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COURT OF APPEALS
DIVISION II

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NO. 46723-2 STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BY C
DEPUTY

MMH, LLC and GREAYBEARD
HOLDINGS, LLC

Appellants

DOWNTOWN CANNABIS COMPANY,
LLC, MONEY GRASS FARMS, LLC,
AND JAR MAGT, LLC d/b/a Rainier
on Pine,

Intervenors-Appellants

vs

CITY OF FIFE,

Respondent

AND

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

Intervenor-Respondent

PLAINTIFF-INTERVENORS'
SUPPLEMENTAL BRIEF

ORIGINAL

TABLE OF CONTENTS

I. *Cannabis Action Coalition v. Kent*..... 2

II. RECENT LEGISLATION..... 6

CONCLUSION 10

DECLARATION OF SERVICE 12

TABLE OF AUTHORITIES

CASES

<i>Cannabis Action Coalition v Kent</i> , 351 P.3d 151 (2015)	<i>Passim</i>
<i>Department of Ecology v Wahkiakum County</i> , 184 Wn. App 372, P.3d 364 (2014).....	5
<i>State v Cawyer</i> , 182 Wash. App. 610, 330 P.3d 219 (2014)	8

STATUTES

E2SHB Sec. 1301	6
Fife Ordinance 1872.....	1
House Bill 2510 (2014).....	6
Laws of 2013, c3 § 1	1
Laws of 2015, ch. 70 (SB 5052)	6
Laws of 2015, ch 70, sec. 2	7
Laws of 2015 ch. 70, sec 8(2)(d)	7
Laws of 2015, 2 nd Spec. Sess. Ch 4	6
Laws of 2015, 2 nd Spec. Sess. ch 4, sec. 101	7
Laws of 2015, 2 nd Spec. Sess, ch. 4, sec. 301(8).....	8
Laws of 2015, 2 nd Spec Sess, ch 4, sec 301(9).....	8
Laws of 2015, 2 nd Spec. Sess., ch. 4, sec. 801(3)(a)	8
Laws of 2015, 2 nd Spec. Sess, ch. 4, sec 1001(3)(x)	9
Laws of 2015, ch. 70, sec. 48	9

Laws of 2015 ch. 70, sec. 27	9
Laws of 2015, 2 nd Spec. Sess, ch. 4, sec. 206(2)(g) and 1603	9
RCW 69.50	6
RCW 69.50.331	8
RCW 69.51A.140	9
Senate House Bill 2144 (2014).....	6
WAC 314-55 2014.....	6
Wash. Const. art. XI, § 11.....	2, 4

As Plaintiff-Intervenors stated in their opening brief, when Washington State voters passed I-502 they voted to enact a comprehensive, highly detailed regulatory scheme that allowed for the limited retail sale of marijuana to those 21 years and older. I-502's goal was to achieve three objectives:

- Allow law enforcement resources to be focused on violent and property crimes;
- Generate new state and local tax revenue for education, health care, research, and substance abuse prevention; and
- Take marijuana out of the hands of illegal drug organizations and bring it under a tightly regulated, state licensed system similar to that for controlling hard liquor.

Laws of 2013, c 3 § 1.

Fife Ordinance 1872, which bans all retail sales of marijuana, prohibits what state law allows. It prohibits the Liquor Control Board from licensing retail outlets from operating in Fife and in prohibits the holders of retail licenses from operating in Fife. Fife's ordinance directly and irreconcilably conflicts with state law because it takes a licensing decision out of the hands of the Liquor Control Board – the entity directed to carry out the requirements of I-502. Fife's ordinance directly and irreconcilably conflicts with state law because, if similar bans were adopted by all local jurisdictions, I-502's goals would not,

and could not, be achieved. The Ordinance violates Wash. Const. art. XI, § 11.

The recent case of *Cannabis Action Coalition v. Kent*, 351 P.3d 151 (2015), a case involving unregulated collective marijuana gardens for medical purposes, does not apply to this case. In addition, while the legislature has amended I-502 this past year, the changes do not affect this controversy.

This Court should reverse the trial court's ruling that Fife's ban on retail sales of marijuana did not violate Art. XI, § 11.

I.

Cannabis Action Coalition v. Kent

Cannabis Action Coalition v. Kent, 351 P.3d 151 (2015), involved the Medical Use of Cannabis Act (MUCA) and a zoning ordinance enacted by Kent prohibiting certain types of collective gardens within city limits. As the State Supreme Court noted, the state legislature in 2011 amended MUCA such that the amendment "would have created a comprehensive regulatory scheme under which all patients, physicians, processors, producers, and dispensers could be securely and confidentially registered in a database maintained by the Washington Department of Health." *Id.* at 153. If a patient registered, the patient would not be subject to state prosecution or civil consequences for marijuana-related offenses. *Id.* If a patient did not

register, the patient would be entitled to only an affirmative defense to marijuana prosecutions. *Id.*

Under the bill, qualifying patients could establish collective gardens for the purpose of growing medical marijuana for personal use. The bill also clarified that local governments retained their authority to regulate the productions, processing, or dispensing of medical marijuana through zoning, business licensing, health and safety requirements, and business taxes. *Id.*

The Governor vetoed 36 of the bill's 58 sections. *Id.* The Governor vetoed the centerpiece of the bill: the establishment of a registration system. *Id.* The Governor did not veto the provision concerning the collective gardens or the provision concerning local zoning requirements. *Id.*

Kent enacted a zoning ordinance prohibiting certain types of collective gardens from operating within city limits.

The Court devoted most of its analysis determining whether the MUCA zoning provision only applied to commercial collective gardens or all collective gardens. It concluded it applied to all collective gardens. The Court then dealt in one paragraph with the issue of whether Kent's ordinance was otherwise consistent with state law. *Id.* at 156.

The Court noted that Kent's ordinance was a land use ordinance and was not simply a ban on all medical marijuana activity. *Id.* at 156. (The Court noted that Kent's ordinance did not apply to all collective gardens. The Court noted that if eleven qualifying patients participated in the collective garden then the Kent ordinance would not apply. *Id.* at 156, n. 4.) The Court concluded that the ordinance did not violate Art. XI, § 11.

Cannabis Action Coalition does not apply to this appeal for a number of reasons.

First, as enacted, MUCA was not a comprehensive state regulatory scheme. While it was intended to be a comprehensive scheme the Governor vetoed large portions of the bill. What remained were remnants of a bill that was intended to be comprehensive. The MUCA did not have as a goal driving out the illicit market for marijuana sales or taxing marijuana sales to raise revenue. Instead, the MUCA at most provided an affirmative defense under certain circumstances to growing marijuana.

Second, MUCA does not authorize, or require, a state agency to grant licenses for the operation of collective gardens so that medical marijuana will be available throughout the state. Instead, at most, the MUCA gives those participating in a collective garden an affirmative

defense against prosecutions. The MUCA did not direct any affirmative action. In contrast, here, I-502 authorized, and required, the Liquor Control Board to issue licenses throughout the state in order to drive out the illicit sales of marijuana. I-502 requires the Liquor Control Board to determine how many retail outlets need to be located in each county in order to achieve that objective.

Third, Fife's ordinance is not a land use ordinance. Instead, it simply bans all retail outlets. *Cannabis Action Coalition* noted that Kent's ordinance had limitations on what it was restricting. Here, I-502 allows local jurisdictions to enact limited zoning laws but does not allow local jurisdictions to enact outright bans of retail sales. Unlike Kent, Fife has simply banned all retail outlets with no limitations whatsoever.

Fourth, as noted by this Court in *Department of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 337 P.3d 364 (2014), this type of prohibition would thwart the legislative purpose of I-502 of having retail outlets across the state to drive out the illegal market of marijuana sales and to raise revenue through the taxation of marijuana sales. The Kent ban has no such effect because there was no comparable goal of the statute. If all local jurisdictions enacted the flat prohibition that Fife enacted then there would be no retail outlets

for recreational marijuana and the comprehensive regulatory scheme enacted by I-502 would be thwarted.

II. RECENT LEGISLATION

This case must be analyzed under the July 2014 versions of I-502's statutes and rules (see RCW 69.50 et seq. and WAC 314-55 et seq. - 2014), but the 2015 legislative changes in Laws of 2015, ch. 70 ("SB 5052" - relating to establishing the cannabis patient protection act), and Laws of 2015, 2nd Spec. Sess., ch. 4 ("HB 2136" - relating to comprehensive marijuana market reforms to ensure a well-regulated and taxed marijuana market in Washington state) do provide some additional context as to the legislature's subsequent intent about the permissibility of local bans. Although neither bill definitively answers whether a ban like Fife's is permitted under current statute, the 2015 legislative changes provide additional evidence that Fife's ban prevents what is allowed under state law and is therefore invalid.¹

In terms of intent, the legislature has reaffirmed the underlying intent behind I-502 that the "state continues to ensure a safe, highly

¹ It should be noted that there have been numerous pieces of legislation introduced since I-502's passage that would have clarified the issue of local bans. Some bills would have expressly permitted local bans - HB 2510 (2014). Others would have expressly prohibited local bans - SHB 2144 (2014). Even earlier versions of one of the bills at issue in this supplemental brief, Laws of 2015, 2nd Spec. Sess., ch. 4, had language that would have permitted local jurisdictions to pass local bans via a vote of the people - E2SHB sec. 1301.

regulated system in Washington that protects valuable state revenues while continuing efforts towards disbanding the unregulated marijuana markets.”² It also talks about the need for “partnership with local jurisdictions” and an intent to “share marijuana tax revenues with local jurisdictions for public safety purposes and to facilitate the ongoing process of ensuring a safe regulated marijuana market *in all communities across the state.*”³ (emphasis added). Similarly in the medical marijuana context, the legislature intended to “adopt a comprehensive act that uses the regulations in place for the recreational market to provide regulation for the medical use of marijuana.”⁴ It also directed the Liquor and Cannabis Board to “reconsider and increase the maximum number of retail outlets...to accommodate the medical needs of qualifying patients.”⁵ In both cases, the legislature expressed its intent to create an adequate marijuana supply throughout the state

Evidence of the state’s intent is also seen in the 2015 statutory changes, which add language about when local jurisdictions may pass ordinances that impact marijuana businesses. For example, in

² Laws of 2015, 2nd Spec. Sess., ch. 4, sec. 101.

³ *Id.*

⁴ Laws of 2015, ch. 70, sec. 2.

⁵ Laws of 2015, ch. 70, sec. 8(2)(d).

amending RCW 69.50.331 (Application for license) cities, counties and towns are authorized to enact ordinances that allow marijuana businesses to be sited less than one thousand feet away from certain public facilities.⁶ They are also now allowed to “adopt an ordinance prohibiting a marijuana producer or marijuana processor from operating or locating a business within areas zoned primarily for residential use or rural use with a minimum lot size five acres or smaller.”⁷ Local jurisdictions may also “adopt an ordinance requiring individual notice” by an I-502 license applicant to certain nearby facilities, such as schools, during application process.⁸ Absent from any of these statutory changes is express authority for local jurisdictions to ban I-502 businesses outright, despite the clear evidence that the legislature knows how to provide such authority when desired. The canon of statutory construction expression unius, “which states to express one thing in a statute implies the exclusion of the other,” applies here. *State v. Cawyer*, 182 Wash. App. 610, 623, 330 P.3d 219, 225 (2014).

Changes to medical marijuana laws follow a similar pattern. For example, newly recognized “cooperatives,” which allow up to four

⁶ Laws of 2015, 2nd Spec. Sess., ch. 4, sec. 301 (8).

⁷ Laws of 2015, 2nd Spec. Sess., ch. 4, sec. 301(9).

⁸ Laws of 2015, 2nd Spec. Sess., ch. 4, sec. 801(3)(a).

patients to share responsibility for the production of their medical marijuana, may not be located “where prohibited by a city, town, or country zoning provision.”⁹ The legislature also repealed RCW 69.51A.140 (Counties, cities, towns – Authority to adopt and enforce requirements), which was at issue in *Cannabis Action Coalition v. City of Kent*, 351 P.3d 151 (2015) and provided broad authority to local jurisdictions to regulate medical marijuana through zoning and licensing.¹⁰ It did authorize local jurisdictions to create “civil penalties” for growing more than fifteen marijuana plants in a housing unit or growing it in a way that can viewed or smelled by the public, but not bans for state licensed businesses.¹¹ These changes illustrate the legislature’s intent to regulate marijuana at the state level and to carve out authority for local regulation in limited circumstances.

The 2015 legislative changes also included funding for local jurisdictions for “marijuana enforcement,” which is contingent on whether the local jurisdiction has I-502 businesses.¹² This is not the equivalent of acquiescence by the legislature that local jurisdictions can ban retail sales of marijuana. Instead, it is a recognition that not

⁹ Laws of 2015, 2nd Spec. Sess., ch. 4, sec. 1001(3)(c).

¹⁰ Laws of 2015, ch. 70, sec. 48.

¹¹ Laws of 2015, ch. 70, sec. 27.

¹² Laws of 2015, 2nd Spec. Sess., ch. 4, secs. 206(2)(g) and 1603.

all local jurisdictions will have retail outlets because of market forces. In other parts of the same bill the legislature demonstrated that it knows how to authorize local jurisdictions to pass bans. For example it authorized local ordinances that prohibit “business within areas zoned primarily for residential use or rural use with a minimum lot size of five acres.”¹³ If the legislature believed that local jurisdictions already had the authority to completely ban marijuana activity then these changes would have been unnecessary.

CONCLUSION

Fife’s ban is not comparable to Kent’s zoning ordinance banning certain types of collective gardens for medical marijuana users. MUCA was not a comprehensive regulatory scheme and does not have as a goal driving out the illicit sale of marijuana throughout the state nor the goal of raising tax revenues throughout the state.

The legislative changes do not demonstrate that the legislature has acquiesced in Fife’s complete ban of retail sales of marijuana. If that were true, the legislature would not have needed to enact authorizations allowing local jurisdictions to ban certain types of operations.

¹³ Laws of 2015, 2nd Spec. Sess., ch. 4, sec. 301(9).

Dated this 5th day of August, 2015.

Respectfully submitted,

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2015 AUG -5 PM 1:37

DECLARATION OF SERVICE

STATE OF WASHINGTON

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1. Plaintiff-Intervenors' Supplemental Brief

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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