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NO. 362892

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

YAKIMA COUNTY,

Respondent,

vs.

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 RESPONDENT YAKIMA COUNTY

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Yakima County Board of Commissioners (“Board) has broad authority to adopt zoning and land use regulations applicable to the unincorporated areas of Yakima County. Pursuant to this authority, the Board adopted legislative enactments that prohibit and disallow the production, processing, and retail sale of marijuana and marijuana-infused products in any zone within the unincorporated areas of Yakima County.

MLM Entertainment, LLC, d/b/a Sticky Budz (“MLM”) is, and has been, operating a business for the production and processing of marijuana and/or marijuana-infused products on real property in unincorporated Yakima County owned by Muffett Land, LLC (“ML”).

The County initiated legal action against MLM and ML (collectively “MLM”). The County asked the trial court to declare that MLM’s marijuana business on the property violated various portions of the Yakima County Code (“YCC”), and constituted a public nuisance under the YCC and Washington law. The County also sought a warrant of abatement authorizing the County to abate this public nuisance and bring conditions on the property into compliance with the law.

MLM denied the County’s allegations and asserted a variety of affirmative defenses. It asserted that the County’s ban on marijuana

businesses and commencement of the nuisance and abatement action violated MLM's constitutional rights to due process and equal protection.

II. COUNTER-STATEMENT OF THE ISSUES ON APPEAL

- A.** Does the County have the authority to ban marijuana businesses from operating in unincorporated areas of Yakima County?
- B.** Does the County have the authority to designate that violations of its code constitute a public nuisance per se?
- C.** Does the County's prohibition on marijuana businesses satisfy the requirements of equal protection?
- D.** Did the trial court err in granting the County's motion for summary judgment?

III. COUNTER-STATEMENT OF THE CASE

A. Passage of I-502.

On November 6, 2012, the voters of the State of Washington approved Initiative 502 ("I-502") which systemically changed the State's marijuana laws. *See* Washington Laws 2013, c. 3. Included among the various components of I-502 was a structure for the legalized limited production, processing, and sale of recreational marijuana to persons 21 years and older, and the creation of a regulatory state licensing system through the Washington State Liquor and Cannabis Board ("LCB"). *Id.* at § 4.

B. The County's response to the passage of I-502.

1. Adoption of a temporary moratorium.

On September 3, 2013, the Board adopted Resolution 300-2013, which declared a six-month moratorium prohibiting the production, processing and retail sale of recreational marijuana within all zoning districts within Yakima County. CP 228, 229, 233-235. The resolution also imposed a six-month moratorium on the filing with the County of any applications for licenses, permits, or other approvals for the processing, production, and/or retail sale of marijuana. CP 235.

2. Continuation of moratorium.

On October 29, 2013, the Board conducted a public hearing at which it heard testimony regarding the moratorium on marijuana businesses within the unincorporated area of the County, and whether it should be extended. CP 229, 236-269. Several individuals spoke in favor of extending the moratorium. CP 239-269.

Attorney George Colby appeared on behalf of the Yakama Nation and spoke in favor of a permanent extension of the moratorium for several reasons including the Yakama Nation's "long and sad" relationship with drugs and alcohol, the Yakama Nation's right to object to the licenses issued for marijuana businesses that would be located on land that had been ceded by it, and the fact that marijuana is illegal under federal law and the laws of the Yakama Nation. CP 247-251.

The County's sheriff at the time, Ken Irwin, testified in favor of

extending the moratorium. CP 252-256. According to Sheriff Irwin, based upon his 41 years of law enforcement experience, marijuana is a “gateway drug” that can lead to the use of other “harder drugs.” CP 253. Sheriff Irwin testified regarding his professional and personal observations on the destructive effect marijuana has on families. CP 253, 254. Sheriff Irwin also testified regarding his experiences as a law enforcement officer with the negative effects marijuana use has on people’s motor skills and their ability to drive. CP 253. Sheriff Irwin expressed his professional opinion that the legalization of recreational marijuana would not “make a dent” in the organized crime activities surrounding marijuana. CP 253, 254. Sheriff Irwin also stated his opinion that the legal framework developed subsequent to the passage of I-502 and intended to prevent minors from getting access to marijuana would be ineffective and that the legalization of recreational marijuana would result in increased availability of marijuana to minors. CP 255, 256.

Several other witnesses provided testimony in support of continuing the moratorium or for adopting zoning regulations prohibiting recreational marijuana on the basis of concern for the County’s youth. CP 256, 257, 259, 260. Two of these witnesses pointed out that the population of Yakima County was comprised of a higher

percentage of minors than the general population of the state of Washington. CP 256, 257, 259. These witnesses testified regarding the need to send a clear message against marijuana use to the County's youth. CP 256, 257, 259, 260. One witness offered testimony regarding marijuana addiction, particularly among children. CP 257.

A witness who "work[ed] with schools around drug free youth and keeping our youth safe" testified that "the number-one way that kids get alcohol is from friends and families. And that is not going to change with marijuana either." CP 259. The witness testified that school officials had reported to her agency a significant "spike" in marijuana "coming to school" since I-502's passage. CP 260. The witness offered testimony regarding the relatively low per capita income of the residents of Yakima County, and of the difficulties that would pose for providing children with drug treatment. CP 260.

The Board received testimony from witnesses at the hearing in support of continuing the moratorium, or for enacting permanent zoning regulations banning recreational marijuana businesses, due to concerns over criminal activity. CP 257, 258, 263, 264. These witnesses referred to the continued prohibitions relating to recreational marijuana under federal law. CP 257, 258, 264. One of these witnesses noted the high percentage of drug users among the inmates in the County's jail

population. CP 262.

A witness testified regarding the likely negative social costs relating to recreational marijuana use. CP 263. By way of analogy, this witness testified that for every dollar raised by taxes on alcohol \$10 dollars is spent for treatment, incarceration, and rehabilitation “for all the ramifications that come from alcohol use.” CP 263.

The Board received testimony from a witness who pointed out that a majority of Yakima County voters voted against the passage of I-502. CP 262-264.

At the conclusion of the public testimony, the Board members offered their own thoughts on whether it would be appropriate to continue the moratorium, and voted unanimously in favor of doing so in order to allow the County to “consider adoption of zoning regulations” relating to production, processing, and retail sales of recreational marijuana. CP 265-267. During this discussion, then-Commissioner Kevin Bouchey expressed concern over the State’s ability to legalize marijuana when it was still prohibited under federal law. CP 265.

3. Development of draft zoning regulations relating to I-502 business.

a. January 21, 2014, Board directive for County staff regarding text amendments to County’s zoning code.

On January 21, 2014, the Board held a regular business meeting

at which it adopted Resolution 31-2014, which directed County staff to develop amendments to the County's zoning code for the Board's consideration prohibiting the production, processing, and retail sale of recreational marijuana within unincorporated Yakima County. CP 229, 270.

b. May 27, 2014, public hearing.

On May 27, 2014, the Board conducted a public hearing at which it heard public testimony regarding the draft text amendments that had been developed as of that date. CP 229, 272-331. At the hearing, the Board heard testimony from witnesses who were in favor of adopting zoning regulations that would ban the production, processing, and retail sale of recreational marijuana in Yakima County, and from witnesses who opposed the adoption of any such zoning regulations. CP 279-331.

The testimony of the witnesses who favored banning marijuana businesses in Yakima County focused on concerns relating to children and marijuana use, the risk that marijuana use posed to Yakima County's homeless population, and concerns relating to public safety and crime. CP 279-329.

One witness who had been working in "the [drug] prevention and treatment [industry] since 1991" testified that "youth who begin using marijuana prior to age 14 have a five-fold increase in the chance of

becoming addicted to marijuana at some point in their life.” CP 285, 286. That witness further testified that “prevention science tells us global access increases use of any substance or any product. If it’s there more people are going to use it.” CP 286. According to the witness, “global access [of marijuana] to youth will come because many people who previously would not have considered using, now will. Parents will no longer hide the drug. It can be left out as alcohol is now. So there is greater access for our youth.” CP 286, 287. The witness testified that the perception of harm from using marijuana was dropping among the youth, and “that when perception of harm goes down, use goes up.” CP 287. The witness encouraged the Board to adopt the ban on marijuana businesses to send a message “that our youth are important and that we want them to understand the dangers of the drug, we could really have an impact in that arena.” CP 287.

Another witness presented data from an October 2012 survey of the use rate of marijuana among Yakima County’s youth. CP 291. The witness testified that the survey results indicated that the rate of marijuana use among 6th, 8th, and 10th graders in Yakima County was higher than the state average. CP 229, 291, 292, 335, 533. The witness presented survey data demonstrating an increase in the percentage of Yakima County’s youth who believed there was “no- or low-risk from

regular [marijuana] use.” CP 293, 533. The witness testified regarding studies that show marijuana use “can result in a loss of 9 IQ points and we don’t want our young people experiencing any loss of IQ points.” CP 293, 294. The witness also testified about the costs associated with providing drug treatment to children, and that “it costs about \$150,000” to provide drug treatment “to a young person for 30 days.” CP 294.

Another witness was a pastor who worked with the local homeless population daily and who provided testimony regarding the risks recreational marijuana presented to the homeless. CP 322-325.

The Board also was presented with 29 exhibits, totaling 287 pages, relating to the potential adoption of zoning regulations that would ban the production, processing, and retail sales of recreational marijuana in Yakima County. CP 333-620. Many of these exhibits supported the adoption of prohibitory zoning regulations. CP 339, 342-347, 350-352, 355, 522, 523, 533, 554-565, 594-620.

c. June 10, 2014, business meeting and public hearing before the Board.

On June 10, 2014, the Board held a regular business meeting, at which the public was able to comment. CP 229, 230, 624-632. The Board received comments from a witness encouraging the Board to ban the retail sale of marijuana. CP 626-628. The witness testified regarding his personal observations of the negative effects and

consequences of marijuana, which included having to disarm individuals who were hallucinating after consuming marijuana. CP 628. The witness also testified that a ban on marijuana businesses was needed to prevent the further erosion of family values. CP 628. The witness stated that allowing marijuana businesses would “give the green light to individuals to create more crime.” CP 628.

Also on June 10, 2014, the Board conducted a public deliberation session regarding I-502 and the production, processing, and retail sale of recreational marijuana in Yakima County. CP 230, 634-648.

During this deliberation session, Commissioner Leita stated his doubt that highly regulated marijuana businesses would diminish drug cartels. CP 640. Commissioner Leita recognized the testimony that had been provided by Sheriff Irwin regarding the impacts marijuana “has had and will have on our community.” CP 640. Commissioner Leita noted that community members “dealing directly with gangs, drug addiction, poverty, and lack of education” had come forward in favor of banning recreational marijuana businesses in Yakima County. CP 640.

Commissioner Elliott commented on the possibility that marijuana was a gateway drug. CP 642. He noted his personal observations of the intoxicating effects of marijuana. CP 642. Commissioner Elliott reiterated that approximately 58% of the voters of

Yakima County had voted against I-502. CP 642.

Commissioner Bouchey once again discussed the fact that marijuana is still illegal under federal law. CP 644. He expressed serious concern regarding the impact marijuana has on children. 644, 645. Commissioner Bouchey “took into consideration with great regard” that a majority of Yakima County voters voted against I-502. CP 636, 637. He expressed his concern that marijuana poses a danger to children in Yakima County. CP 644, 645. Commissioner Bouchey discussed his personal knowledge of a young adult who was “dealing with medically diagnosed cognitive challenges from marijuana use in their teenage years.” CP 645.

Both Commissioner Leita and Commissioner Elliott described the significant investment of time and effort the Board had expended in reviewing and considering the testimony and other evidence that had been presented to the Board and County staff on this issue. CP 639, 641. During this process the Board members gave earnest consideration to the arguments raised in support of allowing marijuana businesses in Yakima County. CP 639, 641, 642.

At the conclusion of its deliberation session, the Board voted unanimously in favor of having County staff prepare an ordinance prohibiting the production, processing, and retail sale of marijuana and

marijuana-infused products in any zone within unincorporated Yakima County. 642-647.

d. Adoption of Ordinance 4-2014.

On June 17, 2014, the Board adopted Ordinance No. 4-2014 at its regular weekly business meeting. CP 230, 650, 651, 653-658. This ordinance prohibited and disallowed the production, processing, and retail sale of marijuana in any zone within the unincorporated areas of Yakima County. CP 653-658.

The recitals of Ordinance No. 4-2014 outline the current federal prohibition of marijuana. CP 653, 654. The recitals also state that the Board “finds and determines that the prohibition of marijuana production, processing, and retail sales uses is within the county’s regulatory authority and this action is the only effective means to protect residential districts, recreational facilities and children within Yakima County’s jurisdiction.” CP 656. The recitals state that the Board found that adoption of Ordinance No. 4-2014 “is supported by the will of the electorate of Yakima County as expressed in their vote against I-502 ... and is in the best interest of the residents of Yakima County and will promote the general health, safety and welfare.” CP 656.

Title 19 of the Yakima County Code (“YCC”) is known as the Uniform Land Development Code (“ULDC”). YCC § 19.01.010(1). At

all times relevant to this case, the ban on marijuana businesses adopted by Ordinance 4-2014 has been part of the ULDC and codified at YCC § 19.30.030(7).

C. MLM’s marijuana business.

Since July of 2015 MLM has been operating a marijuana production and processing business on real property (the “property”) located in unincorporated Yakima County. Br. 1, 3; CP 9, 25. The property is owned by ML. CP 9, 24.

D. Proceedings before the trial court.

On February 13, 2018, the County filed a lawsuit against MLM in Yakima County Superior Court based upon its operation of its marijuana business in violation of the YCC. CP 23-30. The County’s complaint asked the trial court to declare that the operation of this marijuana business was a violation of the YCC and constituted a public nuisance under the YCC and Washington law. CP 26, 27. The County also asked the trial court to issue a warrant of abatement authorizing the County to enter the property and abate the code violations and public nuisance occurring thereon. CP 28-30.

MLM answered the County’s complaint on April 3, 2018. CP 8-15. ML admitted that it owns the property. CP 9, 24. MLM admitted that it is, and had been, operating a business for the production and/or

processing of marijuana on the property. CP 9, 25. In spite of these admissions, MLM denied all the claims and requests for relief asserted by the County, and also asserted various affirmative defenses to those claims. CP 10-13.

The parties stipulated to changing the venue for the lawsuit from Yakima County Superior Court to Kittitas County Superior Court. CP 5, 6. On June 19, 2018, the County filed a motion for summary judgment asking the trial court to declare as a matter of law that MLM's operation of a marijuana business on the property violated YCC and constituted a public nuisance under the YCC and Washington law, and, as such, the County was entitled to the warrant of abate sought in its complaint. CP 176-178, 188-227. MLM opposed the County's motion for summary judgment by raising the exact same arguments that are presented to this Court on appeal. CP 666-691.

On August 14, 2018, after a period of discovery, the Court entered an order granting the County's motion for summary judgment and also issued the requested warrant of abatement pertaining to the property. 1283-1297. MLM filed its notice of appeal on August 17, 2018. CP 1298, 1299.

IV. ARGUMENT

A. Standard of review.

Review of an order granting summary judgment is de novo. *Emerald Enterprises, LLC v. Clark County*, 2 Wn. App.2d 794, 802-03, 413 P.3d 92 (2018), *review denied*, 190 Wn.2d 1030, 421 P.3d 445 (2018) (quoting *Weden v. San Juan County*, 135 Wn.2d 678, 689, 958 P.2d 273 (1998)). Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

B. The County’s prohibition on marijuana businesses satisfies the requirements of equal protection.

MLM’s appeal brief argues that YCC § 19.30.030(7) violates the requirements of equal protection. Br. 19-25. In making this assertion MLM has recycled, almost word for word, the argument it made to the trial court. *See* CP CP 685-690. The trial court did not find MLM’s argument persuasive, and neither should this Court on appeal. *See* CP 1297, 1304-1313, 1325-1336.

1. The County enjoys broad police power to adopt zoning regulations.

Under Article XI, section 11 of the Washington Constitution, the County has the authority to “make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with

general laws.” The extent of the County’s police power is broad and allows it to enact “all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people.” *State v. City of Seattle*, 94 Wn.2d 162, 165, 615 P.2d 461 (1980). The enactment of a zoning ordinance is an example of the exercise of this police power. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 26, 586 P.2d 860 (1978); *Emerald Enterprises*, 2 Wn. App.2d at 817.

Generally, in order to satisfy the constitutional requirement of equal protection a zoning regulation is subject to rational basis review. *Thurston County Rental Owners Ass’n v. Thurston County*, 85 Wn. App. 171, 184-85, 931 P.2d 208 (1997). Under this minimum level of review a court must determine: (1) whether the legislation applies alike to all members within the designated class; (2) whether there are reasonable grounds to distinguish between those within and those without the class; and (3) whether the classification has a rational relationship to the purpose of the legislation. *Id.* at 185.

The undisputed material facts in this case, and the relevant rules of law, demonstrate that YCC § 19.30.030(7) satisfies rational basis review.

2. YCC § 19.30.030(7) treats all marijuana businesses alike.

The first inquiry under the rational basis test is whether the

classification applies alike to all members within the designated class. *Yakima County Deputy Sheriff's Ass'n v. Board of Com'rs for Yakima County*, 92 Wn.2d 831, 835, 601 P.2d 936 (1979). YCC § 19.30.030(7) answers this inquiry in the affirmative by prohibiting the production, processing, and retail sale of marijuana and marijuana-infused products in any zone within the unincorporated areas of Yakima County. The code section creates a classification of individuals or entities engaged in marijuana-related businesses (i.e., producers, processors, and retailers), and excludes those who are not. *See id.* Without exception, those who fall within the classification of being engaged in marijuana-related activities are prohibited from engaging in those activities in any zone in the unincorporated area of Yakima County. *Id.*

In an effort to avoid this inconvenient truth, MLM mischaracterizes certain language regarding the intent of I-502 to support the assertion that marijuana businesses and alcohol-related businesses should be treated as one large classification. Br. 19. This argument was denied by trial court and it should be denied on appeal. *See* CP 1297.

3. I-502 does not restrict the type of zoning controls a local government can enact regarding marijuana businesses.

MLM claims that Washington law requires marijuana businesses be regulated in a manner identical to alcohol businesses. Br. 19-25. In

support of this assertion it points to the fact that part of the intent behind I-502 was to bring marijuana “under a tightly regulated, state-licensed system similar to that for controlling hard alcohol.” Br. 19, 20; CP 686; Laws of 2013, ch. 3 § 1. However, this language is irrelevant to whether the County can lawfully adopt zoning controls that prohibit marijuana businesses such as those reflected in YCC 19.30.030(7).

The plain language of I-502’s statement of intent reflects that it pertains to the creation of a relatively uniform state licensing approach to marijuana and hard alcohol. Laws of 2013, ch. 3 § 1. At first, MLM appears to acknowledge that this in fact has happened, and that the LCB’s administrative rules regulating marijuana are “nearly identical to the regulations governing the issuance of a license to sell hard alcohol.” Br. 20. However, two sentences later MLM appears to retract this admission by claiming the State has “fail[ed] to properly provide balanced regulations when comparing alcohol and marijuana.” Br. 20. Regardless of which of MLM’s conflicting, yet apparently simultaneously held, opinions may be correct, there is nothing in the I-502 statement of intent restricting the general police power of local governments. Laws of 2013, ch. 3 § 1.

The regulation of an activity through a state-issued license generally “does not mean that the activity must be allowed under local

law.” *Rabon v. City of Seattle*, 135 Wn.2d 278, 292, 957 P.2d 621 (1998). In line with this general rule, the LCB has rejected the proposition that the issuance of a license to operate a marijuana business excuses the licensee from complying with “local rules or ordinances including, but not limited to ... zoning ordinances.” WAC 314-55-020(15). Subsequent to the passage of I-502, the right of local governments to adopt zoning ordinances restricting or prohibiting marijuana businesses has been affirmed by the Court of Appeals, without any reference to the need for those regulations to treat or regulate marijuana and alcohol identically. *Emerald Enterprises*, 2 Wn. App.2d 794.

These rules of law undercut MLM’s assertion that I-502 requires marijuana and alcohol to be regulated identically at the local level. The County made similar arguments in its summary judgment briefing before the trial court. CP 1237. In spite of this, MLM’s appeal brief is devoid of any reference to *Rabon*, *Emerald Enterprises*, or WAC 314-55-020(15). Br. 1-27. MLM’s failure to recognize the existence of these rules of law and engage with them demonstrates a lack of belief and confidence in the assertion that state law requires local regulation of marijuana and alcohol to be identical.

4. The Washington Supreme Court has recognized that marijuana activities authorized by state law may be

subject to local zoning control.

In *Cannabis Action Coalition v. City of Kent*, 183 Wn.2d 219, 225-31, 351 P.3d 151 (2015), the Washington Supreme Court affirmed the City of Kent's ability to adopt zoning regulations that prohibited a marijuana-related land use that was authorized under Washington's medical marijuana law. The Court concluded that the city's zoning regulations were not preempted by Washington's medical marijuana laws and that the zoning regulations were consistent with state law. *Id.*

The decision in *Cannabis Action Coalition* mainly addressed Washington's medical marijuana law. *Id.* However, the Court began its analysis by reiterating the broad scope of a local government's general authority to adopt zoning regulations under the Washington Constitution. *Id.* at 225 (quoting WASH. CONST. art. XI, § 11). Subsequently, in *Emerald Enterprises*, the Court of Appeals confirmed that a local government's general police power includes the authority to adopt zoning regulations prohibiting the type of marijuana businesses authorized by I-502. 2 Wn. App.2d at 804-18. The Court of Appeals decision in this regard is consistent with and supported by the Supreme Court's decision in *Cannabis Action Coalition*. The Supreme Court denied review in *Emerald Enterprises*. 190 Wn.2d 1030, 421 P.3d 445 (2018).

5. The County had several reasonable bases for adopting zoning regulations that distinguish between marijuana businesses and non-marijuana businesses.

Legislative bodies, including the Board, have extensive powers to make classifications for purposes of legislation. *Sonitrol Northwest, Inc. v. City of Seattle*, 84 Wn.2d 588, 590, 528 P.2d 474 (1974). The inquiry in determining whether a piece of legislation satisfies the requirements of equal protection is whether there are reasonable grounds to distinguish between those within and those without a classification. *Thurston County Rental Owners Ass'n*, 85 Wn. App. at 185. A classification that is “neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, [does not deny] equal protection of the law.” *Id.* at 186 (quoting *Forbes v. City of Seattle*, 113 Wn.2d 929, 944, 785 P.2d 431 (1990)). In this case, the County had several reasonable bases to distinguish between marijuana businesses and non-marijuana businesses.

At the time Ordinance 4-2014 was adopted by the Board, the possession and use of marijuana was illegal under federal law. 21 U.S.C. § 841(A)(1) (making it unlawful to intentionally manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute, or dispense, a controlled substance); *see also* 21 U.S.C. § 812(c)(10) (categorizing marijuana as a Schedule I controlled substance under

federal law). This federal prohibition was referenced several times by Board members and by witnesses who spoke in favor of the County banning marijuana businesses. CP 234, 251, 252, 257-258, 265, 328-329, 554-565, 644. Ordinance 4-2014 included repeated references to federal law's prohibition of marijuana as part of the reason for its passage by the Board. CP 653-654. These facts are undisputed and demonstrate that the Board's decision to create a classification of marijuana businesses, whose operations remain illegal under federal law, was not arbitrary nor capricious. *Carlson v. City of Bellevue*, 73 Wn.2d 41, 44-5, 435 P.2d 957 (1968) (stating that arbitrary and capricious conduct for purposes of zoning regulations consists of conduct that is done without consideration and in disregard of the facts).

Further, Ordinance 4-2014 included repeated references to the health and safety risks posed by marijuana. The ordinance notes that marijuana is a Schedule I controlled substance under federal law, which means that the substance has a high potential for abuse, has no currently accepted medical use in the United States, and there is a lack of safety for the use of the drug under medical supervision. CP 653, 654. The ordinance also stated that the Board found and determined that the prohibition of marijuana businesses was "the only effective means to protect" the families, children, and property within Yakima County, and

that such a prohibition “is in the best interest of the residents of Yakima County and will promote the general health, safety and welfare...” CP 656. The desire to protect health, safety, and general welfare -- particularly of children -- reflects the testimony and evidence received by the Board during the adoption of Ordinance 4-2014. CP 247-260, 262-264, 285-287, 291, 292, 294, 322-325, 339, 342-347, 350-352, 355, 522, 533, 554-5655, 594-620, 624-632.

MLM challenges the reasonableness of the County’s creation of a classification that treats marijuana businesses differently than alcohol businesses under its zoning code. Br. 19-24. However, Washington courts have already considered, and rejected, the equal protection argument being made by MLM.

For instance, in *State v. Dickamore*, 22 Wn. App. 851, 854, 592 P.2d 681 (1979), a criminal defendant raised an equal protection challenge to his conviction for marijuana possession by claiming that no rational basis existed for classifying marijuana as a controlled substance when comparable drugs such as coffee, nicotine, and alcohol were not included in that classification. The court denied that constitutional challenge, noting that courts had “uniformly upheld the propriety” of this classification against constitutional challenges. *Id.* at 854-55.

The *Dickamore* court relied on the decision in *United States v.*

Kiffer, 477 F.2d 349, 355 (2nd Cir. 1973), in which the Second Circuit conceded that it had “no doubt that the defendant here could produce experts to testify that marijuana is not harmful.” *Id.* at 855. However, as long as there is scientific debate about the effects of marijuana, “the legislature is free to adopt the opinions of those scientists who view marijuana as harmful,” and the court refused “to substitute its judgment for that of the legislature where the statute in question bears a rational relationship to a legitimate legislative purpose.” *Id.* (quoting *Kiffer*, 477 F.2d at 355).

The *Dickamore* court accepted the reasoning from *Kiffer*, that “even if such substances such as tobacco and alcohol are as harmful as marijuana, the legislature is not constitutionally compelled to regulate or prohibit all harmful substances.” *Id.* at 684. Instead a legislative body “may conclude that half a loaf is better than none.” *Id.* (quoting *Kiffer*, 477 F.2d at 355).

In *Seely v. State*, 132 Wn.2d 776, 807-08, 940 P.2d 604 (1997), the Washington Supreme Court adopted and affirmed the analysis from *Dickamore* when it denied the plaintiff’s equal protection designation of marijuana as a Schedule I controlled substance when cocaine, morphine, and methamphetamines were not included within that classification.

Seely and *Dickamore* demonstrate that the County’s exclusion of

alcohol businesses from the classification created by Ordinance 4-2014 complied with the requirements of equal protection.

6. MLM’s attempt to create uncertainty as to whether federal prohibition of marijuana constitutes a reasonable basis for the classification between marijuana businesses and non-marijuana businesses is a red herring.

In contesting the reasonableness of the County distinction between marijuana businesses and non-marijuana businesses, MLM does not call into question the process that resulted in the adoption of County’s ban on marijuana businesses or the evidence that was presented to the Board as part of that process. Br. 21-25; CP 666-691. Instead it relies on the declaration of its counsel filed in opposition to the County’s motion for summary judgment purporting to reflect activity on the part of the federal government relating to marijuana, and also tries to saddle the County with the burden of presenting evidence of federal enforcement action against a marijuana business in Washington. Br. 24; CP 692-925.

All of the purported federal action relied upon by MLM occurred after Ordinance 4-2014 was adopted in June of 2014. The Ninth Circuit’s decision in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), was issued on August 16, 2016. CP 877-909. The bill that would amend the federal Controlled Substances Act to makes its prohibition on

marijuana inapplicable to those who are in compliance with state law pertaining to marijuana was introduced in Congress in June of 2018. Br. 25; CP 911-18. MLM has presented a news article that is almost a year old in which President Trump stated that he “probably will end up supporting” the bill. CP 918.

The court’s decision in *McIntosh* did not alter the fact that marijuana is illegal under federal law. Rather, it held that a rider to an appropriation bill prohibited the United States Department of Justice from spending allocated funds to prevent states from implementing laws pertaining to medical marijuana. *McIntosh*, 833 F.3d at 1169. The rider did not prohibit the DOJ from spending funds to enforce federal laws relating to state laws that authorize recreational marijuana, nor did it invalidate the federal laws prohibiting marijuana. *Id.* at 1168-80.

The Ninth Circuit has recently recognized that the scope of its decision in *McIntosh* is limited to the context of medical marijuana. *United States v. Gilmore*, 886 F.3d 1288, 1290 (9th Cir. 2018). Even in that setting, the court noted that there are instances when *McIntosh* would not prohibit the DOJ from expending funds to enforce federal drug laws in states that have authorized medical marijuana. *Id.* 1290-91. As such, MLM’s reliance on *McIntosh* as demonstrating the unreasonableness of the classifications drawn by the County in YCC §

19.30.030(7) is misplaced.

Further, MLM does not allege that the federal legislation it relies upon has been enacted into law. Br. 25. Its argument that this legislative proposal somehow calls into question the reasonableness of the classifications drawn by YCC § 19.30.030(7) is based on speculation and conjecture.

MLM also calls into question the reasonableness of the ordinance's classification because the County has not presented evidence that a federal enforcement action against a marijuana business in Washington has taken place or is imminent. Br. 24. However, the County is under no obligation to present any such evidence. YCC § 19.30.030(7) is presumed constitutional, and it is MLM's burden to overcome this strong presumption by showing beyond a reasonable doubt that the classification is purely arbitrary. *Thurston County Rental Owners Ass'n*, 85 Wn. App. at 185 (quoting *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wn.2d 523, 528, 520 P.2d 162 (1974)). MLM has failed to carry this burden.

7. Debate over the comparative harm of marijuana versus alcohol is irrelevant to whether YCC § 19.30.030(7) is constitutional.

MLM claims that there is no rational basis to treat marijuana businesses and alcohol differently because the negative consequences of

alcohol use are purportedly far greater than those associated with marijuana use. Br. 21-23. The County has never disputed that there are indeed negative consequences associated with the use of alcohol. CP 1240.

However, as set forth above in section IV(B)(5), federal law's prohibition of marijuana, the need to protect the people and property of Yakima County, and the need to protect and promote the general health, safety, and welfare constitute reasonable grounds for the County to distinguish between marijuana businesses and non-marijuana business, including alcohol-related businesses, when adopting Ordinance 4-2014. Whether MLM is correct that the negative consequences of alcohol use exceed those of marijuana use does not change this conclusion. *Seely*, 132 Wn.2d at 807-08; *Dickamore*, 22 Wn. App. at 855.

8. A rational relationship exists between the County's ban on marijuana businesses and the purposes upon which that ban is based.

The final inquiry under the rational basis test is "whether the classification has a rational relationship to the purpose of the legislation." *Thurston County Rental Owners Ass'n*, 85 Wn. App. at 185. If a "court can reasonably conceive of a state of facts to exist which would justify the legislation, those facts will be presumed to exist and the statute will be presumed to have been passed with reference to those

facts.” *State v. Brayman*, 110 Wn.2d 183, 193, 751 P.2d 294 (1988); *Andersen v. King County*, 158 Wn.2d 1, 31, 138 P.3d 963 (internal citations omitted) (*abrogated on other grounds by Obergefell v. Hodges*, ____ U.S. ____, 135 S.Ct. 2584, 2604, 2607–08 (2015)).

The government is not required to produce empirical evidence to sustain the rationality of a classification. *Andersen*, 158 Wn.2d at 31 (citing *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979-80, 948 P.2d 1264 (1997)). Rather, “the rational basis standard may be satisfied where the ‘legislative choice ... [is] based on rational speculation unsupported by evidence or empirical data.’” *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 148, 960 P.2d 919 (1998) (quoting *Fed. Commc’ns Comm’n v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)).

If scientific opinions conflict on a particular point, a legislative body “is free to adopt the opinion it chooses, and the court will not substitute its judgment for that of the” legislative body. *Brayman*, 110 Wn.2d at 193. Further, “if the validity of the legislative authority’s classification for zoning purposes is fairly debatable, it will be sustained.” *Carlson*, 73 Wn.2d at 56 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)); *Anderson v. Island County*, 81 Wn.2d 312, 317, 501 P.2d 594 (1972) (quoting *Carlson*).

In this case, the undisputed facts demonstrate that the County's purposes for adopting Ordinance 4-2014 were: 1) to avoid violating federal law; 2) to adopt land use regulations that reflected the will and morals of a majority of Yakima County voters; 3) to protect the people, particularly children, and property within Yakima County; and 4) to promote the general health, safety, and welfare. CP 230, CP 652-658.

a. It was rational for the County to ensure its zoning code did not violate federal law.

The federal prohibition on marijuana has been discussed at length in this brief. Federal law does not exempt the type of recreational marijuana businesses and/or activities that were authorized by I-502. 21 U.S.C. § 841(A)(1). It was rational for the County to adopt Ordinance 4-2014 and its prohibitions on marijuana businesses in order to ensure the County's zoning regulations comply with federal law and do not allow or authorize activities that are illegal under federal law.

b. MLM has not challenged that the County's marijuana ban reflects the will of Yakima County's voters.

In *Duckworth*, 91 Wn.2d at 26, the Court noted that the first inquiry in evaluating the legality of a zoning ordinance is "whether the legislation tends to promote the public health, safety, morals or welfare." (Internal citations omitted.) "If it does, the wisdom, necessity and policy of the law are matters left exclusively to the legislative body." *Id.*

While a majority of the statewide electorate voted in favor of I-502, roughly 58% of the votes cast in Yakima County opposed passage of the initiative. CP 653. One of the Board's stated purposes for enacting Ordinance 4-2014, and its ban on marijuana businesses, was to ensure that the County's land use regulations reflect the will and morals of the majority of Yakima County voters who opposed I-502. CP 656. The adoption of the ban on marijuana businesses was, and is, a rational and reasonable method of promoting the will and morals of a majority of Yakima County's voters. *Duckworth*, 91 Wn.2d at 26.

All of this was laid out to the trial court by the County in support of its motion for summary judgment. CP 207-08. MLM acknowledged in its memorandum opposing summary judgment that one of the purposes for the County's adoption of Ordinance 4-2014 was because a "majority of Yakima County voters voted against I-502." CP 673. In spite of this recognition, MLM failed to make any assertion or argument that this purpose was somehow improper or that the ban enacted by Ordinance 4-2014 did not have a rational relationship to this purpose. CP 666-92.

Further, MLM does not dispute on appeal the existence of a rational relationship between the purpose of having the County's land use regulations reflect the will and morals of the majority of Yakima

County's voters and the adoption of Ordinance 4-2014. Br. 1-27. MLM has conceded the existence of a rational basis between YCC § 19.30.030(7) and this purpose. RAP 9.12; *Johnson v. Lake Cushman Maintenance Co.*, 5 Wn. App.2d 765, 780-81, 425 P.3d 560 (2018) (reiterating that “[A]n argument that was neither plead nor argued to the superior court on summary judgment cannot be raised for the first time on appeal”); RAP 10.3(a)(4); *Avellaneda v. State*, 167 Wn. App. 474, 485 n. 5, 273 P.3d 477 (2012).

c. MLM’s appeal brief demonstrates that a rational basis exists between the County’s ban on marijuana businesses and the purpose of protecting the general health, safety, and welfare.

MLM’s appeal brief points to several ways in which the risks associated with alcohol use exceed those of marijuana. Br. 21-23. These arguments – perhaps unwittingly – also demonstrate that a rational relationship exists between the County’s ban on marijuana businesses and protecting people, particularly children, and property within Yakima County, as well as the general health, safety, and welfare.

For instance, MLM’s appeal brief acknowledges that driving under the influence of marijuana increases the risk that the driver will be involved in an accident, that marijuana use can lead to dependency on the drug, and that in some individuals marijuana dependency can lead to “a higher preponderance of suicide.” Br. 21-23; CP 1143, 1144, 1147,

1184. Each of these admissions is, in and of itself, sufficient to demonstrate a rational relationship between the County's ban on marijuana businesses and the protection of the general health, safety, and welfare.

Further, MLM claims that marijuana "is not known to increase aggression," and that "it is not currently possible to attribute any serious long-term health consequences to" marijuana use. Br. 21, 22. However, the declaration of Dr. Robert Stephens, one of MLM's expert witnesses, states that scientific studies exist that report increased aggression when people who are dependent on marijuana stop using the drug, and that marijuana use "could be implicated in dating violence in young adults." CP 1144. Also, according to Dr. Stephens, regular marijuana users have higher rates of bronchitis. CP 1146.

Further, any uncertainty regarding marijuana's impact on aggression and its long-term health risks only serves to underscore the validity of the County's ban. It would certainly be reasonable for the Court to conceive of a number of states of fact where marijuana use can lead to increases in aggression as well as having long-term health consequences on users. The Court should presume that those facts exist and that Ordinance 4-2014 was passed with reference to those facts.

Brayman, 110 Wn.2d at 193; *Andersen*, 158 Wn.2d at 31.

C. It is undisputed that MLM is operating an unlawful marijuana business on the property.

After sifting through MLM's various attempts to create an issue of fact or invalidate YCC § 19.30.030(7), what remains is the following:

1) the County's ULDC has prohibited the operation of marijuana businesses in all zones of unincorporated Yakima County since June of 2014; 2) the property is owned by ML and is located in unincorporated Yakima County; and 3) since July of 2015, MLM has been operating a marijuana production and processing business on the property. CP 9, 10, 24, 25, 653-58; Br. 1, 3.

These undisputed facts establish that conditions on the property constitute a violation of YCC § 19.30.030(7). A violation of the ULDC, which includes YCC § 19.30.030(7), also constitutes a violation of the County's building code, which is set forth at Title 13 of the YCC. YCC §§ 13.25.050(1) and 19.01.060(1). "Continuing violations of Title 13 YCC, constitute public nuisances and may be enjoined or ordered abated in a civil proceeding for injunction or for abatement." YCC § 13.25.060(1). Therefore, a continuing violation of the ULDC is a public nuisance under the YCC. *Id.*

MLM attempts to create ambiguity as to whether a public nuisance exists in this case by questioning the County's ability to make violations of the ULDC subject to the same enforcement procedures as

violations of the County's building code through the process of incorporation by reference. Br. 6. The same argument was made to, and rejected by, the trial court. CP 669; *see* CP 1297. MLM's argument on this point is yet another example of merely restating, largely verbatim, portions of their memorandum opposing summary judgment. Br. 6, CP 669.

Critically, before the trial court and again on appeal MLM has failed to cite any legal authority that would prohibit the County's usage of the incorporation by reference process to designate violations of the ULDC as a public nuisance. *See* CP 666-691; *see also* Br. 1-27. This is not surprising. Washington's appellate court decisions are replete with examples of courts recognizing the use of incorporation by reference to make the provisions of one statute applicable to a different statute. *See Ellensburg Cement Products, Inc. v. Kittitas County*, 179 Wn.2d 737, 748, 317 P.3d 1037 (2014); *see also State v. Wright*, 88 Wn. App. 683, 689-90, 946 P.2d 792 (1997); *Birch Bay Trailer Sales, Inc. v. Whatcom County*, 65 Wn. App. 739, 742, 829 P.2d 1109 (1992). It is perfectly acceptable for the County to designate violations of the ULDC, including YCC § 19.30.030(7), as a public nuisance through the incorporation by reference process.

D. MLM mischaracterizes the nature of the County's public nuisance claim.

MLM’s appeal brief lists 13 different bases that it contends the County relies upon for its public nuisance claim in this case. Br. 11, 12. This list was derived by MLM, and is based upon at least some of the testimony and evidence in favor of banning marijuana businesses that was presented during the legislative process that led up to the Board’s enactment of Ordinance 4-2014. Br. 11, 12; CP 190-97. According to MLM it was inappropriate for the trial court to grant the County’s motion for summary judgment on its public nuisance claim because a factual dispute exists as to each basis. Br. 11-19. MLM’s argument demonstrates that it misunderstands or, more likely, is unwilling to accept that the operation of a marijuana business in unincorporated Yakima County constitutes a public nuisance per se under the YCC.

1. The operation of a marijuana business is a public nuisance per se under the YCC.

“Engaging in any business or profession in defiance of a law regulating or prohibiting the same” constitutes “a nuisance per se.” *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 138, 720 P.2d 818 (1986) (internal citation omitted); *see Kitsap County v. Kitsap Rifle and Revolve Club*, 184 Wn. App. 252, 277 (2014) (reiterating that “a nuisance per se is an activity that is not permissible under any circumstances, such as an activity forbidden by statute or ordinance”). The undisputed facts in this case demonstrate that MLM is, and since July of 2015 has been,

operating a marijuana business on the property in violation of YCC § 19.30.030(7). CP 9, 10, 24, 25, 653-58; Br. 1, 3. The YCC specifically defines this type of continuing code violation as a public nuisance. YCC §§ 13.25.050(1) and .060(1), 19.01.060(1). MLM acknowledges that this is the state of the YCC. Br. 10. Accordingly, MLM’s operation of a marijuana business on the property constitutes a public nuisance per se under the YCC. *Kev, Inc.*, 106 Wn.2d at 138; *Kitsap Rifle and Revolver Club*, 184 Wn. App. at 277. The County’s reply memorandum on summary judgment included this public nuisance per se analysis. CP 1231-33.

Further, under YCC § 16B.11.010, “any building or structure set up, erected, built, used, moved or maintained or any use of property contrary to the provisions of this Title or any Title of the Yakima County County listed in YCC 16B.01.020, shall be and the same is hereby declared to be a public nuisance.” The ULDC is specifically listed at YCC § 16B.01.020(4). MLM’s operation of a marijuana business on the property also constitutes a public nuisance per se under YCC § 16B.11.010. The County referred the trial court and MLM to the existence of a public nuisance on the property under YCC § 16B.11.010 during the summary judgment hearing. RP 54, 55.

On appeal the only argument raised by MLM against the

existence of a public nuisance per se is that “the County’s ‘declaration’ that MLM’s state licensed production facility is a public nuisance is wholly arbitrary.” Br. 7. This is simply incorrect. MLM’s operation of a marijuana business on the property is a public nuisance per se because it is defined as such under the YCC. YCC §§ 13.25.050(1) and .060(1), 16B.01.020(4), 16B.11.010, 19.01.060(1), and 19.30.030(7). The preceding portions of this brief demonstrate that there was, and is, a rational basis supporting this designation by the County.

2. MLM’s nuisance in fact argument is inapplicable to this case.

MLM attempts to excise nuisance per se principles from Washington law by citing *Kev, Inc.*, 106 Wn.2d at 138-39, and *Greenwood v. The Olympic, Inc.* 51 Wn.2d 18, 21, 315 P.2d (1957), for the proposition that “an ordinance may not make a thing a nuisance, unless it is in fact a nuisance.” Br. 7. While this language does appear in the *Kev* decision, the very next sentence of the decision includes the previously cited language that “engaging in any business or profession in defiance of a law regulating or prohibiting the same, however, is a nuisance per se.” 106 Wn.2d at 138. This rule was applied in *County of King ex rel. Sowers v. Chisman*, 33 Wn. App. 809, 658 P.2d 1256 (1983), where, in affirming a King County ordinance that regulated topless dancing and provided for injunctions against violations the

ordinance, the court concluded that these provisions represented ““a decision by the legislative body that the regulated behavior warrants enjoining, and that the violation itself is an injury to the community,”” and that it was not ““the court’s role to interfere with this legislative decision.”” (Emphasis supplied). The rule was also applied by this Court in *ABC Holdings, Inc. v. Kittitas County*, 187 Wn. App. 275, 285 348 P.3d 1222 (2015), where the Court held that a public nuisance had been established by virtue of the appellant’s violation of the Kittitas County Code, and rejected the appellant’s assertion that Kittitas County was required to prove a nuisance in fact.

Further, *Greenwood* does not exempt MLM from the application of Washington’s public nuisance per se principles. That case involved a tort claim for negligence and nuisance between private parties rather than issues regarding the legality of a local government’s exercise of its police power. *Greenwood*, 51 Wn.2d at 20. The regulation at issue was a building code provision that required handrails on certain types of staircases. *Id.* at 20-21. That code section did not prohibit a business or profession. *Id.* at 20-21. Moreover, that code section was enacted 19 years after the building/stairway at issue was constructed. *Id.* In this case, YCC § 19.30.030(7) regulates businesses and professions and was adopted prior to MLM commencing the operation of its marijuana

business. As such, *Greenwood*, has no bearing on this case nor does it alter the fact that MLM's marijuana business constitutes a public nuisance per se.

MLM also relies on *Lawton v. Steele*, 152 U.S. 133 (1894), in support of the assertion that the County must prove its marijuana business is a nuisance in fact. Br. 8, 9. However, as discussed below, the development of Washington case authority demonstrates that *Lawton*'s relevance to the present action is limited to its historical value to nuisance actions. The case is not an accurate statement of the current state of public nuisance law in Washington.

In *State v. Brown*, 37 Wash. 97, 98-103, 79 P. 635 (1905), a case which cited *Lawton* and is relied upon by MLM, the Washington Supreme Court declared a state statute that required dentist offices to be owned and managed by a licensed dentist unconstitutional. The *Brown* court based its decision on the conclusion that while public health and safety concerns justified regulating who could perform dentistry work, those same concerns did not exist in relation to the state of ownership of the property where the dentistry care was performed. *Id.* at 101-03. However, *Brown* was overturned in 1950 by the Court's decision in *State v. Boren*, 36 Wn.2d 522, 532, 219 P.2d 566 (1950).

Boren involved the constitutionality of a different state statute

that was nearly identical to the one at issue in *Brown*, and which prohibited anyone not licensed to practice dentistry from owning, maintaining, or operating a dental office. *Id.* at 524. The Court agreed with its prior general statement in *Brown* “that ‘to own and manage property is a natural right.’” *Id.* at 532 (quoting *Brown*, 37 Wash. at 102). However, the Court recognized that “there is a clear distinction between the right of the state to interfere with the owning and managing of property, as such, and its right under the police power, to protect the health of its people.” *Boren*, 36 Wn.2d at 532. The Court concluded that “the state has decided that” allowing unlicensed persons to own dentistry practices “does not adequately protect the health of its people. Clearly such a regulation is a reasonable exercise of its police power.” *Id.*

Finally, the County has a factual basis for its claim of public nuisance against MLM. MLM is admittedly operating a marijuana business on the property. This business constitutes a violation of YCC § 19.30.030(7) and a public nuisance per se under the YCC. The County has presented a detailed and lengthy factual record in support of its adoption of YCC § 19.30.030(7). CP 228-665. This is all that is necessary to satisfy the requirements of equal protection.

E. MLM is inappropriately attempting to reopen the legislative process relating to the County’s ban on marijuana businesses.

MLM’s argues that a factual dispute exists regarding the 13

“generalizations” it claims the County is relying upon for its public nuisance claim. Br. 11, 12. This could be seen as an argument that the County’s adoption of its ban on marijuana businesses is unconstitutional because disagreement exists with regards to each of the 13 bases. *See* Br. 11, 12. However, Washington courts have reiterated time and again that zoning enactments are “the products of legislative discretion,” and courts “will uphold such actions so long as their propriety is at least ‘fairly debatable.’” *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 886, 480 P.2d 489 (1971) (internal quotations omitted); *Carlson*, 73 Wn.2d at 56 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)); *Anderson*, 81 Wn.2d at 317 (quoting *Carlson*); *see also, Cougar Business Owners Ass’n v. State*, 97 Wn.2d 466, 477, 647 P.2d 481 (1982). As such, any dispute regarding the 13 bases identified by MLM for the County’s ban on marijuana businesses must result in the conclusion that the ban is lawful.

F. The Board was presented with evidence relating to each basis upon which MLM argues a dispute of fact exists regarding the reasonableness the decision to ban marijuana businesses in support of the Board adopting such a ban.

The County’s ban on marijuana businesses must be upheld as constitutional so long as the Board did not act arbitrarily or capriciously in adopting Ordinance 4-2014. *Carlson v. City of Bellevue*, 73 Wn.2d 41, 44-5, 435 P.2d 957 (1968). As noted above, arbitrary and capricious

conduct for purposes of zoning regulations consists of conduct that is done without consideration and in disregard of the facts. *Id.* In this case, the Board was presented with evidence relating to each of the bases upon which MLM questions the validity of Ordinance 4-2014.

1. It was proper for the Board to consider input from the Yakama Nation.

MLM questions “why the County advances” the idea of the “Yakama Nation’s ‘long and sad’ relationship with drugs and alcohol” in support of the County’s ban on marijuana businesses. Br. 12. “This idea” was presented to the Board by legal counsel for the Yakama Nation. CP 247. Yakima County includes areas of land reserved to the Yakama Nation. CP 248. MLM has not cited any legal authority supporting the conclusion that it was somehow improper for the Board to consider input from the Yakama Nation as part of the legislative process that led up to the adoption of Ordinance 4-2014.

2. It is undisputed that marijuana may be a gateway drug.

During the legislative process leading up to the enactment of Ordinance 4-2014, the Board was presented with testimony from Sheriff Irwin that, based upon his 41 years of law enforcement experience, marijuana was a “gateway drug” that can lead to the use of other “harder drugs.” CP 253. This testimony should be presumed true. *Brayman*, 110 Wn.2d at 193.

MLM's own expert acknowledges that, while marijuana is not a "gateway drug" in a pharmacological sense, "most individuals use cannabis before trying other illicit drugs such as cocaine or hallucinogens." CP 1148. This expert equivocates as to whether this will change in light of the passage of I-502. *See* CP 1148. The County is entitled to the presumption that it will not. *Brayman*, 110 Wn.2d at 193.

3. It should be presumed that crime would have increased if the County had not adopted Ordinance 4-2014.

The Board was provided testimony by witnesses, including Sheriff Irwin, regarding the need for the County to adopt a ban on marijuana businesses in order to combat increases in criminal behavior. CP 253-256, 628. This testimony should be presumed true. *Brayman*, 110 Wn.2d at 193.

MLM relies on graphs and statistics from various studies purporting to demonstrate that criminal activity has decreased in Washington since the passage of I-502. Br. 13, 14; CP 721-723, 725, 727. However, this data does not reflect a causal link between the passage of I-502 and this purported decrease in crime. CP 721-723, 725, 727.

MLM cites another study that purportedly found that the

legalization of marijuana caused a significant reduction of rapes and thefts in Washington counties that share a border with Oregon. Br. 14, CP 858-875. Yakima County does not share a border with Oregon, and as such this study is irrelevant to localized conditions in Yakima County. Further, the study cited by MLM reflects that the crime rate at the county level for all counties in Washington actually increased from 2013 to 2014. CP 867.

4. The County's marijuana ban can achieve its desired effect of discouraging marijuana use among children.

One of the central purposes of the County's ban on marijuana businesses was to protect children in the community. CP 656. During the legislative process leading up to the adoption of the ban, the Board received testimony from numerous witnesses expressing concern that allowing marijuana businesses to operate in Yakima County could decrease the perception among children that marijuana is dangerous and could result in increased access to, and use of, marijuana by children. CP 257, 260, 279-329, 294, 644, 645. MLM maintains that since the passage of I-502, minors' perceptions and behaviors regarding marijuana have remained stable. Br. 15, 16. MLM also asserts that the number of children in treatment for marijuana has steadily declined since 2012. CP 16, 17. To the extent this data accurately reflects conditions in Yakima County, it may be presumed that this stabilization is *actually the result*

of Ordinance 4-2014 having its desired effect relative to children.

Brayman, 110 Wn.2d at 193.

5. The County is entitled to the presumption that its ban on marijuana business has contributed to a decrease in marijuana-related driving offenses following the passage of I-502.

MLM cites Washington State Patrol data demonstrating that in the years since I-502 was passed arrests for drug-only DUIs have decreased. Br. 17, 18. This data does not appear to be limited to DUI arrests relating to the suspected consumption of marijuana, but instead includes all drugs other than alcohol. CP 720. As such, the relevance of this data is questionable.

However, to the extent this data is relevant and is illustrative of local conditions in Yakima County, it may be presumed that any decrease in drug-only DUIs is attributable, at least in part, to the ban on marijuana businesses established by Ordinance 4-2014, and that the ban is having its intended effect of protecting the people of Yakima County.

Brayman, 110 Wn.2d at 193.

6. MLM's own experts testify as to negative effects associated with marijuana use.

In opposition to the County's motion for summary judgment, MLM offered declarations from expert witnesses that acknowledge and outline potential negative effects of marijuana use. These consequences

include impairment of a user's ability to operate an automobile, marijuana dependency, the potential harm that chronic marijuana use presents to embryos and young adults, and links between marijuana use and psychotic symptoms and schizophrenia diagnoses and marijuana use. CP 1143, 1145, 1181, 1182, 1184, 1185. One expert noted that the liberalization of marijuana laws may increase the prevalence of cannabis use and its potency. CP 1142. Accordingly, MLM's own evidence demonstrates that there is a rational relationship between Ordinance 4-2014's ban on marijuana business and protecting people, particularly children, within Yakima County.

7. MLM mischaracterizes comments by planning commissioners during the process leading up to the adoption of Ordinance 4-2014.

MLM points to statements made by County Planning Commissioner Gary Ekstedt. According to MLM, Mr. Ekstedt stated that an outright ban on marijuana businesses would be arbitrary and capricious. Br. 18, 19. This is a mischaracterization of Mr. Ekstedt's statements. In the context of a larger discussion regarding making any federally prohibited act also a prohibited local land use, Mr. Ekstedt questioned the breadth of such an approach to zoning controls. CP 939, 940. Mr. Ekstedt's ruminations are not a definitive statement by Mr. Ekstedt, nor were they a statement that a particular County zoning

ordinance banning marijuana businesses would be unconstitutional.

Moreover, statements, findings, and recommendations made by lay members of an advisory-only body, such as the County's Planning Commission, have no bearing on whether Ordinance 4-2014 is in fact constitutional.

G. The Board's legislative process is not governed by the rules of evidence.

MLM claims that the evidence offered by the County in support of its motion for summary judgment did not meet the evidentiary requirements of CR 56(e). Br. 10, 11. In doing so, MLM calls into question the basis for the facts and opinions of various witnesses who testified before the Board in the legislative process that preceded the adoption of Ordinance 4-2014. Br. 10, 11. However, Washington's rules of evidence specifically state that their scope is limited to proceedings in Washington state courts, subject to certain specified exceptions. ER 101. MLM has not cited any legal authority for the proposition that a legislative body's zoning decisions must be based upon evidence that would be admissible under the rules of evidence in a court of law.

H. The trial court's decision on summary judgment should be affirmed.

The undisputed material facts demonstrate that MLM's operation

of a marijuana business on the property constitutes a public nuisance. This public nuisance is subject to abatement under the YCC and Washington law. YCC § 13.25.060(1), (2); RCW 7.48 *et seq.* As the owner of the property, ML is subject to, and liable for, the abatement procedures and the County's request for costs and fees to the same extent as MLM. YCC § 13.25.040. Accordingly, the trial court's granting of the County's motion for summary judgment and its issuance of the associated warrant of abatement should be affirmed. CP 1304-1313, 1325-1336, 1338-1342.

V. CONCLUSION

For the forgoing reasons, the trial court's granting of the County's motion for summary judgment should be affirmed.

RESPECTFULLY SUBMITTED THIS 22nd day of May, 2019.

YAKIMA COUNTY, Respondent
JOSEPH A. BRUSIC,
Prosecuting Attorney

By: _____



Kenneth W. Harper WSBA #25578
Special Deputy Prosecuting Attorney
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DECLARATION OF SERVICE

On the day set forth below, I emailed and deposited in the U.S. Mail a true and accurate copy of: Brief of Respondent Yakima County in Court of Appeals, Division III, Cause No. 362892 to the following parties:

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Electronic filing by JIS Portal to:

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

DATED THIS 22nd day of May, 2019, at Yakima, Washington.



Julie Kihn

MENKE JACKSON BEYER, LLP

May 22, 2019 - 12:21 PM

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