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Ronald R. Carpenter  
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No. 90780-3

SUPREME COURT  
OF THE STATE OF WASHINGTON

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MMH, LLC and Graybeard Holdings, LLC, *et. al.*,

*Appellants,*

vs.

City of Fife, *et. al.*,

*Respondents.*

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Washington State Supreme Court

APR 22 2015

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BRIEF OF AMICUS CURIAE  
CITY OF WALLA WALLA

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**3. Identity and Interest of Amicus**

The City of Walla Walla is a non-chartered Washington code city organized under Title 35A RCW.

The Walla Walla City Council passed zoning Ordinance 2014-29 (Oct. 22, 2014) which allows marijuana facilities to locate in designated zoning districts of the City of Walla Walla through a conditional use permitting process. The City of Walla Walla has an interest in the impact that this case may have upon local zoning authority over marijuana facilities.

**4. Statement of the Case**

Briefly summarized, the facts are as follows: The City of Fife engaged in considerable study and conducted multiple public hearings and meetings between August 13, 2013 and July 8, 2014 to determine whether to allow marijuana facilities and how to zone for them if they were allowed. *See* CP 46-49, ¶¶ 3, 6-11, 16-22; CP 1810-17. Various options were considered including allowance of marijuana facilities in designated zoning districts. *See* CP 48, ¶ 16 and CP 78-97 (a proposed draft ordinance that would have allowed marijuana facilities). The Fife City Council ultimately passed Ordinance 1872 on July 8, 2014 which amended the Fife Zoning Code to list collective gardens, marijuana producers, processors, and retailers as prohibited uses in all zoning districts of that city. CP 43, ¶ 9; *see* CP 98-106

(a copy of Fife City Ordinance 1872).

Appellants filed suit in Pierce County Superior Court on July 15, 2014 seeking to have Ordinance 1872 declared to be in conflict with state law and invalid. CP 1–12. The Pierce County Superior Court granted partial summary judgment in favor of the City of Fife on September 8, 2014 ruling in part that Initiative 502 "does not prevent Fife from enacting ordinances allowing imposition of penalties for zoning or business operation violations under its municipal code, including complete bans on local business licenses for marijuana production, processing, and retailing." CP 1444, ¶ 7.

## **5. Argument**

A. Direct review should be granted pursuant to RAP 4.2(a)(4).

Amicus submits that this case involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination" and that this Court should grant direct review in accordance with RAP 4.2(a)(4). I-502 was passed by Washington voters at the November 6, 2012 general election and enacted by Laws of 2013, ch. 3.

As of the time of submission of this brief, the Municipal Research and Services Center reports that 74 Washington cities have adopted permanent zoning regulations allowing marijuana facilities, 24 do so by existing zoning regulations, and 16 do so by interim zoning regulations. 58 Washington

cities prohibit marijuana facilities, and another 41 have adopted moratoria. MUN. RESEARCH AND SERV. CTR., RECREATIONAL MARIJUANA: A GUIDE FOR LOCAL GOVERNMENTS, <http://mrsc.org/Home/Explore-Topics/Legal/Regulation/Recreational-Marijuana-A-Guide-for-Local-Governmen.aspx> (last visited Apr. 3, 2015). The issues raised in this case therefore have statewide significance.

The issues raised in this case are also unlikely to be resolved any time soon in other forums. The Washington State Liquor Control Board promulgated rules to implement I-502 which are codified at ch. 314-55 WAC, however, those rules address only the requirements for state licensing, and issuance of a state license does not constitute "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). Amicus is informed that the likely vehicle for any statutory reform in the current session of the Washington State Legislature is S.B. 5052, 64th Leg., Reg. Sess. (Wa. 2015) which would establish a consolidated state licensing system for recreational and medicinal marijuana. The most recent version of the bill includes a repealer section that would eliminate a number of statutes including RCW 69.51A.140 which addresses local zoning authority with respect to medical marijuana facilities,

but the bill is otherwise silent regarding local regulatory authority. *See* 2d Sub. S.B. 5052, § 43(5), 64th Leg., Reg. Sess. (Wa. 2015). Various other bills were introduced that might have directly answered questions raised in this case, but they failed to be timely acted upon in accordance with the legislative calendar. *E.g.*, H.B. 1438, 64th Leg., Reg. Sess. (Wa. 2015).

Amicus therefore submits that guidance from this Court is required regarding the scope of local regulatory authority over marijuana facilities, because questions continue to arise for which clear answers are needed.

B. Police power zoning authority includes the authority to regulate and prohibit land uses.

"Zoning ordinances are constitutional in principle as a valid exercise of the police power." *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 218, 242 P.2d 505 (1952); *see also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926). Local police powers in Washington are derived from Article XI, Section 11 of the Washington State Constitution which directly grants authority over land use to cities. *State v. Seattle*, 94 Wn.2d 162, 165, 615 P.2d 461 (1980). This court explained in *Hass v. Kirkland*, 78 Wn.2d 929, 932, 481 P.2d 9 (1971) that the authority granted by Const. art. XI, § 11 "is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself. It requires no

legislative sanction for its exercise so long as the subject-matter is local, and the regulation reasonable and consistent with the general laws." (quoting *Detamore v. Hindley*, 83 Wash. 322, 326, 145 P. 462 (1915)).

Amicus submits that the police power to regulate includes authority to prohibit uses. This Court recognized in *Ackerley Communications v. Seattle*, 92 Wn.2d 905, 920, 602 P.2d 1177 (1979) that "[i]t is a valid exercise of the City's police power to terminate certain land uses which it deems adverse to the public health and welfare within a reasonable amortization period." *See also Seattle v. Martin*, 54 Wn.2d 541, 543-45, 342 P.2d 602 (1959) (recognizing the authority of a city to compel termination of a pre-existing legal land use). The Washington Legislature also understands that local zoning authority includes the power to both "regulate and restrict" land uses. RCW 35.63.080; RCW 35.63.110; RCW 35A.14.330(2).

Since zoning authority is directly derived from Const. art. XI, § 11, amicus submits that this Court should apply the reasonableness test reaffirmed by this Court in *Weden v. San Juan County*, 135 Wn.2d 678, 700, 958 P.2d 273 (1998) to evaluate the validity of a ban. *Weden* involved a county ban on use of jet skis. This Court held that the ordinance enacting the ban "must be a 'reasonable' exercise of the County's police power in order to pass muster under article XI, section 11 of the state constitution." *Weden*,

135 Wn.2d at 700. It went on to apply a two-part test that had been employed when determining the validity of a statute passed pursuant to police power: "First, the statute must promote the health, safety, peace, education, or welfare of the people. . . . Second, the requirements of the statute must bear some reasonable relationship to accomplishing the purpose underlying the statute." *Weden*, 135 Wn.2d at 700 (citation omitted). The same test should apply to land use bans. See *Edmonds Shopping Ctr. v. Edmonds*, 117 Wn.App. 344, 351-55, 71 P.3d 233 (2003).

Amicus recognizes that appellant claims not to challenge "reasonable" local regulatory authority and instead purports to contest only the power to ban. See Brief of Appellant, pp. 19-21, ¶ B(c). However, appellant fails to offer a reasoned basis to distinguish between zoning and prohibitory authority in this or future cases. Both derived from the same self-enabling source: Const. art. XI, § 11. See *Weden*, 135 Wn.2d at 700 (prohibitory authority); *Nelson v. Seattle*, 64 Wn.2d 862, 866, 395 P.2d 82 (1964) (zoning authority). Both are measured for constitutionality by the same "reasonableness" test. See *Weden*, 135 Wn.2d at 700 (prohibitory authority); *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 26-27, 586 P.2d 860 (1978) (zoning regulations). Without some clear differentiation founded upon Const. art. XI, § 11 between regulatory and prohibitory authority,

sweeping arguments made today against bans will be used tomorrow to preclude other local regulatory requirements.

C. I-502 does not usurp any part of local zoning authority

Local exercise of Article XI, § 11 zoning authority may be limited by legislative enactment. *See Lauterbach v. Centralia*, 49 Wn.2d 550, 554-55, 304 P.2d 656 (1956). However, preemption is not presumed and may only be accomplished by clear and unambiguous legislation. *Nelson*, 64 Wn.2d at 866; *see also Weden*, 135 Wn.2d at 695.

Amicus submits that I-502 (Laws of 2013, ch. 3) cannot be construed as clear or unambiguous preemption of any part of local zoning power. It establishes only a generalized licensing framework under which marijuana distribution may be considered legal under state law. It does nothing to evaluate local considerations with respect to land uses. State law expressly defers to counties and cities to make such determinations. *See e.g.*, RCW 36.70A.3201 ([T]he ultimate burden and responsibility for planning . . . and implementing a . . . county's or city's future rests with that community."). When state preemption of local authority to prohibit particular land uses is intended, it is overtly and clearly stated. *E.g.*, RCW 36.70A.200(5).

It is widely recognized that police power may be locally exercised to wholly prohibit otherwise legal uses even though they might be allowed in

other communities within a state. *E.g.*, *Bartolomeo v. Town of Paradise Valley*, 631 P.2d 564, 567-69 (Az. App. 1981) (disallowing commercial uses from a town zoned entirely residential); *Lambros, Inc. v. Town of Ocean Ridge*, 392 So.2d 993, 994 (Fla. App. 1981) (same); *Mindel v. Village of Thomaston*, 541 N.Y.S.2d 526 (1989) (prohibiting hotels); *Town of LaGrange v. Giovenetti Ent. Inc.*, 507 N.Y.S.2d 54 (1986) (prohibiting waste disposal stations). The same holds true with respect to uses already subject to a complex regulatory scheme or a state licensing system. For example, the court in *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 790-92 (6th Cir. 1996) recognized that a Michigan city could forbid landing areas in its jurisdiction even though such facilities are heavily regulated by the Federal Aviation Act. The court in *Rumpke Waste, Inc. v. Henderson*, 591 F.Supp. 521, 530-32 (S.D. Ohio 1984) recognized that an Ohio city was not bound to allow sanitary landfills even though they were generally allowed by state law and strictly regulated by the Ohio EPA. *See also Town of Beacon Falls v. Posic*, 563 A.2d 285, 291-92 (Conn. 1989).

Amicus submits that the conflict analysis performed by the Court of Appeals in *Dep't of Ecology v. Wahkiakum County*, 184 Wn.App. 372, 337 P.3d 364 (2014) has no application here. That statutory scheme at issue in that case expressly provides that its purpose is to "provide the department of

ecology and local governments with the authority and direction to meet federal regulatory requirements for municipal sludge." RCW 70.95J.007. It further expressly limits local authority to that which is delegated by the department. RCW 70.95J.080. In contrast, the rules implementing I-502 expressly confirm that they do not address local zoning requirements. *See* WAC 314-55-020(11). Amicus submits that 2014 AGO No. 2 (Jan. 16, 2014) correctly analyzes state preemption issues with respect to I-502.

"It cannot be said that every municipality must provide for every use somewhere within its borders." *Fanale v. Borough of Hasbrouck Heights*, 139 A.2d 749, 752 (N.J. 1958); *see also Duffcon Concrete Products v. Borough of Cresskill*, 64 A.2d 347 (N.J. 1949). "It is well settled that even a legitimate business or occupation may be restricted or prohibited in the public interest." *John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.*, 339 N.E.2d 709, 719 (Mass. 1975); *see also Snow v. City of Garden Grove*, 10 Cal.Rptr. 480, 483-84 (Cal. App. 1961). The Oregon Supreme Court recognized in *Oregon City v. Hartke*, 400 P.2d 255 (Or. 1965) that local government is responsible for planning within a city in a manner that meets the community needs, and that it is therefore authorized to eliminate some uses that are not in keeping with a city's character or plans for the future. *Harke*, 400 P.2d at 263; *see also Hoeck v. City of Portland*, 57 F.3d 781, 788

(9th Cir. 1995). Amicus submits that Washington charges local jurisdictions with the same primary responsibility and authority with respect to land uses within their borders. *See e.g.*, RCW 36.70A.3201; RCW 35.63.080.

Judicial review of local zoning action is limited and deferential. *See Duckworth*, 91 Wn.2d at 26-27. If reasonable minds could differ in finding a substantial relation between a zoning action and public welfare, the zoning action must be sustained. *Anderson v. Island County*, 81 Wn.2d 312, 317, 501 P.2d 594 (1972). Amicus submits that Fife Ordinance 1872 satisfies the police power test reaffirmed in *Weden* under Washington's judicial review standard for zoning action, and it is therefore valid.

## 6. Conclusion

Amicus curiae requests that this Court grant direct review and affirm the partial order granting summary judgment, CP 1443-44, ¶¶ 2, 3, and 7.

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