

## WASHINGTON COURT OF APPEALS UPHOLDS MARIJUANA BAN AS VALID EXERCISE OF COUNTY'S ZONING AUTHORITY

The Washington Court of Appeals, Division II recently upheld a county ordinance banning the sale of recreational marijuana in a county's unincorporated areas. The court's decision signals that local jurisdictions retain significant zoning authority over recreational marijuana uses, an issue that previously had been addressed only by the Washington Attorney General. *See* 2014 Op. Att'y Gen. No. 2.

In *Emerald Enterprises v. Clark County*, Emerald Enterprises LLC ("Emerald") challenged Clark County's ordinance banning the sale of recreational marijuana, but not medical marijuana, in unincorporated Clark County. *Emerald Enterprises, LLC v. Clark Cty.*, 47068-3-II, 2018 WL 1280788, at \*1-2 (Wash. Ct. App. Mar. 13, 2018) (citing C.C.C. § 40.260.115). Emerald argued that the ordinance either conflicts with or is preempted by Washington's Uniform Controlled Substances Act ("UCSA"), which the legislature amended after voters passed Initiative 502 to legalize the production and sale of recreational marijuana in Washington. Further, Emerald argued that because the ordinance either conflicts with or is preempted by the UCSA, it violates article XI, section 11 of the Washington Constitution, which authorizes counties (and cities and towns) to make and enforce all regulations that do not conflict with state law. Rejecting Emerald's arguments on all counts, the Court of Appeals upheld the ordinance.

First, the court rejected Emerald's argument that the ordinance conflicts with the UCSA because it prohibits what state law permits. Recognizing that "while the UCSA permits the retail sale of marijuana," the court determined that the UCSA "does not grant retailers an affirmative right to sell marijuana." *Id.* at \*4. The court explained that simply because "an activity can be licensed under state law does not mean that the activity must be allowed under local law." *Id.* The court further noted that "nothing in the UCSA states that a county may not prohibit retail recreational marijuana sales." *Id.*

Second, the court rejected Emerald's argument that the County's ordinance banning recreational marijuana thwarts the UCSA's legislative purpose. The court observed that although the "UCSA allows and regulates the sale of marijuana," the UCSA's purpose is "not to encourage the sale, production or use of marijuana." *Id.* at \*6 (emphasis added). Further, the court noted that "[t]here is no evidence of legislative intent to regulate the location of retail [marijuana] stores within counties." *Id.* In a footnote, the court did observe that thwarting the UCSA's legislative purpose "would be of greater concern" if "the ban made it very difficult or impossible for Clark County residents to legally purchase marijuana through an authorized retailer." *Id.* at n. 10. The court concluded, however, that this issue was not before it, as recreational marijuana retailers operate in incorporated areas of Clark County not subject to the ordinance. *Id.*

Third, the court rejected Emerald's argument that the County exercised unauthorized power by enacting an ordinance banning the sale of recreational marijuana. The court framed this issue "as not whether the legislature granted the county exclusionary authority," but "whether state law specifically *removes* authority that the County is presumed to possess" under article XI, section 11 of the Washington Constitution. *Id.* at \*8. The court determined that the UCSA merely

delegates to the Washington Liquor and Cannabis Board (“LCB”) “the power to regulate” recreational marijuana, but does not “affirmatively authorize retailers to engage in the regulated activity over the objections or local authorities.” *Id.* at 8. Thus, the court held that the powers delegated under the UCSA do not preclude the county’s exercise of its zoning authority. *Id.*

Finally, the court rejected Emerald’s argument that the ordinance is expressly or impliedly preempted by state law. *Id.* at \*9-10. “On the contrary,” the court explained, “the UCSA indicates that the legislature intended to leave local governments’ zoning authority undisturbed.” *Id.* at \*10. The court determined that that the LCB’s authority to “influence the location” of a marijuana store by determining the “maximum number of retail locations in a given jurisdiction” are powers “distinct from the County’s zoning authority.” *Id.* Thus, the UCSA did not strip local jurisdictions of their “power to determine whether retail marijuana businesses can operate within its jurisdiction.” *Id.*

There is not yet any indication as to whether Emerald will seek review by the Washington Supreme Court in this matter.