I-502 Impact: New Marijuana Legislation
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Overview
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1. Marijuana Regulation in Washington
MARIJUANA REGULATION
IN
WASHINGTON*

By

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* This is a summary of a paper entitled “Medical and Recreational Marijuana Uses – Local Regulation,” by Carol Morris, which can be found on the website: carolmorrislaw.com
I. Introduction.

Anyone who has attended a city council meeting in the last couple of years knows that local governments are struggling with more than decreased tax revenue. As a result of two state initiatives, a substance that was formerly illegal – marijuana -- has now been legalized (within limits) under state and local law. The struggle has partially resulted from the federal government’s unchanged position that marijuana is illegal.

Recently, the federal government acknowledged state and local laws authorizing marijuana-related conduct, and declared that if such laws are strong and effective in practice, it is “less likely” that marijuana operations will pose a threat to federal enforcement interests.\(^1\) However, these enforcement systems established by states and local government must address the enforcement priorities identified by the federal government, and the necessary resources must be devoted to enforcement efforts. Otherwise, “the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions”.\(^2\)

We can predict that the production and sale of marijuana in Washington will be big business. There are unofficial estimates that the marijuana crop in the United States during 2003-2005 was larger than any other crop (even corn), averaging $35.8 billion in production value.\(^3\) It is estimated to be the second largest cash crop in Washington during the same time period, with a value of $1 billion (average production).\(^4\) The estimated current marijuana consumption in Washington is 160 metric tons per year.\(^5\) Although the Liquor Control Board has adopted certain rules that attempt to limit production, we can expect that these numbers will increase, not decrease, due to legalization.\(^6\)
In Washington, local governments are also struggling because of the adoption of two very different Washington State initiatives and statutory amendments, utilizing extremely disparate approaches for marijuana regulation. The current regulatory scheme for recreational marijuana will likely satisfy the federal government’s requirements, because it comprehensively covers recreational marijuana production, processing and sale. The taxes imposed on recreational marijuana will fund the enforcement of the Liquor Control Board’s rules. Medical marijuana, however, presents a totally different problem, given that only a few provisions remain in State law (chapter 69.51A RCW) after the Governor’s veto in 2011. Consequently, local government regulation of recreational and medical marijuana – where the rubber meets the road -- has resulted in confusion, moratoria, bans and lawsuits.

II. Background.

   A. Federal Law. The Controlled Substances Act (CSA), makes it unlawful to manufacture, distribute, dispense or possess any controlled substance except in the manner authorized by the CSA. It is also illegal under the CSA to open, use, lease or maintain any place for the purpose of manufacturing, distributing or using any controlled substance. All controlled substances are categorized into five schedules, based on the drugs’ accepted medical uses, potential for abuse and their psychological/physical effects on the body. Each schedule corresponds with controls on the manufacture, distribution, registration, labeling, packaging, production quotas, drug security and recordkeeping, as well as use of the listed substances. Marijuana is classified as a Schedule I drug. 
B. Washington State Law.

1. *Washington’s Uniform Controlled Substances Act (USCA)* makes it unlawful to manufacture, deliver or possess with intent to manufacture or deliver, a controlled substance.\(^{12}\) Again, marijuana is listed as a Schedule I drug.\(^{13}\)

2. *Medical Marijuana Initiative.* In November of 1998, the voters of the State of Washington approved Initiative 692 (codified as chapter 69.51A RCW). The intent of Initiative 692 was that “qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law,” but that nothing in the law “shall be construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale or use of marijuana for non-medical purposes.”\(^{14}\)

3. *Legislature’s Adoption of chapter 69.51A RCW, Medical Cannabis.* In 2011, the Washington State Legislature passed ESSSB 5073, which amended chapter 69.51A RCW. In this bill, qualifying patients or their designated care providers are presumed to be in compliance with the medical use of marijuana, and not subject to criminal or civil sanctions, penalties, and/or consequences, if they possess no more than 15 cannabis plants, no more than 24 ounces of usable cannabis, and as long as they meet certain other qualifications.\(^{15}\)

This bill directed employees of the Washington State Departments of Health and Agriculture to authorize and license commercial businesses that produce, process or dispense cannabis. In addition, the bill required that the Department of Health develop a secure registration system for licensed producers, processors and dispensers. These provisions, however, were vetoed by the Governor, together with many others relating to dispensaries and all of the definitions in the bill.\(^{16}\)
The bill’s provisions relating to individual cultivation of medical cannabis and cultivation in collective gardens were not vetoed. An individual qualifying patient may cultivate up to 15 cannabis plants in his/her own residence (or possess up to 24 ounces of usable cannabis).\textsuperscript{17} There are other limits for qualifying patients who are also designated providers.\textsuperscript{18} Up to ten qualifying patients may create and participate in collective gardens for the purpose of producing, processing, transporting and delivering cannabis for medical use.\textsuperscript{19} A collective garden may not contain more than 15 plants per patient up to a total of 45 plants per garden, and the garden may not contain more than 24 ounces of usable cannabis per patient, up to a total of 72 ounces of usable cannabis.\textsuperscript{20}

Under the bill, cities, towns and counties may adopt and enforce requirements for zoning, business licensing, health and safety and business taxes relating to the “production, processing, or dispensing of cannabis or cannabis products within their jurisdiction.”\textsuperscript{21} Additional protection from state prosecution exists in the bill: “no civil or criminal liability may be imposed by any court on cities, towns, and counties or their municipalities and their officers and employees for actions taken in good faith under chapter 69.51A RCW, within the scope of their assigned duties.”\textsuperscript{22}

The Governor’s veto caused confusion in the interpretation of chapter 69.51A RCW. There is a general assumption that medical marijuana dispensaries could be prohibited by local jurisdictions, given the veto on definitions and elimination of corresponding provisions relating to the State Department of Health’s regulation of dispensaries. Although the provisions relating to collective gardens and individual cultivation/possession were not vetoed, the definitions of “qualified patient” and “designated provider” were vetoed, causing more confusion.\textsuperscript{23} Another problem was that the bill’s definitions of these terms provided an affirmative defense to charges
of state law cannabis violations to qualified patients and designated providers who were on a
State registry that was never established (because it was included in another vetoed section of the
bill).24

4. **Initiative 502.** In 2012, the Washington voters passed I-502, which
directs the Washington State Liquor Control Board (LCB) to regulate marijuana by licensing and
taxing producers, processors and retailers.25 The regulatory scheme requires the LCB to adopt
rules before December of 201326 to address the methods for producing, processing and
packaging of the marijuana, to establish security requirements for retail outlets, retail outlet
locations and hours of operation, labeling requirements, method of transport of marijuana
throughout the state, etc. A tax is also levied on marijuana-related activities, and a dedicated
fund consisting of marijuana excise taxes, license fees, penalties and other income received by
the state LCB from marijuana-related activities is created. The THC concentration for various
offenses is established, and possession of limited amounts of marijuana by persons 21 years of
age or older is decriminalized.

5. **Liquor Control Board’s Rules.** The LCB has now adopted Rules to
implement I-502, which will become effective on November 16, 2013. In addition, the LCB
issued a list of retail store locations, with the number of retail outlets that would be allowed in
each county and city in Washington. While I-502 adopted the 1,000 foot separation requirement
between recreational marijuana uses and certain sensitive uses (like child care centers, schools,
etc.), the LCB’s Rules define these uses triggering the 1,000 limitation.27

Initially, the LCB did not perform any environmental analysis before issuing the first
draft of the proposed Rules, even though compliance with the State Environmental Policy Act
(SEPA, chapter 43.21C RCW) was required.28 By July of 2013, the LCB had prepared a SEPA
Checklist, which minimally addressed some of the predicted environmental impacts of marijuana cultivation and none of the impacts of processing or distribution.\textsuperscript{29} Since that time, additional information has been provided on the anticipated environmental impacts associated with the Rules. Here are a few of the issues that are addressed by the Rules:

(a) qualifications for recreational marijuana licensees;
(b) prohibition on the issuance of a license for a recreational marijuana use within 1,000 feet of the defined sensitive uses and a method for measurement of this distance;
(c) procedure to obtain the license, including payment of fees, notice to local government, possible hearing on local government’s objections;
(d) limitation on the maximum amount of space for marijuana production to two million square feet;
(e) description of the manner in which marijuana production may take place (within a fully enclosed, secure indoor facility or greenhouse with four walls or outdoors fully enclosed by a physical barrier with an 8 foot high fence).
(f) limits the average inventory that may be on the licensed premises;
(g) limits the number of marijuana retailers within counties and cities within the counties based on estimated consumption and population data;
(h) describes the insurance requirements for licensees;
(i) describes the security requirements within licensed premises;
(j) requires that the licensees track marijuana from seed to sale;
(k) establishes the manner in which free samples of marijuana may be provided;
(l) prohibits the use of soil amendments, fertilizers and other crop production aids, other than certain identified ones;
(m) identifies transportation requirements;
(n) identifies sign requirements and limitations;
(o) identifies recordkeeping requirements, including the amount of pesticides, soil amendments and other applications used on the product;
(p) identifies tax record keeping requirements;
(q) identifies mechanisms for enforcement of violations, including failure to pay taxes;
(r) specifies marijuana infused product serving size, maximum number of servings and limitations on transactions;
(s) identifies marijuana waste disposal restrictions;
(t) describes the process for quality assurance testing, extraction and the requirements for packaging and labeling;
(u) describes the manner in which the licensee may advertise his or her business; and
(v) describes the violations that would subject a licensee to the enforcement process, suspension, revocation and penalties.\textsuperscript{30}
6. **State Licensing.** The LCB will begin accepting applications for recreational marijuana producers, processors and retailers on November 18, 2013 and plans to start issuing licenses on December 1, 2013.

### III. Federal Response to Washington’s Marijuana Laws.

No state can authorize violations of federal law. The CSA supersedes state regulation of marijuana, even when it is used for medicinal purposes.31

A. **Ogden Memo.** In 2009, the U.S. Department of Justice (“DOJ”) provided clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana,” that certain marijuana users and providers would be a lower priority for prosecution than others.32

B. **June 2010 DOJ Memo.** Another Justice Department memo was sent to U.S. attorneys in June of 2010, clarifying that dispensaries and licensed growers could be prosecuted for violating federal drug and money laundering laws.33 A spokesman for the U.S. Attorney in Los Angeles said the crackdown is aimed at stores that “are selling marijuana at a profit, which is also a violation of California law.”34

C. **DOJ’s letter to Clark County Commissioners.** Here in Washington, the Clark County Commissioners asked the federal government whether such enforcement efforts would extend to their activities implementing the State’s laws on medical marijuana. The response:

> [A]nyone 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 CSA. That same conclusion would apply with equal force to the proposed activities of the Board of . . . County Commissioners and . . . County employees.35

In the same letter, the County Commissioners were warned that such persons may also be subject to money laundering statutes, and that the CSA provides for forfeiture of real property and other
tangible property used to facilitate the commission of such crimes, as well as the forfeiture of all money derived from, or traceable to, such activity.36

D. Federal Response to I-502. On August 29, 2013, the U.S. DOJ issued another memo to all U.S. Attorneys. In this memo, the DOJ advised 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 remain the primary means of addressing marijuana-related activity.”37 Here are the 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.38

The DOJ warned that “[i]f 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.”39

IV. Local Government Response to Marijuana Laws.
A. **Moratoria.** A moratorium is an emergency measure adopted without public notice or public hearings, designed to preserve the status quo while the city or town officials consider new regulations to respond to new or changing circumstances not addressed in current laws. During the period of the moratorium, no applications for building permits or other development permits for the subject use may be submitted.  

Many local governments adopted moratoria after the State enacted the medical and recreational marijuana laws, so that they could evaluate their options and determine a course of action. The lack of any response to the State’s marijuana laws from the federal government (at least until August of this year) caused many local governments to shy away from adopting regulations that would permit or license marijuana uses. Many local government attorneys reviewed reported decisions from other jurisdictions outside Washington for guidance. (However, there appears to be substantial confusion in the courts in the state with the most reported decisions on medical marijuana issues. The California Supreme Court decided to supersede and accept review a decisions rendered in four significant medical marijuana cases, including a case in which a local ordinance adopting a medical marijuana permitting scheme was partially invalidated as preempted under the federal CSA.)

B. **Adoption of Bans of Medical Marijuana Uses.** As a result of the DOJ’s August 29, 2013 memo, many local governments are considering the adoption of bans on medical marijuana uses. This is because the existing state law on the subject of medical marijuana (chapter 69.51A RCW) does not address the federal government’s enforcement priorities (as set forth in the August 29, 2013 memo). Even if it could be argued that chapter 69.51A RCW and the type of local development regulations adopted by most municipalities for medical marijuana
collective gardens meet this standard, few municipalities have the resources to provide vigorous enforcement of these laws.

According to the August 29, 2013 DOJ Memo, “[i]f state 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 those harms.”[^42] Rather than face an action from the federal government challenging the municipality’s ordinance (or enforcement of that ordinance) governing medical marijuana, some local governments are considering the adoption of a temporary ban prohibiting all medical marijuana uses (see below), to be in effect until the Washington State Legislature substantially revises chapter 69.51A RCW (medical marijuana).

A local government can adopt a ban even after it has adopted an ordinance regulating medical marijuana uses, as long as the constitutional restrictions that would accompany such a ban are acknowledged. Under this factual scenario, any existing medical marijuana uses would likely argue that they had attained legal nonconforming status prior adoption of the ban.[^43]

However, the Washington courts have held that, “[i]t is clear that local governments have the authority to preserve, regulate and even, within constitutional limitations, terminate nonconforming uses.”[^44] While it “would be unconstitutional to subject nonconforming uses to immediate termination,” it is a “valid exercise of police power to terminate nonconforming uses that have been abandoned or by providing a reasonable amortization period.”[^45] “As a general matter, an amortization period is insufficient only if it puts a business in an impossible position due to a shortage of relocation sites.”[^46]

Although there is no Washington case on this subject, the California courts have addressed a similar issue – whether a city violated the constitutional rights of a legally operating
medical marijuana collective and dispensary, by adopting an ordinance changing the permissible locations for operating dispensaries, and requiring compliance within four years. Even though the lawsuit for damages against the city was moot (the feds closed the business down), the court went on to decide that the operator had acquired a vested right in the dispensary. The plaintiff was able to show that his due process rights were violated under the facts of this case, because there were no other available sites for him to relocate.

Recently, the Department of Health, the Department of Revenue and the Liquor Control Board issued their draft recommendations for regulating medical marijuana. These recommendations will be forwarded to the Legislature in 2014, and may include: (1) elimination of medical marijuana collective gardens and dispensaries; (2) establishment of a state medical marijuana registry; (3) state and local tax exemptions for medical marijuana sales to medical marijuana patients, excise tax would be the same as recreational marijuana; (4) establishment of requirements for labeling of THC and cannabinoids in medical marijuana; and (5) requirements for consent of a child’s parent or guardian for medical marijuana.

Some local governments adopted zoning and/or business licensing regulations for medical marijuana uses when chapter 69.51A RCW was adopted, in order to comply with state law. Based on the above, these local governments may be in the process of considering adoption of an ordinance that:

- Prohibits new medical marijuana collective gardens and any medical marijuana dispensaries (and any marijuana businesses that do not have a license from the Liquor Control Board of the State of Washington);
- Grants limited immunity as provided in chapter 69.51A RCW and against this prohibition to those medical marijuana collective gardens that were legally in existence at the time the ordinance was adopted, as long as they do not violate the existing regulations applicable to collective gardens;
- Identifies the time limitation for the effectiveness of the ordinance (“until such time as the State of Washington revises chapter 69.51A RCW consistent with the DOJ’s priorities as set forth in the August 29, 2013 Memo”);
Clearly states that no immunity, vested right or legal nonconforming use is created between the date of the adoption of this ordinance and any new ordinance on the same subject;

Provide that the ordinance shall expire permanently on the effective date of the local government’s adoption of a new ordinance on the subject of medical marijuana uses; and

Requires that any medical marijuana uses that are not in conformance with the ordinance must immediately cease operations.

C. Recreational Marijuana. Production, processing, possession, delivery, distribution and sale of the maximum amounts of marijuana established by law, are not criminal or civil offenses under Washington law, as long as they are performed by a person with a valid license (or his/her employee). The LCB has adopted its Rules and a timeline which will allow the LCB to begin accepting applications on November 18, 2013 and to begin issuing licenses on December 1, 2013. This means that prospective licensees may be searching for property prior to this time, and if a municipality hasn’t adopted development regulations to address recreational marijuana, the licensees will have no locational guidance on siting the proposed use. If a municipality has a moratorium in place to address recreational marijuana uses, the new regulations need to be adopted and the moratorium lifted as soon as possible to avoid challenges.

During the period of the moratoria, municipalities should be plotting out the application of the 1,000 foot rule (separation between recreational marijuana uses and sensitive uses defined in the draft Rules) “on the ground,” to determine where recreational marijuana uses cannot locate. Then, the municipality should be considering the possible secondary land use impacts associated with such uses to perform SEPA on comprehensive plan amendments and development regulations. For example, a large-scale growing operation will likely consume large amounts of water and other environmental impacts. Some local governments may choose to permit recreational marijuana uses in those zones best adapted to the secondary land use
impacts. For example, retail uses would be allowed in commercial zones, while processing and production would be allowed in industrial or the most intense commercial zones.

If the municipality intends to raise the appropriateness of the location of the proposed recreational marijuana use to the LCB as “written objections” against the use, the municipality must have zoning in place when the LCB begins issuing licenses. The LCB will determine whether the proposed use is within 1,000 feet of the defined sensitive uses and if so, will not issue the license.51

V. Possible Solutions for Recreational Marijuana Business Owners to Address Local Zoning and Business Licensing Issues.

A. The Problem. First, it must be acknowledged that marijuana businesses will encounter difficulties because the uses are not only illegal under federal law, but also the secondary land use impacts of the uses (legal production, processing and retailing) are unknown. For example, under current law, processing money from marijuana sales puts federally insured banks at risk of drug racketeering charges.52 In 2011, American Express announced that it would no longer handle marijuana-related transactions because of fear of federal prosecution.53 This has resulted in the operation of marijuana businesses on a cash-only basis, which can attract guns and violence.

B. The Local Government Experience. After the medical marijuana laws were enacted, many local governments were confused about their role in the adoption of local regulations to address zoning and business licensing. They were also legitimately worried that they (from the top officials to the enforcement staff) that they would be subject to criminal prosecution.
As described above, State law specifically allowed local governments to adopt zoning, business licensing and business taxes for the production, processing or dispensing of cannabis or cannabis products.\textsuperscript{54} Even though there was specific immunity for local officials and employees in the adoption and enforcement of these laws, such immunity was granted only by the State of Washington, not the federal government.\textsuperscript{55} In response to a specific inquiry in 2012 by the Clark County Commissioners about the adoption of local marijuana regulations, the U.S. Department of Justice threatened to criminally prosecute the Commissioners/County employees, as well as to prosecute them individually under money laundering statutes, etc. (See, Section III(C) on page 8 of this paper.)

Until the August 29, 2013 memo from the U.S. Department of Justice (see, Section III(D) on page 9 of this paper), many local governments believed they were caught in a no-win scenario. They could ban marijuana uses and risk a lawsuit from persons attempting to enforce the new laws,\textsuperscript{56} or they could adopt ordinances allowing marijuana uses and risk prosecution by the federal government. Many local governments simply adopted moratoria to wait for word from the federal government on their next move, after adoption of Washington’s recreational marijuana initiative.

Now that the federal government has provided more clarity on its position, many local governments still wonder about issues not raised in the August 29, 2013 memo. For instance, some ask whether their federal funding for public works projects will be at risk if they adopt marijuana zoning or business licensing regulations.

Other issues were raised by the lack of environmental information available to evaluate these new uses. Local governments planning under the Growth Management Act (chapter 36.70A RCW) are required to consider the environmental impacts of any amendments to their
comprehensive land use plans and zoning regulations. The scant information available from the LCB during the rulemaking process hindered the processing of these amendments. As just one example, we know that cultivation of an agricultural crop (indoors or outdoors) will require large amounts of water. Not every area in the State of Washington will have sufficient water to support these crops. In addition, the studies cited by the LCB acknowledge that indoor cultivation will substantially increase demands for power, which is less expensive in some areas of the State. These two factors alone will impact the State’s transportation system, because the marijuana may be brought from long distances to retail stores.

Local governments are being challenged to craft development regulations for a totally new use with little information on the environmental and secondary land use impacts of the use. So that they are prepared when the LCB begins issuing licenses on December 1, 2013, these development regulations need to be adopted prior to that time – and before any legal recreational marijuana use begins operation.

Recreational marijuana business owners can assist local governments by providing as much information as possible about the use, in the form of a SEPA Checklist, when they apply for a license with the State of Washington. This will help local governments to evaluate the proposed use, and may reduce or eliminate objections that the local government may raise prior to issuance of the license.

In sum, if a recreational marijuana business owner seeks a development permit or business license from a local government, cooperation and patience is needed. There are no reported decisions in Washington on these issues, so any new lawsuit will be a matter of first impression. Anyone who believes that they will receive a swift, clear and definitive decision from the Washington courts need only review the California courts’ experience.
During the same time period, apples were estimated to have a value of $1.145 billion, according to the same website. **Environmental Risks and Opportunities in Cannabis Cultivation**, draft white paper, by Michael O’Hare, BOTEC Analysis, US Berkley, Daniel L. Sanchez, US Berkley & Peter Alstone, p. 5. Other researchers acknowledge the fact that there are 17 states that have legalized medical marijuana, and estimated the 2011 crop in the US to be 17,000 metric tons. **Energy Up in Smoke, the Carbon Footprint of Indoor Cannabis Production**, by Evan Mills, Ph.D, April 5, 2011, page 1.

See, WAC 314-55-075 as an example. Under subsection (6), “the maximum amount of space for marijuana production is limited to two million square feet.”

8 21 U.S.C. Section 856(a)(1).
10 21 U.S.C. Section 821-830; CFR Section 1301 et seq.
11 21 U.S.C. Section 812(c).
12 RCW 69.50.401.
13 RCW 69.50.204(c)(22).
14 RCW 69.51A.005, 69.51A.020.
15 RCW 69.51A.040.
16 See, letter from Christine Gregoire, Governor, April 29, 2011, re: ESSSB 5073. Definitions have since been added to RCW 69.51A.010.
17 RCW 69.51A.040(1).
18 See, RCW 69.51A.040(1)(b).
19 RCW 69.51A.085.
20 Id.
21 RCW 69.51A.140.
[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. . . . The fact that some individuals or collectives or cooperatives might choose to act in the absence of state criminal law in a way that violates federal law does not implicate the city in any such violation. As we observed in Garden Grove [City of Garden Grove v. Superior Court, 157 Cal. App.4th 355, 368, 68 Cal. Rptr. 3d 656, 663 (2007)], governmental entities do not incur aider and abettor or direct liability by complying with their obligations under the state medical marijuana laws.

Definitions have since been added, including those for “designated provider” and “qualifying patient.”

RCW 69.51A.010.

RCW 69.51A.043.

I-502 has been codified in chapter 69.50 RCW (primarily in RCW 69.50.101, .325 through .369.

The Liquor Control Board has developed their draft rules, which are now available for public comment.

See, WAC 314-55-010, 314-55-050(10).

WAC 197-11-055(1).

LCB’s SEPA Checklist dated July 12, 2013, which references Environmental Risks and Opportunities in Cannabis Cultivation, draft white paper prepared by Michael O’Hare, BOTEC Analysis, US Berkley, Caniel L. Sanchez, UC Berkley & Peter Alstone, as the only “environmental information that . . . has been prepared or will be prepared, directly related to this proposal.”

These rules can be found in chapter 314-55 WAC.

Gonzales v. Raich, 545 U.S. 1, 125 S.Ct. 2195, 2198, 162 L.Ed.2d 1 (2005). In Raich I, the US Supreme Court held that the “CSA’s categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law [does not] exceed Congress’ authority under the Commerce Clause.” 545 US at 9, 15; see also, Raich v. Gonzales (‘Raich II’), 500 F.3d 850 (9th Cir. 2007).


See, USA Today, article dated 10/10/11, “Feds Target Medical Marijuana Dispensaries in California.”

Id.

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 Board of Clark County Commissioners.

Id.

Memorandum dated August 29, 2013 from the U.S. Department of Justice, Office of the Attorney General, James M. Cole to All United States Attorneys, “Guidance Regarding Marijuana Enforcement.”


Id., p. 2, emphasis added.

For GMA cities and towns, RCW 36.70A.390.

See, Medical Marijuana Cases Have Courts Exhibiting Multiple Personalities, Flurry of Conflicting Rulings on Medical Marijuana Sets Up Landmark California Review, posted March 13, 2012 by Peter Hecht of McClatchy Newspapers. See, Pack v. Superior Court, 199 Cal.App.4th 1070, 132 Cal.Rptr.3d 633 (2011), opinion superseded and review granted, 268 P.3d 1063 (1-18-12); dismissed as moot, 146 Cal.Rptr.3d 271, 283 P.3d 1159 (8-22-12). After review was granted in Pack, the City repealed the ordinance and replaced it with another which imposed a complete and immediate ban on collectives in the city.

DOJ’s August 29, 2013 Memo, p. 3.

An factual scenario that likely has occurred in many cities, towns and counties in Washington is presented in City of Corona v. Naulls, 166 Cal.App.4th 418, 83 Cal.Rptr.3d 1 (2008), in which a medical marijuana dispensary owner applied and received a business license from the city without disclosing that the business was a medical marijuana dispensary. The city later adopted a moratorium on medical marijuana uses, and the business operator claimed that he was “grandfathered” in as a legal nonconforming use because he had been legally operating prior to the moratorium. The court held that because medical marijuana dispensaries were not identified in the municipal code as a permitted use, the business was operating as an illegal use, constituting a nuisance per se.

45 Rhod-A-Zalea, 136 Wash.2d at 8, Cradduck, 166 Wash. App. at 448. Reasonable amortization provisions have been upheld in a number of cases. See, World Wide Video of Washington, Inc. v. City of Spokane, 125 Wash. App. 289, 308, 103 P.3d 1265 (2005); Northend Cinema, Inc. v. Seattle, 90 Wash.2d 709, 585 P.2d 1153 (1978). In Seattle v. Martin, 54 Wash.2d 541, 544, 342 P.2d 602 (1959), the court adopted a balancing test to determine the reasonableness of the termination period: “whether the harm or hardship to the user outweighs the benefit to the public to be gained from termination of the use.” Applying this test to the termination of the ability of theaters in certain zones to show adult films, the court upheld Seattle’s 90 day amortization period in Northend Cinema.


48 Keep in mind that there is a different vested rights doctrine in California, and that this operator obtained a vested rights through issuance of a permit to build the dispensary and by incurring substantial costs in good faith reliance of that permit. Santa Barbara, 911 F. Supp.2d at 893.

49 RCW 69.50.366, .363, .360.

50 Keep in mind that the LCB will be revising Proposed Rule WAC 314-55-050(10), so that the method for measurement is consistent with federal law – the 1,000 feet will be measured in a straight line.

51 Proposed Rule WAC 314-55-050(10).


54 RCW 69.51A.140.

55 RCW 69.51A.130.

56 The City of Kent, Washington, adopted a ban on medical marijuana uses, which was challenged and upheld at the superior court level. There has been no decision yet from the Court of Appeals.