SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE

MMH, LLC, a Washington limited liability company,

Plaintiff,

and

CITY OF FIFE, a Washington municipal corporation

Defendant.

Companion:

GRAYBEARD, LLC, a Washington limited liability company,

Plaintiff,

and

CITY OF FIFE, a Washington municipal corporation

Defendant.

No. 14-2-10487-7

PLAINTIFFS' MOTION FOR CONTINUANCE OF HEARING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO CR 56(f) AND RESPONSE TO CITY OF FIFE'S MOTION FOR SUMMARY JUDGMENT

Hearing Date: August 29, 2014
Time: 9:00 a.m.

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COMES NOW MMH, LLC and GRAYBEARD, LLC, by and through their attorneys, Davies Pearson, P.C., and pursuant to Rule 56(f) of the Superior Court Civil Rules ("CR"), move the court for an order that continues the hearing on Defendant City of Fife's Motion for Summary Judgment and renotes the hearing for a mutually agreeable date and time. The motion is made on the grounds that Plaintiffs cannot present by affidavit or declaration facts essential to justify their opposition to the City of Fife's Motion to with regard to the WSLCB's promulgation and interpretation of WAC 314-15 et seq.

In the alternative, Plaintiffs respectfully submit their Response to the City of Fife's Motion for Summary Judgment

I. STATEMENT OF FACTS

On November 6, 2012, Washington citizens approved Initiative Measure No. 502 ("I-502"), the legalization of recreational marijuana.[1] I-502 passed in Pierce County by a majority of fifty-four (54) percent.[2] I-502 legalizes and regulates the production, manufacture, and retail sale of marijuana throughout the state of Washington. Plaintiffs were awarded licenses in the April 2014 WSLCB retail outlet lottery and entered into a commercial lease in the City of Fife for the purpose of opening a retail marijuana outlet. In July 2014, the Fife City Council banned all marijuana land uses in the City.

Plaintiffs filed this action in July 2014. On August 1, 2014, Plaintiffs filed their

[1] *November 6, 2012 General Election Results*, Washington Secretary of State, http://vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana.html (last visited July 30, 2014).
[2] *County Results*, Washington Secretary of State, http://vote.wa.gov/results/20121106/Initiative-Measure-

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Motion for Partial Summary Judgment, arguing that they are entitled to judgment as a matter of law because Fife Ordinance No. 1872 is statutorily preempted, is in conflict with State law, and constitutes an unconstitutional talking. The City filed a cross motion asserting that the Ordinance was validly enacted and that it is not preempted or in conflict with State law. The City also asserts that its employees are subject to prosecution for violation of the Federal Controlled Substance Act.

On July 31, 2014, the Attorney General for the State of Washington moved to intervene under the authority of RCW 7.24.110. The parties stipulated that the Attorney General should intervene. On August 7, 2014, Downtown Cannabis Company, LLC, Monkey Grass Farms, LLC, and JAR MGMT, LLC dba Rainier on Pine, each a state-licensed marijuana producer-processor or retailer moved the court for an order allowing intervention. Intervention was subsequently granted.

II. STATEMENT OF ISSUES

1. Whether the City is entitled to judgment as a matter of law that Ordinance No. 1872 was validly enacted when, (1) at the direction of the Council, the City planning commission recommended a zoning ordinance which permitted and regulated marijuana uses in the City of Fife; (2) the public was given notice of the Ordinance as recommended by the council; (3) the council disregarded the planning commission recommendation and enacted a ban via a motion to amend at the July 24, 2014 Council meeting; and (4) the public was not given proper notice of the nature and purpose of the

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No-502-Concerns-marijuana_ByCounty.html (last visited July 30, 2014).

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"amended" ordinance.

2. Whether the City is entitled to judgment as a matter of law when, (1) the State of Washington fully occupies and preempts the entire field of setting penalties for violations of the Washington Uniform Controlled Substances Act ("UCSA"); (2) local laws and ordinances that are inconsistent with the requirements of the USCA cannot be enacted and are preempted and repealed; and (3) Fife Ordinance No. 1872 criminalizes operating an I-502 business in the City of Fife in violation of RCW 69.50.608.

3. Whether the City is entitled to judgment as a matter of law under article XI, section 11 of the Washington State Constitution, when (1) a city may make and enforce regulations that do not conflict with general laws; (2) an ordinance conflicts with general laws if it prohibits that which a statute permits; and (3) Ordinance No. 1872 prohibits what RCW 69.50 *et seq.* allows.

4. Whether the City has established that there are no issues of material fact as that I-502 is preempted by federal law when, (1) the City has presented no evidence that City employees are at risk of Federal prosecution for Controlled Substance Act violations; and (2) the City has presented no evidence that a positive conflict exists between the Federal Controlled Substances Act and I-502.

III. AUTHORITY

The City argues that because I-502 grants municipalities some amount of authority over marijuana businesses, a municipality's outright ban is lawful. This argument goes too far. Municipalities generally possess constitutional authority to

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enact zoning ordinances as an exercise of their police power. article XI, section 11. However, a municipality may not enact a zoning ordinance that is either preempted by, or in conflict with, state law. HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs., 148 Wn.2d 451, 477, 61 P.3d 1141 (2003). Ordinance No. 1872 is both preempted by and in conflict with state law. The City's position that it has constitutional authority to render State law null and void is without merit.

No opt out powers are expressly offered to local governments in I-502, as codified. The voters and Legislature expressly tasked the State with jurisdiction over the recreational marijuana trade. The general law is thorough and creates a pervasively regulated industry to which the Legislature did not leave room for localities to interfere. As such, a positive conflict does not exist with the Federal Controlled Substances Act. The City's claims of federal preemption and prosecution are speculative and without merit.

In passing Ordinance No. 1872, the City of Fife disregards the will of the voters and the intent of our Legislature. The Ordinance was not properly enacted. Additionally, Ordinance No. 1872 preempted directly and conflicts with State law, and as a result, should be invalidated. Moreover, the City cannot meet its burden of establishing this case presents no issues of material fact with regard to its concern of Federal prosecution. On the authority set forth below, the City of Fife's Motion for Summary Judgment should be denied.

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A. SUMMARY JUDGMENT STANDARD

A motion for summary judgment argues (1) that the case presents no genuine issues of fact (thus leaving the trier of fact nothing to decide), and (2) that the moving party is entitled to a judgment as a matter of law. CR 56(c). The burden of establishing both requirements is on the moving party. If the moving party fails to establish both requirements, the motion will be denied. The motion can be denied (i.e., the court may conclude that factual issues exist) even though the nonmoving party has submitted no affidavits or other evidence. *Hash by Hash v. Children's Orthopedic Hosp. and Med. Center*, 110 Wn. 2d 912, 757 P.2d 507 (1988).

B. THE CITY IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE ENACTMENT OF ORDINANCE NO. 1872 FAILED TO COMPLY WITH PROCEDURAL REQUIREMENTS

As correctly noted by the City, in its Motion, zoning amendments must adhere to various statutory procedural requirements. In cases where municipal governments fail to comply in substance or form the attempted legislative act is invalid. For example, in *Savage v. City of Tacoma*, 61 Wn. 1, 112 P. 78 (1910), the Court struck a city ordinance because its adoption was procedurally flawed, stating "where a municipal charter prescribes a definite method for the enactment of ordinances, such requirements are mandatory, and no authority is vested in the lawmaking body of the municipality to pass ordinances except in the manner required by the charter." Id. at 6; *See also Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle*, 70 Wn.2d 222, 227, 422 P.2d 799 (1967) (holding a Seattle City Council legislative act void for failure to comply with

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Seattle City Charter requirement that all legislative acts be by ordinance); *Tennent v. City of Seattle*, 83 Wn. 108, 111–12, 145 P. 83 (1914) (holding a Seattle City Council ordinance invalid for failing to comply with charter requirement that no nonappropriation ordinance shall be passed at the same meeting it is introduced). Here, the City's enactment of the "amended" ordinance fails to comply with state and local procedural requirements.

Both the Revised Code of Washington ("RCW") and the Fife Municipal Code ("FMC") contain express notice requirements. RCW 35A.63.100 provides:

> No zoning ordinance, or amendment [to the comprehensive zoning plan], shall be enacted by the legislative body without at least one public hearing, notice of which shall be given as set forth in RCW 35A.63.070.

RCW 35A.63.100(2). RCW 35A.63.070 requires that the:

> time, place, and purpose of such public hearing shall be given as provided by ordinance and including at least one publication in a newspaper of general circulation delivered in the code city and in the official gazette, if any, of the code city, at least ten days prior to the date of the hearing.

RCW 35A.63.070.

Section 19.92.040 of the FMC requires the following for any amendment to the City's zoning provisions:

> Within 30 days of receiving a recommendation on an amendment request from the planning commission, the city council shall hold a public hearing to consider the request. At a public hearing and supported by written findings, the city council shall either remand, grant, grant with modifications or deny the amendment request. Prior to granting an amendment, the city council must conclude that the request is consistent with FMC 19.92.045. Amendments shall be official upon adoption of an ordinance granting the request.

FMC 19.92.040

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Here, the City did not comply with its own zoning amendment ordinance. At the July 8, 2014 council meeting, the Council received the recommendation but denied it; Councilmember Johnson's motion was not simply to "amend" as it was couched. Instead, Johnson's proposal flatly rejected every provision recommended by the City's planning commission. The amendment so changed the original text that it became, in effect, a new and different ordinance. Under FMC 19.92.040, the Council is only authorized to "remand, grant, grant with modifications or deny the amendment request." Johnson's action exceeded the scope of the Council's authority. The City neither "granted with modification" nor "denied" the proposed ordinance. The City outright banned marijuana uses thus creating a new ordinance. This new Ordinance was entirely different than what was proposed by the planning commission. This procedural failure results in an ordinance that is unenforceable.

Additionally, Washington courts have imposed qualitative due process notice requirements for zoning actions that extend beyond formal statutory notice requirements. Washington courts have held that notice must apprise interested citizens of the nature and purpose of the hearing so they can participate effectively. *Barrie v. Kitsap Cy.*, 84 Wn.2d 579, 584–86, 527 P.2d 1377 (1974); *Glaspey & Sons, Inc. v. Conrad*, 83 Wn. 2d 707, 711–12, 521 P.2d 1173 (1974); *Port of Edmonds v. Northwest Fur Breeders Coop., Inc.*, 63 Wn. App. 159, 166–67, 816 P.2d 1268 (1991), review denied, 118 Wash.2d 1021, 827 P.2d 1012 (1992). If notice fails to apprise parties of the nature and purpose of proceedings, the good intentions of officials in satisfying

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statutory requirements are irrelevant. *Barrie*, 84 Wn. 2d at 584–86, 527 P.2d 1377. Here, the public had notice of an ordinance with reasonably regulated marijuana uses allowed in the City. The public had no notice of a ban. Because the notice was constitutionally insufficient, the ordinance should be invalidated.

The notice provided here consisted of the council agenda herein on the City's website. The agenda for the June 24, 2014, first reading informed the public, "Ordinance No. 1872 - 1st Reading Zoning Code Amendment - Marijuana Land Uses" and contained active links to the copies of the proposed ordinance and supporting documents. (Dec. of Nelson, Partial Summary Judgment, Ex. 20).The Ordinance was ratified on July 8, 2014. The July 8, 2014 agenda simply stated, "Ordinance No. 1872 - Passage Zoning Code Amendment - Marijuana Land Uses." (Dec. of Nelson, Partial Summary Judgment, Ex. 21). There were no references to the fact that marijuana uses were now banned despite the fact that the planning commission had been recommending the opposite for much of the prior year. There was no link to the document as amended. There was nothing noticing the public that a ban was to be enacted on July 8, 2014. This notice fails to apprise parties of the nature and purpose of proceedings in light of the "amendment." As such the Court should not find as a matter of law that the City validly enacted Ordinance 1872.

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C. THE CITY IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE STATE HAS EXPRESSED ITS INTENT TO OCCUPY THE ENTIRE FIELD OF RECREATIONAL MARIJUANA LEGISLATION AND FIFE ORDINANCE NO. 1872 CREATES PENALTIES WHICH DO NOT EXIST UNDER STATE LAW.

Field preemption occurs when the Legislature states its intention either expressly or by necessary implication to preempt the field. *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991). If the Legislature is silent as to its intent to occupy a given field, the court may look to the purposes of the statute and to the facts and circumstances upon which the statute was intended to operate. *Lenci v. Seattle*, 63 Wn.2d 664, 669, 388 P.2d 926 (1964). Here, the legislative intent is both implied and express.[3]

a. The Legislature's intent to preempt the field is implied by the purposes of the statute and by the facts and circumstances upon which the statute was intended to operate.

Consistently, Washington courts look to legislative intent to determine whether a particular field has been preempted. Citing *Washington State Dept. of Revenue v. Hoppe*, the City identifies the official voters' pamphlet as a primary means of determining legislative intent. 82 Wn.2d 549, 552, 512 P.2d 1094 (1973). In *Hoppe*, the Washington Supreme Court also identified several other guiding principles with regard to field preemption, including that the "spirit or intention of the law prevails over the letter thereof" and that the "collective intent of the people becomes the object of the court's

[3] To a large extent, the Plaintiff's responses to the City's claims are set forth in Plaintiff's Motion for Partial Summary Judgment. Rather than repeat them here, Plaintiffs incorporate the authorities and arguments addressed in their motion by reference.

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search for 'legislative intent' when construing a law adopted by a vote of the people."

The City's review of voters' pamphlet is incomplete. In discussing to voters' pamphlet for I-502, the City provides the Court with one sentence of analysis, stating simply that the voters' pamphlet does not contain any evidence of intent. This statement is not correct.

The voters' pamphlet provides ample evidence as to intent, stating "[w]ithout violating state law, people over age 21 could grow, distribute, or possess marijuana, as authorized under various types of licenses." It also provides that "[l]icensed retailers could sell marijuana, and products containing marijuana, to consumers at retail." Under the City's theory, these statements would be rendered meaningless.

The voters' pamphlet takes special care to discuss how marijuana businesses would be restricted as to their locations, "Locations could not be within 1,000 feet of any school, playground, recreation centers, child care center, park, transit center, library, or game arcade." By specifying specific restrictions as to location, the voters' pamphlet contemplates that marijuana businesses must be regulated but not that they be regulated entirely out of a county, city, or municipality.

Finally, the voters' pamphlet details how the number of retail outlets would be determined, specifying that population, security and safety issues, and discouraging purchases from illegal markets must be taken into account. The voters' pamphlet went even further and estimated that the number of retail outlets in Washington would be 328. Based on this language, it cannot be argued that the voters' anticipates that whole

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counties, cities, and municipalities could simply ban marijuana uses. If it was will of the people that recreational marijuana should not exist in their city, they certainly would not have voted I-502 into law.

In stark contrast to the authority given to the State, the only mention of authority given to local governments is one sentence that provides that local governments could submit objections for the State to consider in determining whether to grant or renew a license. Even this grant is insignificant as it only provides local governments with the opportunity to submit objections while leaving all final decisions to the State.

The same conclusion is reached from taking a holistic look at RCW 69.50 et seq. Again, the State is granted substantial authority with regard to licensing and regulating marijuana-related business while the City's sole regulatory authority is to object to an individual application. Based on the above considerations, a voter who read the voters' pamphlet would reasonable not anticipate or expect that local jurisdictions would have the right to zone marijuana businesses entirely out of a city. Again, if it were the will of the people that marijuana business would not be located within their city, they would have voted no on I-502.

b. The Legislature's intent to preempt the field is expressed in RCW 69.50.608.

In addition to stating its intent to fully occupy and preempt the entire field of setting penalties for violation of the UCSA, our Legislature expressly preempted any local law that is inconsistent with the requirements of the UCSA. RCW 69.50.608. Ordinance No. 1872 is expressly preempted as it creates penalties that do not exist

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under State law and is inconsistent with the UCSA. These authorities are fully set forth in Plaintiffs' Motion for Partial Summary Judgment and for the sake of economy will not be repeated here. These authorities are fully incorporated by reference into Plaintiffs' response.

c. The Legislature did not intend that local governments could invalidate state law.

The City argues that the State failed to preempt local governments from regulating marijuana businesses and that such failure was intentional. The City however fails to support the position with a single authority and, instead, references WAC 314-55-020(11). WAC 314-55-020 addresses the general application and licensing requirements for marijuana business applicants. WAC 314-55-020(11) provides notice to applicants that they will be treated the same as other businesses with regard to building code, zoning. Like other businesses, marijuana-related businesses must abide by local zoning laws. WAC 314-55-020(11), does not in any manor authorize a ban.

The WSLCB does not share the City's interpretation of WAC 314-55-020(11). Plaintiffs' counsel spoke to WSLCB Rules Coordinator Karen McCall on August 12, 2014. (Dec. of Nelson in Support of CR 56(f)). Ms. McCall stated the rule was intended to recognize that marijuana businesses, like all other commercial and industrial businesses, are subject to the regulations of their local jurisdiction. WAC 314-55-020(11), however, does not intended to express a right that local jurisdictions may completely zone out marijuana-related businesses. Plaintiffs' attempted to secure a declaration from WSLCB directors Randy Simmons, Alan Rathbun, and Rick Garza,

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formalizing the WSLCB position. However, as of the filing of this response these officials had not responded necessitating the request for the continuance set forth above.

D. THE CITY IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE ORDINANCE NO. 1872 CONFLICTS WITH STATE LAW.

An ordinance conflicts with state law if it permits what state law forbids or forbids what state law permits. *Parkland Light & Water Co. v. Tacoma–Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004). A conflict arises when the two provisions are contradictory and cannot coexist. *Id.* If an ordinance conflicts with a statute, the ordinance is invalid. *Id.* at 434. Ordinance No. 1872 is wholly contradictory to the statutes providing for the production and sale of marijuana under RCW 69.50 *et seq*. Therefore, the ordinance is invalid.

a. RCW 69.50 and Fife Ordinance No. 1872 cannot be harmonized therefore the Ordinance must be invalidated.

The focus of the article XI, section 11 inquiry is on the conduct proscribed by the two laws which is a question of substance. *State v. Kirwin*, 165 Wn.2d 818, 826, 203 P.3d 1044, 1048 (2009); *See also Seattle v. Eze,* 111 Wn.2d 22, 33, 759 P.2d 366 (1988). Here, the conflict is evident. The Fife Ordinance prohibits the precise conduct that the State statute permits: the production, processing, and sale of marijuana. The City's prohibition of the conduct permitted under I-502 gives rise to an irreconcilable conflict which invalidates the ordinance.

The cases cited by the City must be distinguished. In *Lawson*, the Petitioner owned and operated a mobile home park in Pasco, Washington. 168 Wn.2d 675, 677,

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230 P.3d 1038 (2010). There, the Petitioner challenged a local ordinance, which prohibited recreational vehicle sites for occupancy purposes in any residential (RV) park." *Id.* Lawson argued that the challenged ordinance conflicted with the Washington State Mobile Home Leasing and Tenancy Act ("MHLTA"). However, the Act was intended only to "regulate and determine legal rights, remedies, and obligations arising from any rental agreement between a landlord and a tenant regarding a mobile home lot . . ." *Id.* at 683. Based on the purpose of the Act, the Court concluded that the statute neither forbade recreational vehicles from being placed in the lots, nor did it create a right enabling their placement. *Id.* Instead, the statute simply regulated the landlord-tenant relationship once that relationship was established.

The *Lawson* analysis is distinguishable. The statutory structure at issue here extends much further than in *Lawson*. RCW 69.50 *et seq.* provides a comprehensive and pervasive regulatory scheme to establish statewide production and distribution of recreational marijuana. I-502 is intended to decriminalize the use and possession of marijuana, allow law enforcement resources to be focused on violent and property crimes, generate new state and local tax revenue, fight drug cartels, and create tightly regulated, state-licensed access to recreational marijuana. Alternatively, the MHLTA is merely a framework to adjudicate disputes arising between a landlord and a tenant regarding a mobile home. Because the scope of these two acts so vastly differs, an analogy between *Lawson* and the present case cannot be drawn.

Similarly, the City's reliance on *Weden v. San Juan County,* 135 Wn.2d 678, 685-

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88, 958 P.2d 273 (1998) is inappropriate. In *Weden*, the Court confronted an ordinance in which the use of motorized personal watercraft ("PWC") was banned in San Juan County. In analyzing the conflict, the Court focused on RCW 88.02.120, which provides that, "no person may own or operate any vessel on the waters of this state unless the vessel has been registered and displays a registration number and a valid decal in accordance with this chapter . . . ." The Court however found no conflict because RCW 88.02.120, granted no affirmative rights and simply served as "precondition to operating a boat." *Id.* at 695. This reasoning does not analogize to the instant case.

The statute in *Weden* is limited in its application as it simply provides a registration requirement. As stated above, the statutory system at issue here provides a comprehensive licensing and regulatory scheme and identifies significant and important policies with regard to the purposes and goals of the statutory scheme. The applicable statutes here contain specific language directing the establishment of marijuana retail outlets. Under RCW 69.50.345, the state liquor control board must determine the number of retail outlets that may be licensed in each county, taking into consideration (a) population distribution; (2) security and safety issues; and (3) the provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market. The legislature makes it clear that there must be a sufficient number of retail establishments to ensure adequate access to Washington residents. This regulatory scheme cannot be reduced to a mere "precondition" as the registration requirement in *Weden.*

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I-502 represents the will of the voters of Washington State that they be provided adequate access to legal and regulated marijuana. This marijuana regulatory scheme is not merely a "precondition" to operating a marijuana business as was the Court's reasoning in *Weden v. San Juan County.* Nor is the recreational marijuana scheme simply means to determine legal rights arising from mobile home rental agreements as in *Lawson.* The provisions of RCW 69.50 pertaining to recreational marijuana form a pervasively regulated system to regulate every aspect of the production, distribution, and sale of legal marijuana in Washington State. The authority cited above does not provide a basis by which a Court could reconcile the will of the people as expressed in I-502 and ordinances which ban recreational marijuana on an ad hoc basis.

b. Our Legislature has not acquiesced to the Attorney General's opinion.

An Attorney General advisory opinion is not law. Attorney General opinions are not controlling and are often dismissed or ignored. *Skagit County Public Hosp. Dist. No. 304 v. Skagit County Public Hosp. Dist. No. 1*, 177 Wn.2d 718, 725, 305 P.3d 1079 (2013). The force of an Attorney General opinion lies exclusively in the persuasiveness of the reasoning, *Five Corners Family Farmers v. State*, 173 Wn. 2d 296, 309, 268 P.3d 892 (2011). Moreover, the legislature cannot be said to have acquiesced in the Attorney General's interpretation where it subsequently works to review the issues. *Id.* at 309. As argued herein, the Attorney General's reasoning is not persuasive.

Additionally, the Legislature has not acquiesced. The 2014 Legislative Session saw not less than 18 different bills addressing amendments to I-502, including HB 2322

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an act prohibiting local governments from banning I-502 business. (See Dec. of Nelson in Response, Ex. 1). Our Legislature is actively working to overturn the Attorney General's opinion. As such, the Court cannot find any Legislative acquiescence.

E. THE CITY HAS NOT DEMONSTRATED A LACK OF MATERIAL FACT REGARDING EXPOSURE OF THEIR EMPLOYEES TO FEDERAL PROSECUTION OR THE EXISTENCE OF POSITIVE CONFLICT UNDER THE CSA.

The Federal Controlled Substances Act ("CSA") provides as follows:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. The City posits that a positive conflict exists "because zoning for, permitting, and collecting revenue from marijuana businesses aids and abets in the violation of Federal drug laws." (Defendant's Memorandum in Support of Its Motion for Summary Judgment at p. 22). However, the City fails to provide the Court with any evidence or analysis that supports the suggestion that any City employee would in fact be federally prosecuted for performing his or her duties. Similarily, the City suggests that a positive conflict exists between the I-502 and the CSA. To prevail on its summary judgment motion, the City must demonstrate an absence of material facts with regard to their suggestions (1) that City employees will in fact be federally prosecuted for performing their duties, and (2) that there is a positive conflict between the CSA and the UCSA. The City fails to do either.

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a. An issue of material fact exists because no evidence has been presented demonstrating City employees would be subject to federal prosecution for performing their duties.

While somewhat unclear, the City suggests that its employees would be subject to criminal prosecution under 18 U.S.C. § 1962, 21 U.S.C. §§ 841(a)(1), 844(a), and 848(c)(1) and (2). However, the City does not provide a single fact to support its conclusory statements, by declaration or otherwise.

18 U.S.C. § 1962 is entirely inapplicable as it provides, in part, as follows:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a). The City has failed to assert any facts or make any argument as to how a City employee would be subject to criminal prosecution under 18 U.S.C. § 1962(a). As a result, the City does not meet its burden on summary judgment.

21 U.S.C. § 841(a)(1) provides as follows:

> "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

The City has not proven how, nor could it, that a City employee would be subject to criminal penalty under this statute. Similarly, 21 U.S.C. § 844(a) states, in part, that "[i]t shall be unlawful for any person knowingly or intentionally to possess a controlled substance.." Again, it is inconceivable that a City employee would be subject to criminal

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prosecution under this section, as actual possession is a necessary element.

Finally, City employees would not be subject to criminal prosecution under 21 U.S.C. § 848(c)(1) and (2). Not only does the City fail to provide any evidence or argument that its employees would be violating any provision of 21 U.S.C. Chapter 13, but the City also fails to prove that its employees would obtain "substantial income or resources." 21 U.S.C. § 848(c)(2)(B).

b. The City has failed to demonstrate a positive conflict between the CSA and the UCSA.

In assessing whether a state statute is preempted by the CSA, the court looks at whether there is a positive conflict between the two statutes such that they cannot consistently stand together. Such a conflict can arise when it is impossible to comply with both federal and state requirements or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L.E.2d 714 (1985). Several states have addressed positive conflict under the CSA in relation to state marijuana laws. These Courts have not found preemption concluding that it is not impossible to comply with both the CSA and the state statute and that the state laws did not stand as an obstacle to the CSA.

1. Impossibility Preemption

Impossibility preemption is a demanding defense. *Wyeth v. Levine*, 555 U.S. 555, 573, 129 S. Ct. 1187, 173 L.E.2d 51 (2009). It requires more than the existence of a hypothetical or potential conflict. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102

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S. Ct. 3294, 73 L.E.2d 1042 (1982). Instead, such impossibility results when state law requires what federal law forbids, or vice versa. *Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. ____, ____, 133 S. Ct. 2466, 2476-77, 186 L.E.2d 607 (2013). Under impossibility analysis, I-502 is not preempted by the CSA.

In *Ter Beek v. City of Wyoming*, the Michigan Supreme Court held that it was not impossible to comply with both the CSA and a state statute. 495 Mich. 1, 12, 846 N.W.2d 531 (2014). The court reasoned that the state statute neither required anyone to violate the CSA nor did it prohibit punishment under federal law. *Id.* The court took special care to note that the CSA does not require the city, or the state of Michigan, to enforce any prohibitions under the CSA as it is well established that, "[e]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the state to require or prohibit those acts." Id. at 14, quoting *Printz v. United States*, 521 U.S. 898, 924, 117 S. Ct. 2365, 138 L.E.2d 914 (1997), quoting *New York v. United States*, 505 U.S. 144, 166, 112 S. Ct. 2408, 120 L.E.2d 120 (1992).

California courts have used the same reasoning to arrive at an identical conclusion. In *Qualified Patients Ass'n v. City of Anaheim*, the court held that, because the state statutes did not mandate conduct that federal law prohibited and they did not pose an obstacle to federal enforcement of federal law, the state statutes were not preempted by the CSA. 187 Cal. App. 4th 734, 757 (2010). The court reasoned that "[a] claim of positive conflict might gain more traction if the state required, instead of merely

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exempting from state criminal prosecution, individuals to possess, cultivate, transport, possess for sale, or sell medical marijuana in a manner that violated federal law. But because neither [state law] require such conduct, there is no 'positive conflict' with federal law . . . ." Id. at 759. The court went even further, confirming that "a city's compliance with state law in the exercise of its regulatory, licensing, zoning, or other power with respect to the operation of medical marijuana dispensaries that meet state law requirements would not violate conflicting federal law." Id. Finally, the court reaffirmed that "government entities do not incur aider and abettor or direct liability by complying with their obligations under the state medical marijuana laws." Id. at 759-60.

The Ninth Circuit has applied a similar analysis. In *Hyland v. Fukuda* the Court concluded that a Hawaii law allowing felons to carry guns was not preempted by a federal law prohibiting such conduct. 580 F.2d 977, 980-81 (1978). The Court reasoned, "[The state law] has no impact on the legality of the same act under federal law. Simply put, Congress has chosen to prohibit an act which Hawaii has chosen not to prohibit; there is no conflict between [the federal law] and [the state law]." Id. at 981.

The same reasoning applies here. Like Michigan and California, the state statutory scheme in Washington does not require the retail sale of marijuana. It simply provides a licensing and regulatory scheme for marijuana retailers. Under such circumstances, marijuana retailers remain subject to federal criminal prosecution and, as a result, it is not impossible to comply with both the CSA and the UCSA. Thus, impossibility preemption is not implicated.

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2. Obstacle Preemption

Preemption may also be found if, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. *Crosby v. Nat. Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L.E.2d 352 (2000). What is a sufficient obstacle is a matter of judgment to be assessed under the circumstances of the given case and to be informed by examining the federal statute as a whole and identifying its purpose and intended effects. *Id.* The main objectives of the CSA are to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzales v. Raich*, 545 U.S. 1, 12, 125 S. Ct. 2195, 162 L.E.2d 1 (2005). Relying on these general principles, the *Ter Beek* court determined that the state statute's limited state-law immunity did not frustrate the CSA's operation nor refuse its provisions their nature effect, such that its purpose could not otherwise be accomplished. *Ter Beek,* 495 Mich. at 15. The court reasoned as follows:

> As the Court of Appeals duly recognized and the MMMA itself makes clear, . . . this immunity does not purport to alter the CSA's federal criminalization of marijuana, or to interfere with or undermine federal enforcement of that prohibition. The CSA, meanwhile, by expressly declining to occupy the field of regulating marijuana 21 USC 903, 'explicitly contemplates a role for the States' in that regard . . . and there is no indication that the CSA's purpose or objective was to require states to enforce its prohibitions. Indeed, as noted, Congress lacks the constitutional authority to impose such an obligation. As a result, we fail to see how § 4(a) creates, as the City claims, 'significant and unsolvable obstacles to the enforcement of the' CSA, such that the former is preempted by the latter.

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Id. at 16. The court concluded, there existed is no 'positive conflict' between the CSA and the State act, and such that the two 'cannot consistently stand together. Under this authority, the CSA does not preempt I-502.

California courts have arrived at the identical conclusion. In *Qualified Patients Ass'n,* the City identified a specific section of the state law that it argued triggered federal preemption. On review, the Court stated, "but the city's complaint is thus not that state law amounts to an obstacle to federal law, but that 'abuse' or violation of state law does. These circumstances call for enforcement of the state law, not its abrogation." 187 Cal. App. 4th at 760-61. The court concluded, stating that "[t]he city may not justify its ordinance solely under federal law . . . nor in doing so invoke federal preemption of state law that may invalidate the city's ordinance. The city's obstacle preemption argument therefore fails." Id. at 763.

On summary judgment, the City has the affirmative duty to establish that no material fact exists with regard to the claim the its employees are subject to federal prosecution and that a positive conflict exists between RCW 59.50 and the CSA. The City has failed to meet their burden. As a result, the City's Motion for Summary Judgment with regard to Federal law must be denied.

IV. RELIEF REQUESTED

The Court should deny the City's Motion for Summary Judgment and enter judgment declaring Fife Ordinance No. 1872 to be unconstitutional as it is expressly preempted by and is in conflict with state law. Additionally, the Court should enjoin the

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City from enforcing the Ordinance against the Plaintiffs and Issue a Writ commanding the City to issue Plaintiffs' business license.

RESPECTFULLY SUBMITTED this 18 day of August, 2014.

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