

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6620

DATE: July 31, 2019
TO: Councilmembers Chris Ward and Monica Montgomery
FROM: City Attorney
SUBJECT: Expenditure of Measure N Tax Revenues

INTRODUCTION

On November 8, 2016, California voters approved Proposition 64 legalizing adult use, cultivation, and retail sale of recreational cannabis in California. City of San Diego (City) voters also approved a ballot measure labeled “Measure N,” establishing a Cannabis Business Tax in the San Diego Municipal Code (Municipal Code or SDMC).¹ Measure N tax revenue is projected at \$11.9 million in the Fiscal Year 2020 Budget.

You have expressed your desire to explore the establishment of a Cannabis Equity Program,² which would be intended to provide support and mentoring services for communities that may have suffered disproportionate levels of law enforcement of cannabis-related crimes.³ You have asked the Office of the City Attorney for guidance regarding whether Measure N revenues could be used to fund such a program in light of restrictions on general tax revenues.⁴

¹ Measure N is codified in Municipal Code sections 34.0101 - 34.0132.

² Other jurisdictions have established similar programs, such as the City of Sacramento’s Cannabis Opportunity Reinvestment and Equity Program.

³ One of your stated goals of the Cannabis Equity Program would be to provide loan assistance for entrepreneurial access to the cannabis industry. As of the date of this memorandum, the City has issued the maximum number of permits (40) for Marijuana Production Facilities (MPF), but there may be other forms of access to the industry. In addition, the City Council (Council) has the option of amending the Municipal Code to increase the maximum number of MPF permits.

⁴ The establishment of a Cannabis Equity Program in the City may raise other legal issues not addressed in this memorandum. This Office would need to perform additional research and analysis should the Council elect to move forward with such a program.

QUESTIONS PRESENTED

1. What are the existing restrictions on the Council's direction of Measure N tax revenues?
2. May the Council establish specific goals for the use of Measure N tax revenues?

SHORT ANSWERS

1. Measure N is a general tax, the proceeds of which must be placed into the City's General Fund to be allocated in accordance with the City's annual budgeting and appropriation process (Budget Process). As discussed in Part I below, Measure N received approval by more than two-thirds of local voters, but this circumstance does not convert it to a special tax.

2. The Council may annually designate Measure N tax revenues for specific goals during the City's annual Budget Process. The Council may not make multi-year commitments of Measure N tax revenues toward specific goals absent a new public vote approving a special tax

ANALYSIS

I. MEASURE N TAX REVENUES MUST BE PLACED IN THE CITY'S GENERAL FUND AND ALLOCATED DURING THE ANNUAL BUDGET PROCESS

In California, local voters must approve a city's levy of taxes, subject to different vote thresholds depending on whether the tax is identified in the relevant ballot materials as a general tax or a special tax. A general tax is placed in the taxing entity's general fund to be used for "general governmental purposes." *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47, 57 (1982). A special tax is levied for a specific purpose and is "earmarked or dedicated in some manner to a specific project or projects." *Bay Area Cellular Telephone Co. v. City of Union City*, 162 Cal. App. 4th 686, 696 (2008). Under the California Constitution, a general tax requires approval by a majority of local voters, while a special tax requires approval by a two-thirds supermajority of local voters. Cal. Const. art. XIII A, § 4 and art. XIII C, § 2 (b) and (d). Likewise, under the San Diego Charter (Charter), the Council's levy of "a special tax, as authorized by Article XIII A of the California Constitution," requires approval by a two-thirds supermajority of local voters. San Diego Charter § 76.⁵

⁵ This Office recognizes that pending lawsuits in San Francisco, Oakland, and Fresno have raised the legal issue of whether the vote threshold may be a simple majority, rather than a two-thirds supermajority, where a special tax is proposed by citizens' initiative. However, the vote threshold issue in those lawsuits is not relevant here as Measure N is a general tax, not a special tax, and the Council, not citizens, initiated Measure N.

The citizens of San Diego approved Measure N as a general tax. The ballot language of Measure N states that the receipts of the tax will be used for “general revenue purposes” and that the measure required approval of a simple majority (over 50%) of the voters. Measure N, Gen. Elec. (Nov. 8, 2016). The Municipal Code also provides that Measure N revenues must be placed into the City’s General Fund and used for general governmental purposes. SDMC § 34.0101(b). These monies are then “allocated during the general budgeting process in light of changing priorities and conditions.” *Neecke v. City of Mill Valley*, 39 Cal. App. 4th 946, 956 (1995). The Council retains the authority to direct expenditures of General Fund dollars, including Measure N tax revenues, during the Budget Process each fiscal year as delineated in the Charter.⁶ *See* San Diego Charter §§ 69(f) and (h).

Even though over two-thirds of local voters approved Measure N in 2016, the relevant ballot materials identified the tax as a general tax, and the tax cannot be converted to a special tax after the fact without an additional public vote and full compliance with statutory requirements. For Measure N tax revenues to be designated for a specific purpose (i.e., converting it from a general tax to a special tax), a two-thirds supermajority of City voters would need to approve a new ballot measure that expressly identifies the tax as a special tax and includes various accountability measures required by statute. *See* Cal. Gov’t Code § 50075.1.

II. THE COUNCIL MAY DESIGNATE THAT MEASURE N TAX REVENUES BE USED FOR SPECIFIC PROGRAMS PROVIDED IT DOES SO ON AN ANNUAL BASIS

The Council may establish goals and community programs aimed at achieving racial and health equity in marijuana policy, such as the Cannabis Equity Program, and direct funding to those programs on an annual basis during the Budget Process. The Council’s determination “as to where to spend general sales taxes is not equivalent to saying that the tax was ‘levied’ for that particular purpose.” *White v. State*, 88 Cal. App. 4th 298, 309 (2001). Therefore, the Council may structure, establish, or fund specific programs with Measure N tax revenues, without converting it into a special tax, if the funding is committed in one-year increments within the framework of the City’s Budget Process.

CONCLUSION

San Diego voters approved Measure N as a general tax to increase revenues for the City’s General Fund. All Measure N tax revenues must be annually allocated pursuant to the City’s Budget Process. The Council may establish specific goals and programs for use of Measure N

⁶ The annual budget priority memo issued by each Council District provides Councilmembers the opportunity to request money be allocated to fund specific programs and goals during the upcoming fiscal year.

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tax revenues if these programs are funded on an annual basis. To earmark Measure N tax revenues on a multi-year basis for a specific purpose, Cityvoters would need to approve a special tax by a two-thirds vote.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ David L. Powell
David L. Powell
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cc: Honorable Mayor and City Councilmembers
Kris Michell, Chief Operating Officer
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