Title: Resolution Establishing Business Operating Permit Fees for Cannabis Nurseries (Noticed 09/11/2020 & 09/16/2020)

Location: Citywide

Recommendation: Conduct a public hearing and upon conclusion, adopt a Resolution establishing the Business Operating Permit (BOP) fees for cannabis nurseries.

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Presenter: Davina Smith, Cannabis Manager, (916) 808-4772, Office of Cannabis Management, Office of the City Manager.

Attachments:
1-Description/Analysis
2-Fee Resolution
3-Proposition 26
Description/Analysis

**Issue Detail:** On January 14, 2020, the City Council approved an ordinance amending various sections of Sacramento City Code chapter 5.150 relating to cannabis businesses. One of the amendments was the addition of a nursery to the type of cannabis cultivation activities allowed in the city.

A cannabis nursery is a business that cultivates clones, immature plants, seeds or other agricultural products used specifically for the planting, propagation, and cultivation of cannabis. This item will create a separate BOP fee for a nursery permit. As outlined in the attached fee resolution, the proposed BOP fee is $9,700 for the initial application, and $8,570 for renewal. (Attachment 2)

**Policy Considerations:** The proposed fees are consistent with Council’s adopted Fees and Charges Policy and support the City’s goals of budget sustainability and fiscal responsibility.

Proposition 26 (Attachment 3) was passed by voters on November 2, 2010. The intent of the measure was to ensure the effectiveness of Propositions 13 and 218 by providing a definition of a “tax” for state and local purposes. Specifically, it states “that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as ‘fees.’” Thus, under Proposition 26, a tax has been defined broadly to include any levy, change, or exaction of any kind imposed by a local government. Therefore, the City bears the burden of proving that a fee or a charge is not a tax. The proposed fees or fee increase is not a tax under Proposition 26 because of exception 3 (business permit).

The proposed fees are established to cover both the administration and enforcement of the cannabis program, which include the permitting process, providing regulatory and compliance inspections to permitted businesses, and taking enforcement actions against illegal cannabis businesses throughout the city.

**Economic Impacts:** None.

**Environmental Considerations:** This action is exempt from the California Environmental Quality Act (CEQA) because it is the adoption of an ordinance, rule, or regulation that requires discretionary review, including environmental review, and approval of permits, licenses, or other authorizations to engage in commercial cannabis activity (CEQA Guidelines sections 15061(B)(1), California Business and Professions Code section 26055(h)) and because it does not have the potential for causing a significant effect on the environment (CEQA Guidelines section 15061(b)(3)).
**Sustainability:** Not applicable

**Commission/Committee Action:** On September 1, 2020, the Budget and Audit Committee considered the proposed nursery fees and passed a motion to forward the proposed fees for City Council adoption.

**Rationale for Recommendation:** Applicants for a nursery type of cultivation currently pay for a Class A cultivation permit, which is the smallest cultivation permit (up to 5,000 sq. ft. in canopy). The cost of the class A permit is the same as the proposed nursery permit fee. The establishment of a separate BOP fee for a nursery will make tracking of permit fees more efficient.

BOP fees are calculated based on the administrative effort required to effectively implement the City’s cannabis enforcement program. Changes to the permit types have either already been adopted or are scheduled for Council consideration and the fee schedule has been revised to meet the anticipated workload required to effectively administer the cannabis permitting process, to enforce regulations upon the permitted industry and to maintain a healthy regulated industry.

If adopted, the fees will take effect immediately.

**Financial Considerations:** Currently, the City collects the proposed BOP permit fee under a Class A cultivation permit at the same price. The establishment of a separate BOP permit fee for a nursery will make tracking of permit fees more efficient.

**Local Business Enterprise (LBE):** Not applicable.
RESOLUTION NO.

Adopted by the Sacramento City Council

APPROVING BUSINESS OPERATING PERMIT FEES
FOR CANNABIS NURSERIES

BACKGROUND

A. On January 14, 2020, City Council adopted an ordinance amending various sections of chapter 5.150 of the Sacramento City Code including the establishment of a separate type of cannabis cultivation business operating permit for nurseries.

B. A cannabis nursery is a permitted cannabis business that cultivates clones, immature plants, seeds or other agricultural produced specifically for the planting, propagation and cultivation of cannabis. (Sacramento City Code section 5.150.020)

C. The business operating permit fees for cannabis nurseries in Section 1, below, are calculated based on the reasonable cost required to administer and enforce the City’s regulations for the permit.

D. Pursuant to California Constitution, article XIII, §1(e)(3) (Proposition 26), these business operating permit fees are not taxes because they are for the reasonable regulatory costs to a local government for issuing permits; performing investigations, inspections, and audits; and the administrative enforcement and adjudication thereof.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

Section 1. The amount of the business operating permit fee for a cannabis nursery is established as follows:

<table>
<thead>
<tr>
<th>Fee Category</th>
<th>Fee</th>
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<tbody>
<tr>
<td>New</td>
<td>$9,700</td>
</tr>
<tr>
<td>Renewal</td>
<td>$8,570</td>
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Proposition 26

Proposition 26, the “Stop Hidden Taxes Initiative,” was passed by the voters on November 2, 2010, to amend Article XIII C of the State Constitution. According to the ballot measure, the intent of the measure is to ensure the effectiveness of Propositions 13 and 218 by providing a definition of a “tax” for state and local purposes “so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as ‘fees.’” Accordingly, under Proposition 26 a tax has been very broadly defined.

Tax Defined:
“Tax” now means “any levy, charge, or exaction of any kind imposed by a local government, except for the following seven categories of charges:

Exception 1 – Benefit Conferred or Privilege Granted
A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
Examples:
  o Residential parking permit fees
  o Professional licenses
  o Business improvement assessments

Exception 2 – Government Service or Product
A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
Examples:
  o User fees for park and recreation programs
  o Weed abatement fees
  o Sidewalk curb repairs

Exception 3 – Licenses and Permits
A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
Examples:
  o Building inspections
  o Cardroom license
  o Business licenses
Exception 4 – Use of City property
A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property
Examples:
   o City-owned parking lots
   o Swimming pools
   o Convention Center rentals
   o Golf green fees

Exception 5 – Fines and Penalties
A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government as a result of a violation of law
Examples:
   o City Code fines and penalties (e.g., 1.28.020)
   o Parking fines

Exception 6 – Property Development Charges
A charge imposed as a condition of property development
Examples:
   o Development impact fees

Exception 7 – Proposition 218 Fees
Assessments and property related fees imposed in accordance with the provisions of Proposition 218, Article XIII D
Examples:
   o Utility fees for water, sewer, drainage, and solid waste
   o Street lighting assessments

Burden of Proof:
The paragraph following the seven enumerated exceptions states: “The local government bears the burden of proving by a preponderance of the evidence [1] that a levy, charge, or other exaction is not a tax, [2] that the amount is no more than necessary to cover the reasonable costs of the government activity, and [3] that the manner in which those costs are allocated to a payor bears a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.” The latter two requirements only apply to the first three exceptions.

Thus, with the burden of proof now shifted to the City, that requires each department to take into consideration how it aims to prove that a proposed fee or fee increase is not a tax. The following analytical framework can assist in this regard.
Burden of Proof: A 3-step Analysis

1. The City must make a threshold determination whether one of the exceptions applies.
   - If none apply, it is a tax subject to voter approval.

2. If Exceptions 1, 2, or 3 apply, the City must also show that the fee revenue will not exceed the reasonable costs of providing the related governmental activity (at the aggregate level).

3. Finally, the City must show that the costs are fairly allocated to the individual payors.