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No. 90780-3

SUPREME COURT OF THE STATE OF WASHINGTON

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MMH, LLC and GRAYBEARD HOLDINGS, LLC,

Appellants,

and

DOWNTOWN CANNABIS CO., LLC; MONKEY GRASS  
FARMS, LLC; AND JAR MGMT, LLC, d/b/a/ RANIER ON PINE,

Intervenor-Appellants,

v.

CITY OF FIFE,

Respondent,

and

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

Intervenor-Respondent.

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**CITY OF FIFE'S OPENING RESPONSE TO INTERVENOR-  
APPELLANT'S OPENING BRIEF**

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**RESPONDENT's RESTATEMENT OF THE CASE**

**Legislative Enactment of Initiative 502** - On November 6, 2013, Washington citizens approved Initiative 502 (the "Initiative" or "I-502"), which created a state licensing scheme for the production, processing, and retail sale of recreational marijuana whereby taxes would be collected and those lawfully participating in the licensing and taxation scheme would not be subject to State criminal prosecution. CP 119-34.

**Limitations on Geographic Locations for Licensees** - RCW 69.50.354 states: "There may be licensed, in no greater number in each of the counties of the state than the state liquor control board shall deem advisable, retail [marijuana] outlets."

No minimum number of licenses per county is required by RCW 69.50.354 or any other statute or WAC. No minimum number of licenses per city or a minimum number of licenses per measure of population is required by RCW 69.50.354 or any other statute or WAC.

**The Current Status of Marijuana as a Schedule I Hallucinogen**

- Washington's Controlled Substances Act, ("CSA"), is at RCW Title 69.50. It lists marijuana as a hallucinogenic substance and a Schedule I controlled substance. RCW 69.50.204(c)(22).

**The Washington State Attorney General's Acknowledgement of Local Municipal Authority To Regulate Marijuana Land Uses** - On January 16, 2014, at the request of the Washington State Liquor Control Board, ("WSLCB"), the Washington State Attorney General's office issued

an Opinion (AGO 2014 No. 2) regarding the issue of local governments banning marijuana businesses within their jurisdictions. (CP 151-60). It was the conclusion of the Attorney General that local government bans of marijuana businesses were neither field preempted nor conflict preempted, and thus, valid and constitutional. (CP 158-60).

**The July 8, 2014 Fife City Council Meeting** - On July 8, 2014, the City of Fife, (the “City”), had a Council meeting. At the City Council meeting, the City Attorney and the City’s Community Development Director presented proposed City Ordinance No. 1872, (the “Ordinance”), which contained language banning marijuana businesses in the City. (CP 1312). Testimony for, and against, the Ordinance was received by the City Council at the meeting. *Id.* The Ordinance was passed. *Id.*

**The Intervenors’ Licenses** – The intervenors do not hold, or claim to hold, a marijuana license for Pierce County or the City of Fife.

**The Trial Court’s September 8, 2014 Judgment** - On September 8, 2014, Pierce County Superior Court granted the City of Fife’s Motion for Summary Judgment, in part, and denied the Appellants and Appellant-Intervenors’ Motions for Partial Summary Judgment, (CP 1435 - 45, esp 1444 - 45), by entering the following declaratory judgments:

2. ... c. ... The City of Fife’s Ordinance 1872 is not preempted by state law. [Ordinance 1872 is a zoning code amendment to prohibit marijuana producing, marijuana processing, marijuana retailing, and medical marijuana collective gardens in all zoning districts within the City of Fife.]

7. ... the Court finds that while I-502 permits retail cannabis operations to be located throughout the state and allows the Liquor Control Board to grant permits throughout the state, I-502

does not require that retail marijuana stores be located in Fife. In addition, the Court finds that the Liquor Control Board, in contrast to determining that there could be 31 retail outlets located in Pierce County, did not specifically allocate any licenses for operations in Fife.

**Fife's Status as a "Code City"** - The City of Fife is a "code city"

as that term is defined in RCWs 35A.01.020 and 35A.01.035. A listing of code cities within Washington can be found at [www.mrsc.org/Home/Explore-Topics/Governance](http://www.mrsc.org/Home/Explore-Topics/Governance).

### **SUMMARY of ARGUMENTS IN RESPONSE TO INTERVENORS**

1. The Legislature deliberately omitted any requirement for Cities to site marijuana businesses within their city limits.
2. *Dept. of Ecology v Wahkiakum County* is inapposite authority for analyzing whether there is a conflict between the Initiative and the City's Ordinance.
3. The PWT businesses cannot overcome the presumption of constitutionality for the Ordinance.
4. RCW 35A.11.020 provides explicit plenary police powers to the City;
5. The banning of the sale of a substance listed as a Schedule I hallucinogen in the State's own CSA is within the scope of plenary police powers previously determined to be available to Cities.
6. The City's Ordinance is not in conflict with any field preempted by the State and is consistent with the Published 2014 Attorney General Opinion on this subject.

### **ARGUMENTS and AUTHORITIES IN SUPPORT**

- I. **THE LEGISLATURE DELIBERATELY OMITTED ANY REQUIREMENT FOR CITIES TO SITE MARIJUANA BUSINESSES WITHIN THEIR CITY LIMITS**

RCW 69.50.354 states: “There may be licensed, in no greater number in each of the counties of the state than the liquor control board shall deem advisable., retail [marijuana] outlets.”

No minimum number of licenses is required per county and no licenses at all are authorized, under the statute, for cities.

In WAC 314-55-020(11), the WSCLB stated: “The issuance or approval of a [marijuana] 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.

There simply is no provision in I-502’s enabling legislation for licenses to do marijuana businesses within incorporated cities. That Legislative omission must be deemed intentional.

**II. DEPT. OF ECOLOGY v WAHKLAKUM COUNTY IS INAPPOSITE AUTHORITY FOR ANALYZING WHETHER THERE IS A CONFLICT BETWEEN I-502 AND THE CITY’S ORDINANCE**

*Dept of Ecology v Wahkiakum County* does not stand for the proposition that a city is required to permit marijuana sales. *Wahkiakum County* is a case about the beneficial use of re-treated sewage. *Dept of Ecology v Wahkiakum County*, 184 WnApp 372, \_\_\_, 337 P3d 364-66 (2014). The Legislature’s explicit purpose in passing the statute at issue in *Wahkiakum County* was to provide a statutory scheme for recycling sewage waste (biosolids) and using waste as a ‘beneficial commodity’ in

land applications like ‘agriculture, silviculture [the growing of trees], and ... as a soil conditioner,’ rather than disposing of it. *Id.* at 184 WnApp 372, \_\_\_ and 337 P3d 364-65.

Presumably, the Legislature’s formal finding about biosolids implies that the Legislature believed more use of biosolids as fertilizer would be of benefit to the public as opposed to simply disposing of them. In addition, the Legislature designated the Department of Ecology as the body responsible for implementing and managing the biosolids program. *Id.* Finally, there were statutes, (RCWs 70.95J.005(1)(d) and (2), RCW 70.95J.010(1) and (4), RCW 70.95.020, and RCW 70.95.255), and WACs, (WACs 173-308-210(5) and (5)(a), 173-308-300(9)) which preceded the County’s new law by 19 years and stated the conditions under which four classes of biosolids at issue could be applied to land. *Id.* at 337 P3d 365-66. Therefore, the county law at issue, (Wahkiakum County Ordinance No. 151-11), was deemed to be in conflict with the biosolids legislation when it stated, without more detail, that only one of the four classes of State-approved biosolids could be applied to land in Wahkiakum County. *Wahkiakum County* at 368-72

Unlike the legislative findings in *Wahkiakum County*, I-502 and its enabling statutes do not contain any language stating that distributing more marijuana in the State of Washington, and presumably smoking it or ingesting it, would be beneficial for the public’s health, safety, and welfare and should be encouraged. It, arguably, stated only that if it was

inevitable that some persons would continue to distribute marijuana, despite it being criminalized under State and Federal law, then it would be better to regulate the distribution and earn tax income from it.

In addition, in *Wahkiakum*, the Department of Ecology did not, in seeking preemption, insist that the County violate the federal CSA. Ecology simply wished to enforce its unambiguous WACs stating four classes of biosolids, not just one, could be used for agriculture, forestry, and gardening purposes. This was clearly within Ecology's, not Wahkiakum County's, purview because local governments have not traditionally been allowed, in the exercise of their police powers, to pick and choose which WACs they will follow when the duty for compiling those WACs is delegated to Ecology.

Ecology's right to preempt the field in *Wahkiakum* is clear because the regulated activity is not one a local government normally engages in or the State cedes to local government and Ecology's goals were clearly legitimate state goals. The City, in the above-captioned case, however, is in a different position than the county was in *Wahkiakum*. The City is exercising its police power in the sales of a Schedule I hallucinogen. This is an area generally considered to be within a local government's legislative purview because it logically relates to the health, safety, and welfare of its residents. See *Bungalow Amusement*, *infra*.

Review of *Roe v Teletech Customer Care* may be helpful in reaching conclusions about weighing the competing interests reviewed in

the preceding paragraph. *Roe* at 171 Wn2d 736, 257 P3d 586 (2011).

Although it is not a state law – local law conflict case, *Roe* points out the weaknesses in utilizing Washington’s marijuana statutes for justifying the invasion of another competing public policy, specifically the Medical Use of Marijuana Act, (“MUMA”).

Washington patients have no legal right to use marijuana under federal law. *See* 21 U.S.C. §§ 812, 844(a). Though *Roe* claims the divergence between Washington’s MUMA and federal drug law is of no consequence to a state tort claim for wrongful discharge, the two cannot be completely separated. [footnote omitted]. Holding that a broad public policy exists that would require an employer to allow an employee to engage in illegal activity would not be within *Thompson’s* directive to “proceed cautiously” when finding a public policy exception to the at-will employment doctrine. [Internal citation omitted]. *Roe* at 171 Wn2d 759, 257 P3d 597.

*Roe* has presented only one public policy argument to support her wrongful termination claim—that MUMA broadly protects a patient’s “personal, individual decision” to use medical marijuana. MUMA does not proclaim a public policy that would remove any impediment (including employer drug policies) to the decision to use medical marijuana. [footnote omitted] ... *Id.*

MUMA does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer. MUMA also does not proclaim a sufficient public policy to give rise to a tort action for wrongful termination for authorized use of medical marijuana. *Id.*

As a result, the State, in light of its own, and the federal, controlled substances act, probably has a less legitimate basis to argue it has preemption interest in compelling the sales and taxation of a Schedule I hallucinogen, than in having Wahkiakum County acquiesce in Ecology’s decision about whether a substance is deemed safe to put in the ground.

Also, Wahkiakum County blatantly interjected itself into a decision-making role that had already been statutorily reserved for

Ecology. Wahkiakum County decided to write the pre-existing WACs out of existence by passing its own directly contradictory ordinance. This act was obstructive, not passive. Wahkiakum County wanted the *Wahkiakum* Court to let it pick and choose which of the four biosolids previously and explicitly conditionally approved by Ecology could be applied. In other words, Wahkiakum County's Ordinance, if validated by the *Wahkiakum* Court, would literally moot the explicit directives of the WACs promulgated by the agency directed to manage the program.

The situation in *Wahkiakum* presented an obvious conflict, but no such conflict exists in the above-captioned case. The City is not attempting to moot any statute or WAC because no statute or WAC prevents it from banning marijuana businesses within city limits. (See argument in Sections III, IV, and V, below).

The above-captioned case also differs from *Wahkiakum* in that the Department of Ecology was a state agency charged with carrying out the State's law, as opposed to a third party, like the PWT businesses, who do business outside of the jurisdiction at issue.

In *Wahkiakum*, the State, through Ecology, sought an injunction to declare that the county law at issue conflicted with State law and action in that that field was within the State's purview. The State did not, as in the above-captioned case, issue an Attorney General Opinion stating the ordinance at issue, (i.e., the City's Ordinance), would not conflict with any

State law or hinder the State in managing an area the State intended to preempt.

Finally, the Department of Ecology, in *Wahkiakum*, had an easier burden in showing that a State law / County law conflict existed because the statutory authority for counties to enact laws is limited to those powers within RCW 36.32.120(7), whereas code cities' legislative powers are governed by RCW 35A.11.020. (These differing statutes are discussed in more detail in sections 3 and 4, below).

The central difference is that code cities "... shall have all powers possible for a city to have under the Constitution of this state ***and not specifically denied to code cities by law ...***," (emphasis added), RCW 35A.11.020, whereas counties only have the power to "make and enforce ... all such police and sanitary regulations as are not in conflict with state law." RCW 36.32.120(7).

There was no requirement, when Ecology was attempting to show a conflict in *Wahkiakum*, that Ecology prove Wahkiakum County was seeking one of "all powers possible" unless "specifically denied" by law. The Department of Ecology merely had to show Wahkiakum County's law was "in conflict with state law." This is a lesser standard, so *Wahkiakum* does not support, in any way, the argument of the PWT businesses that the City's Ordinance is in conflict with State management of the licensing and taxation scheme.

**III. THE PWT BUSINESSES CANNOT OVERCOME THE PRESUMPTION OF THE CONSTITUTIONALITY OF THE CITY'S ORDINANCE**

“Ordinances are presumed to be constitutional” and “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 (2003). A “heavy burden [, therefore,] rests upon the party challenging [an ordinance’s] constitutionality.” *Id.* In fact, the burden that rests upon the party challenging the ordinance is that the party “must prove beyond a reasonable doubt that [the ordinance] is unconstitutional.” *Cannabis Action Coalition v. City of Kent*, 180 Wn App 455, 480-81, 322 P3d 1246, 1259 (2014). The City’s Ordinance is constitutional. The PWT businesses cannot show otherwise.

**IV. RCW 35A.11.020 PROVIDES PLENARY POLICE POWER TO THE CITY**

RCW 35A.11.020 provides a very liberal grant of power to code cities.

RCW 35A.11.020 provides that:

[A code city] may adopt and enforce ordinances of all kinds ... appropriate to the good government of the city ... [and]

... shall have all powers possible for a city to have under the Constitution of this state, **and not specifically denied to code cities by law** ... [emphasis added by drafter of this brief]

The above highlighted language is supplementary to the powers also granted to the City in Washington State’s Constitution and must be considered when reviewing any argument that the City’s Ordinance

conflicts with State statutes because no Washington statutes specifically deny the power of a city to ban marijuana businesses. As a result, there is no support for the PWT businesses' claim that the City's Ordinance conflicts, implicitly or explicitly, with any State intention to occupy any regulatory field.

V. ***THE BANNING OF THE SALE OF A SUBSTANCE LISTED AS A SCHEDULE I HALLUCINOGEN IN THE STATE'S OWN CSA IS WITHIN THE SCOPE OF PLENARY POLICE POWERS PREVIOUSLY DETERMINED TO BE AVAILABLE TO CITIES***

“The scope of a municipality’s police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people.” *Cannabis Action Coalition v. City of Kent*, 332 P.3d 1246, 1259 (2014). Specifically, code cities possess statutory and constitutional authority to enact ordinances as an exercise of their police power unless specifically directed otherwise. See RCW 35A.11.020 and Washington Constitution, Art. XI, Sec. 11, *supra*. Therefore, “[g]rants of municipal power are to be liberally construed.” *City of Wenatchee v. Owens*, 145 Wn.App. 196, 202 (2008), *review denied*, 165 Wn.2d 1021 (2009).

This policing power includes the right to ban activities, as well as regulate them, despite the fact that the activity, itself, may be wholly legal, in general, outside of a city’s boundaries. *Bungalow Amusement, infra*.

In *Bungalow Amusement v City of Seattle*, which referenced Article XI, Section 11, the Supreme Court allowed Seattle police to cause

any dance hall to be vacated with “the summary method prescribed” in Seattle’s ordinance because, in the opinion of the Court, the City of Seattle had the police power to ban dance halls altogether if it chose to do so, not just conditionally vacate them, despite the fact that no statewide ban existed and dance halls and dancing were otherwise legal. *Id.*, 148 Wn 485, 488-89, 269 P2d 1043 (1928).

It is well-settled law that there are certain businesses and vocations subject to regulation by the exercise of the police power, to the extent of even entirely prohibiting them; this upon the ground of their potential evil consequences. Probably the most common of such businesses is and was the traffic in intoxicating liquor, even before the coming of state and national constitutional prohibitions against such business ... to the extent of entire prohibition by legislation, apart from express constitutional authority for such legislation. *Id.* at 489. (emphasis added).

The City’s policing of marijuana, despite I-502, is still perfectly in tandem with the language of *Bungalow Amusement*. Indeed, doing otherwise may subject the City, itself, to penalties because, as recently as 2011, the U.S. Attorneys for both Eastern and Western Washington warned then-governor Christine Gregoire that the federal government could impose civil and criminal penalties on the State for any licensing scheme, even one for medical marijuana, and stated penalties could also be assessed on those facilitating such a scheme. (CP 108 and CP 112-14).

The opinion of the U.S. Attorneys for the Western and Eastern Districts of Washington publicly stated that marijuana remains illegal

under federal law via the CSA and “[S]tate employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the CSA.” (CP 109-13, esp CP 110).

The opinion of the U.S. Attorneys General referenced Federal CSA’s several sections, noted that the Federal government was not prohibited from filing civil or criminal actions against the State and its employees under the CSA, and specifically referenced criminal statutes 21 USC 841, 856, 860, 843, and 846. (CP 109-13, esp CP 110).

Accordingly, the Department [of Justice] could consider civil and criminal legal remedies regarding those [persons engaging in that conduct] ... Others who knowingly facilitate the actions of the licensees ... should also know their conduct violates federal law ... As the Attorney General has repeatedly stated, the Department of Justice remains firmly committed to enforcing the CSA in all states. (CP 109-13, esp CP 110).

**VI. *THE CITY’S ORDINANCE IS NOT IN CONFLICT WITH ANY FIELD PREEMPTED BY THE STATE AND IS CONSISTENT WITH THE STATE’S PUBLISHED 2014 ATTORNEY GENERAL OPINION***

**A. *The Attorney General is correct in opining that I-502 does not preempt local governments from enacting ordinances banning marijuana businesses.***

On January 16, 2014, at the request of the WSLCB, the Washington State Attorney General’s office issued an Opinion (AGO 2014 No. 2) regarding the issue of local governments banning marijuana businesses within their jurisdictions. It was the conclusion of the Attorney General that local government bans of marijuana businesses were neither field preempted nor conflict preempted, and thus, valid and constitutional.

An Attorney General's Opinion is not binding on the courts nor is it mandatory authority, but the Washington Supreme Court has noted that such opinions are generally "entitled to great weight." *Five Corners Family Farmers v. State*, 173 Wash.2d 296, 268 P.3d 892 (2011) In fact, the *Five Corners* Court noted that formal Attorney General Opinions may be considered persuasive authority because, first, such Opinions represent the considered legal opinion of the constitutionally designated legal adviser of the state's officers, and, second, it is presumed by the Court that the legislature is aware of formal opinions issued by the Attorney General and a failure to amend a statute in response to a formal opinion may be treated as a form of legislative acquiescence. *Id.* at 308.

The State Attorney General's Opinion 2014 No. 2 is correct. There is no evidence of an intention by the State to preempt cities traditional policing powers. In fact, the Legislature's deliberate omission of cities from the licensing statutes shows just the opposite. In addition, the Attorney General's Opinion 2014 No. 2 has not prompted the Legislature to act in response to it and is otherwise correct based on the following points and authorities:

**i. 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 v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010). Field preemption may be expressly stated or may be implicit in purposes or facts and circumstances of the state regulatory system. *Id.*

In assessing the possibility of field preemption in an initiative, the Courts look to legislative intent. *Hoppe, infra*. “Legislative intent” in an initiative is derived from the collective intent of the people and can be ascertained by the material contained with the official voter’s pamphlet. *Dep’t of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973). The language of the voter’s pamphlet section for I-502, however, contains no evidence of an intent for the state regulatory system to preempt the entire field of marijuana business licensing or operation. In fact, neither do the RCW 69.50 amendments which followed I-502's passage.

The only explicit preemption clause anywhere in RCW 69.50 indicates an intent for the State to preempt the field of penalties for violations of the Washington CSA, nothing else.

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 ... RCW 69.50.608.

69.50.608 only concerns penalties for violations of RCW 69.50. There is no provision within RCW 69.50 prohibiting municipal corporations from banning collective gardens or marijuana production, processing, and retail businesses. Therefore, there can be no penalty for implementing a local ban and RCW 69.50.608 does not provide one.

In addition, any failure by the State to preempt the field must be construed as intentional. None of the Legislature's RCW 69.50 amendments state there must be a minimum number of marijuana businesses within a County or City, nor that there is any right for a marijuana businesses to be located within any incorporated city.

If RCW 69.50 or I-502 had listed these as explicit rights, then this intention would have been clear, but the Legislature's only directive in this area was to, by statute, delegate authority to the WSLCB to determine the maximum number of licenses that may be issued in one county, not set a minimum.<sup>1</sup> WSLCB then adopted WAC 314-55-020(11). The text of which reads:

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).

Therefore, to the extent that the post-Initiative WACs express any intent at all, the only apparent intent of the WSCLB rule is that nothing in RCW 69.50 displaces the City's right not to allow marijuana zoning. As a result, the plaintiffs' claims of field preemption fail. The WSCLB clearly did not intend to impose a marijuana business on a city against its will.

- ii. **Conflict Preemption**
  - a. **There is no state-local conflict where an otherwise lawful activity is banned by a City unless the Legislature has intentionally acted to create one.**

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<sup>1</sup> e.g., RCW 69.50.354.

Conflict preemption may arise “when an ordinance permits what state law forbids or forbids what state law permits.” *Lawson v City of Pasco*, 168 Wn.2d 675, 682, 230 P.3d 1038 (2010), but, in light of the fact that “every presumption will be in favor of constitutionality,” courts make every effort to reconcile state and local law. *HJS Dev., Inc. v. Pierce County*, 148 Wash.2d 451, 477, 61 P.3d 1141 (2003), (internal citations omitted). Therefore, a local ordinance is only constitutionally invalid if it directly and irreconcilably conflicts with an unfettered right created by a statute such that the two cannot be harmonized. *Id.* and *Rabon v. City of Seattle*, 135 Wn.2d 278, 292, 957 P.2d 621 (1998). The question is not whether a state law permits an activity in some general sense; because 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* at 292.

An employment law case is instructive in reviewing some of the policy issues in question in the above-captioned case, although it did not deal directly with a state law / local law conflict. *Roe v Teletech Customer Care*, 171 Wn2d 736, 257 P3d 586 (2011). *Roe* dealt with Washington’s Medical Use of Marijuana Act, (“MUMA”) and ruled that MUMA did not provide a private cause of action for an employee who is terminated for using marijuana, despite the enactment of MUMA pursuant to RCW 69.51A. *Id.* at 171 Wn2d 759.

In *Lawson*, the Washington Supreme Court ruled that the State's Mobile Home Leasing and Tenancy Act, ("MHLTA"), despite its language describing, in detailed terms, the restrictions and rights of any RVs leasing space within a mobile home park, did not conflict with local statutes prohibiting RVs from being used as permanent residences in mobile home parks because the State's MHLTA contained no language that created a right to place RVs in mobile home parks.

The statutory definitions in RCW 59.20.030 apply to any RV used as a permanent residence once a landlord-tenant relationship is established, but they do not require Mr. Lawson to lease a lot designed for a mobile home to the owner of such an RV. Nothing in the statute prevents landowners from choosing to whom they lease lots, and nothing in it prevents municipalities from regulating that choice. The statute simply regulates recreational vehicle tenancies, where such tenancies exist. Because Pasco's ordinance, former PMC 25.40.060, may be harmonized with the MHLTA, the two laws do not conflict. *Lawson* at 168 Wn.2d 692 and 230 P3d 1043.

In addition, the *Lawson* Court ruled that the MHLTA was not in conflict with Pasco's ordinance because it "imposes no restrictions on local government's regulation of landlord-tenant relationships involving mobile/manufactured homes, it merely regulates such tenancies once they exist." *Id.* at 168 Wn.2d 679 and 230 P.3d 1042.

This acknowledgement [in the state statute] that [RVs] could be present on mobile home lots is not equivalent to an affirmative authorization of their presence. The statute does not forbid recreational vehicles from being placed in the lots, nor does it create a right enabling their placement. Id. at 168 Wn.2d 679 and 230 P.3d 1042.

The City's Ordinance places no more burdens on marijuana businesses than Pasco's ordinance placed on RV owners. The Legislature, in its amendments to RCW 69.50, provided some regulations for marijuana licenses, delegated others and legalized, under state law, certain activities, e.g., retail marijuana outlets, but did not compel the City to allow the activity within its jurisdiction, just as, in *Lawson*, the MHLTA clearly contemplated that living in an RV was legal and living in a mobile home park was legal, but that did not compel a city to permit people to live in RVs in mobile home parks if the City elected to ban that activity. prohibit a local jurisdiction from excluding that activity.

In *Lawson, supra*, siting RVs in mobile home parks was allowed under state law, but, under local law, RVs could be excluded. Likewise, under state law, marijuana businesses are allowed to operate, but can also, under local law be excluded.

Finally, in *Weden v. San Juan County*, the Supreme Court upheld a local limitation on an activity, (jet ski riding), otherwise allowed under State law. The Washington Supreme Court ruled that San Juan County's prohibition on motorized personal watercraft in certain waters presented no conflict with State law, even though the state law at issue created mandatory registration and safety requirements for such watercraft, and expressly prohibited the operation of unregistered vessels. *Weden v. San Juan County*, 135 Wn.2d 678, 709-10, 958 P.2d 273 (1998).

In making its ruling, the *Wedden* Court expressly rejected the argument that the regulation of vessels constituted permission to operate them 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.” *Wedden*, 135 Wn.2d at 695. The “[r]egistration of a vessel is nothing more than a precondition to operating a boat” and “[n]o unconditional right is granted by obtaining such registration.” *Id.*

So, while obtaining registration with the state was a necessary precondition to being able to operate a personal watercraft, (just as obtaining a state license is necessary for a marijuana business), it did not grant carte blanche to the owner to operate within any specific local jurisdiction or local jurisdictions generally. The same is the case here. One must obtain a license from the WSLCB, but obtaining that license does not grant a business owner the right to set up shop wherever and however he/she likes. He/she must comply with local restrictions.

- b. The state legislature acquiesced to the WSLCB’s interpretation that state law did not preempt local power to impose zoning ordinances.**

When an agency has been delegated rule making authority and has adopted rules pursuant to this authority, the regulations are presumed valid. *Armstrong v. State*, 91 Wn.App. 530, 537 (1998). Not only are the regulations presumed valid, they are also given great weight, *Id.*, because, while a regulation is not a statute, “it has been established in a variety of contexts that properly promulgated substantive agency regulations have

the force and effect of law.” *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445, (1997), *cert. denied* 118 S.Ct. 1574 (1998). As a result, WAC 314-55-020 has the same force and effect of a statute, and, since its adoption on November 11, 2013, WAC 314-55-020 has stated that state marijuana business licenses must comply with local rules and regulations.

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).

If the state legislature did not agree with the WSLCB’s interpretation of I-502’s meaning, it had ample opportunity to make that disagreement known. Since November 2013, the state legislature has made several changes to RCW 69.50, specifically relating to the sections on marijuana. ESHB 2304, for example, was approved on April 2, 2014 and went into effect on June 12, 2014. (CP 134). None of the post-November 2013 changes, though, disturbed WAC 314-55-020.

This constitutes legislative acquiescence because “[t]he Legislature’s failure to amend a statute interpreted by administrative regulation constitutes legislative acquiescence in the agency’s interpretation of the statute [and] [t]his is especially true when the Legislature has amended the statute in other respects without repudiating the administrative construction.” *Manor*, 131 Wn.2d 439, n.2 (1997).

- c. **The state legislature acquiesced to bans in a manner which is consistent with the Attorney General’s Opinion that state law did not preempt a local jurisdiction’s right to ban marijuana businesses.**

An Attorney General formal opinion “constitutes notice to the Legislature of the Department’s interpretation of the law.” *City of Seattle, v. State and Dep’t of Labor and Industries*, 136 Wn.2d 693, 703 (1998). When the Legislature has not acted to overturn an Attorney General’s interpretation, the courts have found that the Legislature has consented to the interpretation. *Id.*, *Five Corners Family Famers*, 173 Wash.2d 296 at 308.

As stated above, the Attorney General opined in January 2014 that local governments may ban marijuana businesses within their jurisdictions and there is no field nor conflict preemption. Now, according to the intervenors, at least 120 local governments either ban marijuana outlets or have moratoriums against the operation of marijuana outlets. Nonetheless nothing amending the laws regarding the State’s licensing and taxation scheme have emerged from the Legislature, even though the Legislature clearly knows it can change the state marijuana laws at any time. The Legislature has had the opportunity to modify or moot the Attorney General’s Opinion. The Legislature has not done so. Therefore, the Courts should conclude that the Legislature is satisfied with the Attorney General’s opinion on the issue.

**d. The Courts should not disturb the Legislature’s acquiescence in response to WAC 314-55-020 and the Attorney General’s opinion in AGO 2014 No. 2**

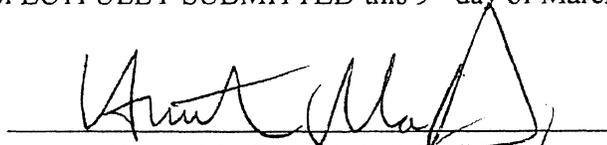
“It is not the role of the judiciary to second-guess the wisdom of the legislature.” *Northwest Animal Rights Network v. State*, 158 Wn.App 237, 245, 242 P.3d 891 (2010). “Indeed, the judiciary’s making such

public policy decisions would not only ignore the separation of powers, but would stretch the practical limits of the judiciary.” *Id.* at 246. The courts are “not equipped to legislate what constitutes a ‘successful’ regulatory scheme by balancing public policy concerns, nor can [courts] determine which risks are acceptable and which are not. ... Such is beyond the authority and ability of the judiciary.” *Id.* (internal citations omitted).

### CONCLUSION

The Legislature deliberately omitted to include cities as geographic locations for marijuana licenses. That omission is binding. The WSLCB has specifically stated that any state marijuana license it issues do not authorize a business license at the local level or authorize noncompliance with local zoning or building codes. The Legislature has acquiesced. The courts should, therefore, not undo what the Legislature clearly wishes to remain in place.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of March, 2015.

A handwritten signature in black ink, appearing to read "F. Hunter MacDonald", is written over a horizontal line. The signature is stylized and cursive.

F. Hunter MacDonald, WSBA #22857  
Attorney for Respondent City of Fife

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Attached for filing, please find a copy of the Respondent, City of Fife's Opening Response to Intervenor-Appellant's Opening Brief.

Thank you!

*Alison Rigby*

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