



## **KENAI PENINSULA BOROUGH**

144 North Binkley Street • Soldotna, Alaska 99669-7520

Toll-free within the Borough: 1-800-478-4441

**PHONE:** (907) 262-4441 • **FAX:** (907) 262-1892

www.kpb.us

**MIKE NAVARRE  
BOROUGH MAYOR**

### **MEMORANDUM**

**TO:** Dale Bagley, Assembly President  
Members, Kenai Peninsula Borough Assembly

**THRU:** Mike Navarre, Mayor *MN*

**FROM:** *CT* Colette Thompson, Borough Attorney  
*HM* Holly Montague, Deputy Borough Attorney

**DATE:** February 24, 2015

**SUBJECT:** Questions regarding Ordinance 2015-02, An Ordinance Enacting KPB Chapter 10.14 Prohibiting the Operation of Marijuana Cultivation Facilities in the Area of the Kenai Peninsula Borough Outside of the Cities, Subject to Voter Approval

This memo responds to questions raised by assembly members relating to ordinance 2015-02.

1. Is ordinance 2015-02 a zoning regulation?

For the reasons discussed immediately below ordinance 2015-02 is not a zoning or land use regulation. Zoning is a form of regulation of the use of land within the community, and of the buildings and structures which may be located thereon, in accordance with a general plan and for the purposes set forth in the state enabling statute.<sup>1,2</sup> AS 29.40 is the state enabling statute authorizing land use regulation within the borough.

AS 17.38 is the enabling legislation for the regulation of marijuana at the state and local level.<sup>3</sup> Ordinance 2015-02 provides for a vote, as authorized by state-wide ballot measure 2, as to whether marijuana cultivation facilities should be prohibited outside the cities. AS 17.38.110 provides “a local government may prohibit the operation of marijuana cultivation facilities ... through the enactment of ordinance or by a voter initiative.” “Local government” is defined by AS 17.38.900 as “both home rule and general law municipalities, including boroughs and cities of all classes and unified municipalities.”

<sup>1</sup> Rathkopf's Law of Zoning and Planning, § 1.2.

<sup>2</sup> Zoning is a prevalent form of land use regulation; however it is not the only form. Specific use regulation such as the borough's material site ordinance (KPB 21.29) is also a form of land use regulation.

<sup>3</sup> This memo addresses the initiative as adopted by the voters. The existing legislation may change as amendments are being drafted.

The statutory schemes set forth by AS 17.38 “Regulation of Marijuana” and AS 29.40 “Planning, Platting and Land Use Regulation” are different processes. Under AS 29.40 the borough has areawide planning and zoning authority unless that authority has been delegated to a city. Five of the six cities in the borough have been delegated the authority over land use regulation. However, if the borough treated ordinance 2015-02 as land use regulation the vote would also need to occur in Kachemak City as the borough still retains the authority for land use regulation in that city. This would contradict the terms of AS 17.38 which authorizes the popular vote. Under AS 17.38.900 each local government, regardless of the areawide land use regulation powers held by the borough, is entitled to by popular vote or ordinance decide whether to prohibit marijuana facilities in their respective boundaries. This is inconsistent with planning and land use law under AS 29.40 which requires boroughs on an areawide basis to make planning and land use regulation decisions unless these powers have been delegated to the cities. AS 17.38 is a direct delegation to the borough and the cities within the borough to prohibit marijuana establishments which does not implicate the AS 29.40 statutory scheme requiring the borough to delegate land use regulation powers to the city before the city could exercise those powers.

The authority for a popular vote regarding the prohibition of marijuana facilities within the borough’s boundaries is also inconsistent with local land use regulation since initiatives on land use regulation questions have been judicially disapproved.<sup>4</sup> Part of the rationale for this disapproval is that initiatives regarding land use regulation bypass the planning commission which is required to consider such regulations under the AS 29.40 statutory scheme. AS 17.38 does not require planning commission involvement to decide whether marijuana establishments should be prohibited in the borough.

The authorization for a vote regarding marijuana establishments is specific to prohibiting, not regulating, marijuana establishments. AS 17.38 is similar to other state laws which authorize municipalities to ban certain activities that are highly regulated by the state, such as, fireworks, alcohol establishments and gambling. AS 18.72.060 provides that a municipality may prohibit the sale, exposure for sale, use, or explosion of fireworks. AS 5.15.620 allows for local option elections on charitable gaming. AS 4.11.491 provides for local option elections to ban the sale, importation and possession of alcoholic beverages.<sup>5</sup> Similarly, AS 17.38 authorizes a local option election on the prohibition of marijuana establishments. These statutes allow for total bans on potentially deleterious activities because of the danger they may present to the public health, safety, and welfare regardless of location or conditions that may be placed on the establishment to ameliorate the negative impacts of the activity. Alcohol, gaming and fireworks are subject to state-issued licenses. The registration provisions in AS 17.38 are more akin to licensing than to zoning.

Licensing is also to be distinguished since, unlike zoning laws which are primarily concerned with the uniformity of land use and stability of community growth, licensing regulations are generally concerned with proper operation or with the limitation or distribution or outright suppression of an operation;

---

<sup>4</sup> *Griswold v. City of Homer*, 186 P. 3d., 588 (Alaska 2008); *Carmony v. McKechnie*, 217 P. 3d., 818 (Alaska 2009).

<sup>5</sup> The borough has adopted ordinances regarding gambling (KPB 11.10) and fireworks (KPB 10.18). The borough is a commenting agency to the Alaska Alcoholic Beverage Control Board regarding alcohol establishments within the borough. (KPB 7.10).

licensing laws typically regulate establishments based on the type of business they conduct while zoning laws regulate them based on their location.<sup>6</sup>

While the borough could protect the public health, safety, and welfare through a land use or zoning ordinance regulating the location of marijuana establishments as anticipated by AS 17.38.110(b), ordinance 2015-02 authorized by AS 17.38.110(a) is not a zoning or land use regulation.

2. How would a prohibition on marijuana cultivation facilities be enforced?

Another question presented is how would a local prohibition on marijuana facilities be enforced. The borough could establish a civil fine which would be enforced administratively. If the fine is not paid the violation would be pursued in court to obtain a judgment and collect the fine. The borough could also pursue an injunction to stop the operation of a marijuana establishment. In addition to these typical avenues of enforcement the borough would also be able to comment to the governing state control board regarding the unlawful operation, and if the operation is in violation of state law or registration processes the state could pursue its remedies against the facility.

3. Could a future prohibition on marijuana cultivation facilities result in a compensable taking?

In short, whether a future prohibition on marijuana cultivation facilities could result in a compensable “taking” depends in large part on the facts relating to an individual business.

The Alaska Constitution states: “Private property shall not be taken or damaged for public use without just compensation.”<sup>7</sup> Two classes of *per se* takings are recognized by the U.S. Supreme Court and the Alaska Supreme Court:

- (1) Cases of physical invasion; and
- (2) Cases where a regulation denies a landowner of all economically feasible use of the property.<sup>8</sup>

When a “case does not fall into either of these categories, courts must engage in a case-specific inquiry to determine whether governmental action effects a taking.”<sup>9</sup> The case-specific inquiry is appropriate here. Under this approach, a court should consider the following three factors in determining whether or not a governmental action is a compensable “taking” of private property:

- (1) The character of the government action, which includes consideration of the legitimacy of the interest advanced by the action;
- (2) its economic impact; and

<sup>6</sup> 83 Am. Jur. 2d Zoning and Planning § 1.

<sup>7</sup> Alaska Const., art. I, §18.

<sup>8</sup> *Anchorage v. Sandberg*, 861 P.2d 554, 557 (Alaska 1993).

<sup>9</sup> *Id.*

(3) its interference with reasonable investment-backed expectations.<sup>10</sup>

At this point we have to speculate on the specific interests that could be advanced in support of a future prohibition of marijuana cultivation operations. Whatever interests are raised, they must be legitimate and furthered by the prohibition. Interests may relate to concerns about safety issues such as the need for appropriate security measures to prevent theft, the cash nature of the businesses, nuisance issues such as the odor that may be associated with such operations, other health concerns, and the affect these operations may have on surrounding property values. In general governmental actions of this character are considered legitimate.

The next consideration is the economic impact such an action would have on the affected property interests. This is difficult to predict and may vary significantly between parcels. In general it seems the prohibition of these activities may not, alone, have much impact on the value of the real property as they would only prohibit engaging in one or more aspects of the marijuana industry. They would not, alone, prohibit other commercial uses of the property.

However, a future prohibition would likely impact other property interests. In order to engage in the various types of marijuana establishment operations expenditures will be required. The amount of such expenditures will vary widely depending upon the anticipated size and sophistication of the operations. Without more information it is difficult to determine the extent of investments that may be unique to the marijuana industry. Ongoing businesses are generally considered “property” and therefore might be considered property “taken” and potentially subject to compensation. Again, it is difficult to predict what value, if any, would be assigned to this property interest and what consideration, if any, would be given to the ability to convert the business into a similar type of business.

The remaining question is whether the prohibition would interfere with reasonable investment-backed expectations. “A ‘reasonable investment-backed expectation’ must be more than a ‘unilateral expectation or an abstract need.’”<sup>11</sup> Here the law clearly authorizes municipalities to prohibit the operation of marijuana establishments by ordinance or voter initiative. When making investment decisions for such operations it would not be reasonable, for purposes of a takings analysis, to ignore that these operations may ultimately be prohibited. This does not mean that any investment in the industry is not reasonable, but that such investment should take into account this risk.

In conclusion, as this is extremely speculative it is difficult to state with certainty whether a valid takings claim would be recognized if the borough were to prohibit the cultivation of marijuana in the future. Where significant investments are made unique to the marijuana industry, it seems more likely that grounds may exist for such a claim.

---

<sup>10</sup> *Hageland Aviation Services, Inc. v. Harms*, 210 P.3d 444, 449-450 (Alaska 2009).

<sup>11</sup> *State Dept. of Natural Resources v. Arctic Slope Regional Cor.*, 834 P.2d 134, 140, quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984).