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CASE REPORT

MEDICAL MARIJUANA - COLLECTIVE GARDENS - PREEMPTION AND CONFLICT WITH STATE LAW. Cities and towns have the authority to ban medical marijuana collective gardens, which are not legalized under state law. *Cannabis Action Coalition v. City of Kent*, No. 70396-0-I, Court of Appeals Div. I (March 31, 2014).

I. Facts. In 2011, the Washington legislature adopted ESSSB 5073, which amended the Washington State Medical Use of Cannabis Act ("MUCA"), codified at Chapter 69.51A RCW. While the legislature intended for the bill to create a comprehensive regulatory scheme whereby patients, physicians, processers, producers, and dispensers would be registered with the state Department of Health, Governor Gregoire vetoed all sections of the bill that would have established the state registry. She left intact those sections of the bill that did not create or were not wholly dependent on the creation of a state registry. RCW 69.51A.085 allows qualified patients to establish collective gardens for the purpose of growing medical marijuana, subject to certain conditions. One condition on qualifying patients' participation in collective gardens is that a copy of each qualifying patient's valid documentation or proof of registration with the state registry, along with a copy of the patient's proof of identity, be available at all times on the premises. The statute also provides that any person knowingly violating the provisions of the statute would not be entitled to the "protections" of the MUCA. While RCW 69.51A.040 attempted to provide qualifying patients with immunity from arrest or prosecution, this immunity was only available if the patient had registered with the state, which did not exist as a result of the Governor's veto. Therefore, the only protection available under the MUCA is an affirmative defense to charges of violations of state law through proof at trial according to RCW 69.51A.043. Given this background, the City of Kent enacted an ordinance banning collective gardens within the city limits. The Cannabis Action Coalition and other plaintiffs sued, intending to participate in a collective garden in Kent. The trial court ruled in favor of Kent, stating that the City had the authority to ban collective gardens, that the ordinance was not preempted by state law, and that the ordinance did not violate any constitutional rights of the plaintiffs.

II. Applicable Law and Analysis. The Court of Appeals affirmed the trial court and held that the City had the authority to ban medical marijuana collective gardens. To reach that determination, the Court first examined the language of the MUCA in light of the Governor's extensive veto and concluded that, contrary to the plaintiffs' belief, the MUCA did not legalize collective gardens. Rather, because patients and designated providers participating in collective gardens are only entitled to assert an affirmative defense to prosecution for violation of state law, collective gardens remain not legal under state law. In other words, an affirmative defense "does not per se legalize an activity." The Court further cited the Governor's veto message, which indicated that she was open to future legislation that would exempt patients and their designated

providers from state criminal penalties, as evidence that this particular bill did not create any such exemptions or legalize collective gardens.

The MUCA, specifically RCW 69.51A.140, further states that "[c]ities and towns may adopt and enforce any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction: Zoning requirements, business licesning requirements, health and safety requirements, and business taxes." The Court stated that, plainly, the legislature and the Governor (having left this sentence intact) intended for cities and towns to exercise their traditional zoning powers with regard to medical marijuana production, processing, and dispensing. Though the collective garden section of the MUCA, RCW 69.51A.085, is a stand-alone provision, the Court stated that it had to be read in conjunction with RCW 69.51A.140, rather than in isolation.

Finally, the Court concluded that banning collective gardens within a city's borders would not be preempted by the MUCA. Cities and towns may not enact zoning ordinances that are either preempted by or in conflict with state law. The Court noted that, in RCW 69.51A.140, the legislature clearly did not express an intent to preempt municipal regulation and had, in fact, explicitly recognized municipalities' role in regulating medical marijuana. City ordinances also may not conflict with state law, which occurs when the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. Reasoning that because collective gardens were not legalized under the MUCA, the Court determined it does not conflict with state law to ban such uses. The Court stated that municipalies may enact ordinances prohibiting and punishing the same acts which constitute an offense under state law.

III. <u>Conclusion.</u> This case resolves the issue of whether cities and towns may prohibit collective gardens within their jurisdictions in the affirmative, at least until such time as the legislature amends the medical marijuana statutes. The impact of this decision upon cities and towns which have elected to regulate, rather than prohibit, collective gardens is unknown at this time. Given that the Court has held collective gardens are not legalized, cities' authority to enact ordinances permitting or licensing the activity may be called into question. Cities and towns should confer with their city attorney to develop a strategy to address collective gardens in the near term.