



City of Clarkston

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829 5th Street • Clarkston, WA 99403

PLANNING COMMISSION

AGENDA

January 17, 2012

CITY HALL
829 5TH STREET

CALL TO ORDER: 5:30 P.M.

ROLL CALL:

APPROVAL OF MINUTES:

May 16, 2011

REGULAR BUSINESS:

- A. Collective Marijuana Gardens

UNFINISHED BUSINESS:

COMMUNICATIONS:

- A. From Public
- B. Written
- C. From Planning Commission
- D. Staff Reports

ADJOURN:



**CITY OF CLARKSTON
PLANNING COMMISSION MINUTES
May 16, 2011**

CALL TO ORDER: 5:30 P.M., Clarkston City Hall, Chair Murray
ROLL CALL: Bob Gilbertson, Larry Moser, John Murray, Jim Merrill: McCroskey excused
Staff: Jim Martin, Vickie Storey

APPROVAL OF MINUTES:
Minutes of the April 4, 2011 meeting were approved on a motion by Gilbertson/Merrill. Motion carried.

PUBLIC HEARINGS:

REGULAR BUSINESS:

A. Proposed Zone Change

PWD Martin said there is some interest in a project that would involve expansion of an existing use on a property that is not currently zoned for multi-family. No application has been received yet. Martin said that the zoning code is inconsistent in addressing residential uses in the Medical Commercial zone. In the description of MC (CMC 17.10.010(6), it states that existing and new residential uses are allowed. But the matrix does not allow residential uses. Martin suggested that the matrix be changed to allow residential uses as a Conditional Use. The Commission directed Martin to bring a proposal back to them for consideration.

Martin asked if the Planning Commission would consider the zoning of an adjacent county property if a city property applies for a zone change. The Commission said an applicant would have make a proposal and they would review it and make a recommendation.

B. Zoning Discussion, Medical Marijuana Dispensaries

Gilbertson said this topic was a discussion item at a planning short course that he attended recently. Storey said the same topic was discussed at a recent WCIA training she had attended. With the proposed changes in the laws regarding medical marijuana and the possibility that dispensaries may apply for permits or licenses, it seems prudent that the city should address the issue now.

Commission discussed whether a dispensary should be considered differently than any other commercial business. Moser said he thinks medical marijuana should be treated like any other prescription medicine and dispensed from a pharmacy. Discussed whether the issue should be addressed in zoning, similar to adult businesses. Some review of business license regulations will also take place in council.

Martin said he will look at requirements for commercial uses. It could also fall under home occupation.

Diamond Cornish, a member of the audience, said it should be treated the same as liquor sales.

Commission wants some information about how liquor stores are regulated, like proximity to schools and what other cities are doing. They also wondered if it is possible to determine the number of medical marijuana permits there are in the state.

No conclusions were reached.

COMMUNICATIONS:

Planning Commission:

Staff:

ADJOURNMENT:

Meeting adjourned at 6:16 p.m.

John Murray, Chair

ORDINANCE No. 1489

AN INTERIM ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CLARKSTON,
WASHINGTON, IMPOSING A MORATORIUM ON THE ESTABLISHMENT OF MEDICAL
CANNABIS COLLECTIVE GARDENS; DEFINING COLLECTIVE GARDENS; PROVIDING
FOR A PUBLIC HEARING; DECLARING AN EMERGENCY; AND ESTABLISHING AN
EFFECTIVE DATE.

WHEREAS, Initiative Measure No. 692, approved November 3, 1998, created an affirmative defense for “qualifying patients” to the charge of possession of cannabis; and

WHEREAS, the initiative and current Chapter 69.51A RCW are clear that nothing in its provisions are to be “construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale or use of marijuana for non-medical purposes”; and

WHEREAS, the City acknowledges the right of qualified health care professionals to recommend the medical use of cannabis, acknowledges the affirmative defense available to qualifying patients from the possession of cannabis as well as the right of patients to designate a “designated provider” who can “provide” rather than sell cannabis to “only one patient at any one time”; and

WHEREAS, the 2011 State Legislature passed E2SSB 5073 (“the Act”) and the Governor has signed the bill but has vetoed several sections of the bill; and

WHEREAS, E2SSB 5073 was effective on July 22, 2011; and

WHEREAS, the Act authorizes “collective gardens” which would authorize certain qualifying patients the ability to produce, grow and deliver cannabis for medical use; and

WHEREAS, the collective garden development may allow development that is incompatible with nearby existing land uses and lead to erosion of community character and harmony; and

WHEREAS, the City Council finds that it is in the public interest that any zoning and development regulations are consistent with both federal and state law; and

WHEREAS, the City Council deems it to be in the public interest to establish a zoning moratorium pending local review of the anticipated changes in the law; and

WHEREAS, pursuant to RCW 35A.63.220 a public hearing must be held within 60 days of the passage of this Ordinance;

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

Section 1.0 Pursuant to the provisions of RCW 35A.63.220, a zoning moratorium is hereby enacted in the City of Clarkston prohibiting the establishment, location, operation, licensing, maintenance, or continuation of any medical cannabis collective garden, whether for profit or not for profit, asserted to be authorized or actually authorized under E2SSB 5073, Chapter 181, Laws of 2011, Chapter 69.51A RCW, or any other laws of the State of Washington. No building permit, occupancy permit, or other development permit or approval shall be issued for any of the purposes or activities listed above, and no business license shall be granted or accepted while this moratorium is in effect. Any land use approvals, business licenses, or other permits for any of these operations that are issued as a result of

error or by use of vague or deceptive descriptions during the moratorium are null and void, and without legal force or effect.

Section 2.0 A “Medical Cannabis Collective Garden” is an area or garden where qualifying patients engage in the production, processing, transporting, and delivery of cannabis for medical use as set forth in the Act and subject to the limitations therein.

Section 3.0 Medical cannabis collective gardens as defined in this Ordinance are hereby designated as prohibited uses in the City of Clarkston and a moratorium related these uses is hereby established. No business license shall be issued to any person or entity for a medical cannabis collective garden, which is defined as a prohibited use under the Ordinances of the City of Clarkston.

Section 4.0 Pursuant to RCW 35A.63.220, the City Council sets the City Council Regular Meeting of October 10, 2011, which begins at 7:00 p.m. at Clarkston City Hall, 829 5th Street, Clarkston, Washington 99403, as the date and time for a public hearing on the continuance of this moratorium. The City Clerk is directed to cause appropriate notice of such hearing to be given.

Section 5.0 Should any section, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this Ordinance be pre-empted by state or federal law or regulation, such decision or pre-emption shall not affect the validity of the remaining portions of this Ordinance or its application to other persons or circumstances.

Section 6.0 This Ordinance shall not be codified.

Section 7.0 The above “Whereas” clauses of this Ordinance constitute specific findings by the Council in support of passage of this Ordinance.

Section 8.0 The City Council declares that an emergency exists requiring passage of this Ordinance for the protection of public health, safety, welfare, and peace based on the Findings set forth in Section 7.0 above. This Ordinance shall take effect and be in full force immediately upon passage and shall expire March 1, 2012 unless extended or repealed according to law.

PASSED BY THE CITY COUNCIL, OF THE CITY OF CLARKSTON, WASHINGTON,
this 26th day of Sept, 2011.

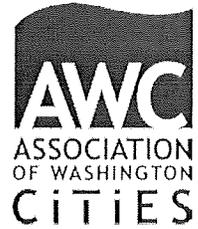
Donna M. Engle, Mayor

Attest:

By _____
Vicki Storey, City Clerk

Approved as to Form:

James Grow, City Attorney



Medical marijuana

Changes to Washington's medical marijuana law took effect on July 22, 2011. What does this mean for cities?

Cities should pay close attention to several key provisions in the law:

Civil and criminal protections

The new law grants some additional civil protections for medical marijuana patients. (For example, a patient cannot be denied an organ transplant based solely on use of medical marijuana.) The bill as passed by the Legislature would have granted protection from arrest and prosecution to those participating in a voluntary state registry. However, the registry provisions were among the vetoed sections. The result is a continuation of the status quo, where qualified patients and providers may use an affirmative defense at trial, but have no specific protection from arrest and prosecution.

Dispensaries

The proliferation of retail medical marijuana dispensaries was one of the primary drivers behind the legislation and one of the most compelling issues facing cities. The law, as it takes effect, does not legalize dispensaries. In fact, the law contains a more stringent requirement with a new 15-day waiting period before a provider can switch to serving a new patient. It is widely understood that the changes clarify that dispensaries are not permitted under state law.

Collective gardens

The law provides a new option for marijuana production in the form of collective gardens. A collective garden can serve up to 10 qualified patients and can have up to 15 plants per patient, but no more than 45 plants and no more than 24 ounces of useable cannabis per patient up to a total of 72 ounces. Only qualified patients may participate in or receive cannabis from a collective garden. However, there is no limit on the number of collective gardens a patient may be a member of and no limit on the amount of time that they must maintain their membership. The lack of regulations is cause for concern that a system of interconnected collective gardens could effectively operate as commercial dispensaries.

Land use regulations

Cities are allowed to adopt and enforce zoning requirements, business licensing requirements, health and safety requirements, and business taxes on the production, processing, and dispensing of cannabis. Based on this provision, a number of jurisdictions are weighing the need to adopt regulations specific to collective gardens. Those considering this type of action should consult with their city attorney.

Local government liability

The law provides for immunity from civil and criminal liability for actions taken by cities and their employees in good faith and within the scope of their duties.

The Medical Marijuana Act

In November 1998, Washington voters approved Initiative 692 – the Medical Marijuana Act. The initiative's primary focus was to create an affirmative defense against criminal prosecution for marijuana possession for qualifying patients, their providers, and their physicians.

With the exception of a few amendments in 2007, the Act remained relatively unchanged until the proliferation of marijuana dispensaries led to a call for statewide regulation.

In 2011, the Legislature passed **E2SSB 5073**, which would have created a state system of regulation for producing and dispensing marijuana for medical purposes. However, significant sections of the bill were vetoed by the Governor – including all provisions for state regulation.

What are cities doing in response?

There are still many unanswered questions about the changes to state law, especially around collective gardens. A number of cities are concerned about the possible proliferation of collective gardens, multiple collective gardens co-locating, and the potential impacts on neighbors.

Cities are responding in a variety of ways including enacting moratoria, prosecuting dispensaries, establishing regulations, and simply taking no action. In addition, the City of Seattle recently passed an ordinance that would require any commercial medical marijuana operation to comply with all applicable laws including city business licensing and taxing requirements.

With the ambiguity surrounding medical marijuana, AWC recommends that cities consult with their legal counsel and carefully weigh the risks before taking any action.

Can we expect clarification or changes to the medical marijuana law?

The Legislature is likely to revisit marijuana laws during the 2012 session. In fact, they may have little choice as an Initiative to the Legislature – backed by Seattle City Attorney Pete Holmes, former U.S. Attorney John McKay, the American Civil Liberties Union, and others – is in the signature-gathering process.

This initiative goes beyond medical marijuana: it would legalize marijuana for people older than 21 and authorize the state Liquor Control Board to regulate and tax marijuana. Proponents have until December 30 to get the required 241,153 signatures. If they succeed, the Legislature has three options when they convene in January 2012:

- Approve the initiative and it becomes law;
- Reject or refuse to act on the initiative, and it will be placed on the November 2012 ballot; or
- Pass an amended version, and both versions go to the November ballot.

What are other states and the federal government doing?

Sixteen other states and Washington, D.C., have some form of medical marijuana law. Of particular note is Colorado, with 17,000 registered patients and new dispensary regulations, and California, with 11,000 registered patients and unregulated dispensaries that have an affirmative criminal defense.

Any use of marijuana, including the medical use, remains prohibited under the federal Controlled Substances Act. Anyone who manufactures, distributes, dispenses, or possesses marijuana for any purpose still may be prosecuted under federal law. (This is why medical providers are unable to “prescribe” marijuana and pharmacies are unable to dispense it.)

In June 2011, the U.S. Department of Justice issued a memo reiterating its position that marijuana in any form remains illegal under the Controlled Substances Act and that the Department retains its right to prosecute those who produce or possess marijuana, as well as those who knowingly facilitate such activities. They continue to indicate that they will prioritize their resources in such a way that they are unlikely to target an individual patient who is in compliance with state law, but expressed concerns about the proliferation of commercial operations.

Where can I get more information?

MRSC has posted a variety of useful information, including examples of ordinances, on its website at www.mrsc.org/subjects/legal/medmarireg.aspx

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(Updated 11-18-11)

MEDICAL MARIJUANA USES LOCAL REGULATION

by

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MEDICAL MARIJUANA USES LOCAL REGULATION

I. 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.¹ 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.² Each schedule corresponds with controls for the manufacture, distribution, registration, labeling, packaging, production quotas, drug security, recordkeeping, as well as use of the listed substances.³

Marijuana is classified as a Schedule I drug.⁴ Drugs with a high potential for abuse, lack of any accepted medical use and absence of any accepted safety for use in medically supervised treatment are labeled Schedule I.⁵ By classifying it as a Schedule I drug, the manufacture, distribution or possession of marijuana became a criminal offense (with one exception for a research study).⁶ While there have been repeated efforts to reclassify marijuana, it remains a Schedule 1 drug.⁷

State Law. No state can authorize violations of federal law. The CSA supersedes state regulation of marijuana, even when it is used for medicinal purposes.⁸

However, the federal government has shifted its enforcement efforts away from those individuals in compliance with state laws governing medical marijuana. In a Memorandum for Selected United States Attorneys, David Ogden, Deputy Attorney General, advises:

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's [of Justice] efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. *As a general matter, pursuit of these priorities should*

¹ 21 U.S.C. Section 841(a)(1).

² 21 U.S.C. Section 811, 812.

³ 21 U.S.C. Section 821-830; CFR Section 1301 *et seq.*

⁴ 21 U.S.C. Section 812(c).

⁵ 21 U.S.C. Section 812(b)(1).

⁶ 21 U.S.C. Section 823(f); 841(a)(1), 844(a).

⁷ See, *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1133 (1994).

⁸ *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 2198, 162 L.Ed.2d 1 (2005).

*not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana is unlikely to be an efficient use of federal resources. . . .*⁹

At least sixteen states have now adopted laws allowing the medical use of marijuana.¹⁰ The issue whether state laws allowing the medical use of marijuana conflict with the CSA has been addressed by some courts outside Washington. The courts have held that state medical marijuana laws are not in conflict because they do not legalize medical marijuana.¹¹ According to the California courts, the CSA preempts state laws that positively conflict where simultaneous compliance with both sets of laws is impossible,¹² but the initiative measure adopted by the California voters “simply decriminalizes for the purposes of state law certain conduct related to medical marijuana.”¹³

B. Washington State Law. 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

In 2011, the Washington State Legislature passed ESSSB 5073, which provides that 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 meet other qualifications set forth in Section 401 of the bill).

⁹ Memorandum dated October 19, 2009 on the Justice Blog (<http://blogs.usdoj.gov/blog/archives/192>), sent to United States Attorneys.

¹⁰ Alaska, Arizona, California, DC, Delaware, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, see, “Medical Marijuana, Pro and Con,” <http://medicalmarijuana.procon.org>. According to this website, the states vary in the amount of usable cannabis possession limits (from 1 oz. (Alaska) to 24 oz. (Washington and Oregon) as well as the number of plants (from 6 plants to 24 plants (Oregon)).

¹¹ California’s Compassionate Use Act “does not conflict with federal law because on its face it does not purport to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from the California drug laws.”

¹² *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 81 Cal.Rptr.3d 461 (2008).

¹³ *Pack v. Superior Court*, 199 Cal. App. 4th, 1070, ___ Cal. Repr.3d ___ (10-4-11).

¹⁴ RCW 69.51A.005, 69.51A.020.

This bill directed employees of the 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. The Governor vetoed these provisions, together with many others relating to dispensaries (including all of the definitions in the bill).¹⁵

The bill's provisions relating to individual cultivation of medical cannabis and cultivation in collective gardens were not vetoed. 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.¹⁶ 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.¹⁷

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."¹⁸ 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."¹⁹

C. Local Response.

Moratoria. Cities and towns may adopt moratoria to address medical marijuana uses.²⁰ A moratorium is an emergency measure adopted without public notice or public hearings, designed to preserve the status quo while the

¹⁵ See, letter from Christine Gregoire, Governor, April 29, 2011, re: ESSSB 5073.

¹⁶ RCW 69.51A.0002.

¹⁷ *Id.*

¹⁸ RCW 69.51A.00092.

¹⁹ Section 1101 of 69.51A.00091. Of interest is *Qualified Patients Association, et al. v. City of Anaheim*, 187 Cal. App. 4th 734, 115 Cal.Rptr. 3d 89 (2010):

[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, 385, 68 Cal. Rptr. 3d 656 (2007)], governmental entities do not incur aider and abettor or direct liability by complying with their obligations under the state medical marijuana laws.

²⁰ Cities and towns planning under the Growth Management Act: RCW 36.70A.390. Non-code cities and towns that do not plan under GMA: RCW 35.63.200. Code cities not planning under GMA: RCW 35A.63.220.

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 medical marijuana dispensaries may be submitted.

There are a number of reasons cities and towns may wish to adopt moratoria on medical marijuana dispensaries. First, the legality of the use is in doubt, given the Governor's vetoing of the portions of ESSSB 5073 relating to dispensaries. Second, the bill directed the department of Health to develop strict rules for the regulation of dispensaries, and these provisions were also vetoed, so there are no standards governing dispensaries. For example, the bill required that the department of Health address such details as the physical standards for dispensaries, maximum amounts of cannabis that may be kept at one time in the dispensary, establishing licensing requirements, limiting the number of dispensers that may be licensed in each county, establishing labeling requirements for cannabis and containers for cannabis.²¹ Until the status of medical marijuana dispensaries is clarified by the Washington State Legislature, cities and towns may wish to adopt moratoria to maintain the status quo.²²

Another alternative is to simply consider medical marijuana dispensaries illegal, and deny any development applications that are submitted for dispensaries. Given that the Legislature will be considering this issue during the 2011-2012 legislative session, it may make more sense to simply adopt and retain the moratorium until the Legislature acts. Otherwise, an appeal of the city's denial may be filed, which may unnecessarily absorb attorneys' fees and city resources, and which may be rendered moot by the adoption of new laws.

Interim Zoning. Cities and towns may adopt interim zoning in response to an emergency situation to regulate use of land pending amendments to the zoning code.²³ An interim zoning ordinance may be more appropriate to address collective gardens because: (1) RCW 69.51A.0002 expressly allows collective gardens; and (2) many of the land use impacts of collective gardens are already known (many ordinances relating to collective gardens are online, together with information supporting the existence of secondary land use impacts).

D. Procedure for Adoption of Moratorium or Interim Zoning.

Both moratoria and interim zoning follow the same procedures for adoption. The moratorium and interim zoning ordinance is adopted immediately, using emergency adoption procedures, without public notice, or a public

²¹ See, Section 702 of ESSSB 5073.

²² Although the California Compassionate Use Act (medical marijuana) is different from ESSSB 5073, there are California decisions in which courts have held that moratoria on medical marijuana dispensaries were within a city's authority to prohibit uses that may conflict with plans or zoning pending a study. *City of Claremont v. Kruse*, 177 Cal.App.4th 1153, 100 Cal.Rptr.3d1 (2009).

²³ Interim zoning is adopted under the same authority and procedures as moratoria.

hearing.²⁴ Usually, emergency adoption procedures require that there be an affirmative vote of a majority of the council plus one.²⁵ The emergency clause describes the need for immediate adoption – not just for the public health and safety (this describes the need for the moratorium, which is to allow time to study the issue and develop new regulations to address the secondary land use impacts of the use, tailored to health and safety concerns). The need for emergency adoption is to prevent incompatible uses from siting in the city or town before the study is done to determine the most appropriate location or development standards.

A moratorium or interim zoning ordinance may be in place for six months. If the city or town chooses to adopt it for a year, a work plan must be developed.²⁶

A public hearing must be held within 60 days after the adoption of the moratorium. During this hearing, the public may present testimony on the issue of a moratorium, and the staff usually has comments regarding the secondary land use impacts which require further study.

The city or town must comply with SEPA after adoption of the moratorium. There is a provision in SEPA for emergencies²⁷ and procedural actions that may be applicable.²⁸ A copy of the moratorium or interim zoning ordinance must also be sent to the Department of Commerce.²⁹

During the period of the moratorium, the city or town must research the secondary land use impacts of medical marijuana collective gardens in preparation for the drafting of “permanent” zoning. These impacts have been well documented by the other states with medical marijuana laws in ordinances available on the internet. Research must be done on ways to address the negative aspects of the secondary land use impacts. It is always helpful to call the planners actually faced with enforcement of an ordinance to find out whether the adopted ordinance adequately addresses the land use impacts, or if there are other problems with enforcement. Because there will be a fee associated with any new permit process, research should also be done on the expected costs of the permit administration, so that the city or town can adopt a resolution to set the permit fee. Permit application forms must also be developed.

A model ordinance is then drafted, which is forwarded to the planning commission for review. The planning commission holds public hearings on the draft ordinance and sends its recommendation to the council. SEPA is

²⁴ See, RCW 36.70A.390.

²⁵ For example, the provisions relating to emergency adoption in code cities appears in RCW 35A.12.130.

²⁶ RCW 36.70A.390.

²⁷ WAC 197-11-880.

²⁸ WAC 197-11-800(19).

²⁹ RCW 36.70A.106.

performed on the new ordinance. After that point, the council may adopt the new ordinance at a public meeting (or if changes have been made to the planning commission's recommendation, the council must hold additional hearings³⁰).

The city or town may repeal the moratorium or interim zoning prior to the expiration of the six month period. Care should be taken to either extend the moratorium or interim zoning ordinance, so that they do not expire prior to adoption of the new regulations.

E. Adoption of "Permanent" Zoning Regulations.³¹

Under RCW 69.51A.00092, local jurisdictions may adopt zoning regulations on the production, processing or dispensing of cannabis or cannabis products. It is a good idea to include "whereas" sections or "findings" that support the need for the particular zoning regulations, which clearly identify the land use impacts of the medical cannabis cultivation. Not every land use impact can be addressed – consideration must be given to the limits of municipal police power.

Municipal zoning regulations enacted pursuant to statutory authority will be held constitutional as a valid exercise of the police power "if they bear a substantial relation to the public health, safety, morals or general welfare."³² There are two inquiries that must be made when measuring legislative enactments against the permissible bounds of police power.

The first question a court considers is whether the zoning ordinance tends to promote the public health, safety, morals or welfare.³³ "If it does, the wisdom, necessity and policy of the law are matters left exclusively to the legislative body."³⁴ The second inquiry is "whether the legislation bears a reasonable and substantial relation to accomplishing the purpose established by the first inquiry."³⁵ "If the court can reasonably conceive of a state of facts which would warrant the legislation, those facts will be presumed to exist" and it will be presumed that the legislation was passed with reference to those facts.³⁶

A city or county's adoption of land use regulations applicable to medical cannabis may also be subject to federal (the CSA) or state (chapter 69.51A RCW) preemption. There are no cases in Washington challenging medical cannabis ordinances on preemption grounds yet. In California, there is a disagreement in the courts of appeal as to whether the state or local medical

³⁰ For GMA cities: RCW 36.70A.035(2).

³¹ Because of the uncertainty surrounding medical marijuana dispensaries, they will not be addressed here.

³² *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 26, 586 P.2d 860 (1978).

³³ *Duckworth*, 91 Wn.2d at 26.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

marijuana laws are preempted (the question is whether they pose an obstacle to the accomplishment of the purposes of the federal CSA, because the purpose of the federal CSA is to combat recreational drug use, not to regulate a state's medical practices).³⁷

The California court of appeals recently determined that a city's ordinance which establishes a *permit scheme* for medical marijuana collectives (or collective gardens) is preempted by the CSA.³⁸ While this case is on appeal to the California Supreme Court, the conservative approach would be to carefully integrate this court's holding into any "permanent" zoning regulations, at least until there is contrary authority. Basically, this court held that the City of Long Beach's lottery and permit system (the initial permit fee was over \$14,000 and the annual fee was \$10,000 for a collective with between 4 and 500 members, which fee increased with the size of the collective) didn't merely decriminalize, it actually authorized and licensed "the large scale cultivation and manufacture of marijuana." While it was argued on behalf of the city that the ordinance merely identified those collectives against which the city would not bring violation proceedings, the court disagreed, finding that it was "the possession of the permit itself, not any particular conduct, which exempts a collective from violation proceedings." However, the court did not find that the zoning restrictions unassociated with the permit system were preempted.³⁹

Based on the existing law, it appears that a city may adopt further limitations on collective gardens beyond those imposed by chapter 69.51A RCW, as long as they meet the general police power requirements and do not, in any way, permit or authorize an activity that is prohibited by the federal CSA. One way cities could address the preemption issue is to consider the adoption of ordinances addressing the cultivation of medical cannabis as a "permitted use" in certain zones, subject to a list of zoning restrictions. This would not require a separate permit, but the activity would have to take place according to the zoning code standards, just like any other use permitted as of right. If the cultivation of medical cannabis is not allowed in all zoning districts, there may be need to distinguish between the cultivation of medical cannabis for individual use from cultivation in collective gardens.

In sum, the conservative approach (until the issue raised by the *Pack* case is finally decided) would be to eliminate any permit system from an ordinance

³⁷ Compare *Qualified Patients Assn. v. City of Anaheim*, *supra*, 187 Cal. App. 4th at p. 760; *County of San Diego v. San Diego NORML*, *supra*, 165 Cal. App. 4th at p. 826 and *Pack v. Superior Court*, 199 Cal. App. 4th 1070 (10-4-11).

³⁸ *Pack v. Superior Court*, 199 Cal. App. 4th 1070 (10-4-11).

³⁹ The *Pack* court found that the following provisions were not federally preempted: provisions that (1) prohibited a medical marijuana collective from providing medical marijuana to its members between 8:00 a.m. – 10:00 p.m.; (2) prohibiting a person under the age of 18 from being on the premises of a medical marijuana collective unless that person is a qualified patient accompanied by his or her physician, parent or guardian; and (3) prohibiting the collective from allowing the consumption of alcohol on the property or in its parking area;.

adopting zoning code standards. However, this would not prevent the city from enforcing violations of the zoning restrictions through the zoning code enforcement or nuisance process.

F. Cultivation of Medical Cannabis for Individual Use.

Identification. Chapter 69.51A RCW provides that an individual qualifying patient or designated provider may cultivate medical cannabis for personal use within his/her private residence, which allows the qualifying patient or designated provider to: (a) possess no more than fifteen (15) cannabis plants; (b).possess no more than twenty-four (24) ounces of usable cannabis; (c) possess no more cannabis product than what could reasonably be produced with no more than twenty-four (24) ounces of usable cannabis; or (d) possess a combination of usable cannabis and cannabis produce that does not exceed a combination total representing possession and processing of no more than twenty-four (24) ounces of usable cannabis. If a person is both a qualifying patient and a designated provider for another patient, the person may possess no more than twice the amounts described this section, whether the plants, usable cannabis, and cannabis product are possessed individually or in combination between the qualifying patient and his or her designated provider. (This does not list all of the limitations on such use in chapter 69.51A RCW. This summary is only meant to provide sufficient information to distinguish between cultivation of medical cannabis for personal use, as opposed to cultivation of medical cannabis in a Collective Garden.)

Zoning Code Standards. Here are some ideas for the types of zoning standards for cultivation of medical cannabis for personal use that should be considered:

1. How large should the area be within the residence?
2. Should there be a wattage limitation on the cannabis cultivation lighting?
3. Should there be a prohibition on the use of gas products (C02, butane, etc.) for cultivation?
4. Should there be a prohibition on medical cannabis cultivation and sales as home occupations in all zones?
5. Should there be a prohibition on exterior evidence of medical cannabis cultivation either within or outside the residence from the right-of-way?.
6. Should there be a requirement that the qualified patient or designated provider reside in the residence where the medical cannabis cultivation occurs?

7. Should there be a requirement that the residence shall maintain a kitchen, bathrooms, and primary bedrooms for their intended use and not be used primarily for medical cannabis cultivation?

8. Should there be a requirement that the medical cannabis cultivation area be in compliance with the current, adopted edition of the Washington State Building Code provisions regarding natural ventilation or mechanical ventilation (or its equivalents)?

9. Should there be a requirement that the medical cannabis cultivation area not adversely affect the health or safety of the nearby residents by creating dust, glare, heat, noise, noxious gasses, odor, smoke, traffic, vibration, or other impacts, or be hazardous due to use or storage of materials, processes, products or wastes?

G. Cultivation of Medical Cannabis in Collective Gardens.

A collective garden is authorized under RCW 69.51A.0002, which allows qualifying patients to share responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use such as, for example, a location for a collective garden; equipment, supplies and labor necessary to plant, grow and harvest cannabis; cannabis plants, seeds and cuttings, equipment supplies and labor necessary for proper construction plumbing, wiring and ventilation of a garden of cannabis plants.

Qualifying patients may create and participate in collective gardens for the purpose of producing, processing, transporting and delivering cannabis for medical use subject to the following conditions: (1) no more than ten qualifying patients may participate in a single collective garden at any time; (2) a collective garden may contain no more than fifteen plants per patient up to a total of forty-five plants; (3) a collective garden may contain no more than twenty-four ounces of usable cannabis per patient up to a total of seventy-two ounces of usable cannabis; and (4) a copy of each qualifying patient's valid documentation or proof of registration with the registry established in state law, including a copy of the patient's proof of identity, must be available at all times on the premises of the collective garden.; and (5) no usable cannabis from the collective garden may be delivered to anyone other than one of the qualifying patients participating in the collective garden.

Here are some questions to consider when deciding what zoning restrictions should be adopted for collective gardens:

1. *Location.*

a. Should the collective gardens be allowed indoors *only*, or indoors *and* outdoors?

b. Should the collective gardens be confined to only one zoning district in the city or town?

c. Should the collective gardens be allowed in all zoning districts in the city or town?

d. Should the collective gardens be prohibited from residential zones?

(See standards for medical marijuana cultivation in residential zones adopted by the City of Arcata, California,⁴⁰ which requires that the residence maintain a kitchen, bathroom, primary bedrooms for their intended uses (not growing marijuana); a prohibition on cultivation and sales in residential zones as a home occupation or accessory use; a prohibition on sales of medical marijuana by the qualified patients, and a limitation on the square footage of the cultivation area in the home (not to exceed 50 square feet). Arcata also imposes limits on the cultivation of medical marijuana in agricultural or industrial zones (cultivation must occur within a self-contained structure that is ventilated and contains a one-hour fire wall; no on-site displays of medical marijuana, the facility must comply with environmental regs for storm water pollution, wastewater diversion, greenhouse gas reduction and energy efficiency.

e. Should there be separation and distance limitations on collective gardens?

(i) Should collective gardens be separated a certain distance from other collective gardens?

(ii) Should collective gardens be separated a certain distance from “sensitive uses” such as schools and youth oriented facilities?

f. Should there be both – should collective gardens be limited to one zone (industrial) in the city or town, and should the collective gardens be separated a certain distance from other collective gardens or sensitive uses in that one zone?

2. *Secondary Land Use Impacts.*

a. Light.

(i) Cannabis grown indoors may require the use of lights, may overload circuits and cause a risk of fire.

⁴⁰ *City of Arcata Zoning Standards for Medical Marijuana: An example of comprehensive regulation*, Nancy Diamond, City of Arcata City Attorney, League of California Cities Spring Conference, May, 2010.

(ii) Cannabis grown outdoors may use lights to deter theft, which may impact neighbors.

(iii) A lack of lighting around the property may hide criminal activity.

b. Odor.

(i) There may be a strong smell of cannabis plants growing outdoors which may become an attractive nuisance – alerting persons to the presence of growing plants. This could create the risk of burglary, robbery.

(ii) The strong smell of cannabis growing outdoors may be offensive to neighbors.

(iii) Consider separating collective gardens a certain distance from each other to prevent odor impacts?

c. Noise. Is there a lighting system powered by diesel or gas generators?

d. Security.

(i) Should the property be completely fenced to prevent theft/criminal activity?

(ii) Should there be lockable gates to prevent unauthorized entry?

(iii) Should there be an alarm system?

(iv) Should there be bars on the windows to prevent unauthorized entry?

(v) Should the collective garden be prohibited from residential zones if security is an issue?

f. Size Limits.

(i) Should the area of cultivation in a collective garden be limited to prevent an entire home from being transformed from residence to grow operation?

(ii) Should collective gardens be separated from other collective gardens so that negative impacts are not magnified?

(iii) Should there be only one collective garden per parcel?

g. Signs. Should signs designating the site as a collective garden be prohibited to reduce theft?

G. Public Record Requests. If there is no permit or business license scheme for collective gardens, it is less likely that people may ask for public records from the city (permit applications, permit application materials, business license applications, as examples) in order to discover the location of collective garden for purposes of joining, theft, vandalism.

H. Nuisance Regulations.

City's may wish to amend nuisance their regulations to make a violation of the codes relating to collective gardens to be a public nuisance, subject to enforcement as a nuisance (abatement).

For all code enforcement procedures, the city attorney should ensure that the code does not create a duty to enforce. Enforcement of codes relating to collective gardens, like all other codes, should be performed according to the discretion of the official in charge of enforcement, depending on the severity of the violation and available funds.

The code enforcement procedure should be the same as other violations – issuance of a notice of violation, hearing before hearing officer, written decision, allow an appeal to court and if no appeal is filed, allow for abatement of nuisance in superior court.



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United States Attorney Jenny A. Durkan Western District Of Washington

Search Warrants Served In Investigation Of Marijuana Trafficking And Money Laundering

FOR IMMEDIATE RELEASE

November 15, 2011

Today, Drug Enforcement Administration agents and local law enforcement executed search warrants in four ongoing federal investigations in Western Washington relating to illegal drug distribution and other crimes in violation of federal law. Each of the investigations targets commercial enterprises that purport to operate as "medical" marijuana establishments but also fail to comply with applicable state law.

As set forth in the search warrant affidavits unsealed by the U.S. District Court today, these businesses attracted the attention of federal law enforcement for a number of reasons: their failure to abide by state medical marijuana guidelines; indications that they were distributing large amounts of drugs; and evidence they were laundering large amounts of money. Some of these marijuana stores were the subject of complaints from their surrounding communities as well as medical marijuana supporters, concerned about businesses operating outside the letter and spirit of state law. One operator was arrested this morning for violating the court ordered terms of his federal supervised release for a prior federal conviction.

The following is a statement from U.S. Attorney Jenny A. Durkan on the ongoing investigations:

"The activities today and the ongoing investigations are targeted actions consistent with Department of Justice policy and guidelines. Our job is to enforce federal criminal laws. In doing so, we always prioritize and focus our resources. As we have previously stated, we will not prosecute truly ill people or their doctors who determine that marijuana is an appropriate medical treatment. However, state laws of compassion were never intended to protect brazen criminal conduct that masquerades as medical treatment. In determining how to focus our drug enforcement resources, we will look at the true nature and scope of an enterprise, and its impact on the community. We will continue to target and investigate entities that are large scale commercial drug enterprises, or that threaten public safety in other ways. Sales to people who are not ill, particularly our youth, sales or grows in school zones, and the use of guns in connection with an enterprise all present a danger to our community."

Those identified in the search warrant affidavits are presumed innocent unless and until proven guilty beyond a reasonable doubt in a court of law.

[Return to Top](#)



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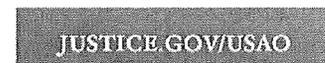
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- HOME
- ABOUT
 - Our District
 - FAQ
 - Getting Here
- MEET THE U.S. ATTORNEY
- NEWS
- DIVISIONS
 - Org Chart
 - Civil
 - Criminal
- PROGRAMS
 - Community Outreach
 - PSC
 - PSN
 - Victim-Witness
- JOBS
 - Attorneys Support
 - Law Students
 - Students
- CONTACT

- Site Map
- Accessibility
- FOIA
- Privacy Policy
- Legal Policies & Disclaimers
- Justice.gov
- USA.gov
- En Español

MEMORANDUM

To: Clarkston Planning Commission

From: Joel Hastings, Chief of Police

Subject: The Public Safety Impact of Medical Marijuana Collective Gardens

Date: January 16, 2012

Recent legislation from Washington Senate Bill 5073 allows qualifying patients and their designated providers to form a "collective garden". Collective gardens are limited to ten qualifying patients and a total of forty-five marijuana plants and seventy-two ounces of usable marijuana.

There are a number of factors associated with the issue of medical marijuana collective gardens that impact public safety. Collective gardens may allow development that is incompatible with nearby existing land uses.

Impact on Public Safety

Marijuana is a high value drug. Based on the current street value of approximately \$3000.00 per pound and \$2500.00 (average) per plant the value of marijuana at a collective garden (72 ounces and 45 plants) is approximately \$126,000.

Medical marijuana is an attractive target for would be thieves and illicit drug distributors. Throughout the nation medical marijuana has been the target of thefts, burglaries, and armed robberies. Regional and local examples can be found in Spokane, Pullman, and Clarkston.

Spokane Valley, Washington had up to nearly a dozen medical marijuana dispensaries in their jurisdiction last year. During that time period, there were approximately six home invasion robberies that were in some manner associated with a dispensary.

In May, 2011 a home invasion robbery occurred in Pullman where the victim was tied up and robbed at gun point. The intended target was a medical marijuana distributor, however the distributor had since moved and the suspects targeted the wrong apartment. At least one of the suspects was a Clarkston resident.

Over the last two years Clarkston/Asotin County have had three reported burglaries of personal medical marijuana grows. While violent crimes related to medical marijuana have been documented, we don't know how many go unreported.

Collective marijuana grows involving up to ten individuals could also increase traffic to and from the operation. The potential for increased noise and odor are other issues to be considered.

Local Regulations

It is my recommendation that Clarkston consider the following when deciding what zoning restrictions should be adopted for collective gardens;

- 1) Location.
 - a. Should the collective gardens be allowed indoors only?
 - b. Should collective gardens be confined to one zoning district (industrial) or allowed in several?
 - c. Should collective gardens be prohibited from residential neighborhood zones?
 - d. Should there be certain distance from other collective gardens?
 - e. Should collective gardens be separated a certain distance from "sensitive uses" such as schools, churches, and youth oriented facilities?
- 2) Secondary Land Use Impacts
 - a. Lighting, odor, noise, security, size limits, signs.