

## MOVING MARIJUANA POLICY FORWARD

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This memorandum outlines marijuana's current status under state and federal law, recommends City priorities for the 2015 legislative session, identifies legal and policy issues for Seattle leaders, and provides historical context for the evolution of Washington's marijuana laws and policies.

### I. INTRODUCTION

#### A. **Production or Distribution of Marijuana without an I-502 License Constitutes a Felony under Both State and Federal Law.**<sup>2</sup>

Marijuana is a Schedule I controlled substance under both state and federal law.<sup>3</sup> Both state and federal law also make manufacture, distribution, delivery, and the dispensing of Schedule I controlled substances a felony.<sup>4</sup>

Washington State Initiative Measure No. 502 ("I-502")—passed on November 6, 2012 by a 56% majority, codified within Chapter 69.50 RCW, and amended by the legislature in 2013 and 2014—exempts from all state criminal and civil sanctions the production and distribution of marijuana if conducted in compliance with state law and regulations. By comparison, Washington State Initiative Measure No. 692—passed on November 3, 1998 by a 59% majority, codified as Chapter 69.51A RCW (the Medical Use of Cannabis Act or "MUCA"), and amended by the legislature in 2007, 2010, and 2011—only provides an affirmative defense to qualifying patients and their designated providers, post-arrest, in state criminal prosecutions for violations of the Uniform Controlled Substances Act (referred to as "VUCSAs").<sup>5</sup>

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<sup>1</sup> I am grateful to Alison Holcomb of the ACLU of Washington and my Deputy Chief of Staff, Assistant City Attorney John Schochet, for their contributions to this memorandum.

<sup>2</sup> Washington lawyers advising clients how to comply with I-502's licensing and regulatory requirements faced a potential ethical problem because the activities being licensed and regulated remain federal crimes. To address these concerns, the Washington Supreme Court recently adopted a new Comment 18 to RPC 1.2:

At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope, and meaning of Washington Initiative 502 and may assist a client in conduct that the lawyer reasonably believes is permitted by this initiative and the statutes, regulations, orders and other state and local provisions implementing them.

<sup>3</sup> Meaning, pursuant to 21 USC §812 and RCW 69.50.203, that marijuana (1) has high potential for abuse, (2) has no currently accepted medical use in treatment in the United States, and (3) is not accepted as safe for use under medical supervision. By contrast, cocaine is listed on Schedule II; it is sometimes used as a topical anesthetic for minor medical procedures involving the mouth, nose, or throat.

<sup>4</sup> 21 USC §841; RCW 69.50.401. Production and distribution of Schedule I substances for research purposes, e.g., may be conducted via federal waivers controlled by the U.S. Drug Enforcement Administration.

<sup>5</sup> *State v. Reis*, 180 Wn. App. 438, 322 P.3d 1238 (2014) (review granted). An "affirmative defense" admits the commission of a crime but argues the crime was justified. MUCA places the burden on the defendant to prove medical justification at trial by a preponderance of the evidence. RCW 69.51A.043, 045, 047. By contrast, in assault

## **B. I-502 Implementation Has Been Slow and Steady.**

In passing I-502, voters intended to end the failed policy of marijuana prohibition and replace it with a new approach that brings the illicit marijuana market under regulatory control and directs new tax revenues to prevention, treatment, research, education, and evaluation.<sup>6</sup> The law includes provisions designed to protect youth, discourage impaired driving, and establish consumer safety standards. The Washington State Liquor Control Board (“LCB”), the agency with primary regulatory authority for implementation and enforcement of I-502, adopted rules that address these goals and also thwart the criminality associated with the illicit drug industry by requiring thorough criminal and financial background checks and establishing a new “seed to sale” tracking system.<sup>7</sup>

LCB has approached implementation of I-502 cautiously and carefully.<sup>8</sup> After months of input from community members and expert consultants,<sup>9</sup> the agency adopted initial rules on October 21, 2013.<sup>10</sup> These rules went into effect 30 days later, and LCB accepted its first license applications from November 18 through December 20, 2013. The first producer license was issued on March 5, and the first retail stores, including one in Seattle, opened July 8, 2014.

LCB conducted a lottery for the limited number of retail licenses it intended to issue. Dozens of applicants who won favorable spots in the lottery were slow to move forward with the application process. In mid-September 2014, LCB sent letters to approximately 60 such applicants across the state, including five of the 21 spots awarded in Seattle, announcing a 60-day deadline to move on their applications or forfeit their lottery spots. To date, seven state-

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and homicide cases, prosecutors are required to prove the *absence* of the affirmative defense of self-defense. See Wash. Pattern Jury Instr. Crim. WPIC 16.02, 17.02.

<sup>6</sup> The Brookings Institution published an excellent review of I-502 that provides a useful orientation to the policy choices included in the measure. *Washington’s Marijuana Legalization Grows Knowledge, Not Just Pot: A Report on the State’s Strategy to Assess Reform*, by Philip Wallach (Aug. 25, 2014), available for download at <http://www.brookings.edu/research/reports/2014/08/25-washington-marijuana-legalization-knowledge-experiment-wallach>.

<sup>7</sup> I-502 rules are codified at Chapter 314-55 WAC.

<sup>8</sup> Washington’s approach to regulating marijuana-infused edible products is instructive. Colorado’s initial lack of rigorous standards regarding serving sizes, homogenization, packaging, and labeling contributed to troubling consumer experiences, including accidental ingestion by children. Washington was careful to adopt rules addressing these concerns: WAC 315-55-095 defines a “single serving” as 10 milligrams of THC, and one unit of an edible may contain a maximum of 10 servings. WAC 315-55-105 requires that marijuana edibles labels contain information about whether the product is meant to be eaten or swallowed, the recommended serving size and the number of servings contained within the unit—including total milligrams of active THC, the net weight, and the list of all ingredients and any allergens. The label also must contain a warning: “Caution: When eaten or swallowed, the intoxicating effects of this drug may be delayed by two or more hours.” The LCB recently further tightened rules regarding edibles in response to issues from Colorado, requiring that all new products be approved by the LCB.

<sup>9</sup> LCB maintains multiple web pages of I-502 related information, including all reports produced by the expert consultants retained by the agency, at <http://liq.wa.gov/marijuana/I-502>.

<sup>10</sup> I-502 established December 1, 2013, as the deadline for LCB to adopt rules.

licensed retail stores have opened in Seattle, six of which opened after the LCB letters went out. Statewide, 97 of the intended 334 retail stores have been licensed.<sup>11</sup>

Initially, all of the retail stores that opened in the summer experienced severe supply shortages. Lacking legal supply sufficient to meet demand, opportunistic illegal suppliers—often thinly veiled as medical marijuana providers—continued to flourish, often with negative impacts on quality of life and public safety. Licensing of producers is still ongoing, and product supply is slowly catching up to demand. However, even when legal supply reaches adequate levels, unlicensed, unregulated, and untaxed suppliers will always have an unfair economic advantage in the absence of a clear and committed threat of enforcement against illegal activity.<sup>12</sup>

**C. Continued Tolerance of Unlicensed, Unregulated Commercial Marijuana Activity under the Auspices of Washington’s Medical Marijuana Law Undermines I-502 Implementation and State-Federal Collaboration on Marijuana Law Enforcement.**

The Obama Administration announced via Deputy Attorney General James Cole’s August 29, 2013 memorandum (the “Cole Memorandum”)<sup>13</sup> that federal marijuana enforcement policy will focus on eight areas of concern:

- Distribution to minors;
- Proceeds from marijuana sales going to gangs and cartels;
- Diversion from states where marijuana is legal under state law to other states;<sup>14</sup>
- Use of state-authorized marijuana activity as a cover for trafficking of other illegal drugs;
- Violence and firearms used in the marijuana market;
- Impaired driving;
- Marijuana grows on public lands; and
- Marijuana use on federal property.

The Cole Memorandum rests on the federal government’s broader “expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests,” admonishing that “a system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice.”

I-502 and LCB rules address these federal priorities. Current exploitation of Washington’s medical marijuana law for commercial purposes, however, undermines public

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<sup>11</sup> LCB publishes and regularly updates the lists of licensees as well as sales and tax revenue figures at <http://www.liq.wa.gov/records/frequently-requested-lists>.

<sup>12</sup> See, e.g., <http://www.businessinsider.com/legal-marijuana-in-washington-and-colorado-hasnt-gotten-rid-of-the-black-market-2015-1>.

<sup>13</sup> Available online at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

<sup>14</sup> Passage of Oregon’s marijuana legalization Measure 91, while ameliorating “leakage” concerns over Washington’s southern border, may present interesting competitive challenges between the two state’s marijuana industries, particularly in light of Oregon’s lower excise taxes and lack of a state sales tax.

safety, consumer health, and the successful and consistent regulation of those who wish to engage in marijuana-related business activities. MUCA must be revisited at the state level in light of I-502, and the City should adopt a marijuana enforcement policy that reflects the new legal landscape for commercial marijuana activity. Failure to take these steps risks federal intervention and frustration of I-502's broader policy goal to replace prohibition with a new approach that emphasizes health, safety, and fairness for all.

## **II. RECOMMENDED STATE LEGISLATIVE PRIORITIES<sup>15</sup>**

Illegal marijuana businesses are thriving in Washington's prolonged transition to a legal, regulated marijuana industry. Most claim legitimacy under the MUCA. MUCA was most recently amended by SB 5073 in 2011, but the bipartisan bill was partially vetoed by Governor Gregoire on April 29, 2011—in the process, damaging the statute's internal structure, logic and legal efficacy.

Initiative 502 was filed with Washington's Secretary of State on June 22, 2011. I-502 expressly did not alter, integrate or coordinate with the MUCA. Sufficient voters signed the initiative petition by year's end to place it on the next general election ballot, and I-502 passed easily in November 2012. In the last (short) legislative session in 2014, a supermajority of the State Senate passed SB 5887 (functionally folding MUCA into I-502), but it failed in the House at the eleventh hour. Because it has now been more than two years since voters approved I-502, the legislature can amend the statute without a supermajority to meet the needs of bona fide medical marijuana users while limiting illicit businesses' ability to game either the I-502 system or MUCA.

The following recommendations for legislative priorities in 2015 focus on (1) ending commercial exploitation of Washington's medical marijuana law that undermines public safety, consumer health, and successful regulation of entrepreneurs wishing to engage in marijuana-related business activities; (2) facilitating robust implementation of I-502's statewide regulatory framework by reducing tensions between state and local government; (3) improving public health and safety protections relating to amateur marijuana extraction processes and commercially-available marijuana concentrates; and (4) aligning government response to underage marijuana possession with that for underage alcohol possession.

### **A. Medical Marijuana Must Be Reconciled With I-502.**

#### ***Background***

The MUCA provides an affirmative defense to criminal prosecution for “qualifying patients” who have been diagnosed by a “health care professional as having a terminal or debilitating medical condition” to produce and use marijuana to treat their conditions.<sup>16</sup>

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<sup>15</sup> Some improvements to I-502 can be accomplished through the LCB's rulemaking authority without legislative action. The LCB periodically reviews its administrative rules, and we will work with the City's Marijuana Interdepartmental Team (IDT) to comment on future rules.

<sup>16</sup> RCW 69.51A.010(4); 69.51A.043.

“Terminal or debilitating medical conditions” include a number of specific conditions (e.g., cancer, HIV, multiple sclerosis, glaucoma) as well as “intractable pain, limited for the purposes of this chapter to mean pain unrelieved by standard medical treatments and medications.”<sup>17</sup> “Health care professionals” include physicians, physician assistants, nurse practitioners, and naturopaths.<sup>18</sup>

Qualifying patients and their designated providers may grow up to 15 plants and possess up to 24 ounces (one and a half pounds) of useable marijuana,<sup>19</sup> and may argue to a jury that their possession of even greater numbers and quantities is justified by their specific medical needs.<sup>20</sup> RCW 69.51A.040 also appears to extend arrest protection to medical marijuana users. However, this provision requires patients to register with the Department of Health using a registry that does not exist following Governor Gregoire’s section veto of SB 5073. RCW 69.51A.043 consequently provides only an affirmative defense at trial, but neither arrest protection nor a bar to prosecution.<sup>21</sup>

SB 5073 was intended to create a licensed, regulated medical marijuana dispensary system, but those provisions were also vetoed. A new provision creating “collective gardens” remained, consisting of groups of up to 10 qualifying patients possessing up to 45 plants (no more than 15 per patient) and up to 72 ounces of useable marijuana (no more than 24 ounces per patient).<sup>22</sup> Marijuana cultivated in collective gardens may not be “delivered to anyone other than one of the qualifying patients participating in the collective garden.”<sup>23</sup> Moreover, “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.”<sup>24</sup>

Storefront medical marijuana dispensaries in Seattle generally purport to function as collective gardens. No statutory provision forbids multiple collective gardens from operating in one location, but such co-location raises the question whether participating patients are in constructive possession of plants and useable marijuana exceeding the numbers covered by the affirmative defense.<sup>25</sup> Patients tending plants in a warehouse containing multiple gardens may be

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<sup>17</sup> RCW 69.51A.010(6).

<sup>18</sup> RCW 69.51A.020(2).

<sup>19</sup> RCW 69.51A.040(1)(a).

<sup>20</sup> RCW 69.51A.045.

<sup>21</sup> See *State v. Reis*, 180 Wn. App. 438, 322 P.3d 1238 (2014) (review granted).

<sup>22</sup> RCW 69.51A.085(1).

<sup>23</sup> RCW 69.51A.085(1)(e).

<sup>24</sup> RCW 69.51A.085(2).

<sup>25</sup> Constructive possession “occurs when there is no actual physical possession but there is dominion and control over the substance,” and “[d]ominion and control need not be exclusive to support a finding of constructive possession.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.03 (3d Ed).

in constructive possession of more than 45 plants, and patients acting as salespeople in storefronts may be in constructive possession of more than 72 ounces of useable marijuana.

Collective gardens—intended to be truly cooperative, closed systems, and not commercial storefronts generating profits for entrepreneurs—are exploited via a loophole that does not limit how quickly collective garden memberships can change.<sup>26</sup> Robust commercial activity involving hundreds, even thousands, of individuals with medical authorizations purchasing marijuana from a single storefront is rationalized as legitimate collective garden participation by constantly rotating the identities of the 10 members of each garden. Such inventiveness may not violate the letter of the law, but plainly undermines its spirit. And while the affirmative defense might defeat criminal prosecution under the law’s current language, it does not prevent seizure of marijuana, sales proceeds, equipment, or records as evidence, and may not be available in civil asset forfeiture proceedings.

Last session, the State Senate passed SB 5887, which would have (1) left MUCA’s basic structure in effect; (2) reduced the amount of marijuana qualifying patients could grow and possess; (3) replaced collective gardens with “cooperative grows” (smaller, explicitly noncommercial versions of collective gardens with limited member rotation); (4) created an additional, new I-502 license for retailers of medical marijuana strains commonly used by qualifying patients; and (5) exempted qualifying patients from some I-502 taxes. The Seattle City Attorney’s Office (CAO) supported this legislation, which would have effectively eliminated current grey-market medical dispensaries and moved retail medical marijuana into the I-502 system. It failed in the House, however, over the issue of revenue sharing with local jurisdictions (discussed below).

How did Governor Gregoire’s partial veto in 2011, left unaddressed after the Legislature’s failed attempt in 2014, affect Seattle? Until late 2013, Seattle had not attempted to regulate medical marijuana locally, beyond restating existing law that marijuana businesses must comply with all generally applicable zoning, building, fire, electrical, and business licensing laws.<sup>27</sup> In October 2013, City Council used its zoning powers to pass Ordinance No. 124326 and (1) define “major marijuana activity” as any marijuana production, processing, sale, or delivery beyond the size of one collective garden (45 plants and 72 ounces), (2) limit such activity to certain commercial and industrial zones, and (3) require a state marijuana license in order to conduct this activity. Marijuana businesses in operation before November 16, 2013 were given until January 1, 2015 to come into compliance—a deadline City Council has since extended to

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<sup>26</sup> See *State v. Shupe*, 172 Wn. App. 341, 289 P.3d 741, 748 (2012). Interpreting an earlier version of the statutory limitations on “designated providers,” the Washington State Court of Appeals, Division III, held that “only one patient at any one time” allowed a designated provider to engage in serial transactions with multiple qualifying patients without regard to the amount of time spent serving each patient. Under this interpretation, Mr. Shupe’s operation of a commercial dispensary did not violate the “only one patient at any one time” rule because Mr. Shupe never had more than one patient at his storefront counter at a time. After serving one patient, he could destroy that patient’s paperwork designating him as the patient’s provider, and then have the next patient customer execute new designating paperwork. In 2011’s SB 5073, which post-dated Mr. Shupe’s conduct and trial, the legislature amended the statute to require a 15-day waiting period after serving as designated provider to one patient before being allowed to serve as the designated provider to another patient. However, no such temporal restriction exists regarding the rotation of memberships in 10-patient collective gardens.

<sup>27</sup> Ordinance No. 123661.

July 1, 2015 or, if the legislature amends the MUCA in this session, to January 1, 2016.<sup>28</sup> This legislation allows medical home grows and single, noncommercial collective gardens on residential properties, but any marijuana enterprise larger than a single collective garden would require a state license, which, under current state law, means an I-502 license. The City’s definition of “major marijuana activity” may not fully encompass commercial marijuana activity—selling marijuana and growing marijuana with the intent to sell it—unless the operation involves more than 45 plants or 72 ounces of marijuana.

### ***Recommendation***

The senior member of Seattle’s legislative delegation to Olympia, 36<sup>th</sup> District Senator Jeanne Kohl-Welles, is an expert on marijuana legislation. She has proposed an elegantly simple solution to the problems posed by Washington’s confusing medical marijuana law: **All marijuana-related business activity, whether for medical or recreational use, would be regulated under a single framework—the one already created by I-502 and the LCB’s work over the past two years.** Corrections and improvements to marijuana laws and regulations will be indicated from time to time as Washington continues to adapt and learn, but such changes would take place in one comprehensive and internally consistent framework for regulating production, sale, and marketing of marijuana.

**To this unified framework would be added three special certification options to serve patients suffering from terminal and debilitating medical conditions:**

- 1) **Medical Grade Cannabis.** LCB would be tasked with consulting with the Departments of Health (“DOH”) and Agriculture to adopt rules establishing: (a) a new “medical grade” standard for marijuana, marijuana-infused products, and marijuana concentrates; (b) testing requirements for 502-certified laboratories to confirm that products meet the new medical grade standard; and (c) labeling permissions for medical grade products. Any licensed producer, processor, or producer-processor would be free to produce and market marijuana products meeting the new standard.
- 2) **Medical Cannabis Consultants.** DOH would be tasked with adopting rules to certify a new “medical cannabis consultant” with an annually renewable license, granted to any qualifying individual wishing to advise others, in the context of a business transaction, on the potential medical benefits of cannabis. Regular training would be required, available to owners and employees of state-licensed marijuana businesses, state-licensed health care professionals, and independent consultants. It would provide some assurance to consumers that professional advice on potential medical uses of cannabis meets regularly updated standards.
- 3) **Medical Cannabis Waiver.** All adults aged 21 and older can already purchase the full range of marijuana products from competing retail stores, and will also be allowed to grow up to six plants at home for personal use (see discussion below). Only underage

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<sup>28</sup> Ordinance No. 124552.

patients diagnosed with a terminal or debilitating medical condition<sup>29</sup>—who would not be able personally to grow marijuana or enter a retail marijuana outlet—and older patients who wish to purchase medical grade products at retail stores tax free would require a new “medical cannabis waiver,” to be created by DOH and replacing MUCA’s “valid documentation.”<sup>30</sup> A patient could apply directly to the agency, which would independently confirm the diagnosis of a terminal or debilitating medical condition with the patient’s health care provider. With approved waivers, older patients could purchase medical grade products from a retail store, grow their own plants, or designate a provider to grow or obtain marijuana for their use. Underage patients with waivers could designate a provider (including parents or guardians) to grow or obtain marijuana. And because health care providers would no longer issue “valid documentation” directly to patients—alleviating physician concerns about federal Drug Enforcement Administration (DEA) control over prescription authority—the economic incentive for other health care providers to “specialize” in medical marijuana authorizations that fuel “pill mill” abuses would be reduced.

**Three changes to the I-502 regulatory structure would simplify and facilitate implementation of the foregoing certification features:**

- 1) State law should be amended to exempt low-THC useable marijuana and marijuana-infused products from the special marijuana excise tax.** Some marijuana products contain low levels of THC<sup>31</sup> and do not cause intoxication. Examples include low-THC, high-CBD<sup>32</sup> strains of marijuana like “Charlotte’s Web,” named after Colorado child patient Charlotte Fiji and made famous by CNN chief medical correspondent Sanjay Gupta, M.D., in his 2013 documentary, *Weed*.<sup>33</sup>
- 2) All adults aged 21 or older should be allowed to grow a small number (up to six) of marijuana plants for personal use and to gift, for no remuneration, a small amount of personally harvested marijuana to another adult aged 21 or older.** This would: (a) further reduce the need for “valid documentation” that fosters medical marijuana “authorization mills;” (b) bring Washington’s marijuana law into line with the other three states to legalize marijuana for adult use (Colorado, Oregon and Alaska) and Washington, D.C.; and (c) establish more equity between marijuana and home beer brewing and wine making.
- 3) I-502’s three-tier excise tax structure should be collapsed into a single tax, applied at the point of sale,** adjusted upward to make the change revenue-neutral, **and**

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<sup>29</sup> Currently, the MUCA contains no restrictions whatsoever on the issuance of valid documentation to—or on the growing, possession, or use of marijuana by—patients under the age of 21. SB 5887 would have established such restrictions, see E3SSB 5887 §20 (2014); DOH’s new “medical cannabis waiver” ought to include similarly heightened safety standards for minors with terminal or debilitating medical conditions, including expiration dates.

<sup>30</sup> RCW 69.51A.010(7).

<sup>31</sup> Delta-9-tetrahydrocannabinol.

<sup>32</sup> Cannabidiol.

<sup>33</sup> See <http://www.cnn.com/2013/08/07/health/charlotte-child-medical-marijuana/>.

**characterized as a consumer tax rather than one paid by the business.** This amendment would: (a) ease implementation of a tax exemption for patients possessing DOH waivers; (b) eliminate unequal tax burdens imposed on independent producers and processors, compared to combined producer-processors; and (c) eliminate licensee double-taxing under I.R.S. Code § 280E, which prohibits businesses engaged in (federally) illegal marijuana commerce to deduct business expenses—including excise taxes paid by such businesses.

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With lawmakers facing tremendous pressures to fund education, transportation projects, climate change measures and mental health treatment, the agenda is already full for the “long” legislative session ahead. I-502’s potential contribution to the state general fund’s bottom line should be obvious. Both revenues and public safety will be compromised, however—with no real benefit to bona fide patients—unless the illegal, unregulated, untaxed commercial medical marijuana industry is finally reconciled with Washington’s I-502 structure. Whether Sen. Kohl-Welles’s proposal or some other approach is enacted, law enforcement’s ultimate ability to readily discern illegal commercial marijuana operations will be the ultimate measure of the legislature’s success, making a single state regulatory system controlling all marijuana production and distribution paramount. The following enhancements will make the nation’s most promising alternative to marijuana prohibition even better.

**B. The Legislature Should Clarify the Scope of State Preemption over Local Jurisdictions’ Ability to Prohibit I-502 Licensees.**

Unlike the Washington State Liquor Act or Colorado’s Amendment 64, I-502 did not provide a mechanism for cities and counties to opt out of—or ban outright—state-licensed marijuana businesses. Article XI, section 11 of the Washington State Constitution provides, “Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations *as are not in conflict with general laws*” (emphasis supplied). As explained by the Washington State Supreme Court, “A local regulation conflicts with a statute when it permits what is forbidden by state law *or prohibits what state law permits*. Where a conflict is found to exist, under the principle of conflict preemption, the local regulation is invalid.”<sup>34</sup> Consistent with this principle, the Washington Court of Appeals, Division II, very recently nullified Wahkiakum County’s attempt to ban local application of biosolids contrary to state law, reasoning that a ruling allowing one city or county to ban implementation of a state law would mean that all cities and counties across the state must be allowed to do so, rendering the law meaningless.<sup>35</sup>

On January 16, 2014, Washington State Attorney General Bob Ferguson issued a nonbinding but influential opinion that local jurisdictions could ban I-502 licensees within their boundaries because I-502 didn’t explicitly state they could not. To date, roughly 50 cities and

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<sup>34</sup> *Parkland Light and Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004) (emphasis supplied).

<sup>35</sup> *Dep’t of Ecology v. Wahkiakum Cy.*, \_\_ Wn. App. \_\_, 337 P.3d. 364, 369-70 (Nov. 14, 2014).

counties have adopted bans, and approximately 60 have extended moratoriums on issuing local business licenses to state-licensed marijuana businesses. In March, the Washington State Court of Appeals, Division I, held that local jurisdictions can prohibit *medical* marijuana businesses within their boundaries.<sup>36</sup> To date, five superior courts have adopted the Attorney General's analysis and ruled that local jurisdictions can prohibit *I-502* licensees. At least two of these rulings are on appeal to the state Supreme Court and Court of Appeals.

Litigation and appeals cost city, county, and state tax dollars. A legislative resolution to such litigation<sup>37</sup> might spare additional taxpayer waste. In the last session, the legislature considered several bills that would have clarified local jurisdictions' power to ban *I-502* licensees; none passed. Four possible approaches include: (1) prohibit any local regulation of *I-502* licensees; (2) permit local regulation of *I-502* licensees, but not outright bans; (3) permit local jurisdictions to ban *I-502* licensees, but only by a public vote; or (4) permit local jurisdictions to ban *I-502* licensees by normal legislative action. Seattle should oppose the first approach because cities should always have some regulatory and zoning authority. The fourth option is also unacceptable because it ignores the voters' will. **The second approach is the best: allowing local regulation but not outright prohibition.** (The CAO has drafted legislation taking this approach.) Alternatively, the third option—allowing bans by a local vote of the people—is a viable compromise. State law currently allows cities and counties to go “dry” and prohibit alcohol sales by a vote of the people,<sup>38</sup> so there is precedent for this approach (though none are currently dry). The public vote approach is also the approach taken by Measure 91 in Oregon. Absent legislative action, the courts will eventually decide this issue, after more delay and expense.

### C. **Sharing the Special Marijuana Tax With Local Jurisdictions Might Facilitate Even Implementation of the Law.**

One of the principal reasons some local jurisdictions have adopted local bans and moratoriums on state-licensed marijuana businesses is because *I-502* shares none of the special marijuana excise tax with cities and counties.<sup>39</sup> Currently, local jurisdictions are only entitled to their standard shares of sales, property, and business and occupation (“B&O”) taxes from *I-502* licensees. The City previously supported bills proposing to share a portion of the excise tax revenue with local jurisdictions, but none passed in the last session. Approaches varied, both in the amount of revenue sharing and the method for allocating shared revenue. Excise tax revenue should only be shared with jurisdictions allowing *I-502* licensees, where local elected officials are implementing the law duly passed by Washington voters.

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<sup>36</sup> *Cannabis Action Coalition v. City of Kent*, 180 Wn. App. 455, 322 P.3d 1246 (2014) (review granted).

<sup>37</sup> Some elected officials make no bones about the revenue-based reason for their refusal to implement the state law. See, e.g., “Why Poulsbo is banning marijuana stores, gardens,” *Seattle Times* guest editorial column by Ed Stern, Poulsbo City Council member (July 7, 2014).

<sup>38</sup> Chapter 66.40 RCW.

<sup>39</sup> Approximately 81% of the marijuana excise tax is dedicated to health care, prevention, treatment, research, education, and evaluation of the impacts of implementation of the law. The remaining 19% flows to the state general fund.

Incentivizing local officials could, in turn, accelerate Washington’s progress in shutting down robust illicit marijuana markets and increase overall tax revenues. On the other hand, retail stores have been licensed in 27 of Washington’s 39 counties to date, and tax revenues are already exceeding original projections. The state legislature might become less concerned about state-level impacts of local bans than local jurisdictions should be about the local impacts of emboldened illegal markets and the loss of local sales and B&O taxes. The state budget issues facing the legislature this session certainly do not make the question any easier to resolve.

#### **D. The Legislature Should Revisit the Definition of “Marijuana Concentrates.”**

Hash oil is the extracted, concentrated resin of the marijuana plant. The highest concentration of THC in a marijuana plant is found in its resin. Hash oil has a much higher THC concentration than marijuana flowers—ranging anywhere between 20% and 90%— and produces a greater “high” than other forms of marijuana. Its price currently ranges between \$25 and \$60 per gram.

Manufacturing hash oil is relatively simple and can be done easily (but not safely) in one’s own kitchen. A hash oil explosion in Seattle last year blew a house six inches off its foundation.<sup>40</sup> In contrast to amateur production, LCB has enacted rules regulating hash oil production for I-502 licensed producers.<sup>41</sup> Compliance with LCB’s rules should prevent explosions at I-502 licensed production sites.

Some county prosecutors apparently believe that they cannot prosecute people for unlicensed manufacturing of hash oil because the RCWs do not specifically address it. RCW 69.50.401(1), however, prohibits the manufacturing of a controlled substance. RCW 69.50.101(s) defines manufacturing as “the . . . conversion, or processing of a controlled substance . . . by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.” Even though this definition of “manufacture” clearly encompasses the unlicensed production of hash oil, some lobbying groups and professional organizations may pursue legislation specifically banning hash oil manufacturing. While additional legislation is unnecessary, the principle of prohibiting hash oil production by anyone other than I-502 licensees is sound.

Marijuana concentrates, including hash oil, were not addressed in I-502. Last year the legislature created a new definition of “marijuana concentrates” and limited possession of these products to seven grams. However, the definition of “marijuana concentrates” only extends to products having THC concentrations greater than 60%; a product at or below 60% THC concentration is considered an “marijuana-infused product” with much greater possession limits of 24 ounces (solids) or 72 ounces (liquids).<sup>42</sup> Hash oil routinely contains less than (but close to) 60% THC—much more than typical infused products like brownies or iced tea. The THC threshold separating concentrates from infused products should be adjusted downward. LCB is aware of this issue, as are law enforcement agencies throughout the state.

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<sup>40</sup> <http://blogs.seattletimes.com/today/2014/01/powerful-blast-rocks-mount-baker-apartment-building/>.

<sup>41</sup> WAC 314-55-104.

<sup>42</sup> One ounce is approximately 28 grams.

**E. Penalties and Enforcement Authority for Underage Marijuana Possession Should Be Analogous to Alcohol.**

Washington’s new marijuana regulatory system replaces illicit dealers who don’t “card” underage buyers with business owners who can lose their licenses if they sell to minors. It also maintains law enforcement’s ability to arrest and prosecute any seller of marijuana to buyers under 21 for felony distribution of a controlled substance.<sup>43</sup> This latter penalty is much harsher than the gross misdemeanor penalty bar owners face for selling to underage drinkers.<sup>44</sup> This distinction might not be debatable now, but it should be a priority to align penalties faced by *consumers* of these substances more fairly, and to enable city prosecutors to participate in enforcement efforts.

I-502 only legalized possession of marijuana for adults age 21 and over.<sup>45</sup> Possession of marijuana by persons under the age of 21 carries a mandatory minimum 24-hour jail sentence and a \$250 fine; these penalties double on a second or subsequent conviction.<sup>46</sup> By contrast, a conviction for being a minor in possession of alcohol carries no mandatory minimum sentence.<sup>47</sup>

The CAO cannot prosecute underage<sup>48</sup> marijuana possession because there is no Seattle ordinance prohibiting it and the CAO cannot prosecute crimes under state law.<sup>49</sup> Moreover, the state preemption provision in Washington’s Uniform Controlled Substances Act<sup>50</sup> requires any local ordinance to include penalties that are identical to those contained in the state law. The CAO supports changing state law to eliminate the mandatory minimum sentences for misdemeanor marijuana possession. With this change, the CAO further supports a Seattle ordinance prohibiting underage marijuana possession to deter youth use as with minor in possession laws regarding alcohol.

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Bringing to a close Seattle’s “Wild West” history with marijuana policy remains the single most important challenge to Washington’s ultimate success in ending marijuana prohibition safely and rationally, replacing it with pragmatic regulatory systems that protect and

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<sup>43</sup> Even a licensed retailer who sells marijuana to a buyer under age 21 may be prosecuted for felony distribution. RCW 69.50.360(3), –.401(3), and 401(2)(c). A sale to a buyer under the age of 18 carries increased penalties. RCW 69.50.406(2). Every sale by unlicensed dealers, regardless of the buyer’s age, constitutes a felony. RCW 69.50.401(2)(c). Prohibited sales by a licensed retailer also carry potential serious regulatory consequences, such as license revocation. WAC 314-55-520.

<sup>44</sup> RCW 66.44.270(1).

<sup>45</sup> RCW 69.50.4013(3); RCW 69.50.360(3).

<sup>46</sup> RCW 69.50.425.

<sup>47</sup> RCW 66.44.270(2)(a).

<sup>48</sup> Persons aged 18 to 20; younger individuals are subject to juvenile justice jurisdiction.

<sup>49</sup> See *City of Auburn v. Gauntt*, 174 Wn.2d 321, 274 P.3d 1033 (2012).

<sup>50</sup> RCW 69.50.608.

respect both consumers and communities. Other important issues include possible distribution licenses, home delivery services, and changes to licensee location restrictions. Although the DEA must also relax its rules requiring all research to be conducted using marijuana produced under federal contract in Mississippi, an academic research chapter could facilitate Washington universities' ability to undertake scientific and other marijuana research using product grown and licensed in Washington. And as proposed by I-502 architect Alison Holcomb, the legislature might also mandate a merit-based system for scoring future license application rounds as well as any medical certification program that is adopted by the legislature for businesses already licensed under Chapter 69.50 RCW.<sup>51</sup> The CAO looks forward to supporting and informing the legislative process this coming session, even as we continue to address marijuana-related challenges here in Seattle.

### **III. SEATTLE'S LOCAL POLICY CHALLENGES**

Pending action by the state legislature, local governments have the opportunity to guide the development of the nascent legal marijuana industry within their borders. Whether in addition to, or in the absence of, state legislative clarity, local policies will remain vitally important to implementing the goals and values of the City of Seattle as they relate to our state's position as national leader in this historic new approach to marijuana regulation.

#### **A. The City Should Curtail Unlicensed, Illegal Marijuana Commerce through Coordinated Civil and Criminal Enforcement.**

Growing and selling marijuana remains illegal under state law except pursuant to a license issued under Chapter 69.50 RCW.<sup>52</sup> As with any controlled substance, manufacture and delivery of marijuana are felonies, so only the county prosecuting attorney has the authority to prosecute these crimes.<sup>53</sup> However, significant compliance with state marijuana laws and City ordinances and regulations can be obtained through civil regulatory enforcement, bolstered by traditional criminal law enforcement efforts. Considering that City Council can also simply ban any marijuana business without a state license, Seattle has an array of options to encourage

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<sup>51</sup> Merit-based scoring of license applications can improve inclusive opportunities for minority, disabled, veteran, and women owned businesses, and can incentivize best practices regarding labor and mitigation of environmental impacts. Merit-based scoring can also address concerns expressed by patients, non-medical consumers, parents, communities, and local governments that some business operators may not be professionally staffed to provide up-to-date information about the potential benefits and risks of use of the products they sell; may not take adequate precautions to prevent underage access; and may not follow best practices in implementing safety and security measures.

<sup>52</sup> The City has established procedures for reviewing all applications for state marijuana business licenses, mirroring procedures established for liquor licenses. If the City finds that there is a basis to object to an applicant or location because of a public safety concern, a CAO precinct liaison attorney will draft an objection on behalf of the Seattle Police Department (SPD) for review by a team of City officials. If approved, it is signed by an SPD official and transmitted to the LCB.

<sup>53</sup> Under a regulatory regime as opposed to outright prohibition, some marijuana offenses currently constituting felonies (such as small, illegal sales among adults 21 and over) are perhaps better addressed as misdemeanors. As greater experience is gained under I-502, the CAO is open to de-felonizing some marijuana offenses at the state level in order to permit consideration of Seattle's particular needs by City Council.

existing marijuana businesses to either seek legitimacy under state law or cease operations altogether.

On October 7, 2013, the City Council adopted Ordinance No. 124326 and established January 1, 2015, as the deadline by which businesses engaged in “major marijuana activity”—encompassing businesses identified as involving more than 45 plants or 72 ounces of marijuana<sup>54</sup>—were required to obtain a state marijuana business license. On September 2, 2014, City Council extended this deadline to July 1, 2015. On October 16, 2014, the Seattle Departments of Planning and Development (“DPD”) and Finance and Administrative Services (“FAS”) issued a letter to approximately 330 businesses identified as being engaged in marijuana-related business (without determining whether each business met the threshold of “major marijuana activity”) and included a “Tip Sheet 134” dated September 25, 2014 to provide guidance regarding applicable use and permitting ordinances.<sup>55</sup> Among other things, the letter advises that marijuana businesses meeting the major marijuana activity definition that commenced operations after November 16, 2013 without a state marijuana business license “are in violation of City law and can be subject to enforcement action.” The CAO presently has eight civil enforcement actions under way, ranging from zoning to building code violations.

The Seattle Municipal Code separately defines a “licensed marijuana business establishment” as “a business establishment acting in compliance with a license issued by the state for the production, processing, selling, or delivery of marijuana, marijuana-infused products, or useable marijuana under Title 69 of the Revised Code of Washington,” without reference to the scale of the activity.<sup>56</sup> “Business” is defined as “all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly,” again without reference to the scale or scope of the activity.<sup>57</sup> These definitions encompass any marijuana-related activity that generates revenue for one or more of the participants in the activity.

Like most local governments, the City of Seattle issues a variety of licenses to private businesses under the Seattle Municipal Code, for two main purposes: (1) tracking business revenues and (2) regulating specific activities. The first applies to all businesses; the second to specific, designated types of businesses.

The City tracks revenues for *all* businesses under Title 5 of the Seattle Municipal Code. From coffee shops to massage parlors, Title 5 licenses are required of every business, without regard to the *nature* of the licensee’s activity—or, more importantly, its *legality*. In other words, a Title 5 business license does not legalize otherwise criminal activity. Even if a Title 5 licensee expresses the intent to operate a medical marijuana facility—an expression irrelevant and not

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<sup>54</sup> “‘Marijuana activity, major’ means the production, processing, selling, or delivery of marijuana, marijuana-infused products, or useable marijuana that involves more than 45 marijuana plants, 72 ounces of useable marijuana, or an amount of marijuana-infused product that could reasonably be produced with 72 ounces of useable marijuana.” SMC 23.84A.025.

<sup>55</sup> See <http://www.scribd.com/doc/243895234/Seattle-MMJ-letter-and-Tips>

<sup>56</sup> SMC 23.42.058.D.1.

<sup>57</sup> SMC 5.30.020(H).

required under Title 5—the licensed business cannot claim the City’s imprimatur as a viable defense to civil asset forfeiture or criminal prosecution.

By contrast, Title 6 regulatory licenses are industry-specific. Licensing commercial marijuana activity outside the I-502 system under Title 6 would send a message that the City endorses a parallel but different system for such activity, perhaps conflicting with state law and undercutting arguments for legislation at the state level. The CAO instead favors a policy requiring all marijuana businesses, regardless of the scale or purpose of their activities, to meet the City’s definition of “licensed marijuana business establishment” and be in compliance with a valid state license issued under Title 69 RCW. This could be achieved either (1) by creating a Title 6 license required for all marijuana businesses that could not be obtained without first having a state license under Title 69 RCW, or (2) with zoning banning commercial marijuana activity not conducted in compliance with a Title 69 RCW license. These legislative solutions could be implemented in six months to a year to allow for a reasonable transition period.

In the shorter term, all marijuana businesses that meet the threshold of major marijuana activity<sup>58</sup> and commenced operations after November 16, 2013 without a state marijuana business license; that have become nuisances as evidenced by neighborhood complaints and 911 calls; or that otherwise violate city building and fire codes and business licensing and taxing requirements, should face prompt civil and criminal enforcement.

## **B. The City Should Honor I-502’s Commitment to Curtail Public Use of Marijuana.**

### **1. Civil citations and changing social norms**

Like public alcohol consumption, consumption of marijuana in public is illegal. Both state and city law make it “unlawful to open a package containing marijuana, useable marijuana, or a marijuana-infused product, or consume marijuana, useable marijuana, or a marijuana-infused product, in view of the general public.”<sup>59</sup> The penalty is identical to that for open containers of alcohol—a civil infraction which involves only a fine, not a criminal offense. The “consume marijuana” language applies to all types of marijuana consumption, not just smoking. The term “in view of the general public” is not defined in I-502. The most reasonable interpretation would be to adopt the same meaning as that established by the alcohol infraction for consumption “in a public place.”<sup>60</sup>

Special situations ranging from Seattle’s annual Hempfest event to open use in private front yards can pose interpretive challenges. Recent issues have also highlighted the challenge of enforcing the law consistently citywide and emphasizing education.<sup>61</sup> A straightforward directive

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<sup>58</sup> The City Council may wish to revisit whether the definition of “major marijuana activity” is useful in light of the fact that it is not difficult for businesses to engage in commercial marijuana activity without meeting the definitional thresholds of 45 plants and 72 ounces of marijuana. Regulatory enforcement should focus on commercial marijuana activity, as contrasted with noncommercial growing for personal use, regardless of its scale.

<sup>59</sup> RCW 69.50.445; SMC 12A.20.100.

<sup>60</sup> RCW 66.44.100, 66.04.010(35).

<sup>61</sup> Shortly after SPD reported to City Council on the first six months’ experience with “pot tickets”, it was revealed that a single officer had issued over 80% of the department’s total ticket tally, resulting in disproportionate

recently issued by SPD—encouraging consistent citywide enforcement emphasizing education through oral or written warnings followed, as necessary, by tickets documenting such warnings—represents a significant step towards achieving compliance with the law.<sup>62</sup> Prioritizing enforcement against smoking (which has a strong smell noticeable to others) over vaporizing (which typically produces no odor) is both pragmatic and encourages a healthier inhalation option for consumers.

Separately, the Washington Indoor Clean Air Act prohibits all types of smoking (including both tobacco and marijuana) in any public place or place of employment.<sup>63</sup> “Place of employment” is broadly defined to include “any area under the control of a public or private employer which employees are required to pass through during the course of employment...”<sup>64</sup> Seattle-King County Public Health, the primary enforcement agency for this law, includes supervised volunteers as employees. “Public place” includes all portions of buildings and vehicles open to the public and outdoor areas near entrances and exits.<sup>65</sup> This law covers outdoor seating areas of restaurants and bars because they are places of employment, but it does not cover outdoor areas away from buildings where employees do not go as part of their jobs. Private clubs that have no employees and are not open to the public are not covered by this law.<sup>66</sup> And while the Indoor Clean Air Act only applies to smoking, King County’s Public Health Code applies the same restrictions to the use of “electronic smoking devices,” which include most vaporization methods.<sup>67</sup>

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enforcement against the homeless and minority populations that frequented the officer’s beat around Pioneer Square. The CAO is working with SPD to ensure more evenhanded enforcement across the City.

<sup>62</sup> Seattle’s I-75, passed by Seattle’s voters in 2003, does not limit issuance of civil infractions under the new SPD policy directive. I-75 directs: “[T]he Seattle Police Department and City Attorney’s Office shall make the investigation, arrest and prosecution of marijuana offenses, when the marijuana was intended for adult personal use, the city’s lowest law enforcement priority.” SMC 12A.20.060.A. Commencing on January 1, 2010, the CAO faithfully implemented I-75 by not prosecuting marijuana possession crimes. I-75 does not, however, to apply to civil infractions for public use of marijuana because the words “investigation, arrest and prosecution” contemplate criminal, not civil offenses. Seattle voters also passed I-502 by a large margin nine years after I-75, and I-502 specifically created the civil infraction for public marijuana use. City Council, moreover, specifically adopted the new civil infraction into the Seattle Municipal Code. SMC 12A.20.100. Applying the rule of statutory construction, *leges posteriores priores contrarias abrogant* (subsequent laws repeal those before enacted to the contrary, aka “Last in Time”), I-75 presents no obstacle to civil enforcement against the open use of marijuana.

<sup>63</sup> See Ch. 70.160 RCW; Ch. 10.64 SMC.

<sup>64</sup> RCW 70.160.020(3).

<sup>65</sup> RCW 70.160.020(2).

<sup>66</sup> Mere payment of a cover charge, even if styled as a “membership fee,” is not sufficient to render a location not open to the public.

<sup>67</sup> See King County Board of Health Code Ch. 19.12. “E-cigarettes” and similar devices are reusable and consequently do not contribute to the litter problem posed by traditional cigarette butts. Because vaporization occurs at sub-combustion temperatures, the potential for house and hotel fires caused by smoking in bed is lessened. Because vapors rapidly dissipate and do not smell, bystanders seldom object to the harm-reducing technology. Though not mandated by state law, electronic smoking devices are nonetheless included in King County’s indoor smoking regulations on the basis of the potential attraction to youth and possibly creating confusion regarding the legality of smoking in public places. Sales to youth under age 18 are prohibited, however, and only adults 21 and over may buy THC products (or alcohol).

## **2. Marijuana use lounges**

Single family homeowners have a legal place to consume marijuana; others, however, such as out-of-town visitors, the homeless, and renters and condominium owners whose buildings do not permit marijuana use, have fewer options. Enforcement against public marijuana use will be more effective if people have alternative locations to use marijuana legally. To this end, the CAO is working with Councilmember Nick Licata to propose legislation to the City Council to license and regulate a new type of business in Seattle called “marijuana use lounges” that would permit vaporizing or eating marijuana. These lounges would be open to customers 21 years of age and older with mandatory ID checks, prohibit alcohol, and have minimum ventilation requirements. Because state law does not allow consumption of marijuana where it is sold, patrons would have to bring their own. Lounges could charge a cover and sell food and nonalcoholic beverages.

Because the state Indoor Clean Air Act prohibits smoking, only vaporizers and marijuana edibles are contemplated in such lounges. The King County Board of Health (BOH) would still need to exempt these lounges from the local ban on the use of electronic smoking devices (i.e., vaporizing). The CAO is working with Councilmember Licata, who is also a member of the Board of Health, to propose such legislation.

Interestingly, hotels may cater to marijuana tourists who want to smoke or vaporize now, without any changes to current statutes and rules. Current BOH rules allow hotels to designate up to 25% of guest rooms as smoking rooms.<sup>68</sup> Downtown hoteliers have expressed interest in marijuana tourism, especially as more retail stores open, and possibly limiting such use to vaporizing. The CAO has offered to help prepare FAQs or brochures for hotels to distribute to visitors regarding I-502 compliance.

## **3. Public use at special events**

The issue of marijuana consumption regularly arises in connection with special events permitted by the City, including Hempfest, the Cannabis Cup, and the I-502 anniversary celebration. These types of events are generally considered “open to the public” for purposes of I-502’s public use prohibition, but marijuana use is common. The City has begun specifically requiring compliance with public marijuana use laws in special events permits, which was not spelled out in the past. As an accommodation, however, the City has permitted events to have fenced-in marijuana use areas provided they: (a) are not visible to the general public; (b) are limited to attendees ages 21 and over; (c) are not staffed internally by employees or volunteers (except for security or aid personnel responding to calls); and (d) are designed so that marijuana smoke from inside the use areas does not impact the general public. The CAO suggests continuing this practice in order to establish norms that marijuana use in public places is prohibited while also accommodating the many attendees who desire appropriate locations for legal marijuana use at certain events. This approach works best when event hosts and the City work together on education and enforcement.

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<sup>68</sup> King County Board of Health Code 19.03.040(G).

After lengthy negotiations, Hempfest 2014 proceeded without detailed permit restrictions. After-action reports indicate that the organizers' voluntary measures to achieve compliance with I-502 rules were relatively effective. The City achieved similar success with a prior Seattle Center event in December 2013. The social norm is changing.

### C. Evolving DUI Training and Investigation Methods

I-502 established a "per se" limit for Marijuana (THC) DUIs at 5 ng/mL of whole blood. Effective October 31, 2013, the Seattle Municipal Code adopted the state per se limit, allowing the CAO to charge under the "per se" prong instead of the "affected by" prong. Under the per se prong, individuals with 5 ng/mL of THC<sup>69</sup> in their blood within two hours of driving are guilty of DUI. Individuals with less than 5 ng/mL THC can still be prosecuted so long as there is evidence that they were affected by the THC at the time they were driving; this was how we prosecuted THC DUIs before I-502 went into effect. Since the change in the law, THC-only DUIs or multiple-drug DUIs appear to be on the rise.<sup>70</sup>

Officers need to be trained on specific clues of THC-only and poly-drug impairment, which differ from alcohol impairment. Whenever an individual combines substances, the resulting interactions and reactions between and among the substances is known as the "additive effect."<sup>71</sup> A low BAC (.02-.05) and a THC level between 2-5 ng/mL create impairment that mimics a .10+ BAC.<sup>72</sup> However, the observable signs and effects of poly-drug impairment DUIs are not what an officer typically learns at the academy.<sup>73</sup>

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<sup>69</sup> Active THC best evidences present impairment, unlike its metabolite, carboxy-THC, which may be detectable for some time after impairment ceases.

<sup>70</sup> Couper, Fiona J., Peterson, Brianna L., The Prevalence of Marijuana in Suspected Impaired Driving Cases in Washington State. *Journal of Analytical Toxicology* 2014: 38:569-574.

<sup>71</sup> "Additive Effect" is defined as an effect wherein two or more substances [drugs] or actions used in combination produce a total effect, the same as the arithmetic sum of the individual effects. *Stedman's Medical Dictionary*, Definition of "Additive Effect", 2006. See also, Bramness, JG, Khiabani, HZ, Morland, J, Impairment Due to Cannabis and Ethanol: Clinical Signs and Additive Effects. *Addiction*. 2010; 105(6):1080-7.

<sup>72</sup> Bramness, JG, Khiabani, HZ, Morland, J, Impairment Due to Cannabis and Ethanol: Clinical Signs and Additive Effects, *Addiction*, 2010; 105(6):1080-7; MacDonald S, Mann R, Chipman M, et al., Driving Behavior Under the Influence of Cannabis or Cocaine, *Traffic Inj Prev.*, 2008; 9 (3):190-194; Ramaekers, Jet al, Marijuana, Alcohol, and Actual Driving Performance, *Hum Psychopharmacol* 2000;15 (7): 551-558; Robbe, O'Hanlon, Marijuana and Actual Driving Performance Executive Summary. NHTSA November 1993; Lamers, CTJ, Ramaekers, JG, Visual Search and Urban City Driving Under the Influence of Marijuana and Alcohol, *Experimental Psychopharmacology Unit, Brain and Behavior Institute, Maastricht University, Netherlands, NHSTA* 2000.

<sup>73</sup> The DUI course in the basic law enforcement academy teaches the officers to recognize the most commonly used and abused drug, alcohol. The basic law enforcement academy also teaches officers to be proficient in the standardized field sobriety tests which are tools to detect impairment across the board, not just for alcohol impaired drivers. However, the basic law enforcement academy does not go into great depth about what to expect from drugs, other than alcohol, on the field sobriety tests nor does it cover physiological responses and reactions of the human body when under the influence of drugs, other than alcohol. They simply do not have enough time to cover all these topics. There are other courses that an officer can attend to learn these subjects, e.g., ARIDE (Advanced Roadside Impaired Driving Enforcement), and Drug Recognition Expert School.

THC-only impaired individuals, unlike alcohol impaired individuals, are more aware of their impairment and able to focus well on one task.<sup>74</sup> Determining whether someone is too impaired by THC to drive is thus more difficult than with alcohol as they can more effectively compensate for the obvious signs of impairment that are detected by standard field sobriety tests. However, THC compromises drivers' ability to perform split-attention tasks and slows reaction times, for example,<sup>75</sup> resulting in driving that looks different from alcohol impairment but is still unsafe.

The legislature can improve impaired driving detection and prosecution by expanded funding for Drug Recognition Expert (DRE) trainings. With the advent of promising new, less-invasive technologies to measure THC in DUI suspects (including oral swabs and breath tests), the legislature might also investigate potential changes to evidentiary standards for the admissibility of such test results in DUI prosecutions. The CAO welcomes the opportunity to assist in matching legislation to proven, evolving technologies that promote safety on our roads.

#### **D. Seattle Leaders Should Welcome Opportunities to Expand the Reach and Effectiveness of Public Information and Education.**

A significant challenge in the successful implementation of a pioneering law is bringing the public up to speed on the law and orienting them to the policy goals the law intends to address. For example, there are many misperceptions about the legality of marijuana sales by businesses that are not I-502 licensees, the risk of explosion caused by illegally manufacturing hash oil, the dangers of driving under the influence of marijuana, the particular dangers posed by mixing alcohol with marijuana, and the risks of improper consumption of marijuana edibles. The CAO supports the pursuit of multiple public information campaigns across diverse platforms to maximize educational opportunities for the public on these issues, and we encourage Seattle's leadership to join with other governmental and nongovernmental partners whenever possible to expand our reach.<sup>76</sup> The CAO is already consulting with local "Above the Influence" programs

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<sup>74</sup> NHSTA's Drugs and Human Performance Fact Sheets: Cannabis/Marijuana, found at <http://www.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm>; Lamers, CTJ, Ramaekers, JG, Visual Search and Urban City Driving Under the Influence of Marijuana and Alcohol, Experimental Psychopharmacology Unit, Brain and Behavior Institute, Maastricht University, Netherlands, NHSTA 2000.

<sup>75</sup> See, e.g., Hartman, RL and Huestis, MA, Cannabis Effects on Driving Skills, Clin. Chem., 2013; 59(3):478-92.

<sup>76</sup> The City's Drug Free Workplace rules should also be revised to reflect marijuana's new legal status under Washington state law. Under current rules, possession of alcohol in the workplace is not grounds for discipline as long as the alcohol is neither consumed nor intended to be consumed on location. Personnel Rule 1.3.3.A.3 ("[P]ossession or sale of alcohol for use in the workplace or during working hours" is a major disciplinary offense; possession without such intent is not.) For example, an employee who purchases wine on his or her lunch hour for an evening dinner, and then stores the wine at his or desk during the afternoon until taking it home after work, unopened, would not be subject to discipline. Now that packages of state-legal marijuana are available for purchase from licensed retail stores in Seattle, the same disciplinary standards should apply to an employee who purchases marijuana for after-hours, off-site consumption.

Workplace safety and standards of conduct should focus on the possibility of present impairment. As methods for detecting present THC impairment improve, the efficacy of drug testing based upon reasonable suspicion will provide greater management flexibility. Positions requiring commercial driver licenses (CDLs) and involving safety-sensitive job duties will undoubtedly lag in the evolution of workplace rules. Ultimately, however, workplace rules should not penalize employees for legal conduct taking place after work—for marijuana, just as it is now for alcohol.

to develop educational public service announcements for youth, and (as noted above) plans to work with the Seattle Hotel Association to prepare FAQs or an informational brochure for guests. Grants may be available to help with these efforts.

#### IV. AFTERWORD

Our nation's experience with marijuana prohibition, like that with alcohol under the 18<sup>th</sup> Amendment, spawned a dedicated reform movement. Activists not only resisted a policy that criminalized adult conduct with scant public safety justification, they advocated for the rights of terminal patients to modest relief from suffering. I-502 promises even more far-reaching reform—one that can improve patient protections while mitigating the great harms wrought by the War on Drugs, including the racially disparate impacts of marijuana prohibition and loss of respect for our laws and those sworn to enforce them.<sup>77</sup>

Across the state, the transition to legal, regulated and taxed marijuana means compassionate grace periods for patients and commercial medical providers to transition to the new reality. It will sometimes be difficult to differentiate between sincere medical providers and opportunists, but that is the central task remaining for elected leaders, now that the voters have spoken. We cannot go back, and we can no longer delay: commercial marijuana activities outside state licensing and regulation must cease.

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<sup>77</sup> Every Seattle official should read Chapters 2 through 4 of the National Research Council's *The Growth of Incarceration in the United States* (National Academies Press 2014) and Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press 2010) to better understand the tremendous harm inflicted on American society by the War on Drugs.