

# LEGAL SERVICES

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## MEMORANDUM

February 27, 2015

**SUBJECT:** Cap on Number of Plants per Residence (CSHB 75(CRA);  
Work Order No. 29-LS0345\I)

**TO:** Representative Cathy Tilton  
Attn: Heath Hilyard

**FROM:** Emily Nauman   
Legislative Counsel

You requested that a provision be added to CSHB 75(CRA) limiting the number of marijuana plants persons may possess in a residence. I have inserted the provision in the bill, however, it will likely be subject to equal protection and privacy challenges. This memo also notes one other issue, directing a fee to be disbursed to a municipality without an appropriation is unconstitutional.

### Equal Protection

A household limit on marijuana plants may violate the equal protection provisions of the state and federal constitutions. You requested that, no matter the number of adults in a residence, the number of plants allowed in a residence be capped at 12. The consequence of this is that an adult living in a residence with more than one other adult will not be allowed to possess the same number of plants as an adult living on his or her own or with just one other person. If a court finds that the two groups of adults are similarly situated but treated differently, equal protection principles apply and the state must demonstrate that it has a legitimate or important interest for the resulting disparate treatment and that the law is linked to that interest. The Alaska Supreme Court has adopted a flexible "sliding scale" test for reviewing equal protection claims. First, the Court determines what weight should be afforded the constitutional interest impaired by the challenged enactment. Second, the Court examines the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest. Finally, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken.<sup>1</sup> Although related to a privacy concern, discussed below, the Court in *Ravin v. State*,<sup>2</sup> held that possession of marijuana was a fundamental constitutional right

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<sup>1</sup> *Ross v. State*, 286 P.3d 495, 498 - 499 (Alaska 2012).

<sup>2</sup> 537 P.2d 494 (Alaska 1975).

and therefore that a state law must be shown to be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy."<sup>3</sup> A court would likely use a similar analysis for an equal protection challenge to this bill draft.

It is worth noting that a court may be persuaded by the analysis in *Nelson v. State* for constructive possession.<sup>4</sup> Constructive possession in *Nelson* is described by the Court as "knowingly having the power and intention at a given time to exercise dominion and control over the property."<sup>5</sup> In other words, the existing restriction in AS 17.38.020(2) may only allow a residence to have six plants to the extent that those six plants are in an area where they may be accessed by any adult in the home. Note that *Nelson*, and constructive possession cases in general, usually apply to crimes of theft. That is very different from the case here, since possession of at least some marijuana plants is constitutionally protected.<sup>6</sup> If the Court were to accept a constructive possession analysis, your change would not be necessary. Alternatively, the restriction may not be necessary at all if you wish to restrict plant possession by residence, rather than by person. As discussed below, even that tactic may be problematic, however.

#### Privacy

Limiting the number of plants an adult has in their home may violate the privacy provisions of the Constitution of the State of Alaska<sup>7</sup> and as expounded in *Ravin v. State*.<sup>8</sup> In *Ravin*, the Court held:

[C]itizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of

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<sup>3</sup> *Id.*, at 497 (footnotes and citations omitted).

<sup>4</sup> 628 P.2d 884 (Alaska 1981).

<sup>5</sup> *Id.*, at 889.

<sup>6</sup> *Id.*, See also Scott Woodham, *Why does Alaska count 6 pot plants per household, not per person?* Alaska Dispatch News, February 26, 2015. Enclosed.

<sup>7</sup> Article I, sec. 22, Constitution of the State of Alaska, provides:

SECTION 22. Right of Privacy. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

<sup>8</sup> 537 P.2d 494 (Alaska 1975).

Representative Cathy Tilton

February 27, 2015

Page 3

marijuana in the home is supportable by achievement of a legitimate state interest.<sup>9]</sup>

The Court held that possession at home of amounts of marijuana indicative of an intent to sell was not protected under the privacy provision of the Constitution of the State of Alaska, however, that reasoning was not sufficient to justify a general law that criminalized all possession of marijuana in all contexts.<sup>10</sup> Related to the amount of marijuana necessary to trigger an intent to sell finding, the Alaska Court of Appeals, in *Noy v. State*<sup>11</sup> ruled that possession of marijuana in an amount greater than four ounces is not personal use possession. To help protect against a successful privacy challenge, you may wish to develop a record that this change in your bill is designed to prevent adults from growing marijuana in a home in amounts indicative of an intent to sell.

#### Dedication of Funds without Appropriation

AS 17.38.100(c) requires that half of the registration application fee be forwarded to the local regulatory authority for the municipality in which the applicant desires to operate the marijuana establishment. An appropriation is necessary to transfer these funds to a municipality.<sup>12</sup> It may be possible to correct this problem by instead directing the state to collect the application fees on behalf of the municipality.

If I may be of further assistance, please advise.

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Enclosures

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<sup>9</sup> *Id.*, at 504.

<sup>10</sup> *Id.*, 511.

<sup>11</sup> 80 P.3d 255 (Alaska App. 2003).

<sup>12</sup> Art. IX, sec. 13, Constitution of the State of Alaska.