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NO. 362892

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

YAKIMA COUNTY,
Respondent,

v.

MLM ENTERTAINMENT, LLC, a Washington limited liability company, d/b/a STICKY BUDZ and MUFFET LAND, LLC, a Washington limited liability company,
Appellants,

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATUTES AND RULES vi

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR 1

A. Assignment of Error 1: The trial court erred in finding that MLM's state licensed land use constituted a public nuisance and granting summary judgment in favor of the County. 2

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 4

A. Standard of Review 4

B. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST 5

a. The County cannot deem something a nuisance unless it in fact is a nuisance 7

b. The County did not offer admissible evidence in support of its claim that MLM's lawful land uses are a nuisance 10

c. Material factual disputes exist as to the County's claim of public nuisance 11

C. THE COUNTY IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE YCC 19.30.030(7) VIOLATES EQUAL PROTECTION 19

a. State law requires marijuana businesses be regulated like alcohol businesses 19

b. Hundreds of alcohol businesses operate in Yakima County 20

c. A rational basis does not exist to treat marijuana businesses and alcohol businesses differently.....21

d. Federal law does not provide a rational basis to treat marijuana businesses differently than alcohol businesses.....24

IV. CONCLUSION AND RELIEF SOUGHT..... 25

TABLE OF AUTHORITIES

Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982). 4

Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 93 P.3d 108 (2004). 5

Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) 5

Kitsap Cty. v. Kev, Inc., 106 Wn.2d 135, 720 P.2d 818 (1986) 7

Greenwood v. The Olympic, Inc., 51 Wn.2d 18, 315 P.2d 295 (1957) 7, 9

Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894). 8

Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). 8

State v. Brown, 37 Wn. 97, 79 P. 635 (1905) 8

City of Seattle v. Proctor, 183 Wn. 293, 48 P.2d 238 (1935) 9

Cougar Business Owners Ass'n v. State, 97 Wn.2d 466, 647 P.2d 481 (1982) 9

Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 753 P.2d 517 (1988). 11

Grader v. City of Lynnwood, 45 Wn. App. 876, 728 P.2d 1057 (1986). 19

United States v. McIntosh, 833 F.3d 1163, 1168 (9th Cir. 2016). 24

STATUTES, ORDINANCES, AND REGULATIONS

Yakima County Ordinance 4-2014 3

CR 56(c) 4

RCW 7.48.120 5

RCW 7.48.130 5

YCC 19.30.030(7) 6, 19

YCC 13.25.060(1) 6, 7

YCC 19.01.060(1) 6, 7

OTHER AUTHORITIES

Initiative Measure No. 502 ("I-502") ..... *Passim*

6 E. McQuillin, Municipal Corporations § 24.66, at 562 (3d ed.

1980). 7

17 William B. Stoebuck and John W. Weaver, 17 Wash. Prac.,

Real Estate § 4.7 (2d ed.). 8

I. INTRODUCTION

Appellant MLM is a Washington State Liquor and Cannabis Board producer processor. MLM has operated its business in unincorporated Yakima County without incident since 2015. No complaints pursuant to the County's zoning code or otherwise have been addressed to MLM.

Despite the lack of any complaints against MLM, in 2018 the County sought a declaration that their state licensed land uses were a public nuisance. RCW 7.48.130 defines a public nuisance as "one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." RCW 7.48.140 lists specific public nuisances. The County did not specify which of the enumerated public nuisances it claimed existed on MLM's property and did not allege any resultant damage.

The County offered no evidence of actual or potential harm. Nonetheless, the trial court found the MLM's land use to constitute a "public nuisance" and granted summary judgment in favor of County. MLM assigns error to the trial court's grant of summary judgment as follows.

II. ASSIGNMENT OF ERROR

Assignment of Error 1: The trial court erred in finding that MLM's state licensed land use constituted a public nuisance and granting summary judgment in favor of the County.

Issue 1: Summary judgment is proper only if the moving party demonstrates the absence of any genuine issues of material fact. A genuine issue of fact exists, thus precluding summary judgment, when reasonable minds could reach different factual conclusions after considering the evidence. Here, the County has advanced no substantive facts is support of its claims of public nuisance. MLM responded with statistical evidence from Washington State Office of Financial Management, the Washington State Institute for Public Policy, and expert opinions demonstrating that adult use marijuana created no specific community harms or in the alternative, less harm than alcohol. Should this case be allowed to go to trial?

Issue 2: Equal protection is satisfied only where there are reasonable grounds to distinguish between those within and those outside a class. I-502 requires that marijuana be regulated in the same fashion as alcohol. Despite this mandate, the County bans WSLCB licensees who produce and sell marijuana while allowing WSLCB licensees who sell and produce alcohol. The County has offered no reasonable basis for this distinction. Does the County's zoning code violate equal protection?

III. STATEMENT OF THE CASE

On November 6, 2012, Washington citizens approved Initiative Measure No. 502 ("I-502"), a state law creating a robust regulatory system legalizing the production and sale of marijuana for private,

recreational use. Laws of 2013, c 3 § 1. Since, I-502's passage, Washington adults have purchased $4,315,187,278 in marijuana products, generating $742,021,302 in excise tax revenue for the state and $388,366,855 in sales tax revenue at the county level.[1]

On June 17, 2014, the Yakima County Board of Commissioners adopted Ordinance No. 4-2014, which prohibited the production, processing, and retail sale of marijuana in any zone within the unincorporated areas of Yakima County. CP 230. In July 2015, MLM began operations as a Washington State Liquor and Cannabis Board Tier 3 Producer Processor in unincorporated Yakima County. CP 38. On May 18, 2018, Yakima County sought a declaration that MLM's land use constituted a public nuisance under their county code and state law. CP 35. The County asserted that because MLM was in violation of the County development code, the use was a public nuisance. CP 39. The County offered no other rationale in support of its requests.

Ultimately, the County sought summary judgment on the issue and the matter proceeded to hearing. CP 176. On August 14, 2018, the Honorable Scott Sparks of the Kittitas County Superior Court granted summary judgment in favor of the County. CP 1297. MLM's timely appeal follows.

[1] https://www.502data.com/ last accessed April 19, 2019.

IV. ARGUMENT

Summary judgment is proper only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The Court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). After the party moving for summary judgment submits affidavits and other supporting materials, the responding party must set out specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. The court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. Id. Here, material issues of fact abound, and the trial court erred in granting summary judgment in favor of the County.

A. Standard of Review

On review of an order for summary judgment, the Court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The standard of review is de novo and the Court shall consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist*. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). The Court may only affirm summary judgment if the pleadings, affidavits, depositions, and

admissions on file demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Because MLM appeals the trial court's grant of summary judgment, this Court shall review the appeal de novo.

B. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST

Before the trial court, the County alleged that it was entitled to,

> a declaratory judgment pursuant to Chapters 7.24 and 7.48 RCW, finding that conditions on [MLM's] property …. constitute a public nuisance and an ongoing violation of the YCC and RCW 7.48.120 and .130, and said conditions are therefore properly subject to abatement.

CP 27. RCW 7.48.120 defines nuisance as:

> unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

RCW 7.48.130 defines a public nuisance as "one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." RCW 7.48.140 lists specific public nuisances. In support of its motion for summary judgement, the County did not assert any specific annoyance, injury, or endangerment. Nor did the County offer facts that MLM's land use "affected equally the rights of an entire community or neighborhood."

In lieu of a factual basis, the County relied on several sections of the Yakima County Code ("YCC") to establish a nuisance. CP 35-38; 197-199. The County first points to their development code which disallows state licensed marijuana businesses in any zoning district. YCC 19.30.030(7); CP 57. Next, the County identifies a section of their building code which states that all violations of the building code are public nuisances and subject to abatement. YCC 13.25.060(1); CP 47. The County attempts to connect these dots arguing that its building code enforcement provisions incorporate by reference all violations of its development code any violation of the development code must be a public nuisance. YCC 19.01.060(1); CP 51.

Via this strained construction of the County code emphasizing a legislative catch-all, the County maintains that MLM has endangered the comfort, repose, health, or safety of others. Critically, nothing in the development code (or building code) expressly states that marijuana land uses are a public nuisance.

Critically, no actual facts however are advanced by the County in support of its allegation of nuisance. No actual or potential harm is alleged. Nothing but a "catch all" provision of the County code brands MLM's land use a public nuisance. In response to the County's motion for summary judgment, MLM offered uncontroverted facts that the introduction of adult use marijuana in Washington communities did not create new public safety issues. Accordingly, MLM established genuine

issues of material fact which should have precluded the trial court's grant of summary judgment.

a. The County cannot deem something a nuisance unless it is in fact a nuisance

The County's request for declaration of public nuisance rests entirely on YCC 13.25.060(1). This ordinance states that all violations of the county building code shall be deemed public nuisances for the purposes of abatement actions. Notably, the ordinance that MLM are likely to be charged with violating, YCC 19.30.030(7), is not part of the building code. YCC 19.30.030(7) is part of the development code or "ULDC".

Nonetheless, the County suggests that MLM's development code violation should be deemed a public nuisance because a separate development code ordinance (YCC 19.01.060(1)) "references" the enforcement provisions of Chapter 13.25 YCC. Assuming for the sake of argument the County's strained construction of its code is correct, the following is evident: the County's "declaration" that MLM's state licensed production facility is a public nuisance is wholly arbitrary.

An ordinance may not make a thing a nuisance, unless it is in fact a nuisance. *Kitsap Cty. v. Kev, Inc.*, 106 Wn.2d 135, 138–39, 720 P.2d 818 (1986); *Greenwood v. The Olympic, Inc.,* 51 Wn.2d 18, 21, 315 P.2d 295 (1957); 6 E. McQuillin, Municipal Corporations § 24.66, at 562 (3d ed. 1980). The rationale for this rule is found in the United States Supreme

Court decision in *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894). There, the Court held a zoning regulation, or any police power regulation, must substantially advance the public health, safety, or welfare; a regulation that fails to do so is void. *See Nectow v. City of Cambridge,* 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). This is simply a redaction of the broad principle that exercises of the police power must find their justification in some public purpose. 17 William B. Stoebuck and John W. Weaver, 17 Wash. Prac., Real Estate § 4.7 (2d ed.). No such justification exists here.

As such, the County's declaration is void. The legislature has no right to arbitrarily declare that to be a nuisance which is clearly not so. *Lawton v. Steele*, 152 U.S. 133, 140, 14 S. Ct. 499, 502, 38 L. Ed. 385 (1894). There, the Supreme Court noted that a legislative "determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts" (*Id*. at 137) and emphasized the need to protect against governmental acts "involving an unnecessary invasion of [ ] rights" and infringement upon individual acts which are "harmless in themselves, and which might be carried on without detriment to the public interests." *Id*. at 138.

The Washington Supreme Court has repeatedly followed *Lawton*. *See State v. Brown*, 37 Wn. 97, 101, 79 P. 635 (1905) (following *Lawton* this court struck down a state law requiring dental offices to be owned by dentists on the ground such law was not necessary to further any valid

state objective); *City of Seattle v. Proctor*, 183 Wn. 293, 298, 48 P.2d 238 (1935) (the determination of the Legislature is not conclusive, but is subject to the supervision of the courts, and, a law imposing unreasonable restrictions on a lawful occupation will be held void); *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466, 477, 647 P.2d 481 (1982) ("the classic statement of the rule in *Lawton v. Steele*[ ], is still valid today ...."), *cert. denied,* 459 U.S. 971, 103 S.Ct. 301, 74 L.Ed.2d 283 (1982). Under this authority, the County must provide a factual basis for its claim of public nuisance.

Greenwood v Olympic is instructive. 51 Wn.2d 18, 21, 315 P.2d 295 (1957). There, our Supreme court addressed a municipal ordinance declaring that certain stairways lacking a handrail were a nuisance. The Court observed that no specific evidence suggested these stairs constituted a nuisance at the time, and that no one had voiced any objection to them over the years. The Court found, "if [the stairs] became a nuisance, it was because the city council of Seattle, by ordinance ……declared them so to be." *Id.* The Court invalidated the ordinance holding, a municipal ordinance may not make a thing a nuisance, unless it is in fact a nuisance.

The same rationale applies here. No specific evidence demonstrates that MLM's business constitutes a nuisance. No one has complained to the County. No specific health risks are alleged. MLM has not impinged on their neighbors' land uses. The only nexus between a

public nuisance and MLM's land use is a section of the County code declaring all violations of the building code public nuisances. A County's generalized declaration alone cannot make a thing a nuisance.

b. The County did not offer admissible evidence in support of its claim that MLM's lawful land uses are a nuisance

The only substantive evidence offered by the County in support of its nuisance claim are the comments of a handful of county residents. These comments were recorded at various public hearings related to the passage of the County's ban on marijuana businesses and offered via verbatim transcripts of the hearings. CP 228-232. The offered statements appear to represent the belief and opinion of the speaker about the regulation of marijuana generally. None of the comments specifically address MLM or any other specific county business. In fact, these comments were made nearly a year before MLM began operations. It is clear on the face of the transcripts that the comments, for purposes of making a determination of actual nuisance, are opinion testimony only and lack any scientific or otherwise grounded basis.

These comments can only be characterized as lay opinion. CR 56(e) specifies that affidavits and declarations submitted in connection with summary judgment proceedings should set forth facts. Such is not the case here. Nothing offered by the County remotely addressed how MLM rendered any person insecure in life or in the use of property as required to constitute a nuisance. The comments advanced by the County

generally concerned various individuals' personal views and opinions of marijuana. The County's proffer of nothing but generalized allegations and perceptions about conduct authorized by state law cannot support a grant of summary judgment.

c. Material factual disputes exist as to the County's claim of public nuisance

Summary judgment lies only where the moving party establishes the absence of any genuine issues of material fact by affidavit. Unless an affidavit sets forth facts, evidentiary in nature, that is, information as to "what took place, an act, an incident, a reality as distinguished from supposition or opinion", the affidavit does satisfy the requirements of CR 56(e). *Grimwood v. University of Puget Sound*, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Ultimate facts, conclusions of fact, or conclusory statements are insufficient. *Id.* at 359–60. Further, affidavits must be based on the personal knowledge of the affiants. *Lilly v. Lynch* 88 Wn. App. 306, 945 P.2d 727 (1997). Based on what the County has provided in support of its motion, there is simply no way to know what is fact, what is opinion, what is speculation, or whether the speaker is qualified to make such statements. The County's offer fails to meet their evidentiary burden under CR 56.

The County relies on the following generalizations to establish a factual basis for its declaration of nuisance:

a) The Yakama Nation has had a "long and sad" relationship with drugs and alcohol. CP 190.

b) Marijuana is a gateway drug that can lead to the use of other drugs. *Id.*
c) Marijuana affects the ability to operate a car. *Id.*.
d) Legalization would not decrease crime. *Id.*
e) Legalization of adult use marijuana would result in increased availability of marijuana to minors. CP 191.
f) Increased use by minors. CP 194.
g) The need to send a clear message against marijuana use to the County's youth. CP 191.
h) The belief that the "number-one way kids get alcohol is from friends and families." *Id.*
i) An apparent increase in the frequency of children bringing marijuana to school since the passage of I-502. *Id.*
j) Concerns regarding drug treatment for children. *Id.*
k) Continued prohibitions relating to recreational marijuana under federal law. CP 192.
l) A high percentage of drug users in the County's jail population. CP 191.
m) "Likely negative social costs" relating to recreational marijuana use and erosion of family values. CP 192.

With this tender the County did not meet its burden of proof at summary judgment. Every item noted above is subject to dispute.

i. Material Factual Dispute: The Yakama Nation's "long and sad" relationship with drugs and alcohol

It is unclear why the County advances this idea in support a finding that MLM's land uses are a public nuisance. The Yakama Nation attempted to ban alcohol on its 1.2 million-acre reservation in September 2000. CP 696. The Yakama's attempts resulted in Washington's attorney general, Christine Gregoire, filing a lawsuit in Federal District Court in Spokane to find that the liquor resolution did not apply to people who were not tribal members or who were on property owned by nonmembers. CP 699. Is the County suggesting that the state should take a consistent approach with marijuana? Or is the County suggesting

that it should respond by banning producers of alcohol in unincorporated portions of the county or on ceded lands based on the requests of the Yakama Nation.

In either case, a sovereign nation's efforts to regulate its members is wholly irrelevant to whether MLM's production of a product under a Washington state license constitutes a public nuisance. If the County seeks to rely on the policies of local sovereign nations, it is notable that the Puyallup Tribe of Indians, the Suquamish Tribe, and the Squaxin Island Tribe each produce and retail cannabis. Further, Canada's recent national legalization of recreational marijuana is instructive as well.

ii. Material Factual Dispute: Marijuana as a "gateway" drug

Cannabis is not a gateway drug in the sense that its pharmacological properties make it a risk factor for progression to other drug use. CP 1148. The history of cannabis as a prohibited substance increases the risk that other illicit drug users will introduce a cannabis user to other drugs in the illicit market. *Id.* Separation of cannabis from the illicit market may actually decrease the risk that a cannabis user will be offered other drugs by the person selling him or her the cannabis. *Id.*

iii. Material Factual Dispute: Cannabis legalization and crime rates

The County alleges as a basis for finding of nuisance that marijuana legalization led or would lead to an increase in crime. This is not correct. Per statistics provided by the Washington State Office of

Financial Management, crime has decreased in the period following the passage of I-502 in Washington state. CP 721.

From 2012 to 2015 there was a 25 percent decrease in arrests for drug equipment and a 16 percent decrease in arrests for violations involving any drugs. *Id.* Incidents involving marijuana decreased by 63 percent between 2012 and 2015. CP 722. Between 2012 and 2015, incidents where marijuana was seized decreased appreciably. CP 723. Among criminal activities involving marijuana, possession or consuming was the most common, decreasing by 65 percent from 2012 to 2015. CP 725. Overall, marked decreases are seen in both non-prison convictions, dropping by 84 percent from 2011 to 2015, and in-prison convictions, dropping by 86 percent during that same time period. CP 727.

Another study focusing on Oregon and Washington, found that the legalization of recreational marijuana caused a significant reduction of rapes and thefts on the Washington side of the border in 2013-2014 relative to the Oregon side and relative to the pre-legalization years 2010-2012. CP 858-875. The report also found reduced consumption of other drugs and both ordinary and binge alcohol use. *Id.*

iv. <u>Material Factual Dispute: Washington's adult use regulations have not resulted in increased access or use by minors.</u>

Statistics released by the Washington State Office of Financial Management, demonstrate that among 6th, 8th, 10th, and 12th graders asked, "Have you used marijuana in the past 30 days?" there were no

significant trends seen since the passage of I-502 in 2012. CP 713. Nor is there a significant decrease in the age minors first use marijuana. CP 715. Further, no data supports the suggestion that implementation of I-502 makes it easier for kids to obtain marijuana. In response to the question, “If you wanted to get some marijuana, how easy would it be to get some?” this measure includes, by convention, those answering, “sort of hard,” “sort of easy” and “very easy.” While access differs by grade level, no significant trends are seen over time. CP 717.

Despite the claims of the County, legalization of adult use marijuana did not appear to impact schools. For the 2015-16 school year, 4 percent of all students were suspended or expelled. Of those suspended or expelled, 9 percent (or 0.4 percent of all students) were suspended or expelled due to marijuana possession. CP 728.

v. Material Factual Dispute: Implementation of I-502 in Washington has not influenced minor’s views on the harms of marijuana

As discussed above, Washington Healthy Youth Survey data illustrates that across grades 6, 8,10, and 12, cannabis use indicators have been stable or fallen slightly since I-502 enactment. Beliefs that cannabis is difficult to obtain, and that using cannabis is harmful began a downward trend in 2006, especially among older students. Since 2010, the view that cannabis is difficult to access has been stable or increased. The downward trend in perceived harm of cannabis use stabilized from 2014 to 2016. CP 764. Other studies also indicate that minors’ marijuana-

related attitudes and behaviors changed little as a result of the passage of I-502. *Id.*

vi. Material Factual Dispute: Implementation of recreational marijuana has had no effect on drug treatment availability

Per OFM, Marijuana substance use disorder (SUD) treatment for youths ages 15 to 19 receiving publicly funded services reached a peak in 2012 and has been decreasing since. SUD treatment for non-marijuana substances has been decreasing since 2007. Of the total SUD youths in treatment, marijuana has constituted 72 percent of the cases since 2012. Rates for youths in marijuana treatment had been increasing by six percent per year until 2012; however, since 2012 those rates have been decreasing by 13 percent per year. Treatment rates for drugs other than marijuana have been decreasing by nine percent per year since 2009. CP 719.

Despite falling treatment rates, Washington State Institute for Public Policy (WSIPP) analysis found no meaningful differences between treatment admissions for cannabis abuse in Washington and those in comparison states following I-502 enactment. CP 766. That is, although admissions to substance abuse treatment for cannabis abuse fell as a percentage of all admissions in Washington in recent years, there is no evidence that the enactment of I-502 caused this change. WSIPP further found the effect of the amount of legal cannabis sales on the number of cannabis abuse treatment admissions in each county produced no

evidence that the amount of sales had an effect on treatment admissions. CP 768.

vii. Material Factual Dispute: Marijuana related driving offenses have decreased since the passage of I-502

Drug only DUI arrests also have decreased since passage of I-502. These arrests moved from a high of 1,710 in 2011 to a low of 1,222 in 2015, for an overall decrease of 29 percent during those four years. CP 726. Drivers involved in fatal crashes who were tested for drugs and alcohol and, of those tested, the number who tested positive are reflected below. Rates for those tested and were found positive for marijuana plus alcohol or other drugs as well as rates for those who tested positive for marijuana only show no significant trend. Similarly, differences among the years' rates are generally not statistically significant. Detailed data on the presence of delta-9 THC in blood showed no difference between pre-and post-legalization. CP 720.

Notably, the impact of cannabis intoxication on driving is substantially less than that of alcohol. CP 1143. Approximately one third of automobile deaths each year can be attributed to alcohol use. Studies show that the odds of being involved in an automobile accident are 6 to 10 times greater if driving after consuming alcohol. Review of systematic studies indicate that cannabis intoxication may double the likelihood (as compared with a factor of 6 to 10 with alcohol) of involvement in serious or fatal automobile accidents. Despite the significant disparity in risk

factors, the County is seemingly comfortable with the production and sales of alcohol products.

viii. Material Factual Dispute: The Yakima County Planning Commission did not consider marijuana land uses to be public nuisances

Yakima County's Planning Commission deliberated on April 9, 2014 regarding appropriate zoning for marijuana businesses in Yakima County. CP 927. During deliberations, Commissioner Eksted indicated that an outright ban of marijuana businesses would be arbitrary or capricious. CP 939. Commissioner Shuttleworth recognized the inherent conflict in a local zoning ban of a state licensed industry. CP 940.

On April 16, 2014, the Planning Commission issued findings of fact and recommendations to the Board of Commissioner. (Dec. of Nelson, Ex. 11). The Commission found,

> [t]he proposed prohibition would use zoning to accomplish a legislative ban (action) and may be considered arbitrary and capricious and subject to appeal. Additionally, the negative impacts/concerns regarding recreational marijuana use will not be resolved through the proposed text amendments since use of recreational marijuana has been decriminalized.

CP 1053. In light of its findings, the Commission recommend that the Board of Yakima County Commissioners direct staff to develop or review appropriate zoning districts and land use requirements for the production, manufacturing, and retail sales of recreational marijuana. CP 1054. The Yakima BOCC declined to follow the Planning Commission's recommendation.

At no point did the planning commission indicate that marijuana uses were potential nuisances.

C. THE COUNTY IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE YCC 19.30.030(7) VIOLATES EQUAL PROTECTION

Equal protection is satisfied only where (1) the challenged legislation treats all members within the designated class alike, (2) there are reasonable grounds to distinguish between those within and those outside the class, and (3) the classification has a rational relationship to the purpose of the enactment. *Grader v. City of Lynnwood*, 45 Wn. App. 876, 881–82, 728 P.2d 1057 (1986). Considering I-502's requirement that marijuana be regulated in the same fashion as alcohol, YCC 19.30.030(7) fails the second prong of the minimum scrutiny test. The County fails to present any reasonable argument for a zoning ordinance that distinguishes between businesses that produce or sell marijuana products from businesses that manufacture and sell alcohol. If such a basis exists, it would reflect the greater objective harm alcohol plays in our society than that played by marijuana and, presumably, impose greater limitations on alcohol than marijuana.

a. State law requires marijuana businesses be regulated like alcohol businesses

Initiative 502 unambiguously states the purpose of the initiative is to 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 alcohol." LAWS OF 2013, ch. 3, § 1. The regulations adopted by WSLCB regulating marijuana are nearly identical to the regulations governing the issuance of licenses to sell hard alcohol. *Haines-Marchel v. Washington State Liquor & Cannabis Bd*., 1 Wn. App.2d 712, 747, 406 P.3d 1199 (2017). Washington voters through I-502 unequivocally announced that regulation of adult use marijuana was not to be different than the regulation of alcohol. Even the State fails to properly provide balanced regulations when comparing alcohol and marijuana. Significant limitations are placed on the less damaging marijuana, and the regulatory structure imposes harmful constraints on the marijuana industry which could encourage illegal activity and markets.

b. Hundreds of alcohol businesses operate in Yakima County

Alcohol related businesses flourish in Yakima County. The County is home to craft distilleries, wineries, taverns, and retailers of alcohol products. CP 61-62. These businesses are a key component to the County's economy and the County actively promotes alcohol businesses to drive tourism in the Yakima Valley. The County's tourism website proudly proclaims Yakima county as the wine capitol of the state. CP 1064-1085. The production of wine, hops, and beer are prominent in the County's promotional materials. *Id.* As set forth below, the County cannot reconcile their promotion of alcohol products with their ban of marijuana products.

c. A rational basis does not exist to treat marijuana businesses and alcohol businesses differently

The health consequences associated with alcohol use are far greater than those associated with the use of marijuana. In the US, approximately 80,000 people die annually from alcohol use. CP 1143, 1183. There are no known cases of death from marijuana over consumption. *Id.*

Alcohol intoxication is widely recognized as a major cause of automobile fatalities. CP 1143. Approximately one third of traffic fatalities are attributed to alcohol use. *Id.* It is estimated that the odds of being involved in an automobile accident are 6 to 10 times greater for those driving after consuming alcohol. *Id.* In comparison, the probability of an accident after cannabis use is less than half the reported rate for alcohol related accidents. The impact of cannabis intoxication on driving is substantially less than that of alcohol.

Alcohol has a known association with aggression and violence. Studies show that up to 86% of homicide offenders, 37% of assault offenders, 60% of sexual offenders, 57% of male marital violence offenders, and 13% of child offenders were drinking alcohol at the time of their offenses. *Id*. at ¶ 15. Alcohol-related aggression accounts for nearly one in three violent acts committed. CP 1185. Cannabis is not known to increase aggression. CP 1143.

More chronic users of alcohol develop dependence than do chronic users of marijuana. Alcohol addiction is common, affecting more than 3 million cases in the US per year. CP 1184. It is estimated that approximately 15% of those individuals who drink alcohol will develop the alcohol dependence syndrome at some time in their lives. The same research estimated that 9% of those who ever consumed cannabis developed cannabis dependence syndrome at some time in their lives. CP 1144. Use of cannabis and cannabis-based products is significantly less addictive than the acute and chronic use of alcohol and ethanol-containing products. CP 1184.

Alcohol is causally linked to over 50 different diseases. CP 1146. It is estimated that alcohol use contributes to approximately 4% of the global burden of disease, which is equivalent to that of tobacco smoking. *Id.* Chronic use of is associated with alcoholism, addiction and dependence, malnutrition, chronic pancreatitis, alcohol liver disease, damage to the central and peripheral nervous system leading to sever psychiatric and neurological diseases, and cancer (oropharyngeal and esophageal cancers). CP 1183. 5-6% of new cancers and cancer deaths globally are directly attributed to chronic use of alcohol and ethanol-containing products. CP 1184. On comparison, it is not currently possible to attribute any serious long-term health consequence to cannabis use. CP 1146.

Chronic use of alcohol and ethanol-based produces appears to be more linked to weight gain. Specifically, calories from alcohol are “empty calories” that have no nutritional value. Most alcoholic drinks contain little vitamins and minerals, and do not contribute to the individual’s diet. Chronic use of cannabis and cannabis-based products is not linked to changes in weight. CP 1185.

Chronic, heavy alcohol use is known to cause serious, neurological diseases such as Wernicke-Korsakov syndrome and dementia characterized by severe cognitive decline. CP 1146. As many as 40% of early-onset dementia cases are attributable to alcohol-related brain damage. *Id.* Heavy alcohol use is also associated with major depression. CP 1147. Alcohol dependence is a significant risk factor for suicide. *Id.* Research does not support a higher preponderance of suicide in those with cannabis dependence compared to those without, once other risk factors are taken into account. *Id.*

The impact of acute use of alcohol on human health is far worse than that attributed to the use of cannabis and cannabis-based products. Nonetheless, the County’s zoning code bans marijuana uses while allowing alcohol business throughout all zones. No basis exists for this unequal treatment.

d. Federal law does not provide a rational basis to treat marijuana businesses differently than alcohol businesses

Although marijuana's placement on Schedule I of the Controlled Substances Act is often cited as a basis supporting local bans, MLM is unaware of any federal enforcement actions against businesses or government entities associated with adult use marijuana in Washington State. Indeed, the County offers no evidence of the threat of any federal enforcement action. Despite the existence of no actual or potential harm, the County advances marijuana's federal status as a basis for excluding WLSCB licensees who produce or sell marijuana rather than alcohol.

Several facts undermine the County's reliance on the federal question. First, and as indicated above, is history itself. There is simply not evidence that the Drug Enforcement Agency or Department of Justice intend to interfere with Washington's adult use marijuana scheme.

Second, is the Ninth Circuit's holding in *United States v. McIntosh*, 833 F.3d 1163, 1168 (9th Cir. 2016). CP 877. At issue there was the effect a Congressional spending rider had on the ability of the Department of Justice to prosecute certain drug crimes. The rider known as Section 542 which appropriated government funds and stated that no funds made available under the act may be used to prevent any state from implementing its own laws that authorized the use, distribution, possession, or cultivation of medical marijuana.

A three-judge panel held that that the rider prohibits the Department from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by state medical marijuana laws and who fully complied with such laws. Under *McIntosh*, if one is strictly complying with state law, neither a state nor the federal government can prosecute. CP 883.

Moreover, on June 7, 2018 a bill was introduced in the United States Congress that would recognize states' legalization efforts. The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act would amend the Controlled Substances Act to make it exempt individuals or corporations who are in compliance with U.S. state, U.S. territory and the District of Columbia, or tribal law on cannabis. CP 911-916. President Donald Trump said he "probably will end up supporting" the bill on June 8, 2018. CP 918.

IV. CONCLUSION

Summary judgment is proper only if the moving party demonstrates the absence of any genuine issues of material fact. Here, the County offers lay opinions and generalizations about marijuana to support its claim of nuisance. MLM responds with crime statistics and public health data compiled by Washington State agencies and behavioral health experts demonstrating that nearly all of what is relied on by the County is not factual.

The evidence offered in response to the County's motion

undoubtedly establishes differing opinions about the social consequences and health effects of marijuana. When reasonable minds could differ, the summary judgment should be denied. This trial court's order granting summary judgment should be vacated, and this matter should be remanded with orders that it be placed on the trial calendar.

RESPECTFULLY SUBMITTED this 19th day of April 2019.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that I served, via electronic mail, a true and correct copy of the pleading to which this certification is attached, upon the following:

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