



PLANNING COMMISSION AGENDA
WEDNESDAY, April 16, 2014
City Council Chambers - Justice and Municipal Center at 6:30 PM

MEMBERS

Grant Sulham – Chair
Winona Jacobsen – Vice Chair
Brad Doll
Dennis Poulsen
David Baus
Debbie Strous-Boyd
Craig Sarver

CITY STAFF

Jason Sullivan, Senior Planner
Debbie McDonald, Planning Commission Clerk

- I. CALL TO ORDER, ROLL CALL and NEXT MEETING POLL** (May 7, 2014)
- II. APPROVAL OF MINUTES**
- III. PUBLIC HEARING** (None)
- IV. PUBLIC COMMENT AND CONCERNS**
- V. OLD/CONTINUING BUSINESS**
- VI. NEW BUSINESS**
 1. Recreational Marijuana Regulation
- VII. FOR THE GOOD OF THE ORDER**
 1. Correspondence
 2. Staff Comments
 3. Commissioner Comments
- VIII. ADJOURNMENT**

Next meeting: May 7 , 2014

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Community Development Department

Planning Commission Minutes

March 20, 2014 Regular Scheduled Meeting
City of Bonney Lake Council Chambers

DRAFTED

The meeting was called to order at 5:40 P.M.

Planning Commission Present

Grant Sulham, **Chair** (Absent)
L. Winona Jacobsen, **Vice-Chair**
Brad Doll
Dennis Poulsen
Dave Baus
Debbie Strous-Boyd
Craig Sarver

City Staff Present

Jason Sullivan, Senior Planner
Debbie McDonald, Commission Clerk

I. APPROVAL OF MINUTES:

MOTION WAS MADE BY COMMISSIONER SARVER AND SECONDED BY COMMISSIONER BAUS TO APPROVE THE MINUTES FROM THE MARCH 5, 2014 MEETING WITH MINOR CORRECTIONS.

MOTION APPROVED 6-0

II. PUBLIC HEARING: NONE

III. PUBLIC COMMENT AND CONCERNS: NONE

IV. OLD/CONTINUING BUSINESS:

Planning Commission By-Laws

Mr. Sullivan commented how Deputy Mayor Swatman would like the Commissioners to reconsider having the Planning Commission Chair being allowed to vote not just in case of ties. Asked the City Attorney and she also agreed that the Chair should be able to vote.

MOTION WAS MADE BY COMMISSIONER DOLL AND SECONDED BY COMMISSIONER BAUS TO ADOPT THE REVISED BY-LAWS OF THE BONNEY LAKE PLANNING COMMISSION DATED MARCH 14, 2014.

Vice-Chair Jacobsen opened the floor for discussion.

Commissioner Doll commented that the word Council should be switched to Commission on page 5 letter G.

A MOTION TO AMEND ARTICLE VI SECTION 4 TO STRIKEOUT “EXCEPT THE CHAIR” AND THE LAST LINE ON PAGE 5 SECTION 4 WAS MADE BY COMMISSIONER SARVER AND SECONDED BY VICE-CHAIR JACOBSEN.

Vice-Chair Jacobsen opened the floor for discussion.

Commissioner Doll commented he likes the Chair remaining impartial.

Commissioner Baus has seen other City Planning Commission’s where the Chair does not vote.

Vice-Chair Jacobsen responded that the Chair should be allowed to vote.

Commissioner Doll commented that even if we allow the Chair to vote, he has the option to abstain.

With no further discussion Vice-Chair Jacobsen called for a vote on the amendment to the motion.

**MOTION APPROVED 5-0-1
Commissioner Baus Abstained**

With no further discussion Vice-Chair Jacobsen called for a vote on the original motion with the approved amendment.

MOTION APPROVED 6-0

V. NEW BUSINESS: NONE

VI. FOR THE GOOD OF THE ORDER:

Correspondence – NONE

Staff Comments – Mr. Sullivan reminded Commissioners with the passing of the By-Laws the Planning Commission meetings will now start at 6:30 P.M.

Commissioner Comments – Vice-Chair Jacobsen commented that the Bonney Lake Historical Society has received some national attention and one international inquiry.

VI. ADJOURNMENT:

MOTION WAS MADE BY COMMISSIONER SARVER AND SECONDED BY COMMISSIONER DOLL TO ADJOURN.

MOTION APPROVED 6-0

The meeting ended at 5:56 P.M.

Debbie McDonald, Planning Commission Clerk

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Memo

Date : April 11, 2014
To : Bonney Lake Planning Commissioners
From : Jason Sullivan – Senior Planner
Re : **Recreational Marijuana Regulations**

PURPOSE:

On April 8, 2014 the City Council passed Ordinance 1481 extending the moratorium related to the issuance of permits associated with the recreational marijuana industry and adding the development of regulations to the Planning Commission's work plan. The purpose of this memo is to introduce the topic and facilitate the Planning Commission's initial discussion of the possible options related to the regulation of the recreational marijuana industry.

ATTACHMENTS

1. Ordinance 1481
2. Bonney Lake Marijuana 1000 Foot Buffer Zone Map
3. City Attorney Memo regarding Recreational Marijuana
4. Washington State Attorney General's Opinion
5. United States Attorney General's Opinion

BACKGROUND:

Initiative 502 was passed by Washington voters in 2012, directing the Washington State Liquor Control Board (LCB) to develop rules for regulating the sale, processing and production of marijuana. It does not supersede, or even address, regulations pertaining to medical marijuana. Final rules went into effect on September 16, 2013, at which time applications for licenses could be submitted to the LCB.

The major provisions of the rules include:

- Licenses will not be issued to businesses in "...a location where law enforcement access, without notice or cause, is limited. This includes a personal residence." Thus home occupation businesses are not allowed;
- Licenses will not be issued to businesses and advertising may not be located within 1000 feet of "the perimeter of the grounds of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, library, or any game arcade (where admission is not restricted to persons age twenty-one or older);"
- On premises advertising signs for retailers are limited to 1600 square inches (a little over 11 square feet);
- Licenses will normally not be issued to those who have a criminal background that exceeds a threshold based upon a point system developed by the Board;
- Marijuana is not permitted to be consumed on licensed premises;
- Three types of licenses will be issued: producer, processor and retailer.

DISCUSSION:

The City Council has directed the Planning Commission to study and propose development regulations to the Council on or before the expiration of the moratorium. The Planning Commission was directed to study a range of approaches to regulation, including zoning, development regulations, and a complete or partial prohibition in all zones.

The Washington State Attorney General recently issued an opinion stating that cities do have the authority to ban marijuana procedures, processors, and retailers. However, the LCB has indicated that a local ban will not be reason that the LCB would deny a licenses and it would be up to the local jurisdiction to enforce the ban.

Within the City of Bonney Lake, the only areas were marijuana uses could allowed under the State's regulations would be a portion of Midtown and Eastown as illustrated on the attached map which illustrates the 1,000 foot buffer zone established by WAC 314-55-050(10). In addition to the areas illustrated on the attached map, the uses would not be allowed in association with a residential structure pursuant to WAC 314-55-015(5).

In addition to the land use issues, there are also other regulatory issues that must be addressed which include the classification of the buildings associated for producers and processors for building code purposes, regulations established by the Clean Air Agency, and agricultural issues regulated by the Department of Agriculture.

ORDINANCE NO. 1481

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BONNEY LAKE, PIERCE COUNTY, WASHINGTON, EXTENDING THE MORATORIUM ENACTED UNDER ORDINANCE NOS. 1468 AND 1469, PROHIBITING THE PRODUCTION, PROCESSING, AND RETAIL SALES OF MARIJUANA AND PROHIBITING THE GRANTING OF ANY CITY LICENSE OR PERMIT RELATED TO SUCH ACTIVITIES, AND ESTABLISHING A WORK PLAN.

WHEREAS, on October 22, 2013, the City Council of the City of Bonney Lake enacted Ordinance No. 1468, which established a temporary moratorium on the production, processing, and retail sales of marijuana and the granting of any city license or permit related to such activities; and

WHEREAS, the City Council held a public hearing on the moratorium at the November 12, 2013 regular meeting, and discussed the testimony given in the public hearing at the November 19, 2013 workshop; and

WHEREAS, on November 26, 2013, the City Council enacted Ordinance No. 1469, which revised and clarified the moratorium; and

WHEREAS, notwithstanding the State's legalization of marijuana, local governments retain authority over zoning and development regulations within their jurisdictions; and

WHEREAS, additional time is needed for the Planning Commission to study and formulate recommendations for the regulation of licensed marijuana businesses through zoning and other land use controls.

NOW THEREFORE, the City Council of Bonney Lake, Washington, do ordain as follows:

Section 1. Findings of Fact. The City Council reaffirms and incorporates by reference the Findings of Fact adopted in Ordinance Nos. 1468, as revised by Ordinance No. 1469. In addition, the City Council finds that additional time is needed for the Planning Commission to study and formulate recommendations for the regulation of licensed marijuana businesses.

Section 2. Moratorium Extended.

A. The moratorium prohibiting the production, processing, and/or retail sale of marijuana and marijuana-infused substances by state-licensed individuals or businesses within all zoning districts in the City of Bonney Lake shall be extended for a period of six months.

B. The moratorium on the issuance of any City building permit, development permit, business license, or any other permit or license to any state-licensed individual or business that

seeks to produce, process, and/or sell marijuana or marijuana-infused products in the City of Bonney Lake shall be extended for a period of six months.

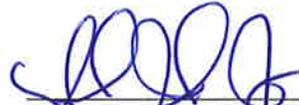
Section 3. Work plan established. The task of developing appropriate regulations for licensed marijuana businesses is hereby added to the Planning Commission work plan. The Planning Commission, in conjunction with the Community Development Department, shall study and propose development regulations to the Council in accordance with BLMC Chap. 14.140, on or before the expiration of the moratorium extension established in this Ordinance. The Planning Commission shall study a range of approaches to regulation, including zoning, development regulations, and a complete or partial prohibition in all zones. If time in excess of six months is needed to develop and propose regulations, the Planning Commission, in conjunction with the Community Development Department, shall request that the Council grant additional time prior to the expiration of the moratorium extension.

Section 4. Term of Moratorium extension. The moratorium established by this ordinance shall be in effect for six (6) months from the effective date of this Ordinance, unless repealed, extended, or modified by the City Council after a public hearing and the entry of appropriate findings of fact as required by RCW 35A.63.220.

Section 5. Public Hearing. A public hearing on the moratorium extension shall be held at the regular Council meeting on May 13, 2014.

Section 6. Effective Date. The moratorium established by this ordinance shall take effect five days after passage and publication as required by law.

PASSED BY THE CITY COUNCIL this 8th day of April, 2014.



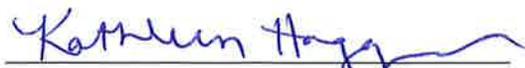
Neil Johnson, Jr., Mayor

ATTEST:



Harwood T. Edvalson, MMC, City Clerk

APPROVED AS TO FORM:



Kathleen Haggard, City Attorney

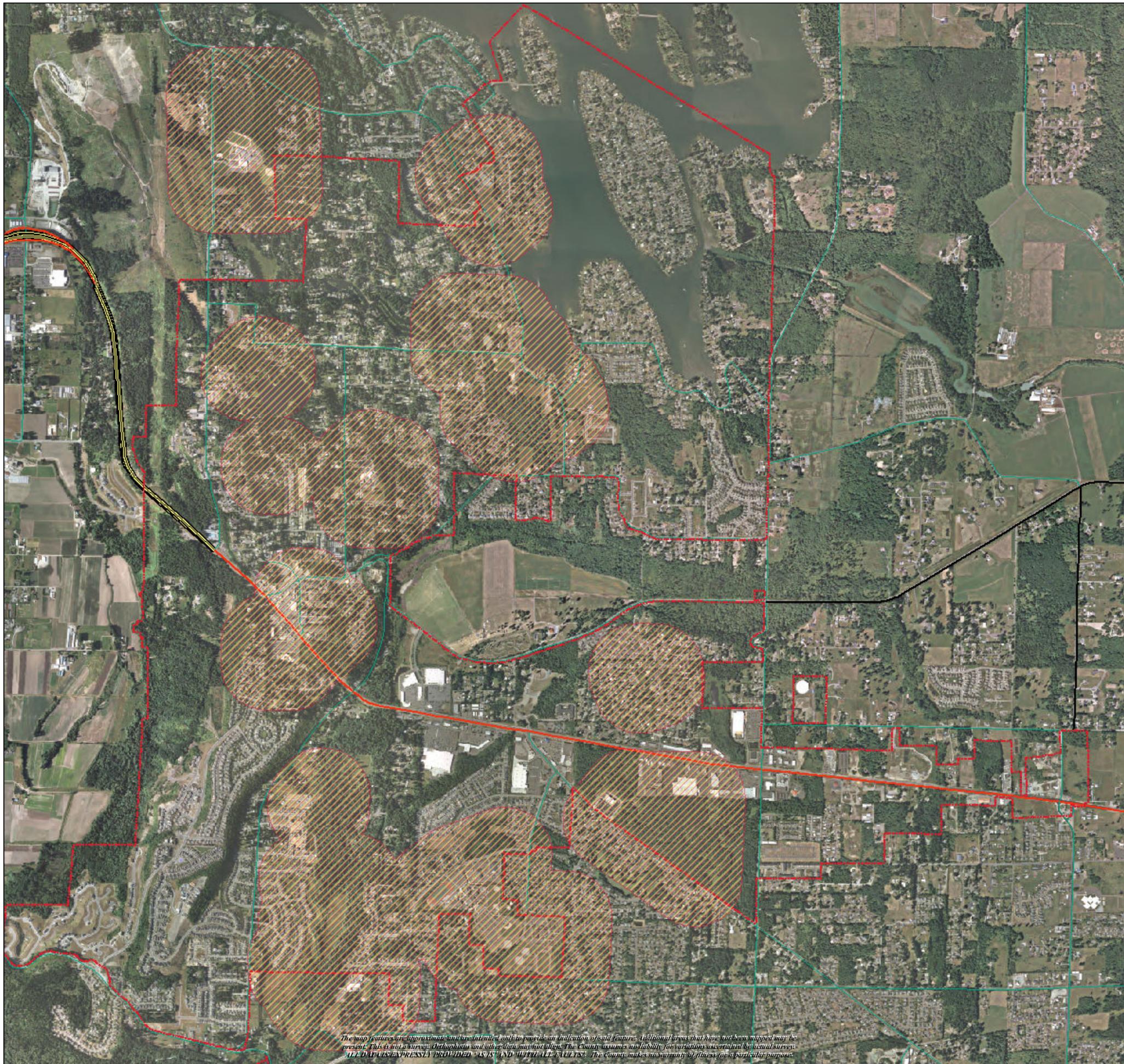


Marijuana Prohibition Areas

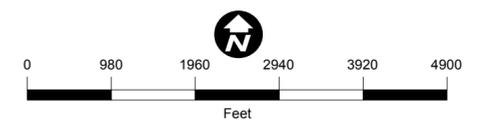
Legend

 Marijuana Prohibition Areas

Note: The prohibited areas based on the requirements established by Chapter 314-55 WAC.



The map features are approximate and are intended only to provide an indication of said features. Additional areas that have not been mapped may be present. This is not a survey. Other data may not align. The County assumes no liability for variations ascertained by actual survey. ALL DATA IS EXPRESSLY PROVIDED "AS IS" AND "WITH ALL FAULTS". The County makes no warranty of fitness for a particular purpose.



17 October 2013

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PORTER FOSTER RORICK

LLP

800 Two Union Square | 601 Union Street | Seattle, Washington 98101 | Tel (206) 622-0203 | Fax (206) 223-2003 | www.pfrwa.com

October 14, 2013

Bonney Lake City Council

Re: Marijuana: recreational and medical

Dear Members of the Council:

As you well know, last year Washington's voters approved I-502, which legalized the regulated production, distribution, sale, and consumption of marijuana for recreational purposes under state law. It is certainly no overstatement to say that this legislative initiative is unprecedented and, as a result, presents a host of challenges to local municipalities when it comes to navigating its statutes and implementing regulations. Because of the uncertainty surrounding this legislation, many communities around the state are concerned about the process and legality of implementing this scheme. Others are concerned about the possible negative impacts that marijuana production, processing, and retail facilities may have on their local communities.

This letter clarifies what is required by I-502 and the Washington State Liquor Control Board's implementing regulations, in addition to the protections they afford our communities. It also discusses what municipalities that are concerned about the impacts of marijuana facilities can do to regulate marijuana businesses within their jurisdictions. Finally, the memo discusses to what extent municipalities can regulate or eliminate collective gardens for medical marijuana cultivation and medical marijuana dispensaries.

The Liquor Control Board is poised to adopt the Washington Administrative Code (WAC) regulations on October 16th, becoming effective on November 16th. The Board expects to begin accepting applications for recreational marijuana producer, processor, and retail licenses on November 18th.

I. State Marijuana Statute

A. Marijuana Licenses

I-502 creates three types of marijuana licenses: a marijuana producer's license, a marijuana processor's license, and a marijuana retailer's license. RCW 69.50.325. A producer's license authorizes its holder to produce, possess, deliver, distribute, and sell

marijuana. A processor's license authorizes its holder to process, package, and label marijuana and marijuana products for sale to marijuana retailers. A retailer's license authorizes its holder to possess, deliver, distribute, and sell usable marijuana and marijuana-infused products. A single licensee can hold licenses for both production and processing. However, a marijuana retailer cannot hold a production or processing license. All three types of marijuana licenses are subject to regulation by the Liquor Control Board and are also subject to the Board's annual renewal. Additionally, all three licenses are limited to the specific location for which the license is issued and are not freely transferrable from the licensee to another individual.

B. Number of Licenses in Bonney Lake

The Liquor Control Board has released the maximum number of marijuana retail locations that will be issued in cities and counties throughout the state; Bonney Lake has been allocated one retail marijuana license. The Board allocated 17 "at large" retail marijuana licenses to Pierce County, but according to the regulations, the Board will only issue those licenses for locations in unincorporated areas and in cities that were not allocated a license.

What is unclear is the number of marijuana producer and processor licenses that will be issued in each municipality. The regulations do not address this. The numbers published by the Board for each city and county only affect the number of retail marijuana licenses the Board may issue. The Board's regulations limit the total amount of marijuana plant canopy grown in the state to 2,000,000 square feet. Thus, the number of producer licenses issued by the Board is dependent on the size of each producer's plant canopy.

C. Licensee Qualifications

According to the proposed WAC regulations implementing I-502, applicants will be subject to a thorough investigation by the Liquor Control Board before they may be awarded any type of marijuana license. WAC 314-55-020. The board will perform a criminal history background check and an administrative violation history background check for each applicant. The criminal history background check includes submitting the applicant's fingerprints to both the Washington State Patrol and the Federal Bureau of Investigation. Any financiers of the operation will be subject to the same investigatory procedures. Additionally, the Board will conduct a financial investigation to verify the source of the funds used to start the proposed business. All applicants for a marijuana license, all members of the business entity, and all managers or agents for the business must have resided in the state for at least three months prior to the application for a marijuana license. The applicant must submit an operating plan for the proposed business, which must demonstrate that the applicant meets the specific requirements for each type of license. These requirements are briefly summarized below.

D. Restrictions on Licensed Marijuana Facilities

1. In General

Law enforcement officers must be allowed unlimited access to any location operating under a marijuana license, regardless of whether officers have cause to enter the premises or have provided notice. WAC 314-55-015(5). Marijuana licensees may not allow consumption of marijuana or marijuana-infused products on their premises, no matter what type of license they possess. WAC 314-55-015(11). The Board will limit the time to apply for an initial license to thirty days after its regulations take effect, but the application window may be reopened at a later date.

2. Production

Marijuana production must take place in a fully enclosed indoor facility; a greenhouse with rigid walls, a roof, and doors; or outdoors as long as the area is fully enclosed by a sight-obscuring wall or fence that is at least eight feet high. WAC 314-55-075. There are three categories of producer licenses, depending on the size of the plant canopy the producer is authorized to maintain: Tier 1, less than 2,000 square feet; Tier 2, 2,000 square feet to 10,000 square feet; and Tier 3, 10,000 square feet to 30,000 square feet. The regulations also limit the maximum amount of marijuana allowed on the producer's premises, with the limits being relative to the size of that year's harvest.

3. Retail

Retailers are not allowed to sell anything other than usable marijuana, marijuana-infused products, or products related to the storage or use of marijuana or marijuana-infused products. RCW 69.50.357; WAC 314-55-079. Retailers are prohibited from selling pure marijuana extract, in addition to being prohibited from selling their products over the internet or by home delivery. Retailers are restricted to a 1,600 square inch sign stating the business's name and may not display usable marijuana or marijuana-infused products in a manner that makes them visible to the general public. Furthermore, employees are forbidden from opening or consuming usable marijuana or marijuana products on the business's premises, or allowing others to do the same.

E. Marijuana Facility Security Requirements

The Liquor Control Board regulations require extensive security precautions. All employees are required to display an identification badge issued by the licensed employer at all

times when they are on the premises. Each licensed premises must have a security alarm system installed on all perimeter entry points and all perimeter windows. Additionally, each licensed premises must maintain an extensive surveillance system, as detailed in the WAC 314-55-083.

The regulations also contain traceability requirements to ensure that marijuana or marijuana-infused products do not make their way out of the regulated stream of commerce. WAC 314-55-083(4). These traceability requirements include providing the Liquor Control Board with notification of certain events such as harvesting plants, destroying marijuana or marijuana products, and any theft of an item containing marijuana. The licensee must also maintain a complete inventory and retain all point of sale records.

Any time a licensee transports marijuana or a marijuana-infused product, the licensee must notify the board of the amount and type of marijuana products being transported, along with the name of the transporter and the times of departure and expected delivery. Licensees who receive such shipments must also report the amount and type of marijuana products received. WAC 314-55-085.

To further ensure that marijuana products do not escape the state-regulated stream of commerce, the Liquor Control Board has also included extensive marijuana waste disposal procedures in its regulations. WAC 315-55-097.

F. Restrictions on Locations

The Board will not issue a marijuana license if the proposed business would be located within 1000 feet (as the crow flies) of an elementary or secondary school, a playground, a recreation center or facility, a child care center, a public park, a public transit center, a library, or any game arcade that allows access to those under 21 years of age. RCW 69.50.331(8); WAC 314-55-050. WAC 314-55-010. Additionally, the Board will not approve a marijuana retailer license for a location within another business. WAC 314-55-015.

G. Opposing the Issuance of a Marijuana License

Cities, towns, and counties may formally submit their objections to the Liquor Control Board granting a marijuana license within the municipality. RCW 69.50.331; WAC 314-55-160. The board is required to notify the chief executive officer of the incorporated city or town before the board issues a new marijuana license. RCW 69.50.331; WAC 314-55-160. That city or town then has the right to file written objections against either the applicant for a marijuana license or against the premises for which the new license is requested. These objections must

be submitted within 20 days of the notice of an application. RCW 69.50.331(7)(b). These written objections must include a statement of facts upon which the objections are based. RCW 69.50.331(7)(c). The Liquor Control Board has the option of extending the time period for submitting written objections. RCW 69.50.331(7)(b).

If the city or town files written objections to the new marijuana license and the Board contemplates issuing a license over that objection, the City may request a hearing, which may be granted at the discretion of the Liquor Control Board. RCW 69.50.331(7)(c); WAC 314-55-160(2)(a). If the Board grants such a hearing, the applicant will be notified and allowed to present evidence at that hearing. WAC 314-55-160(2)(a). When determining whether to grant or deny the license, “the state liquor control board shall give substantial weight to objections . . . based upon chronic illegal activity associated with the applicant’s operations of the premises proposed to be licensed or the applicant’s operation of any other licensed premises, or the conduct of the applicant’s patrons inside or outside the licensed premises.” RCW 69.50.331(9); WAC 314-55-160(2).

If the Board grants the license, it is required to send written notification to the chief executive officer of the city or town in which the license is granted. RCW 69.50.331(7)(d). If the Board denies the license based on a city or town’s objection, the applicant has two options: (1) reapply for the license no sooner than one year from the date of the final order of denial or (2) submit a written request for an adjudicative hearing.

II. Permanent Ban of licensed marijuana businesses

Questions have arisen as to whether the City can completely exclude licensed recreational marijuana businesses, including producers, processors, and retailers. Under state law, we do not think such a ban would be permissible. What is less certain is whether the state law setting up the marijuana licensing system is preempted by the federal Controlled Substances Act, leaving the state law without effect. However, a majority of courts have held that municipalities may not rely on the federal CSA’s preemption of conflicting state laws to justify passing ordinances banning marijuana. Moreover, the Department of Justice has indicated that it will not challenge I-502, which may functionally eliminate the federal preemption argument.

A. State Preemption of Local Ordinances

Although Washington courts have not directly addressed this topic, if cities and other local municipalities amend their ordinances to enact a permanent ban on marijuana producers, processors, or retailers, a challenge to those ordinances will probably be successful. Any local

ordinance purporting to ban legal marijuana is preempted by the state laws that authorize the Liquor Control Board to issue licenses permitting the production, processing, and the retail sale of marijuana.

If a local ordinance and a state statute are on the same subject, the local ordinance is preempted by state statute “if the statute preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the two that cannot be harmonized.” *Tacoma v. Luvene*, 118 Wn.2d 826, 833 (1992). Article III of Washington’s Uniform Controlled Substances Act (UCSA), RCW 69.50.301–69.50.369, regulates the manufacture, distribution, and dispensing of controlled substances. The UCSA also contains a preemption provision, RCW 69.50.608, which states, “municipalities may only enact those laws and ordinances relating to controlled substances that are consistent with this chapter” and that “[l]ocal laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed.” RCW 69.50.608. The Washington Supreme Court has held that this provision does not preempt the entire field of regulating controlled substances. Instead “[o]nly the setting of penalties for violations of the controlled substance statutes is preempted” by this provision, not the ability of local governments to prohibit drug-related activity. *Luvene* at 834.

Despite the fact that the entire field of regulating controlled substances is not preempted by RCW 69.50.608, any local ordinance that is in direct and irreconcilable conflict with a state statute violates article XI, section 11 of Washington’s Constitution. “In determining whether an ordinance is in ‘conflict’ with the general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.” *Luvene* at 834–35. “A local ordinance prohibiting certain behavior conflicts with a state statute only when the language of the state statute expressly or implicitly permits the behavior.” *State v. Fisher*, 132 Wn.App. 26, 32 (2006).

Here, Article III of the UCSA expressly permits the production, processing, and sale of marijuana under certain circumstances. If a city or other municipality were to prohibit these marijuana-related activities, which individuals holding marijuana licenses issued by the Liquor Control Board are expressly authorized to do, these ordinances would directly and irreconcilably conflict with Article III of the UCSA, and would thus violate the Washington Constitution.

B. Federal Preemption of State Law

The question arises as to whether a municipality may impose a permanent ban on siting marijuana facilities within that city’s limits based on the federal law alone, under which

marijuana remains illegal. I-502 creates a situation where federal and state laws seem to be in direct conflict with each other, which is very similar to issues that many states, including Washington, are dealing with regarding the implementation of state medical marijuana laws. On the surface, relying on federal law to ban marijuana facilities seems like a very straightforward, winning argument. However, courts in other states that have considered this issue have held that cities may not enact ordinances that conflict with state law even though marijuana is still illegal under the federal Controlled Substances Act (CSA). Furthermore, the U.S. Department of Justice has recently taken the position that it will not enforce federal law against licensed and rigorously regulated marijuana businesses.

In *Qualified Patients Ass'n v. Anaheim*, the California Court of Appeals determined that Anaheim's ordinance prohibiting medical marijuana facilities within city limits was not legal because it conflicted with state medical marijuana laws. 187 Cal. App. 4th 734 (2010). The court held that the federal CSA did not preempt California's medical marijuana laws:

The federal CSA does not direct local governments to exercise their regulatory, licensing, zoning, or other power in any particular way. Consequently, a city's compliance with state law in the exercise of its regulatory, licensing, zoning, or other power with respect to the operation of medical marijuana dispensaries that meet state law requirements would not violate conflicting federal law.

Therefore, "[t]he city may not justify its ordinance under federal law, nor in doing so invoke federal preemption of state law that may invalidate the city's ordinance."

In *Ter Beek v. City of Wyoming*, the Michigan Court of Appeals held that cities may not rely on federal preemption to justify a local ordinance that is in conflict with state medical marijuana laws. 297 Mich. App. 446 (2012). The city amended its code to enact a zoning ordinance stating that "[u]ses not expressly permitted under this article are prohibited in all districts. Uses that are contrary to federal law, state law, or local ordinance are prohibited." The court held that the city's ordinance was void and unenforceable to the extent that it prohibited the medical use of marijuana in accordance with the Michigan Medical Marijuana Act (MMMA) because it directly conflicted with the state MMMA, and the MMMA is not preempted by the federal CSA. (the "CSA's provisions do not preempt the MMMA's grant of immunity . . . because it is well established that Congress cannot require the states to enforce federal law. . . . Thus, while Congress can criminalize all uses of medical marijuana, it cannot require states to do the same.")

The Oregon Supreme Court decided the federal preemption issue the other way. In *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, the Court held that the federal CSA

preempts any section of Oregon's law that affirmatively authorizes medical marijuana use. 348 Or. 159, 178, 190 (Or. 2010). The Court held that the other aspects of the law, which decriminalize the consumption of marijuana under state law, are not preempted by the CSA. When analyzing federal preemption of the state law, the Court applied the standard that there is an "actual conflict" between state and federal law, resulting in federal preemption, "when it is physically impossible to comply with both state and federal law or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The Court found that "[a]ffirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act." Therefore, to the extent that the Oregon medical marijuana law "affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it without effect."

On August 29th, 2013, responding to concerns raised about federal preemption of Washington and Colorado's recreational marijuana laws, Deputy Attorney General James M. Cole issued a memo ("Cole memo") to all United States Attorneys to provide guidance for the enforcement of federal marijuana laws. The Cole memo reiterates that "Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels." However, it states that the Department of Justice will be focusing its resources on "enforcement priorities that are particularly important to the federal government," which are:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal 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;
6. Preventing drugged driving and other public health consequences;
7. Preventing the growing of marijuana on public lands; and
8. Preventing marijuana possession or use on federal property.

The Cole memo goes on to say that jurisdictions that have implemented "strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana" are less likely to threaten the federal priorities listed above. When state laws provide a robust system that addresses those federal concerns, the "enforcement of

state law by state and local law enforcement should remain the primary means of addressing marijuana-related activity.” Thus, the federal government has indicated that it will not intervene as long as state marijuana laws and regulations do not threaten to undermine its enforcement priorities.

Although the Cole memo is not binding law, it does provide valuable insight into how the federal government will respond to Washington’s recreational marijuana laws. Some attorneys are taking the position that this memo effectively dismantles any argument for banning licensed marijuana businesses based on federal preemption of state law. At a minimum, the memo addresses concerns regarding federal prosecution of local officials who comply with the state marijuana law.

III. City regulation of marijuana establishments

A. Zoning for Recreational Marijuana

Bonney Lake is a non-charter code city and, as a result, is granted the broadest powers available to a local self-government in Washington. RCW 35A.11.050. Within the confines of the state Constitution, Bonney Lake’s powers of self-government are construed liberally in its favor. Pursuant to article XI, section 11 of the Washington Constitution, a city may “make and enforce within its limits all such local police, sanitary and other regulations” that are not in conflict with the state’s general laws. Zoning is a form of police power that regulates property use. *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 222 (1992). As a result, the power to zone is in a city’s hands unless that power is limited by the State Legislature through a specific statute or when the exercise of zoning authority conflicts with state law.

Under this broad authority, the City is free to restrict where marijuana businesses may be located through amendments to zoning regulations, with the goal of minimizing negative impacts. Around the State of Washington, municipalities have enacted ordinances restricting marijuana businesses to certain zones—or, conversely, prohibiting them in certain zones—and passed nuisance ordinances to address the potential smell of marijuana production facilities.

B. Regulation of Medical Marijuana—Collective Gardens and Dispensaries

Bonney Lake’s municipal code currently bans collective gardens and dispensaries. *See* BLMC 18.08.030. (Per state law, a collective garden is a collective for cultivation in which up to 10 medical marijuana patients can grow no more than 15 plants each, for a total of no more than 45 plants. RCW 69.51A.085.) We believe the City can keep this ban on the books as long

as the language is updated to be consistent with I-502, which passed after this ordinance was enacted.

1. Collective Gardens

Given the current state of the law, there is a strong argument that municipalities may enact zoning ordinances that exclude collective gardens. In June 2012, the City of Kent has passed an ordinance excluding all collective gardens from its jurisdiction. This ordinance was challenged and upheld at the superior court level, and is currently being appealed in Division 1 of the Washington State Court of Appeals.

Kent argues that because the governor vetoed key sections of Washington's medical marijuana bill when it was passed, including the establishment of a state registry for collective gardens, it is questionable whether the production of marijuana for medical use in collective gardens is legal under state law, in addition to remaining illegal under the federal CSA. Kent has a strong argument, but it remains to be seen how the court will rule.

2. Medical Marijuana Dispensaries

As with collective gardens, we believe the City's ban on dispensaries can remain on the books, as long as the language is amended to track with I-502. The governor vetoed the sections of the medical marijuana law that set up a licensing system for dispensers out of a concern that actively regulating or licensing marijuana dispensers could be considered a violation of federal law, so the proposed state licensing system was never put in place. The way the state law is currently written only prevents municipalities from excluding licensed medical marijuana dispensers, and as a result of the governor's veto, none of the medical marijuana dispensaries in the state have a license.

Once I-502 and its implementing regulations have fully launched, the focus will turn to pressuring unlicensed marijuana dispensaries to get licensed or shut down. An ordinance that the Seattle City Council passed on October 7th illustrates this trend. The bill requires any marijuana business, including medical marijuana dispensers, to be licensed by the state before January 1, 2015. Seattle City Council Bill No. 117781. The bill does not specify what type of state license the affected dispensers must obtain, leaving the door open for dispensers to obtain either a recreational marijuana retail license or for the state legislature to create a medical marijuana dispenser license by 2015. The Seattle City Council has written a letter to the state legislature requesting that it create such a licensing system. Seattle's bill will have the effect of precluding all marijuana dispensers that are not licensed by the state, which none are at this point, but will not preclude the possibility of siting licensed dispensaries.

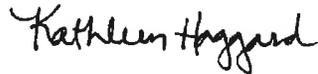
Bonney Lake City Council
October 14, 2013
Page 11

There is a good argument that a municipality may enact (or continue) a complete ban on medical marijuana dispensers until the state legislature creates a medical marijuana dispenser license. However, if such a licensing system is ever implemented, we will likely advise that the ban be repealed.

If you have any questions or need additional information, please let us know.

Sincerely,

PORTER FOSTER RORICK LLP

A handwritten signature in black ink that reads "Kathleen Haggard". The signature is written in a cursive style with a large initial 'K'.

Kathleen J. Haggard

KJH:cn

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**STATUTES—INITIATIVE AND
REFERENDUM—ORDINANCES—COUNTIES—CITIES AND
TOWNS—PREEMPTION—POLICE POWERS—Whether Statewide
Initiative Establishing System For Licensing Marijuana Producers,
Processors, And Retailers Preempts Local Ordinances**

- 1. Initiative 502, which establishes a licensing and regulatory system for marijuana producers, processors, and retailers, does not preempt counties, cities, and towns from banning such businesses within their jurisdictions.**
- 2. Local ordinances that do not expressly ban state-licensed marijuana licensees from operating within the jurisdiction but make such operation impractical are valid if they properly exercise the local jurisdiction’s police power.**

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January 16, 2014

The Honorable Sharon Foster
Chair, Washington State Liquor Control Board
3000 Pacific Avenue SE
Olympia, WA 98504-3076

Cite As:
AGO 2014 No. 2

Dear Chair Foster:

By letter previously acknowledged, you have requested our opinion on the following paraphrased questions:

- 1. Are local governments preempted by state law from banning the location of a Washington State Liquor Control Board licensed marijuana producer, processor, or retailer within their jurisdiction?**
- 2. May a local government establish land use regulations (in excess of the Initiative 502 buffer and other Liquor Control Board requirements) or business license requirements in a fashion that makes it impractical for a licensed marijuana business to locate within their jurisdiction?**

**BRIEF
ANSWERS**

1. No. Under Washington law, there is a strong presumption against finding that state law preempts local ordinances. Although Initiative 502 (I-502) establishes a licensing and regulatory system for marijuana producers, processors, and retailers in Washington State, it includes no clear indication that it was intended to preempt local authority to regulate such

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businesses. We therefore conclude that I-502 left in place the normal powers of local governments to regulate within their jurisdictions.

2. Yes. Local governments have broad authority to regulate within their jurisdictions, and nothing in I-502 limits that authority with respect to licensed marijuana businesses.

BACKGROUND

I-502 was approved by Washington voters on November 6, 2012, became effective 30 days thereafter, and is codified in RCW 69.50. It decriminalized under state law the possession of limited amounts of useable marijuana^[1] and marijuana-infused products by persons twenty-one years or older. It also decriminalized under state law the production, delivery, distribution, and sale of marijuana, so long as such activities are conducted in accordance with the initiative's provisions and implementing regulations. It amended the implied consent laws to specify that anyone operating a motor vehicle is deemed to have consented to testing for the active chemical in marijuana, and amended the driving under the influence laws to make it a criminal offense to operate a motor vehicle under the influence of certain levels of marijuana.

I-502 also established a detailed licensing program for three categories of marijuana businesses: production, processing, and retail sales. The marijuana producer's license governs the production of marijuana for sale at wholesale to marijuana processors and other marijuana producers. RCW 69.50.325(1). The marijuana processor's license governs the processing, packaging, and labeling of useable marijuana and marijuana-infused products for sale at wholesale to marijuana retailers. RCW 69.50.325(2). The marijuana retailer's license governs the sale of useable marijuana and marijuana-infused products in retail stores. RCW 69.50.325 (3).

Applicants for producer, processor, and retail sales licenses must identify the location of the proposed business. RCW 69.50.325(1), (2), (3). This helps ensure compliance with the requirement that "no license may be issued authorizing a marijuana business within one thousand feet of the perimeter of the grounds of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older." RCW 69.50.331 (8).

Upon receipt of an application for a producer, processor, or retail sales license, the Liquor Control Board must give notice of the application to the appropriate local jurisdiction. RCW 69.50.331(7)(a) (requiring notice to the chief executive officer of the incorporated city or town if the application is for a license within an incorporated city or town, or the county legislative authority if the application is for a license outside the boundaries of incorporated

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cities or towns). The local jurisdiction may file written objections with respect to the applicant or the premises for which the new or renewed license is sought. RCW 69.50.331(7)(b).

The local jurisdictions' written objections must include a statement of all facts upon which the objections are based, and may include a request for a hearing, which the Liquor Control Board may grant at its discretion. RCW 69.50.331(7)(c). The Board must give "substantial weight" to a local jurisdiction's objections based upon chronic illegal activity associated with the applicant's operation of the premises proposed to be licensed, the applicant's operation of any other licensed premises, or the conduct of the applicant's patrons inside or outside the licensed premises. RCW 69.50.331(9). Chronic illegal activity is defined as a pervasive pattern of activity that threatens the public health, safety, and welfare, or an unreasonably high number of citations for driving under the influence associated with the applicant's or licensee's operation of any licensed premises. RCW 69.50.331(9).^[2]

In addition to the licensing provisions in statute, I-502 directed the Board to adopt rules establishing the procedures and criteria necessary to supplement the licensing and regulatory system. This includes determining the maximum number of retail outlets that may be licensed in each county, taking into consideration population distribution, security and safety issues, and the provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market. RCW 69.50.345(2). The Board has done so, capping the number of retail licenses in the least populated counties of Columbia County, Ferry County, and Wahkiakum County at one and the number in the most populated county of King County at 61, with a broad range in between. *See* WAC 314-55-081.

The Board also adopted rules establishing various requirements mandated or authorized by I-502 for locating and operating marijuana businesses on licensed premises, including minimum residency requirements, age restrictions, and background checks for licensees and employees; signage and advertising limitations; requirements for insurance, recordkeeping, reporting, and taxes; and detailed operating plans for security, traceability, employee qualifications and training, and destruction of waste. *See generally* WAC 314-55.

Additional requirements apply for each license category. Producers must describe plans for transporting products, growing operations, and testing procedures and protocols. WAC 314-55-020(9). Processors must describe plans for transporting products, processing operations, testing procedures and protocols, and packaging and labeling. WAC 314-55-020(9). Finally, retailers must also describe which products will be sold and how they will be displayed, and may only operate between 8 a.m. and 12 midnight. WAC 314-55-020(9), -147.

The rules also make clear that receipt of a license from the Liquor Control Board does not entitle the licensee to locate or operate a marijuana processing, producing, or retail business in violation of local rules or without any necessary approval from local jurisdictions. WAC 314-

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-55-020(11) provides as follows: "The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances

including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements.

ANALYSIS

Your question acknowledges that local governments have jurisdiction over land use issues like zoning and may exercise the option to issue business licenses. This authority comes from article XI, section 11 of the Washington Constitution, which provides that “[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” The limitation on this broad local authority requiring that such regulations not be “in conflict with general laws” means that state law can preempt local regulations and render them unconstitutional either by occupying the field of regulation, leaving no room for concurrent local jurisdiction, or by creating a conflict such that state and local laws cannot be harmonized. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010).

Local ordinances are entitled to a presumption of constitutionality. *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009). Challengers to a local ordinance bear a heavy burden of proving it unconstitutional. *Id.* “Every presumption will be in favor of constitutionality.” *HJS Dev., Inc. v. Pierce County ex rel. Dep’t of Planning & Land Servs.*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003) (internal quotation marks omitted).

A. Field Preemption

Field preemption arises when a state regulatory system occupies the entire field of regulation on a particular issue, leaving no room for local regulation. *Lawson*, 168 Wn.2d at 679. Field preemption may be expressly stated or may be implicit in the purposes or facts and circumstances of the state regulatory system. *Id.*

I-502 does not express any indication that the state licensing and operating system preempts the field of marijuana regulation. Although I-502 was structured as a series of amendments to the controlled substances act, which does contain a preemption section, that section makes clear that state law “fully occupies and preempts the entire field of *setting penalties* for violations of the controlled substances act.” RCW 69.50.608 (emphasis added).[3] It also allows “[c]ities, towns, and counties or other municipalities [to] enact only those laws and

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ordinances relating to controlled substances that are consistent with this chapter.” RCW 69.50.608. Nothing in this language expresses an intent to preempt the entire field of regulating businesses licensed under I-502.

With respect to implied field preemption, the “legislative intent” of an initiative is derived from the collective intent of the people and can be ascertained by material in the official voter’s pamphlet. *Dep’t of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973); *see also Roe v. TeleTech Customer Care Mgmt., LLC*, 171 Wn.2d 736, 752-53, 257 P.3d 586 (2011). Nothing in the official voter’s pamphlet evidences a collective intent for the state regulatory system to preempt the entire field of marijuana business licensing or operation. Voters’ Pamphlet 23-30 (2012). Moreover, both your letter and the Liquor Control Board’s rules recognize the authority of local jurisdictions to impose regulations on state licensees. These facts, in

addition to the absence of express intent suggesting otherwise, make clear that I-502 and its implementing regulations do not occupy the entire field of marijuana business regulation.

B. Conflict Preemption

Conflict preemption arises “when an ordinance permits what state law forbids or forbids what state law permits.” *Lawson*, 168 Wn.2d at 682. An ordinance is constitutionally invalid if it directly and irreconcilably conflicts with the statute such that the two cannot be harmonized. *Id.*; *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998). Because “[e]very presumption will be in favor of constitutionality,” courts make every effort to reconcile state and local law if possible. HJS Dev., 148 Wn.2d at 477 (internal quotation marks omitted). We adopt this same deference to local jurisdictions.

An ordinance banning a particular activity directly and irreconcilably conflicts with state law when state law specifically entitles one to engage in that same activity in circumstances outlawed by the local ordinance. For example, in *Entertainment Industry Coalition v. Tacoma-Pierce County Health Department*, 153 Wn.2d 657, 661-63, 105 P.3d 985 (2005), the state law in effect at the time banned smoking in public places except in designated smoking areas, and specifically authorized owners of certain businesses to designate smoking areas. The state law provided, in relevant part: “A smoking area may be designated in a public place by the owner” Former RCW 70.160.040(1) (2004), *repealed by* Laws of 2006, ch. 2, § 7(2) (Initiative Measure 901). The Tacoma-Pierce County Health Department ordinance at issue banned smoking in all public places. The Washington Supreme Court struck down the ordinance as directly and irreconcilably conflicting with state law because it prohibited what the state law authorized: the business owner’s choice whether to authorize a smoking area.

Similarly, in *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004), the Washington Supreme Court invalidated a Tacoma-Pierce County Health Department ordinance requiring fluoridated water. The state law at issue authorized the water districts to decide whether to fluoridate, saying: “A water district by a

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majority vote of its board of commissioners may fluoridate the water supply system of the water district.” RCW 57.08.012. The Court interpreted this provision as giving water districts the ability to regulate the content and supply of their water systems. *Parkland Light & Water Co.*, 151 Wn.2d at 433. The local health department’s attempt to require fluoridation conflicted with the state law expressly giving that choice to the water districts. As they could not be reconciled, the Court struck down the ordinance as unconstitutional under conflict preemption analysis.

By contrast, Washington courts have consistently upheld local ordinances banning an activity when state law regulates the activity but does not grant an unfettered right or entitlement to engage in that activity. In *Weden v. San Juan County*, the Court upheld the constitutionality of the County’s prohibition on motorized personal watercraft in all marine waters and one lake in San Juan County. The state laws at issue created registration and safety requirements for vessels and prohibited operation of unregistered vessels. The Court rejected the argument that state

regulation of vessels constituted permission to operate vessels anywhere in the state, saying, “[n]owhere in the language of the statute can it be suggested that the statute creates an unabridged right to operate [personal watercraft] in all waters throughout the state.” *Weden*, 135 Wn.2d at 695. The Court further explained that “[r]egistration of a vessel is nothing more than a precondition to operating a boat.” *Id.* “No unconditional right is granted by obtaining such registration.” *Id.* Recognizing that statutes often impose preconditions without granting unrestricted permission to participate in an activity, the Court also noted the following examples: “[p]urchasing a hunting license is a precondition to hunting, but the license certainly does not allow hunting of endangered species or hunting inside the Seattle city limits,” and “[r]eaching the age of 16 is a precondition to driving a car, but reaching 16 does not create an unrestricted right to drive a car however and wherever one desires.” *Id.* at 695 (internal citation omitted).

Relevant here, the dissent in *Weden* argued: “Where a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders but they may not prohibit same outright[,]” and that an ordinance banning the activity “renders the state permit a license to do nothing at all.” *Weden*, 135 Wn.2d at 720, 722 (Sanders, J., dissenting). The majority rejected this approach, characterizing the state law as creating not an unabridged right to operate personal watercraft in the state, but rather a registration requirement that amounted only to a precondition to operating a boat in the state.

In *State ex rel. Schillberg v. Everett District Justice Court*, 92 Wn.2d 106, 594 P.2d 448 (1979), the Washington Supreme Court similarly upheld a local ban on internal combustion motors on certain lakes. The Court explained: “A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated.” *Id.* at 108. The Court found no conflict because nothing in the state laws requiring safe operation of vessels either expressly or impliedly provided that vessels would be allowed on all waters of the state.

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The Washington Supreme Court also rejected a conflict preemption challenge to the City of Pasco’s ordinance prohibiting placement of recreational vehicles within mobile home parks. *Lawson*, 168 Wn.2d at 683-84. Although state law regulated rights and duties arising from mobile home tenancies and recognized that such tenancies may include recreational vehicles, the Court reasoned “[t]he statute does not forbid recreational vehicles from being placed in the lots, nor does it create a right enabling their placement.” *Id.* at 683. The state law simply regulated recreational vehicle tenancies, where such tenancies exist, but did not prevent municipalities from deciding whether or not to allow them. *Id.* at 684.

Accordingly, the question whether “an ordinance . . . forbids what state law permits” is more complex than it initially appears. *Lawson*, 168 Wn.2d at 682. The question is not whether state law permits an activity in some places or in some general sense; even “[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law.” *Rabon v. City of Seattle*, 135 Wn.2d 278, 292, 957 P.2d 621 (1998) (finding no preemption where state law authorized licensing of “dangerous dogs” while city ordinance forbade ownership of “vicious animals”). Rather, a challenger must meet the heavy burden of proving that state law creates an entitlement to engage in an activity in circumstances outlawed by the local ordinance. For example, the state laws authorizing business

owners to designate smoking areas and water districts to decide whether to fluoridate their water systems amounted to statewide entitlements that local jurisdictions could not take away. But the state laws requiring that vessels be registered and operated safely and regulating recreational vehicles in mobile home tenancies simply contemplated that those activities would occur in some places and established preconditions; they did not, however, override the local jurisdictions' decisions to prohibit such activities.

Here, I-502 authorizes the Liquor Control Board to issue licenses for marijuana producers, processors, and retailers. Whether these licenses amount to an entitlement to engage in such businesses regardless of local law or constitute regulatory preconditions to engaging in such businesses is the key question, and requires a close examination of the statutory language.

RCW 69.50.325 provides, in relevant part:

(1) There shall be a marijuana producer's license to produce marijuana for sale at wholesale to marijuana processors and other marijuana producers, regulated by the state liquor control board and subject to annual renewal. . . .

(2) There shall be a marijuana processor's license to process, package, and label useable marijuana and marijuana-infused products for sale at wholesale to marijuana retailers, regulated by the state liquor control board and subject to annual renewal. . . .

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(3) There shall be a marijuana retailer's license to sell useable marijuana and marijuana-infused products at retail in retail outlets, regulated by the state liquor control board and subject to annual renewal. . . .

RCW 69.50.325(1)-(3). Each of these subsections also includes language providing that activities related to such licenses are not criminal or civil offenses under Washington state law, provided they comply with I-502 and the Board's rules, and that the licenses shall be issued in the name of the applicant and shall specify the location at which the applicant intends to operate. They also establish fees for issuance and renewal and clarify that a separate license is required for each location at which the applicant intends to operate. RCW 69.50.325.

While these provisions clearly authorize the Board to issue licenses for marijuana producers, processors, and retail sales, they lack the definitive sort of language that would be necessary to meet the heavy burden of showing state preemption. They simply state that there "shall be a . . . license" and that engaging in such activities with a license "shall not be a criminal or civil offense under Washington state law." RCW 69.50.325(1). Decriminalizing such activities under state law and imposing restrictions on licensees does not amount to entitling one to engage in such businesses regardless of local law. Given that "every presumption" is in favor of upholding local ordinances (*HJS Dev., Inc.*, 148 Wn.2d at 477), we find no irreconcilable conflict between I-502's licensing system and the ability of local governments to prohibit licensees from operating in their jurisdictions.

We have considered and rejected a number of counterarguments in reaching this conclusion. First, one could argue that the statute, in allowing Board approval of

licenses at specific locations (RCW 69.50.325(1), (2), (3)), assumes that the Board can approve a license at any location in any jurisdiction. This argument proves far too much, however, for it suggests that a license from the Board could override any local zoning ordinance, even one unrelated to I-502. For example, I-502 plainly would not authorize a licensed marijuana retailer to locate in an area where a local jurisdiction's zoning allows no retail stores of any kind. The Board's own rules confirm this: "The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements." WAC 314-55-020(11).

Second, one could argue that a local jurisdiction's prohibition on marijuana licensees conflicts with the provision in I-502 authorizing the Board to establish a maximum number of licensed retail outlets in each county. RCW 69.50.345(2); *see also* RCW 69.50.354. But there is no irreconcilable conflict here, because the Board is allowed to set only a maximum, and nothing in I-502 mandates a minimum number of licensees in any jurisdiction. The drafters of I-502 certainly could have provided for a minimum number of licensees per jurisdiction, which would have been a stronger indicator of preemptive intent, but they did not.

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Third, one could argue that because local jurisdictions are allowed to object to specific license applications and the Board is allowed to override those objections and grant the license anyway (RCW 69.50.331(7), (9)), local jurisdictions cannot have the power to ban licensees altogether. But such a ban can be harmonized with the objection process; while some jurisdictions might want to ban I-502 licensees altogether, others might want to allow them but still object to specific applicants or locations. Indeed, this is the system established under the state liquor statutes, which I-502 copied in many ways. *Compare* RCW 69.50.331 *with* RCW 66.24.010 (governing the issuance of marijuana licenses and liquor licenses, respectively, in parallel terms and including provisions for local government input regarding licensure). The state laws governing liquor allow local governments to object to specific applications (RCW 66.24.010), while also expressly authorizing local areas to prohibit the sale of liquor altogether. *See generally* RCW 66.40. That the liquor opt out statute coexists with the liquor licensing notice and comment process undermines any argument that a local marijuana ban irreconcilably conflicts with the marijuana licensing notice and comment opportunity.

Fourth, RCW 66.40 expressly allows local governments to ban the sale of liquor. Some may argue that by omitting such a provision, I-502's drafters implied an intent to bar local governments from banning the sale of marijuana. Intent to preempt, however, must be "clearly and expressly stated." *State ex rel. Schillberg*, 92 Wn.2d at 108. Moreover, it is important to remember that cities, towns, and counties derive their police power from article XI, section 11 of the Washington Constitution, not from statute. Thus, the relevant question is not whether the initiative provided local jurisdictions with such authority, but whether it removed local jurisdictions' preexisting authority.

Finally, in reaching this conclusion, we are mindful that if a large number of jurisdictions were to ban licensees, it could interfere with the measure's intent to supplant the illegal marijuana market. But this potential consequence is insufficient to overcome the lack of clear preemptive language or intent in the initiative itself. The

drafters of the initiative certainly could have used clear language preempting local bans. They did not. The legislature, or the people by initiative, can address this potential issue if it actually comes to pass.

With respect to your second question, about whether local jurisdictions can impose regulations making it “impractical” for I-502 licensees to locate and operate within their boundaries, the answer depends on whether such regulations constitute a valid exercise of the police power or otherwise conflict with state law. As a general matter, as discussed above, the Washington Constitution provides broad authority for local jurisdictions to regulate within their boundaries and impose land use and business licensing requirements. Ordinances must be a reasonable exercise of a jurisdiction’s police power in order to pass muster under article XI, section 11 of the state constitution. *Weden*, 135 Wn.2d at 700. A law is a reasonable regulation if it promotes public safety, health, or welfare and bears a reasonable and substantial relation to accomplishing the purpose pursued. *Id.* (applying this test to the personal watercraft ordinance); *see also Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 26, 586 P.2d 860 (1978) (applying this

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test to a zoning ordinance). Assuming local ordinances satisfy this test, and that no other constitutional or statutory basis for a challenge is presented on particular facts, we see no impediment to jurisdictions imposing additional regulatory requirements, although whether a particular ordinance satisfies this standard would of course depend on the specific facts in each case.

We trust that the foregoing will be useful to you.

ROBERT W.
FERGUSON
*Attorney
General*

JESSICA FOGEL
*Assistant
Attorney
General*

WTOS

[1] Useable marijuana means “dried marijuana flowers” and does not include marijuana-infused products. RCW 69.50.101(1).

[2] The provision for objections based upon chronic illegal activity is identical to one of the provisions for local jurisdictions to object to the granting or renewal of liquor licenses. RCW 66.24.010(12).

[3] RCW 69.50.608 provides: “The state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with this chapter. Such local ordinances shall have the same penalties as provided for by state law. Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of the city, town, county, or municipality.” The Washington Supreme Court has interpreted this provision as giving local jurisdictions concurrent authority to criminalize drug-related activity. *City of Tacoma v. Luvene*, 118 Wn.2d 826, 835, 827 P.2d 1374 (1992).



The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole 
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.¹

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

¹ These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. 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 structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

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