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.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Municipalities possess constitutional authority to enact reasonable 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. The Respondents argue that because I-502 grants municipalities some amount of regulatory authority over marijuana businesses, a municipality's outright ban is therefore constitutional. This argument goes too far.

In passing Ordinance No. 1872, the City of Fife disregards the will of the voters and the intent of our Legislature. No opt out powers are expressly offered to local governments in I-502. 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.

On the authority set forth below, Plaintiff's MMH and Graybeard respectfully requests the court find Fife Ordinance No. 1872 conflicts unconstitutionally with I-502.

II. ARGUMENT

Ordinance No. 1872 violates article XI, § 11 because the ordinance irreconcilably conflicts with I-502. In determining whether an ordinance is in 'conflict' with general laws the test is,

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

City of Bellingham v. Schampera, 57 Wn.2d 106, 111, 356 P.2d 292, (1960)(internal citations omitted). In their respective responses, the City and attorney general argue that Fife Ordinance No. 1872 does not conflict because I-502 "contains no specific language crating a right that Fife's ordinance denies." (Attorney General br. at 22). However, the City and attorney general misstate the article XI, § 11 test, and ask the court to disregard a simple fact: that the ordinance forbids, what the general law expressly permits.

A. The City and attorney general misstate the *Schampera* Test: irreconcilable conflict exists where an ordinance prohibits what state law permits and is not limited to circumstances where state law creates an entitlement.

Respondents argue that irreconcilable conflict arises, "only where State law creates a right to engage in an activity in circumstances prohibited by a local ordinance." (Attorney General

br. at 10). Respondents however misstate the law. As explained by the Court in *City of Bellingham v. Schampera*, the ultimate question to be asked in the case of any local ordinance involving an exercise of police power is where the ordinance (a) permits or licenses that which a state law forbids, or (b) prohibits that which a state law permits. 57 Wn.2d 106, 111, 356 P.2d 292 (1960).[1] Washington case law does not require that a statutory "right" exist in order for the Court to find conflict.

The inquiry does not focus on a "right", but must focus on whether the substantive conduct proscribed (or licensed) by the two laws are at odds. The analysis does not hinge on the existence of a statutory right. In *Schampera*, the appellant challenged Bellingham's DUI ordinance arguing that conflicted with the State DUI statute because the ordinance imposed penalties in excess of those provided by statute. *Id.* at 108. The Court concluded that the ordinance did not conflict because both laws prohibited the same conduct.

> The statute, as well as the ordinance, in the case at bar, is prohibitory, and the difference between them is only that the ordinance goes farther in its prohibition—*but not counter to the prohibition under the statute*. The city does not attempt to

[1] While now arguing that this is a "shorthand version of the test that the Court has sometimes used," the attorney general posited this formulation as proper on at least one occasions. *See* 14 Op. Att'y Gen. 4 (1982).

> authorize by this ordinance what the Legislature has forbidden; not does it forbid what the Legislature has expressly licensed, authorized, or required.

Id. at 111(emphasis added). No conflict existed, because the Bellingham ordinance simply went farther in its prohibitions.

However, where an ordinance permits conduct that a statute prohibits, the ordinance is unconstitutional. In *Town of Republic v. Brown*, 97 Wn. 2d 915, 652 P.2d 955, 958 (1982), the Court found article XI, § 11 conflict under similar facts. Comparing the City of Republic's DUI ordinance with the State DUI statute, the Court determined that the ordinance provided for a presumption of being under the influence if a driver's blood alcohol level ("BAC") was found to be 0.10 percent or greater, while the statute set forth a per se violation of the statute at the same BAC. Additionally, the ordinance did not contain the mandatory sentence that was provided in the statute. *Id.* at 920. The Court held the Republic ordinance conflicted with the state statute by permitting conduct (driving with a BAC over .10 and a discretionary jail sentence) which was forbidden by statute. *Id.* The statute created no "right or entitlement" that was prohibited by the local ordinance. Nonetheless, conflict existed because the ordinance permitted that which a state law forbid.

The inquiry must remain focused on what is specifically permitted or prescribed by the statute. In *Ritchie v. Markley*, 23 Wn.App. 569, 597 P.2d 449 (1979) (overruled on other grounds), the court found a conflict between Clallam County's shoreline management act and the State Shoreline Management Act of 1971 because the county ordinance did not exempt agricultural activities from permit requirements. The court focused on the specific activities addressed by the competing laws,

> As noted, SMA specifically allows irrigation projects and agricultural service roads to be built without a state permit in shoreline and wetland areas. The county shoreline ordinance, by contrast, allows no exemptions for agricultural activities. The two laws conflict because they reflect opposing policies.

Id. at 574. In that case, the ordinance allowed the county to prohibit precisely what the state statute allowed and was held unconstitutional.

The identical reasoning was applied in *City of Seattle v. Eze,* 111 Wn.2d 22, 33, 759 P.2d 366 (1988). There, the Court held that no conflict existed between a city ordinance and state statute where both prohibited the same conduct and the ordinance differed only "in terms of the scope of their prohibitions." *See also State v. Kirwin*, 165 Wn. 2d 818, 826-27, 203 P.3d 1044, 1048 (2009) (the

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)). Again, the focus of the inquiry is the substantive nature of the competing laws. Here, the subject matter is identical, the licensing of marijuana businesses. However, Ordinance No. 1872 does not "simply go farther in its prohibitions", the ordinance expressly prohibits that which is permitted by I-502. An irreconcilable conflict thus exists.

a. *Weden* and *Lawson* must be distinguished when the analyzed under the proper constitutional standard.

As argued *supra*, the appropriate constitutional inquiry does not focus on a "right", but must focus on whether the substantive conduct proscribed (or licensed) by the two laws are at odds. Stated another way, if the areas of operation of the statute and ordinance are distinct there is no conflict. *Seattle Newspaper-Web Pressmen's Union Local No. 26 v. City of Seattle*, 24 Wn. App. 462, 469, 604 P.2d 170, 173 (1979). Under this analysis, the respondents' reliance on *Weden* and *Lawson* is misplaced.

While the *Weden* court found no conflict between the San Juan County Ordinance and state law, the Court went to great

length to clarify that the ordinance and statute did not contemplate the same subject matter,

> The Legislature did not enact chapter 88.02 RCW to grant PWC owners the right to operate their PWC anywhere in the state. The statute was enacted to raise tax revenues and to create a title system for boats. *See* RCW 88.02.120. RCW 88.02.020 provides, in pertinent part: "Except as provided in this chapter, 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...." On its face, the statute prohibits operation of an unregistered vessel. Nowhere in the language of the statute can it be suggested that the statute creates an unabridged right to operate PWC in all waters throughout the state.

Weden v. San Juan Cnty., 135 Wn. 2d 678, 694-95, 958 P.2d 273, 281 (1998). Conflict did not exist because the statute prohibited the "operation of an unregistered vessel," while the County ordinance prohibited the "operation of personal water craft use on all marine waters and one lake in the San Juan County." The subject matter of the two laws was different.[2] Because the areas of operation of the statute and ordinance were distinct, irreconcilable conflict did not exist.

Similarly, in *Lawson v. City of Pasco* the Court's focus was the substantive content of the statute and challenged ordinance.

[2] The Court also examined whether the ordinance conflicted with chapter 88.12 RCW, chapter 90.58 RCW, chapter 43.99 RCW, and the public trust doctrine with similar results. *Weden,* 135 Wn. 2d at 695.

168 Wn.2d 675, 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. Lawson argued that the ordinance conflicted with the Washington State Mobile Home Leasing and Tenancy Act ("MHLTA").

However, the Court examined the MHLTA and determined it 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. The Court concluded that the statute neither forbade recreational vehicles from being placed in the lots, nor did it require them. *Id.* Conflict did not exist because the statute regulated landlord-tenant relationships in mobile home parks whereas the ordinance outlawed certain vehicles from the parks. Again, the areas of operation of the statute and ordinance were distinct, thus irreconcilable conflict did not exist.

What these cases teach us is that our inquiry must focus on what specifically the Legislature authorized by statute and what the City seeks to prohibit in an ordinance. In *Weden,* San Juan County's ordinance banned personal watercraft on certain waters, while the statute addressed a wholly different subject matter: the

registration of boats in Washington State. In *Lawson,* no conflict existed where the ordinance banned RV's and the statue regulated mobile home tenancies. In *Schampra, Kirwin, and Eze,* no conflict existed because, although the subject matter was the same between statute and ordinance, the ordinances' prohibitions were not *counter* to those of the statutes.

In this case, Fife Ordinance 1872 prohibits precisely what the Legislature has expressly authorized: the production and sale of recreational marijuana. Ordinance 1872 does not simply differ in the scope of its prohibition; the ordinance is an outright ban of a business activity that is granted by State law. In the words of *Schampera*, Ordinance No. 1872 is *counter to the prohibition* of the statute. The Ordinance is thus invalid

b. The Respondents misstate *Rabon*: A local ordinance may require more than state law requires only where the laws are prohibitive and conflict with the general law does not result.

Further, Respondents overstate the holding of *Rabon v. City of Seattle*, 135 Wn. 2d 278, 292, 957 P.2d 621, 627 (1998). The attorney general relies on Rabon for the proposition that, "[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law." (Attorney

General br. at 11). However, the attorney general citation omits a critical qualifier. The full citation follows,

> The fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law. *A local ordinance may require more than state law requires where the laws are prohibitive*. *Lenci v. City of Seattle*, 63 Wn.2d 664, 671, 388 P.2d 926 (1964).

Rabon, 135 Wn. 2d at 278 (emphasis added). As describe below, the attorney general's argument fails as applied to Ordinance No. 1872.

Lenci v. City of Seattle concerned an auto wrecker's challenge to a Seattle ordinance which required a fence taller than that required by the relevant statute. 63 Wn.2d 664, 388 P.2d 926 (1964). Of considerable import is the explanation given by the court in *Lenci* in holding the challenged ordinance did not conflict with state law,

> It is well-settled that a city may enact local legislation upon subjects already covered by state legislation so long as its enactments do not conflict with the state legislation; and the fact that a city charter provision or ordinance enlarges upon the provisions of a statute, by requiring more than the statute requires, does not create a conflict unless the statute expressly limits the requirements.

Id. at 671 (internal quotations omitted). When taken in context, for the rule stated by the attorney general to apply, (1) the ordinance and statute must both be *prohibitive* in nature*,* and (2) where the

laws are both prohibitive, the ordinance can go farther in its prohibition.

Such an analysis does not apply to Fife's ordinance. First, I-502 is not *prohibitive*. Second, the ordinance does not go farther in its prohibition; it goes *counter* to what is licensed by I-502. *Rabon* does not save the city. Irreconcilable conflict exists.

B. The authority to enact reasonable regulations does not equal the authority to exclude a lawful land use.

The attorney general argues throughout that in seeking to invalidate Ordinance No.1872, MMH asks the court to "invent a distinction and hold that I-502 allows cities to adopt 'reasonable regulations' but not ban marijuana businesses." (Attorney General br. at 24). The Court need not "invent" anything. The distinction between authority to regulate and authority to exclude has been repeatedly addressed by this Court.

Constitutionally, cities may enact reasonably regulate activities that are authorized by state law within their borders but, they may not prohibit same outright. In *Second Amendment Found. v. City of Renton,* 35 Wn.App. 583, 668 P.2d 596 (1983), the City of Renton prohibited by ordinance the possession of handguns in taverns and bars. A group of handgun owners

challenged the ordinance on the basis that it unconstitutionally conflicted with Chapter 9.41 RCW, the state law governing the licensing of concealed pistols. *Id.* at 585. Citing *Schampera*, the court found that because chapter 9.41 RCW did not license one to be in possession of a firearm at any time or place, the Renton ordinance did not contradict the statute. *Id.* at 588-89. Because the ordinance simply went farther in its prohibition of firearm possession, conflict did not exist.

The court defined the city's authority under these circumstances,

> While an absolute and unqualified local prohibition against possession of a pistol by the holder of a state permit would conflict with state law, an ordinance which is a limited prohibition reasonably related to particular places and necessary to protect the public safety, health, morals and general welfare is not preempted by state statute.

Id. at 589. *See also Yarrow First Assocs. v. Town of Clyde Hill,* 66 Wn.2d 371, 376, 403 P.2d 49 (1965) ("the power to regulate streets is not the power to prohibit their use"). Thus, the authority to ban something permitted under state law does not constitutionally follow on the heels of a city's authority to regulate.

Indeed, Washington's attorney general acknowledged the same distinction. In an opinion addressing the constitutionality of

ordinances which ban firearms in bars, our attorney general recognized,

> [the] distinction between the validity of (a) an absolute, unqualified, local prohibition against possession of a concealed handgun by the holder of a state concealed weapon permit-at any time or place-and (b) a limited prohibition related only to particular times and places. The former is invalid under state law but the latter is not.

14 Op. Att'y Gen. 8 (1982); *See Weden v. San Juan Cnty.,* 135 Wn. 2d 678, 721, 958 P.2d 273 n.7 (1998) (Saunders, J dissenting). The rule was also recognized in State, Dep't of Ecology v. Wahkiakum Cnty., in addressing the reach of Wahkiakum county's authority to regulate biosolids,

> 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.

184 Wn.App. 372, 385, 337 P.3d 364 (2014). The distinction between authority to regulate and authority to exclude is well settled. While a city's police power is expansive, it is not limitless. Ordinance No. 1872 over reaches and must be held unconstitutional.

C. Exclusionary zoning is unconstitutional.

The distinction between regulatory authority and authority to ban an activity is further clarified in the context of zoning regulation. The City and Attorney General's arguments rely heavily on the assertion that WAC 314-55-020 (11) expressly grants cities and counties the authority to exclude I-502 businesses from their jurisdictions. However, their reliance is misplaced. While WAC 314-55-020 (11) requires regulatory compliance from I-502 business owners, the regulation is not permission to municipalities to unlawfully or unconstitutionally exclude through zoning state permitted businesses.

Zoning ordinances will typically be found invalid and unreasonable where the zoning ordinance attempts to exclude or prohibit existing and established uses or businesses that are not nuisances. 8 McQuillin Mun. Corp. § 25:5 (3d ed.). Express delegations of power to prohibit an otherwise lawful use are rare, and usually are limited to specific uses which are regarded as singularly harmful. 1 Am. Law. Zoning § 9:16 (5th ed.). Exclusionary zoning ordinances are an unreasonable exercise of police power. *See Norco Const., Inc. v. King Cnty.,* 97 Wn. 2d 680, 685, 649 P.2d 103, 106 (1982). Common subjects of these

exclusionary ordinances are junkyards, dumps, outdoor movies, motels, and mobile home parks. Generally, municipal efforts to totally exclude these uses homes from a community have been found unconstitutional.

This Court dealt with this issue in the context of mobile homes in *Duckworth v. City of Bonney Lake*, 91 Wn. 2d 19, 586 P.2d 860 (1978). There, a family challenged the revocation of a permit to place a mobile home in a residential district. The relevant ordinance provided however that mobile homes may only be cited in a designated "duplex and trailer" district. *Id.* at 24. The Court found the city's ordinance constitutional in reliance primarily on the notion that the ordinance provided an adequate area within the city for mobile homes.

> In sum, it is generally recognized that where a municipality provides an adequate area for mobile home development, as was done in the instant case, mobile homes may be excluded from conventional residential districts. As we have said, a municipality may exclude them from conventional residential districts because as a nonconventional use they tend to lower, adversely affect, or at least stunt the growth potential of the surrounding land.

Duckworth v. City of Bonney Lake, 91 Wn. 2d 19, 31, 586 P.2d 860, 868 (1978). Conversely, were an ordinance completely excludes a use, it will generally be deemed unconstitutional.

While *Duckworth* did not expressly address complete exclusion of mobile homes, the issue has been addressed in other jurisdictions. The courts of most jurisdictions are not favorably disposed toward zoning regulations which exclude otherwise legal uses from all of the territory of a municipality. 3 Am. Law. Zoning § 20:4 (5th ed.). A zoning ordinance which totally excludes legitimate uses or fails to provide for such uses anywhere within the municipality should be regarded with particular circumspection and in fact must bear a more substantial relationship to the public health, safety, morals and general welfare of the community than an ordinance which merely confines that use to certain area in the municipality. *Hodge v. Zoning Hearing Bd. of West Bradford Tp*., 11 Pa. Commw. 311, 312 A.2d 813 (1973). In evaluating the validity of exclusionary ordinances, the courts shift the burden of proof to the municipality to demonstrate that the ordinance promotes the public health, safety, and welfare. *See Appeal of Shore*, 524 Pa. 436, 573 A.2d 1011 (1990) (invalidating an ordinance which totally excluded mobile homes from a municipality, where there was no evidence to support justification of such exclusion). The same scrutiny would apply to exclusionary zoning of I-502 uses.

A similar analysis was applied by this Court in *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. Wenatchee,* 50 Wn.2d 378, 381, 312 P.2d 195 (1957). In determining that a zoning ordinance cannot wholly exclude churches from residential districts, the Court examined the case law from numerous jurisdictions and held,

> Generally, zoning ordinances which wholly exclude churches in residential districts have been held to be unconstitutional. Apparently, such provisions have not survived court review for the generally-stated reason that an absolute prohibition bears no substantial relation to the public health, safety, morals, or general welfare of the community.

Congregation of Jehovah's Witnesses, 50 Wn. 2d at 381. Without doubt, the building at issue in *Congregation of Jehovah's Witnesses* was subject to Wenatchee's reasonable zoning and building safety requirements, as would any other business or home. However, as *Congregation* makes clear, a city's authority to enforce reasonable zoning ordinances does not equate to the power to exclude.

Cases dealing with the zoning of alcohol sales are helpful by analogy. In a minority of jurisdictions, state liquor laws are held to preempt local zoning laws that attempt to regulate the locations of places selling alcoholic beverages. 3 Am. Law. Zoning § 18:52 (5th

ed.). Other states permit local governments to zone with respect to alcohol sales, either expressly or through case law. *Id.*

An illustrative example is found in *Westlake v. Mascot Petroleum Co*., 61 Ohio St. 3d 161, 164, 573 N.E.2d 1068, 1071 (1991) holding modified by *Ohioans for Fair Representation, Inc. v. Taft*, 1993-Ohio-218, 67 Ohio St. 3d 180, 616 N.E.2d 905. There, Ohio's Supreme Court addressed the respective authority of municipalities and the state to regulate liquor sales under Section 3, Article XVIII of the Ohio Constitution, a provision analogous to Washington's article XI, § 11.[3] Also, at issue in *Westlake*, was a provision of the Ohio liquor control regulation which acknowledged that applicants were required to meet local "building, safety, or health requirements" similar to WAC 355-15-020 (11). *Id.* at 166. On review of the legislative intent of the relevant statutes, the Court found the primary authority to regulate the sale of alcoholic beverages is delegated to the Department of Liquor Control, and that the legislative or executive authority of a political subdivision has only such rights or powers with regard to these sales as are expressly granted under the relevant liquor statutes. *Id.* at 167. The

[3] Ohio Constitution Section 3, Article XVIII provides that the authority of municipalities is limited to local police, sanitary and similar regulations not in conflict with state law,

Court held a municipality is without authority to extinguish privileges arising under a valid Ohio Liquor Control permit through the enforcement of zoning regulations. Similarly, Fife's ordinance must fail.

D. Ordinance No. 1872 thwarts the intent of the legislature and will of the people.

The attorney general argues that Washington voters intended that local jurisdictions could ban I-502 business thus undermining the statewide distribution system. In support of their argument, the attorney general cites the marijuana reforms of Colorado, Alaska, and Oregon stating that in those instances, voters allowed local governments to ban marijuana business.

However, this assertion omits a key distinction: in each of the states cited by the attorney general, the voters' pamphlets expressly stated that local governments would be able to prohibit marijuana businesses. For example, Alaska's ballot language stated,

> The bill would allow a local government to prohibit the operation of marijuana-related entities. A local government could do that by enacting an ordinance or through voter initiative. The ordinances could cover the time, place, manner, and registration of a marijuana entity's operations.[4]

[4] State of Alaska Division of Elections, *Ballot Measures Appearing on the 2014 General Election Ballot,* last accessed April 12, 2015 available at http://www.elections.alaska.gov/doc/bml/BM2-13PSUM-ballot-language.pdf

In Colorado, the following language appeared,

> Local governments may enact regulations concerning the time, place, manner, and number of marijuana establishments in their community. In addition, local governments may prohibit the operation of marijuana establishments through an ordinance or a referred ballot measure; citizens may pursue such a prohibition through an initiated ballot measure.[5]

While in Oregon, voters were advised,

> A city or county may adopt reasonable time, place and manner regulations of the nuisance aspects of licensed retail activities. A city or county may opt out of having marijuana businesses only by petition signed by 10 percent of registered voters and approved by a majority of voters at a general election.[6]

The I-502 pamphlet contains no such language. CP 662-670. In 2012, Washington voters were advised that,

> The state could deny, suspend, or cancel licenses. Local governments could submit objections for the state to consider in determining whether to grant or renew a license. The state could inspect the premises of any license holder. Prior criminal conduct could be considered for purposes of granting, renewing, denying, suspending or revoking a license. The state could not issue a license to anybody under age 21.

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[5] Colorado Secretary of State, *2012 State Ballot Information Booklet and Recommendations on Retention of Judge*s, last accessed April 12, 2015 available at http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822971738&ssbinary=true

[6] Oregon Secretary of State, *2014 Voters' Pamphlet* last accessed April 12, 2015, http://www.oregonvotes.gov/pages/history/archive/nov42014/guide/pdf/book13.pdf

CP 663. Further,

> The number of retail outlets, and thus retail licenses, is determined by LCB in consultation with the Office of Financial Management, taking into account population, security and safety issues, and discouraging purchases from illegal markets. The initiative also caps retail licenses by county. Given the initiative's similarities with previous state monopoly liquor laws, the number of retail outlets is estimated at 328 (the same number of state and contracted liquor stores that were in operation Dec. 31, 2011).

CP 665. The Court's purpose when determining the meaning of a statute enacted by the initiative process is to determine the intent of the voters who enacted the measure. *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn. 2d 736, 746, 257 P.3d 586, 590 (2011). The only reasonable inference to be drawn here is that voters intended the ultimate authority over siting of retail marijuana outlets to be vested with the State and the LCB. It cannot be inferred from the voters' pamphlet that Washington voters intended that local city and county councils could render I-502 meaningless through local legislation.

In *Washington State Dept. of Revenue v. Hoppe*, the Court identified the official voters' pamphlet as a primary means of determining legislative intent when construing a law adopted by a vote of the people. 82 Wn.2d 549, 552, 512 P.2d 1094 (1973). The Court also identified several other fundamental principles of

interpretation, stating 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 search for 'legislative intent' when construing a law adopted by a vote of the people." *Id.* Here, it is plain that Washington voters intended that the LCB would decide where retail outlets would be located, not local governments.

Hoppe concerned when and how proposed property tax changes would take effect in King County. *Id.* On review of the challenged legislation Court stated,

> A conscientious voter who read every word of the text of [the proposed legislation], the ballot title, the official explanation of the effect of the measure and the statement for the proposal would not find a whisper of suggestion that its impact would not be felt until 1974.

Id. at 555. Similarly, those who voted for I-502 would have not the slightest inclination that their local city council could gut the initiative. Allowing local governments such authority would "create in the legislature a veto power over every initiative." *Id.* at 557. In rejecting King County's arguments, the Court held, "[t]o so hold would turn the reserved initiative power of the people into a futile exercise." *Id.* The same applies here. The will of the people should be honored.

Washington's 2012 voters' pamphlet takes special care to discuss how marijuana businesses would be restricted as to their locations, "[l]ocations could not be within 1,000 feet of any school, playground, recreation centers, child care center, park, transit center, library, or game arcade." The pamphlet details how many outlets would open, 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. It cannot be argued that voters anticipated that whole 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. Nothing in the 2012 Voters Pamphlet demonstrates that an average voter would understand that cities could outlaw I-502 businesses. If proponents of I-502 wanted voters to approve language that would authorize local bans they should have clearly

explained to voters the consequences of the initiative. *See TeleTech Customer Care Mgmt. (Colorado)*, 171 Wn. 2d at 753. Washington voters intended that the LCB would decide where retail outlets would be located, not local governments.

III. CONCLUSION

Ordinance No. 1872 conflicts with state law because it prohibits lawful marijuana business activity that is expressly permitted under state law. Accordingly, the Court should reverse the trial court's grant of summary judgment to the City, and remand the matter for further proceedings.

Submitted this 13th day of April, 2015

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