

Cannabis Business Blog

Pre-Emption Puzzle: Local Government May Zone to Prohibit Collective Medical Marijuana Gardens Notwithstanding State Law Authorization

By Jared Van Kirk on 6.1.15 | Posted in I-502, I-502 Marijuana Legislation, Washington

This article was first posted on GSB's [Northwest Land Law Forum](#) blog, May, 29, 2015.

Cities and counties don't always have the power to regulate on anything they please. Sometimes local action is pre-empted by state or federal law, but determining when local government action is pre-empted is often tricky business.

The general rule in Washington (and Oregon) is that local governments are authorized to make and enforce all laws necessary to further its police power, including zoning laws, so long as they do not directly conflict with state or federal laws. The Medical Use of Cannabis Act (MUCA), enacted in 2010, codified at RCW 69.51A.085(2), authorized patients to establish collective gardens for growing medical marijuana. "Collective gardens" are defined by state law to include group efforts to pool resources and grow medical marijuana for patients' own use. The MUCA further clarified that local governments retain authority to regulate the production, processing or dispensing of medical marijuana through zoning, business, licensing, health and safety requirements, and business taxes. RCW 69.51A.140. Relying on this zoning authority, the City of Kent, Washington enacted an ordinance that prohibited "collective gardens" in every zoning district within the city.

In the recent case, *Cannabis Action Coalition (CAC) v. City of Kent*, the Washington Supreme Court was asked whether the MUCA authorization for "collective gardens" preempts the Kent ordinance banning them. A statute preempts the field and invalidates a local ordinance "if there is express legislative intent to preempt the field or if such intent is necessarily implied...from the purpose of the statute and facts and circumstances under which it was intended to operate." The Court found no express preemption clause, leaving the question of whether preemption is implied. CAC argued that the express authorization allows cities to zone only commercial production and processing of marijuana and not non-commercial collective gardens. The court rejected that argument, finding nothing in the express language that distinguished between a profit or the shared use collective garden activities. The Court went on to find that, although state law prohibits local governments from opting out of medical marijuana altogether, the local ordinance concerned a particular land use, collective gardens,

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and did not address the personal use of medical marijuana. Accordingly, the Court found that the City's ordinance was not pre-empted.

Justice Gonzalez provided an interesting dissent explaining that, although a city may regulate consistent with the MUCA, it may not completely ban what the state permits. The majority failed to acknowledge that participation in collective gardens is legal under state law and, as a result, Gonzalez asserts, the city may not enact regulations, zoning or not, that prohibit this lawful activity.

It is also important to note that while this appeal was pending, the legislature enacted comprehensive reform concerning the regulation of medical marijuana in Washington including repeal of the statutory provisions authorizing collective gardens. Laws of 2015, ch. 70. That said, this case provides an interesting commentary as the Washington Supreme Court prepares to decide whether to hear a case challenging cities' and counties' authority to ban licensed recreational marijuana retailers and the legislatures of both Oregon and Washington work to fashion regulations surrounding the production, processing and distribution of both medical and recreational marijuana that focus on standards controlling activities and revenue rather than land use.

Warning Regarding Federal Law: The possession, distribution, and manufacturing of marijuana is illegal under federal law, regardless of state law which may, in some jurisdictions, decriminalize such activity under certain circumstances. Penalties for violating federal drug laws are very serious. For example, a conviction on a charge of conspiracy to sell drugs carries a mandatory minimum prison term of five years for a first offense and, depending on the quantity of marijuana involved, the fine for such a conviction could be as high as \$10 million. In addition, the federal government may seize, and seek the civil forfeiture of, the real or personal property used to facilitate the sale of marijuana as well as the money or other proceeds from the sale. Although the U.S. Department of Justice (DOJ) recently rescinded its guidance regarding prioritization of criminal prosecutions of individuals and entities operating in compliance with effective state regulatory systems, DOJ left in place long standing guidance to federal prosecutors regarding how to exercise this discretion. Individuals and companies are cautioned to consult with experienced attorneys regarding their exposure to potential criminal prosecution before establishing business operations in reliance upon the passage of state laws which may decriminalize such activity. Federal authority to prosecute violations of federal law as crimes or through seizures and forfeiture actions is not diminished by state law. Indeed, due to the federal government's jurisdiction over interstate commerce, when businesses provide services to marijuana producers, processors or distributors located in multiple states, they potentially face a higher level of scrutiny from federal authorities than do their customers with local operations.

Tags: Cannabis Action Coalition (CAC) v. City of Kent, Medical Use of Cannabis Act (MUCA)