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Pre-Emption Puzzle: Local Government May Zone to Prohibit Collective Medical Marijuana Gardens Notwithstanding State Law Authorization

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Cities and counties don't always have the power to regulate on anything they please. Sometimes local action is pre-empted by state or federal law, but determining when local government action is pre-empted is often tricky business.

The general rule in Washington (and Oregon) is that local governments are authorized to make and enforce all laws necessary to further its police power, including zoning laws, so long as they do not directly conflict with state or federal laws. The Medical Use of Cannabis Act (MUCA), enacted in 2010, codified at RCW 69.51A.085(2), authorized patients to establish collective gardens for growing medical marijuana. "Collective gardens" are defined by state law to include group efforts to pool resources and grow medical marijuana for patients' own use. The MUCA further clarified that local governments retain authority to regulate the production, processing or dispensing of medical marijuana through zoning, business, licensing, health and safety requirements, and business taxes. RCW 69.51A.140. Relying on this zoning authority, the City of Kent, Washington enacted an ordinance that prohibited "collective gardens" in every zoning district within the city.

In the recent case, *Cannabis Action Coalition (CAC) v. City of Kent,* the Washington Supreme Court was asked whether the MUCA authorization for "collective gardens" preempts the Kent ordinance banning them. A statute preempts the field and invalidates a local ordinance "if there is express legislative intent to preempt the field or if such intent is necessarily implied...from the purpose of the statute and facts and circumstances under which it was intended to operate." The Court found no express preemption clause, leaving the question of whether preemption is implied. CAC argued that the express authorization allows cities to zone only commercial production and processing of marijuana and not non-commercial collective gardens. The court rejected that argument, finding nothing in the express language that distinguished between a profit or the shared use collective garden activities. The Court went on to find that, although state law prohibits local governments from opting out of medical marijuana altogether, the local ordinance concerned a particular land use, collective gardens, and did not address the personal use of

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medical marijuana. Accordingly, the Court found that the City's ordinance was not pre-empted.

Justice Gonzalez provided an interesting dissent explaining that, although a city may regulate consistent with the MUCA, it may not completely ban what the state permits. The majority failed to acknowledge that participation in collective gardens is legal under state law and, as a result, Gonzalez asserts, the city may not enact regulations, zoning or not, that prohibit this lawful activity.

It is also important to note that while this appeal was pending, the legislature enacted comprehensive reform concerning the regulation of medical marijuana in Washington including repeal of the statutory provisions authorizing collective gardens. Laws of 2015, ch. 70. That said, this case provides an interesting commentary as the Washington Supreme Court prepares to decide whether to hear a case challenging cities' and counties' authority to ban licensed recreational marijuana retailers and the legislatures of both Oregon and Washington work to fashion regulations surrounding the production, processing and distribution of both medical and recreational marijuana that focus on standards controlling activities and revenue rather than land use.

Posted in I-502, I-502 Marijuana Legislation, Washington

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