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Cannabis Business Blog

Washington State Supreme Court Considering Case Challenging Local Bans on State-Licensed Marijuana Businesses

By Jared Van Kirk on 12.18.14 | Posted in Washington

In 2014, bans and moratoria on state-licensed marijuana businesses by local governments in Washington have emerged as a significant threat to the complete implementation of I-502. While courts to date have sided with local governments (which are being supported by the Washington Attorney General) and upheld these bans, the issue is still being litigated, and an appeal by a licensed retailer and parties supported by the American Civil Liberties Union of Washington is currently pending before the Washington Supreme Court.

According to the Municipal Research and Services Center, 46 cities and 4 counties have banned marijuana businesses while 61 cities and 8 counties have enacted moratoria. This means that in over a hundred local jurisdictions – which are home to hundreds of thousands of Washington residents – marijuana businesses, and particularly retail stores, are excluded.

Beginning in June 2014, licensed retailers began to challenge these local laws in a series of lawsuits against the cities of Centralia, Fife, Kennewick, and Wenatchee and against Clark and Pierce Counties. The licensed retailers challenging these bans argue that it was never the intention of the voters or the Washington State Liquor Control Board to create a system in which state-legal recreational marijuana was locally unavailable to a large number of Washingtonians. To the contrary, one of I-502's stated goals was to "take marijuana out of the hands of illegal drug organizations and bring it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol." I-502 directed the Liquor Control Board to license retail outlets "in each of the counties of the state." The Liquor Control Board did this through a population-based approach, distributing retail licenses across all Washington counties and in each major city, including in counties and cities that are now opting out through local bans.

Under the Article XI, Section 11 of the Washington Constitution, a local jurisdiction is authorized to make local laws, but they must not conflict with the general laws of the State. When a city or county adopts an ordinance that prohibits activity which state law permits, or thwarts the legislative purpose of a state law, it exceeds its authority and the ordinance is unconstitutional. State-licensed marijuana retailers argue that local bans conflict with I-502's requirement that the Liquor Control Board license retail outlets in every county and frustrate the intent of voters to make marijuana legally available across the state and ultimately supplant the black market.

The Washington Attorney General, however, issued a non-binding opinion, in which he concludes that I-502 does not prevent local governments from banning marijuana businesses. In the Attorney General's view, unless a "state law creates an entitlement to engage in an activity in circumstances outlawed by the local ordinance," local governments may ban business activity within their borders. According to the Attorney General local bans are legal because state-issued marijuana licenses do not create such an entitlement. The Attorney General has joined many of the suits challenging local bans, arguing in favor of local bans.

To date, lower courts have sided with local governments and the Attorney General in four of these lawsuits. The first decision came in the City of Fife litigation in which Garvey Shubert Barer and the Tacoma office of Gordon Thomas Honeywell participated as cooperating attorneys with the ACLU. That decision is now before the Washington Supreme Court on a petition for direct review, and the Court is expected to decide whether to hear the case early next year. The issue will also be heard again on December 22 in the litigation against Pierce County.

We will keep this blog updated with developments on this critical issue.

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.