91158-8

No. 44700-2-II

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

WAHKIAKUM COUNTY, Respondent

v.

Department of Ecology, State of Washington, Appellant

APPEAL FROM THE ORDER OF THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Wahkiakum County asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

II. COURT OF APPEALS DECISION

The County petitions for review of the decision of Division II of the Court of Appeals filed November 4, 2014, reversing the Superior Court of Cowlitz County and declaring Wahkiakum County's Ordinance # 151-11 unconstiututional. The decision is in the Appendix at pages A-1 through A-16.

III. ISSUES PRESENTED FOR REVIEW

1. What is the standard of review for the determination of constitutionality of a duly enacted county ordinance?

2. When reviewing a grant or denial of summary judgment, may an appellate court rely on facts outside the record below?

3. Is the Wahkiakum County biosolids ordinance constitutional?

IV. STATEMENT OF THE CASE

In 1992, the State of Washington, in compliance with the federal Clean Water Act, 33 USC §1251 et. seq., changed its regulatory scheme for certain types of solid waste by coining the term "biosolids," defining the term as "municipal sewage sludge that is a primarily organic, semisolid product resulting from the wastewater treatment process, that can be beneficially recycled and meets all requirements under this chapter" and "septic tank sludge, also known as septage, that can be beneficially recycled and meets all requirements under this chapter." RCW 70.95J.010(1). RCW 70.95J then regulated biosolids, and additionally authorized plaintiff Department of Ecology (hereinafter, "Department" or "the Department") to create additional administrative regulations. RCW 70.95J.020.

The legislature further acknowledged that "sewage sludge can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health." RCW 70.95J.007(e). This accords with federal law acknowledging that sludge contains "toxic pollutants." 33 USC 1345(d)(2)(a)(i). More specifically, after public hearings on the subject, the Wahkiakum County commission found that biosolids and septage contain toxic metals such as "arsenic, cadmium, copper, lead,

mercury, molybdenum, nickel, selenium, and zinc;" that they contain deadly microorganisms such as "*e. coli, heliobacter pylori, legionella, cryptosporidium, giardia*, and various viruses;" and that "disease and heavy metal contamination constitute potential threats to the life and health of humans, pets, livestock, crops, and also the natural flora and wildlife of the County." The Ordinance is attached as Appendix B.

The Department adopted a regulatory scheme calling for treatment of biosolids to varying levels set by the Department and regulating how each class can be disposed of. The highest level of treatment is Class A, which is the only class of biosolids in which all disease-causing microorganisms have been destroyed. WAC 173-308-160. No level or class of biosolids has been treated to eliminate toxic metal contamination.

The Department provided at WAC 173-308-030(6): "Facilities and sites where biosolids are applied to the land must comply with other applicable federal, state and local laws, regulations, and ordinances, including zoning and land use requirements."

On April 26, 2011, the Board of Commissioners of Wahkiakum County enacted an ordinance (hereafter, "the Ordinance") that restricted land application of biosolids (as opposed to burial or incineration, the

other methods by which biosolids can be disposed of) to Class A biosolids only. Appendix A. The Board did not restrict the time, place, or manner of disposal of Class A biosolids or make any restriction regarding the burial or incineration of Class B biosolids or septage. Id. The State of Washington Department of Ecology filed suit against Wahkiakum County in Cowlitz County Superior Court, seeking a declaration that the Ordinance is unconstitutional. Appendix C. The trial court ruled as follows on summary judgment:

> The Department has the burden of proving the Ordinance unconstitutional beyond a reasonable doubt. State v. Immelt, 150 Wn.App. 681, 686, 208 P.3d 1256, 1259 (2009), reversed on other grounds, 173 Wn.2d 1 (2011). See also Johnson v. Johnson, 96 Wn.2d 255, 258, 634 P.2d 877 (1981) ("To prevail, [Johnson] must demonstrate that statute's invalidity beyond a reasonable doubt and rebut the presumption that all legally necessary facts exist") (internal quotes omitted). Every presumption will be in favor of constitutionality. Lenci v. City of Seattle, 63 Wn.2d 664, 667-8, 388 P.2d 926 (1964). All facts necessary to establish the legality of an ordinance are presumed to exist until disproved by the challenger. Johnson, supra. ...
>
> The Department has been given two opportunities to establish the facts necessary to overcome its burden in this case, but it has failed to do so. The record herein:
>
> a. Does not establish that the Ordinance constitutes a "ban" on biosolids application within the County.
>
> b. Does not establish that the Ordinance prohibits what the State "unconditionally allows." Ritchie v. Markley, 23 Wn.App. 569, 597 P.2d 449 (1979).

> c. Does not establish that the Ordinance cannot be harmonized with the laws and regulations of the State of Washington. ...
>
> No issue of material fact exists since all facts not otherwise proved are presumed to favor constitutionality. Johnson, supra.
>
> Appendix D, p. 3.

The Superior Court therefore found in favor of the Ordinance's constitutionality and so declared. Appendix D, p. 4. The Department timely appealed.

On appeal, the County was joined by *amicus curiae* Lewis County, Washington; while the Department's part was taken up by *amici* Northwest Biosolids Management, Inc., and Natural Selections Farms, Inc., et. al. Each of the *amicus* briefs filed in favor of the Department's position contained additional factual allegations not contained in the record below, and the County's objection and motion to strike such allegations was denied. See, e.g., *amicus* brief of Natural Selection, et. al., in Appendix E; County's Motion to Strike and Answer to the same; and the Division II ruling regarding County's motion. The Court of Appeals's opinion in favor of the Department and reversing the Superior Court cited to facts from the brief of *amicus* Natural Selection, et. al. Opinion, 8.

Wahkiakum County now seeks review from this court.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Pursuant to RAP 13.4(b)(1), the Decision of the Court of Appeals is in Conflict with Decisions of the Supreme Court Establishing the Standard of Review of a City or County Ordinance's Constitutionality.

The first holding of the panel in Division II contaminated the entire remaining opinion. At page 4 of its opinion, it announces it will review this case de novo using the standard "as a matter of law." In a footnote, it explicitly refuses to use the standard of "unconstitutional beyond a reasonable doubt." The panel is half right. Appellate courts review summary judgment motions de novo, owing no duty of deference to the trial court. Smith v. Safeco, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). But "the appellate court engages in the same inquiry as the trial court." Id., quoting Jones v. Allstate Ins. Co., 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). And, as that inquiry is one into the constitutionality of a duly passed municipal ordinance, it is an inquiry that must be made in a certain way, with certain presumptions.

This court has made it clear, in a line of cases that goes back at least to 1921, that to find the enactment of a city or county unconstitutional requires proof of unconstitutionality beyond a reasonable

doubt. This, propounded by this court in 2010, was before the Court of Appeals, having been quoted in its entirety in the County's response to *amicus* Northwest Biosolids Management Association:

> In Washington, it is well established that statutes are presumed constitutional and that a statute's challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt. Wash. Fed'n of State Employees v. State, 127 Wash.2d 544, 558, 901 P.2d 1028 (1995). This standard, that we will not declare a statute unconstitutional "unless its conflict with the constitution is plain beyond a reasonable doubt," stretches all the way back to our holding in Parrott & Co. v. Benson, 114 Wash. 117, 122, 194 P. 986 (1921). This standard has appeared throughout our jurisprudence. See State v. Maciolek, 101 Wash.2d 259, 263, 676 P.2d 996 (1984); see also State v. Aver, 109 Wash.2d 303, 306–07, 745 P.2d 479 (1987). We discussed the reasoning behind the standard in Island County v. State, 135 Wash.2d 141, 147, 955 P.2d 377 (1998):
>
> "[T]he "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution.... Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution."
>
> We later reaffirmed our understanding that a demanding standard is justified because "we assume the Legislature considered the constitutionality of its enactments and afford great deference to its judgment." Tunstall v. Bergeson, 141 Wash.2d 201, 220, 5 P.3d 691 (2000).
>
> School Districts' Alliance for Adequate Funding of Special Educ. v. State, 170 Wn.2d 599, 605-06, 244 P.3d 1, 4-5 (2010).

The burden of the challenger to prove the unconstitutionality of a duly adopted enactment applies as strongly to ordinances as statutes. This court has applied it to city ordinances in Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988) (Seattle ordinance proscribing disorderly conduct); City of Pasco v. Shaw, 161 Wn.2d 450, 458, 166 P.3d 1157 (2007) (city ordinance requiring landlords to obtain a certificate of inspection). This court has applied it to counties in Citizens for More Important Things v. King Cnty., 131 Wash. 2d 411, 413, 932 P.2d 135, 136 (1997) (county ordinance regarding the Mariners stadium); Kitsap Cnty. v. Mattress Outlet/Gould, 153 Wash. 2d 506, 509, 104 P.3d 1280, 1283 (2005) (county sign ordinance). And the burden was litigated in trial briefs. E.g., p. 4-5 of Wahkiakum's initial memorandum, attached as Appendix F. Further, the Superior Court applied the proper burden in its decision. Appendix D, p. 3. By refusing to apply the proper burden, the Court of Appeals denigrates the rulings of this court and places into doubt each and every holding in the Court of Appeals's opinion.

For instance, at 6-9 of its opinion, the Division II panel opines that Wahkiakum County "prohibits what the State permits." This, of course, was heavily litigated below. The County's point was that in this case the line between what constitutes "prohibition," which is unconstitutional, and

"further regulation," which is both legal and expected, is one on which reasonable minds can differ, and thus one which cannot sustain a burden of "beyond a reasonable doubt." E.g., Brief of Respondent, 11 et. seq (attached as Appendix G).

> "A county or local ordinance conflicts with state law when it permits or licenses that which the statute forbids and prohibits, and vice versa. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits. *Where a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders* but they may not prohibit same outright."
>
> Weden v. San Juan County, 135 Wash.2d 678, 720, 958 P.2d 273 (1998) (emphasis added) (internal citations omitted).

This reasoning carried the day in Welch v. Board of Supervisors of Rappahannock County, Va., 888 F.Supp. 753, 759 (W.D.Va.,1995): "Here, the County has not passed a complete ban on sewage sludge within its boundaries; it simply has banned one of three possible methods of use or disposal. [The other two are burial and incineration.] Regardless of the EPA's preference for land application, the Ordinance does not conflict with the federal standards for use or disposal of sewage sludge."

The Court of Appeals's duty in this case was to harmonize the county's ordinance with the state's statutory scheme if possible and to find reasonable ways to uphold the ordinance. King County v. Taxpayers of King County, 133 Wash.2d 584, 612, 949 P.2d 1260 (1997) [harmonize if

possible], Johnson v. Johnson, 96 Wash.2d 255, 258, 634 P.2d 877, 882 (1981), State v. Immelt, 150 Wash.App. 681, 686, 208 P.3d 1256, 1259 (2009) [beyond a reasonable doubt]. But the panel does not mention the Welch decision, which perfectly harmonizes a restriction on land application of class B biosolids with a statewide statutory scheme. If the panel were using the correct burden of persuasion, then by finding to the contrary of Welch in this case, it was literally accusing that decision, and thus that federal court, of being not just unpersuasive but unreasonable.

The Court of Appeals failed to apply a number of additional presumptions in favor of the ordinance that were cited by the County in its brief at 4 et. seq:

- All legally necessary facts required to uphold constitutionality are presumed to exist. Johnson, supra.

- "[I]nterpret ordinances in a manner which upholds their constitutionality if possible." Tukwila School Dist. No. 406 v. City of Tukwila, 140 Wash.App. 735, 743, 167 P.3d 1167 (2007), citing Leonard v. City of Spokane, 127 Wash.2d 194, 197-98, 897 P.2d 358 (1995).

- "*Every presumption* will be in favor of constitutionality." Id. (citing Winkenwerder v. City of Yakima, 52 Wash.2d 617, 328 P.2d 873

(1958)), HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services, 148 Wash.2d 451, 478, 61 P.3d 1141, 1155 (2003) [emphasis added].

- "A statute will not be construed as taking away the power of a municipality to legislate unless this intent is *clearly and expressly stated.*" State ex rel Schillberg v. Everett District Court, 92 Wn.2d 106, 108, 594 P.2d 448 (1979) [emphasis added].

- Note, too, that the Department of Ecology challenged the Ordinance on its face, not as applied. "[A] facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied." Tunstall v. Bergeson, 141 Wn.2d 201, 221, 5 P.3d 691 (2000) (italics in original), quoting Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1012, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992)(Scalia, J. dissenting). Thus, here, the court must be "convinced beyond a reasonable doubt that there is no set of circumstances in which" the ordinance could be constitutional. Id.

The Court of Appeals ignores these controlling authorities, and also fails to apply the correct standard in its interpretation of legislative intent – simply reading and interpreting legislation according to its preference rather than interpreting "in a manner which upholds...

constitutionality if possible" per Tukwila, supra. See, e.g., the court's opinion at 10, purporting to describe the effect of RCW 70.95J.005(2). "When enacting the statutory scheme for the disposal of biosolids, the legislature directed Ecology to ensure that biosolids are 'reused as a beneficial commodity' to the maximum extent possible." RCW 70.95J.005(2) actually reads as follows: "The legislature declares that a program shall be established to manage municipal sewage sludge and that the program shall, to the maximum extent possible, ensure that municipal sewage sludge is reused as a beneficial commodity *and is managed in a manner that minimizes risk to public health and the environment.*" [Emphasis added.]

The Court of Appeals claims the ordinance frustrates the purpose of the legislature as divined through RCW 70.95J.005(2), but that is because it strikes out an entire phrase. The statute as a whole shows that the legislature meant, at least as strongly as it did that sewage sludge be reused, that public health be protected – an acknowledged purpose of the county's ordinance. The Court of Appeals's failure to acknowledge the actual content of the laws it purports to interpret are contrary to this court's requirement to interpret the statute in favor of the county. E.g., Schillberg, supra, Tukwila, supra.

The entire opinion of the Court of Appeals is contaminated by its failure to acknowledge that its burden is not to discover a single way the Wahkiakum County ordinance can be struck down, but to foreclose every way it could reasonably be upheld. This court should accept review and apply the correct standard, not just for the sake of the county, but for the other municipalities that will, if this case is upheld, be challenged in the exercise of their police powers by special interests emboldened by the appellate decision herein.

Pursuant to RAP 13.4(b)(1), the Decision of the Court of Appeals is in Conflict with Decisions of the Supreme Court Establishing the Standard of Review for Conflict Analysis

Up until this case, the courts have used the following test to determine whether an ordinance conflicts with law: "An ordinance must yield to a statute on the same subject on either of two grounds: if the statute preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the two that cannot be harmonized." King County v. Taxpayers of King County, 133 Wash.2d 584, 612, 949 P.2d 1260 (1997), citing Brown v. Yakima, 116 Wash.2d 556, 559, 807 P.2d 353 (1991). (The Department denies it has preempted the field. See Page 1 of its Answer to Amicus Brief of Lewis County, Appendix H herein.)

The Court of Appeals now reads the case of Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 699, 169 P.3d 14 (2007), to provide that "an ordinance conflicts with state law if a county exercises power that the relevant state law did not confer to the counties." Opinion, 6. This misreads Biggers to overrule Schillberg, supra, and creates a new prong of conflict analysis that greatly weakens the police power of municipalities.

This court has held that the state constitution "Article 11, §11 is a direct delegation of police power. [This power is] as ample within its limits as that possessed by the [state] legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation reasonable and consistent with the general laws." Brown v. City of Yakima, 116 Wash.2d 556, 559, 807 P.2d 353, 354 (1991), citing Haas v. Kirkland, 78 Wash.2d 929, 932, 481 P.2d 9 (1971) (quoting Detamore v. Hindley, 83 Wash. 322, 326, 145 P. 462 (1915)). Thus, the legislature need not "confer" power to municipalities.

In Biggers, this court did not change that rule. Biggers was decided on the ground that the subject the municipality was regulating was outside its police power: that the local governing body was attempting to regulate shoreline management, and that our state constitution granted exclusive power to the State to manage shorelines:

> Article XVII, section 1 of the Washington Constitution declares that shorelines were originally owned by the state, and therefore subject to state regulation. Even after sale or lease of shorelines, the state continues to hold remaining sovereign interests of the public. Indeed, the SMA was expressly based on the proposition that shorelines are of "statewide significance." *Local governments do not possess any inherent constitutional police power over state shoreline use.*
>
> Biggers, 162 Wash.2d at 694 (emphasis added).

Biggers was not a case in which the local government had any power to regulate what it purported to regulate. But here, there is no dispute that the police power is being used to regulate biosolids; the only question is whether the county's and the state's uses of their police power are in conflict. The Biggers case is therefore inapplicable here. But more importantly for this court as it determines whether to grant review, the Court of Appeals has used an incorrect reading of Biggers to create a new prong of conflict analysis that undercuts this court's prior rulings. This court has held that the counties' police power is as "ample within its limits as that possessed by the legislature itself." Brown, supra. The Court of Appeals attempts to replace that rule with one that requires a "statutory scheme" to "confer" power to counties. Opinion, 6. This not only lacks support from the Biggers opinion, it directly contradicts this court's holding in Weden that a county may "further regulate" within a statutory scheme. Weden, 135 Wash.2d at 720.

It is hard to overemphasize the change the Court of Appeals has wrought on the relative status of cities and counties *vis a vis* the Washington state legislature. Cities and counties have long been accustomed to the full exercise of their constitutionally-derived powers, even in areas also regulated by the state. See, e.g., Eze, supra:

> Washington case law... establishes that a local ordinance does not conflict with a state statute in the constitutional sense merely because one prohibits a wider scope of activity than the other. Republic v. Brown, 97 Wash.2d at 919, 652 P.2d 955; State ex rel. Schillberg v. Everett Dist. Justice Court, 92 Wash.2d 106, 108, 594 P.2d 448 (1979); Bellingham v. Schampera, 57 Wash.2d [106] at 111, 356 P.2d 292; State v. Rabon, 45 Wash.App. 832, 836–38, 727 P.2d 995 (1986). These principles have been succinctly stated as follows:
>
> " 'The statute, as well as the ordinance, in the case at bar, is prohibitory, and the difference between them is only that the ordinance goes farther in its prohibition—but not counter to the prohibition under the statute. The city does not attempt to authorize by this ordinance what the Legislature has forbidden; nor does it forbid what the Legislature has expressly licensed, authorized, or required. * * * Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail.' "
>
> (Citations omitted.) *Schampera*, 57 Wash.2d at 111, 356 P.2d 292, quoted in Republic v. Brown, 97 Wash.2d at 919, 652 P.2d 955, and in State v. Rabon, 45 Wash.App. at 836, 727 P.2d 995.
>
> City of Seattle v. Eze, 111 Wash. 2d at 33.

The Court of Appeals reverses this long-established rule without explanation and replaces it with a requirement that cities and counties stay out of any legislative business the State has addressed unless the State invites cities and counties to participate.

This court should accept review to clarify that the state legislature need not "confer" the power to legislate upon counties and cities and that the burden of persuasion of "beyond a reasonable doubt" is indeed a heavier burden than that in the traditional summary judgment motion – two rulings of this court the Court of Appeals has failed to follow. As the highest court capable of determining matters under the state constitution, this court should accept review pursuant to RAP 13.4(b)(1) and (3).

A Matter of Public Interest

This court should also accept review pursuant to RAP 13.4(b)(4). This case presents more than an important issue of state constitutional law involving the sovereignty of counties and cities, and it is more than a case in which the Court of Appeals has contradicted this court's explicit rulings. It is both of those things, but it is also a matter of topical interest. Biosolids are not the only statutory scheme hitting the courts lately as local jurisdictions struggle to cope with putative statewide mandates.

The issues developed here have already found their way into litigation between municipalities and private parties regarding local regulation of recreational marijuana. Attached hereto as Appendix I is the State of Washington's opinion regarding local regulation of marijuana up to and including "bans." The court will observe the similarities between it

and the county's briefing at the trial and appellate level. This reasoning is being tested in cases that seem destined to arrive in this court, as the cities of Fife, Kennewick, and Wenatchee have successfully defended their marijuana regulations in their respective superior courts. See, e.g., Appendix I (Wenatchee decision), Appendix J (Fife oral opinion).

Each of these marijuana cases involves a comprehensive statutory scheme, and the cases of Weden and Schillberg ("A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated." State ex rel Schillberg v. Everett District Court, 92 Wn.2d 106, 108, 594 P.2d 448 (1979)) were successfully interposed in support of regulation of marijuana that constitutes more of a "ban" than the county's ordinance, in that the county permits biosolids disposal within its boundaries, so long as that disposal does not take the form of land application of class B biosolids, while each marijuana ordinance prohibits the sale of marijuana in all forms, within municipal boundaries.

These issues are a matter of intense public scrutiny nowadays, which qualifies this case for review pursuant to RAP 13.4(b)(4).

RAP 9.12 Violation

Over the County's objection, the Court of Appeals also based its opinion in part on facts it cited from the brief of an *amicus*. See its opinion at 8-9. This court has addressed such practices.

> "Generally, an appellate court will not consider an issue not raised below. Rones v. Safeco Ins. Co., 119 Wash.2d 650, 656, 835 P.2d 1036 (1992); Hansen v. Friend, 118 Wash.2d 476, 485, 824 P.2d 483 (1992). This rule also applies to attempts to raise factual allegations at the appellate level that were not before a trial court in granting summary judgment. See Kendall v. Douglas, Grant, Lincoln, & Okanogan Cys. Pub. Hosp. Dist. 6, 118 Wash.2d 1, 8–10, 820 P.2d 497 (1991) (appellate court refused to consider evidence outside of the record submitted by party opposing summary judgment). To do otherwise would be to undermine the rule that an appellate court is to engage in the same inquiry as the trial court in reviewing an order of summary judgment."
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> WA Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgmt., 121 Wash. 2d 152, 163, 849 P.2d 1201, 1206-07 (1993).

This is the case that this court feared when it wrote of the danger of undermining the standard of review. The Court of Appeals here relied upon facts not adduced at the trial level to reverse the trial court's summary judgment order. This court has propounded rules of procedure to prevent this. RAP 9.12.

The notion that a summary judgment motion can be heard with new facts in the Court of Appeals is not only novel, it is toxic to the adversary process. At the level of the Superior Court, there are provisions that permit facts that are contested to be tried out before a trier of fact. But here at the appellate level, the facts were accepted by the Court of Appeals against the motion of Wahkiakum County, without the County's

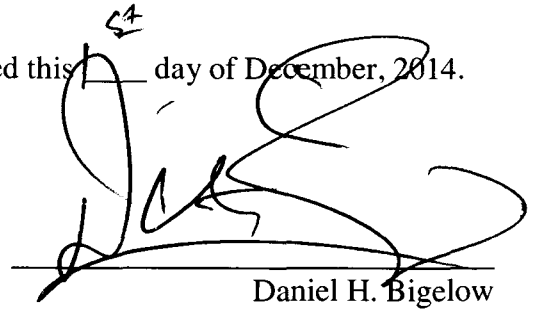
having any opportunity to contest them. This is a violation of the Court of Appeals's duty under Johnson, supra, to resolve the facts in favor of the County, but it is also a more fundamental violation of how facts are established in any court. No court gets to choose its record, except through the fact-finding process.

Besides violating this court's rules and precedents, this Division II panel also placed itself in direct conflict with a decision of Division I, which has ruled against such conduct. Green v. Normandy Park, 137 Wn. App. 665, 678, 151 P.3d 1038, 1044 (2007). Therefore, its action should be reviewed pursuant to both RAP 13.4(b)(1) and (2).

VI. CONCLUSION

For the reasons heretofore set out, the County of Wahkiakum respectfully prays this court accept review herein and engage in de novo review of the constitutionality of the ordinance in quo, using the proper standard of review, engaging in all the required factual and legal presumptions in favor of constitutionality, and without considering any fact outside the record of the trial court herein. Upon review, the County prays the court reverse the Court of Appeals and reinstate the ruling and order of the Cowlitz County Superior Court upholding the constitutionality of the Ordinance.

Respectfully submitted this 4 day of December, 2014.



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CERTIFICATE

I certify that I mailed a copy of the foregoing Petition for Review to the following addresses, postage prepaid, on December 15, 2014.

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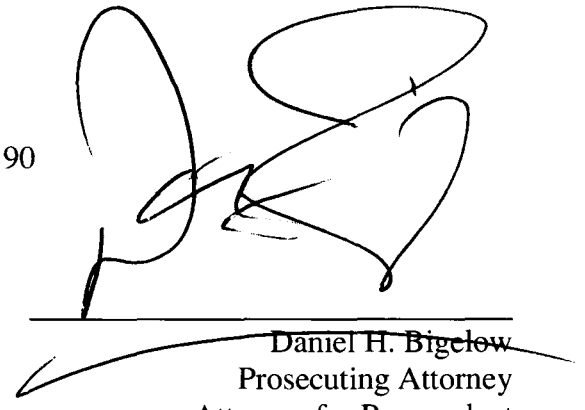

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APPENDIX A:

Court of Appeals Decision

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant, v. WAHKIAKUM COUNTY, a political subdivision of Washington State, Respondent.	No. 44700-2-II PUBLISHED OPINION

LEE, J. — The Washington State Legislature has charged the Department of Ecology (Ecology) with executing the state's biosolids program to facilitate and encourage recycling, rather than disposal, of sewage waste. In 2011, Wahkiakum County passed an ordinance banning the use of the most common class of biosolids within the County. Ecology filed an action for an injunction and declaratory judgment arguing that the County's ordinance conflicts with state law, and, thus, is unconstitutional under article XI, § 11 of the Washington Constitution which prohibits local government from enacting ordinances that is "in conflict with general laws." The superior court granted the County's cross-motion for summary judgment declaring the ordinance constitutional. Ecology appeals.

We hold that the County's ordinance is unconstitutional because it irreconcilably conflicts with state law. Accordingly, we reverse the superior court's order granting summary judgment in favor of the County and remand for entry of summary judgment in favor of Ecology.

FACTS

In 1992, the Washington State Legislature enacted chapter 70.95J RCW establishing the state's biosolids program. The legislature designated Ecology as the body responsible for implementing and managing the biosolids program. RCW 70.95J.020. The purpose of the biosolids program is to recycle sewage waste by retreating it and using it as a "beneficial commodity" in land applications "in agriculture, silviculture, and in landscapes as a soil conditioner." RCW 70.95J.005(1)(d), (2); .010(1) and (4).

There are four classes of biosolids: exceptional quality (EQ), class A, class B, and septage. Because of the time spent in a septic tank before collection, septage is essentially the equivalent of class B biosolids. Class B biosolids are treated with processes that eliminate at least 99 percent of pathogens. Class A biosolids are treated with processes that reduce pathogens to below detectable levels. EQ biosolids are class A biosolids that are additionally treated to reduce other contaminants. [1] Class A biosolids comprise approximately 12 percent of biosolids produced in Washington; class B biosolids comprise approximately 88 percent of biosolids.

Because pathogens have not been completely eliminated from class B biosolids, their use is restricted. WAC 173-308-210(5). Public access to and crop harvesting from land treated with class B biosolids are restricted for at least 30 days while natural environmental processes remove remaining pathogens from the biosolids. WAC 173-308-210(5)(a). Class B biosolids are used in farming, land reclamation, and other applications where public access restrictions are practical. In

[1] EQ biosolids are used in the same manner as class A biosolids, and septage is used in the same manner as class B biosolids. For the purpose of clarity, our references to class A refers to both class A and EQ and our references to class B refers to both class B and septage.

contrast, class A biosolids are limited to land applications where public access restrictions are impractical—primarily home, lawn, and garden use. Biosolids can also be disposed of using two other methods: incineration and landfill disposal. However, landfill disposal is prohibited except in cases where it is economically infeasible to use or dispose of the material other than in a landfill. RCW 70.95.255; WAC 173-308-300(9).

In 2011, the County passed Ordinance No. 151-11 (the ordinance), which states, in relevant part, "No Class B biosolids, septage, or sewage sludge may be applied to any land within the County of Wahkiakum." Clerk's Papers (CP) at 49. Ecology filed a complaint against the County alleging that the ordinance violated article XI, § 11 of the Washington Constitution, and seeking a declaratory judgment and an injunction against the County's implementation of the ordinance. Ecology filed a motion for summary judgment, and the County filed a cross-motion for summary judgment. The superior court granted the County's cross-motion for summary judgment. Ecology appeals.[2]

ANALYSIS

The issue before us is whether the County's ordinance banning the land application of all class B biosolids violates article XI, § 11 of the Washington Constitution. We hold that it does.

[2] On appeal, several parties have been granted permission to file amicus briefs in this case. Lewis County filed an amicus curiae brief in support of the County. Natural Selection Farms, Inc. and Boulder Park, Inc. (collectively the "farm amici"), and Northwest Biosolids Management Association, National Association of Clean Water Agencies, Washington Association of Sewer and Water Districts, and the town of Cathlamet (collectively the "public amici") have filed amicus briefs in support of Ecology.

I. STANDARD OF REVIEW

We review an order granting summary judgment de novo. *Weden v. San Juan County*, 135 Wn.2d 678, 689, 958 P.2d 273 (1998) (citing *Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 392, 879 P.2d 276 (1994)). The superior court properly grants a motion for summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). Here, there are no disputed facts; the issue before us is whether the County's ordinance violates article XI, §11 of the Washington Constitution.

We presume that enacted ordinances are constitutional. *Weden*, 135 Wn.2d at 690 (quoting *Holmes Unlimited, Inc. v. City of Seattle*, 90 Wn.2d 154, 158, 579 P.2d 1331 (1978)).[3] Whether an ordinance is constitutional is a question of law that we review de novo. *Weden*, 135 Wn.2d at

[3] The County asserts that because ordinances are presumed constitutional, Ecology bears the burden of proving that the ordinance is unconstitutional beyond a reasonable doubt. According to the County this standard imposes a higher burden on Ecology. The County asserts that under this burden, "it is not enough even for [Ecology] to prove it is right. It must prove *it cannot possibly be wrong.*" Br. of Resp't at 9.

The County not only misstates the "beyond a reasonable doubt" standard, but it provides no citation any authority supporting its contentions that "beyond a reasonable doubt" means that the party bearing the burden must prove that it cannot be wrong. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). In this case, such an assumption is particularly appropriate because Washington courts do not define beyond a reasonable doubt by requiring the party bearing the burden to prove that it is not wrong. Therefore, although the County is correct that we presume the constitutionality of an ordinance, the County presents no valid reason for (1) departing from the standards of review articulated in cases addressing whether an ordinance conflicts with state laws, or (2) imposing the unrealistically high burden on the Department to prove that it cannot possibly be wrong in order to prevail on its claim.

693 (citing *City of Seattle v. Williams*, 128 Wn.2d 341, 346-47, 908 P.2d 359 (1995); *Washam v. Sonntag*, 74 Wn. App. 504, 507, 874 P.2d 188 (1994)).

II. THE COUNTY'S ORDINANCE CONFLICTS WITH STATE LAW

Article XI, § 11 of the Washington Constitution states, "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." An ordinance is constitutional unless "(1) the Ordinance conflicts with some general law; (2) the Ordinance is not a reasonable exercise of the County's police power; or (3) the subject matter of the Ordinance is not local." *Weden*, 135 Wn.2d at 692.

Ecology argues that the County's ordinance violates article XI, § 11 because it conflicts with the general laws governing the disposal and land application of biosolids. We agree.

An ordinance conflicts with a state law if the state law "'preempts the field, leaving no room for concurrent jurisdiction,' or 'if a conflict exists such that the two cannot be harmonized.'" *Weden*, 135 Wn.2d at 693 (quoting *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 561, 807 P.2d 353 (1991)). In *Weden v. San Juan County*, our Supreme Court stated:

> "'In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.' *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 [(1923)]. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits,'" *State v. Carran*, 133 Ohio St. 50, 11 N.E.2d 245, 246 [(1937)]."

135 Wn.2d at 693 (quoting *City of Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292, (1960)). An ordinance also irreconcilably conflicts with state law if it thwarts the legislature's purpose. *Diamond Parking, Inc. v. City of Seattle*, 78 Wn.2d 778, 781, 479 P.2d 47 (1971) ("We are of the opinion that the conflict here is irreconcilable. If the ordinance is given the effect for

which the appellant contends, the legislative purpose is necessarily thwarted."). Finally, an ordinance conflicts with state law if a county exercises power that the relevant state law did not confer to the counties. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 699, 169 P.3d 14 (2007).

Reading the case law regarding conflict between a county ordinance and state law as a whole, the County's ordinance conflicts with the state law and is unconstitutional if it (1) prohibits what the state law permits, (2) thwarts the legislative purpose of the statutory scheme, or (3) exercises power that the statutory scheme did not confer on local governments. Here, Ecology has demonstrated that all three of these scenarios render the County's ordinance unconstitutional. Accordingly, the superior court erred by granting summary judgment in the County's favor.

A. THE COUNTY'S ORDINANCE PROHIBITS WHAT STATE LAW PERMITS

As stated above, a county ordinance that prohibits what state law permits is in conflict with general laws and in violation of article XI, § 11. *Weden*, 135 Wn.2d at 693. Ecology argues that the County's ordinance prohibits what the state law permits because state law, and the corresponding Department regulations, create a comprehensive permitting scheme for the land application of class B biosolids. Ecology is correct.

In *Biggers*, the City of Bainbridge Island passed a moratorium on shoreline development. 162 Wn.2d at 688-90. Our Supreme Court held that the moratorium irreconcilably conflicted with the state's Shoreline Management Act (SMA)[4] because the SMA created a comprehensive regulatory scheme for permitting shoreline development. *Biggers*, 162 Wn.2d at 697-98.

[4] Ch. 90.58 RCW.

Similarly, in *Diamond Parking*, our Supreme Court held that the City of Seattle's ordinance prohibiting the transfer of licenses irreconcilably conflicted with state law allowing the rights and privileges of one corporation to transfer to another corporation upon merger. 78 Wn.2d at 786. The court reasoned that the state had created a comprehensive statutory scheme governing corporations and the City could not prohibit what state corporate law allowed. *Diamond Parking*, 78 Wn.2d at 781-82.

Here, the legislature directed Ecology to create a comprehensive regulatory scheme to manage biosolids, including land application of class B biosolids. *See* ch. 70.95J RCW. Under the regulatory scheme, Ecology may issue permits for land application of class B biosolids, provided the application for the permit meets certain standards. RCW 70.95J.025, .020. Thus, Ecology had the authority to regulate and permit the use and disposal of class B biosolids. And, Ecology's regulations have the force of state law. *See Gen. Tel. Co. of NW, Inc. v. City of Bothell*, 105 Wn.2d 579, 583, 716 P.2d 879 (1986). Because the County's ordinance conflicts with state law by banning what has been permitted, it impermissibly prohibits what state law explicitly permits.

The County's arguments to the contrary are unpersuasive. First, the County argues that it has not prohibited all land application of biosolids, but rather it has simply imposed further, more stringent regulations, pursuant to its own police power. However, although the County's regulation allows for land application of class A biosolids, the County does not address the fact that the ordinance prohibits any land application of class B biosolids even though the state scheme explicitly sets criteria for permitting land application of class B biosolids. Even if the County had authority to more strictly regulate land application of biosolids, it does not have the authority to

entirely prohibit the land application of class B biosolids when such application is allowed under a comprehensive regulatory scheme that has been enacted in accordance with legislative directive. *Gen. Tel.*, 105 Wn.2d at 586-87.

The County relies on *Weden* to argue that a county can prohibit an activity even if state law allows a person to obtain a permit for that activity. But the County's reliance on *Weden* is misplaced. In *Weden*, San Juan County passed an ordinance prohibiting the use of personal watercraft in San Juan County waters. 135 Wn.2d at 684. Users of personal watercraft argued that the ordinance was invalid because it conflicted with chapter 88.02 RCW governing registration of water vessels. *Weden*, 135 Wn.2d at 694-95. Our Supreme Court rejected this contention stating:

> The Legislature did not enact chapter 88.02 RCW to grant [personal watercraft] owners the right to operate their [personal watercraft] anywhere in the state. The statute was enacted to raise tax revenues and to create a title system for boats.

Weden, 135 Wn.2d at 694.

Here, the statutes and regulations managing biosolids are far more complex than simply generating revenue or creating a title system. The legislature specifically directed Ecology to adopt rules to implement a biosolids management program that "to the maximum extent possible" ensures that biosolids are "reused as a beneficial commodity." RCW 70.95J.005(2), .020. Under that directive, Ecology adopted a regulatory scheme that specifically grants permits for land application of class B biosolids and, thus, created a right to land application of class B biosolids when a permit is acquired. As the farm amici explain, the permitting process for land application of biosolids is in-depth and time consuming. In order to obtain a permit for land application of

biosolids the farm must submit a Site-Specific Land Application Plan that takes into account "site boundaries, proposed staging areas, location of all water bodies and wells, and buffer zones to protect sensitive areas." Br. of Farm Amici at 6. The Site-Specific Land Application Plan is also subject to public comments and public meetings. Permit applicants must work closely with Ecology when attempting to obtain a permit for land application of biosolids. Farmers have come to rely on the well-established and uniform state regulation of land application of biosolids for planning and investment.

As the current scope of the state's permitting scheme demonstrates, the permitting of land application of biosolids does significantly more than generate revenue or create a title system. *Weden* does not support the County's argument.

B. THE COUNTY'S ORDINANCE THWARTS THE LEGISLATURE'S PURPOSE

Ecology also argues that the County's ordinance irreconcilably conflicts with state law because enactment of the County's ordinance thwarts the legislature's purpose in enacting state law. Specifically, Ecology argues that the legislature intends that sewage waste be recycled and used for land application rather than be disposed of in a landfill or incinerated. Because the County's ordinance bans land application of all class B biosolids, which is the overwhelming majority of biosolids produced in Washington, it effectively prohibits land application of biosolids, especially land application of biosolids in farming and land reclamation. Moreover, as Ecology points out, if local governments have the power to ban land application of biosolids, land application of biosolids could be banned throughout the state, clearly thwarting the legislature's purpose of recycling biosolids through land application rather than landfill disposal or incineration.

The County's ordinance thwarts the express purpose of the legislature and, thus, is irreconcilable with state law and unconstitutional under article XI, § 11.

Ecology states that the statutory scheme for the disposal of biosolids demonstrates a clear legislative preference for the land application of biosolids rather than incineration or disposal in a landfill. Ecology is correct. When enacting the statutory scheme for the disposal of biosolids, the legislature directed Ecology to ensure that biosolids are "reused as a beneficial commodity" to *the maximum extent possible*. RCW 70.95J.005(2). The legislature's stated intent was to increase the recycling and reuse of biosolids, and it tasked Ecology with carrying out that mission.

Based on the undisputed facts in the record, class B biosolids comprise approximately 88 percent of the biosolids produced in the state. Ecology argues that by banning class B biosolids, the County has essentially banned the land application of biosolids within the County. The County disputes this argument by stating that 12 percent of biosolids produced in the state (class A) can still be used within the County. However, as the record shows, class A biosolids have a specific purpose: home lawn and garden, and application where public restriction is not plausible. Because class A biosolids have a specific purpose, they are not meant to be used in the same manner as class B biosolids. Therefore, preventing the land application of an entire class of biosolids specifically intended for land application thwarts the legislature's stated purpose of reusing biosolids to the maximum extent possible.

Further, Ecology argues that upholding the County's ordinance thwarts the legislature's purpose by allowing any county in the state to prohibit land application of class B biosolids. The County responds that Ecology's argument must fail because Ecology cannot show that all counties would ban the land application. But, the County fails to recognize the salient point in Ecology's

argument—if all counties had the power to determine whether to ban land application of class B biosolids, then the entire statutory and regulatory scheme enacted to maximize the safe land application of biosolids would be rendered meaningless. *See City of Los Angeles v. County of Kern*, 214 Cal. App. 4th 394, 154 Cal. Rptr. 3d 122 (2013), *rev'd on other grounds*, 59 Cal. 4th 618, 328 P.3d 56 (2014).[5] The County's ordinance thwarts the legislature's purpose by usurping state law and replacing it with local law. Therefore, we hold that the County's ordinance is unconstitutional under article XI, § 11.

Ecology also has the authority to prohibit the disposal of biosolids in landfills unless other uses or disposal methods are economically infeasible. RCW 70.95.255. Ecology has exercised this authority to prohibit the disposal of biosolids in landfills through WAC 173-308-300. Under WAC 173-308-300(9) a permit must be acquired in order to dispose of biosolids in a landfill. A permit may not be acquired unless the applicant can demonstrate "to the satisfaction of the

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[5] Specifically the court stated:

> Land application of biosolids is a widely used, widely accepted, comprehensively regulated method by which municipalities fulfill their obligation to reduce the flow of waste to landfills. . . . One jurisdiction's action to ban it, and to interfere with other jurisdictions' efforts to comply with their CIWMA obligations, is not consistent with a statutory scheme that presumes all jurisdictions will have access to crucial waste-stream-reduction methods. If we held that Kern County is empowered to ban land application of biosolids, we would necessarily be implying that all counties and cities are empowered to do the same. . . . Kern County asks us to adopt a position that would authorize all local governments to say "not here." That principle would not be consistent with a statute that requires all local governments to adhere to waste management plans in which recycling is maximized.

City of Los Angeles, 154 Cal. Rptr. 3d at 139. The court also rejected Kern County's characterization of the City's argument as a "slippery slope" argument and as based on speculation. *City of Los Angeles*, 154 Cal. Rptr. 3d at 139 n.12. The California Supreme Court later reversed the Court of Appeals based exclusively on a procedural issue regarding tolling of the statute of limitations while a claim is pending in federal court. *City of Los Angeles v. County of Kern*, 59 Cal. 4th 618, 328 P.3d 56 (2014).

department that options for beneficial use are economically infeasible." WAC 173-308-300(9)(a).[6] A ban on land application of biosolids causes a direct conflict with the mandate that biosolids be disposed of as a beneficial commodity rather than disposal in a landfill. Thus, the County's ban on land application of class B biosolids does not just thwart the legislature's purpose to use biosolids to the maximum extent possible, it also thwarts the legislature's purpose to prevent disposal of biosolids in landfills absent economic infeasibility.

C. THE COUNTY HAS EXERCISED POWER NOT CONFERRED TO LOCAL GOVERNMENTS UNDER THE STATUTORY SCHEME

The County's ordinance also clearly exercises power the legislature did not confer on local governments under the statutory scheme for management or disposal of biosolids. The County argues that it has the authority to further regulate land application of biosolids under WAC 173-308-030(6), including banning land application of class B biosolids. Although we agree that the County may have the authority to further regulate land application of biosolids to comply with other laws, we do not agree that the County has the authority to completely ban the land application of class B biosolids when such a ban conflicts with state law.

WAC 173-308-030(6) requires facilities and sites where biosolids are applied to land to comply with other applicable federal, state and local laws, regulations and ordinances, such as zoning and land use requirements. This regulation recognizes that land application of biosolids does not exist in a vacuum, but rather, that there are other laws that may also apply to facilities and sites engaging in land application of biosolids. This is reflected in the other sections of WAC 173-

[6] Although incineration is another method of disposing of biosolids, the County has not presented any argument or authority suggesting that disposal of biosolids by incineration is considered an alternative beneficial use that would further the legislature's purpose.

308-030 which, for example, recognize that fertilizers also have to comply with Department of Agriculture requirements and transportation of biosolids also have to comply with regulations of the Washington State Utilities and Transportation Commission. Read in context, WAC 173-308-030(6) provides for additional local regulation required under other applicable laws.[7] Thus, the County may regulate biosolids if necessary to comply with other applicable laws. However, the County does not have the authority to completely ban the land application of all class B biosolids when that ban conflicts with state law.

The County further argues that the legislature intended for the counties to be the ultimate decision maker regarding the use of biosolids because RCW 70.95J.007[8] references the regulatory requirements under the federal Clean Water Act, which includes a savings clause that states, in relevant part, "The determination of the manner of disposal or use of sludge is a local determination." 33 U.S.C. § 1345(e). We disagree.

Even if we assume, without deciding, that this savings clause applies after a state has received delegation from the EPA to administer a State permitting program for sewage sludge disposal, a local determination still must comply with our state Constitution. When a local

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[7] For example, the Growth Management Act (GMA) requires all counties to protect critical areas, surface water, and groundwater resources. RCW 36.70A.060(2), .070(5)(c)(iv). If necessary to protect critical areas, it is conceivable that the county could regulate the application of biosolids in relation to the mandates of the GMA. And, WAC 173-308-030(6) would require facilities and sites to comply with these regulations.

[8] RCW 70.95J.007 states:

> The purpose of this chapter is to provide the department of ecology and local governments with the authority and direction to meet federal regulatory requirements for municipal sewage sludge. The department of ecology may seek delegation and administer the sludge permit program required by the federal clean water act as it existed February 4, 1987.

ordinance prohibits what the state law explicitly permits or thwarts the state's legislative purpose, as the County's ordinance does here, it violates our State's constitution. As shown above, counties have the authority to adopt "all such local police, sanitary and other regulations as are not in conflict with general laws." WASH. CONST. art. XI, § 11. However, as previously discussed, the County lacked the authority under our state Constitution to adopt this ordinance. Thus, even if we assume that the savings clause of the federal Clean Water Act applies to these issues, the "local determination" referenced in the savings clause must be one that Wahkiakum County has the authority to make. As shown the County lacked authority to adopt the ordinance in question.

The County also argues that the legislature's decision to strike a provision related to a county's authority under the biosolids statute demonstrates its intent to have the counties be the ultimate authority on the management of biosolids. The County relies on a statement in a House Bill Report on H.B. 2640, 52d Leg., Reg. Sess. (Wash. 1992). In the section comparing the original bill to the substitute bill, the report states, "The substitute bill also deletes a provision restricting local government's ability to ban the use or disposal of sludge." H.B. REP ON H.B. 2640, at 3. But, read as a whole, the legislative history undermines the County's argument. The provision that was struck read:

> A city, county, or local health department may prohibit, on a permit-by-permit basis only, the use or disposal of municipal sewage sludge that meets standards established by this chapter.

H.B. 2640, § 5, 52d Leg., Reg. Sess. (Wash. 1992). However, the legislature also struck another provision that stated:

> The department shall adopt rules authorizing local permits for the use and disposal of sludge. The rules shall allow a city, county, or local health department

> to have primary regulatory authority. Department rules shall provide for state review of the issuance or denial of local permits and enforcement actions.

H.B. 2640, § 4(4). Therefore, although the language of the bill report appears to state that the legislature struck a provision that limited local authority, it is clear from a comparison of the original bill and the substitute bill that the changes to the bill reduced the authority of local governments to manage the biosolids program. This conclusion is consistent with the legislature's intent to create a comprehensive state program for the management of biosolids. Accordingly, the legislative history of the biosolids statute provides no support for the County's position that the legislature intended for local governments to retain the authority to ban the land application of biosolids.

Further, the statutory scheme gives the Department the authority to review and grant permit applications for the use and disposal of biosolids. RCW 70.95J.025, .020. Although the legislature has provided a mechanism for Ecology to delegate this responsibility to local health departments if it chooses to do so, Ecology retains the authority to revoke the delegation of authority if the local health department is not effectively administering the biosolids program. RCW 70.95J.080. Ecology also retains the power to review the decisions of the local health departments. RCW 70.95J.090. If the legislature did not grant the County the power to review, grant, or deny permits under the state biosolids program without an express delegation of authority by Ecology, then the legislature could not have intended to grant the County authority to unilaterally ban land application of an entire class of biosolids that comprise the majority of the biosolids produced in Washington. Further, by expressly giving Ecology the authority to reverse the decision of a local

health department, the legislature intended for the final decision regarding land application of biosolids to rest with Ecology, not the local government.

We hold that the County's ordinance is unconstitutional under all three theories of conflict preemption. Therefore, the superior court erred by granting summary judgment in favor of the County. We reverse the superior court's order granting summary judgment in favor of the County and remand to the superior court for entry of summary judgment in favor of Ecology.

Lee, J.

We concur:

Hunt, J.P.T.

Hunt, J.P.T.

Bjorgen, A.C.J.

Bjorgen, A.C.J.

APPENDIX B

Wahkiakum Biosolids Ordinance

ORDINANCE NO. 151 -11

AN ORDINANCE REGARDING THE REGULATION OF THE USE OF BIOSOLIDS

WHEREAS, the term "biosolid" means sewage sludge that is a primarily (but not entirely) organic, semisolid product resulting from the wastewater treatment process; and

WHEREAS, the term "septage" means biosolids composed primarily of human waste from septic tanks; and

WHEREAS, RCW 70.95J.005(e) reflects the Washington State Legislature's acknowledgement that biosolids "can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health;" and

WHEREAS, among the metals that may pose such risk are arsenic, cadmium, copper, lead, mercury, molybdenum, nickel, selenium, and zinc; and

WHEREAS, among the microorganisms that may pose such risk are e. coli, heliobacter pylori, legionella, cryptosporidium, giardia, and various viruses; and

WHEREAS, disease and heavy metal contamination constitute potential threats to the life and health of humans, pets, livestock, crops, and also the natural flora and wildlife of the County; and

WHEREAS, the County of Wahkiakum prides itself on the quality of its agriculture, which is of economic benefit and historical importance to the citizens of the County; and

WHEREAS, the benefits of agriculture to the County of Wahkiakum are greatly enhanced by both the quality and the perceived quality, of the County's agricultural goods; and

WHEREAS, the County of Wahkiakum is distinguished by its many rivers and sloughs, which flood to a greater or lesser extent on an annual basis; and

WHEREAS, such floods have the potential to spread items applied on the ground on one property onto such other property as the flood may affect; and

WHEREAS, regulation of the use of septage, sludge, and biosolids is necessary for the protection of the health and welfare of citizens of and visitors to Wahkiakum County and also for the protection of the good reputation of Wahkiakum County agriculture;

NOW THEREFORE, THE COMMISSION OF THE COUNTY OF WAHKIAKUM DOES HEREBY ORDAIN AS FOLLOWS:

Daniel H. Bigelow
Prosecuting Attorney
P.O. Box 397
Cathlamet, Washington 98612
(360) 795-3652

EXHIBIT 1

A new chapter is hereby added to the Wahkiakum County Code in Title 70, to be designated Chapter 70.08, and to read as follows:

70.08.010: Definitions.

(a) "Biosolids" shall have the definition given to that word in WAC 173-308-005(b), as such definition may hereafter amended or recodified.

(b) "Class A Biosolids" means biosolids that meet the requirements for Class A pathogen reduction in WAC 173-308-170, as that administrative code section now exists or may hereafter be amended or recodified.

(c) "Class B Biosolids" means biosolids that meet the requirements for Class B pathogen reduction in WAC 173-308-170, as that administrative code section now exists or may hereafter be amended or recodified.

(d) "septage" means biosolids composed primarily of human waste from septic tanks.

70.08.020: Land Application of Biosolids.

(a) No Class B biosolids, septage, or sewage sludge may be applied to any land within the County of Wahkiakum.

70.08.030: Penalty.

(a) Any person who fails to comply with any provision of this chapter shall be subject to a civil penalty not to exceed one thousand dollars for each violation. Each application of a load of biosolids upon the land shall constitute a separate violation.

(b) The civil penalty provided for in this section shall be imposed by a notice in writing either by certified mail with return receipt requested or by personal service, to the person incurring the same. The notice shall describe the violation with reasonable particularity and shall order the acts constituting the violation or violations to cease and desist or, in appropriate cases, may require necessary corrective action to be taken within a specific and reasonable time.

(c) Any civil penalty imposed pursuant to this section shall be subject to review by the Board of County Commissioners as provided in RCWC 86.16.405, as it now exists or may hereafter be amended or recodified.

70.08.040: Interpretation.

This chapter is intended to further regulate the use of biosolids and not to repeal or limit any restrictions upon the use of biosolids that now exist or may hereafter be adopted.

Daniel H. Bigelow
Prosecuting Attorney
P.O. Box 397
Cathlamet, Washington 98612
(360) 795-3652

DULY PASSED AND ADOPTED this 26 day of April, 2011.

BOARD OF COUNTY COMMISSIONERS
OF WAHKIAKUM COUNTY, WASHINGTON

ATTEST:

Marsha LaFarge
Clerk of the Board

Lisa M. Marsyla, Chairman

Daniel L. Cothren, Commissioner

APPROVED AS TO FORM this
____ day of April, 2011:

Blair H. Brady, Commissioner

Daniel H. Bigelow
Prosecuting Attorney

Daniel H. Bigelow
Prosecuting Attorney
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(360) 795-3652

APPENDIX C

Department's Superior Court Complaint

STATE OF WASHINGTON
COWLITZ COUNTY SUPERIOR COURT

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

WAHKIAKUM COUNTY, a political subdivision of Washington State,

Defendant.

NO. 11 2 00554 3

COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

INTRODUCTION

Plaintiff State of Washington, Department of Ecology (Ecology), as represented by Robert M. McKenna, Attorney General, and Lee Overton, Assistant Attorney General, brings this civil action against defendant Wahkiakum County, seeking declaratory relief under the Uniform Declaratory Judgments Act, Chapter 7.24 RCW, and seeking injunctive relief under Chapter 7.40 RCW.

This action arises from the enactment by the Board of Wahkiakum County Commissioners of Ordinance No. 151-11 (Ordinance), prohibiting the application of biosolids to land within Wahkiakum County. The Ordinance is in conflict with the general laws of the State of Washington because it conflicts with Chapter 70.95J RCW, which establishes a program for permitting the land application of biosolids that "shall, to the maximum extent

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possible, ensure that municipal sewage sludge is reused as a beneficial commodity." RCW 70.95J.005(2). The legislature, by its enactment of Chapter 70.95J RCW, authorized the land application of biosolids conditioned upon the issuance of a state permit, and directed Ecology to adopt rules to implement a program for issuing such permits. RCW 70.95J.020(1), (4). The Ordinance therefore prohibits an activity allowed by state law when conducted pursuant to a valid state permit. Because it forbids what state law permits, it is in violation of article 11, section 11 of the Washington State Constitution.

Ecology requests that this court declare Ordinance No. 151-11 unconstitutional and void with respect to its provision that: "No Class B biosolids, septage, or sewage sludge may be applied to any land within the County of Wahkiakum." Ecology further requests that this court enjoin the defendant from enacting or enforcing any ordinance seeking to prohibit the application of biosolids to land within Wahkiakum County.

Ecology alleges as follows:

I. PARTIES

1.1 Plaintiff Ecology is an administrative agency of the State of Washington. RCW 43.21A.040; RCW 43.17.010. Ecology is the agency charged with implementing the state biosolids permit program established by Chapter 70.95J RCW. RCW 70.95J.005(2); RCW 70.95J.020(1). Ecology is also the agency charged with issuing and enforcing the permits authorized under the biosolids program. RCW 70.95J.020, 040, 050, 080.

1.2 Defendant Wahkiakum County is a political subdivision of the State of Washington. The Board of Wahkiakum County Commissioners is the local governmental authority established under RCW 36.32.010 and empowered under RCW 36.32.120(7) to make and enforce within Wahkiakum County, by appropriate resolutions or ordinances, all such police and sanitary regulations as are not in conflict with state law.

II. JURISDICTION AND VENUE

2.1 The court has jurisdiction over this matter under RCW 7.24 et seq.

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2.2 Venue is proper in Cowlitz County Superior Court under RCW 36.01.050(1). Cowlitz County Superior Court is the superior court of the nearest judicial district to that of Wahkiakum County.

III. BACKGROUND FACTS

3.1 On April 26, 2011, the Board of Wahkiakum County Commissioners enacted Ordinance No. 151-11. A true and correct copy of the Ordinance is attached to this complaint as Exhibit 1 and is incorporated by this reference.

3.2 On May 5, 2011, notice of the Board's adoption of the Ordinance, together with a copy of the Ordinance, was published in the Wahkiakum County Eagle, the newspaper in which legal notices of the county are printed.

3.3 The Ordinance defines "biosolids" by reference to WAC 173-308-005(b), a provision of the Biosolids Management Regulation that explains that "biosolids" is the "term used in this chapter to refer to sewage sludge or septage that has been or is being treated to meet standards so that it can be applied to the land."

3.4 RCW 70.95J.010 defines "biosolids" as "municipal sewage sludge that is a primarily organic, semisolid product resulting from the wastewater treatment process, that can be beneficially recycled and meets all requirements under this chapter. For the purposes of this chapter, 'biosolids' includes septic tank sludge, also known as septage, that can be beneficially recycled and meets all requirements under this chapter." WAC 173-308-080 repeats this definition.

3.5 The Ordinance provides that "No Class B biosolids, septage, or sewage sludge may be applied to any land within the County of Wahkiakum."

3.6 Approximately 90 percent of all biosolids managed in the state are Class B.

3.7 In 1992, the legislature enacted Engrossed Substitute House Bill 2640, codified at Chapter 70.95J RCW.

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3.8 RCW 70.95J.005(2) provides: "The legislature declares that a program shall be established to manage municipal sewage sludge and that the program shall, to the maximum extent possible, ensure that municipal sewage sludge is reused as a beneficial commodity and is managed in a manner that minimizes risk to public health and the environment."

3.9 RCW 70.95J.020(1) provides: "The department shall adopt rules to implement a biosolid management program within twelve months of the adoption of federal rules, 40 C.F.R. Sec. 503, relating to technical standards for the use and disposal of sewage sludge."

3.10 RCW 70.95J.020(4) provides: "Materials that have received a permit as a biosolid shall be regulated pursuant to this chapter."

3.11 RCW 70.95J.025(1) provides, in part: "The department shall establish annual fees to collect expenses for issuing and administering biosolids permits under this chapter. . . . Fees shall be established in amounts to recover expenses incurred by the department in processing permit applications and modifications, reviewing related plans and documents, monitoring, evaluating, conducting inspections, overseeing performance of delegated program elements, providing technical assistance and supporting overhead expenses that are directly related to these activities."

3.12 RCW 70.95J.080 provides: "The department may delegate to a local health department the powers necessary to issue and enforce permits to use or dispose of biosolids. A delegation may be withdrawn if the department finds that a local health department is not effectively administering the permit program."

3.13 In 1998, Ecology implemented the state biosolids program by adopting Chapter 173-308 WAC, the Biosolids Management Regulation.

3.14 Prohibition of the land application of Class B biosolids within Wahkiakum County would all but eliminate the land application of biosolids, undermining within the county the implementation of the statutorily required permit program for biosolids management.

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IV. CLAIMS

4.1 Wahkiakum County Ordinance No. 151-11 is unconstitutional because it is in violation of article 11, section 11 of the Washington State Constitution. The Ordinance is contrary to the laws of the State of Washington because it conflicts with and is preempted by Chapter 70.95J RCW.

4.2 A controversy exists between plaintiff and defendant as to whether Ordinance No. 151-11 is constitutional.

4.3 Plaintiff Ecology will suffer immediate damage and harm if Ordinance No. 151-11 is not declared unconstitutional and is permitted to go into effect.

V. REQUEST FOR RELIEF

Plaintiff Ecology requests that this court grant the following relief:

1. Enter judgment in favor of plaintiff Ecology declaring that Ordinance No. 151-11 is unconstitutional and void, with respect to its provision that: "No Class B biosolids, septage, or sewage sludge may be applied to any land within the County of Wahkiakum."

2. Enter judgment permanently enjoining defendant Wahkiakum County from enacting or enforcing any ordinance seeking to prohibit the application of biosolids to land within Wahkiakum County.

3. Enter judgment awarding plaintiff Ecology its costs and disbursements in this action.

DATED this 17th day of May 2011.

ROBERT M. MCKENNA
Attorney General

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ORDINANCE NO. 151 -11

AN ORDINANCE REGARDING THE REGULATION OF THE USE OF BIOSOLIDS

WHEREAS, the term "biosolid" means sewage sludge that is a primarily (but not entirely) organic, semisolid product resulting from the wastewater treatment process; and

WHEREAS, the term "septage" means biosolids composed primarily of human waste from septic tanks; and

WHEREAS, RCW 70.95J.005(e) reflects the Washington State Legislature's acknowledgement that biosolids "can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health;" and

WHEREAS, among the metals that may pose such risk are arsenic, cadmium, copper, lead, mercury, molybdenum, nickel, selenium, and zinc; and

WHEREAS, among the microorganisms that may pose such risk are e. coli, heliobacter pylori, legionella, cryptosporidium, giardia, and various viruses; and

WHEREAS, disease and heavy metal contamination constitute potential threats to the life and health of humans, pets, livestock, crops, and also the natural flora and wildlife of the County; and

WHEREAS, the County of Wahkiakum prides itself on the quality of its agriculture, which is of economic benefit and historical importance to the citizens of the County; and

WHEREAS, the benefits of agriculture to the County of Wahkiakum are greatly enhanced by both the quality and the perceived quality, of the County's agricultural goods; and

WHEREAS, the County of Wahkiakum is distinguished by its many rivers and sloughs, which flood to a greater or lesser extent on an annual basis; and

WHEREAS, such floods have the potential to spread items applied on the ground on one property onto such other property as the flood may affect; and

WHEREAS, regulation of the use of septage, sludge, and biosolids is necessary for the protection of the health and welfare of citizens of and visitors to Wahkiakum County and also for the protection of the good reputation of Wahkiakum County agriculture;

NOW THEREFORE, THE COMMISSION OF THE COUNTY OF WAHKIAKUM DOES HEREBY ORDAIN AS FOLLOWS:

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Prosecuting Attorney
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EXHIBIT 1

A new chapter is hereby added to the Wahkiakum County Code in Title 70, to be designated Chapter 70.08, and to read as follows:

70.08.010: Definitions.

(a) "Biosolids" shall have the definition given to that word in WAC 173-308-005(b), as such definition may hereafter amended or recodified.

(b) "Class A Biosolids" means biosolids that meet the requirements for Class A pathogen reduction in WAC 173-308-170, as that administrative code section now exists or may hereafter be amended or recodified.

(c) "Class B Biosolids" means biosolids that meet the requirements for Class B pathogen reduction in WAC 173-308-170, as that administrative code section now exists or may hereafter be amended or recodified.

(d) "septage" means biosolids composed primarily of human waste from septic tanks.

70.08.020: Land Application of Biosolids.

(a) No Class B biosolids, septage, or sewage sludge may be applied to any land within the County of Wahkiakum.

70.08.030: Penalty.

(a) Any person who fails to comply with any provision of this chapter shall be subject to a civil penalty not to exceed one thousand dollars for each violation. Each application of a load of biosolids upon the land shall constitute a separate violation.

(b) The civil penalty provided for in this section shall be imposed by a notice in writing either by certified mail with return receipt requested or by personal service, to the person incurring the same. The notice shall describe the violation with reasonable particularity and shall order the acts constituting the violation or violations to cease and desist or, in appropriate cases, may require necessary corrective action to be taken within a specific and reasonable time.

(c) Any civil penalty imposed pursuant to this section shall be subject to review by the Board of County Commissioners as provided in RCWC 86.16.405, as it now exists or may hereafter be amended or recodified.

70.08.040: Interpretation.

This chapter is intended to further regulate the use of biosolids and not to repeal or limit any restrictions upon the use of biosolids that now exist or may hereafter be adopted.

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DULY PASSED AND ADOPTED this 26 day of April, 2011.

BOARD OF COUNTY COMMISSIONERS
OF WAHKIAKUM COUNTY, WASHINGTON

ATTEST:

Marsha LaFarge
Clerk of the Board

Lisa M. Marsyla, Chairman

Daniel L. Cothren, Commissioner

APPROVED AS TO FORM this
_____ day of April, 2011:

Blair H. Brady, Commissioner

Daniel H. Bigelow
Prosecuting Attorney

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APPENDIX D

Superior Court Findings & Conclusions

FILED
SUPERIOR COURT

2013 FEB 22 P 3:21

COWLITZ COUNTY
BEVERLY R. LITTLE, CLERK
BY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF COWLITZ

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	**NO. 11-2-00554-3**
Plaintiffs,	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
vs.	
WAHKIAKUM COUNTY, a political subdivision of the State of Washington,	
Defendant.	

On September 30, 2011, this matter came regularly before the court on the motion of Department of Ecology (the Department) for summary judgment and the cross-motion of defendant Wahkiakum County (the County) for summary judgment. At that time, the court heard arguments of counsel for each party and considered the agreed record, which consisted of the Declaration of Daniel Thompson dated August 4, 2011, with its attached Exhibits 1-2; and the Declaration of Lee Overton dated August 10, 2011, with its attached Exhibits 1-3.

This court determined that a material issue of fact existed as to whether the ordinance complained of constitutes a "ban:" regulation sufficient to thwart the state's statutory scheme. Therefore it denied summary judgment and invited additions to the record. The parties then stipulated to clerk's numbers 19-28; the Department also filed additional argument on September 14, 2012; and the defendant County responded on October 12, 2012.

Additional argument from each party was heard on October 12, 2012.

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BASED on the file herein and the arguments of counsel, the court now makes the following:

FINDINGS OF FACT:

1. Wahkiakum County is the smallest county in the State of Washington by land area and has a population of less than four thousand.

2. Class B biosolids contain disease vectors, heavy metals, pharmaceutical residue, and other toxins.

3. Class A biosolids have been treated to eliminate the disease vectors.

4. Class B biosolids can be legally disposed of by burial, incineration, or land application, and each method is regulated by law.

5. Wahkiakum County has unique qualities, including its riparian environment, its culture, and its tradition of small farms and organic farming that differentiate it from other counties in the state in the way that it would be affected by the spreading of treated sewage sludge within its borders.

6. On April 26, 2011, Wahkiakum County duly enacted its Ordinance #151-11 (the Ordinance), providing, *inter alia*, as follows: "No Class B biosolids, septage, or sewage sludge may be applied to any land within the County of Wahkiakum."

7. The Department has not established, and the court makes no determination (and would not in any event consider) whether the Ordinance, and this court upholding the Ordinance, would encourage other jurisdictions to pass similar regulations.

8. Sewage treatment facilities throughout the state, including Wahkiakum County, acknowledge a preference for rendering sewage sludge into Class A biosolids but have often been disincentivized from doing so by the fact that it costs substantially more to do so than it costs to treat sludge to the standard of class B biosolids.

9. Nonetheless, at least 12% of biosolids in the state are Class A biosolids that may be applied to land in the county without conflict with the Ordinance.

10. Wahkiakum County generates less than 1% of the state's biosolids. None of the biosolids generated by the county are presently treated to Class A standards.

And the court makes the following:

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CONCLUSIONS OF LAW:

1. The Department has the burden of proving the Ordinance unconstitutional beyond a reasonable doubt. State v. Immelt, 150 Wn.App. 681, 686, 208 P.3d 1256, 1259 (2009), *reversed on other grounds*, 173 Wn.2d 1 (2011). *See also* Johnson v. Johnson, 96 Wn.2d 255, 258, 634 P.2d 877 (1981) ("To prevail, [Johnson] must demonstrate that statute's invalidity beyond a reasonable doubt and rebut the presumption that all legally necessary facts exist") (internal quotes omitted). Every presumption will be in favor of constitutionality. Lenci v. City of Seattle, 63 Wn.2d 664, 667-8, 388 P.2d 926 (1964). All facts necessary to establish the legality of an ordinance are presumed to exist until disproved by the challenger. Johnson, supra.
2. Pursuant to the standards enumerated in 1., *supra*, the Department has not established that other jurisdictions will follow the county in adopting versions of the Ordinance. All presumptions are to the contrary. Nor is such fact, even if established, relevant to this inquiry, which is focused on the ordinance before the court.
3. The fact that it is more expensive to treat sludge to Class A standards, as over ten percent of sludge is, has no bearing on the constitutionality of the Ordinance.
4. The Department has been given two opportunities to establish the facts necessary to overcome its burden in this case, but it has failed to do so. The record herein:
    a. Does not establish that the Ordinance constitutes a "ban" on biosolids application within the County.
    b. Does not establish that the Ordinance prohibits what the State "unconditionally allows." Ritchie v. Markley, 23 Wn.App. 569, 597 P.2d 449 (1979).
    c. Does not establish that the Ordinance cannot be harmonized with the laws and regulations of the State of Washington.
5. No issue of material fact exists since all facts not otherwise proved are presumed to favor constitutionality. Johnson, *supra*.
6. County is entitled to judgment as a matter of law declaring that the Ordinance herein is constitutional.
7. The Department urges this court to take a more restrictive view of the burden of proof and hold the Department to traditional summary-judgment standards despite the fact that the issue in this case is the constitutionality of a duly adopted county ordinance. The court declines to do so,

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but holds that if it had adopted the standard urged by the Department, the court would have reached the same conclusion and made the same order.

THEREFORE THE COURT HEREBY ORDERS:

BASED on the agreed order and the conclusions of law supra, the court hereby orders as follows:

1. Department's motion for summary judgment is denied.
2. County's cross-motion for summary judgment is granted. Wahkiakum County Ordinance #151-11 is constitutional.
3. This case is dismissed with prejudice.

Signed this 22 day of Feb, 2013.

JUDGE

Presented by:

Daniel H. Bigelow, WSBA #21227
Prosecuting Attorney
Wahkiakum County

Approved as to form:

Lee Overton, WSBA # 38055
Assistant Attorney General
For the Department

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APPENDIX E

Amicus Brief, Motion to Strike, Div. II Ruling

NO. 44700-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY

Appellant,

v.

WAHKIAKUM COUNTY, a political subdivision of Washington State

Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT DEPARTMENT OF ECOLOGY OF AMICI NATURAL SELECTION FARMS, INC. AND BOULDER PARK, INC.

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I. INTRODUCTION

Amici Natural Selection Farms, Inc. and Boulder Park, Inc. (collectively, "Farm Amici") respectfully submit this *amicus curiae* brief in support of appellant Washington State Department of Ecology ("Ecology"). Farm Amici are third- and fourth-generation farm families who have worked for decades with Washington's cities and towns to recycle biosolids to the soil, growing crops and improving soil quality in eastern Washington. For the Farm Amici – some of whom are descendants of original homesteaders – their soils are their heritage and their foundation for the future. They rely on biosolids to build their soils with organic matter, to replenish nutrients, to nourish the soil's biological communities of microorganisms, and to increase crop yields.

Farm Amici know first-hand the efficiency and benefits of the Ecology's biosolids management program. Washington's success in recycling biosolids will be jeopardized if every county and locality can countermand the state program through bans or other conflicting restrictions. Farm Amici submit this brief to explain (1) the value of biosolids for rural farming communities in Washington and (2) the need for a consistent, science-based, state biosolids program that is not blocked by bans or other incompatible local ordinances.

II. INTERESTS OF AMICI

A. Natural Selection Farms, Inc.

Farm Amicus Natural Selection Farms, Inc. ("NSF") is a family owned agri-business owned by Ted Durfey and Pamela Durfey, in Sunnyside, Washington (Yakima County). http://www.naturalselectionfarms.com/. The Durfeys' concern for soil fertility and conservation led the family to try soil conditioning with biosolids more than 20 years ago, and over time they have regularly used biosolids on over 1,500 acres of land they own or manage. NSF distributes and land applies biosolids for farms in Yakima, Benton, Klickitat, and Kittitas counties. Approximately 20 farms of various sizes work with NSF in using biosolids on a wide variety of crops and pastureland; approximately 4,000 to 6,000 acres are fertilized with biosolids annually. The source of these biosolids is over 25 wastewater treatment agencies in eastern and western Washington that service approximately 600,000 people.

NSF's project grew as their neighbors began to observe changes in the soils that have been treated with biosolids. NSF has experienced increased soil organic matter, higher retention of moisture, improvements in soil structure, decreased soil erosion, better soil fertility, and the return of earthworms to the fields. Some of these benefits have been quantified in

a cooperative Washington State University – University of Washington study. *See* S. Brown et al., *Quantifying Benefits Associated With Land Application of Residuals in Washington State*, 45 Environ. Sci. Technol. 7451-58 (2011). NSF continues to receive requests for biosolids; however, demand continues to exceed the supply.

Fig. 1. NSF farmland, grapes in foreground, hops in background.

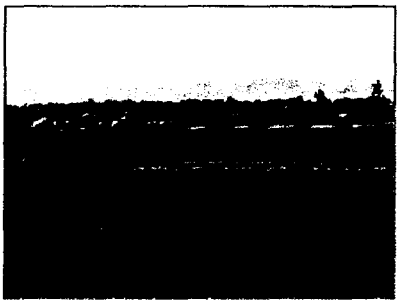

Fig. 2. Research plots at NSF for evaluation of various rates of biosolids and varieties of canola.

B. Boulder Park, Inc.

Farm Amicus Boulder Park, Inc. ("BPI") is a farmer-owned and managed agri-business that provides hauling and Class B biosolids application for amending soils and fertilizing crops. The BPI partners – Leroy Thomsen, Gary Poole, and Larry Glessner – are lifelong residents of Douglas County, well-known local farmers who are active in their communities of Waterville and Mansfield, on the plateau east of Lake Chelan.

The BPI partners first used Class B biosolids on their own fields in 1991. For over 20 years, more than 5,000 acres of their own land has been

applied with biosolids, with some fields receiving multiple applications. As demand for biosolids grew among other farmers in Douglas County, the BPI partners sought other sources of biosolids. In 1997, BPI began contracting with a number of wastewater agencies to bring their biosolids to Douglas County. Many of these were smaller eastern Washington agencies who saved significantly in hauling and permitting costs by having their biosolids marketed to local farmers as part of a larger project. The crops grown on soil amended with biosolids are small grains consisting mainly of winter wheat, spring wheat, winter canola, and small quantities of oats.

Currently 48 farms of various sizes are participating in the project. Biosolids are applied to 6,000 to 8,000 acres annually. These biosolids are sourced from more than 25 wastewater treatment agencies, representing a combined population of 1.8 million. *See* King Co. Government Envtl. Svcs., *Biosolids Projects*, *available at* http://www.kingcounty.gov/environment/wastewater/Biosolids/BiosolidsRecyclingProjects/BoulderPark.aspx.

Documented increases in crop productivity and soil tilth and fertility from biosolids have benefited farmers throughout Douglas County. C. Cogger et al., *Long-Term Crop and Soil Response to Biosolids Applications in Dryland Wheat*, 42 J. Envtl. Quality 1872 (2013). As

knowledge about these results has spread among eastern Washington agricultural communities, BPI has received requests for biosolids from farmers in Grant and Adams counties. The state biosolids program and its primacy over local ordinances provide a consistent regulatory climate for BPI. A return to county-by-county regulations would affect BPI's ability to provide biosolids and application services to farmers who need biosolids to improve their soils.

Fig 3. Biosolids-grown wheat on dryland fields of Boulder Park.

Fig. 4. Applying an agronomic rate the of biosolids on a fallow wheat field at Boulder Park.

III. THE DEPARTMENT OF ECOLOGY RIGOROUSLY OVERSEES THE AMICI'S USE OF BIOSOLIDS

Adding fields to BPI or NSF's state permit is a thorough, multi-step process prescribed by Ecology in its General Permit for Biosolids Management. Washington State Department of Ecology, *Statewide General Permit for Biosolids Management* (2010), *available at* https://fortress.wa.gov/ecy/publications/publications/wsr9808050.pdf. When a farmer expresses an interest in amending his/her soils with

biosolids, BPI or NSF review the fields and compile information needed for the state-required Site-Specific Land Application Plan ("SSLAP"). *See* Wash. Admin. Code 173.308.90003 (2007). This information includes site boundaries, proposed staging areas, location of all water bodies and wells, and buffer zones to protect sensitive areas.

Ecology's regional biosolids coordinator (one for each of the state's four regions) reviews applications for permit coverage and guides applicants through the process. Proposed sites are posted with a public notice for 30 days following the submission of the SSLAP. The regional biosolids coordinator responds to any public comments. If there is sufficient interest, Ecology may hold a public meeting. However, as a courtesy and good management practice, managers from BPI or NSF personally contact neighbors. The Farm Amici also hold annual open houses and farm tours – attended by Ecology's regional biosolids coordinator since the advent of the state's biosolids program – which have been successful in making the projects accessible to the community and satisfying concerns about the use of biosolids.

Fig. 5. Natural Selection Farms owner Ted Durfey, overlooking fields of hops, leads a tour of biosolids use on his land.

Fig. 6. Boulder Park manager Dave Ruud leads a tour through biosolids research plots on land owned by BPI partner Gary Poole.

Ecology's regulators oversee initial farm evaluations, permitting, development of an application rate, field application of biosolids, and environmental monitoring. They inspect sites, provide assistance to the permittee, and answer public questions throughout the life of the project. Ecology's procedure is well established and grounded in biosolids and agricultural science. The general permit that establishes statewide standards for land application has a term of five years and Ecology updates the permit to reflect continuous improvement in their oversight and advances in agricultural use of biosolids.

Ecology's permitting process is well established but time-consuming. Additionally, the preparation for application and agronomic rate development requires farmers to develop nutrient plans well in advance of the fertilizing season to ensure that they identify high priority fields for biosolids use. The threat of county restrictions or bans or an arbitrary local permitting process would further complicate farm planning and investment.

IV. WASHINGTON STATE FARMERS HAVE PROVEN THE VALUE OF BIOSOLIDS TO THEIR CROPS AND SOIL

A. Biosolids Provide Numerous Micronutrients Essential for Plant Growth

Micronutrients like boron, manganese, zinc, chloride and copper are essential for plant growth and are provided by biosolids. Although farms in Washington that have been cropped for multiple generations may be depleted in some of the micro nutrients, these are rarely added as they can be expensive. Biosolids contain a full suite of nutrients, both macro and micro.

The cost of biosolids is far less than the cost of purchasing these elements in chemical formulation. BPI collects a soil amendment fee annually from some farmers who receive biosolids and returns this fee to the biosolids producer. In 2011, BPI collected and returned $6.77 per dry ton of biosolids to producers, which was only fourteen percent of that year's market price of the macro nutrients (nitrogen, phosphorus, potassium, and sulfur) in chemical form. The farmer's cost for biosolids – if any – will be only a small fraction of the market price of the macro nutrients.

These are not insignificant savings for farmers. If a crop needs 50 pounds per acre of nitrogen, farmers using biosolids would save $19 per acre on nitrogen alone. The value derived from a standard three dry tons of biosolids per acre is $51.31/dry ton x 3 dry tons/acre = $153.93/acre for the macro nutrients only. *See* D. Sullivan, *Fertilizing With Biosolids*,

Pacific Northwest Extension, Publication PNW:508-E (revised 2014). Additional value would be derived from the full suite of micronutrients.

B. The Richness of Biosolids Provides Higher Crop Yields

Another economic benefit for the farmer who uses biosolids is the increase in crop yields. Agronomic rates of biosolids can produce equal to or better grain yields than applications of chemical nitrogen. *See* D. Sullivan et al., *Predicting Biosolids Application Rates For Dryland Wheat Across a Range of Northwest Climate Zones*, 40 Cmty. Soil Sci. Plant Anal. 1770-89 (2009); R. Koenig et al., *Dryland Winter Wheat Yield, Grain Protein and Soil Nitrogen Responses to Fertilizer and Biosolids Applications,* 2011 Appl. Envtl. Soil Sci. 925462. A 20-year study of crop and soil responses was conducted by Washington State University soil scientists in commercial wheat production fields of BPI. These dryland (non-irrigated) wheat fields are managed in a two-year fallow rotation – a year of cropping followed by a fallow year – as a method of capturing soil moisture during the fallow year. Various rates of biosolids amendment were compared with the traditional anhydrous ammonia and a no-fertilizer control. Operational rates of biosolids increased grain yields over the chemical fertilizer across eight successive harvests. All rates reliably produced equivalent or greater grain yields than the standard chemical nitrogen fertilizer. *See* Cogger, C. et al., *Long-Term Crop and Soil*

Response. Biosolids also increased yields from the second harvest, more than three years after the initial biosolids application.

C. The Organic Bulk of Biosolids Improves Soil Quality

Soil conservation and moisture retention are crucial practices in dryland farming. The organic matter in biosolids provides benefits in these areas that chemical fertilizer cannot. From the first applications of biosolids in the early 1990s, Boulder Park farmers noticed changes to their soils as well as increased crop yields. Even one application of biosolids made a difference in added tilth and body of the soil; fields not amended with biosolids felt hard underfoot and the thin, powdery soil was easily blown by wind. After biosolids were tilled into a field wind erosion was significantly reduced due to organic matter aggregating and holding the soil particles.

University research in Washington has confirmed and quantified the increase in soil carbon from biosolids applications. In a 20-year study of the effects of Class B biosolids on dryland wheat yield and soil quality, biosolids had a large positive effect on total soil carbon, *id.*, nearly doubling the concentration compared with control and chemical fertilizer treatments. There was also an associated decrease in density of the soil, important for soil tilth and water infiltration. The researchers concluded that "agronomic biosolids applications are an effective and low-cost tool

to increase soil carbon and improve soil quality in soils depleted of organic matter after years of grain-fallow rotation." *Id.*

Similar increases in soil carbon were found in Yakima, Chelan, Douglas, and Pierce counties – including croplands managed by both amici Natural Selection Farms and Boulder Park. *See S.* Brown et al., *Quantifying Benefits,* at 7451-58. Researchers found that biosolids and compost increased total soil carbon in control soils across all sites, with different soils, tillage practices, crops, and time since application. These results were consistent with previous studies in other states. *See* G. Tian et al., *Soil Carbon Sequestration Resulting From Long-term Application of Biosolids For Land Reclamation,* 38(1) J. Envtl. Quality 61-74 (2009).

The Pacific Northwest Extension (extension programs at Washington State University, Oregon State University and the University of Idaho) publication *Fertilizing With Biosolids* summarizes the results of decades of use and research on the benefits of biosolids for soils in this region in the table below.

Benefits to Soil Quality from Biosolids Applications

Biological	Increases soil microbial community
Chemical	Adds macro- and micro-nutrients Increases cation exchange capacity Provides slow release nitrogen and other nutrients Buffers soil pH Increases soil carbon storage
Physical	Increases water holding capacity Improves soil tilth Loosens compacted clay soils Prevents soil erosion Increases water infiltration Aerates soil Provides organic matter

D. Sullivan, *Fertilizing With Biosolids.*

V. LOCAL BIOSOLIDS BANS WILL UNDERMINE THE STATE PROGRAM

A. Biosolids are Currently Regulated Under a Comprehensive and Equitable State Program That Would Be Jeopardized by Local Ordinances

Farmers rely on state primacy in regulating biosolids because in the modern era farmers often have little political say in local regulation of farm practices, even in rural communities. Unfounded fears or prejudices against biosolids can lead to restrictive ordinances or bans that eliminate biosolids as an option for farmers. In a technical field like using biosolids for fertilizer, it is critical – and the legislature so recognized when it established the state program in 1992 – that science-based, uniform state standards govern a statewide activity such as recycling biosolids from

treatment plants to farm fields. This Court should join the many federal and state courts around the country that have upheld state primacy in regulating land application and struck down restrictive local ordinances and bans.[1]

Statewide primacy and uniformity in biosolids regulations and permitting is important for many large farming operations that span county lines and have operations in more than one county. One set of state rules for biosolids quality and land application procedures has increased public and private investment in biosolids recycling and furthered the state law's stated purpose that "the program shall, to the maximum extent possible, ensure that municipal sewage sludge is reused as a beneficial commodity. . . ." RCW 70.95J.005(2). Farm Amici have relied for many years on the legislature's endorsement and support for biosolids recycling. The trial court's ruling upholding a biosolids ban threatens that reliance.

[1] *See, e.g., Los Angeles v. Kern County*, 214 Cal. App. 4th 394 (2013), *review granted on other grounds*, 302 P.3d 572 (Ca. 2013); *Liverpool Twp. v. Stephens*, 900 A.2d 1030 (Pa. Commw. Ct. 2006); *Granville Farms, Inc. v. Cnty. of Granville*, 612 S.E.2d 156 (N.C. Ct. App. 2005); *Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410 (M.D. Pa. 2003); *O'Brien v. Appomattox Cnty.*, 293 F. Supp. 2d 660 (W.D. Va. 2003); *Blanton v. Amelia Cnty.*, 540 S.E.2d 869 (Va. 2001); *Soaring Vista Props., Inc. v. Bd. of Cnty. Comm'rs*, 741 A.2d 1110 (Md. 1999); *Franklin Cnty. v. Fieldale Farms, Corp.* 507 S.E.2d 460 (Ga. 1998).

B. Prohibition on Long-Term Landfilling of Biosolids Confirms the Legislature's Support for Beneficial Use of Class B Biosolids

The Washington legislature's support for biosolids use as a soil conditioner is expressed throughout the state biosolids law. For example, the legislature's findings include that "[p]roperly managed municipal sewage sludge is a valuable commodity and can be beneficially used in agriculture, silviculture, and in landscapes as a soil conditioner." *See* RCW 70.95J.005(1)(d). The legislature provides an overarching command to Ecology to establish a program "to manage municipal sewage sludge and that the program shall, to the maximum extent possible, ensure that municipal sewage sludge is reused as a beneficial commodity and is managed in a manner that minimizes risk to public health and the environment." *See* RCW 70.95J.005(2).

In a corollary to its beneficial use directive, the legislature gave Ecology the authority to prohibit final disposal of sewage sludge in landfills except under certain economic circumstances. *See* RCW 70.95.255. Ecology incorporated this direction in its biosolids state program and regulations.

Landfilling of biosolids in Washington is not considered a beneficial use, unless the biosolids are used for the purpose of reclamation in a closure plan, *e.g.*, establishing vegetation on cover materials. Wash.

Admin. Code 173.308.300 at (5) and (6). Landfilling of biosolids for disposal is only allowed on an emergency or temporary basis until the generator can establish a beneficial program. For *emergency* landfilling, the local health jurisdiction must agree that no healthful beneficial use options are presently available. For *temporary* landfilling, the generator must submit a plan to Ecology, stating (1) the conditions that dictate disposal (rather than beneficial use); (2) the steps that will be taken to correct these conditions and eliminate the need for disposal as a long-term management option; (3) a schedule for correcting the conditions that make disposal necessary; and (4) written approval for disposal from the local health jurisdiction. *Id.*

The formality of these steps and the significance of the course correction required for the generator who has no valid beneficial use program are another indication of the state's intention to maximize the use of biosolids as a beneficial soil conditioner. Regardless of whether biosolids are Class A or Class B, the rule is written to convey that landfilling is not an option that will be readily approved by the state, except on an emergency or temporary basis while the generator is developing appropriate markets for its biosolids product. For the Farm Amici and their customers who rely on the limited supply of biosolids for their crops, the state's discouragement of disposal is an important position.

Because the state makes it difficult to dispose of Class B biosolids and directs agencies to find beneficial uses, more biosolids in Washington have become available for agricultural use.

C. The State Biosolids Program Allows for County Participation in Permitting, Monitoring, and Enforcement

Preemption of local biosolids bans by the state program does not deprive localities of a significant role in the oversight of land application. Ecology delegates authority to implement and assist in the administration of appropriate portions of the state program to local health departments, with final permit review by Ecology. *See* RCW 70.95J.080 and -.090. Natural Selection Farms has direct experience working with a jurisdiction that has received delegation of authority from Ecology. Yakima County, the home county of amicus National Selection Farms, secured delegation from Ecology and participates in review of farms proposed for land application. Yakima County's participation in biosolids use in the county has contributed to the widespread acceptance of biosolids recycling in the county. Delegation enables the state program to incorporate local knowledge, conditions, and concerns. For the eastern Washington Farm Amici, delegation maintains the consistency of the primary state program and synchronizes relations with local government.

By contrast, unilateral bans or regulations like Wahkiakum's are divorced from and contrary to the state program. Agricultural use of biosolids will be inefficient and expensive, if not impossible, if local governments independently prescribe site management practices and duplicative permit requirements. Farmers could lose the ability to use Class B biosolids completely if they resided in a county, such as Wahkiakum, that ignored the delegation opportunity offered by Ecology and chose to ban biosolids instead. The preemption analysis requires that the Court assess the consequences if other counties, not just Wahkiakum, began to assert local primacy on biosolids regulation. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) ("[T]he practical effect of the statute must be evaluated not only by considering the consequences of the [ordinance] itself, but also . . . what effect would arise if not one, but many or every, State adopted similar legislation.").

D. The Conflict Between a Ban and the State Program is Stark and Requires Preemption

Farm Amici have successfully applied biosolids many hundreds of times pursuant to state permits and regulations and know that a ban on Class B land application is irreconcilable with the state program. Farm Amici only work with Class B biosolids, which are available in the large volumes needed for eastern Washington farms. Class A biosolids, which

are considerably more expensive for treatment plants to generate, are typically generated in smaller volumes and are used for smaller, non-farm applications where Class B site access restrictions would be impossible to implement. Class A biosolids often are a dryer product with less organic matter and at times less nitrogen content. The experience of the Farm Amici is that Class B biosolids are greatly superior in farmer acceptance due to their increased organic matter.

Wahkiakum's notion that banning Class B biosolids does not conflict with the state program because municipalities and farmers can simply switch to generating and using Class A biosolids has no basis in reality. For the Farm Amici, there simply is no adequate supply of Class A biosolids to meet the growing needs of eastern Washington farmers. Even if Class A biosolids became available in volume, operations would have to be overhauled and tested to adjust to a new and quite different biosolids product. For the Farm Amici's municipal suppliers, conversion to Class A would be time-consuming and expensive and would disrupt their beneficial use programs as they attempt to find non-farm markets for Class A biosolids.

The practical conflict between a Class B ban and a state program focused largely on Class B biosolids is sufficient for the Court to find conflict preemption as a matter of law under Washington Const. art. XI,

section 11. Whether analyzed under the test of does the Wahkiakum ban "thwart" the legislative purpose, *Diamond Parking v. City of Seattle*, 78 Wn.2d 778, 781; 479 P.2d 47 (1971), or the test of does the ordinance "prohibit[ ] what state law permits," *Entm't Indus. Coal. v. Tacoma-Pierce Cnty. Health Dep't*, 153 Wn.2d 657, 663; 105 P.3d 985 (2005), the Class B biosolids ban fails for the reasons outlined above.

Many provisions of the state biosolids law and regulations reinforce a finding of preemption: (i) the legislature's declaration to reuse biosolids "to the maximum extent possible," RCW 70.95J.005(2); (ii) the prohibition of landfill disposal of biosolids except under exigent circumstances, RCW 70.95.255; (iii) the definition that biosolids are not a solid waste, and therefore not subject to local control under solid waste law, RCW 70.95J.005(1)(d); RCW 70.95J.010(1); and (iv) the lack of a savings clause in the biosolids law empowering local regulation of biosolids (beyond the right to seek delegation of state authority under the program on specified terms). While the plain meaning of the biosolids law and regulations are controlling, the legislative history reinforces preemption. *See, e.g.*, S.B. Rep. on E.S.H.B. 2640, at 3, 52nd Leg., (Wash. 1992) (final Senate bill report states that "Technical amendments are made to clarify: the intent to maintain state primacy for the sludge management program . . . .").

VI. CONCLUSION

The Farm Amici and their municipal and farm partners have benefited tremendously from a state biosolids program that encourages and advances land application statewide. Ecology's biosolids program provides certainty, stability, and science-based oversight to improve soil health, boost crop yields, and assist Washington's wastewater community in a vital recycling activity. For equal access – regardless of county of residence – to biosolids and its benefits to soils, crops and farm families, good public policy and the application of preemption principles require that land application of biosolids be governed by state law, not local ordinances. The Farm Amici ask that the trial court ruling be reversed.

DATED this 29th day of May, 2014.

Menke Jackson Beyer, LLP

By: _____

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NO. 44700-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellant,

v.

WAHKIAKUM COUNTY, a political subdivision of Washington State,

Respondent.

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 20TH day of May 2014, I filed the Amicus Curiae Brief of Natural Selection Farms, Inc. and Boulder Park, Inc., with the Court of Appeals, Division II, and served the parties herein as indicated below:

DANIEL H. BIGELOW WAHKIAKUM COUNTY PROSECUTING ATTORNEY 64 MAIN STREET, P.O. BOX 397 CATHLAMET, WA 98612	[ ] U.S. Mail [ ] By Fax [x] By Email: dbigelow@WAPA-SEP.wa.gov [X] OVERNIGHT DELIVERY VIA U.P.S.
GLENN J. CARTER CHIEF CIVIL DEPUTY PROSECUTING ATTORNEY FOR LEWIS COUNTY 345 W. MAIN STREET, 2ND FLOOR CHEHALIS, WA 98532	[ ] U.S. Mail [ ] By Fax [x] By Email: Glenn.Carter@lewisco untywa.gov [X] OVERNIGHT DELIVERY VIA U.P.S.
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OLYMPIA, WA 98504-0117

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[X] OVERNIGHT
DELIVERY VIA U.P.S.

The foregoing being the last known addresses.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of May 2014, at Yakima, Washington.

Kathy S. Lyczewski

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant, v. WAHKIAKUM COUNTY, a political subbdivision of Washington State, Respondent.	NO. 44700-2-II MOTION TO STRIKE IMPERMISSIBLE ADDITIONS TO THE RECORD IN *AMICUS CURIAE* BRIEF OF NATURAL SELECTION FARMS, INC., *et al.*

I. IDENTITY OF PARTY REQUESTING RELIEF

The County of Wahkiakum seeks the relief set forth in Section II.

II. RELIEF SOUGHT

The striking of factual sources and references in the *amicus curiae* brief of Natural Selection Farms, Inc., *et. al.* (hereafter abbreviated as Natural Selection).

III. GROUNDS FOR RELIEF SOUGHT

This motion is based on RAP chapter nine, especially RAP 9.1, 9.10, and 9.11; also the record herein and the authorities set out below.

IV. FACTS RELATED TO MOTION

The County relies on the record herein and will set forth a detailed statement of sections of Natural Selection's *amicus* brief that are without foundation in the record on appeal as Appendix A, which is attached to this motion and incorporated herein by this reference. For the purposes of argument, a factual sketch follows:

This is a case that was disposed of when the trial court ruled on a motion for summary judgment. CP 475. Summary judgment was based on a statement of stipulated facts. CP 227. In its *amicus curiae* brief, Natural Selection cites to "authorities" not in the record below. E.g., Brief at iii. These "authorities" are cited for propositions that generally extol the safety and beneficence of biosolids while minimizing their dangers. E.g., Brief, 3, 8. Where no authority supports a factual assertion, rather than forbear, Natural Selection presents factual allegations without any citation whatever. E.g., Brief at 8. In its brief at 17, Natural Selection urges this court to take cognizance of facts because it has "successfully applied biosolids many hundreds of times," so this fact is something it would "know." Simply that: we've done this a lot and so we know. This

without citation to the actual basis of knowledge or citation to any indication in the record as to the "hundreds of times." It later states, based on its own unsworn representation of its own knowledge, that its opponents' position has "no basis in reality." This example is remarkable for its own lack of basis.

The specific passages objected to are enumerated in Appendix A, but the County requests the court's indulgence if the County fails to enumerate each and every objectionable phrase. This brief and the brief of fellow late-joining *amici* constitute over forty pages marbled with factual assertions not in the trial court record, and in addition to identifying and arguing against them, the County must also reply to the legal arguments of *amici* by separate brief. Please accept a blanket objection to each and every objectionable fact or authority whether or not cited, and the County promises in return to make a good faith effort to identify them all.

V. ARGUMENT

Natural Selection is here to challenge the ruling of the trial court. It wants this court to change the decision of the trial court. And it makes no secret of the fact that it considers its strong suit to be its practical experience in the field, saying as much in its brief at 1, 16, and 18, and dismissing the opinions of those who do not have Natural Selection's expertise in this "technical field" at 12. In other words, throughout the

brief, it does not so much argue the law as the facts. And it assumes this court will take its word on numerous factual assertions, while it backs up other factual assertions with citations to "authorities" that were neither cited below nor subject to the rigors of the adversary system and proved at trial to the satisfaction of a finder of fact.

The record of the Court of Appeals consists of the report of proceedings and the clerk's papers. RAP 9.1. That makes particular sense in this case, since that is, in essence, what a motion for summary judgment is based on. And the trial court's findings and conclusions note this, observing specifically that the court's final order is "based on the file herein" and even more specifically that "the Department has been given two opportunities to establish the facts necessary to overcome its burden in this case, but it has failed to do so." CP 476-7. *Amici* now seek a third opportunity to establish such facts, this time at the appellate level.

When a party attempts to supplement the record on appeal contrary to RAP 9.1, the proper remedy is for the Court of Appeals to strike it, and motions to do so have been accepted and granted. E.g., Dep't of Labor & Indus. v. Lanier Brugh, 135 Wn. App. 808, 822, 147 P.3d 588, 595 (2006). In that case, the court noted what is equally germane here: the existence of RAP 9.12, a permissible way to supplement a court record on appeal, but the procedure of which was not even attempted by the party attempting to

supplement the record. Of course, there is a reason *amici* did not attempt this here: they could not have succeeded in making the necessary showing. *Amici* would have had to satisfy this court that "it is equitable to excuse a party's failure to present the evidence to the trial court" pursuant to RAP 9.101(a)(3), for one thing. But even more fatally, pursuant to RAP 9.11(a)(1), *amici* would have to show how new facts would change the court's review of a summary judgment decision that is required by RAP 9.1, RAP 9.12, and, e.g., Smith v. Safeco, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003), to consider only the trial court record and engage in the same inquiry as the trial court. This is literally impossible.

The inquiry whether RAP 9.12 could be satisfied is academic anyway, and brought up purely as a point of interest. The important thing is to remember that there is a particular method by which new facts could have been brought up, but Natural Selection fails even to grant that method lip service before attempting to fill this court's ear with things the court below never heard.

Another important thing to remember is that even RAP 9.12 does not exist so that it can facilitate retrial of factual matters at the appellate level. Rather, "The purpose of RAP 9.12 "is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." Green v. Normandy Park, 137 Wn. App. 665, 678, 151 P.3d 1038, 1044 (2007),

citing Wash. Fed'n of State Employees, 121 Wash.2d at 157, 849 P.2d 1201.

The Green court provided further: "It is the appellate court's task to review a ruling on a motion for summary judgment based solely on the record before the trial court." Id. (emphasis added), citing Wash. Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt., 121 Wash.2d 152, 163, 849 P.2d 1201 (1993); Gaupholm v. Aurora Office Bldgs., Inc., 2 Wash.App. 256, 257, 467 P.2d 628 (1970).

The Green case concerned an incident similar to our own in which a party to an appeal, unsatisfied with the record below, simply started citing willy-nilly to items not in the record (but at least having the courtesy first to designate them, however ineffectively, as clerk's papers, which *amici* here have not done). Green, 137 Wn.App. at 680. The Court of Appeals was justifiably agog at the party's "complete defiance of the Rules of Appellate Procedure," and even more incensed when that party "exacerbated the damage done by its defiance of our rules of procedure by filing a written response to the motion to strike, arguing, in essence, that the rules do not apply to it because the trial judge was wrong..." Id.

This example should prove instructive to *amici* and guide its future conduct even if it has not guided its past behavior. And this court should

keep the guiding principle of appellate review of summary judgment motions close to its heart and strike each and every factual assertion by *amici* not accompanied by a citation to the superior court record in this case.

VI. CONCLUSION

Based on the file herein, the above authorities and argument, and the attached Appendix A, Wahkiakum County requests this court grant its motion to strike. *Amici* apparently do not like the record on appeal – though they did not dislike it sufficiently to intervene at trial – and are attempting to retry on appeal the summary judgment that decided this case, with a new record that has not passed through the fire of the adversary system and which the County cannot rebut through fact finding hearings. This is a good deal for them if they can get it. It spares them the years of litigation that brought us to this point and gives them a record of their own choosing that they did not even have to have anyone swear to, or get another party to stipulate to. But for those very reasons, *amici* stand, in the words of Green court, in "complete defiance of the Rules of Appellate Procedure," and worse, in complete defiance of the system of justice those rules exist to safeguard.

Respectfully submitted this 10th day of June, 2014.

Daniel H. Bigelow, WSBA #21227
Prosecuting Attorney
Wahkiakum County

APPENDIX A

PAGE	OBJECTION TO:	GROUNDS
iii	Each authority cited	Not part of trial court record
iv	Each authority cited	Not part of trial court record
2	Second paragraph, and its continuation onto page 3	Not part of trial court record
3	Photographs	Not part of trial court record
4	Second full paragraph and all following until second full sentence on page 5	Not part of trial court record
5	Photographs	Not part of trial court record
6	First full paragraph	Not part of trial court record. Particularly egregious starting at third sentence.
6	Photographs (and captions on following page)	Not part of trial court record
7	Both paragraphs on the page	Uncited; not part of trial court record
8	Entire content through page 12	Not part of trial court record
12	Table "Benefits to Soil Quality"	Not part of trial court record
12	First paragraph of section A, all but last sentence	Not part of trial court record
13	Assertion regarding practical benefits of "one set of state rules" and amici's reliance	Not part of trial court record
15	Assertion regarding amici's reliance	Not part of trial court record
16	From 2nd sentence of C through first phrase of final sentence of that paragraph	Uncited; not part of trial court record
17	Second and third sentences	Contains statement of future fact; uncited; not part of trial court record
17	Portion of section D up to the final, incomplete paragraph at the end of page 18	Uncited; not part of trial court record
19	phrase "for the reasons outlined above"	For clarity, since those reasons must be stricken
20	First sentence	Not part of trial court record

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DEPARTMENT OF ECOLOGY, Appellant, v. WAHKIAKUM COUNTY, Respondent.	No. 44700-2-II ORDER GRANTING IN PART AND DENYING IN PART WAHKIAKUM COUNTY'S MOTIONS TO STRIKE

Respondent, Wahkiakum County, filed two motions to strike numerous portions of the briefs filed by amici curiae in support of the Department of Ecology. The County makes both specific objections and a general objection. We decline to accept the County's general invitation to strike any portions of the briefs we conclude are inappropriate; but we address each of the County's specific objections.

The County's objections are all based on the contention that the amici present facts outside the record that are inappropriate for us to consider under RAP 9.1. We agree that RAP 9.1 limits the record to the clerk's papers and report of proceedings in a case, and that the appropriate remedy is to strike the portions of a party's brief that present facts outside the record. *See Dep't of Labor & Indus. v. Brugh*, 135 Wn. App. 808, 822-23, 147 P.3d 588 (2006). However, given the unique purpose and position of an amicus, the facts contained in an amicus brief are not limited to the trial record if those facts meet the criteria for judicial notice. *See e.g. New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 502, 687 P.2d 212

(1984) (relying on facts outside the record provided by amicus); *State v. Hodgson*, 60 Wn. App. 12, 17 n.5, 802 P.2d 129 (1990) (taking judicial notice of facts outside the record at the request of amici).

"The purpose of an amicus brief is to help the courts with points of law." *Ochoa Ag Unlimited*, 128 Wn. App. 165, 172, 114 P.3d 692 (2005) (citing RAP 10.3(e); *Pleas v. City of Seattle*, 49 Wn. App. 825, 827 n.1, 746 P.2d 823 (1987), *rev'd on other grounds*, 112 Wn.2d 794, 774 P.2d 1158 (1989)). Here, the question of law presented is whether the County's ordinance irreconcilably conflicts with the state statutory scheme regulating the use of biosolids. To answer this question we must evaluate whether the County's ordinance thwarts the legislative purpose of the state's statutory scheme. Administrative and legislative facts provided by amici with extensive experience with biosolids are helpful to us in making this determination and, thus, are subject to judicial notice. *See Ochoa Ag Unlimited,* 128 Wn. App. at 172.

We may take judicial notice of facts outside the record if they meet the criteria under ER 201, or if they are considered legislative facts. We may take judicial notice of facts at any stage of the proceedings, regardless of whether or not a party requests us to do so. ER 201(c), (f). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." ER 201(b).

However, even if material does not meet the strict criteria for "adjudicative facts" under ER 201, we may take judicial notice of facts outside the record as "legislative facts." *Cameron v. Murray*, 151 Wn. App. 646, 658-59, 214 P.3d 150 (2009). Legislative facts are "background

information a court may take into account 'when determining the constitutionality or proper interpretation of a statute, or when extending or restricting common law rule.'" *Cameron*, 151 Wn. App. at 658-59 (quoting 5D WASH. PRAC., HANDBOOK WASH. EVID.D. ER 201, comment (1) (2008-09 ed.)). Legislative facts include scholarly works, scientific studies, and social facts. *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980).

This approach to evaluating the County's specific objections to amici briefs is consistent with RAP 18.8, which allows us to "waive or alter the provisions of any of these rules . . . in order to serve the ends of justice." This case, to some extent, requires determining the effect of the County's ordinance, both within the County and throughout the State, in order to determine whether there is an irreconcilable conflict between the County's ordinance and the state statutory scheme. The County has been permitted to present arguments supporting its position that its ordinance will have little effect on the overall state statutory scheme. Moreover, it has made allegations regarding the viability of continuing to implement the current state statutory scheme. Therefore, it serves the ends of justice to provide amici the opportunity to counter the County's predictions about the effect, or lack thereof, of its ordinance. *See State v. McCuistion*, 174 Wn.2d 369, 395 n.7, 275 P.3d 1092 (2012).

Based on these well-accepted principles of appellate procedure, we would normally be inclined to deny the County's motions to strike in toto. However, the County has provided us with appendices to their motions identifying specific pieces of information to which it objects. Accordingly, we address each of the County's objections in turn.

A. OBJECTIONS TO BRIEF OF PUBLIC AMICI[1]

First, the County objects to page iv, arguing that it is not part of the trial record. Page iv of the brief contains citations to articles and government materials. These scientific articles and government reports are properly submitted to us as legislative facts. Therefore, we take judicial notice of these facts, and the County's motion to strike page iv of Public Amici's brief is **DENIED.**

Second, the County objects to information contained in pages 3-6. Pages 3-6 solely address the interests of the parties filing the amicus brief and their familiarity with the issues presented in this case. The information in this case is not argument on the legal issues presented in this case, but is relevant to our decision regarding whether to grant Public Amici's motion to appear as amicus in this case, a decision we have already made in granting Public Amici's motion. The County's motion to strike information contained in pages 3-6 of Public Amici's brief is **DENIED.**

Third, the County objects to the sentence on page 7 of the brief labeling the County's ordinance as arbitrary. This is argument, not a fact. The County's motion to strike this sentence on page 7 of Public Amici's brief is **DENIED.**

Fourth, the County moves to strike the photographs included on page 7, which illustrate forest and crop application of biosolids. We agree these photographs are outside the record and do not meet the criteria for either adjudicative or legislative facts. The County's motion to strike the photographs on page 7 of Public Amici's brief is **GRANTED.**

[1] Public amici refer collectively to the Northwest Biosolids Management Association, National Association of Clean Water Agencies, Washington Association of Sewer and Water Districts, and the Town of Cathlamet.

Fifth, the County objects to the first sentence after the photographs, arguing that it "explicitly asserts it will describe facts not in evidence." This sentence is not a fact, but it is argument. The County's motion to strike the first sentence following the photographs on page 7 is **DENIED.**

Sixth, the County objects to the first sentence of section A on page 7. We agree that this sentence contains specific facts, such as the amount of biosolids produced in the entire Northwest Region, that are outside the record; but these assertions are legislative facts. We take judicial notice of these facts, and the County's motion to strike the first sentence of section A on page 7 is **DENIED.**

Seventh, the County objects to the first sentence of the first full paragraph on page 8, stating, "Class A and Class B biosolids are equivalent under federal and state law for safety." This is not a fact, but rather a legal conclusion that can be drawn by looking at federal and state safety laws. Federal and state laws are adjudicative facts under ER 201. The County's motion to strike the first sentence of the first full paragraph on page 8 is **DENIED.**

Eighth, the County objects to the first two sentences of section B on page 8. These sentences contain facts about the development of the use of biosolids after the passage of the Clean Water Act in 1972 but before passage of the state statutory scheme. This information is helpful to us in making a determination about the legislative intent in enacting a state statutory scheme regulating biosolids. Accordingly, they are appropriate legislative facts. The County's motion to strike the first two sentences of section B on page 8 is **DENIED.**

Ninth, the County objects to two sentences on page 9 discussing the Environmental Protection Agency's regulations under the clean water act. Public Amici rely on federal

regulations and information relied on by the EPA in developing those regulations. There are numerous arguments in this case comparing the state statutory scheme and regulations with the federal Clean Water Act and the EPA's regulations, and this information is helpful to the court. We take notice of this information as legislative facts. The County's motion to strike the two sentences on page 9 of Public Amici's brief is **DENIED.**

Tenth, the County objects to the first paragraph on page 10 outlining the state of biosolids regulation before our state legislature passed the current statutory scheme. This information is helpful to us in making a determination about the legislative intent when deciding to enact a state statutory scheme regulating biosolids. Accordingly, they are appropriate legislative facts. The County's motion to strike the first paragraph on page 10 is **DENIED.**

Eleventh, the County objects to the last full paragraph on page 11, all sentences after the first sentence. The sentences to which the County objects provide general information illustrating the implementation of delegation to local health departments which is a subject of some of the arguments before us. This background information is helpful to us in determining whether the County's ordinance irreconcilably conflicts with the state statutory scheme. Thus, this background information presents legislative facts pertinent for our review. The County's motion to strike the last full paragraph on page 11, all sentences after the first sentence, is **DENIED.**

Twelfth, the County objects to the entire paragraph beginning on page 11 and ending on page 12. This paragraph presents scientific information that is appropriate for consideration as legislative facts. The County's motion to strike the entire paragraph beginning on page 11 and ending on page 12 is **DENIED.**

Thirteenth, the County objects to the entirety of section C, pages 12-14. This section primarily presents the background information contained in the articles referenced on page iv, which we decline to strike. Further, the information presented here responds to the County's numerous assertions that biosolids are harmful, therefore allowing amici to present an alternative argument serves the interests of justice and is helpful to us. The County's motion to strike the entirety of section C, pages 12-14 is **DENIED.**

B. OBJECTIONS TO BRIEF OF FARM AMICI[2]

First, the County objects to all the authorities listed on pages iii and iv of Farm Amici's brief, arguing that they are not part of the trial record. Page iv of the brief contains citations to articles and government materials (presumably County does not object to the statutes, regulations, and legislative materials). Such articles need not be stricken because academic, scholarly, and government articles or reports are appropriate legislative facts. The County's motion to strike the authorities cited on pages iii and iv of Farm Amici's brief is **DENIED.**

Second, the County objects to information contained on pages 3-5. Pages 3-5 address solely the interests of the parties filing the amicus brief and their familiarity with the issues presented in this case. This information is not argument on the legal issues presented in this case, but is relevant to whether we should grant Farm Amici's motion to appear as amicus, a decision we have already made in granting Farm Amici's motion to file their amicus brief. The County's motion to strike information contained in pages 3-5 of Farm Amici's brief is **DENIED.**

Third, the County objects to the first full paragraph on page 6. This paragraph provides information about the practical implementation of the statutory scheme, which is helpful to us in

[2] Farm Amici refer collectively to Natural Selection Farms, Inc. and Boulder Park, Inc.

determining whether the County's ordinance irreconcilably conflicts with the state statutory scheme. *Ochoa Ag Unlimited*, 128 Wn. App. at 172. The County's motion to strike the first full paragraph on page 6 of Farm Amici's brief is **DENIED.**

Fourth, the County objects to the photographs and captions on pages 6-7. We agree these photographs are outside the record and, thus, are not appropriate administrative or legislative facts. The County's motion to strike the photographs on pages 6-7 of Farm Amici's brief is **GRANTED.**

Fifth, the County objects to the entirety of pages 8-12. Pages 8-12 of Farm Amici's brief discuss the benefits of biosolids. This discussion is based on scholarly, academic, and government reports or articles and, therefore, are appropriate legislative facts. The County's motion to strike pages 8-12 of Farm Amici's brief is **DENIED.**

Sixth, the County objects to the first paragraph of section A beginning on page 12 and ending on page 13. This paragraph addresses the importance of a uniform, scientifically -based regulatory scheme for biosolids. This paragraph does not contain specific facts; rather it presents a policy argument supporting the argument that the County's ordinance irreconcilably conflicts with the state statutory scheme because the county ordinance thwarts the state's legislative purpose. The County's motion to strike the first paragraph of section A beginning on page 12 and ending on page 13 is **DENIED.**

Seventh, the County objects to the assertions on page 13 about the practical benefits of uniform rules and Farm Amici's reliance on those rules. These assertions are also arguments related to whether the County's ordinance irreconcilably conflicts with the state statutory

scheme. The County's motion to strike the assertions on page 13 about the practical benefits of uniform rules and Farm Amici's reliance on those rules is **DENIED.**

Eighth, the County objects to the assertion on page 15 about Farm Amici's reliance on the Department of Ecology's policy for biosolid disposal. This assertion provides policy information that is helpful to us. The County's motion to strike the assertion on page 15 regarding Farm Amici's reliance on the Department of Ecology's policy about disposal of biosolids is **DENIED.**

Ninth, the County objects to the majority of the full paragraph in part C on page 16. This paragraph explains the policy implementing the Department of Ecology's delegation of regulatory authority to local health departments. This background information is helpful to us in determining whether the County's ordinance irreconcilably conflicts with the state statutory scheme. The County's motion to strike the majority of the full paragraph in part C on page 16 is **DENIED.**

Tenth, the County objects to the second and third sentences in the first paragraph on page 17. These sentences address the potential consequences of allowing counties to independently ban the use of biosolids. The County has presented assertions that its ordinance will have little to no effect on the state statutory scheme as a whole. Farm Amici's brief presents the potential policy implications of the County's ordinance, which is helpful to us in determining whether the County's ordinance irreconcilably conflicts with the state statutory scheme. The County's motion to strike the second and third sentences in the first paragraph on page 17 is **DENIED.**

Eleventh, the County objects to the entirety of section D contained on pages 17-18. The information presented here responds to the County's assertions that its ordinance does not

conflict with the state statutory scheme because using Class A biosolids in place of Class B biosolids is a valid alternative; therefore, allowing amici to present an alternative argument serves the interests of justice and is helpful to us. The County's motion to strike the entirety of section D contained on pages 17-18 is **DENIED.**

Twelfth, the County objects to the phrase "for the reasons outlined above" because it has requested that those reasons be stricken. Because we have denied the County's motions to strike, with the exception of pictures, the County's motion to strike is **DENIED.**

Thirteenth, the County objects to the first sentence on page 20. This sentence is contained in the conclusion section of Farm Amici's brief and is not presented as either argument or fact. We agree with the County that this sentence is based on facts outside the record and is not necessarily helpful to us. The County's motion to strike the first sentence on page 20 is **GRANTED.**

In conclusion, the County's two motions to strike portions of the amici's briefs are granted in part and denied in part. Further, we note that the County was ordered to respond to the briefs filed by amici and, thus, was given the opportunity to counter amici's general factual assertions supporting the policy implications of the County's ordinance. *See McCuistion*, 174 Wn.2d 369, 395 n.7, 275 P.3d 1092 (2012) ("by allowing answers to the State's motion for reconsideration and the various amicus briefs filed on behalf of the State, we gave Mr. McCuistion an opportunity to counter the factual assertions of the State and its amici."). To the extent the County failed to respond to amici's assertions, its failure was based on its own assumption that we would grant its motions to strike in their entirety. *See* Wahkiakum County's briefs responding to amici.

Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Hunt, Lee

DATED this 25th day of June, 2014.

FOR THE COURT:

Bjorgen, A.C.J.
ACTING CHIEF JUDGE

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APPENDIX F

County's Trial Court Memorandum of Points and Authorities

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF COWLITZ

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, **Plaintiffs,** **vs.** **WAHKIAKUM COUNTY, a political subdivision of the State of Washington,** **Defendant.**	**NO. 11-2-00554-3** **MEMORANDUM OF POINTS AND AUTHORITIES RE: SUMMARY JUDGMENT**

I. BACKGROUND

Until 1992, regulating the disposal of human waste in the State of Washington was the responsibility of the counties. See plaintiff Department of Ecology's materials: Declaration of Lee Overton, Ex. 3. (Plaintiff Department of Ecology will hereafter be referenced as the Department in the interest of brevity.) In 1992, pursuant to a federal directive embodied in the Clean Water Act, 33 USC §1251 et. seq., and federal regulations adopted pursuant to that act, the State of Washington passed ESHB 2640 creating RCW chapter 70.95J regulating disposal of "municipal sewage sludge that is a primarily organic, semisolid product resulting from the wastewater treatment process, that can be beneficially recycled and meets all requirements under this chapter" and "septic tank sludge, also

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known as septage, that can be beneficially recycled and meets all requirements under this chapter." RCW 70.95J.010(1). These two types of human waste are lumped into the single term "biosolids." Id.

RCW 70.95J.005(e) acknowledges the problematic nature of biosolids management: "Municipal sewage sludge can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health." This is somewhat of an understatement. After public hearings on the subject, the Wahkiakum County commission found that biosolids and septage contain toxic metals such as "arsenic, cadmium, copper, lead, mercury, molybdenum, nickel, selenium, and zinc;" that they contain deadly microorganisms such as "*e. coli, heliobacter pylori, legionella, cryptosporidium, giardia*, and various viruses;" and that "disease and heavy metal contamination constitute potential threats to the life and health of humans, pets, livestock, crops, and also the natural flora and wildlife of the County." See page one of the ordinance in quo, attached to the initial pleadings herein and again as Exhibit 1 to Declaration of Lee Overton.

The potential dangers posed by land application of biosolids have been held sufficient in other jurisdictions to justify a municipal exercise of police power. See, e.g., Welch v. Board of Sup'rs of Rappahannock County, Va., 888 F.Supp. 753, 759 (W.D.Va.,1995): "[T]here clearly is at least a rational basis for believing that [such an] Ordinance will protect the health and safety of those within the County. Given the County's rational belief that the land application of sewage sludge poses health and safety risks, it is beyond question that a complete ban furthers the purpose of protecting against those risks." See also McElmurray v. U.S. Dept. of Agriculture, 535 F.Supp.2d 1318, 1321 (S.D.Ga.,2008) ("The Clean Water Act recognizes that municipal sewage sludge contains toxic pollutants."), Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556, 562 (C.A.5 (Tex.),1997) ("[E]xperts have yet to reach a consensus on the safety of land application of sludge.").

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But since the Department, the State, and the federal government all have regulatory schemes governing the disposal of sludge and biosolids, there can be no real argument that such regulation is unjustified. Therefore merely suffice it to say that the elected representatives of Wahkiakum County determined that its tolerance for the risk of contamination of its crops, livestock, wildlife, and citizens by toxins, disease vectors, and heavy metals originating from the deliberate spreading of human waste upon land within its borders was not as great as the tolerance for such risk at the state level. In order to better protect its citizens from these risks, the Board of Commissioners passed an ordinance restricting land application of septage and biosolids within the county to only those that have been treated to the level designated Class A – the only level of certification that guarantees that at least all potential disease vectors (if not heavy metals or other toxins) have been eliminated. WAC 173-308-160.

The county has little argument with the Department's recapitulation of its regulatory scheme in its Motion for Summary Judgment, but differs from the Department only in detail. For instance, WAC 173-308-080 does not provide or prove, as represented by the Department, that "land application is the primary form of managing biosolids." The county takes the position that whether land application is the primary method of biosolid management has no bearing on the legal posture of the case, however.

The county also observes that when the Department relates (at page four of its memorandum) that biosolids are "beneficially used on agricultural land, forest land, public contact sites, or land reclamation sites," the Department is not, as an initial scan might indicate, claiming that such use is "beneficial" to land or people in the dictionary sense. Rather, "beneficial use" is a term of art defined in the Washington Administrative Code at WAC 173-308-080. Basically, any time biosolids are spread on the land pursuant to the Department's scheme, they are by definition "beneficially used" whether actual benefit results or not.

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But, however facially inapposite the Shakespearean admonition that a rose by any other name would smell as sweet may be to the present subject matter, the principle applies. Differences regarding terminology do not amount differences of substance. The area of substantial difference herein is what power the Department has to prevent the County of Wahkiakum from enforcing a duly enacted ordinance.

II. PRESUMPTIONS AND BURDENS

The County of Wahkiakum has passed an ordinance pursuant to the police power granted to it by the Washington State Constitution, Art. 11, §11.

"Article 11, §11 is a direct delegation of police power. [This power is] as ample within its limits as that possessed by the [state] legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation reasonable and consistent with the general laws." Brown v. City of Yakima, 116 Wash.2d 556, 559, 807 P.2d 353, 354 (1991), citing Hass v. Kirkland, 78 Wash.2d 929, 932, 481 P.2d 9 (1971) (quoting Detamore v. Hindley, 83 Wash. 322, 326, 145 P. 462 (1915)).

A duly enacted ordinance – and the Department does not argue that the ordinance in quo was not "duly enacted" – "is presumed constitutional, requiring the party challenging it to demonstrate that it is unconstitutional *beyond a reasonable doubt*." State v. Immelt, 150 Wash.App. 681, 686, 208 P.3d 1256, 1259 (2009) (emphasis added), citing City of Puyallup v. Pacific NW Bell Tel. Co., 98 Wash.2d 443, 448, 656 P.2d 1035 (1982). This is a strong presumption, considering that burdens of proof are generally considered to be items relating to proof of facts rather than legal conclusions.

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"In establishing the constitutional invalidity of an ordinance, a heavy burden rests upon the party challenging its constitutionality." Lenci v. City of Seattle, 63 Wash.2d 664, 667-68, 388 P.2d 926 (1964) (citing Letterman v. City of Tacoma, 53 Wash.2d 294, 333 P.2d 650 (1958)).

"Every presumption will be in favor of constitutionality." Id. (citing Winkenwerder v. City of Yakima, 52 Wash.2d 617, 328 P.2d 873 (1958)), HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services, 148 Wash.2d 451, 478, 61 P.3d 1141, 1155 (2003). "Like statutes, municipal ordinances are presumed constitutional, and courts interpret ordinances in a manner which upholds their constitutionality if possible." Tukwila School Dist. No. 406 v. City of Tukwila, 140 Wash.App. 735, 743, 167 P.3d 1167, 1171 (2007), citing Leonard v. City of Spokane, 127 Wash.2d 194, 197-98, 897 P.2d 358 (1995).

If, overcoming these heavy burdens and presumptions, a challenger can show an ordinance "directly and irreconcilably conflicts" with state statute, the court will rule such ordinance constitutionally invalid; "If, however, the ordinance and statute can be harmonized, no conflict will be found." HJS Development, 148 Wash.2d at 482. (citations omitted).

III. FRAMEWORK FOR CONFLICT ANALYSIS

"An ordinance must yield to a statute on the same subject on either of two grounds: if the statute preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the two that cannot be harmonized." King County v. Taxpayers of King County, 133 Wash.2d 584, 612, 949 P.2d 1260 (1997), citing Brown v. Yakima, 116 Wash.2d 556, 559, 807 P.2d 353 (1991). Separate methods of analysis have grown up around each of these two grounds.

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Here, the Department has not argued that the state has preempted the field. Nor has it ever been the Department's contention that the field is preempted in its entirety. In enacting administrative code provisions consistent with its understanding of the statutes regulating biosolids, the Department acknowledged as much with WAC 173-308-030(6): "Facilities and sites where biosolids are applied to the land must comply with other applicable federal, state and local laws, regulations, and ordinances, including zoning and land use requirements." The Department's pronouncement in this regard has some authority, for "Where the Legislature charges an agency with the administration and enforcement of an ambiguous statute, we give 'the agency's interpretation great weight in determining legislative intent.' Friends of Columbia Gorge, Inc. v. Wash. State Forest Practices, 129 Wash.App. 35, 47, 118 P.3d 354 (2005) (citing Postema v. Pollution Control Hearings Bd.,142 Wash.2d 68, 77, 11 P.3d 726 (2000))." Lake Union Drydock Co., Inc. v. State Dept. of Natural Resources, 143 Wash.App. 644, 652, 179 P.3d 844, 848 (Wash.App. Div. 2, 2008). Furthermore, this view comports with the well-established rule that "A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated." State ex rel Schillberg v. Everett District Court, 92 Wn.2d 106, 108, 594 P.2d 448 (1979).

Therefore we address the second method of analysis: whether "a conflict exists" between the Department's regulations and Wahkiakum County's ordinance "that cannot be harmonized." King County v. Taxpayers, supra.

IV. "PROHIBITS WHAT THE STATUTE LICENSES"

The Department first attempts to find a conflict on the grounds that the Department's scheme would permit what Wahkiakum's ordinance would prohibit. But it has not yet been established beyond a reasonable doubt (Immelt, supra) that this is the case. "A county or local ordinance conflicts with state law when it permits or licenses that which the statute forbids and prohibits, and vice versa.

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Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits. *Where a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders* but they may not prohibit same outright." Weden v. San Juan County, 135 Wash.2d 678, 720, 958 P.2d 273 (1998) (emphasis added) (internal citations omitted).

The statutory scheme in this case, as interpreted by the Department heretofore in WAC 173-308-030(6), supra, is consistent with this analysis. It requires that those who would spread any kind of biosolids not only have permission from the Department, but also be in compliance with any other "applicable federal, state and local laws, regulations, and ordinances, including zoning and land use requirements." In other words, the Department already prohibits land application of biosolids if done in violation of county ordinance. There is no inconsistency to be found here.

In interpreting WAC 173-308-030(6), note that the word "including" signals that a following list is nonexclusive. "The word 'including' is a term of enlargement, not limitation." U.S. v. Hoffman, 154 Wash.2d 730, 741, 116 P.3d 999, 1004 (2005). See also Town of Ruston v. City of Tacoma, 90 Wash.App. 75, 84, 951 P.2d 805, 810 (Wash.App. Div. 2,1998): "Generally, the statutory use of "including" does not exclude entities that are not specifically enumerated thereafter. In re Arbitration of Fortin, 82 Wash.App. 74, 84 n. 4, 914 P.2d 1209 (1996) (citing 2A Norman J. Singer, Sutherland Stat. Const., Intrinsic Aids § 47.23 (5th ed.1992))." Thus, "zoning and land use requirements" are not the only "applicable ordinances" covered in the WAC, which is presumed to follow statutory intent. This means the fact that the county's ordinance is an exercise of police power rather than the particularly mentioned zoning capacity is irrelevant to our legal inquiry.

Observe the terms used by the court in Ritchie v. Markley, 23 Wn.App. 569, 597 P.2d 449 (1979), cited by the Department: "The ordinance in effect allows the county to prohibit precisely what

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the statute *unconditionally* allows, and in so doing violates the state constitution." (Emphasis added.)

Here, the statute, as interpreted by the Department, does not "unconditionally" allow the spreading of biosolids: further regulation by the counties is both expected and provided for. Counties may, after all, further regulate state-licensed activities. Weden, supra.

Thus, by its own terms and as interpreted (until now) by the Department itself, statute does not conflict with Wahkiakum County's ordinance. Absent preemption of the field, counties are permitted to further regulate activities regulated by the State, this was anticipated in the regulatory scheme in quo, and this is what the county has done.

V. "THWARTS THE PURPOSE"

The Department asserts that even absent any particular conflict, Wahkiakum's ordinance is invalid because it "reflects opposing policies" or "thwarts the purpose" of the statutes the Department is tasked to effectuate. E.g., Ritchie, supra, 23 Wn.App. at 574: "The ordinance thwarts the state's policy..."; Biggers v. City of Bainbridge Island, 162 Wash.2d 683, 699, 169 P.3d 14, 23 (2007): "The SMA's statewide mandates, and the coordinated system established by that act, are thwarted by the City's rolling moratoria."

Answering this allegation requires a clear-eyed view of what the state's policy really was in creating RCW chapter 70.95J. The Department's reiteration of statutory policy declarations misses the most telling point, which is baldly stated at RCW 70.95J.007: "The purpose of this chapter is to provide the department of ecology and local governments with the authority and direction *to meet federal regulatory requirements* for municipal sewage sludge." (Emphasis added.)

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That's right: the purpose of the statute is primarily to effectuate federal requirements, without which no change in the law was likely ever to have been made. This policy is repeated in RCW 70.95J.020, providing in relevant part:

> (1) The department shall adopt rules to implement a biosolid management program within twelve months of the adoption of federal rules, 40 C.F.R. Sec. 503, relating to technical standards for the use and disposal of sewage sludge. The biosolid management program shall, at a minimum, conform with all applicable federal rules adopted pursuant to the federal clean water act as it existed on February 4, 1987.
>
> (2) In addition to any federal requirements, the state biosolid management program may include, but not be limited to, an education program to provide relevant legal and scientific information to local governments and citizen groups.

Note the way this is worded. The primary purpose of the statute is to comply with new federal regulations; "additional" elements "may" be included as a secondary consideration. The legislature literally didn't care what else the program did as long as it complied with federal regulations. This is clarified yet again in the WAC provisions adopted by the Department itself in response to the legislature's directive. WAC chapter 173-308 regarding biosolids management references the Code of Federal Regulations a dozen times and the Clean Water Act no less than fifteen times.

This is further proved by the evidence of the Department's own pleadings. See Exhibit 3 of Department counsel Lee Overton's declaration – the Final Bill Report for ESHB 2640, stating in relevant part:

> The federal Clean Water Act of 1987 required the Environmental Protection Agency (EPA) to develop rules to increase federal requirements for sludge management. In 1989, the EPA adopted rules relating to how states must regulate a sludge management program. These rules, in part, require states to have direct enforcement authority.... The [prior] state solid waste law does not provide the department with direct enforcement authority [as required]... The

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> Department of Ecology is required to develop a biosolid management program that will conform with federal regulations...

Therefore, the only way we can know what policies Wahkiakum County's ordinance must effectuate to avoid conflict with the state's policies is to know what the federal policies that drive the state's policies are. After all, federal law trumps state law according to much the same system of rules by which state law trumps county ordinance. See, e.g., State v. Norris, 157 Wash.App. 50, 73-74, 236 P.3d 225, 236 (Wash.App. Div. 2,2010):

> The Supremacy Clause provides that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; ... any thing in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. This provision nullifies state law that is incompatible with federal law. See U.S. Const. art. VI, cl. 2; Altria Group, Inc. v. Good, —— U.S. ——, 129 S.Ct. 538, 543, 172 L.Ed.2d 398 (2008); Testa v. Katt, 330 U.S. 386, 389–93, 67 S.Ct. 810, 91 L.Ed. 967 (1947)...
>
> We infer preemption when the scope of federal law indicates Congress's intent to occupy the legislative field or when federal law actually conflicts with state law. Altria Group, 129 S.Ct. at 543; see McKee, 164 Wash.2d at 387, 191 P.3d 845. Conflict preemption occurs where compliance with both state and federal law is impossible or where the state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

The fact that federal law drives state law on this issue is very important because the federal policy which is the basis – and entire reason – for the Washington State statutory scheme on disposal of biosolids is one of local control. The Federal Clean Water Act (CWA) that governs the State's actions herein provides as follows: "*The determination of the manner of disposal or use of sludge is a local determination....*" 33 U.S.C. § 1345(e) (emphasis added). "In addition, although not directly dealing with the use or disposal of sewage sludge, the Act expressly permits states *and localities* to adopt or enforce any standard or limitation with regard to discharges of pollutants, unless such

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standard or limitation is less stringent than the standards or limitations under the Act. Id. § 1370." Welch v. Board of Sup'rs of Rappahannock County, Va., 888 F.Supp. 753, 756 (W.D.Va.,1995) (emphasis added). The Code of Federal Regulations, taking its cue from the provisions of the CWA itself, provides further: "Nothing in this part precludes a State *or political subdivision thereof* ... from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge." 40 C.F.R. § 503.5(b) (emphasis added).

This applies equally to issues of land application of biosolids: "... Clean Water Act ... regulations encourage direct land application of sewage sludge, but they do not require that states *or local governments* allow it. See Welch [supra], (EPA's "mere preference [for land application] is vastly different from legislation forcing states and localities to permit land application"). U.S. v. Cooper, 173 F.3d 1192, 1201 (C.A.9 (Cal.),1999) (emphasis added). (Here and elsewhere in this memorandum, the County follows the Department's example of citing persuasive reasoning in noncontrolling cases. State ex rel. Todd v. Yelle, 7 Wn.2d 443, 451, 110 P.2d 162, 166) (1941).)

The federal government's preference for local control is based on salutary policy. "[T]he natural consequence of Congress's authorization of local control is variety and inconsistency in the way localities choose to address the subject. What plaintiffs characterize as balkanization is more appropriately characterized as Congress's choosing to exploit one of the strengths of our federal system—its flexibility—by allowing states *and localities* to (1) experiment with different approaches (see New State Ice Co. v. Liebmann (1932) 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (dis. opn. of Brandeis, J.) [describing states as laboratories that can experiment with different laws]), subject to the minimum national standard contained in Part 503, and (2) adapt their regulations to local conditions, such as geography, climate, soil types and population density." County Sanitation Dist. No. 2 of Los

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Angeles County v. County of Kern, 127 Cal.App.4th 1544, 1610, 27 Cal.Rptr.3d 28, 76 (Cal.App. 5 Dist.,2005) (emphasis added).

In sum, the State of Washington made it more than ordinarily clear that its primary goal and policy in adopting the present system of regulation for biosolids and septage was to effectuate federal rules. The federal rules the state was effectuating carried a preference for local control that was stated in U.S. Code and repeated in administrative materials. That preference for local control is "unmistakably clear." Kern, supra, 127 Cal.App. 4th at 1610. So it can hardly be said that Wahkiakum County's local ordinance "thwarts the policy" of the State's regulatory scheme. Rather, as observed by the Kern court, local solutions are part of the benefits of the robust federal scheme that has been adopted by the State.

There is an argument to be made that any state system that disregards or legislates against U.S.C. § 1345(e)'s mandate that "The determination of the manner of disposal or use of sludge is a local determination," and 40 C.F.R. § 503.5(b)'s provision that "Nothing in this part precludes a State or political subdivision thereof ... from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge," is *itself* pre-empted by those federal provisions pursuant to the Supremacy Clause. Altria, supra; Testa, supra.

VI. CONTRARY PRECEDENT DISTINGUISHED

In an effort to bolster its argument, the Department introduces as controlling precedent the case of Entertainment Industry Coalition v. Tacoma-Pierce County Health Department, 153 Wn.2d 657, 105 P.3d 985 (2005), which it characterizes as considering "the validity of a local ban on indoor smoking." But this case is not to the point: the "ban" being considered was adopted by a health department – an executive body – and not a legislative body of any kind. "A health board's authority

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to enact health regulations comes solely from statutory delegation." Id., 153 Wn.2d at 663. In other words, a health board does not have the constitutional powers that a county legislature possesses pursuant to Washington Constitution Art. 11, §11. A health board thus does not have the benefit of the presumptions enumerated supra that a county ordinance has. Nor does a health board have the presumptive power of counties, observed in Weden, surpa, to further regulate activities that may also be subject to regulation by the state. Their authority is not plenary; therefore their limitations are not Wahkiakum County's; therefore the Entertainment case is inapposite.

The Department's reliance on Biggers v. City of Bainbridge Island, 162 Wash.2d 683, 694, 169 P.3d 14, 21) (Wash.,2007), is similarly misplaced. That case involved a county attempting to further regulate shoreline management, which is by constitutional provision specifically *not* an exercise of the county's inherent plenary police power:

> Article XVII, section 1 of the Washington Constitution declares that shorelines were originally owned by the state, and therefore subject to state regulation. Even after sale or lease of shorelines, the state continues to hold remaining sovereign interests of the public. Indeed, the SMA was expressly based on the proposition that shorelines are of "statewide significance." *Local governments do not possess any inherent constitutional police power over state shoreline use.*

Biggers, 162 Wash.2d at 694 (emphasis added).

The same is very much not the case here, where the county is well within the traditional scope of its powers. As the Department observes, disposal of sewage sludge in all its various forms was the exclusive responsibility of the counties until the federal government mandated increased – but not exclusive – state involvement.

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VII. CONCLUSION

Despite the fact that counties have the power to further regulate state-regulated activities, that the Department's own administrative code allows for such regulation in the particular case, and that federal law controlling under the Supremacy Clause encourages local control of septage and biosolids issues, the Department claims Wahkiakum County's biosolids ordinance is unconstitutional. But the precedent it cites for the purpose does not address the issue, and even if this were a close case (which the county argues it is not), every presumption and inference is against the Department's position and in favor of the county's police power. The Department has not met its "heavy burden" and cannot prove that the county's ordinance is either unconstitutional or impossible to harmonize with its own regulatory scheme. Lenci, supra.

The County of Wahkiakum has a natural interest in how human waste containing toxins and malignant microorganisms is spread on land within its boundaries. Regulation of such an enterprise is a rational exercise of police power and, under "unmistakably clear" federal law, a perfect candidate for local control so individual localities can adapt regulations to "local conditions." (Kern, supra). Rather than attempt to prohibit local regulation of biosolid application, the Department should support and celebrate it.

Respectfully submitted this 7th day of September, 2011.

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APPENDIX G

County's Brief to Div. II

No. 44700-2-II

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

WAHKIAKUM COUNTY, Respondent

v.

Department of Ecology, State of Washington, Appellant

APPEAL FROM THE ORDER OF THE SUPERIOR COURT

OF THE STATE OF WASHINGTON FOR

WAHKIAKUM COUNTY

RESPONDENT'S BRIEF

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I. FACTS

As this is an appeal on a motion for summary judgment, there are no disputed facts. The complete record is before the court. Briefly, the salient facts are as follows:

In 1992, the State of Washington, in compliance with the federal Clean Water Act, 33 USC §1251 et. seq., changed its regulatory scheme for certain types of solid waste by coining the term "biosolids," defining the term as "municipal sewage sludge that is a primarily organic, semisolid product resulting from the wastewater treatment process, that can be beneficially recycled and meets all requirements under this chapter" and "septic tank sludge, also known as septage, that can be beneficially recycled and meets all requirements under this chapter." RCW 70.95J.010(1). RCW 70.95J then regulated biosolids, and additionally authorized plaintiff Department of Ecology (hereinafter, "Department" or "the Department") to create additional administrative regulations.

RCW 70.95J.020. At the time of its adoption of RCW 70.95J, the legislature declared, "the purpose of this chapter is to provide the department of ecology and local governments with the authority and direction to meet federal regulatory requirements for municipal sewage sludge." RCW 70.95J.007.

The legislature further acknowledged that "sewage sludge can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health." RCW 70.95J.007(e). This accords with federal law acknowledging that sludge contains "toxic pollutants." 33 USC 1345(d)(2)(a)(i). More specifically, after public hearings on the subject, the Wahkiakum County commission found that biosolids and septage contain toxic metals such as "arsenic, cadmium, copper, lead, mercury, molybdenum, nickel, selenium, and zinc;" that they contain deadly microorganisms such as *"e. coli, heliobacter pylori, legionella, cryptosporidium, giardia,* and various viruses;" and that "disease and heavy metal contamination constitute potential threats to the life and health of humans, pets, livestock, crops, and also the

natural flora and wildlife of the County." CP 48 et. seq. The Ordinance is also attached as Exhibit A.

The Department adopted a regulatory scheme for treating such biosolids for the purpose of mitigating the danger they present, calling for treatment of biosolids to varying levels set by the Department and regulating how each class can be disposed of. The highest level of treatment is Class A, which is the only class of biosolids in which all disease-causing microorganisms have been destroyed. WAC 173-308-160. No level or class of biosolids has been treated to eliminate toxic metal contamination.

Pursuant to its understanding of the state's mandate, the Department provided at WAC 173-308-030(6): "Facilities and sites where biosolids are applied to the land must comply with other applicable federal, state and local laws, regulations, and ordinances, including zoning and land use requirements."

On April 26, 2011, the Board of Commissioners of Wahkiakum County enacted an ordinance (hereafter, "the

Ordinance") that restricted land application of biosolids (as opposed to burial or incineration, the other methods by which biosolids can be disposed of) to Class A biosolids only. Exhibit A. The Board did not restrict the time, place, or manner of disposal of Class A biosolids or make any restriction regarding the burial or incineration of Class B biosolids or septage. Id.

II. ARGUMENT

A. Standard of Review, Legal Presumptions and Burdens

The Department correctly observes that this court is deciding a purely legal issue and thus decides *de novo*, with no duty of deference to the decision of the Cowlitz County Superior Court in this matter. Smith v. Safeco, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). But "the appellate court engages in the same inquiry as the trial court." Id., quoting Jones v. Allstate Ins. Co., 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). And, as that inquiry is one into the constitutionality of a county ordinance, it is an

inquiry that must be made in a certain way, with certain burdens and presumptions.

Our Supreme Court has ruled that when the issue in litigation is the constitutionality of a duly adopted legislative enactment, the challenger of its constitutionality "must demonstrate that statute's invalidity *beyond a reasonable doubt* and rebut the presumption that all legally necessary facts exist." Johnson v. Johnson, 96 Wash.2d 255, 258, 634 P.2d 877, 882 (1981) [internal quotes omitted] (emphasis added). This presumption has been held applicable to ordinances: an ordinance "is presumed constitutional, requiring the party challenging it to demonstrate that it is unconstitutional *beyond a reasonable doubt*." State v. Immelt, 150 Wash.App. 681, 686, 208 P.3d 1256, 1259 (2009) (emphasis added), citing City of Puyallup v. Pacific NW Bell Tel. Co., 98 Wash.2d 443, 448, 656 P.2d 1035 (1982).

"Beyond a reasonable doubt" is traditionally a burden of proof rather than a burden of persuasion for a matter in which the

facts are, as here, undisputed. This is significant. Of all the inquiries this court makes as a matter of law, this is the only one in which, rather than the traditional "as a matter of law" standard, this court actually has to consider a burden of proof. It is not enough for this court to be persuaded by the Department (which it should not be in any event). It must be persuaded *beyond a reasonable doubt*.

It is thus perhaps an understatement to say, as the Court of Appeals has done in the past, that "In establishing the constitutional invalidity of an ordinance, a heavy burden rests upon the party challenging its constitutionality." Lenci v. City of Seattle, 63 Wash.2d 664, 667-68, 388 P.2d 926 (1964) (citing Letterman v. City of Tacoma, 53 Wash.2d 294, 333 P.2d 650 (1958)). And even this "heavy burden" is not the end of the Department's travail.

"Like statutes, municipal ordinances are presumed constitutional, and courts interpret ordinances in a manner which upholds their constitutionality if possible." Tukwila School Dist.

No. 406 v. City of Tukwila, 140 Wash.App. 735, 743, 167 P.3d 1167, 1171 (2007), citing Leonard v. City of Spokane, 127 Wash.2d 194, 197-98, 897 P.2d 358 (1995).

Furthermore, "Every presumption will be in favor of constitutionality." Id. (citing Winkenwerder v. City of Yakima, 52 Wash.2d 617, 328 P.2d 873 (1958)), HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services, 148 Wash.2d 451, 478, 61 P.3d 1141, 1155 (2003).

In this case, there is no such thing as an unknown fact. If the fact is not in the record, then it is, pursuant to Johnson, supra, presumed to be whatever fact would support constitutionality of the Wahkiakum County ordinance.

In this case, there is no such thing as ambiguity. If the record is not clear, if the law is not clear, then, pursuant to Winkenwerder, supra, and Tukwila, supra, the answer is whatever would support constitutionality of the Wahkiakum County ordinance.

And if, after all this, the Department can show conflict between the ordinances herein, it is still not done: it must show not a conflict, but a "direct and irreconcilable conflict." "If, however, the ordinance and statute can be harmonized, no conflict will be found." HJS Development, 148 Wash.2d at 482 (citations omitted). Furthermore, "A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated." State ex rel Schillberg v. Everett District Court, 92 Wn.2d 106, 108, 594 P.2d 448 (1979).

And the Department must make its proof, against all these presumptions, not just to the satisfaction of the court (which would be difficult enough), but *beyond a reasonable doubt*. Immelt, supra. Reasonable minds cannot be allowed to differ as to the result. If the court finds that any reasonable person could come to a conclusion contrary to the Department's, then the Wahkiakum County ordinance is valid.

This court must not allow the Department to take advantage of the fact that "beyond a reasonable doubt" is a very unusual burden for a case resolving on a matter of law, and a very heavy burden for a civil case to leverage this novelty into this court's use of a lighter burden. In this case, it is not enough even for the Department to prove it is right. It must prove *it cannot possibly be wrong*.

B. Harmonizing the Intent of the Legislature With the Cathlamet Ordinance

The County derives its authority to make ordinances from our state constitution at Article 11, §11: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

"Article 11, §11 is a direct delegation of police power. [This power is] as ample within its limits as that possessed by the [state] legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation

reasonable and consistent with the general laws." Brown v. City of Yakima, 116 Wash.2d 556, 559, 807 P.2d 353, 354 (1991), citing Hass v. Kirkland, 78 Wash.2d 929, 932, 481 P.2d 9 (1971) (quoting Detamore v. Hindley, 83 Wash. 322, 326, 145 P. 462 (1915)).

Consistency with the general laws is measured as follows: "An ordinance must yield to a statute on the same subject on either of two grounds: if the statute preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the two that cannot be harmonized." King County v. Taxpayers of King County, 133 Wash.2d 584, 612, 949 P.2d 1260 (1997), citing Brown v. Yakima, 116 Wash.2d 556, 559, 807 P.2d 353 (1991).

The Department has never argued preemption of the field. Nor would such an argument avail in any event, given the presumptions against preemption in the absence of explicit statutory provision. See, e.g., Hue v. Farmboy Spray Co., 127 Wn.2d 67, 78-79, 896 P.2d 682, 688-89 (1995). Thus, the only

question is whether "a conflict exists that cannot be harmonized." King County v. Taxpayers, supra.

"A county or local ordinance conflicts with state law when it permits or licenses that which the statute forbids and prohibits, and vice versa. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits. *Where a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders* but they may not prohibit the same outright." Weden v. San Juan County, 135 Wash.2d 678, 720, 958 P.2d 273 (1998) (emphasis added) (internal citations omitted).

Much of the argument in this case heretofore has dealt with the proper interpretation of Weden in the context of this controversy. The Department has argued hotly that regulations limiting the land application of biosolids to Class A constitutes an "outright prohibition," or ban. Meanwhile, the County has taken the position that carried the day in Welch v. Board of Sup'rs of Rappahannock County, Va., 888 F.Supp. 753,

759 (W.D.Va.,1995): "Here, the County has not passed a complete ban on sewage sludge within its boundaries; it simply has banned one of three possible methods of use or disposal. [The other two are burial and incineration.] Regardless of the EPA's preference for land application, the Ordinance does not conflict with the federal standards for use or disposal of sewage sludge."

In Wahkiakum County, in addition to the options to bury or burn Class B biosolids and septage pursuant to, e.g., WAC 173-308-020, -080, and -300 , the county has also left the producers of Class B biosolids the option of shipping that waste to one of the other counties in the State of Washington (all of which are larger than Wahkiakum County), or anywhere else in the United States or the world, that will accept it as the "benefit" the Department claims it to be. Additionally, producers of biosolids in Wahkiakum County or anywhere else on Earth are welcome to treat biosolids to Class A standards and spread them upon the surface of the land within Wahkiakum County and would violate neither law nor ordinance by doing so.

The foreclosure of a single option in the disposal of sludge in a single (very small) portion of the state cannot be considered an "outright prohibition" under Weden. In Weden, the court upheld an ordinance prohibiting the state-licensed act of using motorized personal watercraft in county waters. Id. The prohibition the Weden court upheld and called "reasonable regulations of [State] licensed activity within [the County's] borders "is no less onerous than the prohibition complained of here. Weden, supra.

And for further authority on the expectation that counties will enact "reasonable regulations," we need look no further than the Department itself.

It was the Department that propounded WAC 173-308-030(6): "Facilities and sites where biosolids are applied to the land must comply with other applicable federal, state and local laws, regulations, and ordinances, including zoning and land use requirements."

Wahkiakum County has done nothing more than what WAC 173-308-030(6) contemplates: create a "local land use ordinance" with which land users must comply.

Remember the inquiry the court must make in this matter. We are here to find any possible way to harmonize the Ordinance with the statutory scheme laid down by the legislature. E.g., King County v. Taxpayers, supra. Weden, supra, and WAC 173-308-030(6) have shown us this way. Weden tells us that further regulation within County borders is expected and unexceptionable, (even to the level of prohibiting certain watercraft). WAC 173-308-030(6) shows us the Department itself expects, and expects to comply with, such regulation.

And it does so without limitation. The canons of statutory construction tell us "[t]he word 'including' is a term of enlargement, not limitation." U.S. v. Hoffman, 154 Wash.2d 730, 741, 116 P.3d 999, 1004 (2005). See also Town of Ruston v. City of Tacoma, 90 Wash.App. 75, 84, 951 P.2d 805, 810 (Wash.App. Div. 2,1998): "Generally, the statutory use of

'including' does not exclude entities that are not specifically enumerated thereafter. In re Arbitration of Fortin, 82 Wash.App. 74, 84 n. 4, 914 P.2d 1209 (1996) (citing 2A Norman J. Singer, Sutherland Stat. Const., Intrinsic Aids § 47.23 (5th ed.1992))." So, even if it were not possible (and therefore mandatory, pursuant to Leonard v. City of Spokane, supra) to interpret the Ordinance as a "land use" regulation directly addressed by WAC 173-308-030(6), WAC 173-308-030(6) does not limit itself to obedience only to "zoning and land use requirements, but rather to all "applicable federal, state and local laws, regulations, and ordinances." No one can argue the Ordinance is not an "applicable ordinance" pursuant to WAC 173-308-030(6): it is inarguably an ordinance, and it applies by its own terms.

That is the end of the inquiry – as much of a smoking gun as anyone is going to see in the murky field of environmental regulation. But it is more even than that.

First, WAC 173-308-030(6) is proof that the Department's position regarding local ordinances like

Wahkiakum's has changed since the WACs were written. In order to hold the position that the Ordinance does not control, the Department has to deny its own past policy as memorialized in codes it wrote itself. How can the Department claim that there is no reasonable way for the Ordinance to control when its own professionals, charged with carrying out the legislature's scheme, specifically provided that local ordinances control?

Second, WAC 173-308-030(6) is the decisive response to the Department's argument, in its brief at 27, that because RCW 70.95J contains no "savings clause" permitting local regulation, local regulation conflicts with the purpose of biosolids statutes. In any event, in this state, the Constitution is our "savings clause." Weden, supra, provides that local regulation is presumed acceptable, and Hue, supra, holds that in the absence of specific verbiage preempting the field, local regulation is presumed to be permitted. No "savings clause" is necessary. But, in WAC 173-308-030(6), the Department itself wrote one

anyway. The Department is the author of the very provision it argued did not exist.

Ultimately, though, WAC 173-308-030(6) is most important as evidence of legislative intent. "Where the Legislature charges an agency with the administration and enforcement of an ambiguous statute, we give 'the agency's interpretation great weight in determining legislative intent.' Friends of Columbia Gorge, Inc. v. Wash. State Forest Practices, 129 Wash.App. 35, 47, 118 P.3d 354 (2005) (citing Postema v. Pollution Control Hearings Bd.,142 Wash.2d 68, 77, 11 P.3d 726 (2000))." Lake Union Drydock Co., Inc. v. State Dept. of Natural Resources, 143 Wash.App. 644, 652, 179 P.3d 844, 848 (Wash.App. Div. 2, 2008). While the Department now argues that legislative intent is to overrule local ordinances, WAC 173-308-030(6) was written much closer to events than the Department's pleadings in this case – and when the Department wrote administrative code provisions enacting its interpretation of legislative intent, it provided for additional regulation of

biosolids by local ordinance. This is evidence the Legislature intended additional regulation of biosolids by local ordinance. Thus, it is the present position of the Department that violates legislative intent, not the Ordinance.

C. The Actual Intent of the Legislature

And what is the intent of the legislature, in any event? The Department attempts to persuade the court of its position by making a single case, pointing out provisions in state and federal law that back it up, and eliding contrary views. This shows the Department's fundamental misunderstanding of the burdens and presumptions in this case. As noted supra, it is not enough for the Department to have a persuasive case, even if it did. For it to prevail, there can be no other possible persuasive case. If reasonable minds can differ, it is not for this court to pick the most reasonable solution – it is to find for the County. Therefore the County asks the court to consider this alternative to the Department's theory – which, besides being reasonable (which is all it has to be), also has the advantage of being entirely correct.

The Department bases its theory of legislative intent on RCW 70.95J.005, which contains legislative findings. The Department notes subsection (2): "The legislature declares that a program shall be established to manage municipal sewage sludge and that the program shall, to the maximum extent possible, ensure that municipal sewage sludge is reused as a beneficial commodity and is managed in a manner that minimizes risk to public health and the environment." The Department takes the phrase "to the maximum extent possible" out of context and turns it into an overarching declaration of legislative purpose, rather than admitting what it is: an acknowledgment there is only so much reuse a dangerous product like municipal sewage sludge can be subjected to – a "maximum extent."

Subsection (1) of the very same statute notes that sewage sludge is "unavoidable," "often a financial burden," and "can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health." Id. After this litany of disadvantages, a finding that it should be reused "to the

maximum extent possible" does not sound like a universal recommendation, but a limiting proviso.

But more important even than that, the Department bases its argument about legislative *purpose* on a set of legislative *findings*. The legislature's purpose is best found in RCW 70.95J.007, titled "Purpose." The Department barely acknowledges this statute exists, and never cites it in its argument regarding legislative purpose. It provides, *"The purpose of this chapter is* to provide the department of ecology and local governments with the authority and direction *to meet federal regulatory requirements* for municipal sewage sludge." (Emphasis added).

And there you have it. There was no grand legislative design; not in the Washington legislature, anyway. The federal government handed down regulatory requirements and the state legislature dutifully adopted them. This purpose is repeated in RCW 70.95J.020, providing in relevant part:

> (1) The department shall adopt rules to implement a biosolid management program within twelve months of the adoption of federal rules, 40 C.F.R. Sec. 503, relating to technical standards for the use and disposal of sewage sludge. The biosolid management program shall, at a minimum, conform with all applicable federal rules adopted pursuant to the federal clean water act as it existed on February 4, 1987.
>
> (2) In addition to any federal requirements, the state biosolid management program may include, but not be limited to, an education program to provide relevant legal and scientific information to local governments and citizen groups.

Note the way this is worded. The primary purpose of the statute is to comply with new federal regulations; "additional" elements "may" be included as a secondary consideration. The only additional element the legislature mentioned by name was an education campaign, not anything to do with land application or beneficial use. The fact is apparent: The legislature literally didn't care what else the program did as long as it complied with federal regulations.

A deeper look into legislative history shows us the same thing. See the Final Bill Report for ESHB 2640, stating in relevant part:

> The federal Clean Water Act of 1987 required the Environmental Protection Agency (EPA) to develop rules to increase federal requirements for sludge management. In 1989, the EPA adopted rules relating to how states must regulate a sludge management program. These rules, in part, require states to have direct enforcement authority.... The [prior] state solid waste law does not provide the department with direct enforcement authority [as required]... The Department of Ecology is required to develop a biosolid management program that will conform with federal regulations...
>
> CP 66-67

There is no mention here of grand schemes for total reuse of septage sludge. Though it seems unlikely the legislature, which left much in the hands of the Department, would have registered strong objection to such a scheme within the limits of economy and common sense, it certainly played no part in their decision to pass the laws the Department now wishes us to believe were crafted with land application of biosolids at their very heart and soul. All the legislature was concerned with was

complying with federal regulations – laudable, but unhelpful to the Department here.

Since the State of Washington unequivocally declared that its "statutory purpose" is to comply with federal regulation, the only way to know the State's purpose is to know the purpose of the federal regulation. That purpose is made clear in the Federal Clean Water Act:

"*The determination of the manner of disposal or use of sludge is a local determination....*" 33 U.S.C. § 1345(e) (emphasis added). "In addition, although not directly dealing with the use or disposal of sewage sludge, the Act expressly permits states *and localities* to adopt or enforce any standard or limitation with regard to discharges of pollutants, unless such standard or limitation is less stringent than the standards or limitations under the Act. Id. § 1370." Welch v. Rappahannock County, supra, 888 F.Supp. at 756 (W.D.Va.,1995) (emphasis added). The Code of Federal Regulations, taking its cue from the provisions of the CWA itself, provides further: "Nothing in this

part precludes a State *or political subdivision thereof* ... from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge." 40 C.F.R. § 503.5(b) (emphasis added).

This applies equally to issues of land application of biosolids: "... Clean Water Act ... regulations encourage direct land application of sewage sludge, but they do not require that states *or local governments* allow it. See Welch [supra], (EPA's "mere preference [for land application] is vastly different from legislation forcing states and localities to permit land application"). U.S. v. Cooper, 173 F.3d 1192, 1201 (C.A.9 (Cal.),1999) (emphasis added).

With the federal government's statutory scheme – the very one that controls biosolids policy and practice (the Department's regulations, at WAC 173-308, cites the Clean Water Act at least fifteen times) – calling explicitly for local control, and with the Washington State Legislature explicitly

pointing to federal law as the fundamental basis for its own legislative scheme, it is clear this court must determine Wahkiakum County's local ordinance is valid. How can an initiative for local control "thwart the purpose" of a law that has built its preference for local control, in so many words, into its provisions?

Other courts have followed this line of reasoning to its natural conclusion; notably Welch, supra, and Kern, immediately infra. The Kern court noted that the federal preference for local control is "unmistakably clear." Kern, infra, 127 Cal.App. 4th at 1610. And this preference exists for good reason. "[T]he natural consequence of Congress's authorization of local control is variety and inconsistency in the way localities choose to address the subject. What plaintiffs characterize as balkanization is more appropriately characterized as Congress's choosing to exploit one of the strengths of our federal system—its flexibility—by allowing states *and localities* to (1) experiment with different approaches (see New State Ice Co. v.

Liebmann (1932) 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (dis. opn. of Brandeis, J.) [describing states as laboratories that can experiment with different laws]), subject to the minimum national standard contained in Part 503, and (2) adapt their regulations to local conditions, such as geography, climate, soil types and population density." County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern, 127 Cal.App.4th 1544, 1610, 27 Cal.Rptr.3d 28, 76 (Cal.App. 5 Dist., 2005) (emphasis added).

Thus, despite the Department's claims that the central and noble purpose of the biosolids statutes is the state's absolute control over all local disposal initiatives, we find that the central, and, yes, noble, purpose of the biosolids statutes is to carry forward the overarching federal plan for sludge disposal – a plan that has memorialized its preference for local control. Federal law, federal regulation, state law, even state regulation written by the Department contemporaneously with the adoption of this scheme, all provide for local control. It is the County that is in

step with the overarching purposes and policies of the legislature, and the Department that is frustrating those purposes.

D. Expense and Statistics as Proof of a "Total Ban"

The Department argues with great conviction that since 88% of biosolids (and dropping) are currently treated to Class B standards, a prohibition on land application of Class B biosolids is a "total ban." This is absurd on its face. By this logic, homosexuality does not exist in the United States, since less than 88% of people are gay. http://www.gallup.com/poll/6961/what-percentage-population-gay.aspx, retrieved 9/16/13. People with an IQ of over 130 do not exist, since they constitute less than five percent of the population. See, e.g., http://en.wikipedia.org/wiki/Intelligence_quotient, retrieved 9/14/13. The Department has also cured cancer. According to the Center for Disease Control, the "Percent of noninstitutionalized adults who have ever been diagnosed with cancer" is 8.2% -- far beneath the percentage of biosolids that

can be spread on the lands in Wahkiakum County. http://www.cdc.gov/nchs/fastats/cancer.htm, retrieved 9/14/13. We are fortunate to discover that African Americans, at 13.1% of the population of the United States, have not been "totally banned" from the land – unless, that is, when the growing number of treatment facilities treating biosolids to Class A brings the percentage of Class B biosolids down to 86.9%, the Department continues to argue that biosolids are "totally banned." http://quickfacts.census.gov/qfd/states/00000.html, retrieved 9/14/13.

Fun with statistics aside, all agree that the amount of biosolids remaining in the state after 88% are excluded is sufficient to drown Wahkiakum, the smallest county in the state, in excrement. So this is not really about how regulating all but 12% of something is a "ban." Nor, as we have seen above, is it as though Class B biosolids cannot find their final resting place in Wahkiakum County, either through burial or incineration. Nor is the problem that those within Wahkiakum County are not

permitted to create Class B biosolids. They are – but they must bury, incinerate, ship elsewhere, or further treat such waste, rather than spread it on the surface of the lands of this riparian and bucolic county.

But – and this, the Department believes, is its trump card – doing that would be very expensive and spreading Class B biosolids on the surface of the land is cheap. In other words, this is about money. The Department, without any evident sense of irony, makes every argument about the "economic infeasibility" of requiring further safety measures for Class B biosolids that every form of business has made against government regulation since time immemorial.

The question has already been answered in so many words in Johnson v. Johnson, supra, in which another statute was challenged for constitutionality on the grounds it was too expensive: "Although a more cost effective program may be conceivable, that does not render RCW 74.20.040 unconstitutional." Id., 96 Wn.2d at 263.

Remember, the Ordinance is an exercise of Wahkiakum County's police power, which was granted by Article 11, §11 of the Washington State Constitution. Brown, supra. Police power is "[t]hat inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society." Weden, supra, 135 Wn.2d at 692 (citations omitted). "The police power is firmly rooted in the history of this state, and its scope has not declined." Id.

There is no question that it is appropriate to use police power to regulate biosolids. "Biosolids" are composed of "treated human waste." O'Brien v. Appomattox County, 213 F.Supp. 627, 629 (2002). In some ways, they are more obviously hazardous than firearms: "Unlike [g]uns [which] in general are not deleterious devices or products or obnoxious waste materials that put their owners on notice that they stand in responsible relation to a public danger, the dumping of sewage and other pollutants... is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger." United States v. Weitzenhoff,

35 F.3d 1275, 1283 (9th Cir.1993) (internal citations omitted). Besides, the Department's own regulations, the state statutory scheme, and indeed the federal scheme that controls over all are each predicated on the applicability of police power to regulate the disposal of human waste. So the only remaining question is whether the cost of compliance changes the equation.

This is not the first time limits have been sought on the power to protect public safety on the grounds of cost (though it may be the first time any Department of Natural Resources has ever done so). Automotive manufacturers are an instructive example. As they have pointed out, requiring safety belts makes cars more expensive. E.g., Williamson v. Mazda Motor of America, Inc., 131 S.Ct. 1131 (2011). Airbags are more expensive still. E.g., Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 120 S.Ct. 1913 (2000). The thought that a governmental exercise of police power to regulate in favor of the "comfort, safety and welfare of society" can be invalidated on the basis of cost must have been the inspiration of the car companies that were parties to

lawsuits like those. And if that line of reasoning had been accepted, cars would not now have safety belts and airbags.

Businesses are concerned primarily with their bottom lines. Nor is it wrong that this should be so. Municipal entities, in their capacities as stewards of tax dollars, sometimes fall into the trap of thinking they are businesses as well, and steward their money accordingly. This is often a laudable impulse. In many ways, however, these impulses are why safety regulations exist. If the market were exactly as concerned with safety as the people (whose views are expressed, however imperfectly, through the government they create), there would be no need for safety regulations, because businesses would already be acting according to standards the people approve of. But the market is not as concerned with safety as the people. The people do not approve of the cold equations of commerce, where the cost of lives lost is balanced against the cost of safety measures. See, e.g., the infamous Ford Pinto "risk-benefit analysis" case, Grimshaw v. Ford Motor Co., 174 Cal.Rptr. 348 (1981). It is often the role of government to use its police

power to change the equation for the business-minded, and incentivize behavior that is best for the public even though it might not otherwise "cost out."

That is why the Johnson court disregards "cost effectiveness" as a factor. It is not for the government to create the cheapest world, nor yet the cheapest safe world. The police power exists so those who exercise it can make those balancing tests for themselves, rather than have anyone subject to their regulations nullify them on grounds of inconvenience.

And that is also why the documents proposed by the Department to prove "economic infeasibility" do not show a unanimous preference for treatment of sludge to Class B biosolids. Twelve percent of biosolids are already treated to Class A standards. Of the dozen establishments surveyed by the Department, all had considered moving to Class A, and, despite it being more expensive, one of the twelve (8.3% of responding entities) did make the move to Class A – despite it being more

expensive by over a million dollars. CP 429. Why? Because more than money is at stake here. Wahkiakum's position, and this court's, will be vindicated by the same historical forces that caused Cowlitz County to convert its facilities from Class B to Class A levels of sewage treatment regardless of there being a much cheaper alternative. Id. Causing some treatment plants to do involuntarily what others are doing voluntarily hardly constitutes a "ban." And this is particularly so when Class B biosolids can still be both generated and even disposed of within the county pursuant to the Ordinance, as already noted supra.

E. The Slippery Slope Argument

Without getting into the question of what substance must be making this slope slippery, the County will address the Department's argument in its brief at 30 that "If all other counties in the state were to adopt regulations similar to Wahkiakum's, there would be no effective biosolids land application anywhere in the state."

There are two problems with this. First, it is not true on its face. Class A biosolids are welcome on Wahkiakum County land pursuant to the Ordinance. This is the first time the County has heard that "biosolids land application" of Class A biosolids constsitutes "ineffective biosolids land application." (And, of course, there are other ways of disposing of biosolids than land application.) Anyway, if other counties wish to help Wahkiakum County usher in an age of pervasive treatment to Class A biosolids, such "further regulation" is within the counties' power and in the best interest of all citizens. As the court has seen, noneconomic factors are leading us there anyway.

Second, it won't happen. The Department has argued over and over that land application of Class B biosolids constitutes "beneficial use" and Class B biosolids are used "extensively" on such wholesome areas as farms and forests. Brief of Department at 11. If this is so, then other counties will not follow Wahkiakum County's foolish example. They will keep their Class B biosolids and ask for more, including, no doubt, those Wahkiakum County

infelicitously refuses to apply on its own fields and forests. Remember, all inferences are to be drawn in favor of the County, and all facts not known for certain are presumed to favor the County's position. Johnson, supra. In other words, whenever anybody starts a sentence with "If," the uncertainty inherent in the phrase is resolved in favor of the County, and of constitutionality of its duly passed ordinance. The only way the Department can make this argument cognizable in light of the burdens and presumptions in this case would be to present proof that every county *would* prohibit land application of Class B biosolids within its borders, and this the Department has not done.

This court is limited to determining whether the Wahkiakum County Ordinance conflicts with the state law, and Wahkiakum County has no burden to defend the hypothetical future actions of other counties.

F. Precedent Cited By the Department

The Department cites a raft of authority, some persuasive authority from jurisdictions in which this same drama has taken place, some general authority within our state, though nothing local that is directly on point.

1. Out of State Decisions

First, some words about the out of state authority that the Department urges the court to consider persuasive. One fault is primary to them all. In none of these cases, from whatever state, from whatever federal circuit, has the Department established that the law of that jurisdiction regarding supremacy is the same as it is in our state. This state has particularly stringent rules regarding supremacy. Johnson, supra; Immelt, supra. The idea of proving a matter of law beyond a reasonable doubt is firmly entrenched here, but elsewhere this powerful burden may well be unusual. If we do not know whether the cases decided favorably to the Department were decided to a level of "beyond a reasonable doubt," but rather

were decided (as well they may have been) to the more traditional "as a matter of law" standard, then we do not know whether the results in that very case would be the same had it been decided in Washington. This significantly degrades their utility even as persuasive authority. It is the Department's burden to prove this because in the absence of proof, all presumptions and interpretations are to be made in favor of the county. Tukwila, supra; Winkenwerder, supra. The Department has been challenged to do this previously and has not responded, if that gives the court any idea of the probable result.

A second fault shared by all is that the fact that, while some out of state courts have made decisions favoring the Department's point of view, that does not negate the fact that other courts have found differently. See, e.g., Kern, supra, Welch, supra. Again, remember the burden here. If there is a reasonable way to uphold the Ordinance, this court must take it. Johnson, supra, Immelt, supra. Reasonable courts, from federal to state, from coast to coast, have decided that ordinances like Wahkiakum County's

should be upheld. If reasonable minds can differ, then our state law dictates that the ordinance be upheld. So the only thing the Department can do with the weight of persuasive out-of-state authority that could possibly help it is to show that such authority is unanimously against the Ordinance. In the face of any reasonable controversy – and it would be stretching a point to consider the Kern or Welch courts unreasonable – all the Department shows us is that some courts have found the way the Department wishes all courts had found. This is insufficient to carry the Department's burden.

That said, certain of the Department's out-of-state persuasive authority has features of interest. The Department cites Blue Circle Cement, Inc. v. Board of County Com'rs of County of Rogers, 27 F.3d 1499 (C.A.10 (Okl.),1994) in favor of the proposition that the State controls here. In fact, the Blue Circle court goes out of its way to emphasize that both local and state concerns must bow to an overarching federal purpose. "[I]f the [County] ordinance were to run afoul of the Supremacy Clause, it

would *only be* because of the form of implied preemption that precludes a state or local regulation from frustrating the full accomplishment of *congressional purposes embodied in a federal statute.*" Blue Circle, 27 F.2d at 1505 (emphasis added).

The Blue Circle court went on to say, "we must consider 'whether [the local] regulation is consistent with the structure and purpose of the [federal] statute as a whole.'" The internal quotes are to Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) and the bracketed interlineations are inserted by the Blue Circle court. In other words, the Blue Circle court went out of its way to emphasize that it is the federal purpose that controls.

And, as the court has seen, the federal purpose is the same as the county purpose. "The determination of the manner of disposal or use of sludge is a local determination...." 33 U.S.C. § 1345(e). This is "unmistakably clear." Kern, supra, 127 Cal.App. 4th at 1610. Thus, insofar as Blue Circle is of any persuasive

effect, it persuades us to disregard the Department's desires and refer directly to federal purposes, which, as the court already knows, are that a "political subdivision" of a state may impose "more stringent requirements" than propounded elsewhere, 40 C.F.R. § 503.5(b), because sludge disposal is a "local determination." 33 U.S.C. § 1345(e).

The Department's reliance on ENSCO, Inc. v. Dumas, 807 F.2d 743 (8thCir.1986), is simply obsolete. It was distinguished handily in Welch, supra, which the County brought to the court's attention before the Department cited ENSCO:

> Unlike this case, however, ENSCO concerned a situation in which a county passed an outright ban on the treatment and disposal of a substance that federal law affirmatively instructed it to treat and dispose of safely. Here, the County has not passed a complete ban on sewage sludge within its boundaries; it simply has banned one of three possible methods of use or disposal. [The other two are burial and incineration.] Regardless of the EPA's preference for land application, the Ordinance does not conflict with the federal standards for use or disposal of sewage sludge.
>
> Welch, 888 F.Supp. at 757.

Meanwhile, the case of Jacksonville v. Arkansas Dep't of Pollution Control, 308 Ark. 543, 824 SW2d 840 (1992), cited within the distinguished ENSCO case, and the even older Ogden Environmental v. San Diego, 687 F.Supp. 1436 (SD Cal. 1988), were both decided long before Welch or Kern and did not affect either decision. In any event, the Jacksonville case was decided based on the specific provisions of the Resource Conservation and Recovery Act (RCRA), which does not have a local control preference analogous to 33 U.S.C. § 1345(e) built into its terms. Instead, it has various provisions such as 42 U.S.C. § 6929 (1988), which specifically delineate the limits of state authority and the interplay between federal and local regulations.

The case of Ogden Environmental Servicese v. San Diego, 647 F.Supp. 1436 (1988), also decided long before the contrary Welch and Kern cases, suffers from all the various defects complained of in other cases earlier: it is not decided at our "beyond a reasonable doubt" standard (Id., 647 F.Supp. 1441) and

it is not decided under the provisions of the Clean Water Act with its preference for "local decisions."

2. Decisions Within This Jurisdiction

The Department attempts to bring authority from within the state, but has similar difficulties finding analogous situations. One of the cases it relies upon most heavily is Biggers v. City of Bainbridge Island, 162 Wash.2d 683, 694, 169 P.3d 14 (2007). Biggers contains a lot of quotes that might be useful to the Department, had the case actually been decided on the basis of those quotes. However, the Biggers case was decided not by determining that the State and another governmental entity were both permitted to regulate in the same field, but the State's regulations took precedence. Rather, the Biggers case was decided on the ground that the subject the two entities were regulating upon was shoreline management, and that the State had exclusive constitutional power to manage shorelines:

> Article XVII, section 1 of the Washington Constitution declares that shorelines were originally owned by the state, and therefore subject to state regulation. Even after sale or lease of shorelines, the state continues to hold remaining sovereign interests of the public. Indeed, the SMA was expressly based on the proposition that shorelines are of "statewide significance." Local governments do not possess any inherent constitutional police power over state shoreline use.
>
> Biggers, 162 Wash.2d at 694 (emphasis added).

Biggers was not a case, like this one, in which the local government has Constitutional power to regulate the subject matter of the case. That ended the argument in Biggers and any other language in it can only be dicta.

The same problem afflicts the Department's citation of Diamond Parking, Inc., v. City of Seattle, 78 Wn.2d 778, 479 P.2d 47 (1971), for the purpose of showing a conflict between a "coordinated system" of the State's against an ordinance that, in the words of the Department in its brief at 19 (but not the text of the opinion) "interferes with" such a system. The Diamond court

actually held that the City of Seattle had attempted to regulate corporations, which is a task delegated specifically to the legislature by the Washington State Constitution at Art. 12 § 1. Diamond, 78 Wn.2d at 782. There was no conflict to resolve because, as there and not here, the ordinance that was passed was beyond the purview of the police power.

The reason the Department has not analyzed in detail the facts of any Washington case is that there are no analogous cases that favor it. While it bandies about terms like "interferes with," which sounds much more favorable to the Department than the "direct and irreconcilable conflict," it cannot find any cases in the state in which a mere "interference" was found to create a conflict sufficient to invalidate a statute. Its most-cited case, Parkland Light & Water v. Tacoma-Pierce County Bd. of Health, 151 Wn.2d 428, 90 P.2d 37 (2004), involves a case in which a water utility, granted by statute the authority to determine whether to fluoridate its water, found itself in conflict with its local board of health, which, with no statutory or constitutional authority whatever,

passed an ordinance requiring the utility to fluoridate even though the utility had already decided not to. Id., 151 Wn.2d at 429. That's not "interference with methods," that's "direct and irreconcilable conflict." And it is nothing like the illusory conflict in this case. The most analogous case by far is Weden and its prohibition of state-licensed personal watercraft in San Juan County, a case that clearly favors the County. Weden, supra.

The upshot of all the authority cited by the Department is that no case in Washington is both comparable and favorable, while jurisdictions throughout the nation are split. Consensus among the states is as hard to come by now as it has always been. E.g., Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556, 562 (C.A.5 (Tex.),1997) ("[E]xperts have yet to reach a consensus on the safety of land application of sludge.").

The burden under which the Department labors is such that this state of affairs favors the County and the Ordinance.

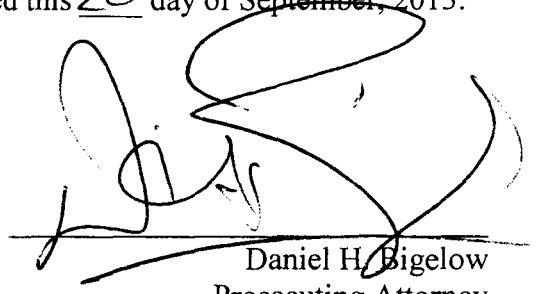
III. CONCLUSION

It is the duty of this court to find any reasonable means to uphold the Ordinance. It must seek any single way to do so, no matter how many other reasonable means exist to do anything else. In many cases this might be an onerous task, but here it is a simple one because there is no conflict between the Legislature's scheme – which contemplates local control, is based on federal law and regulation favoring local control, and spawned administrative code provisions providing for local control – and the Ordinance, which limits just one of several methods of disposal of human waste in just one small area of the state. Pursuant to Weden, supra, further regulation of this nature is presumed effective and permissible – and pursuant to Johnson, supra, no hypothetical parade of horribles can overcome this presumption. Nor can the court credit the arguments that the County is "totally banning" biosolids when the Department itself agrees that 12% of biosolids throughout the state can be legally piled on Wahkiakum County land, which is far more than the County could reasonably be

expected to accept. Nor yet should this court entertain for an instant the invitation of the Department to hold a legislative act unconstitutional because it is costly. The Department itself would be the next victim of such bad policy.

The Ordinance is in the best tradition of, and fully in line with the intent of, federal legislation, the code of federal regulations, the state's legislative scheme, and even the administrative code provisions written by the plaintiff to enforce that code. Since writing that chapter of the WAC, the Department has lost its way. This court should set the Department back on the right path and uphold the Ordinance.

Respectfully submitted this 20th day of ~~September~~, 2013.



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CERTIFICATE

I certify that I mailed a copy of the foregoing Respondent's Brief to the following addresses, postage prepaid, on September 20, 2013.

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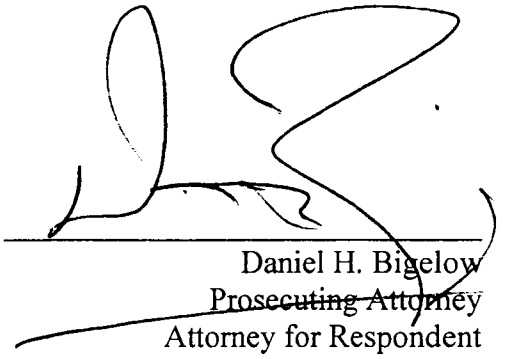

Daniel H. Bigelow
~~Prosecuting Attorney~~
Attorney for Respondent
WSBA No. 21227

ORDINANCE NO. 151 -11

AN ORDINANCE REGARDING THE REGULATION
OF THE USE OF BIOSOLIDS

WHEREAS, the term "biosolid" means sewage sludge that is a primarily (but not entirely) organic, semisolid product resulting from the wastewater treatment process; and

WHEREAS, the term "septage" means biosolids composed primarily of human waste from septic tanks; and

WHEREAS, RCW 70.95J.005(e) reflects the Washington State Legislature's acknowledgement that biosolids "can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health;" and

WHEREAS, among the metals that may pose such risk are arsenic, cadmium, copper, lead, mercury, molybdenum, nickel, selenium, and zinc; and

WHEREAS, among the microorganisms that may pose such risk are e. coli, heliobacter pylori, legionella, cryptosporidium, giardia, and various viruses; and

WHEREAS, disease and heavy metal contamination constitute potential threats to the life and health of humans, pets, livestock, crops, and also the natural flora and wildlife of the County; and

WHEREAS, the County of Wahkiakum prides itself on the quality of its agriculture, which is of economic benefit and historical importance to the citizens of the County; and

WHEREAS, the benefits of agriculture to the County of Wahkiakum are greatly enhanced by both the quality and the perceived quality, of the County's agricultural goods; and

WHEREAS, the County of Wahkiakum is distinguished by its many rivers and sloughs, which flood to a greater or lesser extent on an annual basis; and

WHEREAS, such floods have the potential to spread items applied on the ground on one property onto such other property as the flood may affect; and

WHEREAS, regulation of the use of septage, sludge, and biosolids is necessary for the protection of the health and welfare of citizens of and visitors to Wahkiakum County and also for the protection of the good reputation of Wahkiakum County agriculture;

NOW THEREFORE, THE COMMISSION OF THE COUNTY OF WAHKIAKUM DOES HEREBY ORDAIN AS FOLLOWS:

Daniel H. Bigelow
Prosecuting Attorney
P.O. Box 397
Cathlamet, Washington 98612
(360) 795-3652

EXHIBIT 1

A new chapter is hereby added to the Wahkiakum County Code in Title 70, to be designated Chapter 70.08, and to read as follows:

70.08.010: Definitions.

(a) "Biosolids" shall have the definition given to that word in WAC 173-308-005(b), as such definition may hereafter amended or recodified.

(b) "Class A Biosolids" means biosolids that meet the requirements for Class A pathogen reduction in WAC 173-308-170, as that administrative code section now exists or may hereafter be amended or recodified.

(c) "Class B Biosolids" means biosolids that meet the requirements for Class B pathogen reduction in WAC 173-308-170, as that administrative code section now exists or may hereafter be amended or recodified.

(d) "septage" means biosolids composed primarily of human waste from septic tanks.

70.08.020: Land Application of Biosolids.

(a) No Class B biosolids, septage, or sewage sludge may be applied to any land within the County of Wahkiakum.

70.08.030: Penalty.

(a) Any person who fails to comply with any provision of this chapter shall be subject to a civil penalty not to exceed one thousand dollars for each violation. Each application of a load of biosolids upon the land shall constitute a separate violation.

(b) The civil penalty provided for in this section shall be imposed by a notice in writing either by certified mail with return receipt requested or by personal service, to the person incurring the same. The notice shall describe the violation with reasonable particularity and shall order the acts constituting the violation or violations to cease and desist or, in appropriate cases, may require necessary corrective action to be taken within a specific and reasonable time.

(c) Any civil penalty imposed pursuant to this section shall be subject to review by the Board of County Commissioners as provided in RCWC 86.16.405, as it now exists or may hereafter be amended or recodified.

70.08.040: Interpretation.

This chapter is intended to further regulate the use of biosolids and not to repeal or limit any restrictions upon the use of biosolids that now exist or may hereafter be adopted.

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DULY PASSED AND ADOPTED this 26 day of April, 2011.

BOARD OF COUNTY COMMISSIONERS
OF WAHKIAKUM COUNTY, WASHINGTON

ATTEST:

Lisa M. Marsyla, Chairman

Marsha LaFarge
Clerk of the Board

Daniel L. Cothren, Commissioner

APPROVED AS TO FORM this
____ day of April, 2011:

Blair H. Brady, Commissioner

Daniel H. Bigelow
Prosecuting Attorney

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APPENDIX H

Department's Reply to Amicus Brief

NO. 44700-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

v.

WAHKIAKUM COUNTY, a political subdivision of Washington State,

Respondent.

DEPARTMENT OF ECOLOGY'S ANSWER TO AMICUS CURIAE BRIEF OF LEWIS COUNTY (CORRECTED)

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I. INTRODUCTION

This Court should decline to address the arguments raised in Lewis County's amicus curiae brief because they relate almost entirely to the issue of field preemption, an issue not raised by the parties in this case. The issue in this case concerns conflict preemption: whether Wahkiakum County has gone too far in its regulation of biosolids, implementing a policy so opposed to that of the Legislature that it thwarts the legislative purpose of the biosolids statute. In contrast, Lewis County seeks a declaratory judgment from the Court that the State has not preempted the field of biosolids regulation, an issue that neither party has raised or argued. The Court should not be distracted from the issue of this case by Lewis County's preoccupation with an issue the parties have not raised.

To the extent that the amicus brief acknowledges the issue of conflict preemption at all, it merely asserts a mainstay of preemption law—that local governments may legislate upon subjects already covered by state legislation, and even require more than state law requires, so long as the local enactments do not conflict with the state legislation. But it argues no further, merely contending without argument that this allows Wahkiakum County to legislate to a degree that virtually eliminates the state biosolids program in the county.

Even if this Court reaches Lewis County's arguments, it should reject the county's attempts to establish that the biosolids statute extends the county's solid waste authority to cover biosolids. In its attempts to establish that the State has not preempted the field, Lewis County argues wrongly that local authority to regulate biosolids derives from its authority under the solid waste statute, and that this was the Legislature's intent in enacting the biosolids statute. This is a fundamental error. No local authority to regulate biosolids derives from the solid waste statute, and none derives from the biosolids statute except through delegation from the Department of Ecology (Ecology). However, article XI, section 11 of the Washington Constitution does provide local governments with authority to reasonably legislate on local matters, so long as such legislation does not conflict with the general laws. And Ecology has assumed for purposes of this litigation that, if counties have any authority to legislate on biosolids matters, article XI, section 11 is the likely source of that authority.

II. ARGUMENT

A. The Issue in This Case Is Whether Wahkiakum County's Ordinance Conflicts Irreconcilably With State Legislative Policy

The issue in this case is whether the different policies reflected in county ordinance and state statute are so opposed that the ordinance thwarts the legislative purpose of the statute. If such is the case, then

ordinance and statute conflict irreconcilably and cannot be harmonized. *Diamond Parking, Inc. v. City of Seattle*, 78 Wn.2d 778, 781, 479 P.2d 47, 49 (1971) (holding that the conflict between ordinance and statute is irreconcilable because the legislative purpose of statute is necessarily thwarted); *Ritchie v. Markley*, 23 Wn. App. 569, 597 P.2d 449 (1979) (holding that "the two laws conflict because they reflect opposing policies" and because the "ordinance thwarts the state's policy"); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007) (ordinance and statute conflict because statute's mandate is thwarted by the ordinance).

Here, the Legislature's policy choice and approach to biosolids management is clear. Disposing of sewage sludge as waste in landfills and incinerators creates needless financial burdens on municipalities and ratepayers. RCW 70.95J.005(1)(c). When properly managed as biosolids, sewage sludge ceases to be waste and becomes a valuable commodity, reusable as fertilizer on farms and forests. RCW 70.95J.005(1)(d). The biosolids statute reflects the Legislature's chosen policy solution to this statewide problem, directing (not merely permitting) Ecology to create a program that will ensure, "to the maximum extent possible," that sewage sludge is treated, managed, and applied to land as biosolids on farms and forestland, rather than disposed of as waste in landfills.

RCW 70.95J.005(2). The Legislature further promoted this maximum reuse policy by authorizing Ecology to prohibit the disposal of sewage sludge in landfills, the primary alternative to reuse, with any exceptions to be based on the economic infeasibility of landfill alternatives. RCW 70.95.255. Ecology's biosolids regulations have adopted this landfill prohibition, together with its narrow economic infeasibility exemption. WAC 173-308-300(9).

Wahkiakum County's biosolids policy and the effect of its ordinance are equally clear. The County's ordinance prohibits land application of all biosolids produced by its own local facilities and at least 88 percent of biosolids produced in the rest of the State. CP 8–10, 27, 317–18, 148. The ordinance thus effectively bans virtually all land application of biosolids in the county.

This county policy directly opposes state legislative policy, which tackles a statewide economic and wastewater management challenge by mandating that its beneficial reuse policy shall be implemented to the maximum extent possible. A ban of virtually all biosolids land application is the exact opposite of "to the maximum extent possible." The ordinance can only be understood as pursuing a policy in direct opposition to that of the Legislature.

B. The Amicus Brief Focuses on Field Preemption, an Issue Not Raised by the Parties in This Case

New issues are not considered when raised for the first time in an amicus brief. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 217, 304 P.3d 914, 923 (2013), citing *Ruff v. King Cnty.*, 125 Wn.2d 697, 704 n.2, 887 P.2d 886 (1995). Because Lewis County presents its various arguments in support of a position on field preemption, an issue not raised by the parties, and because it neglects to address the issues actually presented in the case, this Court should simply decline to address the arguments of the amicus brief.

1. The amicus brief improperly raises a new issue.

Amicus Lewis County asserts that Ecology's position in this litigation is "that local governments like Wahkiakum county lack concurrent regulatory authority over biosolids," and it requests this Court to "declare that counties retain the concurrent authority over the use of biosolids." Amicus Curiae Brief of Lewis County (Amicus Br.) at 19, 17. This is the thrust of its brief and, accordingly, the succession of arguments in the brief are designed to show that the State has not preempted the field of biosolids regulation. But Ecology has not taken the position in this litigation that the State has preempted the field. Indeed, Wahkiakum County has acknowledged this explicitly. *See* CP 75 ("the Department has

not argued that the state has preempted the field"). Nor has Wahkiakum County raised or argued the issue of field preemption.

2. The amicus brief does not address whether Wahkiakum County's ordinance conflicts with the biosolids statute.

Amicus Lewis County presents a succession of arguments designed to establish that the State has not preempted the field of biosolids regulation. These arguments are as follows: (1) that counties possess, as a part of their authority to regulate solid waste, the authority to regulate biosolids, Amicus Br. at 5–6; (2) that the Legislature, when enacting the biosolids statute, intended that counties should retain this alleged solid waste authority to regulate biosolids, Amicus Br. at 6–9; (3) that the state biosolids regulations expressly recognize the authority of local governments to impose further, more stringent biosolids regulations, Amicus Br. at 9–10; (4) that even if the counties' solid waste authority does not extend to biosolids, article XI, section 11 of the Washington Constitution provides counties with sufficient authority to regulate biosolids, and the biosolids statute does not over-ride that authority by preempting the field, Amicus Br. at 10–11; (5) that where state law has regulated but not preempted the field, Washington law recognizes local authority to impose further, more stringent regulations, Amicus Br. at 11-14; and (6) that the State has not preempted the field because, had it done

so, this would prevent counties from meeting their obligations under the Growth Management Act (GMA), Amicus Br. at 16–17. None of these arguments engages with whether Wahkiakum County's policy of discouraging land application to the extent of banning it almost entirely can be reconciled with the legislature's maximum reuse mandate.

Lewis County does touch on the conflict preemption issue when it asserts a well-established mainstay of preemption law—that local governments may legislate upon subjects already covered by state legislation, and even require more than state law requires, so long as the local enactments do not conflict with the state legislation. Amicus Br. at 11–14. But it goes no further. Asserting this principle falls short of engaging Ecology's argument that the county ordinance conflicts with legislative policy. Such engagement is not accomplished merely by asserting that Wahkiakum County may require more than state law requires. But that is the extent of Lewis County's venture into the conflict preemption issue. Despite the headings of two sections purporting to address the conflict preemption issue, *see* Amicus Br. at 11, 15, the amicus brief does not actually engage that issue. It merely asserts that, "Wahkiakum county is permitted to adopt broader restrictions on the application of biosolids than state law, including an outright ban on certain classes of biosolids," Amicus Br. at 14, and that, "the state right to apply

biosolids is explicitly conditioned on compliance with local law," Amicus Br. at 15. These assertions do not even acknowledge the degree of opposition between ordinance and legislative policy. They simply take the position that harmony can be achieved by allowing the local ordinance to over-ride legislative policy.

Importantly, the biosolids statute is not a mere licensing statute setting out a precondition to engaging in an activity, like the state registration requirements for watercraft in *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998), and in *State ex rel. Schillberg v. Everett District Justice Court*, 92 Wn.2d 106, 594 P.2d 448 (1979). Nor is it a mere regulatory statute that places prohibitory constraints on an activity to which the Legislature is indifferent as to whether anyone engages in it, like the statute pertaining to auto wrecking yards in *Lenci v. City of Seattle*, 63 Wn.2d 664, 388 P.2d 926 (1964), or the state law pertaining to dangerous dogs in *Rabon v. City of Seattle*, 135 Wn.2d 278, 957 P.2d 621 (1998). Far from imposing licensing or regulatory requirements on an activity to which it is indifferent, the Legislature has mandated in the biosolids statute that biosolids be beneficially reused in farming and forestry *to the maximum extent possible*. Wahkiakum County's ordinance unquestionably opposes this mandate, prohibiting the very activity that the Legislature mandates be maximized.

C. Neither the Solid Waste Statute nor the Biosolids Statute Grants Local Governments Authority to Regulate Biosolids

While this Court should not reach Lewis County's arguments that local governments are not preempted from regulating biosolids, if it does reach those arguments, this Court should conclude that whatever authority counties may have to regulate biosolids, it cannot derive from the solid waste statute or the biosolids statute.

Washington's solid waste statute, RCW 70.95, establishes a comprehensive statewide program for regulating solid waste handling. RCW 70.95.020. It requires Ecology to adopt rules establishing minimum functional standards for solid waste handling. RCW 70.95.060(1). Ecology's rules are at WAC 173-350. The solid waste statute assigns primary responsibility for *solid waste* regulation to local governments. RCW 70.95.020(1). It requires them to adopt regulations governing solid waste handling, and provides that local solid waste ordinances may be more stringent than the minimal functional standards adopted by Ecology. RCW 70.95.160.

The amicus brief contends that "[b]iosolids are a small part of a larger state solid waste program," for which counties are assigned primary regulatory responsibility and given the express authority to impose further, more stringent regulations. Amicus Brief at 3, 5–6. It argues that this

contention is supported by the biosolids statute, RCW 70.95J, and by the statute's legislative history.

This is a fundamental misreading of the law. The biosolids statute and its regulations are explicit that biosolids are not solid waste and are not regulated as solid waste. *See* RCW 70.95J.005(1)(d); RCW 70.95J.010(1); RCW 70.95J.020(4); WAC 173-308-060(2); WAC 173-350-020(11). Moreover, the biosolids statute and its legislative history are clear that local regulatory authority granted by the solid waste statute does not carry over to the regulation of biosolids. Thus, whatever authority counties may have to regulate biosolids, it does not derive from their authority under the solid waste statute.

1. State law provides that biosolids are not solid waste.

Sewage sludge that has not been treated to biosolids standards is regulated as solid waste. RCW 70.95.030(22). However, when treated to biosolids standards, it ceases to be waste and becomes a valuable commodity destined for beneficial reuse. RCW 70.95J.005(1)(d); RCW 70.95J.010(1).[1] Washington law is clear that biosolids do not fall within

[1] The federal Environmental Protection Agency uses the terms "sewage sludge" and "biosolids" interchangeably. Ecology's regulations and the Washington biosolids statute do not. RCW 70.95.030(20) defines "sewage sludge" as "semisolid substance consisting of settled sewage solids combined with varying amounts of water and dissolved materials, generated from a wastewater treatment system, *that does not meet the requirements of chapter 70.95J RCW*." RCW 70.95.030(20) (emphasis added). "Biosolids" are defined as "municipal sewage sludge that . . . meets all requirements under this chapter." RCW 70.95J.010(1).

the solid waste regulatory scheme. RCW 70.95J.020(4) (biosolids shall be regulated pursuant to the biosolids statute); WAC 173-308-060(2) (biosolids are not solid waste and are not subject to regulation under solid waste laws); WAC 173-350-020(11) (solid waste regulations do not apply to biosolids). Lewis County's contention that biosolids are a solid waste for which the Legislature approved local regulation cannot be sustained.

2. The biosolids statute does not authorize local governments to regulate biosolids other than through delegation by Ecology.

RCW 70.95J, the biosolids statute, establishes a permitting program, declares a policy of maximizing the reuse of biosolids, directs Ecology to adopt rules implementing the program, and provides Ecology the necessary authority to assume responsibility over the administration, permitting, and enforcement related to biosolids management. RCW 70.95J.007 describes the purpose of the chapter as providing "the authority and direction to meet federal regulatory requirements for municipal sewage sludge," so that Ecology "may seek delegation and administer the sludge permit program required by the federal clean water act." Prior to passage of the statute, Ecology lacked the authority necessary to meet the federal delegation requirements. The biosolids statute remedied that.

The amicus brief offers the theory that, because the biosolids statute requires the biosolids program to meet federal delegation requirements and conform to federal technical standards, this somehow requires Ecology to incorporate into its rules a federal savings clause, transforming it thereby into an explicit grant of authority to local governments to regulate biosolids. Amicus Br. at 6–9. However, the requirement to meet the federal delegation requirements and federal biosolids standards does not and cannot amount to a grant of such authority. Federal law and regulations establish minimum standards and leave it to the states to adopt their own policies and programs, so long as the minimum standards are met. Moreover, inconsistently with Lewis County's theory, the federal delegation rules require state programs to assign primary responsibility for regulating biosolids to the State.

There are two provisions in the biosolids statute that mention the need to meet federal regulations. The first is the statute's purpose provision, focusing on federal delegation requirements. It provides Ecology authority to seek delegation and administer the federal biosolids program. RCW 70.95J.007. In 1989, the U.S. Environmental Protection Agency (EPA) promulgated the regulations containing federal delegation requirements for state programs, at 40 C.F.R. § 501, pursuant to the Clean Water Act. These regulations provided the procedures that the EPA would

follow in approving, revising, and withdrawing state programs, as well as the requirements that state programs must meet to be approved by the EPA. 40 C.F.R. § 501.1(b). It is these requirements to which the state Legislature was primarily responding, in 1992, with the passage of RCW 70.95J. *See* CP 66–68 (Final B. Rep. on E.S.H.B. 2640, 52nd Leg., Reg. Sess. (Wash. 1992)).[2]

The federal regulations at 40 C.F.R. § 501 required that states seeking delegation possess certain powers: the authority to require compliance with the sludge regulations, the authority to issue and enforce permits pertaining to use and disposal of sewage sludge, to take legal actions, abate violations, issue civil and criminal penalties, and the authority to regulate all sewage sludge management activities subject to the (not then released) regulations of 40 C.F.R. § 503. *See* 40 C.F.R. § 501.1(c)–(d). The federal regulations allowed a state to delegate portions of its program responsibilities to local agencies, but required that the state assume "full authority and ultimate responsibility for administering all aspects of the State's approved program . . . ." 40 C.F.R. § 501.1(l)(6).

[2] This document is also available on the Washington Legislature's website, at: http://apps.leg.wa.gov/documents/billdocs/1991-92/Pdf/Bill%20Reports/House/2640-S.FBR.pdf.

Prior to passage of RCW 70.95J, Ecology had no authority to issue or enforce biosolids permits, issue penalties, or delegate permitting authority to counties. Thus, Ecology lacked the authority to meet the federal regulatory requirements in 40 C.F.R. § 501. The purpose of the law was in part to provide that authority. This is captured in the Final Bill Report on E.S.H.B. 2640, the bill that became RCW 70.95J:

> In 1989, the EPA adopted rules relating to how states must regulate a sludge management program. These rules, in part, require states to have direct enforcement authority, including the power to impose both civil and criminal penalties, and to have the power to delegate permitting authority to local governments. The state solid waste law does not provide the department with direct enforcement authority or the ability to delegate sludge permits to local governments.

CP 66–67 (Final B. Rep. on E.S.H.B. 2640, at 1–2). Thus, one of the purposes of RCW 70.95J was to provide Ecology with that authority and thereby meet the federal delegation requirements of 40 C.F.R. § 501.

The second provision in the biosolids statute referring to federal rules anticipated the forthcoming federal rules that were to provide the technical standards for treating biosolids, at 40 C.F.R. § 503, and directed Ecology to adopt rules that would, "at a minimum," conform to those federal rules. RCW 70.95J.020(1). The federal rules at 40 C.F.R. § 503 provided minimum standards. The federal rules were clear that they did

not preempt the field, and explicitly allowed states to adopt more stringent requirements. 40 C.F.R. § 503.5(b).[3]

Lewis County's theory is that this federal non-preemption provision must somehow be incorporated into state rules and be transformed thereby into an explicit grant of authority to local governments.[4] The theory fails, because a non-preemption provision at the federal level pertains to the relation between federal law on the one hand and state and local law on the other; it does not address the relation between state and local law. Moreover, it also fails because it is inconsistent with the federal delegation requirements for state programs. The biosolids statute requires Ecology to establish a program that would meet federal delegation requirements, which require Ecology to have primary responsibility for administering the biosolids program and local governments to receive such authority only through delegation by

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[3] Similar non-preemption provisions occur at 40 C.F.R. § 501.1(i), (j), in the context of the delegation requirements. "Nothing in this part precludes a State or political subdivision thereof, or interstate agency, from adopting or enforcing requirements established by State or local law that are more stringent or more extensive than those required in this part or in any other federal statute or regulation." 40 C.F.R. § 501.1(i). And, "Nothing in this part precludes a State from operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by federal law, the additional coverage is not part of the federally approved program." 40 C.F.R. § 501.1(j).

[4] At least one court has encountered this argument and called it bizarre: "[The County of] Kern argues bizarrely that if the [state law] were construed to prohibit local bans on land application, it would somehow 'conflict' with the federal Clean Water Act." *City of L.A. v. Cnty. of Kern*, 509 F. Supp. 2d 865, 894 (C.D. Cal. 2007), *dismissed in part, vacated in part and remanded on prudential standing grounds*, 581 F.3d 841 (9th Cir. 2009) (absence of a restriction is not a grant of authority).

Ecology. This is inconsistent with Lewis County's contention that the biosolids statute directly grants local governments the authority to regulate biosolids. In accordance with the federal delegation requirements for state programs, the biosolids statute makes no provision for further regulation by local governments, providing instead for local governments to receive, at the discretion of Ecology, delegated authority to issue and enforce permits. RCW 70.95J.080.

3. The Legislature clearly intended that local solid waste authority should not extend to the regulation of biosolids.

In 1992, the Legislature enacted Engrossed Substitute House Bill 2640, codified at RCW 70.95J. The amicus brief contends the Legislature intended that local governments would retain solid waste authority over biosolids, seizing on the Legislature's removal from an earlier version of the bill a provision that would have restricted local governments from banning the use or disposal of biosolids. However, put into context, the removal of this provision shows exactly the opposite of what the amicus brief contends.

Prior to its passage, ESHB 2640 went through several versions, with the final version incorporating amendments by the Senate.[5] The

[5] In appropriate circumstances, sequential drafts may be useful in determining legislative intent. *Bellevue Fire Fighters Local 1604 v. City of Bellevue*, 100 Wn.2d 748,

original bill, H.B. 2640, required Ecology to adopt rules to implement a sludge management program, but kept primary regulatory authority at the local level. This first version provided that even where standards established by Ecology regulations had been met, local jurisdictions would have authority to prohibit the use of biosolids, although on a permit-by-permit basis only. H.B. 2640, at 2–3, 52nd Leg., Reg. Sess. (Wash. 1992).

The first version of the bill failed to distinguish between sewage sludge that qualified as biosolids and sewage sludge that did not. However, by explicitly defining sewage sludge and biosolids, subsequent versions of the bill were able to clarify that local governments would not by this bill be conferred jurisdiction over sewage sludge that had been treated to biosolids standards. The language granting primary authority to local jurisdictions was deleted and the delegation provision inserted. The House report on the substitute bill explained: "Municipal sewage sludge that meets all state and federal standards will be regulated as a biosolid; sludge not meeting these standards will continue to be regulated as a solid waste." CP 67 (H.B. Rep. on E.S.H.B. 2640, at 2, 57th Leg., Reg. Sess. (Wash. 1992)).

Further clarifying the matter, the enacted bill contained the provision: "Materials that have received a permit as a biosolid shall be

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675 P.2d 592 (1984). Implied in this reasoning is that the Legislature was aware of prior drafts and language. *State v. Komok*, 113 Wn.2d 810, 816, 783 P.2d 1061, 1064 (1989).

regulated pursuant to this chapter." *See* RCW 70.95J.020(4). The report on the bill as amended by the Senate explained: "Technical amendments are made to clarify: the intent to maintain state primacy for the sludge management program . . . ." S.B. Rep. on E.S.H.B. 2640, at 3, 57th Leg., Reg. Sess. (Wash. 1992).[6] The Senate bill report also included the following summary of testimony in favor of the bill:

> The legislation is necessary for the state to maintain its primacy in administering the federally delegated authority for sludge (biosolids) management programs. The Department of Ecology shall be the lead agency and may delegate the permitting responsibilities to local governments.

S.B. Rep. on E.S.H.B. 2640, at 3.

Thus, the original inclusion of the "may prohibit, on a permit-by-permit basis only" provision shows that even where the Legislature initially supposed that local governments could retain solid waste authority over biosolids, they intended to prevent local governments from enacting sweeping bans, and limited prohibitions to a permit-by-permit basis. When the bill was revised so that local governments received biosolids regulatory authority only through delegation, the "may prohibit, on a permit-by-permit basis only" provision was struck because there was simply no need to restrict such authority. The statute no longer granted

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[6] This document is available at: http://apps.leg.wa.gov/documents/billdocs/1991-92/Pdf/Bill%20Reports/Senate/2640-S.SBR.pdf.

counties authority to regulate biosolids, except through delegation by Ecology.

III. CONCLUSION

Because they are presented in support of Lewis County's request for a declaratory judgment on an issue that neither party has raised or argued, this Court should decline to address the arguments in the amicus curiae brief. Moreover, this Court should reject the amicus brief's arguments and contentions that the solid waste statute and the biosolids statute confer to local governments the authority to regulate biosolids. If local governments do have the authority to regulate biosolids (and Ecology does not here argue otherwise), it is not conferred through either of these two statutes.

Wahkiakum County's ordinance directly and irreconcilably conflicts with state policy and the purpose of the state biosolids law. For

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this reason, it is conflict preempted, and the February 22, 2013, decision of the Cowlitz County Superior Court upholding the ordinance should be reversed.

RESPECTFULLY SUBMITTED this 2nd day of June 2014.

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APPENDIX I

AGO Opinion 2014 #2

Opinion

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STATUTES—INITIATIVE AND REFERENDUM—ORDINANCES—COUNTIES—CITIES AND TOWNS—PREEMPTION—POLICE POWERS—Whether Statewide Initiative Establishing System For Licensing Marijuana Producers, Processors, And Retailers Preempts Local Ordinances

1. **Initiative 502, which establishes a licensing and regulatory system for marijuana producers, processors, and retailers, does not preempt counties, cities, and towns from banning such businesses within their jurisdictions.**

2. **Local ordinances that do not expressly ban state-licensed marijuana licensees from operating within the jurisdiction but make such operation impractical are valid if they properly exercise the local jurisdiction's police power.**

January 16, 2014

The Honorable Sharon Foster
Chair, Washington State Liquor Control Board
3000 Pacific Avenue SE
Olympia, WA 98504-3076

Cite As:
AGO 2014 No. 2

Dear Chair Foster:

By letter previously acknowledged, you have requested our opinion on the following paraphrased questions:

1. **Are local governments preempted by state law from banning the location of a Washington State Liquor Control Board licensed marijuana producer, processor, or retailer within their jurisdiction?**

2. **May a local government establish land use regulations (in excess of the Initiative 502 buffer and other Liquor Control Board requirements) or business license requirements in a fashion that makes it impractical for a licensed marijuana business to locate within their jurisdiction?**

BRIEF ANSWERS

1. No. Under Washington law, there is a strong presumption against finding that state law preempts local ordinances. Although Initiative 502 (I-502) establishes a licensing and regulatory system for marijuana producers, processors, and retailers in Washington State, it includes no clear indication that it was intended to preempt local authority to regulate such

businesses. We therefore conclude that I-502 left in place the normal powers of local governments to regulate within their jurisdictions.

2. Yes. Local governments have broad authority to regulate within their jurisdictions, and nothing in I-502 limits that authority with respect to licensed marijuana businesses.

BACKGROUND

I-502 was approved by Washington voters on November 6, 2012, became effective 30 days thereafter, and is codified in RCW 69.50. It decriminalized under state law the possession of limited amounts of useable marijuana[1] and marijuana-infused products by persons twenty-one years or older. It also decriminalized under state law the production, delivery, distribution, and sale of marijuana, so long as such activities are conducted in accordance with the initiative's provisions and implementing regulations. It amended the implied consent laws to specify that anyone operating a motor vehicle is deemed to have consented to testing for the active chemical in marijuana, and amended the driving under the influence laws to make it a criminal offense to operate a motor vehicle under the influence of certain levels of marijuana.

I-502 also established a detailed licensing program for three categories of marijuana businesses: production, processing, and retail sales. The marijuana producer's license governs the production of marijuana for sale at wholesale to marijuana processors and other marijuana producers. RCW 69.50.325(1). The marijuana processor's license governs the processing, packaging, and labeling of useable marijuana and marijuana-infused products for sale at wholesale to marijuana retailers. RCW 69.50.325(2). The marijuana retailer's license governs the sale of useable marijuana and marijuana-infused products in retail stores. RCW 69.50.325(3).

Applicants for producer, processor, and retail sales licenses must identify the location of the proposed business. RCW 69.50.325(1), (2), (3). This helps ensure compliance with the requirement that "no license may be issued authorizing a marijuana business within one thousand feet of the perimeter of the grounds of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older." RCW 69.50.331(8).

Upon receipt of an application for a producer, processor, or retail sales license, the Liquor Control Board must give notice of the application to the appropriate local jurisdiction. RCW 69.50.331(7)(a) (requiring notice to the chief executive officer of the incorporated city or town if the application is for a license within an incorporated city or town, or the county legislative authority if the application is for a license outside the boundaries of incorporated

[1] Useable marijuana means "dried marijuana flowers" and does not include marijuana-infused products. RCW 69.50.101(ll).

cities or towns). The local jurisdiction may file written objections with respect to the applicant or the premises for which the new or renewed license is sought. RCW 69.50.331(7)(b).

The local jurisdictions' written objections must include a statement of all facts upon which the objections are based, and may include a request for a hearing, which the Liquor Control Board may grant at its discretion. RCW 69.50.331(7)(c). The Board must give "substantial weight" to a local jurisdiction's objections based upon chronic illegal activity associated with the applicant's operation of the premises proposed to be licensed, the applicant's operation of any other licensed premises, or the conduct of the applicant's patrons inside or outside the licensed premises. RCW 69.50.331(9). Chronic illegal activity is defined as a pervasive pattern of activity that threatens the public health, safety, and welfare, or an unreasonably high number of citations for driving under the influence associated with the applicant's or licensee's operation of any licensed premises. RCW 69.50.331(9).[2]

In addition to the licensing provisions in statute, I-502 directed the Board to adopt rules establishing the procedures and criteria necessary to supplement the licensing and regulatory system. This includes determining the maximum number of retail outlets that may be licensed in each county, taking into consideration population distribution, security and safety issues, and the provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market. RCW 69.50.345(2). The Board has done so, capping the number of retail licenses in the least populated counties of Columbia County, Ferry County, and Wahkiakum County at one and the number in the most populated county of King County at 61, with a broad range in between. *See* WAC 314-55-081.

The Board also adopted rules establishing various requirements mandated or authorized by I-502 for locating and operating marijuana businesses on licensed premises, including minimum residency requirements, age restrictions, and background checks for licensees and employees; signage and advertising limitations; requirements for insurance, recordkeeping, reporting, and taxes; and detailed operating plans for security, traceability, employee qualifications and training, and destruction of waste. *See generally* WAC 314-55.

Additional requirements apply for each license category. Producers must describe plans for transporting products, growing operations, and testing procedures and protocols. WAC 314-55-020(9). Processors must describe plans for transporting products, processing operations, testing procedures and protocols, and packaging and labeling. WAC 314-55-020(9). Finally, retailers must also describe which products will be sold and how they will be displayed, and may only operate between 8 a.m. and 12 midnight. WAC 314-55-020(9), -147.

The rules also make clear that receipt of a license from the Liquor Control Board does not entitle the licensee to locate or operate a marijuana processing, producing, or retail business in violation of local rules or without any necessary approval from local jurisdictions. WAC 314-

[2] The provision for objections based upon chronic illegal activity is identical to one of the provisions for local jurisdictions to object to the granting or renewal of liquor licenses. RCW 66.24.010(12).

-55-020(11) provides as follows: "The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements."

ANALYSIS

Your question acknowledges that local governments have jurisdiction over land use issues like zoning and may exercise the option to issue business licenses. This authority comes from article XI, section 11 of the Washington Constitution, which provides that "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." The limitation on this broad local authority requiring that such regulations not be "in conflict with general laws" means that state law can preempt local regulations and render them unconstitutional either by occupying the field of regulation, leaving no room for concurrent local jurisdiction, or by creating a conflict such that state and local laws cannot be harmonized. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010).

Local ordinances are entitled to a presumption of constitutionality. *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009). Challengers to a local ordinance bear a heavy burden of proving it unconstitutional. *Id.* "Every presumption will be in favor of constitutionality." *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003) (internal quotation marks omitted).

A. Field Preemption

Field preemption arises when a state regulatory system occupies the entire field of regulation on a particular issue, leaving no room for local regulation. *Lawson*, 168 Wn.2d at 679. Field preemption may be expressly stated or may be implicit in the purposes or facts and circumstances of the state regulatory system. *Id.*

I-502 does not express any indication that the state licensing and operating system preempts the field of marijuana regulation. Although I-502 was structured as a series of amendments to the controlled substances act, which does contain a preemption section, that section makes clear that state law "fully occupies and preempts the entire field of *setting penalties* for violations of the controlled substances act." RCW 69.50.608 (emphasis added).[3] It also allows "[c]ities, towns, and counties or other municipalities [to] enact only those laws and

[3] RCW 69.50.608 provides: "The state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with this chapter. Such local ordinances shall have the same penalties as provided for by state law. Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of the city, town, county, or municipality." The Washington Supreme Court has interpreted this provision as giving local jurisdictions concurrent authority to criminalize drug-related activity. *City of Tacoma v. Luvene*, 118 Wn.2d 826, 835, 827 P.2d 1374 (1992).

ordinances relating to controlled substances that are consistent with this chapter." RCW 69.50.608. Nothing in this language expresses an intent to preempt the entire field of regulating businesses licensed under I-502.

With respect to implied field preemption, the "legislative intent" of an initiative is derived from the collective intent of the people and can be ascertained by material in the official voter's pamphlet. *Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973); *see also Roe v. TeleTech Customer Care Mgmt., LLC*, 171 Wn.2d 736, 752-53, 257 P.3d 586 (2011). Nothing in the official voter's pamphlet evidences a collective intent for the state regulatory system to preempt the entire field of marijuana business licensing or operation. Voters' Pamphlet 23-30 (2012). Moreover, both your letter and the Liquor Control Board's rules recognize the authority of local jurisdictions to impose regulations on state licensees. These facts, in addition to the absence of express intent suggesting otherwise, make clear that I-502 and its implementing regulations do not occupy the entire field of marijuana business regulation.

B. Conflict Preemption

Conflict preemption arises "when an ordinance permits what state law forbids or forbids what state law permits." *Lawson*, 168 Wn.2d at 682. An ordinance is constitutionally invalid if it directly and irreconcilably conflicts with the statute such that the two cannot be harmonized. *Id.*; *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998). Because "[e]very presumption will be in favor of constitutionality," courts make every effort to reconcile state and local law if possible. *HJS Dev.*, 148 Wn.2d at 477 (internal quotation marks omitted). We adopt this same deference to local jurisdictions.

An ordinance banning a particular activity directly and irreconcilably conflicts with state law when state law specifically entitles one to engage in that same activity in circumstances outlawed by the local ordinance. For example, in *Entertainment Industry Coalition v. Tacoma-Pierce County Health Department*, 153 Wn.2d 657, 661-63, 105 P.3d 985 (2005), the state law in effect at the time banned smoking in public places except in designated smoking areas, and specifically authorized owners of certain businesses to designate smoking areas. The state law provided, in relevant part: "A smoking area may be designated in a public place by the owner . . . ." Former RCW 70.160.040(1) (2004), *repealed by* Laws of 2006, ch. 2, § 7(2) (Initiative Measure 901). The Tacoma-Pierce County Health Department ordinance at issue banned smoking in all public places. The Washington Supreme Court struck down the ordinance as directly and irreconcilably conflicting with state law because it prohibited what the state law authorized: the business owner's choice whether to authorize a smoking area.

Similarly, in *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004), the Washington Supreme Court invalidated a Tacoma-Pierce County Health Department ordinance requiring fluoridated water. The state law at issue authorized the water districts to decide whether to fluoridate, saying: "A water district by a

majority vote of its board of commissioners may fluoridate the water supply system of the water district." RCW 57.08.012. The Court interpreted this provision as giving water districts the ability to regulate the content and supply of their water systems. *Parkland Light & Water Co.*, 151 Wn.2d at 433. The local health department's attempt to require fluoridation conflicted with the state law expressly giving that choice to the water districts. As they could not be reconciled, the Court struck down the ordinance as unconstitutional under conflict preemption analysis.

By contrast, Washington courts have consistently upheld local ordinances banning an activity when state law regulates the activity but does not grant an unfettered right or entitlement to engage in that activity. In *Weden v. San Juan County*, the Court upheld the constitutionality of the County's prohibition on motorized personal watercraft in all marine waters and one lake in San Juan County. The state laws at issue created registration and safety requirements for vessels and prohibited operation of unregistered vessels. The Court rejected the argument that state regulation of vessels constituted permission to operate vessels anywhere in the state, saying, "[n]owhere in the language of the statute can it be suggested that the statute creates an unabridged right to operate [personal watercraft] in all waters throughout the state." *Weden*, 135 Wn.2d at 695. The Court further explained that "[r]egistration of a vessel is nothing more than a precondition to operating a boat." *Id.* "No unconditional right is granted by obtaining such registration." *Id.* Recognizing that statutes often impose preconditions without granting unrestricted permission to participate in an activity, the Court also noted the following examples: "[p]urchasing a hunting license is a precondition to hunting, but the license certainly does not allow hunting of endangered species or hunting inside the Seattle city limits," and "[r]eaching the age of 16 is a precondition to driving a car, but reaching 16 does not create an unrestricted right to drive a car however and wherever one desires." *Id.* at 695 (internal citation omitted).

Relevant here, the dissent in *Weden* argued: "Where a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders but they may not prohibit same outright[,]" and that an ordinance banning the activity "renders the state permit a license to do nothing at all." *Weden*, 135 Wn.2d at 720, 722 (Sanders, J., dissenting). The majority rejected this approach, characterizing the state law as creating not an unabridged right to operate personal watercraft in the state, but rather a registration requirement that amounted only to a precondition to operating a boat in the state.

In *State ex rel. Schillberg v. Everett District Justice Court*, 92 Wn.2d 106, 594 P.2d 448 (1979), the Washington Supreme Court similarly upheld a local ban on internal combustion motors on certain lakes. The Court explained: "A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated." *Id.* at 108. The Court found no conflict because nothing in the state laws requiring safe operation of vessels either expressly or impliedly provided that vessels would be allowed on all waters of the state.

The Washington Supreme Court also rejected a conflict preemption challenge to the City of Pasco's ordinance prohibiting placement of recreational vehicles within mobile home parks. *Lawson*, 168 Wn.2d at 683-84. Although state law regulated rights and duties arising from mobile home tenancies and recognized that such tenancies may include recreational vehicles, the Court reasoned "[t]he statute does not forbid recreational vehicles from being placed in the lots, nor does it create a right enabling their placement." *Id.* at 683. The state law simply regulated recreational vehicle tenancies, where such tenancies exist, but did not prevent municipalities from deciding whether or not to allow them. *Id.* at 684.

Accordingly, the question whether "an ordinance . . . forbids what state law permits" is more complex than it initially appears. *Lawson*, 168 Wn.2d at 682. The question is not whether state law permits an activity in some places or in some general sense; even "[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law." *Rabon v. City of Seattle*, 135 Wn.2d 278, 292, 957 P.2d 621 (1998) (finding no preemption where state law authorized licensing of "dangerous dogs" while city ordinance forbade ownership of "vicious animals"). Rather, a challenger must meet the heavy burden of proving that state law creates an entitlement to engage in an activity in circumstances outlawed by the local ordinance. For example, the state laws authorizing business owners to designate smoking areas and water districts to decide whether to fluoridate their water systems amounted to statewide entitlements that local jurisdictions could not take away. But the state laws requiring that vessels be registered and operated safely and regulating recreational vehicles in mobile home tenancies simply contemplated that those activities would occur in some places and established preconditions; they did not, however, override the local jurisdictions' decisions to prohibit such activities.

Here, I-502 authorizes the Liquor Control Board to issue licenses for marijuana producers, processors, and retailers. Whether these licenses amount to an entitlement to engage in such businesses regardless of local law or constitute regulatory preconditions to engaging in such businesses is the key question, and requires a close examination of the statutory language.

RCW 69.50.325 provides, in relevant part:

> (1) There shall be a marijuana producer's license to produce marijuana for sale at wholesale to marijuana processors and other marijuana producers, regulated by the state liquor control board and subject to annual renewal. . . .
>
> (2) There shall be a marijuana processor's license to process, package, and label useable marijuana and marijuana-infused products for sale at wholesale to marijuana retailers, regulated by the state liquor control board and subject to annual renewal. . . .

> (3) There shall be a marijuana retailer's license to sell useable marijuana and marijuana-infused products at retail in retail outlets, regulated by the state liquor control board and subject to annual renewal. . . .

RCW 69.50.325(1)-(3). Each of these subsections also includes language providing that activities related to such licenses are not criminal or civil offenses under Washington state law, provided they comply with I-502 and the Board's rules, and that the licenses shall be issued in the name of the applicant and shall specify the location at which the applicant intends to operate. They also establish fees for issuance and renewal and clarify that a separate license is required for each location at which the applicant intends to operate. RCW 69.50.325.

While these provisions clearly authorize the Board to issue licenses for marijuana producers, processors, and retail sales, they lack the definitive sort of language that would be necessary to meet the heavy burden of showing state preemption. They simply state that there "shall be a . . . license" and that engaging in such activities with a license "shall not be a criminal or civil offense under Washington state law." RCW 69.50.325(1). Decriminalizing such activities under state law and imposing restrictions on licensees does not amount to entitling one to engage in such businesses regardless of local law. Given that "every presumption" is in favor of upholding local ordinances (*HJS Dev., Inc.*, 148 Wn.2d at 477), we find no irreconcilable conflict between I-502's licensing system and the ability of local governments to prohibit licensees from operating in their jurisdictions.

We have considered and rejected a number of counterarguments in reaching this conclusion. First, one could argue that the statute, in allowing Board approval of licenses at specific locations (RCW 69.50.325(1), (2), (3)), assumes that the Board can approve a license at any location in any jurisdiction. This argument proves far too much, however, for it suggests that a license from the Board could override any local zoning ordinance, even one unrelated to I-502. For example, I-502 plainly would not authorize a licensed marijuana retailer to locate in an area where a local jurisdiction's zoning allows no retail stores of any kind. The Board's own rules confirm this: "The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements." WAC 314-55-020(11).

Second, one could argue that a local jurisdiction's prohibition on marijuana licensees conflicts with the provision in I-502 authorizing the Board to establish a maximum number of licensed retail outlets in each county. RCW 69.50.345(2); *see also* RCW 69.50.354. But there is no irreconcilable conflict here, because the Board is allowed to set only a *maximum*, and nothing in I-502 mandates a minimum number of licensees in any jurisdiction. The drafters of I-502 certainly could have provided for a minimum number of licensees per jurisdiction, which would have been a stronger indicator of preemptive intent, but they did not.

Third, one could argue that because local jurisdictions are allowed to object to specific license applications and the Board is allowed to override those objections and grant the license anyway (RCW 69.50.331(7), (9)), local jurisdictions cannot have the power to ban licensees altogether. But such a ban can be harmonized with the objection process; while some jurisdictions might want to ban I-502 licensees altogether, others might want to allow them but still object to specific applicants or locations. Indeed, this is the system established under the state liquor statutes, which I-502 copied in many ways. *Compare* RCW 69.50.331 *with* RCW 66.24.010 (governing the issuance of marijuana licenses and liquor licenses, respectively, in parallel terms and including provisions for local government input regarding licensure). The state laws governing liquor allow local governments to object to specific applications (RCW 66.24.010), while also expressly authorizing local areas to prohibit the sale of liquor altogether. *See generally* RCW 66.40. That the liquor opt out statute coexists with the liquor licensing notice and comment process undermines any argument that a local marijuana ban irreconcilably conflicts with the marijuana licensing notice and comment opportunity.

Fourth, RCW 66.40 expressly allows local governments to ban the sale of liquor. Some may argue that by omitting such a provision, I-502's drafters implied an intent to bar local governments from banning the sale of marijuana. Intent to preempt, however, must be "clearly and expressly stated." *State ex rel. Schillberg*, 92 Wn.2d at 108. Moreover, it is important to remember that cities, towns, and counties derive their police power from article XI, section 11 of the Washington Constitution, not from statute. Thus, the relevant question is not whether the initiative provided local jurisdictions with such authority, but whether it removed local jurisdictions' preexisting authority.

Finally, in reaching this conclusion, we are mindful that if a large number of jurisdictions were to ban licensees, it could interfere with the measure's intent to supplant the illegal marijuana market. But this potential consequence is insufficient to overcome the lack of clear preemptive language or intent in the initiative itself. The drafters of the initiative certainly could have used clear language preempting local bans. They did not. The legislature, or the people by initiative, can address this potential issue if it actually comes to pass.

With respect to your second question, about whether local jurisdictions can impose regulations making it "impractical" for I-502 licensees to locate and operate within their boundaries, the answer depends on whether such regulations constitute a valid exercise of the police power or otherwise conflict with state law. As a general matter, as discussed above, the Washington Constitution provides broad authority for local jurisdictions to regulate within their boundaries and impose land use and business licensing requirements. Ordinances must be a reasonable exercise of a jurisdiction's police power in order to pass muster under article XI, section 11 of the state constitution. *Weden*, 135 Wn.2d at 700. A law is a reasonable regulation if it promotes public safety, health, or welfare and bears a reasonable and substantial relation to accomplishing the purpose pursued. *Id.* (applying this test to the personal watercraft ordinance); *see also Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 26, 586 P.2d 860 (1978) (applying this

test to a zoning ordinance). Assuming local ordinances satisfy this test, and that no other constitutional or statutory basis for a challenge is presented on particular facts, we see no impediment to jurisdictions imposing additional regulatory requirements, although whether a particular ordinance satisfies this standard would of course depend on the specific facts in each case.

We trust that the foregoing will be useful to you.

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WROS

APPENDIX J

MMH v. Fife, Oral Decision

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

MMH, LLC, a Washington Limited Liability Company, and GRAYBEARD hOLDINGS, LLC, a Washington Limited Liability Company, Plaintiffs, vs. CITY OF FIFE, a Washington municipal corporation, Defendant.	S/C NO. 14-2-10487-7 MOTION FOR SUMMARY JUDGMENT

REPORT OF PROCEEDINGS

FRIDAY, AUGUST 29, 2014

Pierce County Courthouse
Tacoma, Washington

Before the

HONORABLE RONALD E. CULPEPPER

Presiding Judge

Department No. 17

[Appearances on next page]

Reported by: Karla A. Johnson, RPR
Official Court Reporter, #82191

APPEARANCES:

For the plaintiffs:	Mark Nelson, Attorney
For Defendant Fife:	Loren Combs, Attorney Jennifer Combs
Also present:	Noah Purcell, Assistant Attorney General
	Jared VanKirk, Attorney
	Salvidore Mungia, Attorney Gordon Thomas Honeywell 1201 Pacific Ave., Ste. 2100 Tacoma, WA 98401-1157
	Stewart Estes, Attorney

FRIDAY, AUGUST 29, 2014; AFTERNOON SESSION

(All parties present.)

--oOo--

(Excerpt.)

THE COURT: Good afternoon. You can all be seated. I'm sorry for the delay. I was just jotting down a couple notes. I actually had made quite a few notes earlier and had to revise them a bit after hearing the arguments, which I thought were very good. I thought the briefs were very good. I want to thank you all for your professionalism.

I mentioned this morning the things I'm not deciding. I won't go into any great detail on that again, but, again, I'm not deciding whether I-502 is good. I'm not deciding whether Fife's ban is good. I'm not deciding the wisdom of federal drug policy or anything else. I'm deciding fairly narrow, I think, issues of law.

One thing I'm also not going to decide, I think I mentioned earlier, is the procedural challenges raised by the plaintiffs, and I don't mean to suggest that they're not valid; I just have not spent too much time on that, and we can address those later regardless of

other decisions. I just didn't, frankly, focus more on the preemption issues.

Just kind of an aside on the federal preemption issue raised by Fife, and this isn't a major part of my decision at this point, but on this issue I think I am inclined to agree with the interveners that there is no federal preemption here. The statute itself grants the State quite a bit of authority. The Feds do not preempt the State's authority to legislate in this area.

If the federal authorities want to take enforcement action, if these actions violate federal law, they can do that, but they can't require the State to do Amendment 10, and a lot of other things prohibit that.

The most significant issues, of course, is whether Fife's Ordinance 1872 is preempted by state law. As we know, Article XI, Section 11, and the State constitution grants local jurisdictions kind of general police power so long as they don't conflict with other law.

Now, of course, the state constitution, Article XI, Section 11, was also voted on by voters, although many years ago, so the voters spoke in granting localities, local governments, some authority. And,

again, generally they have police powers unless they conflict with state law. So Fife can legislate within various limits unless there's a conflict with I-502, and that's what we're here about, of course.

And I'm not going to speak, again, about the wisdom of I-502. It may be great legislation, maybe not so great, but it does set up what appears to me to be a fairly well thought-out, comprehensive system of licensing and regulation of marijuana production, processing, and retailing. And it's an industry, I think, still in its infancy. Somebody in one of the briefs said this was an experiment, and I suppose that's, to some extent, true. You can actually learn a lot from experiments. We'll see. We'll know the results, I hope, in the not-too-distant future whether I-502 is a good idea or not or works.

And the plaintiffs have challenged Fife's ban. They're saying it's preempted by state law and they seek a summary judgment declaring 1872 in conflict with state law.

Now, as all the attorneys know, on a summary judgment the judge is required to take all the facts in a light most favorable to the nonmoving party. I don't really think there's much dispute about the fact. It seems to me to be pretty much a legal issue. There may

be some facts on the procedural challenges that may be dealt with later.

Fife seeks a judgment that its ordinance is valid. The law, as we know, presumes the validity of local ordinances, so in this case I conclude that the plaintiffs have the burden to show that that presumption has been overcome.

First let me discuss express preemption. I do conclude that 1872 is not expressly preempted by state law. The section of I-502, and I cannot recall the exact number, that says there can be no inconsistent penalties for violation of the Uniformed Controlled Substances Act isn't really an issue here. The plaintiffs cannot be assessed penalties for violation of the Uniform Controlled Substances Act if they're doing things within their licensed capacity from the State Liquor Control Board, so the only penalties that Fife could impose would be zoning or business penalties under their municipal code or perhaps civil abatement or a nuisance action if they wanted to. They could not impose penalties for violating the Controlled Substances Act. But that, I think, is the only express, potential express, preemption I can find, and I don't find that here.

To me, the more difficult issue, of course, is the

conflict preemption. The plaintiffs have apparently valid licenses issued by the Liquor Control Board, which is authorized to set up the regulatory scheme to suppress the black market, to raise taxes, all the good things Initiative 502 hopes to do, but Fife does not allow them to do their business within the borders of Fife.

So does this irreconcilably conflict with I-502? And I conclude that the plaintiffs and the plaintiff interveners have not met their burden of proof on this point to overcome the presumption of validity. There were issues about the intent of I-502. I don't find anything specifically there that is of much help about the local communities. I think it could be consistent for people to generally think legalization of marijuana is a good thing but maybe not in their back yard, maybe someplace else, so I don't that's an irreconcilable conflict.

There's the issue of the Attorney General's opinion, an opinion written to the State Liquor Control Board back in January of this year. It is entitled to some weight, and I give it some weight, but it's only an opinion.

There is the issue of legislative nonaction. That's about all I can say. There was no action to

overturn the AG's opinion. It does indicate they were aware of it and it does indicate the legislature couldn't muster enough votes to overcome it. There were many other things they were doing, the McCleary decision, lots of things, and they may have simply run out of time, but, in fact, they did not do anything to change the law in response to that.

So the plaintiffs have received their licenses to conduct a business under I-502, and the Washington State Liquor Control Board has some authority to set the numbers per county, but they don't have any specific citing authority. Their number for Fife was zero. That's not dispositive, but that might be some indication. It might be different if the number is, for example, 17, as it is for Pierce County and the other case that's pending before another judge.

So, again, I conclude that Fife's ordinance is not preempted by I-502 or other state law. With respect to the federal preemption, I'm declining to actually decide that. I think Fife indicated they were kind of withdrawing that argument if I ruled in favor on the state preemption. So I'm going to deny plaintiff's motion for a summary judgment declaring 1872 is invalid, deny the motions for injunctive and mandamus relief, still reserving the issue on the procedural,

potential procedural, irregularities, and I'm granting Fife's motion for summary judgment that 1872 is not preempted by state law.

So questions, things I could clarify? You were all so noisy this morning.

MR. PURCELL: Your Honor, a small thing. If you do a written order, I think it's worth noting that the plaintiffs don't actually technically licenses yet. We pointed this out in our brief. They scored high in the lottery for licenses, and there's nothing --

THE COURT: Well, I'm assuming for purposes of this that they do have licenses.

MR. PURCELL: That's fine. Just for clarity's sake, I just wanted to clarify that they haven't actually received the licenses yet from the Liquor Control Board.

THE COURT: And we should probably talk about somebody preparing an order and presenting that at some time. I don't know if you want to circulate that.

MR. PURCELL: We would be happy to do that, Your Honor.

THE COURT: Do you know when?

MR. PURCELL: Well, maybe Tuesday if that's okay.

THE COURT: Not okay Tuesday. We hope to

finish our murder trial Tuesday.

MR. PURCELL: What would Your Honor prefer?

THE COURT: Well, we've got at least four different sets to circulate it to. I don't know how long that will take.

MR. PURCELL: Maybe towards the end of next week.

THE COURT: How about next Friday? Thursday I have one hearing that's going to take all day.

MR. PURCELL: You want us to present those in court?

THE COURT: Well, if you can agree on the form, you don't need to, but why don't we set a date for presentation next Friday just in case.

MR. COMBS: On your morning calendar, Your Honor?

THE COURT: Pardon me?

MR. COMBS: On your 9 a.m. calendar?

THE COURT: Yes, please.

Other things I can clarify? Lots of good arguments. Not all of them were convincing.

MR. McDONALD: Do you have that bus route number?

THE COURT: I think if I were going to set up a shop, I would do it right across the border. Thank

you all. We'll be at recess.

(The matter was concluded.)

CERTIFICATE

STATE OF WASHINGTON)
)
COUNTY OF PIERCE)

I, Karla Johnson, Official Court Reporter for Department No. 17, of the Pierce County Superior Court, do hereby certify that the foregoing proceedings were reported by me stenographically and reduced to typewritten form.

I further certify that the foregoing transcript of proceedings is a full, true and correct transcript of my machine shorthand notes of the aforementioned matter for the date of: 8-29-14.

Dated this 3rd day of September, 2014.

KARLA A. JOHNSON
#82191