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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.

**REPLY IN SUPPORT OF APPELLANT'S APPEAL;
APPELLANT'S RESPONSE TO RESPONDENT'S MOTION FOR
ATTORNEYS' FEES AND COSTS**

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Other Authority

CR 11
CR 11(a)

Washington Constitution, Article XI, Section 11

Tacoma-Pierce County Health Department Environmental Health Code,
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COMES NOW Appellant Tacoma-Pierce County Health Department (the “Health Department”), and submits Appellant’s Reply Brief in support of its appeal, and its response to Respondent Pink Lung Brigade’s (“PLB”) Motion for Attorneys’ Fees and Costs.

I. INTRODUCTION & OVERVIEW

This case concerns the Health Department’s enactment of regulations affecting the vaping industry. The Health Department enacted the current version of its Environmental Health Code (“EHC”) Chapter 9¹ (the “Regulations”) in July 2016. Given the rising popularity of vaping, especially among young people, the lack of regulation thereof, and the unknown health effects of vape products, the Health Department exercised its authority expressly granted by the Legislature and set forth in RCW 70.345.210(3) to enact the Regulations in an effort to reduce access of vape products to youth; minimize the risks posed to the public of pervasive, unregulated vaping, prevent vape retailer shops from becoming vaping lounges, and reduce the exposure of vapor to vape shop employees and customers. (CP 912-921).

In its September 10, 2018 Findings of Fact and Conclusions of the Law (the “Order”), the trial court found the Regulations were preempted by

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

the Washington Constitution, Article XI, Section 11 and Ch. 70.345 RCW, even though it failed to consider the express grant of authority set forth in RCW 70.345.210(3). (CP 1718-25). The Legislature explicitly identified permissible regulations, “[s]ubject to RCW 70.345.150, political subdivisions may regulate the use of vapor products in indoor public places.” RCW 70.345.210(3).

The trial court’s ruling renders this section of the statute meaningless, fails to give effect to the language enacted by the Legislature, and contracts the well-established presumption of constitutionality of local ordinances and the rules of statutory construction. Accordingly, and for the reasons set forth below, the Health Department respectfully requests this Court reverse the trial court’s Order and allow the Health Department to enforce its Regulations.

II. ARGUMENT

A. The Court Of Appeals Must Review The Trial Court Decision De Novo.

This Court must review the Order de novo. De novo review is proper when the issues before the Court are issues of law rather than fact. Floeting v. Group Health Cooperative, 192 Wn.2d 848, 852, 434 P.3d 39 (2019). The case before the Court involves solely questions of statutory and constitutional interpretation, both of which are reviewed de novo on appeal.

Dep't. of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2004); State v. Chenoweth, 160 Wn.2d 454, 462, 158 P.3d 595 (2007).

The task before the Court is to engage in the same inquiry as the trial court, and determine whether, under the totality of all the evidence and findings of fact, that the Health Department should be enjoined from enforcing the Regulations.

Because review is de novo, PLB's reliance on the findings and conclusions in the Order and its conclusory statements as to the correctness thereof are not persuasive where the standard of review on appeal is de novo. PLB also argues that "free review" is inappropriate on appeal. It is believed that PLB refers to de novo review, but PLB fails to identify what it believes to be the proper standard of review and make arguments in accord with that standard.

Pursuant to de novo review, the Court must find that the trial court's conclusions were incorrect and unsupported by law and fact, and reverse the Order.

B. The Court Must Give Effect To The Express Grant Of Authority.

The trial court erred in failing to give any effect to the express grant of authority set forth in RCW 70.345.210(3), which expressly authorizes political subdivisions to regulate vaping in indoor public places. Instead,

the trial court took the position that, because the Regulations impose requirements beyond those set forth in Ch. 70.345 RCW, the Regulations are void. (CP 1718-25). However, the question before the Court when engaging in conflict preemption analysis is not just whether or not state law permits what the Health Department does, 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 2732 (1998). Because the Legislature expressly authorized local jurisdictions to regulate, it is clear that the Legislature does not prohibit local regulations. Ch. 70.345 RCW.

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 566 (1991), relying upon Seattle v. Eze, 111 Wn.2d 22, 33, 759 P.3d 366 (1988) and cases cited therein. Moreover, the express grant of authority contemplates wider regulation by political subdivisions. Here, the trial court not only neglected the express grant of authority set forth in RCW 70.345.210(3), but also makes no effort to reconcile RCW 70.345.210(3) with the rest of the statutory scheme. Despite this precedent and the explicit language of RCW 70.345.210(3), the trial court relies solely on the preemption language in RCW 70.345.210(1) in support of the analysis that political subdivisions, such as the Health Department, are barred from

enacting any regulations related to sales and tasting. This fails to give effect to the entire statutory scheme.

State law preemption occurs expressly, by implication, or where an irreconcilable conflict occurs. “Preemption occurs when the legislature either expressly or by necessary implication states its intention to preempt the field, or whether a state and local ordinance are in such direct conflict that the two cannot be reconciled.” Kennedy v. City of Seattle, 94 Wn.2d 675, 679, 230 P.3d 1038 (2010).

A local statute is only invalid under conflict preemption if it directly and irreconcilably conflicts with a state law such that the two cannot be harmonized. Lawson v. City of Paso, 168 Wn.2d 675, 682, 230 P.3d 1038 (2010); Weden v. San Juan County, 135 Wn.2d 678, 693, 958 P.2d 278 (1998). The trial court failed to conduct the analysis required by Lawson and Weden. The trial court neglected to refer to RCW 70.345.210(3) in its order, evidencing its failure to consider the scope of the authority conferred by the express grant of authority, nor did the trial court reconcile the two sections of the statute in a manner giving effect to all of the language in the statute. By simply concluding that the Regulations were preempted by state law, the trial court failed to perform the required preemption analysis.

The language set forth in RCW 70.345.210(3) conclusively establishes that the Legislature did not intend for local jurisdictions, such as

the Health Department, to be prohibited from regulating the vaping industry at all. Similarly, it is evident that the Legislature did not intend for vape shop retailers to be free from any regulation; and accordingly, did not intend for vaping to be an unabridged right² conferred on the public. Other sections of Ch. 70.345 RCW impose regulations and prohibitions on vape retailers, including sampling without assistance of a vendor, sampling outside the retail store premises, and sampling for individuals under the age of eighteen. RCW 70.345.080, .100(1)(b) and (c). The Health Department's Regulations cannot be preempted when the Legislature clearly intended that local jurisdictions retain the ability to regulate vaping and vaping retailers, even with respect to sampling. The express grant of authority set forth in RCW 70.345.210(3) clearly indicates that Health Department's Regulations were contemplated and authorized by the Legislature. The Court should therefore reverse the trial court's Order and allow the Health Department to enforce said Regulations.

C. The Health Department's Regulations Are Within Its Authorized Power.

The Regulations are within the authority conferred upon the Health Department by statute. In addition to the express grant of authority

² Our courts have already established that smoking, clearly an analogous activity to vaping, is not a fundamental right. Am. Legion Post #149 v. Washington State Dep't of Health, 164 Wn.2d 570, 600-01, 192 P.3d 306, 322 (2008).

conferred upon the Health Department by RCW 70.345.210(3), it has broad authority to “enact such local rules and regulations as are necessary in order to preserve, promote, and improve the public health and provide for enforcement thereof...” RCW 70.05.060. These powers coincide with and are incidental to 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). PLB’s arguments to the contrary are not persuasive and are not premised on the law.

It is clear that the Legislature contemplated local entities, such as the Health Department, would possess enforcement capability. This enforcement was contemplated not only by Ch. 70.345 RCW, but under RCW 70.155.120, which provides, “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...” The Legislature obviously anticipated the role of local health departments in enforcing its Regulations, which it further codified in RCW 70.345.210(3) as further evidenced by such complimentary regulations providing for funding of such efforts. The Order finding that the Health

Department lacks authority to enact and enforce its Regulations is not consistent with the broad authority conferred by the Legislature, and constitutes reversible error. Accordingly, the Order should be reversed.

D. The Health Department's Regulations Are Presumed Constitutional.

The trial court erred in finding the Regulations void because there is insufficient evidence in the record for PLB to overcome the presumption of constitutionality. The trial court's order should also be reversed on this basis.

An enacted local ordinance, such as the Health Department's Regulations, is presumed constitutional, and the party challenging the constitutionality thereof 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). In the context of a constitutional challenge to an ordinance, "beyond a reasonable doubt" means that "[the Court] will not strike a duly enacted schedule 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). Further, the party challenging constitutionality must "by argument and research" convince the court that there is no reasonable doubt the statute is unconstitutional. *Island County*

v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

The trial court's order is devoid of analysis finding the Regulations unconstitutional beyond a reasonable doubt, indicating that such an inquiry was not considered in the trial court's findings. PLB's response similarly lacks this analysis and lacks identifiable authority supporting its argument. Instead, PLB's response is replete with conclusory statements that the Regulations violate Article XI, Section 11 of the Washington Constitution. The conclusions of the trial court and PLB are insufficient to overcome the high burden of constitutionality as the "argument and research" necessary to meet the burden is plainly absent. Moreover, the trial court's analysis must begin with the premise that the Regulations are constitutional. Emerald Enterprises, 2 Wn. App. 794, 804. The trial court instead seems to have placed the burden of showing constitutionality on the Health Department and required the Health Department to prove that its Regulations did not conflict with the Constitution. The absence in the Order of an articulable legal basis addressing the purported issues with the constitutionality of the statute is reversible error. There is no basis to conclude that the high burden establishing the Regulations are unconstitutional was met or could be met by PLB, and the Order does not reflect this analysis.

E. PLB Did Not Meet Its Burden To Obtain A Permanent Injunction.

The trial court erred in granting PLB injunctive relief because the trial court failed to identify all the elements for such relief as set forth under Tyler Pipe. Specifically, the trial court neglected to identify what clear legal and/or equitable right existed with respect to PLB. Simply stating that one's rights were violated, without more, is insufficient to support a permanent injunction. Tyler Pipe Indus. Inc. v. Dep't. of Revenue, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982). Since no right³ was identified, the trial court erred in enjoining the Health Department from enforcing the Regulations. (CP 1724-25).

PLB suggests in its Response that the Health Department's failed to contest the remaining elements of Tyler Pipe. This is improper because, as the plaintiff, it is PLB's burden to prove, and the trial court must find, all three elements: (1) a clear legal and/or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting in or will result actual or substantial injury. Tyler Pipe Indus. Inc. v. Dep't. of Revenue, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982). No injunction can issue without finding each of the three elements and the trial court erred in granting such relief without identifying what clear legal

³ Am. Legion Post #149 v. Washington State Dep't of Health, 164 Wn.2d 570, 600-01, 192 P.3d 306, 322 (2008).

and/or equitable right was violated, let alone the remaining showing required by Tyler Pipe.

As argued extensively herein, there is no unfettered right to vape or sell vapor products. Even if the trial court found such a right, it would still be reversible error, since the Health Department has a legitimate interest in protecting the public health and is empowered with enacting and enforcing rules and regulations to exercise that authority. RCW 70.05.060. In addition, the Legislature has itself curtailed the right of vape users and vape shop owners to how vapor products can be sampled (sampling prohibited without assistance of a vendor, RCW 70.345.080); where they can use vapor products (use of vapor products limited in indoor and outdoor areas, RCW 70.345.150); and to whom they can sell such products (retailers cannot sell vapor products to individuals under the age of eighteen, RCW 26.08.080). The existence of Ch. 70.345 RCW itself infringes upon the so-called right to vape conclusory relied upon PLB. Finally, the Legislature clearly did not intend vape users and vape shop retailers to be immune from regulation, because it specifically authorized local jurisdictions to regulate vaping in indoor public places. RCW 70.345.210(3).

The trial court's failure to identify what clear legal and/or equitable right the Health Department's Regulations violate constitutes error and demands reversal.

F. Respondent Failed To Meet Its Burden.

As the plaintiff in this case, PLB had the burden before the trial court to establish a legal basis for release. In this case, that includes the burden of establishing the unconstitutionality of the Regulations, beyond a reasonable doubt. As argued extensively above, PLB failed to do so. Moreover, PLB fails to respond to the merits of the Health Department's arguments in support of reversal of the trial court's order. The bulk of PLB's response is devoted to reliance upon the trial court's ruling, notwithstanding the standard of review. The legal burdens applicable to inquiries of constitutionality and preemption are not addressed and, to the extent they are given cursory analysis, such analysis does not rely upon the established law of the State.

PLB simply relies on the conclusion and analysis of the trial court to make its case on a de novo review. PLB fails to provide any authority regarding the proper analysis under an express grant of authority relative to an assertion of preemption. PLB also fails to identify the legal basis for its assertions of constitutional violations. While the Health Department set forth extensive legal authority and persuasive argument in support of its appeal, any authority and argument that PLB relied upon is absent. Instead, PLB devotes its brief to recitation of the Order and the conclusions of the trial court. This is insufficient for PLB to meet its burden and prevail on a

de novo review, and further demonstrates the paucity of legal support for PLB's claims.

G. The Trial Court's Order Denying PLB's Request For Attorneys' Fees Should Not Be Disturbed On Appeal.

Even if PLB's request for attorneys' fees had merit, PLB is not entitled to recover its fees and expenses under RCW 4.84.185 because PLB has failed to comply with the statutory requirements that would entitle it to recovery. PLB conveniently only identifies the statute under which it seeks its fees and costs and consequently omits the explicit requirements for an award thereunder. For an award of fees under RCW 4.84.185, the prevailing party must file a motion within thirty days of entry of the order terminating the action in favor of the prevailing party. RCW 4.84.185. The court must then enter written findings, after considering all evidence presented at the time of the motion, whether or not the non-prevailing party's claim or defense was frivolous or advanced without reasonable cause. RCW 4.84.185. PLB filed no such motion and its opportunity to do so has expired. Accordingly, no written findings were entered by the court, and any sanction award that a trial court could have made against a party is unreviewable on appeal where the record lacks an order and findings. Havsy v. Flynn, 88 Wn. App. 514, 521-22, 945 P.2d 221 (1997).

PLB also fails to set forth the basis for an award of fees and costs

pursuant to CR 11. PLB's request for CR 11 sanctions should be denied because all the Health Department's claims and defenses conform with the requirements set forth in CR 11(a) in every respect. As the record reflects, prior to the trial court's final ruling, several orders were entered in favor of the Health Department, including an award of sanctions against PLB entered by the Thurston County Superior Court.

The Health Department's claims and defenses are not frivolous simply because PLB says they are. "A frivolous action, for which an award of attorneys' fees is allowed, is one that cannot be supported by any rational argument on the law or facts." Hanna v. Margitan, 133 Wn. App. 596, 615, 373 P.3d 300 (2016). The Health Department's action is clearly not frivolous, as it is supported by extensive briefing. In addition, the trial court twice upheld portions of the Regulations over PLB's request for injunctive relief. (CP 423-425, 858-861).

Overall, the trial court's denial of PLB's request for attorneys' fees is correct, because PLB's basis for seeking fees lacks factual, legal, and logical basis. While PLB may be a non-profit entity, the Health Department is also a non-profit entity, charged with protecting public health. The Health Department's claims and defenses are clearly aligned with its purpose. The trial court's order denying PLB's request for fees should not be disturbed on appeal.

III. CONCLUSION

The trial court's issuance of the permanent injunction is reversible error. The trial court neglected the give effect to the express grant of authority set forth in RCW 70.345.210(3), thereby restricting the Health Department's ability to promote public health interests by regulating the vaping industry. The trial court's decision defies the clear intent of the Legislature to provide local jurisdictions with such authority, and ignores the powers expressly delegated to entities like the Health Department to act pursuant to the Washington Constitution, Article XI, Section 11. In light of the analysis set forth above, the Health Department respectfully moves the Court to reverse the trial court's order of September 10, 2018 and permit it to enforce the Regulations.

DATED this 17th day of May 2019.

McGAVICK GRAVES, P.S.

By: 

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

DECLARATION OF SERVICE

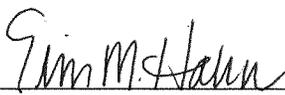
The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

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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