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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ANTI-SMOKING ALLIANCE dba PINK LUNG BRIGADE, a
Washington non-profit corporation,

Respondent,

v.

TACOMA-PIERCE COUNTY DEPARTMENT OF HEALTH AND
HEALTH BOARD,

Appellant.

APPELLANT'S BRIEF

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ER 801
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Washington State Constitution, Article XI, Section 11

COMES NOW Appellant, Tacoma-Pierce County Health Department (the “Health Department”), and hereby submits Appellant’s Opening Brief.

I. INTRODUCTION

Respondent, the Pink Lung Brigade (“PLB”), commenced this matter at the trial court level seeking to prevent the Health Department from enforcing its Environmental Code Regulations affecting the vaping industry, specifically vaping retailers. The Health Department enacted these regulations in accord with an express grant of authority made to political subdivisions pursuant to RCW 70.345.210(3). The Health Department’s regulations require 1) vaping retailers allow no more than three customers to sample vaping products at any one time, 2) that such sampling occur at the counter, 3) that samples not contain nicotine, and 4) that retailers who wish to offer sampling install a ventilation system. PLB sought to enjoin enforcement of these regulations on several basis, which it ultimately failed to brief, were not factually supported, and were not supported by any relevant legal or factual analysis. Ultimately, the Court erred in concluding that Ch. 70.345 RCW and Article XI, Section 11 of the Washington State Constitution preempted political subdivisions from regulating vaping retailers in any form. This ruling is clearly in error for several reasons, but chiefly because it failed to acknowledge or reference

the express grant of authority made to political subdivisions by the plain language of RCW 70.345.210(3).

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. The Health Department Designates the Following Assignments of Error.

1. The trial court erroneously enjoined the Health Department from enforcing its regulations set forth in the Health Department's Environmental Health Code ("EHC") section 9¹. (CP 1724 – 25).

2. The trial court erred by analyzing preemption under a conflict analysis and therefore erred by failing to perform the appropriate preemption analysis required by law where, as here, the statute provides an express grant of authority as set forth in RCW 70.345.210(3), which permits regulation by political subdivisions, and which express grant of authority was not analyzed as evidenced by the Court's failure to reference RCW 70.345.210(3) in its order. (CP 1721 – 24).

3. That the trial court also erred by erroneously enjoining the Health Department from enforcing its regulations by finding that Ch. 70.345 RCW preempted any regulation by political subdivisions pursuant to Article XI, Section 11 of the Washington State Constitution and Ch. 70.345 et. al.

¹ TPCHD Environmental Code Ch. 9 § 3 (July 6, 2016). The applicable provisions of the Health Code are also available in the record at CP 912 -921.

(CP 1724).

4. The trial court erred in finding the Health Department's regulations were preempted by Ch. 70.345 RCW by failing to follow the principals of statutory construction and to give effect to all language used by the Legislature; specifically, the express grant of authority set forth in RCW 70.345.210(3). (CP 1721 – 24).

5. The trial court erred in finding the Health Department's regulations violate Ch. 70.345 RCW and RCW 70.345.020 with regard to licensure. This is because the Health Department's license requirements were removed when the code was revised in July 2016² and because the Court misinterprets penalties related to non-compliance with the Health Department's environmental code as "license requirements". (CP 1723).

6. Similarly, the trial court erred in finding the Health Department's regulations violate Ch. 70.345 RCW where they touch upon enforcement and penalties, because the trial court erroneously concluded that the Health Department has no authority to regulate vaping at all, in clear contravention of RCW 70.345.210(3). The court also errs in this conclusion because it finds the Liquor Control Board possesses sole enforcement authority regarding vaping. This finding conflicts with authority granted to

² CP 912 – 921

political subdivisions who possess authority to regulate under RCW 70.34.210(3) and therefore have the attendant authority to take measures to induce compliance with their regulations. (CP 1723 – 24).

7. The trial court erred in failing to grant the Health Department’s motion to strike and considering factual assertions in support of its order, which were not supported by the record and were not relevant to the constitutional analysis and preemption analysis ostensibly performed by the court.

8. The trial court erred in finding the Health Department’s regulations violate Article XI, Section 11 of the Washington State Constitution, which grants broad authority to regulate matters touching upon public health where such authority has explicitly been delegated to political subdivisions, including the Health Department. (CP 1724 – 25).

9. The trial court abused its discretion by enjoining the Health Department from enforcing its regulations when the evidence presented by PLB failed to satisfy the requirements set forth in CR 65 and Washington State common law establishing legal standards for when an injunction shall issue.

B. Issues Pertaining to the Health Department’s Assignments of Error.

1. Whether the permanent injunction was wrongfully issued

where the Health Department’s regulations and Ch. 70.345 RCW do not irreconcilably conflict, are not preempted and where RCW 70.345.210(3) contains an express grant of authority.

2. Whether a permanent injunction is wrongful when Ch. 70.345 RCW, case law, and the tenants of statutory construction do not support the Court’s conclusion that Ch. 70.345 RCW preempts any regulation of vaping by political subdivisions pursuant to the “general laws of the State of Washington under Article XI, Section 11 of the Washington Constitution, RCW 70.345 et seq. and the doctrine of conflict preemption which establish clear legal and/or equitable rights conferred on PLB and its members, as retail vapor shop owners.” (CP 1724 – 25).

3. Whether the evidence considered pursuant to CR 65 supports the following findings of fact by the trial court *or* the conclusion that such findings of fact are relevant as a matter of law under a preemption analysis, a constitutional analysis, or pursuant to Ch. 70.345 RCW:

a. “4. ECH 9(6)(F)(2), TPCHD’s three person limit on the number of people who may sample vapor at given time in a retail vapor shop, is inconsistent with the State law which has no such limitation.”

b. “5. ECH 9(6)(F)(1), TPCHD’s requirements that tastings are only allowed at the sales counter in retail vapor shops, is inconsistent with state law which has no such limitation.”

c. “6. ECH 9(6)(D)(2) and (3), TPCHD’s prohibition

on sampling vapor containing nicotine in retail vapor shops, is inconsistent with state law which has no such limitation. RCW 70.345.100(1)(d) allows the customer to explicitly consent to a tasting of a vapor product that contains nicotine. This restriction will harm retail vapor shops because approximately 90% or more of all sampling and sales are of e-liquid containing nicotine and nicotine-free vapor cannot replicate the taste.”

d. “7. TPCHD’s investigation and enforcement provision, including its penalty and criminal provisions, will make it completely untenable for retail vapor shops to stay in business. There is simply no way a retail vapor shop can stay in business if they have to follow the ventilation requirements, number restrictions, and nicotine prohibits, nor is there any way they can stay in business violating these provisions in the fact of the criminal prosecutions and escalating fines for violations.”

4. Whether the permanent injunction should be dissolved where, pursuant to the principals of statutory construction and the express grant of authority set forth in RCW 70.345.210(3), the Health Department’s regulations are proper, within the scope of RCW 70.345.210(3) and 70.05.060, do not conflict with the law, are a permissible regulation pursuant to the power delegated to the Health Department via Article XI, Section 11, and are an appropriate exercise of it authority to protect and regulate matters touching upon public health.

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III. STATEMENT OF THE CASE

A. Background of the Case.

1. The Vaping Industry.

a. The Rising Popularity of Vaping.

Vaping, or the act of inhaling and exhaling an aerosolized vapor through an electronic cigarette, has increased dramatically in recent years as an alternative to consumption of tobacco products via cigarettes or similar vehicles. (CP 912 – 921). Use of vapor products has become commonplace, and is present in public areas and in some places of employment. (CP 912 – 921.). The pervasiveness of vapor products increase the social acceptance of vaping, provide models for unhealthy behavior, provide a vehicle for consumption of nicotine and other substances, and complicate enforcement efforts of state and local authorities regulating the use of tobacco vapor products in public places. (CP 120 – 1165).

b. Vaping Presents Known Dangers and Raises Ample Concerns of Additional Unknown Dangers.

The market for vaping products and e-juice³ is largely unregulated. Despite the presence of nicotine, carcinogens, and unknown chemicals, and the vapor emissions containing those chemicals, these products are free

³ E-juice is the liquid that is vaporized for inhalation.

from the same legal scrutiny applicable to other nicotine products or inhalants. (CP 531 – 533, 923 – 924, 1120 – 1165)⁴. The lack of safety monitoring and labeling requirements results in consumption of these poisons through inhalation of aerosolized e-juice and exposure to secondhand vapor emissions. (CP 531 – 533, 923 – 924). Moreover, the increasing popularity of these products among adolescents is concerning, particularly due to vaping devices’ high-tech designs and child-friendly flavors. (CP 923 – 924).

c. Attempts to Regulate Vaping.

As vaping has become more popular, examination of the chemical makeup of e-liquid products has increased. Presently, research by the Center for Disease Control (“CDC”) has found nicotine, carbonyl compounds, volatile organic compounds (VOCs), polycyclic aromatic hydrocarbons, tobacco specific nitrosamines, heavy metals and glycols present in vaping liquid. (CP 531 – 533). The CDC has encouraged and promoted legislative efforts to ban indoor use of e-cigarettes in public places to the same extent that indoor smoking is prohibited. (CP 531 – 533). The Washington State Association of Local Public Health Officials conducted a

⁴ Per ER 703, if the facts or data relied upon by an expert are the type reasonably relied upon by other experts in the particular field in forming opinions or inferences upon the subject, the facts or data relied upon need not be admissible in evidence.

study, which conclusions mirrored those of the CDC: “[u]ntil second hand aerosol vapor exposure is deemed safe, it is prudent to protect non-users under the assumption that it is best to protect the public from unknown harms.” (CP 1042 – 1061).

d. Vaping as an Alternative to Smoking and Efforts to Reduce Exposure.

Vaping advocates, including PLB, argue that vaping is a socially desirable alternative to smoking. However vaping’s use as a cessation aid also presumes that there is nicotine in the vapor. (CP 1556). This is in accord with CDC’s conclusions and the evidence considered by the Health Department and Washington’s Legislature. (CP 531 – 533). Due to the presence of nicotine, individuals working at vaping retailers are exposed to vapor and vapor containing nicotine at a greater level than other sections of the population due to their employment.

Both sets of regulations at issue in this litigation, Ch. 70.345 RCW and Ch. 9 of the Health Department’s Environmental Health Code, recognize that vapor is a health risk and exposure should be minimized. For example, use of vapor products is completely banned in several public places: child care facilities, schools, within 500 feet of schools, school buses, and elevators. RCW 70.345.150. The Health Department’s

regulations seek to minimize exposure to vapor products through its ventilation and sampling provisions.

The ventilation provisions adopted by the Health Department provide:

1. The license holder must retain at the retail outlet acceptable documentation that demonstrates the retail outlet has a suitable ventilation system. A suitable ventilation system meets the “Smoking Lounge” standards for Retail Stores of Table 403.3, MINIMUM VENTILATION RATE of the 2012 International Mechanical Code (“IMC”), as now or hereafter amended, or the equivalent standards required by the jurisdictional Building Official.

(CP 912 – 921). The City of Tacoma, Pierce County, and many other local jurisdictions have adopted the IMC as part of their local building codes.

(CP 521 – 523). The IMC standards incorporated by Ch. 9 provide the specifics for complying with the Health Department’s ventilation requirements. (CP 912 – 921). Similar regulations are in use and govern ventilation requirements for spaces like dressing rooms, courtrooms, and places of religious worship. (CP 1167 – 1170).

PLB argued, absent evidentiary support, that such regulations would “require shop owners to purchase prohibitively expensive ventilations systems.” (CP 1554 – 1555, 1574 – 1774). As the IMC clearly describes, the Health Department’s requirements are similar to those already governing many public places and retail establishments located in the

community and are no more prohibitively expensive to comply with in this context than other building modifications required by the building code. (CP 524 – 527). The requirements of any given retail space would be specific to the existing structure and limitations and/or existing construction thereof. (CP 523 – 526). Evidence⁵ offered by the Health Department articulates that installation of a ventilation system *could cost* up to \$40,000. (CP 526 – 527). In declarations offered by PLB, this figure is \$145,000 or more, yet this figure is unsupported by documentation. (CP 1555, 1561, 1565, 1574). Several of the declarations offered by PLB were missing signatures, were signed by declarants not operating in Pierce County, and left blank space where key information should have been filled in. (CP 1565, 1569, 1578).

In enacting its regulations, the Health Department aimed to limit exposure to vapor products by including provisions limiting the number of customers who can sample vapor products at one time. The Regulations restrict the number of individuals sampling vapor products to no more than three, require that the sampling occur at the counter, and that the samples be free of nicotine. (CP 912 – 921). The regulations prevent vaping retailers' establishments from becoming a lounge environment and limit the

⁵ Baldrige's testimony is admissible pursuant to ER 702, 703, and 705 and is not subject to a motion to strike.

exposure of vapor to employees, customers of vaping retailers, and others who may enter vape shops. By concluding that RCW 70.345.210(3) does not permit any regulation of vaping retailers, the trial court endorsed a statutory scheme where employees of vaping retailers face the highest exposure to vapor products with the lowest level of statutory protection. Based on the harms recognized by the Legislature related to vapor products, this interpretation is untenable.

2. **Enactment of Ch. 70.345 RCW, Revision of the Regulations, and Resulting Litigation.**

a. **Enactment of Statutory and Local Regulations.**

In 2016, the State enacted legislation aimed at regulating the vaping industry under Ch. 70.345 RCW. (CP 890 – 902). This legislation contains a limited preemption clause and an express grant of authority for local jurisdictions to regulate. RCW 70.345.210(3). Local jurisdictions are prohibited from regulating the use of vapor products in outdoor public places. RCW 70.345.210(2). Contrastingly, the Legislature specifically authorized political subdivisions to regulate the “use of vapor products in indoor public places.” RCW 70.345.210(3). After the Legislature’s adoption of Ch. 70.345 RCW, the Health Department followed an open public process that led, on July 6, 2016, to the Health Department’s adoption

of revised vaping regulations in compliance with the new State law. (CP 926 – 1036)⁶.

The Health Department exercised the authority granted by RCW 70.345.210(3) and enacted regulations, specifically Chapter 9 of the Environmental Health Code⁷ (“Regulations”) effecting vaping retailers, in an effort to reduce access to vapor products by youth, minimize the risk posed to the general public by pervasive, unregulated vaping, prevent vapor retailers’ places of business from becoming vaping lounge environments, and reduce exposure to vapor by employees and customers of vaping retailers. (CP 912 – 921). The Regulations still permit sampling. Following the Legislature’s adoption of Ch. 70.345 RCW, the Health Department followed an open public process that led, on July 6, 2016, to the Board of Health’s adoption of revised vaping regulations. (CP 926 – 1036). The revised regulations, enacted July 2016, eliminated the prior version’s licensure restrictions⁸.

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⁶ As a courtesy, PLB’s counsel was specifically advised of the schedule for the proposed revisions to the regulations via letter from counsel dated May 27, 2016. (CP 515 – 519). PLB’s counsel was also directed to the Health Department’s website where updates on the public process were available. (CP 515 – 519). Via separate correspondence, opposing counsel was also provided a copy of the agenda for the June 1, 2016 meeting, the website location of updated regulations, and the schedule for further public meetings. (CP 515 – 519).

⁷ The declaration of DiBiase includes a full copy of TPCHD’s Environmental Health Code, Chapter 9, Exhibit B (CP 912 – 921).

⁸ Tacoma-Pierce County Health Dep’t Bd. of Health Ch. 9 (July 6, 2016). (CP 912 – 921).

b. Litigation Over Health Department Regulations.

PLB filed a Complaint and sought injunctive relief of March 16, 2016⁹. (CP 1 – 14). On April 8, 2016, the trial court heard PLB’s motion for a preliminary injunction to enjoin the Health Department from enforcing its regulations. (CP 451 – 473). PLB’s motion for injunctive relief was denied in part and granted in part. (CP 423 – 425). The Health Department was permitted to enforce its regulations except those with respect to the ventilation requirement. (CP 423 – 425). Because Ch. 70.345 RCW had been passed, but not yet signed into law, the trial court invited the parties to submit further briefing on the impact of Ch. 70.345 RCW. (CP 423 – 425). Instead of submitting additional briefing, PLB filed an Amended Complaint. (CP 438 – 450).

The Health Department filed a motion seeking to dissolve the April 18, 2016 preliminary injunction. (CP 478 – 489). The trial court granted the Health Department’s Motion to Dissolve and lifted the restriction on enforcing its ventilation requirements, but granted limited affirmative relief over the Health Department’s objection. (CP 858 – 861).

On June 30, 2017, the Health Department filed a Motion for Summary Judgment seeking dismissal of PLB’s case. (CP 870 – 886). The

⁹ PLB filed its first Complaint for Injunctive Relief in Thurston County Superior Court on or about January 17, 2016; that cause of action was ruled improperly filed and the matter was refiled in Pierce County.

trial court denied the Health Department's motion for summary judgment on September 27, 2017. (CP 1230 – 1232). The Health Department timely sought discretionary review seeking a review of the trial court's order denying summary judgment. (CP 1238 – 1243). This Court denied the Health Department's request for discretionary review. (CP 1457 – 1464).

While the Health Department's motion for discretionary review was pending, PLB filed a motion for summary judgment. (CP 1248 – 1306). In response, the Health Department sought to consolidate PLB's motion for summary judgment with a hearing on the merits pursuant to CR 65, which the trial court permitted. (CP 1431 – 1438, 1516 – 1517). This was based on the fact that, by virtue of PLB filing a motion for summary judgment, it appeared that those facts relevant to the legal analysis were not disputed. On September 10, 2018, the trial entered findings of fact and conclusions of law that concluded Ch. 70.345 RCW and Article XI, section 11 preempted the Health Department from enacting and enforcing the Regulations. (CP 1718 – 1725).

The Health Department timely appealed the trial court's decision, and hereby seeks review of the Findings of Fact and Conclusions of Law entered on September 10, 2018 and relief in the form of dissolution of the injunction.

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IV. ARGUMENT

A. Standard of Review.

The Health Department appeals the trial court's order enjoining enforcement of the Regulations after a consolidated hearing pursuant to CR 65(a)(2). This consolidated hearing was held because "the essential facts are not in dispute and the only issue on the merits is an issue of law." City of Seattle v. Davis, 174 Wn.App. 240, 245, 306 P.3d 961 (2012). The Health Department's Assignments of Error set forth in Section II concern decisions of the trial court based on issues of law. To the extent factual conclusions are implicated, they would be reviewed pursuant to an abuse of discretion; however it is a legal conclusion whether myriad facts offered by PLB are relevant to the legal analysis required. Accordingly, the Health Department contends that the errors claimed are subject to de novo review. Clayton v. Grange Ins. Ass'n, 74 Wn.App. 875, 877, 875 P.2d 1246 (1994); State v. Pierce County, 65 Wn.App. 614, 617-18, 829 P.2d 217 (1992).

B. The Health Department's Regulations Do Not Violate Article XI, Section 11; The Trial Court Erroneously Concluded that the Health Department, as a Political Subdivision Empowered to Regulate Health and Safety, was Precluded from Regulating Vaping.

The trial court erred in concluding the Regulations violate Article XI, Section 11, as it failed to consider the statutory power of health departments to regulate matters of public health and safety. Because this

explicit authority is delegated to health departments, the trial court erred in concluding the Regulations were void, as identified by the Health Department's Assignment of Error No. 1. (CP 1724 – 25).

PLB alleges that the Health Department has violated RCW 70.05.060 which provides:

Each local board of health shall have supervision over all matters pertaining to the preservation of the life and health of the people within its jurisdiction and shall:

- (1) Enforce through the local health officer or the administrative officer appointed under RCW 70.05.040, if any, the public health statutes of the state and rules promulgated by the state board of health and the secretary of health;
 - (2) Supervise the maintenance of all health and sanitary measures for the protection of the public health within its jurisdiction;
 - (3) Enact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof;
- [. . .]

Under this provision, local boards of health are authorized to enforce and enact local rules to promote and preserve public health and safety. The source of the Health Department's regulatory authority is the statutory delegation contained in Ch. 70.05 RCW. Numerous cases recognize that RCW 70.05.060 effectively and broadly delegates power to local boards of health pursuant to RCW 70.08.010. See e.g. Entertainment Industry Coalition v. Tacoma-Pierce County Health Department and Tacoma-Pierce County Board of Health, 153 Wn.2d 657, 663, 105 P.3d 985 (2005); Rabon

v. City of Seattle, 135 Wn.2d 278, 957 P.2d 621 (1998). RCW 70.08.010,

provides:

Any city with one hundred thousand or more population and the county in which it is located, are authorized, as shall be agreed upon between the respective governing bodies of such city and said county, to establish and operate a combined city and county health department, and to appoint the director of public health.

PLB also contends that RCW 70.160.080 bars the Health Department's ability to enact regulations on vaping. RCW 70.160.080 provides, "Local fire departments or fire districts and local health departments may adopt regulations as required to implement this chapter." The chapter referenced is the Clean Indoor Air Act regulating the ability of places open to the public to permit smoking in their premises. This chapter does not speak to vaping whatsoever. This argument fails, as this statute specifically grants broad authority to local health departments to enact further regulations. However, assuming, arguendo, that the basis of this argument is the fact that the two statutes touch on the same topic, this argument must also fail. Our courts have repeatedly declined to find a conflict merely because a matter touches on the same matter covered by another statute. Employco Personnel Services, Inc. v. City of Seattle, 117 Wn.2d 606, 617, 817 P.2d 1373 (1991).

The statutes identified do nothing to impact the clear fact that RCW 70.345.210(3) augments the Health Department's authority by permitting

the Health Department to regulate vaping so long as it does not ban sampling, which it has not done.

C. The Court Erroneously Conclude that Conflict Preemption Applies and Failed to Give Effect to the Express Grant of Authority Set Forth in RCW 70.345.210(3).

The trial court failed to perform the correct conflict preemption analysis and erroneously found that Chapter 9 of the Environmental Code was preempted by Ch. 70.345 RCW and Article XI, Section 11, as identified in the Health Department’s Assignment of Error No. 2. (CP 1721 – 24).

State law preemption occurs expressly, by implication, or where an irreconcilable conflict exists. Stated differently, “[p]reemption occurs when the legislature either expressly or by necessary implication states its intention to preempt the field, or whether a state statute and local ordinance are in such direct conflict that they cannot be reconciled.” Kennedy v. City of Seattle, 94 Wn.2d 675, 679, 230 P.3d 1038 (2010). The statute that PLB identifies as the basis for preemption is found in RCW 70.345.210(1): “[Ch. 70.345 RCW] preempts political subdivisions from adopting or enforcing requirements for the licensure and regulation of vapor product promotions and sales at retail.” However both PLB and the trial court ignore the express grant of authority in the following section, RCW 70.345.210(3), which provides: “Subject to RCW 70.345.150, political subdivisions *may regulate the use of vapor products in indoor public places.*” (Emphasis supplied).

The trial court found the Regulations are irreconcilable with Ch. 70.345 RCW based on conflict preemption alone and failed to acknowledge or analyze the effect of the express grant of authority at all. This is clearly in error.

Under conflict preemption, a local statute is only invalid if it directly and irreconcilably conflicts with a state law such that the two cannot be harmonized. Lawson v. City of Pasco, 168 Wn.2d 675, 682, 230 P.3d 1038 (2010); Weden v. San Juan County, 135 Wn.2d 678, 693, 958 P.2d 273 (1998). In its conflict preemption analysis, the trial court took the position that, because the Regulations imposed requirements not required by Ch. 70.345 RCW, the Regulations were void. However, conflict preemption analysis is not so unyielding. The “general rule is that the fact that an activity can be licensed under state law does not mean that the activity must be allowed under local law.” Emerald Enterprises, LLC v. Clark County, 2 Wn.App. 794, 805, 413 P.3d 92 (2018). The trial court appears to make just this error and seems to regard Ch. 70.345 RCW as conferring a legal and/or equitable right on retail vapor shop owners. (CP 1725). RCW 70.345.210(3) clearly demonstrates that the Legislature did not intend for vapor retail shop owners to be free from regulation by local health departments.

Because it did not acknowledge RCW 70.345.210(3), the trial court

made no effort to reconcile RCW 70.345.210(1) with the express grant of authority set forth in RCW 70.345.210(3). Tellingly, subsection three is not identified anywhere in the trial court's order. (CP 1718 – 1725). Through RCW 70.345.210(3), the Legislature explicitly preserved the ability of political subdivisions to enact further regulations, so long as those regulations are related to the use of vapor products in indoor public places. It is well established that “a local ordinance does not conflict with a state statute in the constitutional sense merely because the ordinance prohibits a wider scope of activity.” Brown v. City of Yakima, 116 Wn.2d 556 (1991) relying upon Seattle v. Eze, 111 Wn.2d 22, 33, 759 P.2d 366 (1988) and cases cited therein. Despite this precedent and the explicit language of RCW 70.345.210(3), the trial court and PLB rely solely on RCW 70.345.210(1) and contend that political subdivisions, such as the Health Department, are barred from enacting any regulations relating to sales and tasting. The question is not only whether or not a state law permits what the Health Department forbids, but whether the state law prohibits the Health Department from regulating in this area. Weden v. San Juan County, 135 Wn.2d 678, 693, 958 P.2d 273 (1998). It does not. RCW 70.345.210(3).

No unabridged right exists within the vaping industry to engage in wholly unregulated sampling. The express grant of authority clearly

permits political subdivisions to take such action with respect to vaping in indoor public places so long as sampling is not barred. Vape shop owners are already prohibited from being able to sample and taste wherever and however they so choose. Sampling and tasting is not vaunted as an unabridged right within the statutory scheme established by Ch. 70.345 RCW. For example, state law prohibits, among other things, sampling without the assistance of a vendor, sampling outside the shop premises and sampling for individuals under the age of eighteen. RCW 70.345.080, .100(1)(b) and (c). The express grant of authority itself contradicts the idea that vape shop owners have an unabridged right to sample. It is clear that the Legislature intended for local ordinances to have some ability to regulate this industry. Failing to interpret the statute this way also has the undesirable and unlikely outcome of offering employees of vape shop retailers the least amount of protection under the statutory scheme.

The Health Department's Regulations that touch on sampling and tasting do not further curtail the rights of vape shop owners when viewed in light of the whole stator scheme. Even if they do so, such curtailment is permissible. The Health Department's Regulations do not prevent customers from tasting and sampling. Said regulations pertain to where this tasting can occur and how many people can taste at one time. Vape shop owners are free to offer tasting to their customers. The Health Department's

Regulations are not irreconcilable with Ch. 70.345 RCW. Because the statute and the local ordinance can be reconciled, conflict preemption does not invalidate the Regulations.

The trial court should have applied an express preemption analysis in light of RCW 70.345.210(3), rather than the erroneous conflict preemption analysis. PLB relies on the preemption language contained in RCW 70.345.210(1) to support its position that the Health Department is preempted from enforcing its regulations. However, “[e]xpress preemption requires a clear indication of legislative intent to occupy the field.” Lawson v. City of Pasco, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010). Furthermore, courts must interpret an express preemption clause narrowly but fairly. Kitsap Cty. v. Kitsap Rifle & Revolver Club, 1 Wn.App. 393,404, 405 P.3d 1026 (2017). The Legislature’s express grant of authority contained in RCW 70.345.210(3) clearly indicates that the legislature contemplated local ordinances could and would take their own action with respect to vaping in indoor public areas. By allowing local ordinances to enact their own vaping regulations, the Legislature did not preempt the field. Furthermore, and as argued supra, the Regulations do not prohibit what is preempted by RCW 70.345.210(1). It would be unfair, and contrary to well established law, to interpret this preemption contained in RCW 70.345.210(1) as broadly as the trial court did, and as PLB demands.

D. The Trial Court Erred in Failing to Apply the Presumption of Constitutionality; The Regulations are Constitutional.

The trial court failed to hold PLB to the high burden required to prove a local ordinance is unconstitutional. The Regulations were not shown to be unconstitutional, thus, the trial court erred in granting PLB relief, as identified in the Health Department's Assignment of Error No. 3. (CP 1724).

An enacted local ordinance is presumed constitutional, and the party challenging the ordinance has the burden of showing unconstitutionality beyond a reasonable doubt. Emerald Enterprises, LLC v. Clark County, 2 Wn.App. 794, 804, 413 P.3d 92 (2018). "Beyond a reasonable doubt" in the context of a constitutional challenge to an ordinance means that "[the Court] will not strike a duly enacted statute unless [it] is 'fully convinced, after a searching legal analysis, that the statute violates the constitution.'" School Districts' Alliance for Adequate Funding of Special Educ. v. State, 170 Wn.2d 599, 607, 244 P.3d 1 (2010). This "refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution." Island County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

No analysis is apparent in the order demonstrating that the Regulations were void beyond a reasonable doubt, nor is there any analysis

reflecting consideration of the applicable legal tenants. The Regulations are presumed constitutional and this presumption must be dealt with before concluding that a statute runs afoul of the constitution. The failure to do so is in error, is contrary to law, and fails to hold PLB to its burden. As the plaintiff in the underlying litigation, PLB is required to overcome that burden “beyond a reasonable doubt.” PLB failed to do so, and thus the trial court erred in finding the Regulations were void. The trial court’s ruling must be reversed; as argued supra the Health Department’s Regulations are constitutional. Entertainment Industry Coalition v. Tacoma-Pierce County Health Department and Tacoma-Pierce County Board of Health, 153 Wn.2d 657, 663, 105 P.3d 985 (2005)

E. The Trial Court’s Conflict Preemption Analysis is in Error Because it Failed to Follow the Principles of Statutory Construction by not Considering RCW 70.345.210(3), and Erred in Failing to Give Effect to all Portions of the Statute Drafted by the Legislature.

The order fails to follow the well-established principles of statutory construction when it found that Regulations were void under Ch. 70.345 RCW because it failed to give effect to the express grant of authority set forth in RCW 70.345.210(3). Consequently, the trial court erred in failing to fulfill statutory interpretation constructs by reading the entire statute crafted by the Legislature in its entirety, as identified by the Health Department’s Assignment of Error No. 4. (CP 1718 – 25).

The analysis does not reflect an effort to read RCW 70.345.210(1) in harmony with 70.34.210(3), which explicitly grants political subdivisions, such as the Health Department, the authority to regulate indoor use of vaping in public places. RCW 70.345.210(3) explicitly provides that “[s]ubject to RCW 70.345.150, political subdivisions may regulate the use of vapor products in indoor public places.” Under RCW 70.345.150, use of vapor products is prohibited in various indoor and outdoor areas, although “[t]he use of vapor products is permitted for tasting and sampling in indoor areas of retail outlets.” RCW 70.345.150(1)(b).

The Health Department’s interpretation harmonizes both provisions, and allows for the Health Department to regulate vaping indoors so long as tasting and sampling is still permitted. This interpretation is in accord with the long accepted tenants of statutory construction. The trial court failed to engage in such construction and consequently failed to give effect to the express grant of authority set forth in RCW 70.345.210(3).

The trial court is required to interpret statutes in a manner that, if possible, gives effect to all of the language used by the legislature. Hood Canal Sand and Gravel, LLC v. Goldmark, 195 Wn.App. 284, 298, 381 P.3d 95 (2016), (emphasis added). “Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of a mere lack of uniformity in detail.” Weden v. San

Juan County, 135 Wn.2d 678, 693, 958 P.2d 273 (1998), quoting Bodkin v. State, [132 Neb. 535], 272 N.W. 547 [(1973)].

The Health Department's regulations clearly do not conflict with Ch. 70.345 RCW, they do not forbid what the legislature allows, and the Health Department's position offers an interpretation where the Regulations and Ch. 70.345 RCW can be read in harmony. The Health Department's regulations may be more restrictive than Ch. 70.345 RCW, but it is plainly evident that the Health Department's regulations do not forbid tasting and sampling. The Health Department's regulations assert only a reasonable limitation on the number and location of tasters within the retail outlet, and requires ventilation and do so in legitimate service of public health concerns. (CP 912 – 921). If the Legislature wanted to prohibit local jurisdictions from passing their own regulations with respect to tasting and sampling, it would have done so. This fact is abundantly clear by the language of RCW 70.345.210(2), which does in fact prohibit a political subdivision from “regulat[ing] the use of vapor products in outdoor public places unless [...]” RCW 70.345.210(2) shows what language the Legislature uses when it intends to bar regulation on a particular topic. If the Legislature intended RCW 70.345.210(3) to be read in the same way as RCW 70.345.210(2), the same language would be used. The specific language and structure used by the Legislature further undermines the trial

court's limited reading of the statute, and powers granted to the Health Department under RCW 70.345.210(3).

F. The Licensure and Enforcement Provisions of the Trial Court's Order Do Not Support Conflict Preemption: the Health Department's Power to Regulate Includes the Power to Enforce and Penalize.

The trial court's findings fail to recognize the posture of the Regulations with respect to licensure, and wholly ignore the broad authority granted to health departments pursuant to RCW 70.05.060, as identified by the Health Department's Assignments of Error Nos. 5 and 6. (CP 1723 – 24).

“Generally speaking, a [political subdivision]'s¹⁰ powers are coextensive with those possessed by the State. Without question, a [political subdivision's] plenary powers include the power to enact ordinances prohibiting and punishing the same acts which constitute an offense under state law.” City of Bellingham v. Schampera, 57 Wn.2d 106, 109 356 P.2d 292 (1960) cited with approval Cannabis Action Coalition v. City of Kent, 180 Wn.App. 455, 482, 322 P.3d 1246 (2014). The trial court appears to adopt PLB's assertion¹¹ that the application and enforcement of the

¹⁰ Here the Health Department's powers stem from its authority as a local board of health which broadly include powers to “preserve, promote and improve the public health” and for the “prevention, control, and abatement of nuisances detrimental to the public health. RCW 70.05.060(1);(5).

¹¹ Arguably, unplead. (CP 438 – 450).

Regulations will lead to the downfall of the Pierce County vaping industry. This assertion, and the trial court's finding, is based solely on conjecture, which is irrelevant to the legal analysis the trial court was required to do. This assertion is also questionable based on the years in which sampling of vapor products was not possible as they were sold in self-contained units. (CP 56, 69).

First, the trial court's conclusion that the licensure provisions of the Regulations violate state law is erroneous, as the licensure provisions of the Regulations were revoked when the Regulations were revised in July 2016. (CP 912 – 921). Accordingly, they can no longer be used to support a claim of conflict preemption.

Regardless, Ch. 70.05 entities like the Health Department, clearly possess enforcement capability. City of Bellingham v. Schampera, 57 Wn.2d 106, 109 356 P.2d 292 (1960). This is also contemplated by Ch. 70.345 RCW, as under RCW 70.155.120, "Moneys appropriated from the youth tobacco and vapor products prevention account to the department of health shall be used by the department of health for the implementation of this chapter, including the collection and reporting of data regarding enforcement and the extent to which access to tobacco products and vapor products by youth has been reduced." RCW 70.155.120(2). The Legislature anticipated local health departments would play a role in

enforcement of vaping regulations, as the Legislature explicitly granted health departments that authority through RCW 70.345.210(3). The trial court cannot be permitted to curtail actions of the Health Department so explicitly within its purview.

G. The Trial Court Erred in Granting PLB Relief when PLB Failed to Prove the Requirements in CR 65 to Obtain a Permanent Injunction.

The trial court erred in finding that retail vape shop owners possess a clear legal and/or equitable right which is inviolate from regulation by the Health Department. No such right was or can be identified, thus the trial court erred in enjoining the Health Department from enforcing its Regulations on this basis as identified by the Health Department's Assignment of Error No. 7. (CP 1724 – 25). No injunction can be issued without establishing this fundamental first step.

A party seeking injunctive relief must show that (1) that he has a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) the acts complained of are either resulting in or will result in actual or substantial injury. Tyler Pipe Indus. Inc. v. Dep't of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). In determining whether there is a clear or equitable right, the court examines the clarity of the legal right allegedly implicated by the challenged statute. Washington Fed. Of State Employees, Counsel 28 AFL-CIO v. State, 99 Wn.2d 878,

665 P.2d 1337 (1983); Tyler Pipe Indus. Inc. v. Dep't of Revenue, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982). Simply stating one's rights have been violated, without more, is insufficient to support a permanent injunction. Tyler Pipe, 96 Wn.2d at 793. Had this analysis occurred, this burden could not be satisfied.

The trial court erred in granting the permanent injunction because it failed to identify what clear or equitable right existed with respect to PLB. The trial court stated that “the general laws of the state of Washington under Article XI, Section 11 of the Washington Constitution, RCW 70.345. et. seq. and the doctrine of conflict preemption establish clear legal and/or equitable rights conferred on PLB and its members.” (CP 1724 – 25). Well-established precedent requires the trial court to determine what clear legal and/or equitable right exists. The trial court did not do so here, which is fatal to the trial court's order.

No further analysis is necessary to demonstrate that the permanent injunction issued by the trial court is improper, since the trial court failed to establish the first prong of the test established by Tyler Pipe and its progeny. Tyler Pipe Indus. Inc. v. Dep't of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982). Assuming, arguendo, that the trial court determined that the implicated right was to be free from unnecessary health and safety regulations, this is still reversible error. As argued supra, the Health

Department has a legitimate interest in protecting public health and is empowered with enacting and enforcing rules and regulations to exercise that intent. RCW 70.05.060. In addition, the Legislature conferred upon local subdivisions an express grant of authority to regulate the vaping industry through RCW 70.345.210(3). The trial court's conclusion that such right exists, despite the existence of this authority, is insufficient to support its order.

In Am. Legion Post #149 v. Washington State Dep't of Health, 164 Wn.2d 570, 600-01, 192 P.3d 306, 322 (2008), the court found that privacy interests were not implicated by regulations limiting the use of tobacco products because there is no fundamental right to smoke cigarettes. Similarly, there is no fundamental right to vape. Where no fundamental right is implicated, the government need only have a rational basis connecting the regulation to public health. It is well established, and argued thoroughly herein, that the Board of Health has a legitimate interest in protecting public health, which is what the Regulations were designed to do. RCW 70.05.060.

An injunction will not issue in doubtful cases. Washington Fed. Of State Employees, Counsel 28 AFL-CIO v. State, 99 Wn.2d 878, 665 P.2d 1337 (1983). Because the trial court failed to identify the threshold inquiry

identifying a clear legal and/or equitable right implicated by the Health Department's regulations, the trial court's order should be reversed.

H. The Trial Court's Order Relies on Factual Assertions Not Supported By the Record and Not Relevant to the Constitutional Analysis.

The trial court erred in failing to grant the Health Department's Motion to Strike and in relying on questionable and irrelevant testimony in its findings of fact, as identified by the Health Department's Assignment of Error No. 9. Consequently, the conclusions reached by the trial court warrant reversal. (CP 1720 – 21).

Findings of fact are sustained on appeal only when they are supported by substantial admissible evidence. State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). The substantial evidence standard is met when there is evidence sufficient to persuade a fair-minded, rational individual that the finding is true. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). The evidence on which the trial court relied in making its findings of fact is not supported by substantial evidence. The evidence offered by PLB lacked foundation, was speculative, contained rank hearsay, was not authenticated or executed in accord with the requirements applicable to submission of evidence via declaration or affidavit, and was wholly irrelevant to the applicable legal inquiries before the court. (CP 1317 – 1327).

1. Testimony Lacks Foundation.

Pursuant to ER 602, “a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” “Stated negatively, the rule bars testimony which purports to relate to facts, but which is based on the reports of others.” Hollingsworth v. Washington Mut. Sav. Bank, 37 Wn.App. 386, 681 P.2d 845 (1984). The declarations on which PLB and the trial court rely all testify as to the cost of the ventilation systems, as well as the economic consequences of the Health Department’s regulations. (CP 1555, 1557, 1561, 1565 – 66, 1569, 1574). However, none of the declarants offer testimony sufficient to form a foundation for their estimate of cost or for the purported economic consequences. Not a single bid regarding the cost of installation of a ventilation system is offered by a single PLB declarant.

a. The Ventilation System.

The trial court found that “[a]ccording to PLB, the cost [of installing a ventilation system] is \$145,000 or more. Some retail vapor shops can neither obtain their landlord’s approval to install the system or the characteristics of their shop will not allow [for it].” (CP 1720). This testimony is irrelevant to any applicable legal inquiry. As argued supra, the entire building code subjects landlords, tenants, and owners to its provisions, regardless of ownership. However, the trial court reached this

finding with insufficient evidence in the record to do so. Not a single lease is provided. Not a single declaration from a landlord is provided.

Despite testifying to the cost to install a ventilations system, no ventilation bids are provided, and only one declaration indicates a bid. No PLB declarants' testimony offers details about the facility in which the ventilation system to which the bid relates would be installed, the facility lease terms, or the identity or credentials of the individual or company providing the bid. (CP 1555, 1561, 1565, 1569, 1574). To the extent that any declarants attempt to lay any foundation, the declarants reference testimony such as, "based on my independent research online and in talking to various vendors" and "based on my personal inquiry." (CP 1555, 1561, 1574). Declarants who have allegedly done research on the ventilation system have failed to provide the research, website, or any materials reviewed. None of these materials, even if reviewed, are included or identified by source. No foundation for this testimony is laid which precedes its consideration. Consequently, the testimony is inadmissible and its consideration was in error. ER 402, 602.

b. Economic Consequences.

The trial court found that "[t]his restriction [on sampling nicotine products] will harm retail vapor shops because approximately 90% or more of all sampling and sales are of e-liquid containing nicotine and nicotine-

free vapor cannot replicate the taste.” (CP 1721). The trial court also found:

There is simply no way a retail vapor shop can stay in business if they have to follow the ventilation requirements, number restrictions, and nicotine prohibitions, nor is there any way they can stay in business violating these provision in the face of the criminal prosecutions and escalating fines for violations.

(CP 1721). The evidence in the record, ostensibly in support of this finding, is unsupported by any foundation therefor, and is thus insufficient to sustain the trial court’s finding. Further, how this consideration relates to the applicable legal analysis is unclear.

Though the declarants are business owners, they all claim the Regulations will put them out of business without providing any detail to support such a conclusion. (CP 1557, 1561, 1565 – 1566, 1569). Notably, only the limit on the number of samples and presence of nicotine were enjoined during the pendency of the case. (CP 858 – 861). Yet, not a single business owner averred that their business was closed as a result. The declarants fail to provide sales numbers or data relating to the number of customers who sample, even for their own businesses. PLB’s declarants make blanket conclusions regarding the impact to other business owners as a result of the Regulations, although the business owners referenced by the sweeping testimony do not offer declarations themselves. (CP 1555 – 56, 1574). The declarants fail to identify these business owners by name. (CP 1555 – 56, 1574). PLB submits such testimony to establish a foundation

for their conclusion the closure of the aforementioned retail shops were linked in some way to the Regulations. This whole line of analysis is unsupported by any evidence whatsoever. Moreover there is no legal support offered for the premise that a statutory scheme fails simply because it has an economic impact on a business.

At best, the testimony of PLB's declarants support limited conclusions regarding the specific declarants' own businesses, not the businesses of others. The statements are uniformly conclusory and speculative. Review of the declarations as a group reveals that they are templates, without unique information provided declarant-by-declarant.

2. PLB's Declarants' Testimony is Hearsay.

As the subject declarations lack foundation, the testimony of PLB's declarants is overwhelming hearsay and thus insufficient to support the trial court's findings. Declarations must be based on personal knowledge and may not be based on hearsay. Charbonneau v. Wilbur Ellis Co., 9 Wn.App. 474, 477, 512 P.2d 1126 (1973). Hearsay is a statement made by a person other than the declarant, offered to prove the truth of the matter asserted. ER 801. Under ER 802, hearsay testimony is generally not admissible unless permitted under the Rules of Evidence, other court rules, or statute. PLB's declarants offer testimony from unidentified vape shop patrons and unidentified business owners. These statements are simply summarized;

neither direct quotes nor their identities are offered. The context of the “conversations” identified is also not offered. At minimum, to overcome the prohibition on hearsay, the trial court was required to consider the evidence on which the declarant’s testimony was based, or, if possible, the testimony should come directly from the cited source. Without identification of the source of the testimony, the trial court cannot adequately determine what weight, if any, to give the testimony and should not accept it at face value. Accordingly, such evidence is inadmissible and inadequate to support the trial court’s findings of fact.

3. PLB’s Declarants’ Testimony is Irrelevant.

The trial court was required to undertake an analysis pertaining to exclusive issues of statutory and constitutional inquiry. The declarants appear to draw conclusions that the Regulations require certain actions, are therefore in conflict with state law, and thus, improper. To the extent this evidence touches upon legal inquiries, it cannot be considered. These are legal questions in the sole purview of the court. The factual issues addressed in the trial court’s order, such as the cost of a ventilation system or the economic consequences of the Regulations, are wholly irrelevant to the legal question before the trial court. The trial court consequently erred in allowing such testimony to serve as a basis for its decision.

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V. CONCLUSION

Issuance of a permanent injunction was in error. The trial court performed the incorrect legal inquiry by solely analyzing conflict preemption and failing to consider or give effect to the express grant of authority. There is no basis for the injunction premised on Article XI, Section 11 as these powers are expressly delegated to entities like the Health Department. This statutory grant of authority, and the power it confers, is not acknowledged or analyzed, which is fatal to the injunction. The Health Department respectfully requests this Court reverse the trial court's September 10, 2018 order and permit it to enforce its lawful Regulations. Finally, assuming arguendo, PLB's objections to the Regulations have some merit, a more logical outcome would analyze each prohibition contained in the Regulations in light of RCW 70.345.210(3), the entire statutory scheme, and the policy reflected therein.

DATED this 15th day of February 2019.

McGAVICK GRAVES, P.S.

By: 

Lori M. Bemis, WSBA #32921
Of Attorneys for Appellant

DECLARATION OF SERVICE

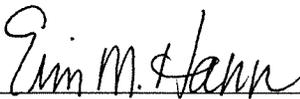
The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Courts' Secure Portal which will send notification of such filing to the following:

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