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Inside This Issue

Cannabis Law Continues to Lack Uniformity Between State and Local Regulatory Authority

By Alexis Quinones

Initiative Measure No. 502 ("I-502") approved by the voters of the State of Washington on November 6, 2012, established a licensing and regulatory system for marijuana producers, processors, and retailers at the state level. Although the dichotomy between federal law and state level marijuana regulatory systems, such as the one in Washington, has garnered significant attention as of late; it is the ongoing dichotomy between state level agency regulatory authority and local jurisdiction police power, and how that dichotomy is evidenced in the state legislature and litigation, that is the subject of this article.

I-502 granted to the Washington State Liquor and Cannabis Board ("WSLCB") the power to promulgate and enforce rules in furtherance of the initiative and to license marijuana businesses. On a local level, the Washington State Constitution grants local governments the authority to make and enforce laws, which are not in conflict with state laws, and specifies powers covering such areas as local police, sanitation, zoning and other regulations.[1] Cities, towns, and counties may opt out of the state level marijuana business licensing system and ban those businesses within their jurisdiction. Since the passage of I-502, several challenges have been made to the authority of local governments to do so, under the auspices that I-502 preempts local governments from banning such businesses or enacting restrictive zoning ordinances that effectively make operation of such businesses within the jurisdiction impractical. However, multiple court decisions[2] throughout the state have clarified that local governments carry broad authority to regulate within their jurisdictions, and nothing in I-502 limits that authority with respect to licensed marijuana businesses. The superior courts concluded that I-502 left intact the normal powers of local governments to regulate within their jurisdictions.[3] Attorney General Bob Ferguson published a formal opinion in 2014 supporting the superior courts' decisions and concluding that I-502 does not preempt local governments from enacting ordinances restricting cannabis businesses, including placing reasonable restrictions on location or prohibiting such land uses altogether.[4]

Those cities, towns, and counties who have chosen to exercise their police power to restrict cannabis businesses have to date done so primarily utilizing either interim moratoria, permanent prohibition, or restrictive zoning.[5] RCW 35A.63.220 permits local governments to prohibit marijuana businesses for a designated time while the legislative body considers the matter further, provided a public hearing is held and findings of fact are issued. Local governments are empowered by RCW 35A.63.100 to enact ordinances prohibiting marijuana land uses in furtherance of the jurisdiction's comprehensive plan. Such moratoria and permanent prohibitions are enacted, with public hearing, but often without a vote of the residents. In a recent superior court case, *MMH, LLC*

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v. City of Fife, the plaintiff licensee propounded, in part, that the city's prohibition on marijuana land use did not reflect the will of the people.[6] This lack of cohesiveness has caught the attention of lawmakers. House Bill 1438, initially introduced in the 2016 legislative session, was intended to require that municipal policy reflect the will of its voters as applied to marijuana retailers. If it had passed, HB 1438 would have prohibited municipalities from enacting ordinances or regulations that have the effect of precluding the siting of licensed marijuana retailers within its borders, unless through one of two alternative electoral processes the municipality enacts an ordinance banning the operation of marijuana retailers. The two electoral mechanisms allowing municipalities to ban marijuana retailers within their jurisdictions require either the completion of a citizen initiative process or submittal of a referendum to the voters, and the ordinance would become effective only upon approval by a majority of the voters participating in the election. HB 1438 was not approved during the 2016 legislative session.

During the 2018 regular legislative session, three bills were introduced that, at least in part, intended to provide for uniformity in the licensing and siting of marijuana businesses. SB 6291 would have prohibited cities, towns, and counties from banning the siting of marijuana retailers, unless such prohibition was approved through a voters' initiative. Similarly, HB 2215 would have prevented cities, towns, and counties from prohibiting the siting of marijuana retailers unless through a voters' initiative, but it also prevented the WSLCB from licensing a retailer in a jurisdiction with a ban. HB 2336 was the successor bill to HB 1438 and was substantively similar to its predecessor bill, except that its application would have extended to all marijuana producers, processors, and retailers. None of the aforementioned bills were approved during the 2018 regular legislative session.

Although not approved, HB 2215 intended to solve the current disparity between licensed marijuana businesses and operational marijuana businesses by creating unity between state and local regulatory authority. Not only did it limit local government authority to enact prohibitions on marijuana businesses, it also sought to prohibit the WSLCB from issuing marijuana licenses in jurisdictions with bans. Currently, 80 jurisdictions within Washington state permanently ban or temporarily prohibit marijuana businesses through moratoria.[7] The WSLCB licenses marijuana producers, processors, and retailers within the boundaries of those prohibited jurisdictions, creating an enforcement burden for governments who choose to institute restrictive zoning ordinances to verify that licensed businesses within their purview do not operate in violation of local ordinance. It also creates an interpretation burden for licensees as new laws are adopted that antiquate already enacted ordinances. For example, Ordinance No. 1473, enacted by the City of Othello in 2016, explicitly prohibits the "production, processing, and/or retailing of marijuana or products containing marijuana," and refers to I-502 for the definitions of such terms. Questions of application may arise pertaining to marijuana licensees permitted by laws enacted after I-502, such as registered cooperatives pursuant to RCW 69.51A.250 and WAC 314-55-410 who produce and process marijuana for medical purposes, and marijuana research facilities that are licensed to produce and process marijuana for limited research purposes pursuant to RCW 69.50.372 and WAC 314-55-073.

As cannabis regulation within Washington state is incredibly dynamic, it is reasonable that lawmakers seek to unify state and local regulatory authority. The current extent of such uniformity involves a notice and objection process. The WSLCB must give notice to local government before issuing or renewing a license for a marijuana business located within each authority's jurisdiction and provides a timeframe in which the jurisdiction may object to the grant of a license.[8] In issuing or denying licenses, or renewals thereof, the WSLCB must give substantial weight to a local government's objection if the objection is based on chronic illegal activity associated with the applicant's operations or the conduct of the applicant's patrons.[9] However, pursuant to WAC 314-55-050, an objection based on local zoning does not provide adequate grounds for the WSLCB to seek denial of a marijuana application.

In February 2017, Kittitas County sought to reconcile the discrepancy between the state licensing process and the local business permitting authority through a declaratory ruling with the WSLCB. Kittitas County claimed that the WSLCB lacked authority under the Growth Management Act to license a marijuana applicant over objections by a local jurisdiction, specifically RCW 36.70A.103, which requires state agencies to comply with local comprehensive plans and development regulations, with limited exclusions. In response, the WSLCB issued a declaratory order in May 2017 wherein it determined that the provisions of RCW 36.70A.103 apply to locations owned, operated, or occupied by state agencies, but not to the location of businesses licensed by a state agency.[10] Therefore, the WSLCB is authorized to license marijuana applicants despite objections by local jurisdictions.

Despite multiple attempts by lawmakers, local governments, and licensees, the legalized marijuana framework in Washington state continues to lack uniformity between state regulatory authority and local government exercise of police power.

1 Washington State Constitution Article XI, Section 11.

2 Cannabis Action Coalition v. City of Kent, 180 Wn.App. 455, 322 P3d 1246 (2014), *aff'd* 351 P3d 151 (2015); SMP Retail, LLC v. Wenatchee, Chelan County Superior Court, No. 14-2-00555-0; Graybeard Holdings, LLC v. Fife, Pierce Co. Superior Court 14-2-

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10485-1 (2014); MMH, LLC v. Fife, Pierce County Superior Court, No. 14-2-10487-7 (2014).

3 *Id.*

4 AGO 2014 No.2.

5 *See* Castle Rock Ordinance No 2017-02 (2017), Poulsbo Ordinance 2014-12 (2014), City of Shoreline Ordinance No 735 (2016).

6 MMH, LLC v. Fife, Pierce County Superior Court, No. 14-2-10487-7 (2014).

7 MRSC Map of Zoning Ordinances, available online at: http://mrsc.org/Home/Explore-Topics/Legal/Regulation/Marijuana-Regulation-in-Washington-State.aspx#local-zoning-approaches.

8 RCW 69.50.331(7).

9 RCW 69.50.331(10).

10 Washington State Liquor and Cannabis Board Declaratory Order No. 01-2017.

2018 Legislative Session Report

By Richard Potter

The Administrative Law Section's legislative committee works with the Bar Association's legislative affairs staff to identify bills affecting the Public Records Act (42.56 RCW), Open Public Meetings Act (42.30 RCW), Administrative Procedure Act (34.05 RCW) or the Office of Administrative Hearings Act (34.12 RCW), as well as bills affecting other statutes that impact administrative agency procedures, processes, hearings, rulemakings, appeals/judicial review, etc. (as opposed to the substantive law implemented by agencies). The Committee reviews identified bills and tells the Bar personnel whether the Section has a formal position on any bills or any technical drafting comments, which the Bar passes on to appropriate legislators and staff.

The 2018 session was the second of the legislature's 2017-2018 biennium. Bills that were introduced but not enacted in the first year can be considered by the legislature in the second year. In 2017 the Section's legislative committee had serious concerns with 10 bills that would have amended the Administrative Procedure Act, and the Section's board of trustees formally opposed three of those bills. None of these bills were enacted in 2017 and none were revived in the 2018 session.

In the 2018 session the Committee reviewed 40 bills (not counting companion bills). Three involved the Administrative Procedure Act. Thirty involved the Public Records Act. The following bills reviewed by the Committee were enacted.

- House Bill 1622 concerns the State Building Code Council. It includes an amendment to RCW 34.05.328(5)(a)(i) of the Administrative Procedure Act (APA) that requires the Council to adhere to statutory requirements applicable to "significant legislative rules."
- House Bill 1047 requires manufacturers that sell drugs in Washington to operate a drug take-back program to collect and dispose of prescription and over-the-counter drugs from residential sources. It includes an amendment to RCW 42.56.270 of the Public Records Act to exempt from disclosure proprietary information filed with the Department of Health under this new law.
- House Bill 1388 transfers responsibilities for the oversight and purchasing of behavioral health services from the Department of Social and Health Services (DSHS) to the Health Care Authority, except for the operation of the state hospitals, and it transfers responsibilities for the certification of behavioral health providers from DSHS to the Department of Health. It includes an amendment to RCW 42.56.270(11) of the Public Records

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Act to exempt from disclosure "proprietary data, trade secrets, or other information that relates to … determining prices or rates to be charged for services, submitted by any vendor to the department of social and health services or the health care authority for purposes of the development, acquisition, or implementation of state purchased health care …."

- House Bill 1513 sets up a system under which persons at least 16 years old can pre-register to vote before they turn 18. It includes an amendment to RCW 42.56.230 of the Public Records Act to exempt voter registration application records of persons under 18 years of age from public disclosure requirements.
- House Bill 2097 regulates certain usages and disclosures by government agencies and private employers of persons' religious affiliations or beliefs. It adds a new section to the Public Records Act (42.56 RCW): "All records that relate to or contain personally identifying information about an individual's religious beliefs, practices, or affiliation are exempt from disclosure under this chapter." The Governor gave interpretation and other directive to state agencies and vetoed Section 6 of the bill. See the Governor's veto message via the legislature's webpage for this bill (url is below) or the "Bill Action" section of the Governor's website (https://www.governor.wa.gov).
- House Bill 2307 amends RCW 42.56.430 of the Public Records Act to require that release of sensitive fish and wildlife data be subject to a confidentiality agreement.
- Senate Bill 6059 implements the Corporate Governance Annual Disclosure Model Act. It includes amending RCW 42.56.400 of the Public Records Act to exempt from disclosure information included in the annual disclosure filing with the Insurance Commissioner.
- House Bill 2682 amends RCW 42.56.380 of the Public Records Act to exempt from disclosure hop grower lot information used in the state department of agriculture export document.
- House Bill 2700 requires audio and video recordings of child forensic interviews disclosed in a criminal or civil proceeding to be subject to a protective order unless the court finds good cause for the interview to not be subject to such an order. It amends RCW 42.56.240 of the Public Records Act to exempt from disclosure audio and video recordings of child forensic interviews depicting allegations of child abuse, child neglect, or exposure to violence, except by court order upon a showing of good cause and with advance notice to the child's parent, guardian, or legal custodian.
- Senate Bill 5375 renames the Cancer Research Endowment Authority the Andy Hill Cancer Research Endowment. It includes an amendment to 42.56.270 RCW of the Public Records Act to exempt from disclosure "financial, commercial, operations, and technical and research information and data submitted to or obtained by the Andy Hill cancer research endowment program in applications for, or delivery of, grants under chapter 43.348 RCW, to the extent that such information, if revealed, would reasonably be expected to result in private loss to providers of this information."
- Senate Bill 6241 concerns the January 1, 2020, implementation of the School Employees' Benefits Board program. It includes an amendment to 42.56.400 RCW of the Public Records Act to exempt from disclosure K-12 health care benefit information that the Office of the Insurance Commissioner must provide to the Health Care Administration.
- Senate Bill 6408 amends RCW 10.109.010 and 10.109.030 (Criminal procedure; use of body worn cameras) to remove the 7/1/19 expirations dates, and amends RCW 42.56.090 of the Public Records Act to exempt from disclosure "intimate images," as defined.
- Senate Bill 6319 implements a federal produce safety rule. It includes amending RCW 42.56.380 of the Public Records Act to exempt from disclosure "information obtained from the federal government or others under contract with the federal

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If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please contact Eileen M. Keiffer emkeiffer@gmail.com.

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government or records obtained by the department of agriculture, in accordance with section 10 of this act."

- Senate Bill 6245 establishes several new requirements concerning the use of spoken language interpreter services by the Department of Social and Health Services, the Health Care Authority, the Department of Labor and Industries, and the Department of Children, Youth, and Families. It also requires the Department of Enterprise Services (DES) to develop a model for state agencies to use to purchase interpreter services.
- Senate Bill 6179 amends RCW 80.04.080 and 81.04.080 to reduce the statutory requirements for annual reports that public service companies are required to file with the Utilities and Transportation Commission. This was a Commission request bill.

For the last several sessions the Committee has been working with the Bar's legislative personnel to encourage legislators to put all Public Records Act disclosure exemptions in the PRA itself, rather than bury them in other RCW titles. The Code Reviser has assured us that it does its best to accomplish this goal during its work with legislators to draft bills that are introduced for consideration. In the 2018 session, of the nearly 30 bills that involved new PRA disclosure exemptions, only one did not place the exemption verbiage in the PRA itself, and that proposal failed to pass the legislature.

Full information on 2018 session bills is available at http://apps.leg.wa.gov/billinfo.

Case Law Update

***City of Seattle and Seattle Police Department v. 2009 Cadillac CTS, WA* Court of Appeals, Division I (Jan 26, 2018).**

By Alexandra Kenyon

The Washington state Court of Appeals, Division I, held that under the drug forfeiture statute RCW 69.50.505 (1) a claim of ownership starts the 90-day clock for commencement of a hearing on forfeiture under the Administrative Procedures Act ("APA") (which governs forfeiture proceedings); (2) the agency's sending of a notice of hearing satisfied the requirement of holding a hearing within the requisite 90 days; and (3) beginning the forfeiture hearing within 105 days of seizure did not violate due process.

The Seattle Police Department ("SPD") seized a 2009 Cadillac CTS, four wheels and tires, and cash from Johnny White on February 17, 2015. On the same day, SPD mailed White a notice of seizure and intended forfeiture for the car, the wheels, and the tires. On February 19, 2015, SPD mailed White another notice of seizure and intended forfeiture for the cash. On March 12, 2015, White sent a letter to SPD claiming ownership of the seized items. On April 15, 2015, SPD sent White a notice of hearing set 105 days from the seizure. At the hearing, White moved to dismiss the forfeiture proceeding, arguing the hearing was untimely.

With regard to the 90-day clock requirement, the court reiterated longstanding Supreme Court holdings addressed in the *Tellevik* line of cases. In *Tellevik I*, our Supreme Court considered the constitutionality of the forfeiture statute. The Supreme Court's initial opinion found "the statute requires a full adversarial hearing with judicial review within 90 days of the seizure of real property if the claimant notifies the seizing agency in writing."[1] The opinion was later amended to strike "of the seizure of real property," and added a citation to the APA. In *Tellevik II*, the court concluded "the 90-day hearing requirement articulated in *Tellevik I* is not dicta, but is, instead, central to its holding."[2] While *Tellevik* and its progeny clearly require a 90-day hearing, this leaves unanswered what action a city must take to satisfy the requirement and what event starts the clock.

Pursuant to the APA, "(a)n adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted."[3] The court held that because the requirement for a hearing within 90 days is grounded in application of the APA, it is clear that the hearing is commenced when the notice of hearing was given, i.e., the seizing agency satisfied the 90-day requirement when it "notifies a claimant that some stage of the hearing will be conducted" – in this case 55 days.

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As to what event starts the clock, White contended that the 90-day requirement started when the property was seized. The city argued the triggering event was the claim of ownership.

Although RCW 69.50.505(3) states "proceedings for forfeiture shall be deemed commenced by the seizure," the court noted that there is no indication that the right to a hearing within 90 days also commences on that date and that the 90-day requirement controls the due process timeliness requirements for the hearing process; it does not apply to proceedings for forfeiture as a whole. In fact, forfeiture proceedings under RCW 69.50.505 do not necessarily include a hearing. A hearing is only required if a claimant contests the intended forfeiture.

The case law on the forfeiture statute has consistently failed to clearly answer whether the 90-day requirement is triggered by seizure or claim of ownership; however, this court looked to the APA for further guidance. The APA explicitly provides that "(a)fter receipt of an application for an adjudicative proceeding … within ninety days after receipt of the application … the agency shall… (c)ommence an adjudicative proceeding in accordance with this chapter." The court found that, in the context of forfeiture, because the claimant's notice of claim of ownership serves as the "application," the claim of ownership triggers the right to a forfeiture hearing and starts the 90-day clock.

As a last consideration, the court detailed that under a second level due process balancing test, compliance with the provisions of the forfeiture statute, i.e., commencement of adjudicative proceedings within 90 days of the claim of ownership, meets the requisites of due process. The court went on to explain that due process is flexible, and particular circumstances may impact the timing of a hearing. For example, the court acknowledged other fact patterns which might compel more timely proceedings despite compliance with statutory requirements such as (1) the length of the delay; (2) the reason for the delay; (3) the claimant's assertion of his right to a hearing; and (4) whether the claimant suffered any prejudice.

Ultimately, the court found that the length of the delay, if any, was minimal because the hearing occurred within 105 days of seizure, White did not assert any need for an earlier hearing, and White did not show the timing hampered his defense in any way.

1 Tellevik v. 31641 West Rutherford Street, 120 Wn.2d 68, 838 P.2d 111, 845 P.2d 1325 (1993) ("Tellevik I").

2 Tellevic v. 31641 West Rutherford Street, 125 Wn.2d 364, 884 P.2d 1319 (1994) ("Tellevik II").

3 RCW 34.05.413(5).

Arthur West v. City of Puyallup, WA Court of Appeals, Div. II (Feb. 21, 2018).

By Ann Marie Soto

Earlier this year, the Court of Appeals, Division II, clarified the application of the Public Records Act ("PRA"), RCW Chapter 42.56, to the social media posts of a Puyallup City Councilmember. The court confirmed that a public official's social media posts can constitute an agency's public records subject to PRA disclosure; however, whether any particular post will constitute a public record under the PRA must be determined on a fact and case specific basis.

The court applied the *Nissen* test[1] to determine whether posts on a personal Facebook account can be public records (they can) and whether the specific posts met the definition of "public record." In *Nissen*, the Supreme Court held that text messages prepared on an official's private cell phone within his official capacity and within the scope of his employment constituted public records subject to disclosure under the PRA. In the case at hand, there was no dispute that at least some of the records met the first two parts of the PRA's definition of "public record" ("writings" related to the "conduct of government or a government function"). Thus, the decision rested on whether the records were "prepared" by a public agency (West did not claim that the City owned, used, or retained the Facebook posts).

Again relying on *Nissen*, the court stated that records prepared by agency employees/officials in the "scope of employment" may be public records. The communication is within the scope of employment only when (1) the job requires it, (2) the employer directs it, or (3) it furthers the employer's interests. Here, the court held that the Councilmember's job did not require the posts, the City did not direct the posts, and the posts only tangentially furthered the City's interests. Therefore, the posts were not public records. These included posts aimed at the Councilmember's supporters related to City Council meeting agendas, public works projects, and general information about city activities and city business.

1 Nissen v. Pierce Cty., 183 Wn. 2d 863, 879, 357 P.3d 45 (2015).

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- Why you think this person should be recognized

The award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law. After receiving his law degree from Cleveland State University of Law in 1965, he began practicing in Washington in 1968, serving as an Employment Security Department hearings examiner from 1970 to 1974 and as a senior administrative law judge at the Office of Administrative Hearings from 1975 to 1993. He continued to serve as an ALJ pro tem after his retirement in 1993. He was an early proponent for the creation of a central hearings panel, and played an important role in the creation of the Office of Administrative Hearings (RCW 34.12).

Frank was generous with his time and expertise and is well-remembered for his sense of humor, his command of the English language, and his writing style – including his knowledge of legal terminology and history. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name.

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