

ORDINANCE NO. 4094

AN ORDINANCE of the City Council of the city of Kent, Washington, adopting a six-month moratorium within the city of Kent prohibiting the establishment, location, operation, licensing, maintenance or continuation of marijuana processors, producers, and retailers claiming authorization under Chapter 69.50 RCW or any other law of the state of Washington and setting a date for a public hearing on the moratorium.

RECITALS AND PRELIMINARY FINDINGS OF FACT

A. On November 30, 1998, Washington voters approved Initiative 692, now codified as Ch. 69.51A RCW, which created a limited affirmative defense to certain marijuana-related criminal charges under state law if the person charged could demonstrate that he or she was a qualifying patient or designated provider as those terms are defined in Ch. 69.51A RCW. Ch. 69.51A RCW has been amended a number of times. Most recently, the state legislature passed a third amendment to the law, ESSSB 5073, Chapter 181, Laws of 2011, portions of which the Governor vetoed. The newly amended law took effect on July 22, 2011. As a result of Ch. 69.51A RCW and its amendments, the City experienced an influx of businesses which, either in the form of medical marijuana dispensaries or collective gardens, distributed marijuana.

B. On June 5, 2012, after numerous public hearings, the City Council passed Ordinance 4036, prohibiting medical marijuana collective gardens and dispensaries in each zoning district within the City.

C. On November 6, 2012, the voters of Washington approved Initiative 502. I-502, which amended Ch. 69.50 RCW, provides that the state licensed production, processing and retail sale of marijuana does not constitute a crime under state law. I-502 requires the state Liquor Control Board ("LCB") to develop rules for the implementation of the licensing provisions of I-502. The LCB recently finalized the rules.

D. While the state licensed production, processing and retail sale of marijuana does not constitute a crime under state law, the production, processing, distribution and possession of marijuana continues to be a violation of the federal Controlled Substances Act ("CSA"). Marijuana continues to be a Schedule I controlled substance under both state and federal law. In fact, the Kent Police Department partners with the federal Drug Enforcement Agency to investigate federal drug crimes, including crimes related to the manufacture, distribution and possession of marijuana, which occur within the City and the surrounding community.

E. While the Department of Justice ("DOJ") issued a letter on August 29, 2013, indicating that enforcement of marijuana related regulations in Washington should primarily rest with state and local law enforcement agencies, the DOJ also stated that if robust measures were ineffective to guard against certain identified harms or in the event of reluctance on the part of the state to ensure against the occurrence of identified harms, the federal government reserved the right to enforce federal laws despite the state's regulatory structure, and to challenge the state licensing structure itself. In a letter dated August 30, 2013, and in response to the letter from the DOJ, the National Sheriff's Association, the International

Association of Chiefs of Police, the National Narcotic Officers Associations' Coalition, the Major Cities Chiefs Police Association, and the Association of State Criminal Investigative Agencies expressed extreme disappointment in the position of the DOJ.

F. I-502 required the LCB to establish rules to determine the number of state licensed retail outlets that may be located in each county. No similar provision was made for state licensed production or processing. Recently, the LCB determined that it would issue three state licenses for the retail sale of recreational marijuana in the city of Kent. For production and processing, the location of these businesses will be market-driven. Thus, production and processing land uses may be spread across the state or may be concentrated in one city or county, which could include Kent.

G. Neither I-502 nor the rules established by the LCB address the location within a city of state licensed production, processing or retail sales facilities, other than a 1000 foot buffer from elementary schools, secondary schools, playgrounds, recreation centers, child care centers, public parks, transit centers, libraries, or game arcades.

H. In 2005, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the United States Supreme Court determined that the intrastate regulation of marijuana is a valid exercise of the power of Congress and that in the event of a conflict between a state law that permits marijuana production, processing, distribution and possession and the federal CSA, the federal CSA will be deemed supreme. Therefore, it is unlikely that a court will determine that a state law can require a city to permit a land use that constitutes a federal crime under the federal CSA.

I. As a non-charter code city, Kent has specific authority to determine the appropriate uses of land through its zoning authority. I-502 contained

no language specifically limiting the authority of cities to determine whether to permit marijuana land uses within city boundaries. In addition, the LCB rules provide that the issuance of a state license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited building and fire codes, zoning ordinances, and business licensing requirements.

J. The production, processing, and retail sale of marijuana, which remains illegal under federal law, has only recently become a permitted activity under Washington state law. Colorado is the only other state that permits the retail production, processing and sale of marijuana. Thus, the land use impacts associated with state licensed production, processing and retail sale of marijuana have not been established and are not understood.

K. While I-502 purports to create a system under state law to legally produce, process, and sell marijuana, the operators of marijuana-related businesses that have held themselves out as legally operating businesses have consistently demonstrated an unwillingness to follow City regulations. For example:

- Medical marijuana dispensaries in the City remained in operation despite two moratoria on the maintenance of medical marijuana dispensaries.
- Medical marijuana dispensaries ignored City business licensing requirements or engaged in deception when completing business license applications.
- Medical marijuana operators remained in operation despite the pendency of criminal charges related to violations of City ordinances.
- Property owners who leased space to medical marijuana dispensaries have been unwilling to require tenants to operate within the bounds of the City's zoning code.

L. In at least one instance, a medical marijuana dispensary located in the City was robbed at gun point, and the owner of the dispensary was reluctant to report the crime to the Kent Police Department.

M. The City Council has determined that the passage of a six-month moratorium on the production, processing or retail sale of marijuana will serve the public health, safety and welfare.

N. The City Council has also determined that the passage of a six-month moratorium on the issuance of any business license for the production, processing or retail sale of marijuana will serve the public health, safety and welfare.

O. The City Council has also determined that during the six-month moratorium, staff shall develop and process a permanent zoning code amendment that shall prohibit, in all zoning districts of the City, any land use that constitutes a violation of a state or federal law, unless specifically permitted in a specified zoning district, as well as a permanent amendment to the business license code, that shall prohibit the issuance of a business license to any business that constitutes a violation of a state or federal law, unless the business is specifically permitted in the Kent City Code.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF KENT, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

ORDINANCE

SECTION 1. - *Preliminary Findings of Fact.* The recitals and findings of fact set forth above are adopted as the city council's preliminary findings in support of the moratorium imposed by this ordinance. The city council may, in its discretion, adopt additional findings at the conclusion of the public hearing referenced in Section 5 below.

SECTION 2. - *Moratorium Imposed.* Pursuant to the provisions of Article 11, Section 11 of the Washington State Constitution, and RCW 35A.63.220 and RCW 36.70A.390, a moratorium is hereby enacted prohibiting within the city of Kent the establishment, location, operation, maintenance, continuation, permitting or licensing of any producer, processor or retail seller of marijuana that is licensed by the state of Washington pursuant to I-502 and Chapter 69.50 RCW. 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 permits, business licenses or other permits or authorizations 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 3. - *No Nonconforming Uses.* No use that constitutes or purports to be a use prohibited in Section 2 this ordinance, that was engaged in prior to the enactment of this ordinance shall be deemed to have been a legally established use under the provisions of the Kent City Code and that use shall not be entitled to claim legal nonconforming status.

SECTION 4. - *Effective Period for Moratorium.* This moratorium shall take effect beginning five days from the date of its publication, and shall be in effect for a period of six months thereafter, and shall automatically expire at the conclusion of that six month period unless the same is extended as provided in RCW 35A.63.220 or RCW 36.70A.390, or unless terminated sooner by the city council.

SECTION 5. - *Public Hearing.* Pursuant to RCW 35A.63.220 and RCW 36.70A.390, the city council will hold a public hearing regarding this moratorium at the city council's regular meeting, at 7:00 p.m. in Council Chambers, Kent City Hall, on Tuesday, January 7, 2014, or as soon thereafter as the business of the city council shall permit.

SECTION 6. - *Referral to Staff.* The planning director is hereby authorized and directed to develop and recommend an appropriate land use regulation that will prohibit within the City any land use that constitutes a violation of federal or state law, unless otherwise specifically identified as permitted in the Kent City Code. The finance director is hereby authorized and directed to develop and recommend appropriate business licensing and other regulations that will prohibit within the City any business that constitutes a violation of federal or state law, unless otherwise specifically identified as permitted in the Kent City Code.

SECTION 7. - *Severability.* If any one or more section, subsection, or sentence of this ordinance is held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portion of this ordinance and the same shall remain in full force and effect.

SECTION 8. - Corrections by City Clerk or Code Reviser. Upon approval of the city attorney, the city clerk and the code reviser are authorized to make necessary corrections to this ordinance, including the correction of clerical errors; references to other local, state or federal laws, codes, rules, or regulations; or ordinance numbering and section/subsection numbering.

SECTION 9. - Effective Date. This ordinance shall become effective five (5) days after its publication. The city clerk is directed to publish a summary of this ordinance at the earliest possible publication date.


SUZETTE COOKE, MAYOR

ATTEST:


RONALD F. MOORE, CITY CLERK

APPROVED AS TO FORM:

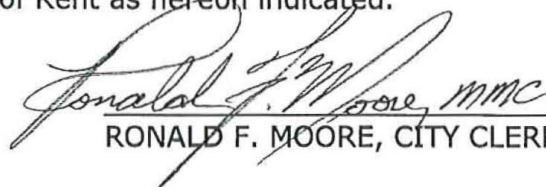

ARTHUR "PAT" FITZPATRICK, ACTING CITY ATTORNEY

PASSED: 19th day of November, 2013.

APPROVED: 19th day of November, 2013.

PUBLISHED: 22nd day of November, 2013.

I hereby certify that this is a true copy of Ordinance No. 4094 passed by the city council of the City of Kent, Washington, and approved by the Mayor of the City of Kent as hereon indicated.

 (SEAL)
RONALD F. MOORE, CITY CLERK

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