NO. 90780-3

SUPREME COURT
STATE OF WASHINGTON

MMH, LLC AND GRAYBEARD HOLDINGS, LLC,
Appellants,

and 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.

BRIEF OF APPELLANT

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I. INTRODUCTION

In 2012, Washington citizens approved Initiative Measure No. 502 ("I-502") and legalized recreational marijuana. I-502 does more than create a narrow defense to marijuana use and possession. It provides a statutory right to obtain marijuana legally through large-scale commercial production, processing, and retail operations. The law requires the "provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market." These provisions are intended to be applied uniformly throughout the state.

Plaintiffs MMH and Graybeard[1] ("MMH") were awarded retail 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. However, in July 2014, the Fife City Council by passed Fife Ordinance No. 1872 banning all marijuana related land uses in the City.

Under Washington's Constitution, cities may not enact local ordinances that conflict with state law. MMH filed suit in Pierce

[1] Plaintiffs MMH, LLC and Graybeard, LLC initially filed separate actions; however their matters were consolidated by agreement. Plaintiffs will be referred to as MMH herein for the sake of clarity. CP 682.

County Superior Court to invalidate Ordinance No. 1872 on the grounds that it irreconcilably conflicted with I-502. MMH and Fife filed cross motions for summary judgment. In August 2014, the Honorable Ronald Culpepper found no conflict between the ordinance and I-502 and granted summary judgment in favor of the City. MMH's appeal follows.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred in finding that Fife Ordinance 1872 does not irreconcilably conflict with state law.

Issue 1: Under article XI, § 11 of the Washington State Constitution, a city may only make and enforce ordinances that do not conflict with general laws. An ordinance conflicts with general laws if it prohibits that which a statute permits. I-502 legalizes the production and retail sale of marijuana for adults. Ordinance No. 1872 prohibits the production and retail sale of Marijuana and subjects I-502 businesses to civil and criminal penalties. Does Ordinance No. 1872 irreconcilably conflict with state law?

Issue 2: An ordinance also irreconcilably conflicts with state law if it thwarts the legislature's purpose. I-502 creates a tightly regulated, statewide marijuana distribution system with the goals of (1) allowing law enforcement to focus on violent and property crimes; (2) generating new state and local tax revenue; and (3) taking marijuana out of the hands of illegal drug organizations throughout the State. Fife Ordinance No. 1872 prohibits I-502 licensed marijuana sales thus undermining the statewide regulatory scheme. Does Ordinance No. 1872 irreconcilably conflict with state law?

Issue 3: An ordinance conflicts with state law if it provides for an exercise of power that the statutory scheme did not confer to local governments. I-502 granted the authority of siting retail outlets to the WSLCB. Further, I-502 contains no opt-out provisions for local government. In banning marijuana businesses under Ordinance

No. 1872, the city of Fife has usurped the will of the voters and the authority of WSLCB. In creating a ban in the absence of statutory authority, does Ordinance No. 1872 irreconcilably conflict with state law?

III. STATEMENT OF THE CASE

A. Voters Approve I-502 and Legalize Recreational Marijuana in Washington State

On November 6, 2012, Washington citizens approved Initiative Measure No. 502 ("I-502"), a state law creating a robust regulatory system legalizing the production and sale of marijuana for private, recreational use. CP 214-271. I-502 passed in Pierce County by a majority of 54 percent. CP 162, footnote 3. Voters approved I-502 with the intent to stop treating adult marijuana use as a crime. CP 214. Under I-502, Washington's prior prohibition scheme is replaced with a tightly regulated, state-licensed system similar to that for controlling hard alcohol. *Id.* I-502 decriminalizes the use and possession of marijuana with the goals of (1) allowing law enforcement resources to be focused on violent and property crimes; (2) generating new state and local tax revenue for education, health care, substance abuse prevention; and (3) taking marijuana out of the hands of illegal drug organizations. *Id.*

B. I-502 Replaces Black Market Production and Distribution of Marijuana in Washington with a Tightly Regulated Statewide System Administered by the WSLCB

All regulatory authority under I-502 is vested with the Washington State Liquor Control Board ("WSLCB"). CP 215; RCW 69.50.345. I-502 requires WSLCB to establish and implement procedures and regulations for the licensing of marijuana producers, processors, and retailers. CP 228-9; RCW 69.50.345. The rules implemented by the board cover all aspects of marijuana production and sale: regulation of equipment, record keeping, methods of production, processing and packaging, security, employees, retail locations, and labeling. *Id. see also* RCW 69.50.342(6). Further, WSLCB has promulgated extensive rules establishing requirements for licensees including (1) minimum residency requirements, (2) age restrictions, (3) background checks for licensees and employees, (4) signage and advertising limitations, (5) requirements for insurance, recordkeeping, reporting, and taxes, (6) and detailed operating plans for security, traceability, employee qualifications, and destruction of waste. *See* 314-55 WAC.

The WSLCB is charged with siting retail outlets throughout the State by taking into consideration (a) population distribution, (b) security and safety issues, and (c) the provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market. CP 230; RCW 69.50.345(2). WSLCB regulations acknowledge that I-502 businesses must comply with local rules that apply to retail businesses in general, building and fire codes, and zoning ordinances. WAC 314-55-020(11). However, nothing in I-502, the statutes codifying it, or the regulations promulgated by WSLCB expressly state that a city or a county may ban I-502 businesses from their jurisdiction.

C. WSLCB Allocates Thirty-one Retail Marijuana Licenses to Pierce County

In October 2013, the WSLCB promulgated rules setting forth the application requirements for a marijuana retailer license and the method by which retail locations will be apportioned throughout the state. CP 199. Per regulation,

> 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.* Once the number of locations per city and at large have been identified, the eligible applicants will be selected by lottery in the event the number of applications exceeds the allotted amount for the cities and county.

WAC 314-55-081(1)(emphasis added). Following these guidelines, the WSLCB determined that there would be thirty one (31) retail licenses in Pierce County, which includes seventeen (17) at large retail licenses and zero (0) retail licenses assigned to the City of Fife. CP 275.

In April 2014, MMH was awarded Pierce County at large retail licenses in the WSLCB lottery. CP 207. Because WSLCB did not designate retail licenses to Fife, MMH's at large license allowed them to be licensed by WSLCB to operate in the City of Fife. CP 199; WAC 314-55-081(1).

D. The Fife Planning Commission Recommends that the City Allow I-502 Marijuana Businesses in Selected Zoning Districts

Fife is a city in Pierce County. CP 2. In August 2013, the Fife City Council passed Ordinance No. 1841 imposing a one year moratorium on the establishment, location, permitting, licensing, or operation of licensed marijuana uses in the City. CP 46, 51-56. The Fife Planning Commission was instructed to prepare appropriate

regulations for the establishment of marijuana businesses within the City. CP 47. After several months of study sessions and public comment, the Commission presented a draft ordinance to the City Council which allowed licensed marijuana business to operate in certain zoning districts in the City of Fife. CP 48, 78-97. MMH actively participated in the City's development process. CP 191, 200. Based on the planning commission's recommendations, MMH executed a lease agreement in Fife for the purpose of operating a retail marijuana outlet. CP 200.

E. The Fife City Council Passes Ordinance No. 1872 and Bans I-502 Businesses

On June 24, 2014, the Fife City Council held a hearing on the ordinance recommended by the Planning Commission (now designated Ordinance No. 1872). CP 49. After a short deliberation, Fife Councilmember Johnson moved to amend the ordinance from its original intent of allowing marijuana uses in the City to an outright ban on the production, processing, and retail sales of marijuana in the City of Fife. *Id.* The City Council voted 5-2 in favor of the amendment. *Id.* The City's ban on I-502 marijuana businesses became effective July 15, 2014. CP 98-106.

F. MMH Challenges Ordinance No. 1872 and the Pierce County Superior Court Upholds the Ordinance as Constitutional

MMH filed an action in Pierce County Superior Court in July 2014 seeking a declaration that Ordinance No. 1872 was unconstitutional and enjoining the City of Fife from its enforcement. CP 1. The parties filed cross motions for summary judgment. CP 13, 161. The parties stipulated that the Attorney General for the State of Washington would intervene. RP 1. In August 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. CP 1552. Intervention was subsequently granted. CP 1795-6.

On August 29, 2014, the Honorable Ronald Culpepper granted City of Fife's motion for summary judgment finding that Ordinance No. 1872 was neither preempted by nor unconstitutionally conflicted with state law. RP 111-114. On September 8, 2014, the superior court entered the Order Granting Partial Summary Judgment and Other Pending Motions which is the subject of this timely appeal. CP 1435. Specifically, the court found,

> [T]here 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. 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.

CP 1444.

MMH subsequently dismissed remaining claims that were not adjudicated by the court's August 29, 2014 ruling. CP 1512-15. MMH filed a notice of appeal to this court on September 18, 2014. CP 1463.

IV. ARGUMENT

Ordinance No. 1872 violates article XI, § 11 because the ordinance irreconcilably conflicts with I-502. An ordinance conflicts with a state law if the state law "'preempts the field, leaving no room for concurrent jurisdiction,' or 'if a conflict exists such that the two cannot be harmonized.'" *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998) (quoting *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 561, 807 P.2d 353 (1991)). Where an ordinance conflicts with a statute, the ordinance is invalid. *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*. at 434. I-502's requirement of the provision of adequate access to licensed sources of marijuana is wholly contradictory to the ordinance's outright ban.

In determining whether an ordinance is in 'conflict' with general laws the test is,

> [W]hether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits.

Weden ,135 Wn.2d at 693 (quoting *City of Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292, (1960)(internal citations omitted)). Unconstitutional conflict can also be found where an ordinance thwarts the legislature's purpose. *State, Dep't of Ecology v. Wahkiakum Cnty.*, ____ Wn.App. _____, 337 P.3d 364, 365 (2014) (quoting *Diamond Parking, Inc. v. City of Seattle,* 78 Wn.2d 778, 781, 479 P.2d 47 (1971)). Finally, an ordinance conflicts with state law where a municipality exercises power that the relevant state law did not confer to the local government. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 699, 169 P.3d 14, 169 P.3d 14 (2007).

The superior court erred in finding no conflict exists between Ordinance 1872 and I-502. As set forth above, an ordinance conflicts with the state law if it (1) prohibits what the state law permits, (2) thwarts the legislative purpose of the statutory scheme, or (3) exercises power that the statutory scheme did not confer on local governments. *Wahkiakum Cnty.*, 337 P.3d at 367. First, Ordinance No. 1872 conflicts with I-502 because it expressly prohibits business activity that is permitted under state law. Second, Ordinance No. 1872 conflicts because local bans thwarts the legislative purpose of providing statewide access and uniform regulation. Finally, Ordinance No. 1872 places power into the hands of local government that the legislature conferred upon WSLCB. The Court should hold the superior court erred.

A. Standard of Review

An order granting summary judgment is reviewed de novo. *Weden,* 135 Wn.2d at 689 (citing *Greaves v. Med. Imaging Sys., Inc*., 124 Wn.2d 389, 392, 879 P.2d 276 (1994)). The superior court properly grants a motion for summary judgment when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." CR 56(c). Neither party alleged disputed facts to the trial court; thus, the issue before the

Court is whether Ordinance No. 1872 ordinance violates article XI, § 11 of the Washington Constitution.

Whether an ordinance conflicts with a general law for purposes of article XI, § 11 is purely a question of law subject to de novo review. *Weden*, 135 Wn.2d at 693 (citing *City of Seattle v. Williams*, 128 Wn.2d 341, 346–47, 908 P.2d 359 (1995)).

B. Fife Ordinance No. 1872 irreconcilably conflicts with state law because the ordinance prohibits what state law permits

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). The focus of the inquiry is on the substantive conduct proscribed by the two laws. *State v. Kirwin*, 165 Wn.2d 818, 826, 203 P.3d 1044, 1048 (2009). A conflict arises when the two provisions are contradictory and cannot coexist. *Parkland Light*, 151 Wn.2d at 433. 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 I-502. Therefore, the ordinance is invalid.

At issue in *State v. Kirwin was* a city ordinance and a state statute that prohibited littering. The ordinance and statute contained

virtually identical language with the exception that the city ordinance imposed a harsher penalty for littering than did the statute. 165 Wn.2d at 825. Under article XI, § 11 analysis, the Court found that the different penalties did "not create an impermissible direct conflict." *Id.* at 827. The Court held as follows:

> [T]he focus of the article XI, § 11 inquiry is on the conduct proscribed by the two laws (a question of substance), not their attendant punishments (a question of magnitude). The two laws coexist because, although the degree of punishment differs, their substance is nearly identical and therefore an irreconcilable conflict does not arise.

Id. Here, the conflict is evident. The Fife Ordinance prohibits the precise conduct that the State statute permits: the production, processing, and sale of marijuana. Under, *Kirwin,* the City's prohibition of the conduct permitted by the state give rise to an irreconcilable conflict which invalidates the ordinance.[2]

City of *Seattle v. Eze* provides a similar analysis. 111 Wn.2d 22, 33, 759 P.2d 366 (1988). There, the court reviewed a challenge to the constitutionality of an ordinance prohibiting disorderly conduct on a bus. Eze argued that the ordinance unconstitutionally

[2] While concurring with the majority with regard to the underlying search incident to arrest, Justice Madsen found an irreconcilable conflict between the ordinance and the statute under article 1, section 12. *See State v. Mason*, 34 Wn.App. 514, 663 P.2d 137 (1983) (ordinance invalid where it contravenes the penalty provisions chosen by the Legislature to punish the crime of promoting prostitution).

conflicted with the state law because the Seattle ordinance prohibited a wider range of activity than did the state statute. In holding that no conflict existed, the court found that a conflict between an ordinance and a statute will not exist where,

> [T]he ordinance goes farther in its prohibition—*but not counter to the prohibition under the statute.* The city does not attempt to authorize by this ordinance what the Legislature has forbidden; nor does it forbid what the Legislature has expressly licensed, authorized, or required.

Id. (internal quotation marks omitted and emphasis added) (quoting *City of Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292 (1960)). As in *Kirwin*, conflict existed because the city prohibited what the Legislature had expressly authorized. Ordinance No. 1872 is *counter to the prohibition* of the statute and thus invalid.

a. By Prohibiting what I-502 allows, Ordinance No. 1872 Conflicts with State Law

The Court also found impermissible conflict in *Parkland Light & Water Co. v. Tacoma–Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004) as well. That case involved a dispute over the Tacoma–Pierce County Board of Health's resolution requiring municipal water districts to fluoridate their water. The Court held that the resolution conflicted with a statute which gave

water districts the power to control the content of their water systems and, with that power, the authority to fluoridate their water. *Id.* at 434. The Court took great exception to the fact that the resolution deprived the water districts the specific statutory power and discretion provided by the Legislature. *Id.* Similarly, the Ordinance here divests the WSLCB of its statutory grant of authority to regulate the siting of marijuana production and retail. As in *Parkland Light*, Ordinance No. 1872 must fail in its entirety because of this conflict.

In *Entertainment Indus. Coal. v. Tacoma-Pierce County Board of Health*, 153 Wn.2d 657, 105 P.3d 985 (2005), businesses filed an action challenging a county resolution banning smoking in all public establishments. The Court held that the Health Board resolution irreconcilably conflicted with specific state statutory provisions which allowed smoking areas to be designated in a public place by the owner of an establishment. *Id.* at 664. The resolution, by imposing a complete smoking ban, prohibited what was permitted by state law. The Court found this conflict irreconcilable and concluded that "[b]y prohibiting what the statute allows, the Health Board's resolution is invalid." *Id.* Similarly, Fife Ordinance No. 1872 cannot stand.

b. The Scope and Reach of I-502's Regulatory Scheme Distinguish this Case from *Lawson and Weden*

MMH anticipates the City will rely on *Lawson v. City of Pasco,* 168 Wn.2d 675, 230 P.3d 1038 (2010) and *Weden v. San Juan County,* 135 Wn.2d 678, 958 P.2d 273 (1998) in support of Ordinance No. 1872. Those cases are distinguishable. In *Lawson*, the Petitioner owned and operated a mobile home park in Pasco, Washington and challenged a local ordinance which prohibited recreational vehicle sites for occupancy purposes in any residential (RV) park. *Lawson,* 168 Wn.2d at 677. 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*. I-502 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 at issue in *Lawson* 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* 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 . . . ." *Weden,* 135 Wn.2d at 695. 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.* 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.*

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.* Nor is the recreational marijuana scheme simply a 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 relied on by the City does not provide a basis by which a Court could reconcile the will of the people as expressed in I-502 and ordinances such as Fife's which ban recreational marijuana on an ad hoc basis**.**

c. While Cities Maintain Reasonable Regulatory Authority, the City Does not have the Authority to Ban

The legislature directed WSLCB to create a comprehensive regulatory scheme to manage every aspect of recreational marijuana production, processing, and sale. *See* RCW 69.50.342; 69.50.345. Under the regulatory scheme, WSLCB may issue licenses for retail outlets, provided the applicant for the permit

meets certain standards. RCW 69.50.354. WSLCB has the authority to determine the location of retail outlets. RCW 69.50.342(6).

WSLCB regulations acknowledge that I-502 businesses must comply with local rules that apply to retail businesses in general, such as building and fire codes, and zoning ordinances. WAC 314-55-020(11). However, nothing in I-502, the statutes codifying it, or the regulations promulgated by WSLCB expressly state that a city or a county may ban I-502 businesses from their jurisdiction.

Division II of the Washington State Court of Appeals recently addressed a nearly identical scenario. In *State, Dep't of Ecology v. Wahkiakum Cnty.*, ____ Wn.App. _____, 337 P.3d 364 (2014), the court invalidated a county ordinance which banned the application of biosolids within its borders under article XI, § 11. At issue was RCW 70.95J which established a comprehensive biosolids recycling program in Washington. *Id.* at 365. The legislature designated the Department of Ecology as the body responsible for implementing and managing the biosolids program. *Id.*

In invalidating the County ordinance, the court focused on the breadth of the regulatory scheme and the fact that the legislature had granted the Department of Ecology authority to regulate the biosolids program. In addressing the irreconcilable conflict, the court stated,

> 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. The same is true here. Marijuana retail outlets are allowed under I-502's comprehensive regulatory scheme. The Department of Ecology is vested with the authority to administer the regulatory scheme, determine where outlets would be sited, and grant licenses. As in *Wahkiakum,* Fife's ordinance conflicts with state law by banning what has been permitted.

C. Fife Ordinance No. 1872 Irreconcilably Conflicts With State Law Because the Ordinance Thwarts The Legislature's Purpose And The Will Of The Voters

I-502 approaches the regulation and distribution of marijuana in the context of a statewide, general concern. I-502 authorizes the state liquor control board to regulate and tax marijuana for persons twenty-one years of age and older and creates statewide DUI laws

to combat driving under the influence of marijuana. I-502 was enacted to generate new state and local tax revenue for education, health care, research, and substance abuse prevention. Moreover, the law was enacted to 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 alcohol." CP 215.

The statutory scheme established under I-502 demonstrates a clear legislative directive that distribution of marijuana is of statewide concern. A local municipality usurping the authority of the State on an issue of statewide importance is not permissible under article XI, § 11. *Weden*, 135 Wn.2d at 705. Ordinance No. 1872 renders the state regulations meaningless.

Finding Ordinance No. 1872 (and others like it) constitutional thwarts the legislature's purpose by allowing any local government in the state to ban the production and sale of legal marijuana. Such local bans would eviscerate the statewide regulatory scheme. The *Wahkiakum* court specifically recognized this in its holding,

> 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.

Wahkiakum, 337 P.3d at 370 (internal citations omitted). The same argument must prevail here. The Court should not allow I-502 to be gutted by local bans.

Similarly, in *Diamond Parking, Inc. v. City of Seattle*, 78 Wn.2d 778, 781, 479 P.2d 47 (1971) this Court held that the City of Seattle's ordinance prohibiting the transfer of licenses irreconcilably conflicted with state law allowing the rights of one corporation to transfer to another corporation upon merger. The court reasoned that the state had created a comprehensive statutory scheme governing corporations and the City could not prohibit what state corporate law allowed. *Id.* at 781–82. The Court's holding was explicit,

> [w]e are of the opinion that the conflict here is irreconcilable. If the ordinance is given the effect for which the appellant contends, the legislative purpose is necessarily thwarted.

Id. at 781. The same rationale should be applied here. If the cities and counties throughout the State are able to sidestep the requirements of I-502, the will of the people and the directive of the legislature are without effect.

D. Fife Ordinance No. 1872 Irreconcilably Conflicts with State Law Because the Ordinance Provides for an Exercise of Power that the Statutory Scheme did not Confer to Local Government

As addressed above, WAC 314‑55-020(11) directs that I-502 businesses must comply with local rules that apply to retail businesses in general, such as building and fire codes, and zoning ordinances. The City argued to the trial court that this regulation constituted authority to ban marijuana business. CP 29. However, when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose. *Great W. Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal. 4th 853, 867-68, 44 P.3d 120, 129 (2002) (citing *Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs of Cnty*. *of Rogers*, 27 F.3d 1499, 1506-07 (10th Cir. 1994)). Thus, the City's grant of reasonable regulatory authority does not equate to the power to completely ban in conflict with state law.

Similar regulatory provisions were analyzed in *Wahkiakum*.

> WAC 173–308–030(6) requires facilities and sites where biosolids are applied to land to comply with other applicable federal, state and local laws, regulations and ordinances,

> such as zoning and land use requirements. This regulation recognizes that land application of biosolids does not exist in a vacuum, but rather, that there are other laws that may also apply to facilities and sites engaging in land application of biosolids. This is reflected in the other sections of WAC 173–308–030 which, for example, recognize that fertilizers also have to comply with Department of Agriculture requirements and transportation of biosolids also have to comply with regulations of the Washington State Utilities and Transportation Commission. Read in context, WAC 173–308–030(6) provides for additional local regulation required under other applicable laws. Thus, the County may regulate biosolids if necessary to comply with other applicable laws. However, the County does not have the authority to completely ban the land application of all class B biosolids when that ban conflicts with state law.

Wahkiakum, 337 P.3d at 370-71. Similarly, Fife is not granted the authority to ban I-502 outlets.

WAC 314-55-020(11) has the same operative effect in the context of I-502. This regulation recognizes that production and retailing of marijuana is subject to the same general zoning and safety requirements as any other business which may operate in their jurisdiction. However, the legislature expressly granted the WSLCB authority to site and license I-502 retailers. Thus, the legislature intended WSLCB have the final say regarding the distribution and location of retail outlets, not the local government.

IV. CONCLUSION

Municipalities generally possess constitutional authority to enact zoning ordinances as an exercise of their police power. However, a municipality may not enact a zoning ordinance that is in conflict with state law. Ordinance No. 1872 conflicts with state law because it prohibits lawful marijuana business activity that is expressly permitted under state law. The ordinance further conflicts as it thwarts the legislature's intent to create a statewide production and distribution system. Moreover, Ordinance No. 1872 is an exercise of power that I-502 law did not confer to local governments.

I-502 is thorough and creates a pervasively regulated industry to which the Legislature did not leave room for localities to interfere. Ordinance No. 1872 irreconcilably conflicts with I-502. Accordingly, the Court should reverse the trial court's grant of summary judgment to the City and reverse denial of MMH's motion for summary judgment and remand the matter for further proceedings.

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Submitted this 5th day of February, 2015

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