



CITY OF KIRKLAND
Planning and Community Development Department
123 Fifth Avenue, Kirkland, WA 98033
425.587-3225 - www.kirklandwa.gov

MEMORANDUM

To: Kurt Triplett, City Manager

From: Eric Shields, Planning Director
Paul Stewart, Deputy Planning Director
Robin Jenkinson, City Attorney

Date: January 10, 2014

Subject: Options for Addressing Recreational Marijuana Businesses in Kirkland

RECOMMENDATION

City Council reviews the options provided below and provides direction to staff.

BACKGROUND DISCUSSION

Since applications for marijuana retail and processing facilities have been filed, citizens have expressed concerns about potential marijuana sales along Market Street. At the January 7, 2014 Council meeting, the Council directed staff to provide options about how to respond to citizen concerns. This memorandum does not address medical marijuana and focuses on marijuana sales, not on processing or production. Recreational sales of marijuana are currently considered to be a retail use and would be allowed in those zones that allow retail subject to rules and licensing requirements adopted by the Washington State Liquor Control Board (e.g. the 1000' buffer restrictions). The Liquor Control Board (WSLCB) has allocated two retail licenses to the City of Kirkland.

Attachment 1 is the list of applications currently submitted to the LCB as of January 7, 2014 and Attachment 2 is a map that shows the location of the applications by type. Note that many of the applications do not comply with zoning. For example an application was submitted for processing along Market Street where only retailing is allowed. Attachment 3 is a memorandum prepared for Council discussion at its August 2013 meeting. Attachment 4 is a summary of the regulations and issues concerning recreational marijuana prepared by City Attorney Robin Jenkinson earlier this year.

Following is a list of options. Section A addresses substantive options and Section B discusses procedural options.

A. Substantive Options:

1. Maintain current regulations that treat marijuana sales the same as any other retail use. Sale of marijuana would continue to be allowed in any zone allowing retail uses, including the Market Street Corridor (MSC) Zones, subject to all applicable zoning regulations.
Staff has drafted a letter to the WSLB informing them of applications for sites in Kirkland that do not comply with the state regulations and should be eliminated for

consideration. Even if the existing zoning is maintained, the Council could choose to amend this letter to the WSLCB advising it of preferred license locations. The letter could indicate that the Market Street locations are not sites the City finds suitable due to the proximity to school walk routes, traffic impacts to Market Street and proximity to low density residential areas. A draft of such a letter is included as Attachment 3.

2. Impose limitations on *marijuana sales* :

- a. Identify zones which now allow retail uses in which marijuana sales would be specifically prohibited. For example, some of the zones in which retail sales are allowed are actually classified as Office Zones. MSC 1 and 4 along Market Street. and Rose Hill 8 at the east end of NE 85th Street are examples. Zoning regulations could be amended to prohibit marijuana sales in Office Zones. This option would address the majority of properties along Market Street but would still leave marijuana sales allowed in the MSC 2 and 3 zones located at 15th and 7th Avenues and Market Street. (Note: 7th Avenue would be precluded since it is within the 1000' buffer from Heritage Park).
- b. Prohibit marijuana sales on sites that abut or are within a specified distance from a low density residential zone. This would affect most properties along Market Street as well as several other parts of the City. Although this would "protect" low density zones, residents living in higher density zones would not be similarly protected. A variation on this concept would be to prohibit marijuana sales on sites that abut or within a specified distance of city-designated school walk routes.
- c. As discussed with the Council previously, other restrictions for marijuana sales could be instituted, dealing with issues such as:
 - Size of businesses (maximum floor area);
 - Amount of product available for sale;
 - Hours of operation; and/or
 - Prohibition on drive-in and drive-through facilities (already prohibited along Market Street)

3. Remove *retail uses as permitted uses in certain zones*:

Rather than regulating marijuana sales specifically, zoning changes could address retail uses more generally. As noted above, retail uses are allowed in certain Office Zones (MSC 1 and 4 and RH 8). Rather than prohibit just marijuana sales, this option would remove all retail uses as permitted uses in one or more of these zones.

One consequence of this option would be that some existing uses (for example hair salons) would become nonconforming uses. To avoid this, it would be possible to replace the broad retail use listing with a more limited listing that allows only personal services. Note also that restaurants would continue to be allowed unless those uses were also eliminated.

This option would still leave retail in the MSC 2 zone.

B. Procedural Options:

Options A.2 and A.3 above require changes to zoning. This could be handled in one of the following ways:

1. Refer the matter to be addressed in the Comprehensive Plan update. This option would

maintain existing zoning until mid-2015.

2. Direct the Planning Commission to consider desired changes as soon as possible. With work on the Comprehensive Plan and other projects, the Commission meetings are already scheduled out. Marijuana zoning would have to be worked into the schedule. In addition, state and City regulations require changes to be made in a deliberative manner. Therefore adoption of new regulations through the standard process would likely take several months.
3. In addition to option 2 above, the City Council could adopt interim regulations that could take effect quickly. The interim regulations would have an initial maximum duration of six months during which time the City would prepare ongoing regulations using option 2 above. Depending on the complexity of the regulations, an ordinance could be prepared for a public hearing and the Council could adopt interim regulations as early as the next Council meeting (February 4).
4. As an alternative to interim regulations, the City Council could adopt a six-month moratorium prohibiting the establishment or licensing of any retail seller of marijuana and stating that no building permit, occupancy permit, or other development permit or approval shall be issued for such uses. If the Council chose, the moratorium could be geographically limited. As with option 3, the moratorium could be prepared for consideration, at a public hearing, as early as February 4.

On January 14, 2014, the Washington State Attorney General issued an opinion responding to the following questions from the chair of the LCB:

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

In the Opinion, a copy of which is attached, the Attorney General concludes: 1) that Initiative 502 does not preempt local jurisdictions from banning marijuana businesses within their jurisdictions; and 2) local ordinances that do not expressly ban state-licensed marijuana licensees from operating within their jurisdictions but make such operations impractical are valid if they properly exercise the local jurisdiction's police power. While attorney general opinions are not binding on the courts, they are oftentimes given considerable weight. There have not been any reported Washington court opinions on this subject.

Attachments:

1. List of marijuana applications as of January 7, 2014
2. Map of marijuana applications
3. Draft letter to the WSLCB
4. Staff memo of July 16, 2013
5. Regulating Recreational Marijuana
6. School Walk Routes
7. 2014 AGO Opinion No. 2

MARIJUANA LICENSE APPLICATIONS (1/8/14)

Producers

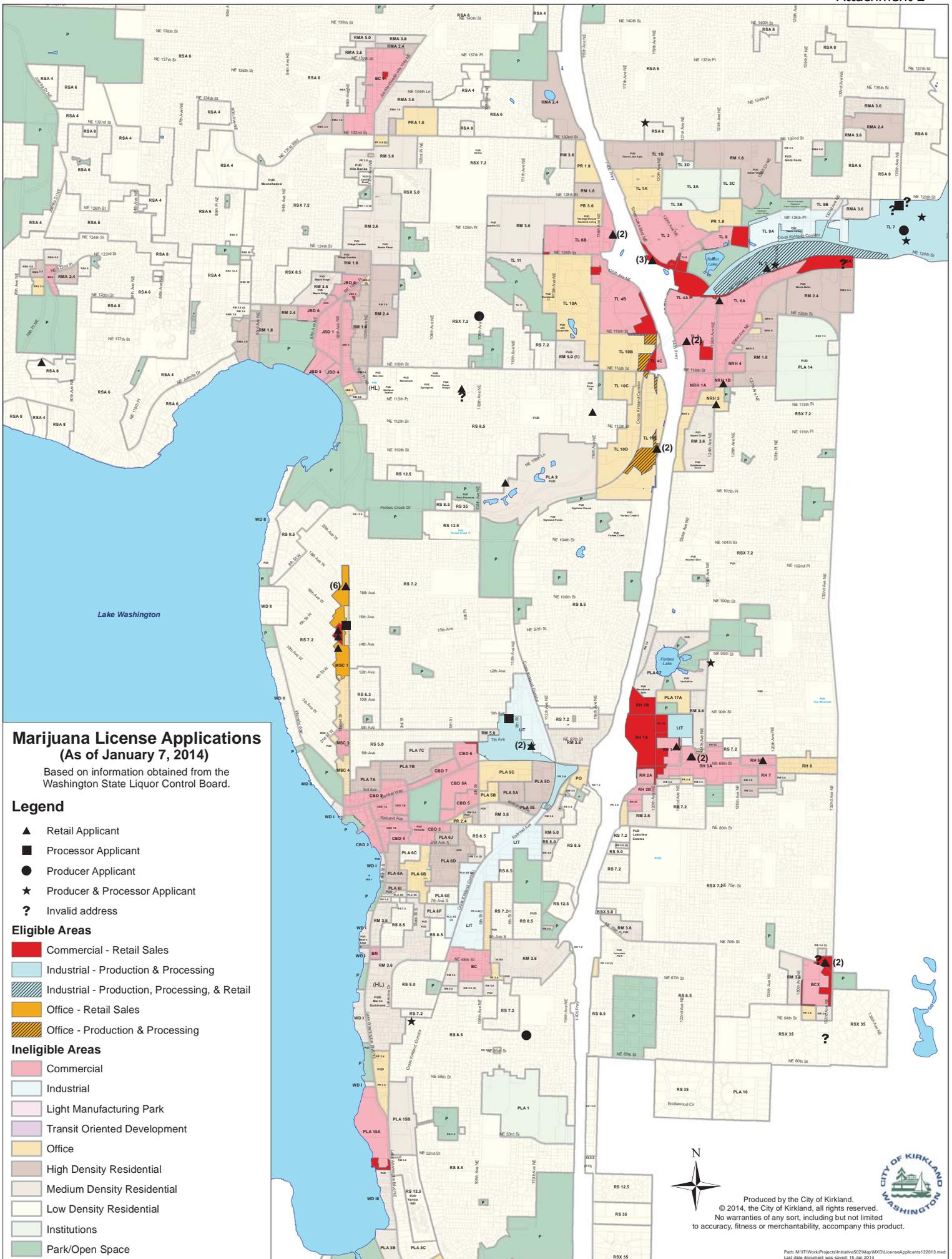
Tradename	Licensi	StreetAddress	Suite/Rm	City	Sta	County	ZipCode	PrivDesc	DateRci
SEATTLE CANNABIS KITCHENS	053096	6227 102ND PL NE		KIRKLAND	WA	KING	980336923	MARIJUANA PRODUCER TIER 1	20131225
VERDELUX CHOCOLATES	054239	13621 NE 126TH PL STE 425		KIRKLAND	WA	KING	980348755	MARIJUANA PRODUCER TIER 1	20140103
BLUE MOOSE	412968	6105 111TH PL NE		KIRKLAND	WA	KING	980337202	MARIJUANA PRODUCER TIER 2	20131210
IN GOOD SPIRITS	409081	13613 NE 126TH PL STE 350		KIRKLAND	WA	KING	980348722	MARIJUANA PRODUCER TIER 2	0
LESTER FARMS LLC	054326	13600 NE 128TH ST STE D		KIRKLAND	WA	KING	980343363	MARIJUANA PRODUCER TIER 2	20140103
P AND R PROCESSING LLC	054342	9260 124TH AVENE		KIRKLAND	WA	KING	98033	MARIJUANA PRODUCER TIER 2	20140103
TETRA CONSULTING	413292	825 7TH AVE		KIRKLAND	WA	KING	980335749	MARIJUANA PRODUCER TIER 2	20131210
THINK ABOUT IT	412993	11851 108TH AVE NE		KIRKLAND	WA	KING	980343926	MARIJUANA PRODUCER TIER 2	20131211
TURNKEY, LLC	052130	12700 NE 124TH ST STE 16		KIRKLAND	WA	KING	980348304	MARIJUANA PRODUCER TIER 2	20131220
VAJRADHARA PRODUCTS	054112	13649 NE 126TH PL		KIRKLAND	WA	KING	980348715	MARIJUANA PRODUCER TIER 2	20140101
WOWMARIJUANA	053528	13263 119TH AVE NE		KIRKLAND	WA	KING	980342174	MARIJUANA PRODUCER TIER 2	20131227
LEGANJAFairy LLC	051728	13536 NE 126TH PL		KIRKLAND	WA	KING	980348704	MARIJUANA PRODUCER TIER 3	20131217

Processors

Tradename	Licensi	StreetAddress	Suite/Rm	City	Sta	County	ZipCode	PrivDesc	DateRci
CHAD GROSPE	413915	1524 MARKET ST		KIRKLAND	WA	KING	980335401	MARIJUANA PROCESSOR	20131214
HOH LABS	054536	13600 NE 126TH PL STE D1		KIRKLAND	WA	KING	980348720	MARIJUANA PROCESSOR	20140103
LEGANJAFairy LLC	051728	13536 NE 126TH PL		KIRKLAND	WA	KING	980348704	MARIJUANA PROCESSOR	20131217
LESTER FARMS LLC	054326	13600 NE 128TH ST STE D		KIRKLAND	WA	KING	980343363	MARIJUANA PROCESSOR	20140103
P AND R PROCESSING LLC	054342	9260 124TH AVENE		KIRKLAND	WA	KING	98033	MARIJUANA PROCESSOR	20140103
RECREATION, HEALTH & EXERCISE CONSULT	413184	14253 23RD AVE NE B-301		KIRKLAND	WA	KING	980344991	MARIJUANA PROCESSOR	20131212
SEATTLE CANNABIS KITCHENS	053096	6227 102ND PL NE		KIRKLAND	WA	KING	980336923	MARIJUANA PROCESSOR	20131225
TETRA CONSULTING	413292	825 7TH AVE		KIRKLAND	WA	KING	980335749	MARIJUANA PROCESSOR	20131210
TURNKEY, LLC	052130	12700 NE 124TH ST STE 16		KIRKLAND	WA	KING	980348304	MARIJUANA PROCESSOR	20131220
VAJRADHARA PRODUCTS	054112	13649 NE 126TH PL		KIRKLAND	WA	KING	980348715	MARIJUANA PROCESSOR	20140101
VERDELUX CHOCOLATES	054239	13621 NE 126TH PL STE 425		KIRKLAND	WA	KING	980348755	MARIJUANA PROCESSOR	20140103
WAKALOLO	412807	723 9TH AVE STE A		KIRKLAND	WA	KING	980335662	MARIJUANA PROCESSOR	20131206
WOWMARIJUANA	053528	13263 119TH AVE NE		KIRKLAND	WA	KING	980342174	MARIJUANA PROCESSOR	20131227

Retailers

Tradename	Licens	StreetAddress	Suite/Rm	City	Sta	County	ZipCode	PrivDesc	DateRc
420 PM CORP	054026	13100 NE 70TH PL		KIRKLAND	WA	KING	980338571	MARIJUANA RETAILER	20140101
420 PM CORP	054027	13112 NE 70TH PL		KIRKLAND	WA	KING	980338571	MARIJUANA RETAILER	20140101
502	051095	11516 124TH AVE NE		KIRKLAND	WA	KING	980334643	MARIJUANA RETAILER	20131210
BILOXI GREEN	412927	1818 MARKET ST		KIRKLAND	WA	KING	980334946	MARIJUANA RETAILER	20131122
BUDDY'S BUDS	414319	12525 TOTEM LAKE BLVD NE		KIRKLAND	WA	KING	980347205	MARIJUANA RETAILER	20131214
BUZZ U	054868	1818 MARKET ST		KIRKLAND	WA	KING	980334946	MARIJUANA RETAILER	20140104
CAMERON DEAK	054638	11236 115TH PL NE		KIRKLAND	WA	KING	980334518	MARIJUANA RETAILER	20140103
CEMA INVESTMENTS	413826	8520 122ND AVE NE 80TH ST		KIRKLAND	WA	KING	980335831	MARIJUANA RETAILER	20131217
EMERALD CITY BOTANICALS	054386	10856 NE 108TH ST		KIRKLAND	WA	KING	980335033	MARIJUANA RETAILER	20140103
FIREPLACE	054759	1818 MARKET ST		KIRKLAND	WA	KING	980334946	MARIJUANA RETAILER	20140104
GOOD NEWS EVERYONE	414073	12642 NE 85TH ST		KIRKLAND	WA	KING	980338045	MARIJUANA RETAILER	20131217
GREAN SEA LLC	054506	12525 TOTEM LAKE BLVD NE		KIRKLAND	WA	KING	980347205	MARIJUANA RETAILER	20140103
GREEN BEE	413330	12700 NE 124TH ST STE 1		KIRKLAND	WA	KING	980348304	MARIJUANA RETAILER	20131127
HECTOR DEGNER	414469	11901 124TH AVE NE		KIRKLAND	WA	KING	980348112	MARIJUANA RETAILER	20131221
IVI ENTERPRISE	413594	11308 124TH AVE NE UNIT 301		KIRKLAND	WA	KING	980334636	MARIJUANA RETAILER	20131213
JACKPOT	414602	13100 ME 70TH PL		KIRKLAND	WA	KING	980330000	MARIJUANA RETAILER	20131227
JOSH'S JOINT	053742	13205 NE 124TH ST # 124		KIRKLAND	WA	KING	980348000	MARIJUANA RETAILER	20140101
KUSH	414407	12525 TOTEM LAKE BLVD NE		KIRKLAND	WA	KING	980347205	MARIJUANA RETAILER	20131225
MAISON BOTANIQUE	413682	1818 MARKET ST		KIRKLAND	WA	KING	980334946	MARIJUANA RETAILER	20131214
MCCORMICK GREEN	413252	1818 MARKET ST		KIRKLAND	WA	KING	980334946	MARIJUANA RETAILER	20131120
MIND'S EYE	413325	1818 MARKET ST		KIRKLAND	WA	KING	980334946	MARIJUANA RETAILER	20131126
OKEEMOMO LLC	054218	11901 124TH AVE NE		KIRKLAND	WA	KING	980348112	MARIJUANA RETAILER	20140103
ONE LOVE ORGANICS	414109	11014 120TH AVE NE STE A		KIRKLAND	WA	KING	980335022	MARIJUANA RETAILER	20131221
ONE LOVE ORGANICS	414173	12504 116TH AVE NE STE A		KIRKLAND	WA	KING	980344321	MARIJUANA RETAILER	20131224
ORGANIC GARDENS	414172	11014 120TH AVE NE STE B		KIRKLAND	WA	KING	980335022	MARIJUANA RETAILER	20131221
ORGANIC GARDENS	414177	12504 116TH AVE NE STE B		KIRKLAND	WA	KING	980344321	MARIJUANA RETAILER	20131224
RECREATIONAL MARIJUANA KING	414401	1431 MARKET ST		KIRKLAND	WA	KING	980335432	MARIJUANA RETAILER	20131217
REOCAPITAL	414346	12106 NE 85TH		KIRKLAND	WA	KING	980338037	MARIJUANA RETAILER	20131217
RESOLUTE PARTNERS	414063	1313 MARKET ST		KIRKLAND	WA	KING	980335456	MARIJUANA RETAILER	20131224
STONER HAZE CORP	054037	6157 132ND AVE NE		KIRKLAND	WA	KING	980338608	MARIJUANA RETAILER	20140101
THC4LESS	414479	12403 NE 124TH ST		KIRKLAND	WA	KING	980344022	MARIJUANA RETAILER	20131225
THE GARDEN L L C.	054499	11341 106TH AVE NE		KIRKLAND	WA	KING	980334435	MARIJUANA RETAILER	20140103
THE GARDEN L L C.	054500	11341 106TH AVE NE STE B		KIRKLAND	WA	KING	980334435	MARIJUANA RETAILER	20140103
THE NOVEL TREE	053596	825 7TH AVE		KIRKLAND	WA	KING	980335749	MARIJUANA RETAILER	20131231
TWISTED GREENS CORP	054035	13114 NE 70TH PL		KIRKLAND	WA	KING	980338571	MARIJUANA RETAILER	20140101
TWISTED SACKS CORP	414475	1417 MARKET ST		KIRKLAND	WA	KING	980335432	MARIJUANA RETAILER	20131225
W & L HOLDINGS	414297	11509 JUANITA DR NE		KIRKLAND	WA	KING	980343421	MARIJUANA RETAILER	20131210



Marijuana License Applications (As of January 7, 2014)

Based on information obtained from the Washington State Liquor Control Board.

Legend

- ▲ Retail Applicant
- Processor Applicant
- Producer Applicant
- ★ Producer & Processor Applicant
- ? Invalid address

Eligible Areas

- Commercial - Retail Sales
- Industrial - Production & Processing
- Industrial - Production, Processing, & Retail
- Office - Retail Sales
- Office - Production & Processing

Ineligible Areas

- Commercial
- Industrial
- Light Manufacturing Park
- Transit Oriented Development
- Office
- High Density Residential
- Medium Density Residential
- Low Density Residential
- Institutions
- Park/Open Space



Produced by the City of Kirkland.
© 2014, the City of Kirkland, all rights reserved.
No warranties of any sort, including but not limited to accuracy, fitness or merchantability, accompany this product.



Sharon Foster, Board Chair
 Ruthann Kurose, Board Member
 Chris Marr, Board Member
 Washington State Liquor Control Board
 P.O. Box 43085
 Olympia, WA 98504-0385

Subject: Comments on Marijuana Applications in Kirkland

Dear Liquor Control Board Members:

On behalf of the Kirkland City Council, I offer the following comments on applications submitted to the Washington State Liquor Control Board (WSLCB) for marijuana retail, processing and production licenses in Kirkland. The City is not opposed to having licensed recreational marijuana uses within the City. Our zoning regulations do not specifically address marijuana as a distinct use. Instead, marijuana businesses are allowed in those zones where retailing, processing or production is allowed.

However, several of the Kirkland applications are in locations where the zoning clearly doesn't allow the type of use proposed. In other locations, the zoning allows the use but the proposed sites are within 1,000 feet of public parks, elementary or secondary schools, child care centers or public transit centers. In addition, there are some locations where the City Council has heard from citizens expressing strong opposition to the siting of marijuana retail facilities. There are also a number of applications listing addresses that are nonexistent. This letter is intended to provide you with information about these issues.

The following license applications are in zones that do not allow retailing, production or processing:

License	Applicant	Address	Zoning Issue
412968	Blue Moose	6105 111 th Pl. NE	Producer in residential zone (RS 8.5 zone)
413915	Chad Grospe	1524 Market St.	Processor in office zone (MSC 1 zone)
412993	Think About It	11851 108 th Ave. NE	Producer in residential zone (RSX 7.2 zone)
413594	M Enterprise	11308 124 th Ave. NE	Retailer in office zone (NRH 3 zone)
414172	Organic Gardens	11014 120 th Ave. NE	Retailer in office zone (TL 10E zone)
414297	W & L Holdings	11509 Juanita Dr. NE	Retailer in a residential zone (RSA 8 zone)
053096	Seattle Cannabis Kitchens	6227 102 nd Pl NE	Producer & Processor in residential zone (RSX 7.2 zone)
054638	Cameron Deak	11236 115 th Pl NE	Retailer in residential zone (RS 8.5 zone)
054386	Emerald City Bot.	10856 NE 108 th St.	Retailer in residential zone (RS 8.5 zone)
054499 054500	The Garden LLC	11341 106 th Ave. NE	Retailer in residential zone (RS 8.5 zone)
054037	Stoner Haze	6157 132 nd Ave NE	Retail in residential zone

A number of applications for uses that would be allowed in the zone where they are proposed appear to be prohibited under RCW 69.50.331 and WAC 314-55-160(2) as the locations are within 1,000 feet of elementary or secondary schools, public parks, child care centers or transit facilities. Following are the applications in that category:

License	Applicant	Address
413826	Cema Investments	8520 122 nd Ave. NE
414073	Good News Everyone	12642 NE 85 th St.

414109	One Love Organics	12504 116 th Ave. NE
414172	Organic Gardens	
414479	THC4Less	12403 NE 124 th St
414469	Hector Degner	11901 124 th Ave. NE
054218	Okeemomo LLC	

A surprisingly large number of retail applications have been submitted for sites along Market Street in the Market Street Corridor (MSC) 1 Zone. MSC 1 is defined in the Kirkland Zoning Code as an “office zone” although limited retail uses are allowed. The predominant uses allowed and actually developed in the zone are small offices and small medium density multi-family buildings. There are no existing true retail uses in this zone. The only non-office commercial use is a single hair salon.

The MSC 1 Zone is a narrow strip of land composed of properties fronting on Market Street. The zone is bordered on both sides by single-family residential neighborhoods. Residents of the adjacent neighborhoods have expressed strong concerns about marijuana sales so close to the neighborhoods. Kirkland Middle School is located several blocks to the east of the proposed marijuana retail sites; and although the school is not within 1,000 feet of the proposed marijuana retailers, the retailers are located along designated school walk routes. Consequently, the City Council requests that the WSLCB not issue retail licenses to properties in the MSC 1 Zone along Market Street and instead approve Kirkland’s allotment of two licenses in other more clearly appropriate commercial locations. The following applications in the MSC 1 Zone are of concern to the City:

License	Applicant	Address	Comments
412927	Biloxi Green	1818 Market St.	Located in an office zone, abutting residential neighborhoods, on school walk routes.
054868	Buzz U		
054759	Fireplace		
413682	Maison Botanique		
413252	McCormick Green		
413325	Mind’s Eye		
414063	Resolute Partners	1313 Market St.	

Finally, the City has no record of the following addresses:

License	Applicant	Address	Comments
054326	Lester Farms	13600 NE 128 th St Suite D	
051728	Leganjafairy LLC	13536 NE 126 th PI	
		14253 23 rd Ave NE B-301	Appears to be a Seattle address.
054026	420 PM Corps	13100 NE 70 th PI	
053742	Josh’s Joint	13205 NE 124 th St #124	
054037	Stoner Haze	6157 132 nd Ave NE	
054500	The Garden LLC	11341 106 th Ave NE Suite B	We have no record of the suite number.

All other marijuana applications listed on the WSLCB web site appear to be located in appropriate zones and are more than 1,000 feet from public parks, elementary and secondary schools, child care centers and public transit centers. The City expresses no objections to issuing licenses for those applications.

Thank you for your consideration of these comments. We look forward to being informed of the applications that you select for final consideration.

Sincerely,

Kurt Triplett,
City Manager

cc:

DRAFT



CITY OF KIRKLAND

123 Fifth Avenue, Kirkland, WA 98033 425.587.3000
 www.kirklandwa.gov

MEMORANDUM

To: Kurt Triplett, City Manager
From: Eric Shields, Planning Director
Date: July 16, 2013
Subject: Marijuana Sales, Processing and Production

Recommendation

The Council considers whether changes to City zoning regulations are appropriate for marijuana sales, processing and production. If they are, Council determines the types of regulations desired and directs staff to prepare interim zoning regulations for consideration at a public hearing on September 3, 2013.

Background

State Regulations

Initiative 502 was passed by Washington voters in 2012. The initiative legalized the possession of small amounts of marijuana and directed the Washington State Liquor Control Board (Board) to develop rules for regulating the sale, processing and production of marijuana. It does not supersede, or even address, regulations pertaining to medical marijuana. Proposed rules were recently prepared by the Board and submitted for public comment. Final rules will go into effect on September 16, 2013, at which time applications for licenses may be submitted to the Board. Highlights of the rules are shown in attachment 1.

The major provisions of the rules, some of which are not mentioned in the attachment, are:

- 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 it appears that 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;

- The Board will determine the maximum number of retail licenses to be issued in each county based upon a formula that distributes the number of locations proportionate to the most populous cities within each county;
- There will be a 30 day period following the submittal of an application during which the Board will forward license applications to applicable local jurisdictions with a 20 day opportunity to submit comments. This will also occur for annual license renewals;
- Hours of operation for retail licensees are restricted to between 8 a.m. and 12 a.m.;
- Alarms and surveillance camera are required; and
- Businesses must buy liability insurance.

Kirkland Locations

When the 1000 foot restrictions are taken into account, there are relatively few locations in Kirkland where retail sales, processing or production would be allowed under these proposed rules. Attachment 2 is a map showing the restricted areas as well as properties where sales (red and orange zones) and processing or production (light blue zones) would be allowed if the City does not adopt any additional restrictions.

In summary, retail sales would be allowed only in the following locations:

- Totem Lake Business District (TLBD):
 - Properties located on the west side of the I-405/ NE 124th St. interchange; and
 - A very small triangle of land located on the west side of Slater Ave. NE;
- Market St. Corridor Business District (MSC): An area along Market St. that includes the MSC 2 zone neighborhood center located between 5th St. W and 14th Ave. W and portions of the MSC 1 "office" zone located two blocks south and three blocks north of the MSC 2 zone;
- Central Business District (CBD): at the southwest corner of 7th Ave. and 6th St;
- Rose Hill Business District (RH): along NE 85th St. near I-405; and
- A small portion of Carillon Point.

Processing and Production would be allowed only in:

- Totem Lake: the easternmost portions of the TL7 zone;
- Norkirk: a small area east of 6th St.

Issues

The question for Council consideration is whether the City should enact zoning restrictions for marijuana businesses in addition to those applying to other businesses. Examples of additional regulations include:

- Restrictions on the number of plants or ounces of marijuana allowed. For example, the City of Seattle is proposing a limit of 45 plants and 72 ounces of marijuana in certain zones (It isn't clear, but staff presumes that refers to the quantities on site at any given time);
- Maximum floor area limits. Seattle is proposing a limit of 10,000 square feet for indoor growing and processing to avoid displacing other industrial uses. (The MSC 1 and 2 zones already limit the floor area of a business to 2000 and 4000 square feet respectively);
- Prohibition on drive through facilities. (This too is already limited in MSC zones);
- Additional limitations on hours of operation. As noted above, the Board rules only restrict hours of operation to between 8 a.m. and 12 a.m.; or
- Prohibition on locating directly next to a low density zone.

Timing

As noted above, applications for licenses could be submitted to the Board beginning in mid-September. As further noted, before the Board issues a license, the City will be given the opportunity to file written objections against the proposed premises. If the Council would like to have regulations in place to potentially be used as part of the City's written objections to any license, the regulations should be in place by mid-September. There is no requirement in the rules that objections based on local regulations be considered by the Board, but it will give notice to the license applicant, who may not have knowledge of the applicable local regulations.

The Council may ask, or be asked, whether the City could adopt a moratorium or ban on the marijuana uses allowed by Initiative 502. There is no clear option to prohibit marijuana facilities entirely. Initiative 502 allows the Board to license marijuana producers, processors and retailers throughout Washington. The question is really whether the City would prevail in an action to enforce an ordinance imposing a moratorium or ban, once the operator obtains a license from the Board. This remains an open question.

There is insufficient time to have permanent Zoning Code changes in place by the time the Board starts accepting applications. Consequently, if the regulations are to be in place prior to the submittal of license applications, it would be necessary for the Council to adopt an interim ordinance on September 3, 2013 and direct that final regulations be processed through the normal code amendment procedures within six months. If this is Council's desire, staff asks that the Council provide direction on August 6 on what kinds of regulations it would like to consider. Staff will return with a proposed ordinance and schedule a public hearing for the September 3 Council meeting.

Related Enforcement Issue

The Council may have seen a recent article about the Seattle City Attorney wanting to enforce the state's prohibition on public marijuana consumption. The Kirkland City Council has already amended Title 11 of the Kirkland Municipal Code, the City's criminal code, to include RCW 69.50.445. This is the provision in Initiative 502 which prohibits the use of marijuana in view of the general public. This amendment was included as part of Ordinance O-4401, adopted February 19, 2013, which made a number of amendments to Title 11 of the KMC at the request of the Police Department. A person who violates RCW 69.40.445 is guilty of a class 3 civil infraction under chapter 7.80 RCW. The penalty for a class 3 infraction, with statutory assessments, is a total of \$103.00. Of this amount, 44.89% or \$46.24 is paid to the City and 55.11% or \$56.76 is paid to the State.

REGULATING RECREATIONAL MARIJUANA

I. Background.

Initiative 502.

In 2012, the voters of the State of Washington approved Initiative 502 which directs the Washington State Liquor Control Board (LCB) to regulate marijuana by licensing and taxing producers, processors, and retailers. The regulatory scheme requires the LCB to adopt rules before December of 2013 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 fund consisting of marijuana excise taxes, license fees, penalties and other income received by the state LCB from marijuana-related activities is created. The money in this fund is dedicated to various identified uses. 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.

Some of the licensing aspects of I-502 that are of interest to the City:

- (a) How many recreational marijuana retailers can be licensed in King County? The LCB shall, in consultation with the Washington Office of Financial Management, determine the maximum number of retail outlets that may be licensed in each county, taking into consideration (a) population distribution; (b) security and safety issues; and (c) the provision of adequate access to licensed sources of usable marijuana to discourage purchases from the illegal market.
- (b) Will the City be notified before a license for any recreational marijuana use is considered? The LCB will give notice to the City of the LCB's receipt of license application for premises located in the City. The City has 20 days to file written objections with the LCB against the applicant or against the premises for which the new or renewed license is requested.
- (c) Will there be a hearing on whether the license should issue? The LCB may hold a hearing, and if the LCB makes an initial decision to deny the license or renewal based on the City's written objections, the applicant may request a hearing.
- (d) What weight will the LCB give the City's written objections? The LCB shall give "substantial weight" to the objections from the City, "based on chronic illegal activity associated with the applicant's operation of the premises proposed to be licensed or the applicant's operation of any other licensed

premised, or the conduct of the applicant's patrons inside or outside the licensed premises.

- (e) Will the LCB notify the local jurisdiction of its decision on a license? If the license is granted, notice will be sent to the City.
- (f) Are there any prohibitions on siting, or is this left to the City? No license shall be issued for a recreation marijuana licensed use within 1,000 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 21 or older.
- (g) What about marijuana advertising? Any licensed marijuana producer, processor or retailer is prohibited from placing or maintaining any advertisement of marijuana (or marijuana product in any form) within 1,000 feet of the perimeter of a school grounds, playground, recreation center or facility, child care persons aged 21 or older, on or in a public transit vehicle or public transit shelter or on or in a publicly owned or operated property.

II. LCB Rules.

The LCB issued draft rules on May 16, 2013, and asked for comment on the draft rules by June 10, 2013. The LCB filed official draft rules with the Code Reviser on July 3, 2013. The LCB timeline provides that the LCB will hold public hearings on the proposed rules August 6-8, 2013. On August 14, 2013, rules will be adopted. On September 16, 2013, the rules will become effective. That same day, the LCB will begin accepting applications for all marijuana license types. The window for LCB license applications will initially be open for 30 days, but it may be extended. December 2013/January 2014, the LCB will begin issuing producer, processor and retailer licenses.

III. City Options.

A. Do nothing.

The Planning Department has mapped out the application of the 1,000 foot rule and identified the areas that are specifically excluded from having any recreational marijuana-related businesses. Within the remaining areas, the City could allow the existing zoning regulations to control and only allow recreational marijuana uses in zoning districts that permit production (growers), processors (incorporate plant products into edibles, liquids, or packaged bud ready for retail) and retailers (shops where marijuana products and related paraphernalia are sold). If the LCB notifies the City that an application for a license has been received, the City would transmit this information to the LCB as part of the "written objection" procedure.

B. Interim Zoning.

Another alternative is to adopt interim zoning in advance of the issuance of the final LCB Rules if the City determines additional zoning regulations are necessary. Aspects of recreational marijuana production, processing and retailing that could be regulated include but are not limited to:

- Maximum floor area limits
- Maximum number of plants/amounts of useable marijuana /marijuana product allowed at a single facility
- Special building requirements (i.e. ventilation, security system, site fencing)
- Special inspection requirements
- Whether drive-through windows allowed

C. Adopt Business Licensing Regulations.

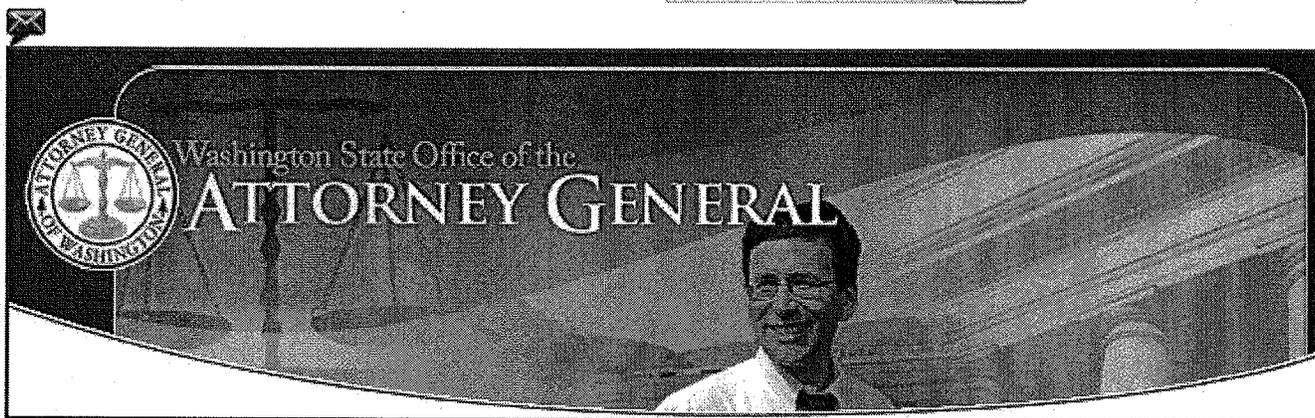
A marijuana entrepreneur with a license issued by the LCB, will still need a City business license. The City should consider whether there is a need for additional information to process a business license than that provided by an applicant for a license materials. If not, the City could request copies of the application materials submitted to the LCB. The City could specifically require a LCB license as a condition of issuing a City business license.

ShareShareShareShareMore

0

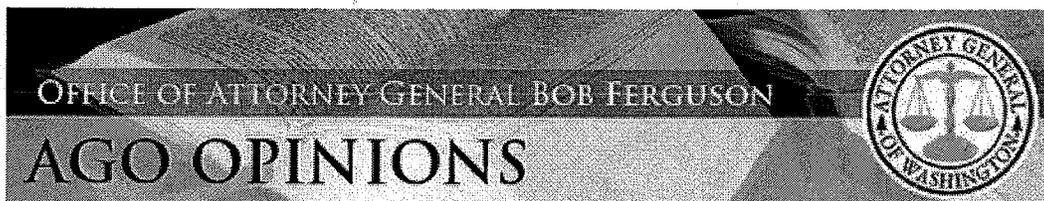
Receive Updates

Go



2014 AGO Opinion No. 2 - Whether Statewide Initiative Establishing System For Licensing Marijuana Producers, Processors, And Retailers Preempts Local Ordinances

Washington State Attorney General sent this bulletin at 01/16/2014 10:30 AM PST



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.

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

[original page 2]

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

[original page 3]

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-

[original page 4]

-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

[original page 5]

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

[original page 6]

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 unbridged 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 unbridged 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.

[original page 7]

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. . . .

[original page 8]

(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.

[original page 9]

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

[original page 10]

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. Luvane*, 118 Wn.2d 826, 835, 827 P.2d 1374 (1992).



STAY CONNECTED:





SUBSCRIBER SERVICES:

[Manage Preferences](#) | [Delete Profile](#) | [Help](#)

