NO. 95730-4

SUPREME COURT
STATE OF WASHINGTON

EMERALD ENTEPRISES, LLC and JOHN M. LARSON,
Appellants,

v.

CLARK COUNTY,
Respondent,

and

ROBERT W. FERGUSON, Attorney General of the State of Washington,
Intervenor

ANSWER TO PETITION FOR REVIEW

Attorneys for Respondent:

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INTRODUCTION

The authority of Clark County (County) to prohibit the retail sale of marijuana is derived directly from the police power granted to counties via Article XI, Section 11 of the Washington Constitution. There is a strong presumption that any local ordinance based on the police power is lawful and nothing in Initiative 502 (I-502) weakens that presumption. Division II upheld the County's ordinance (Ordinance) because I-502 and the Ordinance can be read in harmony and I-502 does not preempt the Ordinance.

Division II correctly found that I-502 and the Ordinance could be read in harmony. First, Division II found that the Ordinance and I-502 addressed different subject matters, the legalization of marijuana and the zoning of businesses. Second, Division II found that the Ordinance did not thwart the legislative purpose of I-502, being to relieve a burden on law enforcement, generate tax revenue, and undercut the illegal market. Third, Division II found the County's zoning power arose from Article XI, Section 11 of the Washington Constitution and was not diminished in any manner by I-502.

Division II correctly found that I-502 did not preempt the Ordinance. First, Division II found that I-502's alleged preemption provision, RCW 69.50.608, was limited to criminal penalty laws, so there

was no express preemption of the zoning Ordinance. Second, Division II found that I-502 did not implicitly preempt the field of marijuana because I-502's purpose was to allow for marijuana retail, not require it, and the regulations accompanying I-502 expressly recognized local authority to zone.

Division II correctly applied the laws of Washington to this case in a manner that does not merit further review by this Court.

COUNTERSTATEMENT OF ISSUES

ISSUE I: Did Division II correctly find that I-502 and the Ordinance can be read in harmony.

ISSUE II: Did Division II correctly find that I-502 does not preempt the Ordinance.

STATEMENT OF THE CASE

I-502, approved by the voters in November, 2012, served the purpose of allowing law enforcement to refocus substantial energy from minor marijuana enforcement to more violent and property-related crimes, along with generating tax revenue for education, health care, research and substance abuse prevention. To do so, I-502 was codified into the Uniform Controlled Substances Act (UCSA), providing a limited regulatory scheme for managing, among other things, marijuana retail.

In May, 2014, the County adopted an ordinance that prohibited the operation of marijuana retail businesses through zoning measures.

Appellants (Emerald) challenged the Ordinance twice, the first time through a declaratory action and the second time in an administrative action. Emerald lost both actions and appealed them to Division II. Division II consolidated the actions and affirmed both on March 13, 2018.

ARGUMENT

1. Standard.

This Court should not accept review if Emerald fails to show that Division II's decision is in conflict with either a decision of this Court or another appellate decision. Review should also not be accepted if Emerald fails to show that an issue in the case is of substantial public interest.

2. Division II's Decision is Not in Conflict with a Supreme Court Decision.

Emerald argues that this Court should accept review because Division II's decision is in conflict with *City of Bellingham v. Schampera* 57 Wn.2d 106, 356 P.2d 292 (1960); *Rabon v. City of Seattle*, 135 Wn.2d 278, 957 P.2d 621 (1998); and *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004). Emerald is wrong on all cases.

Emerald claims Division II's decision is in conflict with *City of Bellingham v. Schampera* because it changes longstanding Conflict Preemption Analysis. Emerald makes this argument based on Division

II's use of the term "unabridged rights" while conducting the conflict analysis. Emerald, however, fails to clearly state how Division II's analysis, including the mention of unabridged rights, conflicts with the *Schampera* analysis.

In *Schampera,* this Court adopted the reasoning of an Ohio case that 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." *Schampera* at 111. Left alone, the *Schampera* case might be problematic, but this Court added to the analysis in *Rabon v. City of Seattle* by holding that, "the 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* at 292.

Emerald argues that *Rabon* is inapplicable because it requires that the statute and ordinance at issue have to be prohibitive, and Emerald argues that the UCSA is not prohibitive. Emerald is wrong. Division II found that despite legalizing recreational marijuana, the UCSA placed significant limitations on the marijuana retail industry, to include prohibiting retail sales without a license. In support of this finding, Division II recognized that WAC 314-55-020(15) acknowledged that licenses were not to be construed as approval to violate local rules and or

zoning ordinances. In that light, Emerald fails to show how Division II's decision is in conflict with either *Schampera* or *Rabon.*

Emerald claims that Division II's decision is in conflict with *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health* because it allows an ordinance to strip a regulatory agency of regulatory powers granted to the agency via statute. In very cursory fashion, Emerald argues that the Clark County Ordinance divests the Washington State Liquor and Cannabis Board (WSLCB) of it regulatory authority. Emerald, however, fails to state what regulatory authority is divested. Thankfully, Division II addressed that issue in the underlying decision. Division II found that "the UCSA does not empower the Board *[WSLCB]* to ensure marijuana retail locations in every jurisdiction; the law merely directs the Board to regulate sales when they occur." Slip Op. at 8. Implicitly, Division II found *Parkland Light* inapplicable because the Ordinance did nothing to diminish the statutory grant of regulatory authority. In that light, Emerald fails to show how Division II's decision is in conflict with *Parkland Light.*

For the reasons stated above, Emerald fails to show how Division II's decision is in conflict with any decision of this Court.

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3. Division II's Decision is Not in Conflict with Another Appellate Decision.

Emerald argues that this Court should accept review because Division II's decision is in conflict with *Dep't of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 337 P.3d 364 (Div. II 2014). Emerald is wrong.

Emerald's claimed conflict is based on a fundamental misunderstanding of the nature of the statute in *Wahkiakum.* In *Wahkiakum,* the statute encouraged, "to the maximum extent possible," the reuse of sludge as a beneficial commodity. *Wahkiakum* at 382. The court found that, "The legislature's stated intent was to increase the recycling and reuse of biosolids." *Id.* In doing so, the court recognized the complexity[1] involved in obtaining a permit and, thus, created a right in the applicant upon receipt of that permit. *Wahkiakum* at 369. The conflicting ordinance in *Wahkiakum* attempted to extinguish that right. *Wahkiakum* at 378.

In our case, Division II found that the UCSA did not encourage the sale, production, or use of marijuana, it simply allowed and regulated it. Division II found this to be an important distinction. Slip Op. at 11.

[1] To obtain a permit, the applicant had to submit a Site-Specific Plan that took into account site boundaries, staging areas, bodies of water and wells, and buffer zones. Additionally, the applicant had to work closely with Department of Ecology when applying for the permit.

Specifically, Division II found "no evidence of legislative intent to regulate the location of retail stores within the County." Slip Op. at 12. Division II also recognized that the "Board's own regulations clarify that retail licenses do not supersede local law, including local zoning authority." Slip Op. at 11, *citing,* WAC 314-55-020(15). No similar provision can be found in the statute at issue in *Wahkiakum*. Therefore, Division II properly distinguished the facts of this case from the facts of *Wahkiakum* and ruled accordingly.

4. **The Issue Presented in this Case is not of Substantial Public Interest.**

Emerald argues that this Court should accept review because the availability of recreational marijuana in every jurisdiction is a matter of substantial public interest. Emerald is wrong.

I-502, as codified in the UCSA, expressed the actual intent of the people in three parts: (1) Allow law enforcement resources to be focused on violent and property crimes; (2) Generate new state and local tax revenue for education, health care, research, and substance abuse prevention; and (3) Take marijuana out of the hands of illegal drug organizations and brings it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol. Laws of 2013, c 3 §1. Absent from this expressed intent was any statement regarding the availability of

recreational marijuana in every jurisdiction. Emerald fails to show how this limited intent statement gives rise to a substantial public interest in the ubiquitous siting of marijuana retailers in every jurisdiction.

Subsequent to the codification of I-502, there was opportunity for the legislature to recognize Emerald's asserted substantial public interest and change the law to recognize preemption, but to date the legislature has actually gone in the opposite direction. Specifically, in 2015, the legislature adopted language specifically acknowledging that some jurisdictions would prohibit recreational marijuana. Laws of 2015, 2nd sp.s c 4 §206 (*codified as* RCW 69.50.540(2)(g)(i)(B)). If the legislature had believed there was a substantial public interest in having recreational marijuana in every jurisdiction, surely the legislature would have acted by now.

Emerald appears to claim that allowing the local ban in this case increases uncertainty about the law, and a substantial public interest will be served by review. However, as noted in the Attorney General's Answer to Petition for Review, the Attorney General has expressed an opinion on this law and six separate superior courts have rendered decisions all of which reach the same conclusion -- no local preemption. Atty. G. Answer, p. 6, fn. 4. As was well stated by the Attorney General, Emerald just doesn't like the answer. *Id.* at 16. There is no uncertainty

created by Clark County's local prohibition on recreational retail marijuana, therefore, there is not substantial public interest for this Court to review.

CONCLUSION

This Court should deny the Petition for Review because it is not properly grounded in any of the considerations set forth in RAP 13.4(b)

DATED this 21st day of May, 2018.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Thelma Kremer, hereby certify that I caused a copy of the foregoing *Answer to Petition for Review* to be filed with the Clerk of the Court using the Washington State Appellate Courts' Portal, which will send notification of such filing to the following:

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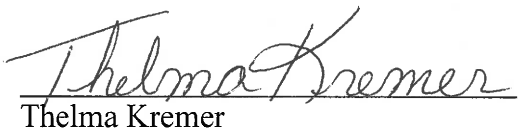
DATED this 21st day of May, 2018.



Thelma Kremer

CLARK COUNTY PROSECUTING ATTORNEY

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Transmittal Information

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