ORDINANCE NO. 4124

AN ORDINANCE of the City Council of the city of Kent, Washington, amending the Kent City Zoning Code to clarify that marijuana-based land uses are prohibited in all zoning districts in the city of Kent; and terminating the moratorium enacted pursuant to Ordinance No. 4109.

RECITALS

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

B. While the state licensed production, processing and retail sale of marijuana does not constitute a crime under state law, the production, processing, distribution and possession of marijuana continues to be a violation of the federal Controlled Substances Act ("CSA"). Marijuana remains a Schedule I controlled substance under both state and federal law. The Kent Police Department partners with the federal Drug Enforcement Agency to investigate federal drug crimes, including crimes 1 Marijuana Producer, Processor, Retailer Amend KCC 15.08
related to the manufacture, distribution and possession of marijuana, which occur within the City and the surrounding community.

C. The Department of Justice ("DOJ") issued a memorandum to its attorneys on August 29, 2013, indicating that enforcement of marijuana related regulations in states whose voters had legalized production, processing and sale of marijuana, such as Washington, should primarily rest with state and local law enforcement agencies. The DOJ specifically noted, however, that no state or local law provides a legal defense to civil or criminal violations of the federal CSA, and that no guidance in the memorandum limited the DOJ's authority to enforce federal laws related to marijuana, "regardless of state law." The DOJ memorandum also left open the possibility that the federal government may bring a legal challenge to a state regulatory structure such as the one established by I-502.

D. The DOJ issued a supplemental memorandum on February 14, 2014, regarding marijuana related financial crimes, in which it reiterated the same warning about the DOJ’s authority to enforce federal law. The DOJ further stated that marijuana-related businesses and entities that "facilitate" such businesses are in no way shielded from federal prosecution under the federal CSA and federal money-laundering statutes.

E. 21 U.S.C. Section 856(a)(1) also states that it shall be unlawful under federal law for any person or entity to "knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance."

F. In 2005, in Gonzales v. Raich, 545 U.S. 1 (2005), the United States Supreme Court determined that the intrastate regulation of marijuana is a valid exercise of the power of Congress and that in the event of a conflict between a state law that permits marijuana production, processing,
distribution and possession and the federal CSA, the federal CSA will be deemed supreme.

G. Pursuant to article XI, section 11 of the Washington Constitution, Kent has specific authority to determine the appropriate uses of land through its zoning authority, provided such regulations are “not in conflict with general laws.” On January 16, 2014, the state Office of the Attorney General issued a formal Opinion stating that nothing in I-502 preempted local control over land use issues such as zoning, that such ordinances are not in conflict with general laws, and confirming the city’s power to impose land use and business licensing requirements, regardless of whether they pertain to activity licensed by the LCB pursuant to I-502 or not. In addition, the LCB rules themselves provide that the issuance of a state license will not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to, building and fire codes, zoning ordinances, and business licensing requirements.

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

I. WAC 365-196-725 mandates that comprehensive plans and development regulations adopted by the City pursuant to Chapter 36.70A RCW, the Growth Management Act, comply with the supremacy principle of Article VI, United States Constitution. Any statute or ordinance in direct conflict with federal law is potentially subject to federal preemption and void as a matter of law.
J. The production, processing, and retail sale of marijuana, which remains illegal under federal law, has only recently become a permitted activity under Washington state law. Colorado is the only other state that has legalized the production, processing and retail sale of marijuana. In Washington, only a handful of marijuana retailers have received licenses from the LCB to operate. Thus, the land use impacts associated with state licensed production, processing and retail sale of marijuana have not been definitively established; however, in states where medical marijuana facilities have existed for a number of years, such as California, negative secondary land use impacts have been associated with marijuana businesses, as documented in studies such as the 2009 White Paper on Marijuana Dispensaries issued by the California Police Chiefs Association’s Task Force on Marijuana Dispensaries.

K. On June 2, 2014, notice was sent to the Washington State Department of Commerce requesting expedited review. On June 17, 2014, the city was granted expedited review and was informed that it had met the Growth Management Act notice requirements under RCW 36.70A.106.

L. The City’s State Environmental Policy Act (SEPA) Responsible Official issued a Determination of Nonsignificance on June 6, 2014.

M. The Land Use & Planning Board (LUPB) discussed and evaluated zoning options at two workshop meetings, and then held a public hearing and considered this matter at its meeting on June 23, 2014. The LUPB recommended that no recreational marijuana land uses be allowed in any zoning district. The LUPB recommendation was considered and endorsed by the City Council Economic & Community Development Committee (ECDC) at its September 8, 2014 meeting. The matter was subsequently considered by the full City Council at its October 7, 2014 meeting.
N. So long as the production, processing and retail sale of marijuana remains illegal under the federal CSA, the City finds that there is no zoning district within the City of Kent where marijuana-based businesses may properly locate.

O. The City recognizes that the DOJ memoranda of August 29, 2013, and February 14, 2014, are guidance documents pertaining to current use of prosecutorial discretion only, and that such guidance is subject to change without prior notice or process. The City finds that the establishment of permissive zoning regulations pertaining to marijuana businesses licensed by the LCB presents a real risk of increased federal criminal enforcement of the CSA within the city of Kent should the DOJ change its position.

P. The City further finds that so long as there is the possibility of federal legal action challenging I-502 and its regulations, the establishment of permissive zoning regulations pertaining to marijuana businesses licensed by the LCB presents a real risk that otherwise commercially-productive property may be tied up by businesses that are unable to operate, thus reducing the economic vitality of the City.

Q. The City Council has determined that the passage of a permanent zoning code amendment that shall prohibit, in all zoning districts of the City, any land use that constitutes a violation of a state or federal law, will serve the public health, safety and welfare.

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

ORDINANCE
SECTION 1. – New Section. Chapter 15.08 of the Kent City Code is amended to add a new Section 15.08.500 to read as follows:

Sec. 15.08.500. Illegal uses prohibited - Marijuana producer, processor, retailer.

A. No use that is illegal under, or contrary to any city, county, state or federal law or statute shall be allowed in any zoning district within the city unless otherwise specifically allowed for in the Kent City Code.

B. No person holding, or claiming to hold, a license from any state regulatory agency to produce, process, sell or distribute marijuana or marijuana-infused products, including but not limited to licenses issued pursuant to Chapter 69.50 RCW and Chapter 314-55 WAC, shall operate, maintain, cause or allow to exist any marijuana-based business in any zoning district within the city. This prohibition is supplemental to, and in no way limits the scope or effect of subsection (A) of this section.

SECTION 2. – Moratorium terminated. The moratorium adopted pursuant to Ordinance No. 4109 shall terminate upon the date this ordinance goes into effect in accordance with Section 5.

SECTION 3. – Severability. If any one or more section, subsection, or sentence of this ordinance is held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portion of this ordinance and the same shall remain in full force and effect.

SECTION 4. – Corrections by City Clerk or Code Reviser. Upon approval of the city attorney, the city clerk and the code reviser are authorized to make necessary corrections to this ordinance, including the correction of clerical errors; references to other local, state or federal laws,
codes, rules, or regulations; or ordinance numbering and section/subsection numbering.

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

SUZETTE COOKE, MAYOR

ATTEST:

RONALD F. MOORE, CITY CLERK

APPROVED AS TO FORM:

TOM BRUBAKER, CITY ATTORNEY

PASSED: 7th day of October, 2014.

APPROVED: 7th day of October, 2014.

PUBLISHED: 10th day of October, 2014.

I hereby certify that this is a true copy of Ordinance No. 4184 passed by the city council of the City of Kent, Washington, and approved by the Mayor of the City of Kent as hereon indicated.

(Seal)

RONALD F. MOORE, CITY CLERK