

MEMORANDUM

DATE: July 15, 2014
TO: Mayor and City Council, City of Pacific
FROM: Carol Morris, Morris Law, P.C., City Attorney
RE: Marijuana

I. Summary of Opinion.

Medical Marijuana: The City should completely ban medical marijuana uses. This includes dispensaries, collective gardens and individual cultivation. Without a ban, there is the possibility that the federal government could challenge the City's regulatory scheme and perhaps prosecute City officials, officers and staff. A complete ban will not affect anyone's ability to obtain medical marijuana, because it can be purchased from a state-licensed store selling recreational marijuana (if not in Pacific, then in Seattle, or some other city that allows recreational marijuana).

Recreational Marijuana: If the City is interested in allowing marijuana uses in Pacific (such as recreational marijuana production, processing and retailing), the City should only allow recreational marijuana uses that have obtained licenses from the State of Washington. The City should identify the zone where recreational marijuana uses will be the most compatible with surrounding uses, such as an industrial zone. Recreational marijuana businesses should also be required to obtain a business license from the City, so a business license ordinance addressing these uses should also be adopted.

As an alternative, the City may ban recreational marijuana uses until the City can gather more information on the secondary land use impacts. Because the Liquor Control Board has begun issuing licenses and these businesses have opened, we soon will be able to observe the effects of these businesses on a community and municipal services.

II. Background.

A. *Medical Marijuana.* When the state law on the subject of medical marijuana (chapter 69.51A RCW) was originally adopted, the Legislature contemplated that the

Department of Health would subsequently draft, adopt and enforce a comprehensive system of rules to regulate medical marijuana. It was also contemplated that local governments could be allowed to adopt zoning, business licensing requirements, health and safety requirements and business taxes addressing medical marijuana uses. RCW 69.51A.140. There were few regulations in chapter 69.51A RCW relating to medical marijuana uses, other than the definition of collective gardens in RCW 69.51A.085.

At the time these statutes were passed by the Legislature, the Governor was afraid that the federal government would prosecute the employees of the State of Washington who drafted, adopted and implemented these medical marijuana administrative rules. As a result, she vetoed all of the regulatory provisions, including the definitions. Many local jurisdictions believed that this “gutting” of the law eliminated any argument that medical marijuana dispensaries were legal, and debated how to address collective gardens. These local jurisdictions also worried that they would be prosecuted by the federal government for adopting zoning and permitting schemes for medical marijuana uses.¹

The City of Kent banned medical marijuana uses and its ordinance was challenged in court.² The City argued that the medical marijuana law³ would only have legalized collective gardens if the participating patients were duly registered under the state’s registration system, but the registry does not exist.⁴ (It was part of the bill that was vetoed by the Governor.) The superior court ruled in favor of the City, and on appeal, the Court of Appeals agreed with this argument. In addition, the Court ruled that RCW 69.51A.140 “allows municipalities to regulate the production, processing and dispensing of medical marijuana,” which “necessarily implies that a city retains its traditional authority to regulate all other uses of medical marijuana.”⁵ As a result, the Court held that the Washington medical marijuana laws “expressly authorize cities to enact zoning requirements to regulate or exclude collective gardens.”⁶

¹ The Clark County Commissioners asked the federal government whether their enforcement efforts would extend to the County’s activities implementing the Washington State law on medical marijuana. The response from the Department of Justice read:

Anyone who knowingly carries out the marijuana activities contemplated by Washington state law, as well as anyone who facilitates such activities, or conspires to commit such violations, is subject to criminal prosecution as provided in the Controlled Substances Act. That same conclusion would apply with equal force to the proposed activities of the Board of ... County Commissioners and ... County employees.

Letter from Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Division Control, U.S. Department of Justice, Drug Enforcement Administration, dated January 17, 2012, addressed to the Clark County Board of Commissioners.

² *Cannabis Action Coalition v. City of Kent*, 322 P.3d 1246, 1253 (2014).

³ ESSSB 5073, as codified in chapter 69.51A RCW.

⁴ *Cannabis Action Coalition*, 322 P.3d at 1252.

⁵ *Id.*, 322 P.3d at 1258.

⁶ *Id.*

B. *Recreational Marijuana.* In 2012, the Washington voters approved Initiative I-502, which allowed the State Liquor Control Board to regulate and tax recreational marijuana for persons 21 years of age or older. It defined recreational businesses (as producers, processors or retailers), required that the Board adopt rules for licensing of such businesses, and established certain siting limitations on the issuance of such licenses for any premises that are within 1,000 feet of the perimeter of the grounds of certain sensitive uses, such as schools, playgrounds, etc.

The Board adopted these new rules (chapter 314-55 WAC) which requires criminal history background checks for licensees, establishes qualifications for licensees, limits the amount of space available for recreational marijuana production, allows marijuana production to take place indoors in a fully enclosed, secure facility or outdoors enclosed by a physical barrier with an 8 foot high fence, limits the average inventory on the licensed premises at any time, limits the number of retailers within counties and cities (within the counties) based upon estimated consumption and population data, establishes insurance requirements for licensees, describes the security requirements, requires employees to wear badges, requires alarm and surveillance systems on the licensed premises, requires that licensees track marijuana from seed to sale, establishes the manner in which free samples of marijuana may be provided, prohibits the sale of soil amendments, crop fertilizers and other crop production aids, identifies transportation requirements, sign requirements, recordkeeping requirements, identifies a mechanism for enforcement of violations, including the failure to pay taxes, specifies marijuana-infused product serving sizes, describes the process for quality assurance testing, extraction and the requirements for packaging and labeling, describes advertisement limitations, explains the process for licensing suspension, revocation and penalties for violations, among other things. In sum, the administrative rules adopted by the Liquor Control Board provide for a more detailed and comprehensive system for the regulation of recreational marijuana than those few paragraphs in chapter 69.51A RCW (relating to medical marijuana).

C. *Federal law.* The manufacture, distribution and possession of marijuana is prohibited by federal law (the Controlled Substances Act, the “CSA”).⁷ No state can authorize violations of federal law. The CSA supersedes state regulation of marijuana, even when it is used for medicinal purposes.

Since I-502 was adopted (allowing for recreational marijuana uses), the U.S. Department of Justice (“DOJ”) issued a memo to all U.S. Attorneys, advising that as long as states adopting laws governing marijuana have “sufficiently robust” regulatory and enforcement systems (on paper *and in practice*) to address the federal government’s identified enforcement priorities, then “enforcement of state laws by state and local law enforcement and regulatory bodies should

⁷ 21 U.S.C. 801, *et seq.*

remain the primary means of addressing marijuana-related activity.”⁸ Here are the federal government’s identified enforcement priorities:

1. Preventing the distribution of marijuana to minors;
2. Preventing the revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
8. Preventing marijuana possession or use on federal property.

The DOJ warned in this letter that “if state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government *may seek to challenge the regulatory system itself* in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on these harms.”⁹

The federal government has already begun to challenge the medical marijuana laws in Washington. In early May, 2014, the federal government arrested medical marijuana growers in Stevens County. According to a news article about this bust, the:

Top Justice Department officials will refrain from prosecutions in states that have legalized some form of marijuana, providing those operations are not involved in any of the eight key activities such as selling to minors, using a state-sanctioned marijuana operation as a cover for other illegal activity, funneling money to organized crime or moving drugs across state lines. They also want to keep violence and guns out of marijuana operations and keep them off federal lands.¹⁰

⁸ Memo dated 8-29-13 from the U.S. Department of Justice, Office of the Attorney General, James M. Cole to all United States Attorneys, “Guidance Regarding Marijuana Enforcement.”

⁹ *Id.*, p.2, emphasis added.

¹⁰ The Spokesman-Review, *Kettle Falls 5 case tests marijuana laws*,” May 11, 2014 (attached).

Currently, marijuana businesses operate on a cash-only basis. This contributes to the public safety problem, because a cash-only business will attract guns and violence. The recent prosecution of the rural Stevens County medical marijuana growers involved the seizure of eight firearms.

On January 14, 2014, the Washington State Attorney General issued an opinion on recreational marijuana.¹¹ It is the Attorney General's opinion that cities are not preempted by state law from banning recreational marijuana businesses, even if the business has been licensed by the Liquor Control Board. He also believes that cities could establish restrictions on recreational marijuana businesses licensed by the Liquor Control Board, even if such restrictions made it "impractical for a licensed marijuana business to locate within their jurisdiction."

III. Analysis.

A. *Medical Marijuana.* It is unlikely that the City of Pacific would be able to adopt and enforce a regulatory scheme for medical marijuana that would satisfy the federal government's enforcement priorities. As an example, even if the City were to adopt all of the Liquor Control Board's rules for the licensing of recreational marijuana, *for licensing of medical marijuana businesses*, the City would also have the burden of enforcing them. This would involve substantial staff time and cost. If the City allowed medical marijuana uses without adopting a regulatory scheme (or if the City adopted a regulatory scheme but did not enforce it), the City, its officials, officers and staff could be exposed to criminal prosecution by the federal government.

It could be argued that the City could tax medical marijuana businesses to pay for the cost of this enforcement scheme. However, it is extremely likely that this tax would be challenged. After all, one reason medical marijuana businesses have not applied for licensing from the State as recreational marijuana businesses is because they do not want to pay taxes or be subject to increased regulation.

A City ban on all medical marijuana uses would not prevent any existing medical marijuana business from continuing to sell marijuana, *as long as it applied for and obtained a recreational marijuana license from the State*. Such a ban may prevent an existing medical marijuana business from operating from its current location in Pacific, depending on the type of ordinance that the City adopted on the subject of recreational marijuana uses.

B. *Recreational Marijuana.* If the City were interested in allowing recreational marijuana uses (such as production, processing and retail sales), the City could adopt ordinances identifying the zone(s) in which such uses could locate. The City could also impose general permitting and business licensing requirements on such uses. The State of Washington would bear the burden of implementing the extensive licensing scheme that it has adopted – and also be

¹¹ AGO 2014 No. 2.

able to collect the revenues associated with the use to pay for enforcement. At this point in time, the State is not sharing these revenues with local governments.

If the City were interested in prohibiting recreational marijuana uses altogether, there are a number of facts that could be cited in support of a ban. First, the State's analysis of the environmental impacts of such uses was cursory, and the State has not complied with SEPA with regard to individual license applications. At this point in time, the City has no information about the secondary land use impacts of the businesses, such as traffic, noise, odor, need for additional police services, etc. The City doesn't even know whether the State will diligently perform their enforcement responsibilities with regard to recreational marijuana businesses with licenses. So, the City could adopt a ban until these secondary land use impacts are known.

CONCLUSION.

The City Attorney recommends a ban on medical marijuana uses. If the City decides to allow recreational marijuana uses, they should be limited to one zone (that can absorb the most intense secondary land use impacts) and a licensing ordinance should also be adopted. The City may also decide to ban recreational marijuana uses.

If you have any questions about the above, please let me know. Thank you.