

**CITY COUNCIL AGENDA ITEM**  
CITY OF SHORELINE, WASHINGTON

<b>AGENDA TITLE:</b>	Ordinance No. 611 Adopting a Moratorium and Interim Regulation for Medical Marijuana Collective Gardens
<b>DEPARTMENT:</b>	City Attorney
<b>PRESENTED BY:</b>	Ian Sievers, City Attorney
<b>ACTION:</b>	<input checked="" type="checkbox"/> Ordinance <input type="checkbox"/> Resolution <input type="checkbox"/> Motion <input type="checkbox"/> Discussion <input type="checkbox"/> Public Hearing

**PROBLEM/ISSUE STATEMENT:**

E2SSB 5073, passed in the 2011 legislative session, legalizes medical marijuana collective gardens run by up to 10 qualified patients with a maximum of 45 marijuana plants. It is likely that a collective garden can contract for service providers to maintain the garden or contract for a site that provides for multiple collective gardens. Staff recommends a moratorium and interim regulations that will allow patients to exercise their right to a collective garden but prohibits collective gardens in residential zones and prohibits the aggregation of multiple gardens on one parcel or nearby parcels until the impacts can be studied and permanent regulations adopted.

There is currently only one medical marijuana dispensary operating in Shoreline under a stay until a pending appeal is resolved. The appeal hearing is scheduled for July 25, 2011.

**RESOURCE/FINANCIAL IMPACT:**

There is no financial impact to operations at this time. As staff develops recommendations for permanent regulations, potential resource and financial impacts will be evaluated. Clarification provided in the moratorium will avoid potential legal expenses over enforcing the intent of E2SSB 5073 regarding the collective gardens.

**RECOMMENDATION**

Pass Ordinance No. 611 establishing a moratorium on marijuana collective gardens in violation of interim regulations and establishing a public hearing on the moratorium.

Approved By:        City Manager \_\_\_\_ City Attorney \_\_\_\_

## **INTRODUCTION**

Ordinance No. 611 is proposed as a moratorium and interim regulation of collective gardens that may be operated by qualified medical marijuana patients under state law. This activity was newly created in E2SSB 5073 and will take effect on July 22, 2011. The statute provides essential restrictions on the collective gardens but does not regulate where these may be located. Municipalities are authorized but not required to zone or regulate these uses.

A moratorium is proposed to enable staff time to evaluate and develop options for Council consideration including either recommended permanent land use controls or the establishment of a regulatory license in addition to Shoreline's business registration license. The moratorium would also allow for any required public processes in developing recommendations to the City Council. A public hearing must be provided within 60 days of establishing the moratorium and is scheduled for September 12, 2011

## **BACKGROUND**

In 1998, Washington voters approved Initiative 692 which provided an affirmative defense to criminal prosecution of state laws prohibiting use and possession of marijuana for limited amounts possessed by individuals qualified for medical use, or for a provider designated by a single qualifying patient. The initiative lacked authorization for large scale distribution of marijuana for patients who were unable to grow their own medical marijuana. Regardless, dispensaries have proliferated in some areas under the argument that a commercial dispensary could dispense to one patient and then another as quickly as transactions could occur. In a July 2010 Inquiry as to whether dispensaries were legal, MRSC responded they were not under a reasonable interpretation of the statutes.<sup>1</sup> General Counsel for the City's risk pool, WCIA, issued a Bulletin to member cities reaching the same conclusion in December of 2010. Hearing Examiners have reached the same conclusion in denying license to dispensaries.

The 2011 legislature adopted a comprehensive scheme of licensing and regulating dispensaries to better address patient needs in E2SSB 5073. However, marijuana possession continues to be a criminal offense under the federal Controlled Substances Act, and all provisions relating to dispensaries were vetoed due to a perceived potential for federal prosecution of state regulators participating in the regulation of commercial dispensaries as well as the dispensaries themselves. The earlier argument used to expand the designated provider into a dispensary was expressly curtailed in the final bill by prohibiting providers from changing their qualified patient more frequently than every fifteen days.

While dispensaries are now clearly unlawful, E2SSB 5073 did provide a model for limited cooperative efforts by patients in production and distribution through collective gardens run by up to 10 qualified patients and containing up to 45 marijuana plants. The bill allows, but does not require, local government to zone and regulate this new land use. It is likely that a collective garden can hire a service provider or lease a site

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<sup>1</sup> "The statutes may be a little fuzzy, but to interpret the statutes as allowing a provider to provide marijuana to multiple patients one after another in a retail setting is stretching the law to an extreme degree."

that would allow multiple collective gardens. A corrective bill was presented in the 2011 special legislative session that would have limited collective gardens to one for any tax parcel but did not pass due to restriction on non-budgetary bills. E2SSB 5073 will take effect on July 22, 2011. Staff recommends a moratorium and interim regulation that will allow patients to exercise their rights to a collective garden but prohibit the establishment of collective gardens in residential zones or prohibit aggregation of collective gardens on one parcel or nearby parcels until the impacts can be studied and permanent regulations adopted.

Ordinance No. 611 also contains findings and a declaration of an emergency to allow the ordinance to take effect immediately upon passage and before the effective date of E2SSB 5073 on July 22<sup>nd</sup>. The courts are extremely deferential to the legislative finding that an emergency exists:

Courts may conduct only a very limited review of an emergency. A legislative declaration "is conclusive and must be given effect unless it is on its face 'obviously false and a palpable attempt at dissimulation.' " To determine the truth or falsity of the declaration of an emergency, the court will not inquire into the facts, but rather must consider only what appears upon the face of the act and its judicial knowledge.<sup>2</sup>

### **ALTERNATIVES ANALYSIS**

The statute authorizing land use moratoria is RCW 35A.63.220 and under the Growth Management Act, RCW 36.70A.390. The key features are adoption of an ordinance without public hearing notice or recommendation from the Planning Commission. The moratorium ordinance must be scheduled for a public hearing and adoption of findings within 60 days from its initial passage. It may remain in effect for six months, but may be extended after a second public hearing if more time is needed to complete an adopted work plan.

Given a liberal vesting rule for development of property in this state, Washington courts have expressly endorsed the use of moratoria to freeze the status quo quickly to prevent owners from securing a vested right by filing an application before a deliberative review of land use changes can be completed.

"Moratoriums and interim zoning are generally recognized techniques designed to preserve the status quo so that new plans and regulations will not be rendered moot by intervening development. Recognizing the emergency, temporary, and expedient nature of such regulations, the courts have tended to be more deferential than usual to the local legislative body."

Richard L. Settle, *Washington Land Use and Environmental Law and Practice* §23, at 72 (ed.1983).

Shoreline has adopted several moratoriums since incorporation to correct perceived defects in the City's code or in reaction to changes in state law, such as the collective gardens recently created.

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<sup>2</sup> *Matson, supra*; citing and quoting *City of Federal Way v. King Co.*, 62 Wn. App. 530, 536, 815 P.2d 790 (1991).

Shoreline follows several cities that have adopted moratoria regarding collective gardens. From discussion with other cities, it is anticipated that more cities will be adopting moratoria. Some cities have adopted an absolute moratorium on any collective garden. Staff does not recommend this for two reasons. First, medical marijuana has been a comprehensive state legislative scheme for patient rights from the passage of Initiative 692 and prohibiting a right granted to patients to act collectively rather than regulate that use as expressly allowed to cities in the statute may bring a challenge, even where a moratorium is declared under existing law. Second, regulations, including moratoria, should be narrowly drawn to address a public harm, and not extend to activity or rights where harm is unlikely. Staff believes the gardens that meet the interim regulations are an important benefit to patients who cannot provide marijuana themselves or through a single provider, particularly since the popular dispensary model is now untenable.

### **SUMMARY**

While the single patient garden or non-commercial 10 patient/provider collective gardens would likely have little impact, the potential for commercial aggregation of many collective gardens should be studied for appropriate land use location and licensing regulations. Adoption of the proposed interim regulation and moratoria will allow the opportunity for marijuana patients to provide for their medicinal needs through the small scale collaboration granted by the legislature but prohibit formation of large scale growing and distribution enterprises pending further study.

### **RECOMMENDATION**

Pass Ordinance No. 611 establishing a moratorium on marijuana collective gardens in violation of interim regulations and establishing a public hearing on the moratorium

### **ATTACHMENTS**

- A. Ordinance 611.
- B. WCIA Risk Management Bulletin Supplement/: Medical Marijuana Law: Post 2011 Washington Legislative Session

**ORDINANCE NO. 611**

**AN ORDINANCE OF THE CITY OF SHORELINE, WASHINGTON, ADOPTING INTERIM REGULATIONS FOR COLLECTIVE GARDENS AND ESTABLISHING A MORATORIUM FOR SIX MONTHS ON THE FILING OR ACCEPTANCE OF ANY APPLICATIONS FOR DEVELOPMENT OF LAND OR BUSINESS LICENSES FOR COLLECTIVE GARDENS EXCEPT THOSE IN COMPLIANCE WITH INTERIM REGULATIONS.**

WHEREAS, E2SSB 5073 (the Act) effective on July 22, 2011 authorizes "collective gardens" which would authorize certain qualifying patients the ability to produce, grow and deliver cannabis for medical use and,

WHEREAS, the Act authorizes local municipalities to exercise local location, health and safety controls for the regulation of collective gardens;

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

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

WHEREAS, pursuant to RCW 36.70A.390 a public hearing must be held within 60 days of the passage of this ordinance, now therefore

WHEREAS, a six-month moratorium on the filing of certain applications for development or licensing of collective gardens will prevent substantial change until the land areas and the text of development standards applicable to collective gardens is reviewed and any needed revisions are made to the development code; and

WHEREAS, the potential adverse impacts upon the public safety, welfare, and peace, as outlined herein, justify the declaration of an emergency; and

WHEREAS, pursuant to SEPA regulation SMC 20.30.550 adopting Washington Administrative Code Section 197-11-880, the City Council finds that an exemption under SEPA for this action is necessary to prevent an imminent threat to public health and safety through unrestricted development of collective gardens under existing regulations. The City shall conduct SEPA review of any permanent regulations proposed to replace this moratorium; now therefore,

**THE CITY COUNCIL OF THE CITY OF SHORELINE, WASHINGTON, DO ORDAIN AS FOLLOWS:**

**Section 1. Finding of Fact.** The recitals set forth above are hereby adopted as findings of the City Council.

**Section 2. Moratorium and Interim Regulation Adopted.** A moratorium is adopted upon the filing of any application or issuance of any permit or business license for the establishment of a collective garden as defined in E2SSB 5073 that does not meet the following criteria:

- A. There shall be no more than one collective garden permitted on a property tax parcel.
- B. Collective gardens may only be located in the NB, O, CB, NCB, MUZ, and I zones.
- C. A collective gardens or facility for delivery of cannabis produced by the garden may not be located within 1000 feet of schools or school bus route stops, and not within 2000 feet of any other collective garden or delivery site.
- D. Any transportation or delivery of cannabis from a collective garden shall be conducted by the garden members or designated provider so that quantities of medical cannabis allowed by E2SSB 5073 §403 are never exceeded.

**Section 3. Public Hearing.** Pursuant to RCW 35A.63.220 and 36.70A.390 the City Council shall hold a public hearing at 7:30 p.m. September 12, 2011 at Shoreline City Hall, 17500 Midvale Ave. N., Shoreline WA to take testimony concerning this moratorium.

**Section 4. Permanent Regulations.** The City Council directs the staff to refer this ordinance to the Shoreline Planning Commission for its review and recommendation of permanent regulations to replace the interim regulations adopted herein, and to transmit this ordinance to the Washington State Department of Commerce as required by law.

**Section 5. Effective Dates.** 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 1 of this ordinance. This ordinance shall take effect and be in full force immediately upon passage and shall expire six months from its effective date unless extended or repealed according to law.

**Section 6. Publication.** The title of this ordinance is approved as a summary of the ordinance for publication in the official newspaper of the City.

**PASSED BY THE CITY COUNCIL ON July 18, 2011**

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Mayor Keith A. McGlashan

**ATTEST:**

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Scott Passey  
City Clerk

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Ian Sievers  
City Attorney

Date of publication: , 2011  
Effective date: , 2011

## **WCIA RISK MANAGEMENT BULLETIN SUPPLEMENT**

### **MEDICAL MARIJUANA LAW: POST 2011 WASHINGTON LEGISLATIVE SESSION**

A SUPPLEMENT TO THE 12/28/2010 BULLETIN

6/23/2011

Written by:

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A WCIA Risk Management Bulletin was issued 12/28 /2010 addressing the then existing state of the law regarding medical marijuana in Washington and the rise of business license applications for medical marijuana "Dispensaries" across the state. In short, the Bulletin concluded that such "dispensaries" were not legal under the law at that time as they inevitably involved the possession and sale of marijuana not allowed by law. It was recommended that business license applications for dispensaries be denied or revoked. The Bulletin predicted that the topic would be addressed in the 2011 Washington State Legislative Session and changes could occur. The topic did arise, legislation was passed and then the legislation was partially vetoed by the Governor. This Bulletin Supplement will address the law as it now exists, post 2011 Legislative Session.

In April 2011 the Washington State Legislature passed Engrossed Second Substitute Senate Bill 5073 through both houses amending Initiative 692 and sent it on to the Governor for signature into law. The bill, as passed, offered sweeping changes to the medical marijuana law in Washington and would have put in place a regulatory licensing scheme for the growth and distribution of medical marijuana through licensed dispensaries to "qualified patients" who had been designated as such by their "health care professionals." The production and sale of medical cannabis and the dispensing standards would have been under regulation by the State Department of Health. Dispensers could sell seeds, plants, usable cannabis, and cannabis products directly to qualifying patients. The bill also provided for optional "collective gardens" where individuals who were qualified patients, or their individual providers, could grow for their own use medical marijuana collectively so long as the participants did not exceed 10 in number or more than 15 plants per person and up to 45 plants total.

Before the Governor could sign the bill, the U.S. Attorney's in Seattle and Spokane sent the Governor an advisory letter, (which she had solicited) approved by U.S. Attorney General Holder, warning and advising the Governor that substantial portions of the bill approved by the Legislature was in direct conflict with Federal Drug Laws and that state employees could be at risk of federal prosecution for aiding and abetting illegal drug possession and sale if they processed licenses for production and sale of medical cannabis under the proposed new bill. The letter of April 14, 2011 to Governor Gregoire signed by U.S Attorney Jenny Durkin and U.S. Attorney Michael Ormsby stated, in part:

**"The Washington legislative proposals will create a licensing scheme that permits large-scale marijuana cultivation and distribution. This would authorize conduct contrary to federal law and thus, would undermine the federal government's efforts to regulate the possession, manufacturing and trafficking of controlled substance. Accordingly, the Department could consider civil and criminal legal remedies regarding those who set up marijuana growing facilities and dispensaries as they will be doing so in violation of federal law. Others who knowingly facilitate the action of the licensees, including property owners, landlords, and financier should also know that their conduct violates federal law. In addition, state employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the CSA (controlled substances act)."** (emphasis added).<sup>1</sup>

Citing this letter, Governor Gregoire issued a partial veto of ESSSB 5073 on April 29, 2011. The Governor vetoed all the new sections dealing with the state licensing of production and licensed dispensing of medical marijuana.<sup>2</sup> The portions of the bill not vetoed and signed by Governor Gregoire amend the original medical marijuana Initiative 692 passed by the people. So, the question becomes: What is left of ESSSB 5073 after the line item veto of the Governor?

#### **WHAT ARE THE SIGNIFICANT CHANGES IN THE LAW UNDER ESSSB 5073 AS SIGNED?**

1. **New stronger protections to qualified medical marijuana users and providers from criminal arrest, prosecution and conviction.**

Previously qualified users and providers were given an affirmative defense to assert at trial if they were charged with a marijuana crime. Now, sec. 401 of the new act provides:

**"Sec. 401 The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, or have real or personal property seized or forfeited ..."**

Section 101 of the new act states:

**"(a) Qualifying patients with terminal or debilitating ((illnesses)) medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of ((marijuana)) cannabis, shall not be ((found guilty of a crime under state law for their possession and limited use of marijuana)) arrested, prosecuted,**

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<sup>1</sup> Letter attached.

<sup>2</sup> Partial veto letter attached



or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of law;

(b) Persons who act as designated providers to such patients shall also not be ((found guilty of a crime under state law for)) arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law, notwithstanding any other provision of law, based solely on their assisting with the medical use of ((marijuana)) cannabis;...”

**2. Health Care Professionals are given greater protection but with greater restrictions regarding issuing “valid documentation” to qualifying patients authorizing medical use of cannabis.**

a. Health Care Professionals have been given the same protections as qualifying patients and providers as noted above. (Sec 301(1))

b. The new act states:

“Sec. 301(2)(a) A health care professional may only provide a patient with valid documentation authorizing the medical use of cannabis or register the patient with the registry established in section 901 of this act if he or she has a newly initiated or existing documented relationship with the patient, as a primary care provider or a specialist, relating to the diagnosis and ongoing treatment or monitoring of the patient's terminal or debilitating medical condition, and only after:

(i) Completing a physical examination of the patient as appropriate, based on the patient's condition and age;

(ii) Documenting the terminal or debilitating medical condition of the patient in the patient's medical record and that the patient may benefit from treatment of this condition or its symptoms with medical use of cannabis;

(iii) Informing the patient of other options for treating the terminal or debilitating medical condition; and

(iv) Documenting other measures attempted to treat the terminal or debilitating medical condition that do not involve the medical use of cannabis.

(b) A health care professional shall not:

(i) Accept, solicit, or offer any form of pecuniary remuneration from or to a licensed dispenser, licensed producer, or licensed processor of cannabis products;

(ii) Offer a discount or any other thing of value to a qualifying patient who is a customer of, or agrees to be a customer of, a particular licensed dispenser, licensed producer, or licensed processor of cannabis products;

(iii) Examine or offer to examine a patient for purposes of diagnosing a terminal or debilitating medical condition at a location where cannabis is produced, processed, or dispensed;

(iv) Have a business or practice which consists solely of authorizing the medical use of cannabis;

(v) Include any statement or reference, visual or otherwise, on the medical use of cannabis in any advertisement for his or her business or practice; or

(vi) Hold an economic interest in an enterprise that produces, processes, or dispenses cannabis if the health care professional authorizes the medical use of cannabis.

(3) A violation of any provision of subsection (2) of this section constitutes unprofessional conduct under chapter 18.130 RCW.”

3. **Use of medical cannabis at work or in jails requires no accommodation and may be prohibited. Drug free work places may be continued. Medical insurance is not required to cover medical cannabis. Medical cannabis may not be smoked in public but it is now an infraction, not a crime. Persons under supervised probation or parole may be prohibited from the use medical cannabis. The use of medical cannabis is not a defense to Driving Under the Influence.**

“Sec. 501. RCW 69.51A.060 and 2010 c 284 s 4 are each amended to read as follows:

- (1) It shall be a ~~((misdemeanor))~~ **class 3 civil infraction to use or display medical ((marijuana)) cannabis in a manner or place which is open to the view of the general public.**
- (2) Nothing in this chapter ~~((requires any health insurance provider))~~ establishes a right of care as a covered benefit or requires any state purchased health care as defined in RCW 41.05.011 or other health carrier or health plan as defined in Title 48 RCW to be liable for any claim for reimbursement for the medical use of ~~((marijuana))~~ cannabis. Such entities may enact coverage or noncoverage criteria or related policies for payment or nonpayment of medical cannabis in their sole discretion.
- (3) Nothing in this chapter requires any health care professional to authorize the medical use of ~~((medical marijuana))~~ cannabis for a patient.
- (4) Nothing in this chapter requires any accommodation of any on-site medical use of ~~((marijuana))~~ cannabis in any place of employment, in any school bus or on any school grounds, in any youth center, in any correctional facility, or smoking ~~((medical marijuana))~~ cannabis in any public place ~~((as that term is defined in RCW 70.160.020))~~ or hotel or motel.
- (5) Nothing in this chapter authorizes the use of medical cannabis by any person who is subject to the Washington code of military justice in chapter 38.38 RCW.
- (6) Employers may establish drug-free work policies. Nothing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free work place.”

“Sec. 1105. (1)(a) The arrest and prosecution protections established in section 401 of this act may not be asserted in a supervision revocation or violation hearing by a person who is supervised by a corrections agency or department, including local governments or jails, that has determined that the terms of this section are inconsistent with and contrary to his or her supervision.

(b) The affirmative defenses established in sections 402, 405, 406, and 407 of this act may not be asserted in a supervision revocation or violation hearing by a person who is supervised by a corrections agency or department, including local governments or jails, that has determined that the terms of this section are inconsistent with and contrary to his or her supervision.

(2) The provisions of RCW 69.51A.040 and sections 403 and 413 of this act do not apply to a person who is supervised for a criminal conviction by a corrections agency or department, including local governments or jails, that has determined that the terms of this chapter are inconsistent with and contrary to his or her supervision.

(3) A person may not be licensed as a licensed producer, licensed processor of cannabis products, or a licensed dispenser under section 601, 602, or 701 of this act if he or she is supervised for a criminal

conviction by a corrections agency or department, including local governments or jails, that has determined that licensure is inconsistent with and contrary to his or her supervision.”

“Sec. 501(8) (8) No person shall be entitled to claim the ((affirmative defense provided in RCW 69.51A.040)) protection from arrest and prosecution under RCW 69.51A.040 or the affirmative defense under section 402 of this act for engaging in the medical use of ((marijuana)) cannabis in a way that endangers the health or well-being of any person through the use of a motorized vehicle on a street, road, or highway, including violations of RCW 46.61.502 or 46.61.504, or equivalent local ordinances.”

4. A “designated provider” who has been terminated by a “qualified patient” cannot become a designated provider for another qualified patient until 15 days have elapsed.

“Sec. 404. (1) A qualifying patient may revoke his or her designation of a specific provider and designate a different provider at any time. A revocation of designation must be in writing, signed and dated. The protections of this chapter cease to apply to a person who has served as a designated provider to a qualifying patient seventy-two hours after receipt of that patient's revocation of his or her designation.

(2) A person may stop serving as a designated provider to a given qualifying patient at any time. **However, that person may not begin serving as a designated provider to a different qualifying patient until fifteen days have elapsed from the date the last qualifying patient designated him or her to serve as a provider.**”

5. Qualifying patients may, under restrictions, create “collective gardens” to produce medical cannabis.

“Sec. 403. (1) **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:

(a) **No more than ten qualifying patients may participate in a single collective garden at any time;**

(b) **A collective garden may contain no more than fifteen plants per patient up to a total of forty-five plants;**

(c) **A collective garden may contain no more than twenty-four ounces of useable cannabis per patient up to a total of seventy-two ounces of useable cannabis;**

(d) **A copy of each qualifying patient's valid documentation or proof of registration with the registry established in section 901 of this act, including a copy of the patient's proof of identity, must be available at all times on the premises of the collective garden; and**

(e) **No useable cannabis from the collective garden is delivered to anyone other than one of the qualifying patients participating in the collective garden.**

(2) For purposes of this section, the creation of a “collective garden” means qualifying patients sharing 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; and equipment, supplies, and labor necessary for proper construction, plumbing, wiring, and ventilation of a garden of cannabis plants.

(3) A person who knowingly violates a provision of subsection (1) of this section is not entitled to the protections of this chapter.”

**(Author’s Note: Sec 501(1) makes the public display of medical cannabis a civil infraction and this would presumably apply to the display of medical cannabis in a collective garden hence some sort of screening from public view seems to be built into the act.)**

6. Cities and Counties may, but are not required to, zone, license, regulate and tax the production, processing and dispensing of cannabis. This would appear to be now limited to collective gardens since that is the only new activity allowed under the act and individual single production of medical cannabis by a qualified user or provider.

“Sec. 1102. (1) Cities 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 licensing requirements, health and safety requirements, and business taxes. Nothing in this act is intended to limit the authority of cities and towns to impose zoning requirements or other conditions upon licensed dispensers, so long as such requirements do not preclude the possibility of siting licensed dispensers within the jurisdiction. If the jurisdiction has no commercial zones, the jurisdiction is not required to adopt zoning to accommodate licensed dispensers.

(2) Counties may adopt and enforce any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction in locations outside of the corporate limits of any city or town: Zoning requirements, business licensing requirements, and health and safety requirements. Nothing in this act is intended to limit the authority of counties to impose zoning requirements or other conditions upon licensed dispensers, so long as such requirements do not preclude the possibility of siting licensed dispensers within the jurisdiction. If the jurisdiction has no commercial zones, the jurisdiction is not required to adopt zoning to accommodate licensed dispensers.”

**(Author’s Note: The Governor vetoed all other sections of the act that would have created legal licensed dispensers of medical cannabis so presumably the language in this section addressing the zoning of licensed dispensers is null and void.)**

7. Police and local jurisdictions are given limited immunity under the act for good faith actions.

“Sec. 1101. (1) No civil or criminal liability may be imposed by any court on the state or its officers and employees for actions taken in good faith under this chapter and within the scope of their assigned duties.

(2) No civil or criminal liability may be imposed by any court on cities, towns, and counties or other municipalities and their officers and employees for actions taken in good faith under this chapter and within the scope of their assigned duties.”

**CHALLENGES AND ISSUES FOR LOCAL GOVERNMENT UNDER THE NEW ACT**

1. **What to do with existing medical marijuana/cannabis dispensaries and business license applications for the same?**

As previously noted, the Governor's line item veto took out all provisions of the law that would have made dispensaries licensed and legal. Hence the law remains the same as before and there is no credible argument that medical cannabis dispensaries that sell cannabis are legal under state or federal law. (See prior WCIA Bulletin of 12/28 /2010-Medical Marijuana Dispensaries- Are They Legal?). The sale of marijuana in the State of Washington remains illegal and subject to criminal prosecution. (RCW 69.50.401 & 410.) Nothing in the new act makes the sale of medical marijuana/cannabis legal.

Existing dispensaries that are selling marijuana/cannabis are subject to police investigation, arrest and prosecution. Priority of enforcement is up to the local jurisdictions and decisions on resource allocation.

Pending or new applications for business licenses dispensaries of medical cannabis should be denied as illegal businesses if there is any evidence that the sale of cannabis is part of the operational scheme or business plan.

2. **Should local governmental entities do zoning or zoning moratoriums regarding medical marijuana/cannabis dispensaries?**

There does not appear to be any current urgency to do so as the legislation that would have allowed legal dispensaries starting in 2012 has been vetoed. However, the political backers of ESSSB 5073 have vowed they will come back with a new proposal in the next legislative session. Preemptive zoning in anticipation that someday dispensaries may become legal under state law is a consideration for local jurisdictions that may be concerned about a future applicant becoming vested to a site that is inconsistent with the overall zoning scheme of the jurisdiction.

3. **Should local jurisdictions get involved in the zoning, regulation or licensing of "collective gardens"?**

This is a difficult issue. The new act does not require any local action but does allow it under Sec. 1102. The possession of marijuana for any reason under federal law may be a crime and the federal law does not recognize exceptions for medical use of cannabis and marijuana except in authorized clinical situations. Hence, an argument can be made that if local jurisdictions specifically allow, license and regulate collective marijuana gardens they and the employees executing the laws could run a fowl of the U.S. Attorney warnings expressed in letter of April 14, 201 delivered to Governor Gregoire. They could be viewed as aiding and abetting a violation of the federal controlled substances act. Some may argue the threat is remote but no one can say it is impossible.

The other side of the argument is that unregulated and uncontrolled collective gardens could become a public safety threat and therefore regulation and licensing is a means of reducing the threat. Under the new law collective gardens may be planted and marijuana grown by qualified patients of up to ten in number. There are no provisions in the state law as to where in a local jurisdiction such gardens may be started nor is there any provisions for fencing, screening, security or safety. It is easy to envision that such collective gardens could become the locus of thefts of marijuana plants and finished product and potentially violent confrontations could occur. Collective gardens could be started next to schools and churches. Some citizens may not appreciate relatively large scale open marijuana cultivation next to their back yards, businesses, churches or schools. There could be political pressure on local elected officials to regulate and license cannabis production via "collective gardens." They may demand regulation and licensing under the authority of Sec. 1102 - " **Cities 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 licensing requirements, health and safety requirements, and business taxes. ”

(Author’s Note: Business taxes on collective gardens is likely not legal as “sales” of medical cannabis is not authorized by the partially vetoed act.)

Local police authorities may feel that zoning, licensing and regulation of collective gardens would assist them in tracking and distinguishing legal grow operations from illegal ones.

There does not appear to be any express authority or provision in the new act that would allow the outright banning of collective gardens by local jurisdictions. Sec. 401 of the act directly empowers qualified users to start and maintain collective gardens. This would appear to preempt local authorities from doing outright bans on collective gardens on private property. Likewise, local jurisdictions could not ban individual qualified patients or their providers from cultivation of medical marijuana/cannabis on private property or at their homes so long as they have the proper documentation and limit their possession to 15 plants or 24 ounces of useable cannabis.

If the decision is made to zone, license and regulate collective gardens by the local jurisdiction care will be need to make sure that an appropriate legislative history is developed to document the negative impacts of unregulated collective gardens and to narrowly fashion regulations tailored to address those negative impacts. Failure to do so could lead to challenges that the regulations or zoning violated substantive due process protections under the Constitution. Members are advised to work closely with their legal counsel on these issues.

If Members think that zoning regulation and licensing of collective gardens is in their best interest they may wish to quickly impose a moratorium prohibiting their establishment for a brief period of time to develop the necessary legislative history and to adopt appropriate ordinances for zoning, licensing and regulating collective gardens.

WCIA strongly advises against Members allowing use of public property or public “pea patches” for use as “collective gardens” where medical marijuana/cannabis is grown. It would expose the jurisdiction to unnecessary liability claims as a landlord under premises liability law if other legal users of the public lands were injured due to criminal activity/thefts potentially associated with the production of the cannabis products.

## CONCLUSION

The truncated and partially vetoed version of ESSSB 5073 signed into law by Governor Gregoire becomes **effective on July 22, 2011**. Medical marijuana/cannabis dispensaries that sell cannabis products remain illegal. The fact that the Legislature went to great lengths to try and make them legal and then failed by virtue of the Governor’s veto; re-enforces the argument that they were never legal. Nevertheless, proponents of medical cannabis will continue to argue to the contrary and will continue to urge novel schemes and models for the distribution of medical cannabis to local jurisdictions in hopes of obtaining business licenses and therefore apparent legitimacy. It is suggested that any such new model be closely analyzed to determine where the profit may be made in the business model. If it ultimately involves a sale of marijuana or cannabis products it is likely illegal under both state and federal law.

The political battle promises to be carried on in the future. Governor Gregoire’s signing letter partially vetoing ESSSB 5073 states she remains open to legislation that would exempt qualifying patients and their providers from criminal penalties when they join a cooperative to distribute medical marijuana. The proponents of ESSSB 5073 promise to return in the next legislative session to have another go at it. It

is not clear how any future effort will have success as long as the federal law remains intact and continues to criminalize possession and sale of marijuana regardless of its designation as for medical treatment. Future case law may also clarify or further obscure the picture. It appears the only certainty is more uncertainty as to what future law in this area may develop.

END