NO. 90780-3

SUPREME COURT OF THE STATE OF WASHINGTON

MMH, LLC and GRAYBEARD HOLDINGS, LLC,

Appellants,

and

DOWNTOWN CANNABIS CO., LLC; MONKEY GRASS FARMS, LLC; AND JAR MGMT, LLC, d/b/a/ RANIER ON PINE,

Intervenor-Appellants,

v.

CITY OF FIFE,

Respondent,

and

ROBERT W. FERGUSON, Attorney General of the State of Washington,

Intervenor-Respondent.

CITY OF FIFE'S RESPONSE TO APPELLANT'S OPENING BRIEF

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I. RESPONDENT'S STATEMENT OF THE CASE

A. Legislative Enactment of Initiative 502

On November 6, 2012, Washington citizens approved Initiative 502 (the "Initiative" or "I-502"), which created a state licensing system for the production, processing, and retail sale of recreational marijuana whereby taxes would be collected and those lawfully participating in the licensing and taxation scheme would not be subject to State criminal prosecution. CP 119-34, CP659-70.

The Appellants (hereinafter collectively referred to as "MMH") errs in stating broadly that the Washington State Liquor Control Board ("WSLCB" or the "Board") is charged with siting retail outlets throughout the state if, in so doing, MMH means to infer that the WSLCB can determine anything beyond the number of licenses to be allocated per county. RCW 69.50.345(2) directs the WSLCB to adopt rules determining the "maximum number of retail outlets that may be licensed in each county," while taking into consideration, in part, "the provision of adequate access to licensed marijuana to discourage purchases from the illegal market." No minimum number of retail outlets in each county is established as per RCW 69.50.345(2).

B. Marijuana Licenses in Pierce County.

As of 28 days prior to the trial court hearing on MMH's motion for partial summary judgment, WSLCB had chosen to issue 17 marijuana retail

licenses for Pierce County at large and 14 licenses for marijuana licenses for cities within Pierce County. (CPs 208 and 275). The City of Fife, (hereinafter, the "City"), was not one of the cities for whom a license was issued. (CPs 208 and 275).

C. Washington State Attorney General Opinion.

On January 16, 2014, at the request of the Washington State Liquor Control Board, ("WSLCB"), the Washington State Attorney General's office issued an Opinion (Attorney General Opinion 2014 No. 2) regarding the issue of local governments banning marijuana businesses within their jurisdictions. (CP 151-60). It was the conclusion of the Attorney General that local government bans of marijuana businesses were neither field preempted nor conflict preempted, and thus, valid and constitutional. (CP 158-60).

D. City of Fife Ordinance No. 1872.

On July 8, 2014, the City of Fife adopted City Ordinance No. 1872 (the "Ordinance"), which banned marijuana businesses in the City. (CP 1-12).

E. Trial Court Decision

MMH filed suit challenging the validity of the City's ordinance (CP 1-12). Both the City and MMH filed motions for partial summary judgment against the other on the issue of state law preemption on August 1, 2014. (CP 13-51 and 161-188).

On September 8, 2014, Pierce County Superior Court granted the City of Fife's Motion for Summary Judgment, in part, and denied MMH's

Motions for Partial Summary Judgment (CP 1435-45) by entering the following declaratory judgments:

> 2. ... c. ... The City of Fife's Ordinance 1872 is not preempted by state law. [Ordinance 1872 is a zoning code amendment to prohibit marijuana producing, marijuana processing, marijuana retailing, and medical marijuana collective gardens in all zoning districts within the City of Fife.]
>
> 7. ... the Court finds that while I-502 permits retail cannabis operations to be located throughout the state and allows the Liquor Control Board to grant permits throughout the state, I-502 does not require that retail marijuana stores be located in Fife. In addition, the Court finds that the Liquor Control Board, in contrast to determining that there could be 31 retail outlets located in Pierce County, did not specifically allocate any licenses for operations in Fife.

II. ARGUMENT

A. Summary of Argument

1. MMH's cases in favor of prohibiting the City's ban on marijuana business zoning are inapposite because the City's ordinance can be simultaneously enforced with I-502's enabling legislation without rendering either null or unenforceable.

2. The Legislature, unless it acts in an affirmative manner, cannot prohibit local police powers granted to code cities by RCW 35A.11.020 and Art. XI, Sec 11 to ban sales of Schedule I drugs within their limits.

3. *Dept. of Ecology v Wahkiakum County* is inapposite authority for analyzing whether there is a conflict between I-502 and the City's Ordinance.

4. The City's Ordinance is not preempted by I-502.

5. The Washington State Legislature acquiesced to the WSLCB's interpretation that state law does not preempt local zoning ordinances.

B. Standard of Review

An order granting summary judgment is reviewed de novo. *Weden*, 135 Wn.2d at 689. Summary judgment is appropriate when there are not disputes of material fact and the moving party is entitled to judgment as a matter of law. CR 56. As a matter of law, local ordinances are entitled to a presumption of constitutionality. *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009). Once challenging a local ordinance bears a heavy burden of proving unconstitutionality. *Id.*

C. MMH's cases in favor of prohibiting the City's ban on marijuana business zoning are inapposite because the City's ordinance can be simultaneously enforced with I-502's enabling legislation without rendering either null or unenforceable.

State v Kirwin and *Seattle v Eze* are inapposite case for MMH's proposition that Fife's ordinance conflicts with any State statute or that the State has previously decided to preempt the field of local marijuana regulation. In *Kirwin* and *Eze*, no conflict was shown and neither case is about marijuana preemption. See *State v Kirwin*, 165 Wn2d 818, 203 P3d 1044 (2009) and *Seattle v Eze*, 111 Wn2d 22, 759 P2d 366 (1988).

The cases which follow in MMH's brief all have one thing in common, the local and State statutes cannot be simultaneously enforced so there is an obvious conflict. That enforcement issue does not exist, nor has it been alleged, however, in the above-captioned case.

The State can still, regardless of the City's marijuana business ban, direct the WSLCB to adopt rules determining the "maximum number of

retail outlets that may be licensed in each county," while taking into consideration, in part, "the provision of adequate access to licensed marijuana to discourage purchases from the illegal market" and the "population distribution" within the county at issue. RCW 69.50.345(2).

In fact, WSLCB did just that in the present case. The WSLCB presumably took RCW 69.50.345(2)'s factors into account, at least prior to the filing of MMH's trial court summary judgment motion, when it intentionally decided not to grant a retail license for the City of Fife by August 1, 2014, because the WSLCB publicly listed, according to MMH's declaration testimony, the number of licenses designated for cities within Pierce County at that time and the City of Fife was not among the cities designated to get even one retail outlet. (CP 275).

Bonney Lake, Lakewood, Puyallup, Tacoma, and University Place were granted a total of 14 with the most populous cities getting the most locations, (CP 275), presumably in accordance with the statutory factor of population distribution. See RCW 69.50.345(2)(a).[1] Therefore, even if MMH's argument is taken at face value that the WSLCB can site a retail outlet in any city, regardless of a city's objections, the fact is that, when the WSLCB had the information and incentive to set Pierce County locations, in accordance with a need to provide "adequate access" within the county "to licensed marijuana [retailers] to discourage purchases from the illegal

[1] The City stipulates to the allegation in MMH's "Statement of the Case" that another 17 at large licenses were designated for Pierce County as of August 1, 2015 for a total, county-wide, of 31.

market," the WSLCB explicitly decided that siting a retail outlet in the City of Fife was not necessary to achieve that goal.

Based on the above, it is apparent and plain that the City's ban can be enforced simultaneously with RCW 69.50.345. WSLCB still enforces RCW 69.50.345 as part of its mission and has not protested against the City's ban through the State Attorney General or anyone else and the City is aware of no action in the Legislature to address any shortage in marijuana flowing through State regulated channels.

This harmonious relationship between jurisdictions is not the situation in the cases cited by MMH which sustain state preemption. In *Parkland Light and Water*, a State statute allowing water districts to control the content of their own water was in obvious conflict with a City-County Board of Health's "resolution" that all water must be fluoridated. *Parkland Light & Water Co. v Tacoma-Pierce County Bd of Health*, 151 Wn2d 428, 433, 90 P3d 37 (2004). The two differing laws could obviously not be simultaneously enforced.

A similar irreconcilable conflict existed in *Entertainment Industries Coalition v Tacoma-Pierce County Board of Health*. The two pieces of competing legislation could simply, and obviously, not co-exist. In *Entertainment Industries*, a State statute allowing owners of public establishments to designate smoking areas within their establishments was in conflict with a City-County Board of Health resolution to outlaw smoking in all public establishments in Pierce County. *Entertainment*

Industries Coalition v Tacoma-Pierce County Board of Health, 153 Wn2d 657, 664, 105 P3d 985 (2005). These two laws could not be reconciled and the Board of Health resolution had to give way to the State statute.

Finally, the out-of-state cases cited by MMH as persuasive authority for conflict preemption did not, as a matter of law, decide there were any preemption conflicts within them. *Great Western v. County of Los Angeles* did not rule, as MMH alleges, that local jurisdictions cannot completely ban an otherwise legal, but regulated, activity. *Great Western v. County of Los Angeles*, 118 Cal.Rptr.2d 746, 756-59, 27 Cal.4th 853, 44 P.3d 120 (Cal., 2002). Specifically, the *Great Western* Court stated:

> "We do not decide whether a broader countywide ban of gun shows would be preempted. *Great Western*, 118 Cal Rptr 2d 759 (emphasis added).

Also, previously in that opinion, the *Great Western* Court rejected arguments that state laws indicated California intended to occupy the entire field of gun sales if, among other things, California's state gun laws required compliance with the laws of local jurisdictions, *Great Western* at 755, a situation similar to the one in the above-captioned case where WAC 314-55-020(11) states a marijuana business license:

> ... shall 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. WAC 314-55-020(11).

Finally, the *Great Western* Court also recognized that different local interests in state regulated activity could be legitimately served by varying

policies in different jurisdictions. *Great Western v. County of Los Angeles*, 118 Cal.Rptr.2d 746, 756-58, 27 Cal.4th 853, 44 P.3d 120 (Cal., 2002).

> The two subdivisions mentioned above expressly anticipate the existence of "applicable local laws." [internal citation omitted]. In addition, we are reluctant to find such a paramount state concern, and therefore implied preemption, "when there is a significant local interest to be served that may differ from one locality to another." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707, 209 Cal.Rptr. 682, 693 P.2d 261.) ... "problems with firearms are likely to require different treatment in San Francisco County than in Mono County." (*Galvan, supra*, 70 Cal.2d at p. 864, 76 Cal.Rptr. 642, 452 P.2d 930.). *Great Western* at 756-57.

> Thus, the costs and benefits of making firearms more available through gun shows to the populace of a heavily urban county such as Los Angeles may well be different than in rural counties, where violent gun-related crime may not be as prevalent. *Great Western v. County of Los Angeles*, 118 Cal.Rptr.2d 746, 757-58.

An argument which MMH cites in conjunction with *Dept. of Ecology v Wahkiakum County* is also rejected in *Great Western.*

> *Blue Circle Cement, Inc.* and related cases cited by Great Western stand broadly for the proposition that when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity ... [but] ... [t]hese cases are ... distinguishable from the present...: First, unlike the RCRA [the federal Resource Conservation and Recovery Act], there is no evidence either in the gun show statutes or, as far as we can determine, in their legislative history, that indicates a stated purpose of promoting or encouraging gun shows. Rather the overarching purpose of Penal Code sections 12071, 12071.1, and 12071.4 appears to be nothing more than to acknowledge ... such shows take place and to regulate them to promote public safety. *Great Western v. County of Los Angeles*, 118 Cal.Rptr.2d 746, 757, 27 Cal.4th 853, 44 P.3d 120 (Cal., 2002).

In the above-captioned case, a similar analysis of the purpose of I-502's enabling legislation must be made to determine if the City's ban frustrates state law. It is acknowledged that RCW 69.50.345 directs the WSLCB to adopt rules determining the "maximum number of retail outlets that may be licensed in each county," while taking into consideration, in part, the "provision of adequate access" to licensed marijuana "to discourage purchases from the illegal market,"[2] and the stated intent of the enabling legislation is to more efficiently use law enforcement resources, generate new state and local tax revenue, and take marijuana out of the hands of illegal drug organizations, (CP 214), but as long as the State Controlled Substance Act otherwise defines marijuana as a Schedule I hallucinogen, (See RCW 69.50.204(c)(22)), the overarching basis for State control of marijuana sales must be to promote public safety, not increase sales. No statutory or regulatory language states that the Legislature's purpose is to encourage as many sales as possible because widely distributing marijuana, itself, has been determined to be of benefit to the public and should be encouraged to the maximum extent.

In addition, the *Blue Circle Cement* case cited in MMH's brief to support *Great Western*'s supposed ruling about local bans does not, itself, rule on a local ban. See *Blue Circle Cement, Inc. v Board of County Commissioners for County of Rogers*, 27 F3d 1499, 1509-10 (10th Cir 1994). In *Blue Circle Cement*, the Tenth Circuit merely held it was inappropriate

[2] RCW 69.50.345(2).

for the District Court to have granted summary judgment to the local government entity, i.e., Rogers County, on the issue and then remanded the case back to the District Court. *Id* at 1509-10.

As a result, neither of the above cases from other jurisdictions stand for the proposition alleged by MMH at page 24 of its amended opening brief. In fact, *Great Western* and *Blue Circle Cement* are good authorities for rejecting MMH's *Wahkiakum* arguments. (See Section II E below).

D. The Legislature, unless it acts in an affirmative manner, cannot prohibit local police powers granted to code cities by RCW 35A.11.020 and Art. XI, Sec 11 to ban sales of Schedule I drugs within their limits.

The City is a non-charter "code city" as that term is defined in RCW 35A.01.020. The scope and extent of a code city's powere described in RCW 35A.11.020.

RCW 35A.11.020 provides that:

> [A code city] may adopt and enforce ordinances of all kinds ... appropriate to the good government of the city ... [and]
>
> ... shall have all powers possible for a city to have under the Constitution of this state, *and not specifically denied to code cities by law* ... [emphasis added by drafter of this brief]

The above highlighted language is supplementary to the powers granted to the City in Washington State's Constitution and must be considered when reviewing any argument that the City's Ordinance conflicts with State statutes because no Washington statute specifically denies the power of a city to ban marijuana businesses. Therefore, such power is not "specifically denied" to the City as per RCW 35A.11.020.

In addition, "The scope of a municipality's police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people." *Cannabis Action Coalition v. City of Kent*, 332 P.3d 1246, 1259 (2014). Specifically, code cities possess statutory and constitutional authority to enact ordinances as an exercise of their police power unless specifically directed otherwise. See RCW 35A.11.020 and Washington Constitution, Art. XI, Sec. 11. Therefore, "[g]rants of municipal power are to be liberally construed." *City of Wenatchee v. Owens*, 145 Wn. App. 196, 202 (2008), *review denied*, 165 Wn.2d 1021 (2009).

This policing power includes the right to ban activities, as well as regulate them, despite the fact that the activity, itself, may be wholly legal, in general, outside of a city's boundaries. *Bungalow Amusement, infra.*

In *Bungalow Amusement v City of Seattle*, which referenced Article XI, Section 11, the Supreme Court allowed Seattle police to cause any dance hall to be vacated with "the summary method prescribed" in Seattle's ordinance because, in the opinion of the Court, the City of Seattle had the police power to ban dance halls altogether if it chose to do so, not just conditionally vacate them, despite the fact that no statewide ban existed and dance halls and dancing was otherwise legal. *Id.*, 148 Wn 485, 488-89, 269 P.2d 1043 (1928).

> It is well-settled law that there are certain businesses and vocations subject to regulation by the exercise of the police power, to the extent of even entirely prohibiting them; this upon the ground of their potential evil consequences.

> Probably the most common of such businesses is and was the traffic in intoxicating liquor, even before the coming of state and national constitutional prohibitions against such business ... to the extent of entire prohibition by legislation, apart from express constitutional authority for such legislation. *Id.* at 489. (emphasis added).

The City's policing of marijuana, despite I-502, is still perfectly in tandem with the language of *Bungalow Amusement.* Indeed, doing otherwise may subject the City, itself, to penalties because, as recently as 2011, the U.S. Attorneys for both Eastern and Western Washington warned then-governor Christine Gregoire that the federal government could impose civil and criminal penalties on the State for any licensing scheme, even one for medical marijuana, and stated penalties could also be assessed on those facilitating such a scheme. (CP 108 and CP 112-14).

The opinion of the U.S. Attorneys for the Western and Eastern Districts of Washington publicly stated that marijuana remains illegal under federal law via the federal Controlled Substances Act and "[S]tate employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the [federal Controlled Substances Act]." (CP 109-13).

The opinion of the U.S. Attorneys General referenced certain federal Controlled Substances Act sections, noted that the federal government was not prohibited from filing civil or criminal actions against the State and its employees under the federal Controlled Substances Act, and specifically

referenced criminal statutes 21 USC 841, 856, 860, 843, and 846. (CP 109-13, esp CP 110).

> Accordingly, the Department [of Justice] could consider civil and criminal legal remedies regarding those [persons engaging in that conduct] ... Others who knowingly facilitate the actions of the licensees ... should also know their conduct violates federal law ... As the Attorney General has repeatedly stated, the Department of Justice remains firmly committed to enforcing the [federal Controlled Substances Act] in all states. (CP 109-13).

E. *Dept. of Ecology v Wahkiakum County* is inapposite authority for analyzing whether there is a conflict between I-502 and the City's Ordinance.

Dept. of Ecology v Wahkiakum County does not stand for the proposition that a city is required to permit marijuana sales. *Wahkiakum County* is a case about the beneficial use of re-treated sewage. *Dept of Ecology v Wahkiakum County*, 184 Wn.App 372, __, 337 P.3d 364-66 (2014). The Legislature's explicit purpose in passing the statute at issue in *Wahkiakum County* was to provide a statutory scheme for recycling sewage waste (biosolids) and using waste as a 'beneficial commodity' in land applications like 'agriculture, silviculture [the growing of trees], and ... as a soil conditioner," rather than disposing of it. *Id.* at 184 Wn. App 372, __ and 337 P.3d 364-65.

The Legislature's formal finding about biosolids implies that the Legislature believed more use of biosolids as fertilizer would be of benefit to the public as opposed to simply disposing of them. In addition, the Legislature designated the Department of Ecology as the body responsible for implementing and managing the biosolids program. *Id.* Finally, there

were several statutes, (RCWs 70.95J.005(1)(d) and (2), RCW 70.95J.010(1) and (4), RCW 70.95.020, and RCW 70.95.255), and several WACs, (WACs 173-308-210(5) and (5)(a), 173-308-300(9)) which preceded the County's new law by, in some cases, 19 years. The WACs stated the conditions under which four classes of biosolids at issue could be applied to land. *Id* at 337 P.3d 365-66. Therefore, the county law at issue, (Wahkiakum County Ordinance No. 151-11), was deemed to be in conflict with the biosolids legislation when it stated, without more detail, that only one of the four classes of State-approved biosolids could be applied to land in Wahkiakum County. *Id* at 337 P.3d 368-72

Unlike the legislative findings in *Wahkiakum County*, I-502 and its enabling statutes do not contain any language stating that distributing more marijuana in the State of Washington, and presumably smoking it or ingesting it, would be beneficial for the public's health, safety, and welfare and should be encouraged. It, arguably, stated only that if it was inevitable that some persons would continue to distribute marijuana, despite it being criminalized under State and Federal law, then it would be better to regulate the distribution and earn tax income from it.

In addition, in *Wahkiakum*, the Department of Ecology did not, in seeking preemption, insist that the County violate the federal Controlled Substances Act. Ecology simply wished to enforce its unambiguous WACs stating four classes of biosolids, not just one, could be used for agriculture, forestry, and gardening purposes. 337 P.3d at 367-68. This was clearly

within Ecology's, not Wahkiakum County's, purview because local governments have not traditionally been allowed, in the exercise of their police powers, to pick and choose which WACs they will follow when the duty for compiling those WACs is in accordance with the power delegated to the particular agency at issue. 337 P.3d at 367-70.

Ecology's right to preempt the field in *Wahkiakum* is clear because the regulated activity is not one a local government normally engages in or the State cedes and Ecology's goals were clearly legitimate State goals. 337 P.3d at 369-71. The City, in the above-captioned case, however, is in a different position than the county was in *Wahkiakum*. The City is exercising its police power to regulate the sales of a Schedule I hallucinogen. (See RCW 69.50.204(c)(22)). This is an area generally considered to be within a local government's legislative purview because it logically relates to the health, safety, and welfare of its residents. See *Bungalow Amusement*, infra.

Review of *Roe v Teletech Customer Care* may be helpful in reaching conclusions about weighing the competing interests reviewed in the preceding paragraph. *Roe* at 171 Wn2d 736, 257 P.3d 586 (2011). Although it is not a state law – local law conflict case, *Roe* points out the weaknesses in utilizing Washington's marijuana statutes for invading of the perquisites of another competing public policy.

> Washington patients have no legal right to use marijuana under federal law. *See* 21 U.S.C. §§ 812, 844(a). Though Roe claims the divergence between Washington's MUMA and federal drug law is of no consequence to a state tort claim for wrongful discharge, the two cannot be completely

> separated. [footnote omitted]. Holding that a broad public policy exists that would require an employer to allow an employee to engage in illegal activity would not be within *Thompson*'s directive to "proceed cautiously" when finding a public policy exception to the at-will employment doctrine. [Internal citation omitted]. *Roe* at 171 Wn2d 759, 257 P3d 597.
>
> Roe has presented only one public policy argument to support her wrongful termination claim—that MUMA broadly protects a patient's "personal, individual decision" to use medical marijuana. MUMA does not proclaim a public policy that would remove any impediment (including employer drug policies) to the decision to use medical marijuana. [footnote omitted] ... *Id.*
>
> MUMA [Medical Use of Marijuana Act] does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer. MUMA also does not proclaim a sufficient public policy to give rise to a tort action for wrongful termination for authorized use of medical marijuana. *Id.*

As a result, the State, in light of its own, and the federal, controlled substances act, has a less legitimate basis to argue it has preemption interests in compelling the sales and taxation of a Schedule I hallucinogen, (See RCW 69.50.204(c)(22)) than it had in deciding which classes of re-treated biosolids were safe to put in the ground.

Also, Wahkiakum County blatantly interjected itself into a decision-making role that had already been statutorily reserved for Ecology. Wahkiakum County decided to write the pre-existing WACs out of existence by passing its own directly contradictory ordinance. 337 P.3d at 367-70. Wahkiakum County wanted the *Wahkiakum* Court to let it pick and choose which of the four biosolids previously and explicitly approved by Ecology could be applied. 337 P.3d at 368-70. In other words,

Wahkiakum County's Ordinance, if validated by the *Wahkiakum* Court, would have literally mooted the explicit directives of the WACs promulgated by the agency directed to manage the program. 337 P.3d at 368-69.

The situation in *Wahkiakum* presented an obvious conflict, but no such conflict exists in the above-captioned case. The City is not attempting to moot any statute or WAC because no statute or WAC prevents it from banning marijuana businesses within city limits.

The above-captioned case also differs from *Wahkiakum* in that the Department of Ecology was a state agency charged with carrying out the State's law, as opposed to a third party. 337 P.3d at 371-72 In *Wahkiakum*, the State, through Ecology, sought an injunction to declare that the county law at issue conflicted with State law and preempted by the State's occupation of the field. 338 P.3d at 366The State did not, as in the above-captioned case, issue an Attorney General Opinion stating the ordinance at issue, (i.e., the City's Ordinance), would not conflict with any State law or hinder the State in managing an area the State intended to preempt. *Dept. of Ecology v. Wahkiakum County,* 184 Wn.App 372, 337 P.3d 364 (2014).

Finally, the Department of Ecology, in *Wahkiakum*, had an easier burden in showing that a State law / County law conflict existed because the statutory authority for counties to enact laws is limited to those powers within RCW 36.32.120(7), whereas code cities' legislative powers are governed by RCW 35A.11.020.

The central difference is that code cities "... shall have **all** powers possible for a city to have under the Constitution of this state and not specifically denied to code cities by law ...," (emphasis added), RCW 35A.11.020, whereas counties only have the power to "make and enforce ... all such police and sanitary regulations as are not in conflict with state law." RCW 36.32.120(7).

There was no requirement, when Ecology was attempting to show a conflict in *Wahkiakum*, that Ecology prove Wahkiakum County was seeking one of "all powers possible" unless "specifically denied" by law. The Department of Ecology merely had to show Wahkiakum County's law was "in conflict with state law." This is a lesser standard, so *Wahkiakum* does not support, in any way, MMH's argument that the City's Ordinance is in conflict with State management of the marijuana licensing and taxation system.

F. **The City's Ordinance is not preempted by I-502.**

1. Field Preemption

Field preemption arises when a state regulatory system occupies the entire field of regulation on a particular issue, leaving no room for local regulation. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010). Field preemption may be expressly stated or may be implicit in purposes or facts and circumstances of the state regulatory system. *Id.*

The similarity between *Lawson* and the above-captioned case is that the manner and method of compliance for nearly all things related to residing

in an RV within a mobile home park, in *Lawson*, are thoroughly regulated by the State. Notwithstanding that, it is permissible, in *Lawson,* without any permission from the State, for a City to ban RVs from mobile home parks entirely. As a result, pervasive regulation does not always indicate field preemption. *Lawson, supra,* at 679-84.

In assessing the possibility of field preemption in an initiative, the Courts look to legislative intent. *Hoppe, infra.* "Legislative intent" in an initiative is derived from the collective intent of the people and can be ascertained by the material contained with the official voter's pamphlet. *Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973). The language of the voter's pamphlet section for I-502, however, contains no evidence of an intent for the state regulatory system to preempt the entire field of marijuana business licensing or operation. In fact, neither do the RCW 69.50 amendments which followed I-502's passage.

The only explicit preemption clause anywhere in RCW 69.50 indicates an intent for the State to preempt the field of penalties for violations of the state Controlled Substances Act, nothing else.

> The State of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with this chapter. Such local ordinances shall have the same penalties as provided for by state law. Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted ... RCW 69.50.608.

There is no provision within RCW 69.50 prohibiting municipal corporations from banning marijuana production, processing, and retail businesses. Therefore, there can be no penalty for implementing a local ban of these businesses.

In addition, any failure by the State to preempt the field must be construed as intentional. None of the Legislature's RCW 69.50 amendments state there must be a minimum number of marijuana businesses within a County or City, nor that there is any right for a marijuana businesses to be located within any city where it would violate that City's zoning ordinances.

If RCW 69.50 or I-502 had listed these as explicit rights, then this intention would have been clear, but the Legislature's only directive in this area was to, by statute, delegate authority to the WSLCB to determine the maximum number of licenses that may be issued in one county, not set a minimum, RCW 69.50.354. WSLCB then adopted WAC 314-55-020(11). The text of which reads:

> The issuance or approval of a license shall 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. WAC 314-55-020(11).

Therefore, to the extent that the post-Initiative WACs express any intent at all, the intent is that nothing in RCW 69.50 displaces the City's right not to allow marijuana zoning. As a result, the plaintiffs' claims of preemption fail.

2. *Conflict Preemption*

Conflict preemption may arise "when an ordinance permits what state law forbids or forbids what state law permits." *Lawson v City of Pasco,* 168 Wn.2d 675, 682, 230 P3d 1038 (2010), but, in light of the fact that "every presumption will be in favor of constitutionality," courts make every effort to reconcile state and local law. *HJS Dev., Inc. v. Pierce County,* 148 Wash.2d 451, 477, 61 P.3d 1141 (2003), (internal citations omitted). Therefore, a local ordinance is only constitutionally invalid if it directly and irreconcilably conflicts with an unfettered right created by a statute such that the two cannot be harmonized. *Id.* and *Rabon v. City of Seattle,* 135 Wn.2d 278, 292, 957 P.2d 621 (1998). The question is not whether a state law permits an activity in some general sense; because "[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law." *Rabon* at 292. See also *Roe v Teletech Customer Care*, 171 Wn2d 736, 759, 257 P.3d 586 (2011). (Washington's Medical Use of Marijuana Act, ("MUMA") did not provide a private cause of action for an employee who is terminated for using marijuana, despite the enactment of MUMA pursuant to RCW 69.51A.

In *Lawson*, the Washington Supreme Court ruled that the State's Mobile Home Leasing and Tenancy Act, ("MHLTA"), despite its language describing, in detailed terms, the restrictions and rights of any RVs leasing space within a mobile home park, did not conflict with local statutes

prohibiting RVs from being used as permanent residences in mobile home parks because the State's MHLTA contained no language that created a right to place RVs in mobile home parks.

> The statutory definitions in RCW 59.20.030 apply to any RV used as a permanent residence once a landlord-tenant relationship is established, but they do not require Mr. Lawson to lease a lot designed for a mobile home to the owner of such an RV. Nothing in the statute prevents landowners from choosing to whom they lease lots, and nothing in it prevents municipalities from regulating that choice. The statute simply regulates recreational vehicle tenancies, where such tenancies exist. Because Pasco's ordinance, former PMC 25.40.060, may be harmonized with the MHLTA, the two laws do not conflict. *Lawson* at 168 Wn.2d 692 and 230 P.3d 1043.

In addition, the *Lawson* Court ruled that the MHLTA was not in conflict with Pasco's ordinance because the MHLTA "imposes no restrictions on local government's regulation of landlord-tenant relationships involving mobile/manufactured homes, it merely regulates such tenancies once they exist." *Id.* at 168 Wn.2d 679 and 230 P.3d 1042.

> The [State] statute does not forbid recreational vehicles from being placed in the lots, nor does it create a right enabling their placement. Id at 168 Wn.2d 679 and 230 P.3d 1042.

The City's Ordinance places no more burdens on marijuana businesses than Pasco's ordinance placed on RV owners. The Legislature, in its amendments to RCW 69.50, provided some regulations for marijuana licenses, delegated others, and legalized, under State law, certain activities, e.g., retail marijuana outlets, but did not compel the City to allow the activity within its jurisdiction.

In *Wahkiakum County*, discussed previously at Section II.E of this brief, a state law explicitly entitled persons to use treated biosolids on property for uses such as farming, lawns, and gardens depending on the level of re- treatment. 184 Wn. App. at ___, 337 P.3d at 365-66. Wahkiakum County adopted an ordinance banning the use of Type B biosolids on any property within the county. 337 P.3d at 366. The court struck down the ordinance because it prohibited a use of biosolids on property that the ordinance explicitly permitted. 337 P.3d at 368. Similarly, in *Entertainment Industry*, the state law in effect at the time banned smoking in public places, but expressly entitled owners of certain businesses to designate smoking areas. Former RCW 70.160.040(1) (2004), repealed by Laws of 2006, ch. 2 §7(2) (Initiative Measure 901). The court held invalid an ordinance that prohibited smoking in all public places because the state law explicitly entitled some business owners to designate smoking areas, but the Health Board ordinance prohibited this. *Entertainment Industry Coalition*, 153 Wn.2d at 664.

In deciding whether an ordinance forbids what State law permits, the challenger must bear the heavy burden of proving that State law creates an entitlement to engage in activity that is prohibited by the local ordinance. The present case is distinguishable from Wahkiakum *County* and *Entertainment Industry Coalition* because although I-502 authorizes the Board to issue licenses and exempts licensees from state law penalties that

would otherwise apply, nothing therein creates an entitlement for licensees to operate regardless of local law. RCW 69.50.325.

Finally, in *Weden v. San Juan County*, the Supreme Court upheld a local limitation on an activity, (jet ski riding), otherwise allowed under State law. The Washington Supreme Court ruled that San Juan County's prohibition regarding motorized personal watercraft in certain waters presented no conflict with State law, even though the state law at issue created mandatory registration and safety requirements for such watercraft, and expressly prohibited the operation of unregistered vessels. *Weden v. San Juan County*, 135 Wn.2d 678, 709-10, 958 P.2d 273 (1998). In making its ruling, the *Weden* Court expressly rejected the argument that the regulation of vessels constituted permission to operate them anywhere in the state, saying, "[n]owhere in the language of the statute can it be suggested that the statute creates an unabridged right to operate [personal watercraft] in all waters throughout the state." *Weden*, 135 Wn.2d at 695. The "[r]egistration of a vessel is nothing more than a precondition to operating a boat" and "[n]o unconditional right is granted by obtaining such registration." *Id.*

So, while obtaining registration with the state was a necessary precondition to being able to operate a personal watercraft, (just as obtaining a state license is necessary for a marijuana business), it did not grant carte blanche to the owner to operate within any specific local jurisdiction or all local jurisdictions generally. The same is the case here.

One must obtain a license from the WSLCB, but obtaining that license does not grant a business owner the right to set up shop wherever and however he/she likes. He/she must comply with local restrictions.

G. **The Washington State Legislature acquiesced to the WSLCB's interpretation that State law does not preempt local zoning ordinances.**

When an agency has been delegated rule making authority and has adopted rules pursuant to this authority, the regulations are presumed valid. *Armstrong v. State*, 91 Wn.App. 530, 537 (1998). Not only are the regulations presumed valid, they are also given great weight, *Id.*, because, while a regulation is not a statute, "it has been established in a variety of contexts that properly promulgated substantive agency regulations have the force and effect of law." *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445, (1997), *cert. denied* 118 S.Ct. 1574 (1998). As a result, WAC 314-55-020 has the same force and effect of a statute.

Since its adoption on November 11, 2013, WAC 314-55-020 has stated that State marijuana business licenses must comply with local rules and regulations.

> The issuance or approval of a license shall 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. WAC 314-55-020(11).

If the State Legislature did not agree with the WSLCB's interpretation of I-502's meaning, it had ample opportunity to make that disagreement known. Since November 2013, the State Legislature has made several changes to RCW 69.50, specifically relating to the sections on

marijuana. ESHB 2304, for example, was approved on April 2, 2014 and went into effect on June 12, 2014. (CP 134). None of the post-November 2013 changes, though, disturbed WAC 314-55-020.

This constitutes legislative acquiescence because "[t]he Legislature's failure to amend a statute interpreted by administrative regulation constitutes legislative acquiescence in the agency's interpretation of the statute [and] [t]his is especially true when the Legislature has amended the statute in other respects without repudiating the administrative construction." *Manor*, 131 Wn.2d 439, n.2 (1997).

H. **The State Legislature acquiesced to local bans in a manner which is consistent with the Attorney General's Opinion that State law did not preempt a local jurisdiction's right to ban marijuana businesses.**

An Attorney General formal opinion "constitutes notice to the Legislature of the Department's interpretation of the law." *City of Seattle, v. State and Dep't of Labor and Industries*, 136 Wn.2d 693, 703 (1998). When the Legislature has not acted to overturn an Attorney General's interpretation, the courts have found that the Legislature has consented to the interpretation. *Id.* and *Five Corners Family Famers*, 173 Wash.2d 296 at 308.

As stated above, the Attorney General opined in January 2014 that local governments may ban marijuana businesses within their jurisdictions and there is no field nor conflict preemption. Now, according to the intervenors' brief, at least 120 local governments either ban marijuana outlets or have moratoriums against the operation of marijuana outlets.

Nonetheless, nothing amending the laws regarding the State's licensing and taxation scheme have emerged from the Legislature, even though the Legislature clearly knows it can change the State's marijuana laws at any time.

The Legislature has had the opportunity to modify or moot the Attorney General's Opinion. The Legislature has not done so. Therefore, the Courts must conclude that the Legislature is satisfied with the Attorney General's opinion on the issue.

I. The Courts should not disturb the Legislature's acquiescence in response to WAC 314-55-020 and Attorney General Opinion 2014 No. 2.

"It is not the role of the judiciary to second-guess the wisdom of the legislature." *Northwest Animal Rights Network v. State*, 158 Wn.App 237, 245, 242 P.3d 891 (2010). "Indeed, the judiciary's making such public policy decisions would not only ignore the separation of powers, but would stretch the practical limits of the judiciary." *Id.* at 246. The courts are "not equipped to legislate what constitutes a 'successful' regulatory scheme by balancing public policy concerns, nor can [courts] determine which risks are acceptable and which are not. ... Such is beyond the authority and ability of the judiciary." *Id.* (internal citations omitted).

III. CONCLUSION

For the reasons stated above, the City of Fife respectfully asks the court to affirm the trial court's order granting the City of Fife's motion declaring the City's ordinance to be valid and not preempted by State law.

RESPECTFULLY SUBMITTED this 12th day of March, 2015.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, by agreement of the parties, a true and correct copy of the foregoing document, upon the following:

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