

No. 90780-3  
SUPREME COURT  
OF THE STATE OF WASHINGTON

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DOWNTOWN CANNABIS CO., LLC; MONKEY GRASS FARMS, LLC;  
AND JAR MGMT, LLC d/b/a RAINIER 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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INTERVENOR-APPELLANT OPENING BRIEF

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I.

**INTRODUCTION**

Wash. Const. art. XI, § 11 allows local governmental entities to enact laws as long as they don't conflict with state law. If a local ordinance prohibits what the state law allows then the local ordinance is invalid.

I-502 authorizes the Liquor Control Board to issue licenses for retail operations in every county of the state and authorizes holders of retail licenses to operate within the geographical limitations of their licenses.

The City of Fife enacted Ordinance 1872 that prohibits marijuana retail outlets from operating within its jurisdictions. Ordinance 1872 negates the LCB's authority to issue licenses for stores to operate within Fife. Ordinance 1872 also negates the permission that licensees have been granted by the LCB from using those licenses within Fife city limits.

The trial court erred when it ruled that Fife's ordinance did not violate Wash. Const. art. XI, § 11. The trial court's ruling should be reversed and this matter should be remanded back to the trial court for resolution of the remaining issues raised including whether I-502 is preempted by federal law.

II.

**ASSIGNMENT OF ERROR**

The trial court erred when it granted Fife's motion for summary judgment ruling that Fife Ordinance 1872 did not violate Wash. Const. art. XI, § 11.

III.

**STATEMENT OF THE CASE**

**A. Voters passed Initiative 502 to bring Washington's marijuana market under strict regulatory control.**

In 2012 Washington State voters passed Initiative 502 that provided for a comprehensive, highly detailed regulatory scheme to allow for the limited retail sale of marijuana to those 21 years and older. By enacting I-502 the voters intended to achieve three objectives:

- Allow law enforcement resources to be focused on violent and property crimes;
- Generate new state and local tax revenue for education, health care, research, and substance abuse prevention; and
- Take marijuana out of the hands of illegal drug organizations and bring it under a tightly regulated, state licensed system similar to that for controlling hard liquor.

Laws of 2013, c 3 § 1.

I-502 charged the LCB to develop rules and procedures to ensure that the third goal, driving out the illegal market, was achieved:

The state liquor board ... must adopt rules ... that establish the procedures and criteria necessary to ... determin[e] ... the maximum number of retail outlets that may be licensed in each county, taking into consideration ... [t]he 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)(c).

The LCB carried out this directive by promulgating rules as to how retail licenses would be allocated:

[T]he liquor control board will determine the maximum number of marijuana retail locations per county. The number of retail locations will be determined using a method that distributes the number of locations proportionate to the most populous cities within each county. Locations not assigned to a specific city will be at large. At large locations can be used for unincorporated areas in the county or in cities within the county that have no retail licenses designated. ...

WAC 314-55-081(1).



- B. I-502 charged the Liquor Control Board with determining the number of retail licenses that should be issued in each county in order to achieve its goals.**

I-502 authorizes the LCB to issue retail licenses in every county within the state:

There may be licensed, in no greater number in each of the counties of the state than as the state liquor control board shall deem advisable, retail outlets established for the purpose of making marijuana concentrates, useable marijuana, and marijuana-infused products available for sale to adults aged twenty-one and over.

RCW 69.50.354.

The LCB determined that the maximum number of licenses it would issue for retail outlets to operate in Pierce County is 31. C.P. at 275. Of these 31 licenses, the LCB designated 17 of them for use “at-large” meaning the holder could operate a retail outlet in any city within Pierce County where the LCB had not designated licenses. C.P. at 190. Fife was a city in which an at-large licensee was authorized to operate.

- C. I-502 charged the LCB with carrying out the requirements that the location of retail outlets be confined to limited areas.**

I-502 authorizes the LCB to adopt rules regarding retail outlet locations. RCW 69.50.342. In implementing that charge, the LCB has



promulgated numerous rules that limit where retail outlets can be located and restrictions upon those operations. The following are some examples of those restrictions.

- LCB will not approve any marijuana license for a location where law enforcement access, without notice or cause, is limited. WAC 314-55-015(5).
- LCB will not approve any marijuana license for a location within another business. WAC 315-55.015(7).
- Retail outlets may only conduct sales between 8:00 a.m. and 12:00 a.m. WAC 315-55-147.
- Retail outlet may only have one identifying sign that cannot be larger than sixteen hundred square inches. WAC 314-55-155.
- A retail outlets cannot be located: (a) within one thousand feet of the perimeter of a school grounds, playground, recreation center or facility, child care center, public park, library, or a game arcade admission to which is not restricted to persons aged twenty-one years or older; (b) on or in a public transit vehicle or public transit shelter; or (c) on or in a publicly owned or operated property. WAC 314-55-155(3).

**D. Fife has banned all marijuana retail outlets within its city limits.**

In 2014 Fife enacted Ordinance 1872 that bans all marijuana retail outlets within its jurisdiction. C.P. at 43. Thus, Ordinance 1872 has the effect of nullifying any retail license issued by the LCB that authorizes the holder to operate a marijuana retail outlet within Fife city limits.

- E. The trial court, despite recognizing that Ordinance 1872 prevented what state law allows, granted Fife's motion for summary judgment.**

The trial court on the one hand concluded that I-502 authorizes the LCB to issue retail licenses in every county of the state and yet ruled that Fife could ban retail outlets without violating Art. XI, § 11.

In its order granting Fife's motion for summary judgment, the Court ruled:

The Court concludes that Fife Ordinance No. 1872 does not violate Washington State Constitution Art. XI, § 11. The Court concludes that there is no irreconcilable conflict between state law and Fife Ordinance No. 1872. 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.

C.P. at 1444.

The trial court did not give much explanation as to how it reached a conclusion that even though state law permits the LCB to grant retail licenses throughout the state, and state law allows retail cannabis operations throughout the state, that Fife banning retail operations within its city limits did not prohibit what is allowed under state law. (R.P. at 111-113.)

An exchange between the court and counsel for Intervenor-Appellants during oral argument suggests that the court considered the size of a given city relevant to the question of whether a local ordinance conflicted with state law:

MR. MUNGIA: ... What you really have to look at is the intent of the statute, or the purpose. And we know the purpose here was to provide a statewide highly regulated market and one of the purposes, in fact, was to drive out the black market. And it's not just in the intent section, Your Honor. You look at 69.50.345(2)(c), and the Liquor Control Board, under that subsection, in fact, is directed to make sure that there was enough access to drive out illegal sales and discourage illegal sales.

So it's not just in the intent; it's within the body of the statute itself. And that's very important here.

THE COURT: And a ban five square miles – I don't know how big Pierce County is, but Fife is just a small part of it – a ban there undermines that?

MR. MUNGIA: Yes, for two reasons, Your Honor. One, it conflicts. ... [Y]ou can't say "if I'm the State, I'm allowing you to do retail marijuana operation," and then for you to say "but you can't do it here," I don't understand. That's a conflict, Your Honor. That's one point.

Two, analytically you can't do an Article XI, Section 11 analysis by saying, well, let's see the size of the jurisdiction to

see whether they can do things that conflict with the law. That's not the analysis. And, in fact, as Your Honor pointed out yourself -

THE COURT: You're talking about frustrating the intent. A small community, seems to me, less likely to frustrate the intent than a larger.

MR. MUNGIA: Again, two points. One it conflicts. If I'm saying you're allowed to do it in Fife even though you're small, Fife, it still conflicts; two, because you can't do an Article XI, Section 11 analysis by saying this is the court picture; Fife is the only one that's banning it. That's not the analysis you have to look at. ... Right now you know that Pierce County is banning it as well, and you can't do that sort of analysis because what's this Court going to do when there's other jurisdictions coming banning it, saying, Oh, I guess the legal principle that I ruled on depended on how many local jurisdictions opted out? That has never been an analysis by any of the courts, by the State Supreme Court under an Article XI, Section 11 analysis.

R.P. at 83 to 85.

**F. Local jurisdictions across the state, as is Fife, are preventing the implementation of I-502.**

As noted above, I-502 authorized the LCB to issue licenses for retail outlets throughout the state. One of the purposes of this statewide charter was to drive out the illegal market for marijuana

across this state. Not only is Fife banning the implementation of I-502 but indeed there are at least 120 local governments that are either banning retail outlets outright or have moratoriums banning retail outlets to operate within their jurisdictions.<sup>1</sup>

#### IV.

#### ARGUMENT

Article XI, § 11 of the Washington Constitution allows local jurisdictions to only pass local laws that do not conflict with the State's general laws. The test under Art. XI, § 11 is straightforward: if a local ordinance prohibits what state law permits it is invalid.

A local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits. Where a conflict is found to exist, under the principle of conflict preemption, the local regulation is invalid.

*Parkland Light and Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 424, 433, 90 P.3d 37 (2004).

The Court of Appeals, Division II recently reaffirmed and clarified the restrictions placed upon local government under Art. XI, § 11 in *Department of Ecology v Wahkiakum County*, \_\_\_\_ Wn App.2d

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<sup>1</sup> Recreational Marijuana: A Guide for Local Governments, Mun. Research and Serv. Ctr., <http://www.mrsc.org/subjects/legal/502/recmarijuana.aspx#table> (identifying recreational marijuana ordinances across Washington) (Last visited Dec. 8, 2014).

\_\_\_\_\_, 337 P.3d 364 (2014). There, the court applied the principle that a county ordinance is invalid if it “prohibits what the state law permits . . . [or] thwarts the legislative purpose of the statutory scheme.” *Id.* at 365. The Court of Appeals’ analysis squarely addresses Fife’s ban of marijuana retail outlets.

*Department of Ecology v Wahkiakum County* dealt with RCW 70.95J that established and governs a biosolids management program that was intended to lead to the use of treated sewage waste as an agricultural commodity. *Id.* at 365. The statute gave the Department of Ecology authority to implement and manage the program through regulation and agency action. *Id.* Under the statute, class A biosolids could be used for land applications that were accessible to the public. Class B biosolids were restricted to land applications that were not accessible to the public. Class A biosolids made up 12% of the biosolids produced in Washington. Class B biosolids made up 88% of biosolids produced in this state. *Id.* at 366-67. Class B biosolids could not be used without first receiving a permit from the Department of Ecology. The statute authorized DOE to issue such permits. *Id.* at 368.

In 2011 Wahkiakum County passed ordinance No. 151-11 that prohibited any class B biosolids from being applied to any land within the county. This ban prohibited those with permits issued by DOE from



using their permits to apply class B biosolids within the county. *Id* at 366. The Department of Ecology brought suit against the County arguing that the ordinance violated Article XI, § 11 of the Washington Constitution. Both parties moved for summary judgment. The trial court ruled in favor of the County finding no violation. The court of appeals reversed the trial court on three bases, two of which apply here. First, the ordinance conflicted with state law by prohibiting activity permitted under the statute and by the Department of Ecology. Second, the ordinance thwarted the legislature's purpose of allowing the use of treated sewage waste.

The court of appeals concluded that the ordinance conflicted with state law because it prohibited what was allowed under state law. The Department of Ecology was directed to create a comprehensive regulatory scheme for the use of biosolids and created rules for issuing permits for land application of class B biosolids. *Id.* at 368. Wahkiakum's ordinance, however, prohibited the use of Class B biosolids within the county. Wahkiakum's ban violated Art. XI, § 11.

Even if the County had authority to more strictly regulate land application of biosolids, it does not have the authority to 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.



...

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.” 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.

*Id.* at 368-69 (citations omitted).

The same is true here. Fife’s ordinance prohibits what is allowed under state law. I-502 authorized the LCB to issue retail marijuana outlets in every county of the state. (Indeed, the trial court acknowledged that “I-502 permits retail cannabis operations to be located throughout the state, and allows the Liquor Control Board to grant permits throughout the state.” C.P. at 1444.) I-502 required the LCB to implement a comprehensive regulatory regime for issuing those licenses. The LCB complied with those mandates by promulgating administrative rules that are in fact state law. The LCB determined that 31 retail outlets could be licensed in Pierce County with 17 of those licenses being at-large. The LCB, under the regulations it promulgated, allows the license issued to MMH to be used in Fife, as long as all other requirements are met. Fife, by its ban, is prohibiting

what is allowed under state law, i.e., state law allows the LCB to issue licenses that can be used in all counties and the cities within those counties. (As noted earlier, the LCB designates a certain number of retail licenses for some cities and then at-large license holders can operate in cities not otherwise designated.) Fife is also preventing all holders of retail licenses who otherwise are eligible to operate within Fife from doing so – again, banning what is allowed under state law. Fife’s ban is invalid under Art. XI, § 11.

This is not a case where MMH is not complying with a Fife zoning ordinance that applies to all other business. (Ordinance 1872 is simply a ban prohibiting all marijuana retail outlets.) I-502 is clear that local governments have the authority to enact zoning laws and that a holder of a I-502 license must abide by general zoning provisions. WAC 314-55-020(11). However, as noted by the *Wahkiakum* court, a local government cannot, by arguing that it has the authority to impose a more stringent regulation, simply ban what is allowed under state law. In *Wahkiakum*, the County argued that it allowed class A biosolids and was simply applying a more stringent requirement pursuant to its police powers. The court rejected this argument:

First, the County argues that it has not prohibited all land applications of

biosolids, but rather it has simply imposed further, more stringent regulations, pursuant to its own police power. However, although the County's regulations 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.

*Id.* at 368. Here, Fife has gone farther than what *Wahkiakum* did. *Wahkiakum* at least allowed the use of class A biosolids. Here, Fife is simply banning all marijuana retail outlets. However, the LCB here, as did the Department of Ecology in *Wahkiakum*, explicitly allowed retail outlets to operate within Fife as allowed under a comprehensive regulatory scheme that it enacted in accordance with I-502.

The court of appeals also concluded that *Wahkiakum*'s ordinance thwarted the legislature's purpose. The purpose of the statute was to allow the beneficial reuse of biosolids throughout the state. The Court agreed with the Department of Ecology that

[ ]f 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.

*Wahkiakum County*, 337 P.3d at 369.

The court rejected Wahkiakum's argument that the Department of Ecology was required to show that all counties would ban the application of class B biosolids in order to show a violation of Art. XI, § 11.

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. 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.

*Id.* at 369-70 (citations omitted).

The trial court appeared to accept the argument advanced by Fife that it was only a small municipality to form part of the basis of its decision.

THE COURT: And a ban five square miles – I don't know how big Pierce County is, but Fife is just a small part of it – a ban there undermines that?

...

You're talking about frustrating the intent. A small community, seems to me, less likely to frustrate the intent than a larger.

As the *Wahkiakum* court noted, however, the size of the local governmental entity is not part of the analysis; instead if local entities such as Fife have the authority to determine whether or not to allow what state law allows under I-502 then the entire regulatory scheme of I-502 would be undermined. I-502 authorizes the LCB to determine how many licenses should be issued in each county. The purpose of having retail outlets across the state is to drive out the illegal market of marijuana sales. Those sales provide revenue for gangs, promote violence, and result in the unrestricted sales of marijuana to all ages. In addition, allowing local jurisdictions to ban retail outlets frustrates I-502's goal of raising revenues through the taxation of marijuana sales.

Indeed, local jurisdictions across the state are thwarting the purpose of I-502. According to the Municipal Research and Services Center, forty-nine local jurisdictions have prohibited I-502 businesses

and seventy-one have moratoriums in place.<sup>2</sup> This case is not just about Fife. The analysis under Art. XI, § 11 is not confined to Fife's actions in a vacuum. Instead, as the *Wahkiakum* court noted, the correct analysis is if local jurisdictions have the authority to ban the use of licenses issued by the LCB then they will have the ability to undermine the goals of I-502. The case here is even stronger than *Wahkiakum* in that 120 jurisdictions are currently banning retail marijuana outlets across the state.

## V.

### CONCLUSION

One of the primary purposes of I-502 was to drive out the illegal and illicit sale of marijuana (sales that are untaxed and unregulated) by creating a comprehensive system regulating the production, distribution and sale of marijuana throughout this state. I-502 authorized the LCB to issue retail outlet licenses in every county of the state in order to ensure an adequate supply of regulated marijuana sales to carry out the goal of driving out the illegal market.

The LCB issued 31 licenses for use in Pierce County with 17 of those being at-large licenses. MMH's at-large license allowed it to

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<sup>2</sup> Recreational Marijuana: A Guide for Local Governments, Mun. Research and Serv. Ctr., <http://www.mrsc.org/subjects/legal/502/recmarijuana.aspx#table> (identifying recreational marijuana ordinances across Washington) (Last visited Dec. 8, 2014).



operate in Fife. Fife Ordinance 1872 prohibited what was authorized by I-502 and the LCB. Fife Ordinance 1872 has the effect of preventing the LCB from authorizing retail marijuana outlets within Fife and is preventing MMH, a holder of a marijuana retail license, from operating in Fife.

Fife Ordinance 1872 conflicts with state law and is invalid. Accordingly, this Court should reverse the trial court's decision and remand for resolution of the remaining issues.


Dated this 5 day of February, 2015.

Respectfully submitted,

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## DECLARATION OF SERVICE

I, Gina A. Mitchell, declare that on February 5, 2015, I caused the following pleadings:

1. Intervenor-Appellants Opening Brief

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

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