Effective January 1, 2018, a 15% excise tax is imposed upon retail purchasers of all cannabis and cannabis products, except for those possessing a state cannabis medical card. The 15% excise tax is calculated based on the average market price from the retail sale, **which leads to an actual current effective tax rate of around 27%.**
 - **Beginning this year, that excise tax was shifted to retail. Because of the way the tax is calculated, this amounted to a tax increase.**
- Local Sales Taxes
 - The City of Berkeley and Alameda County's combined sales tax is 10.25%
- City of Berkeley Business License Tax
 - Measure S, adopted by Berkeley voters in 2010, set the business license tax rate for Non-Medical Cannabis Businesses authorized pursuant to Proposition 19 at 10% or \$100.00 for every \$1,000 of gross receipts. The measure included language allowing the City Council to lower the tax rate by ordinance, which the Council did in 2018 to 5% or \$50 for every \$1000.
 - A note about Measure S - This ballot measure was expressly written to accompany Proposition 19 from 2010, which would have legalized cannabis and did not set a state tax rate. That ballot initiative did not pass.
 - Cities like Berkeley and Oakland, which set high local tax rates in anticipation of Proposition 19 passing, have seen an exodus of the supply chain businesses that can leave and a loss of customers to its brick-and-mortar dispensaries as other jurisdictions have come online with much lower taxes. This also leads the more price-driven customers to jurisdiction shop when choosing where to buy their cannabis, particularly where delivery from neighboring regions is widely available.

- The business license tax rate for Medical Cannabis Businesses is currently 2.5% of gross receipts.

Other Cannabis Tax Rates in the region

Different jurisdictions in Alameda County have set their cannabis tax rates at a range of levels. Over the next year, there will be efforts to lower the local rates in most of these jurisdictions.

Oakland: has seen an exodus of supply chain businesses to lower tax rate jurisdictions.

Hayward: voters approved up to 15% but have set the effective rate at 6% and is having trouble attracting cannabis businesses.

San Leandro: Measure NN approved in November 2016, was a voter-approved gross receipts tax on cannabis businesses of up to 10%. It is currently 6% and will increase over time. All cannabis businesses must have annual audits.

Emeryville: Has set tax rates at 3% for retail, 2% for manufacturing, and 1% for distribution.

City of Alameda: **Currently has no cannabis tax for its cannabis businesses. The City Council chose not to pursue any additional cannabis taxes for the foreseeable future to allow licensed businesses to get on their feet. Cannabis businesses pay regular business license taxes.**

City and County of San Francisco: **Have continually delayed the implementation of a cannabis-specific tax to help the flailing industry.** Cannabis businesses pay regular business taxes.

In order for Berkeley to remain competitive and attract new cannabis businesses, it should consider lowering its business license tax on Non-Medical Cannabis businesses.

FISCAL IMPACTS OF RECOMMENDATION

Reducing the business license tax rate for Non-Medical Cannabis Businesses may reduce tax receipts to the General Fund. However, a lower tax rate will make Berkeley cannabis businesses more competitive in the regional market and may result in greater business activity and tax revenues to the City. According to the FY 2023 Mid-Year Budget Update, Recreational Cannabis Taxes have produced \$1,643,749 in receipts as of February 2023.

ENVIRONMENTAL SUSTAINABILITY

No identifiable environmental effects or opportunities are associated with this report's subject.

CONTACT

Ben Bartlett, Councilmember/Vice-Mayor, District 3

510-981-7130

Attachments:

1. [Ordinance: BMC Chapter 9.04.136](#)
2. [CDTFA total cannabis sales data from 2021 through Q4 2022 show unexpected and continual losses.](#)
3. [MJ Biz article: "California localities extend tax relief to marijuana companies in the absence of state action," February 28, 2022](#)
4. Letter from hi fidelity

Attachment 1

<https://berkeley.municipal.codes/BMC/9.04.136>

Ch. 9.04 Business Licenses | Berke... x +

https://berkeley.municipal.codes/BMC/9.04.136

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9.04.136 Cannabis businesses.

A. 1. Every Medical Cannabis Business that is not a Nonprofit Organization as defined in Section [9.04.305](#), and every Non-Medical Cannabis Business, shall pay an annual tax for each thousand dollars of gross receipts as provided in Section [9.04.240](#). If the "Regulate, Control and Tax Cannabis Act of 2010" on the November 2010 state ballot passes and takes effect, the maximum gross receipts rate that may be applied to medical cannabis businesses shall be reduced to 1.8%, or \$18 per \$1000.

2. Except as provided in paragraph 1 of this subdivision, the tax on Medical Cannabis Businesses that is imposed by this Section shall be phased in as follows:

(a) The tax payable in 2011 shall be \$18 per \$1000 of gross receipts after June 30, 2010.

(b) The tax payable in 2012 shall be \$25 per \$1000 of gross receipts after January 1, 2011.

(c) The tax payable in subsequent years shall be \$25 per \$1000 of gross receipts during the preceding calendar year.

B. For purposes of this Chapter:

1. "Medical Cannabis Business" means any activity regulated or permitted by Chapter [12.26](#) or Title [23](#) that involves planting, cultivating, harvesting, transporting, dispensing, delivering, selling at retail or wholesale, manufacturing, compounding, converting, processing, preparing, storing, packaging, or testing, any part of the plant Cannabis sativa L. or any of its derivatives, pursuant to Health & Safety Code sections [11362.5](#) and [11362.7-11362.83](#).

2. "Non-Medical Cannabis Business" means any of the activities described in the preceding paragraph that are not conducted pursuant to Health & Safety Code sections [11362.5](#) and [11362.7-11362.83](#), but are otherwise authorized by state law.

3. "Cannabis Business" includes both Medical Cannabis Businesses and Non-Medical Cannabis Businesses.

4. A Cannabis Business shall be deemed a "Business" under Section [9.04.010](#) and as that term is used in ...

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- 9.04.136 Cannabis businesses**
- 9.04.140 Grocer, retail or wholesale
- 9.04.145 Motor vehicle dealers (new ...)

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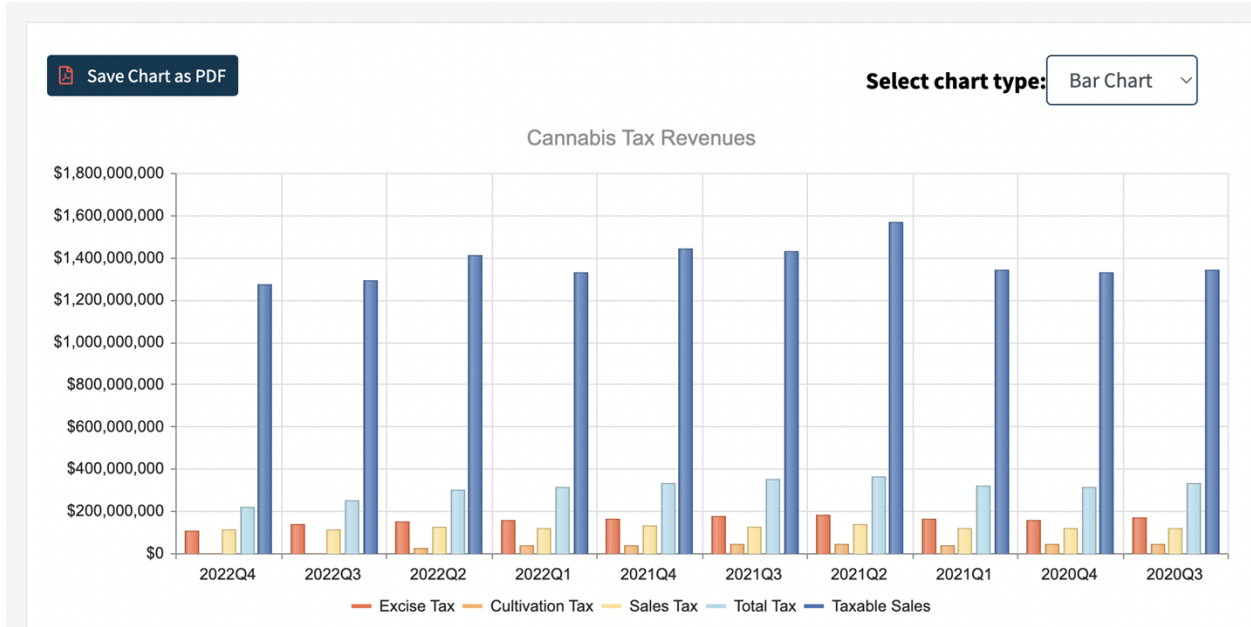
9.04.136 Cannabis businesses. 🔍 ↻ 📄

otherwise authorized by state law.

- B. 3. "Cannabis Business" includes both Medical Cannabis Businesses and Non-Medical Cannabis Businesses.
- 4. A Cannabis Business shall be deemed a "Business" under Section [9.04.010](#) and as that term is used in this Chapter.
- C. For purposes of this Section and Section [9.04.305.A.2](#), "gross receipts" includes any monetary consideration for medical cannabis whatsoever, including but not limited to: membership dues; reimbursement pursuant to Health & Safety Code sections [11362.5](#) and [11362.7-11362.83](#); and any money received for wholesale or retail sales.
- D. 1. The annual tax rate imposed by Section [9.04.240](#) on Non-Medical Cannabis Businesses shall apply to the sum of gross receipts as defined in Section [9.04.025](#) and this Section.
2. The City Council may impose the tax authorized by this Section at a lower rate, and may establish an exemption for Cannabis Businesses whose gross receipts are below a specified amount. The Council may adopt different rates and exemption levels for Medical and Non-Medical Cannabis Businesses. No action by the Council under this paragraph shall prevent it from subsequently increasing the tax rate for any type of Cannabis Business to the maximum specified in this Section and Section [9.04.240](#) or from modifying or eliminating any exemption.
- E. In order to aid in the City's collection of taxes due under this Chapter and ensure that all Cannabis Businesses are taxed consistently to the best of the City's ability, beginning January 1, 2011, in any Cannabis Business, that obtains any product containing Cannabis sativa L. or any of its derivatives for monetary consideration that constitutes gross receipts under subdivision (C) for the provider of that Cannabis sativa, shall either:
 - 1. Report quarterly to the City all such transactions, the monetary consideration involved, and the identity and contact information of the person or entity to whom or to which monetary consideration was provided; or
 - 2. Collect the tax that would be payable as a result of the transaction from the person or entity to whom monetary consideration was provided and remit it to the City.
- F. The City Manager may promulgate regulations to implement and administer this Section, including allowing Medical Cannabis Businesses to remit taxes more frequently than annually. (Ord. 7160-NS § 1, 2010)

Attachment 2

<https://www.cdtfa.ca.gov/dataportal/charts.htm?url=CannabisTaxRevenues>



Attachment 3

<https://mjbizdaily.com/california-localities-extend-tax-relief-to-marijuana-companies/>

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California localities extend tax relief to marijuana companies in absence of state action

By Jackie Bryant
February 28, 2022 - Updated March 11, 2022






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A map showing California localities that are providing tax relief for the cannabis industry.

Since state lawmakers have been slow to lower marijuana taxes, local governments throughout California are scrambling to grant tax relief to cannabis businesses.

The tax rollbacks by cities and counties mainly reflect lobbying from industry organizations as well as local residents and businesses.

Latest News


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- Who's who in federal marijuana reform and legalization 
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They argue that taxation at all levels of the supply chain is simultaneously choking cannabis companies' ability to stay afloat while strengthening the illicit market.

The rush to grant tax relief began a couple of years ago and has since accelerated.

It has encompassed a range of localities, including the cities of Desert Hot Springs and San Diego as well as Humboldt and Sonoma counties.

"This is really a statewide issue," explained Natalynne DeLapp, executive director of the Humboldt County Growers Association.

All this comes against the backdrop of a historic bear market for California wholesale cannabis prices, which plummeted last year in response to a supply glut.

Prices have only recently begun to rebound.

The tax rollbacks also come amid accusations from operators, local lawmakers and industry insiders that the state has not done enough to properly address tax reform, among other ills, leading to what many are calling a crisis in California's cannabis industry.

Marijuana license holders in California are subject to a state cultivation tax of \$161 per pound, as well as a 15% excise tax, in addition to taxes levied by city and county officials.

In January, Gov. Gavin Newsom pledged tax reform, though he was light on details.

Four bills at the state level addressing cannabis taxation have been introduced in the past few weeks: Assembly Bill 2792, AB 2506, Senate Bill 1281 and SB 1293.

SB 1281 appears to be the most comprehensive. Among other things, it would eliminate the cultivation tax and reduce the excise tax to 5%.

With constituents screaming for relief, localities are not waiting for any state tax changes to kick in, especially considering that such legislative actions wouldn't take effect until 2023, at the earliest.

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One of the most high-profile moves took place in Humboldt County on Feb. 7, when the Board of Supervisors voted to reduce by 85% the county cultivation tax locally known as Measure S.

Measure S previously required a \$1-\$3-per-square-foot payment, the amount of which was dependent on license type. Now, those fees will be calculated in the same manner, but growers will pay only 15% of the total amount.

Temporarily lowering the cultivation tax showed the county's "commitment to growers who have committed \$50 million to our local economy in the four years since Measure S was passed," Humboldt County Supervisor Rex Bohn said.

The reduction was met with some opposition from locals who believe cannabis growers got off easy by not having to pay taxes before legalization.

Bohn said this came into stark relief once it became clear that many of the same growers are now choosing to leave their gardens fallow rather than risk planting and paying taxes on marijuana flower they can't sell.

Though Humboldt might be one of the more significant of such actions taken, it's far from the only one.

"Most cities and counties set their local tax rates based on an assumption that cannabis businesses were going to be wildly profitable," DeLapp said.

"The reality is that, in many places, those tax rates are no longer sustainable, particularly for small and independent legacy businesses who are operating without outside capital."

Cannabis lobbyist Nara Dahlbacka, a partner at the Oakland-based Milo Group, said that while tax relief is needed both at the state and local levels, localities enacting reform can "also be a huge help on the red tape side" for businesses.

"In order to expand their (marijuana) businesses, there's a level of red tape and bureaucracy that have to be dealt with at the local and state levels," Dahlbacka said.

The following localities have, or are considering, cannabis tax reductions and relief:

The following localities have, or are considering, cannabis tax reductions and relief:

Humboldt County

- This month, the Board of Supervisors voted to temporarily reduce its cultivation tax by 85% for one year.

Lake County

- In January, the Board of Supervisors voted to postpone until May 15 the due date for cannabis tax payments and suspend the 25% late-payment penalty during the postponement. The board also directed staff to develop additional options for cannabis tax relief for ongoing discussion and voting in future meetings.

Monterey County

- The Board of Supervisors is preparing to vote March 1 on an industrywide cultivation tax reduction, including eliminating automatic increases on all taxes and doing away with the distribution tax entirely.
- After freezing an automatic tax increase on growers previously scheduled for 2021-22, the board voted last October to increase the number of times growers could amend the taxable square footage of their crop canopy from once to twice per year.

Sonoma County

- In January, the Board of Supervisors voted to postpone first-quarter taxes from Jan. 31 to April 30. Total taxes levied for both quarters will be due without penalties or interest on April 30 unless the board approves another extension.

Bellflower

- In October 2020, local officials reduced taxes for manufacturing and distribution from 7.5% to 2% and 1%, respectively.

Berkeley

- In February 2018, local officials reduced the cannabis tax rate from 10% to 5% to remain competitive in the Bay Area.

Cloverdale

- The City Council is scheduled to vote on March 9 to reduce tax rates for all licensees and tier the tax rates for different types of licenses.

Desert Hot Springs

- In February 2021, local officials reduced the tax for cultivation from \$25.50 per square foot to \$10.20 per square foot for cultivation.

Long Beach

- In 2019, the city lowered manufacturing, distribution and testing taxes from 6% to 1%.
- In 2020, the City Council agreed to ditch a proposed tax increase and instead increased the hours of operation for cannabis retailers.

Oakland

- In 2019, the City Council voted to lower the gross receipts tax on cannabis businesses that make \$500,000 or less from 10% to 0.12%.

Palm Springs

- In February 2019, local officials reduced the manufacturing tax from 10% to 2%.

San Diego (city)

- In February, **the City Council voted** to reduce the manufacturing and cultivation tax from 8% to 2%, effective May 1.

San Francisco (city)

- In December 2021, San Francisco authorities **approved a second one-year suspension** of the city's marijuana business tax through 2023.

San Jose

- In July 2019, local officials reduced the flat-rate taxes of 10% to 4% for cultivation, 3% for manufacturing, 2% distribution and 0% for testing.

Additionally, according to Dahlbacka, the following localities have passed resolutions formally requesting the state to amend its cannabis taxes:

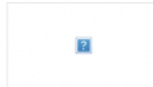
- Alameda County
- Calaveras County
- Lake County
- Mendocino County
- Monterey County
- San Francisco (city and county)
- Santa Cruz County
- City of Berkeley
- City of Desert Hot Springs
- City of Oakland
- City of Rio Dell

Jackie Bryant can be reached at jacqbryant@gmail.com.

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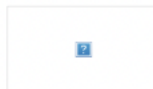
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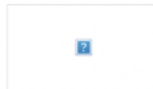
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CULTIVATION

NEW YORK HEMP FARMERS GIVEN PRIORITY TO GROW RECREATIONAL MARIJUANA



Attachment 4



April 18, 2023

Dear Vice Mayor Bartlett:

On behalf of High Fidelity Dispensary, we are writing to support the proposed tax moratorium for Berkeley cannabis businesses.

Operating a licensed, profitable cannabis dispensary in California is now nearly impossible. Layer upon layer of taxation, coupled with punitive federal rules denying tax deductions for operating expenses -- while competing against the unlicensed, unregulated market -- makes this industry unsustainable for operators who play by the rules.

Now that many jurisdictions around Berkeley are lowering their cannabis tax rates, it is incumbent on this city to follow suit. It is our hope that a future tax rate once the moratorium sunsets is fair and equitable and takes into account the unique constraints endemic to this industry.

Thank you for your consideration,

David Prinz, Owner,

Marc Weinstein, Owner

High Fidelity Dispensary

Cc: Mayor and City Council
