IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MMH, LLC, a Washington Limited liability company, Plaintiff, vs. CITY OF FIFE, a Washington municipal corporation, Defendant.	No. 14-210487-7 DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

COMES NOW, the City of Fife (hereafter "City"), by and through its attorneys of record, Loren D. Combs, Gregory F. Amann, and Jennifer Combs of VSI Law Group, LLC, and submits this Memorandum in Support of Its Motion of Summary Judgment.

I. STATEMENT OF FACTS

Present Issue - On July 8, 2014, the Fife City Council voted to approve Ordinance 1872, as amended, banning all collective gardens for marijuana, as well as banning all marijuana production, processing, and retail marijuana businesses in all zoning districts within the City. The Plaintiff(s) have filed a complaint for injunctive relief to allow them to site a retail marijuana business within the City limits.

City's Historical Basis for Opposing Plaintiff(s) Proposed Relief - During the three and one-

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half years preceding the July 8, 2014 Fife City Council vote, marijuana regulation was a contentious issue. In early 2011, E2SSB 5073 seemed to legalize medical marijuana and collective gardens under State law, even though marijuana remained illegal on a Federal level.

E2SSB 5073 included sections requiring a state licensing and registry system for medical cannabis. There was concern, at that time, that City employees would be assisting in violations of federal laws, and might be individually liable, if they assisted individuals growing, distributing, or selling marijuana by issuing business licenses, or issuing passing code inspections.[1]

Most of E2SSB 5073's provisions were later vetoed after concerns over E2SSB 5073 were raised in an April 14, 2011 advisory letter by the U.S. Attorneys for the Western and Eastern Districts of Washington to then-Governor Gregoire. The Governor had asked for the U.S. Attorneys' opinions as they related to E2SSB 5073.

The U.S. Attorneys reiterated the Department of Justice's, (the "Department's"), position that marijuana remained a Schedule I controlled substance under the Federal Controlled Substances Act ("CSA"), and as such, growing, distributing, and possessing marijuana, in any way, other than within a federally authorized research program, violated federal law, regardless of state laws permitting such activities.[2] The letter also stated that the Department maintains the authority to pursue criminal or civil actions for any CSA violations whenever the Department determines that legal action is warranted and that: "[S]tate employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the CSA."[3]

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[1] Declaration of David Zabell.

[2] Declaration of Jennifer Combs, Exhibit A.

[3] Id.

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In response to the U.S. Attorneys' letter, Governor Gregoire vetoed most of E2SSB 5073.[4] A section she left intact was Section 1102, codified in RCW 69.51A.140, which states in relevant part:

> Cities and towns may adopt and enforce any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction: Zoning requirements, business licensing requirements, health and safety requirements, and business taxes.

(Emphasis added.)

The City's Pre I-502 Moratorium on Medical Marijuana Collective Gardens - Approximately four months after the U.S. Attorney Generals' April 2011 Letter, the City of Fife passed Ordinance 1750, on August 9, 2011, in spite of RCW 69.51A.140, imposing a moratorium on medical marijuana collective gardens.

Sections 2 and 3 of this Ordinance read:

> "Section 2. Pursuant to RCW 35A.63.220 and RCW 36.70A.390, a moratorium is hereby imposed prohibiting the creation, establishment, location, operation, licensing, maintenance, or continuation of any collective garden, as authorized by E2SSB 5073 for the purpose of producing, processing, transporting, and/or delivering marijuana (cannabis) for medical use.
>
> Section 3. Collective gardens as referenced and defined in E2SSB 5073 are hereby designated as prohibited uses in the City of Fife. No business license application shall be accepted and no business license shall be issued under FMC Chapter 5.01 to any person for a medical marijuana collective garden."[5]

A similar local ban on medical marijuana and collective gardens was later upheld, in Division I, as valid, constitutional, and enforceable, despite RCW 69.51A.140. *Cannabis Action Coalition v. City of Kent,* 322 P.3d 1246 (2014). In *Cannabis Action Coalition*, Division I upheld the City of Kent's

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[4] Declaration of Jennifer Combs, Exhibit B

[5] Declaration of David Zabell

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ordinance banning collective gardens.[6] The *Cannabis Action Coalition* Court stated that: "The plain language of E2SSB 5073, as enacted, does not legalize medical marijuana or collective gardens." (*Id.* at 1253).

The November 6, 2012 Passage of I-502 – Although nothing changed on the Federal level regarding marijuana's illegality under the CSA, Washington voters passed Initiative 502 ("I-502") on November 6, 2012. This initiative pertained to setting up a state licensing system for recreational marijuana production, processing, and retail businesses. These provisions amended the Washington State Uniform Controlled Substances Act, codified in Chapter 69.50 RCW.[7] As per the amendments, the Washington State Liquor Control Board, ("WSLCB"), was charged with adopting regulatory provisions for such licenses, e.g., RCW 69.50.342, 69.50.345, and 69.50.354. No statutes within 69.50 speak to prohibiting a municipal corporation or county from banning any activity otherwise decriminalized under state law within 69.50.

The City's First Reaction to I-502 - After passage of I-502, the City found it necessary to terminate the collective garden moratorium and institute a new, one-year moratorium that covered both collective gardens and recreational marijuana processing, producing, and retailing businesses, both to allow additional time for the City to evaluate the impacts and evaluate whatever regulatory provisions the WSLCB would adopt. The moratorium included an extensive work plan, including instructions to the Fife Planning Commission to study the issue and return a recommendation to the Fife City Council. This new moratorium was passed on August 13, 2013 as Ordinance 1841.

The Federal Government's Post I-502 Position on Marijuana Prosecutions - On August 29,

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[6] Declaration of Jennifer Combs, Exhibit F

[7] See, for example, RCWs 69.50.325, .328, .331, .334, .339, .342, .345, .348, .351, .354, .357, .360, .363,

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2013, the Department of Justice, (the "Department"), issued a Memorandum for all United States Attorneys, written by James M. Cole, which was titled "Guidance Regarding Marijuana Enforcement."[8] This Memorandum reiterated previous guidelines from the Department of Justice, stating that marijuana was still a "dangerous drug" and that the "illegal distribution and sale of marijuana is a serious crime…"[9]

The Memorandum stated the Department was committed to using its limited investigative and prosecutorial resources to address the most significant threats, but did not rule out the possibility of investigating and prosecuting states and local municipalities, including employees, who participated in marijuana regulatory and distribution systems. Mr. Cole stated that jurisdictions which enacted laws legalizing marijuana and implemented strong and effective regulatory and enforcement systems were "less likely to threaten federal priorities" and that such systems "may allay the threat …to federal enforcement interests."[10] (Emphasis added). Nevertheless, the Memorandum made it clear that state laws and systems did not create a Federal legal defense, nor create any rights, stating in relevant part:

> This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. …This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. …Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.[11] (Emphasis added)

.366, and .369.

[8] Declaration of Jennifer Combs, Exhibit C

[9] Id.

[10] Id.

[11] Id.

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WSLCB's Post I-502 Regulatory Acts Supporting Local Bans - The first version of regulatory provisions adopted by the WSLCB was codified within WAC 314-55 and went into effect on November 11, 2013. In relevant part, WAC 314-55-020(11) states:

> Each marijuana license application is unique and investigated individually. The board may inquire and request documents regarding all matters in connection with the marijuana license application. The application requirements for a marijuana license include, but are not necessarily limited to the following:
> ...
> (11) The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances, including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements.

(Emphasis added.)

The Attorney General's Opinion Supporting Local Bans - The WSLCB made various amendments to certain provisions within WAC 314-55 after its initial adoption on November 11, 2013. As part of this process, the WSLCB requested that the Washington Attorney General's Office ("AG") issue an opinion on two questions:

(1) Are local governments preempted by state law from banning WSLCB licensed businesses in their jurisdictions?

and

(2) May local governments establish land use regulations in excess of I-502's and the WSLCB's requirements or business license requirements in a fashion that makes it impractical for state licensed marijuana business to locate within that jurisdiction?

The AG responded with an Opinion on January 16, 2014 concluding that local jurisdictions were allowed to ban marijuana businesses and they could adopt land use and business license requirements in

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excess of what the state currently required.[12] As part of the AG's rationale for these conclusions, the AG cites the WSLCB's own rules stating that a state license cannot be construed as a local jurisdiction business license nor as an exemption from zoning requirements.[13]

WSLCB's Ongoing Acceptance of Local Bans - After receiving the AG's opinion, the WSLCB continued to make changes to the regulatory requirements. The most recent proposal for revisions was issued by the WSLCB on June 4, 2014.[14] While many things have been changed, and are proposed to change, the WSLCB is still maintaining its position that the issuance of a state marijuana business license does not constitute a license for, or an approval of, a local business license and no marijuana businesses can be exempted from compliance with local zoning ordinances. Significantly, the WSLCB made no change, nor proposed any change, to the original WAC 314-55-020(11), after the AG's Office issued its Opinion.

The Legislature's Acceptance of Local Bans - The state legislature has amended certain provisions of I-502 since its first adoption. The most recent amendment, ESHB 2304, was approved on April 2, 2014, and took effect on June 12, 2014.[15] No amendments have been adopted, however, to address or counter the AG's January 16, 2014 Opinion or the WSLCB WACs.

Fife's Consideration of Ordinance 1872 and Marijuana Zoning - The Fife Planning Commission met several times between January and June 2014 to discuss the marijuana issue, both retail

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[12] Declaration of Jennifer Combs, Exhibit G

[13] Id.

[14] Declaration of Jennifer Combs, Exhibit D

[15] Declaration of Jennifer Combs, Exhibit E

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and medical, to accept public testimony, and to develop a recommendation for the City Council.[16] The Planning Commission's final recommendation was an ordinance that proposed allowing marijuana retail businesses in a highly limited fashion in the Regional Commercial zoning district, allowing marijuana processing and production in a limited fashion in the Industrial zoning districts, and banning medical marijuana collective gardens in all zoning districts.[17] That proposed ordinance was numbered 1872, and was passed by the Planning Commission for recommendation to the City Council on May 5, 2014.[18]

The Fife City Council received a marijuana zoning briefing, including the Planning Commission recommendation, at its Study Session on May 20, 2014.[19] It held a public hearing to discuss the proposed Ordinance 1872 at a regularly scheduled Council meeting on June 10, 2014, then a first reading of Ordinance 1872 at a regularly scheduled Council meeting on June 24, 2014. At that time, Councilmember Johnson moved to amend the proposed ordinance by banning all collective gardens and all marijuana production, processing, and retail businesses in all zoning districts within the City of Fife.[20] That amendment passed on July 8, 2014, at a regularly scheduled Council meeting, when the Council voted 5-2 to approve Ordinance 1872, as amended.[21]

The Plaintiff(s) Request for Equitable Relief - On July 15, 2014, the Plaintiffs filed the current action, requesting this Court to:

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[16] Declaration of David Osaki.

[17] Declaration of David Osaki.

[18] Declaration of David Osaki, Exhibit D.

[19] Declaration of David Osaki.

[20] Declaration of David Osaki.

[21] Declaration of David Osaki, Exhibit E.

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1. Grant a declaratory judgment stating that Ordinance 1872 is preempted by state law, and the City's actions in preventing the Plaintiffs from obtaining City licenses to operate a retail marijuana business constitute unlawful violations of RCW 69.50.608 and Article XI, Section 11 of the Washington State Constitution;

2. Grant preliminary and permanent injunctions, enjoining the City from preventing the Plaintiffs from obtaining necessary licenses in the City of Fife for their retail marijuana business;

3. Issue a Writ of Mandamus; and

4. Grant a declaratory judgment that the City is estopped from enforcing Ordinance 1872;

II. ISSUES PRESENTED

1. **Did the City have the legal authority to pass Ordinance 1872?**

   Short Answer: Yes. The Washington State Constitution article XI, section 11, grants local municipalities the power to pass ordinances regarding zoning and business licenses, for public health, safety, and general welfare.

2. **Is Ordinance 1872 preempted by I-502 if I-502 contains no express or implied statement that I-502 is to preempt a local government's ability to regulate businesses?**

   Short Answer: No. The City's ordinances are presumed to be constitutional. An ordinance may be deemed invalid if state law has preempted the field for the subject matter of the ordinance. There is no indication that I-502 intended to preempt local government authority to regulate businesses.

3. **Is Ordinance 1872 valid and enforceable?**

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Short Answer: Yes. In addition to the City's ordinances being presumed to be constitutional, it is also presumed that the City has complied with its procedural requirements and, thus, the ordinance is valid and enforceable upon adoption.

4. **Even if the Court finds there was some form of preemption, should the Court grant the Plaintiffs' requested relief under Washington State law, despite United States federal law prohibiting Plaintiffs' actions?**

Short Answer: No. The federal Controlled Substances Act (CSA) makes it illegal to manufacture, distribute, or possess marijuana, use property for any of the above purposes, and/or to conspire to commit any crimes set forth in the CSA. The Supremacy Clause of the U.S. Constitution mandates that courts must follow federal law when a conflict arises between federal and state laws.

5. **Should the City's Motion for Summary Judgment be granted?**

Short Answer: Yes. The plaintiffs are unable to overcome the heavy burden of overcoming constitutional and legal presumptions in favor of the validity of municipal ordinances. I-502 did not preempt the field in terms of marijuana business regulation and Ordinance 1872 is not in conflict with state general laws. As a result, it is not preempted by the Washington State Constitution. In addition, Ordinance 1872 was enacted properly, and is constitutional. Finally, marijuana businesses as proposed by the plaintiffs are in violation of federal law. Therefore, the Court must grant the City's Motion for Summary Judgment.

III. ARGUMENT AND AUTHORITY

A motion for summary judgment is authorized under CR 56. The purpose of the summary

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judgment procedure is to avoid a useless trial when there is no genuine issue of material fact. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 5962 603 (1980). A "material fact" is one upon which the outcome of litigation depends in whole or in part. *Atherton Condominium Apartment – Owners Ass'n Bd. Of Directors v. Blume Development Co.*, 115 Wn.2d 506, 516 (1990).

The initial burden under CR 56 is on the moving party to prove that there is no genuine issue as to a material fact and that they are entitled to a judgment as a matter of law. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216,225 (1989). All facts submitted and the reasonable inferences therefrom must be considered in a light most favorable to the nonmoving party. *Strong v. Terrell*, 147 Wn.App. 376, 384 (2008). Any doubt as to the existence of a genuine issue of material fact is resolved against the moving party. *Id.*

If the moving party satisfies its burden, the nonmoving party must then present evidence that demonstrates that material facts are in dispute. *Atherton Condominium Apartment –Owners Ass'n Bd. Of Directors*, 115 Wn.2d at 516. If the nonmoving party fails to make a showing that a triable issue exists, then the summary judgment motion should be granted. *Schaaf v. Highfield*, 127 Wn.2d 17. 21 (1995).

A. <u>The City's Ordinance is valid and enforceable</u>.

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

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the above-captioned case, the plaintiffs are alleging that Ordinance 1872 is unconstitutional, but the City complied with all requirements to enact the ordinance. As a result, Ordinance 1872 is valid and constitutional.

1. The Plaintiff(s) have the Affirmative Burden of Showing, By Clear, Cogent, and Convincing Evidence that Municipal Legislation Was Improper.

"A person challenging the validity of municipal legislative action has the burden to show the action was improper and thus rebut the presumption." *Id.* (citing *Henry v. Oakville,* 30 Wn.App 240, 247 (1981), *review denied*, 96 Wn.2d 1027 (1982)). "This burden of proof is a heavy one and requires clear, cogent, and convincing evidence to sustain it. In the absence of an affirmative showing to the contrary, it is presumed that the mandatory provisions of the law were duly observed, in substance at least, in the ordinance's enactment." *Id.* at 867-868 (citing *Buell v. Bremerton*, 80 Wn.2d 518, 529 (1972)). Clear, cogent, and convincing evidence denotes a quantum of evidence or degree of proof greater than mere preponderance. *City of Wenatchee*, 145 Wn.App. at 203. The plaintiffs can present no proof to carry their burden and show improper action. Therefore, Ordinance 1872 is presumed to be valid and constitutional.

2. The City is Presumed to Have Complied with the Procedural Requirements to Enact Ordinance 1872 and All Proof Shows It Did So.

To enact an ordinance involving a zoning amendment, the City must comply with certain statutory procedural requirements, i.e., RCW 35A.63.100, RCW 35A.63.105, and Fife Municipal Code (FMC) 19.92.040, but the City complied with these statutes by having the Fife Planning Commission review the issue, take public testimony, and develop a recommendation. At that point, the Planning Commission's recommendation was reviewed by the City Council, another public hearing was held, and, finally, a first reading of Ordinance 1872 was performed at the June 24, 2014 council meeting, followed

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by an amendment process, and a City Council vote. This all complied with the applicable statutes and, regardless, there is a presumption that "municipal ordinances [are] validly enacted." *City of Bothell v. Gutschmidt*, 78 Wn.App. 654, 660 (1995). Therefore, the plaintiffs will not be able to carry their burden in showing otherwise.

3. The City's Ordinance is Presumed Constitutional and the Authorities in this Memorandum Shows It is Constitutional.

"Ordinances are presumed to be constitutional" and "every presumption will be in favor of constitutionality." *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 477 (2003). A "heavy burden[, therefore,] rests upon the party challenging [an ordinance's] constitutionality." *Id.* In fact, the burden that rests upon the party challenging the ordinance is that the party "must prove beyond a reasonable doubt that [the ordinance] is unconstitutional." *Cannabis Action Coalition v. City of Kent*, 322 P.3d at 1259.

The plaintiffs cannot meet this burden for the following reasons:

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

On January 16, 2014, at the request of the WSLCB, the Washington State Attorney General's office issued an Opinion (AGO 2014 No. 2) regarding the issue of local governments banning marijuana businesses within their jurisdictions.[22] It was the conclusion of the Attorney General that local government bans of marijuana businesses were neither field preempted nor conflict preempted, and thus, valid and constitutional.

An Attorney General's Opinion is not binding on the courts nor is it mandatory authority, but the

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[22] Declaration of Jennifer Combs, Exhibit G

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Washington Supreme Court has noted that such opinions are generally "entitled to great weight." *Five Corners Family Farmers v. State,* 173 Wash.2d 296, 268 P.3d 892 (2011) In fact, the *Five Corners* Court noted that formal Attorney General Opinions may be considered persuasive authority because first, such Opinions represent the considered legal opinion of the constitutionally designated legal adviser of the state officers, and second, it is presumed by the Court that the legislature is aware of formal opinions issued by the Attorney General and a failure to amend a statute in response to a formal opinion may be treated as a form of legislative acquiescence. *Id.* at 308.

The AG's Opinion has not prompted the Legislature to act in response to it and is correct based on the following points and authorities.

i. Field Preemption

Field preemption arises when a state regulatory system occupies the entire field of regulation on a particular issue, leaving no room for local regulation. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010). Field preemption may be expressly stated or may be implicit in purposes or facts and circumstances of the state regulatory system. *Id.*

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

The only explicit preemption clause anywhere in RCW 69.50 indicates an intent for the State to

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preempt the field of penalties for violations of the Uniform Controlled Substances Act, ("UCSA"), nothing else. RCW 69.50's preemption section, RCW 69.50.608, states, in total:

> The state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with this chapter. Such local ordinances shall have the same penalties as provided for by state law. Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of the city, town, county, or municipality. (Emphasis added)

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

In addition, the failure to preempt must be construed as intentional. None of the Legislature's RCW 69.50 amendments state there must be a minimum number of marijuana businesses within a County or City, nor that there is any right for a marijuana businesses to be located within any incorporated city. If RCW 69.50 had listed these as explicit rights, then its intent would have been clear, but the Legislature's only directive in this area was to, by statute, delegate authority to the WSLCB to determine the maximum number of licenses that may be issued in one county, not set a minimum.[23] WSLCB then adopted WAC 314-55-020(11). The text of which reads:

> The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances, including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements. WAC 314-55-020(11)

(Emphasis added.)

Therefore, to the extent that the Legislature expressed intent at all, its apparent intent was to

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[23] e.g., RCW 69.50.345 and .354.

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delegate authority to the WSLCB for decisions on local bans. As a result, the plaintiffs' claims of field preemption fail. The Legislature clearly did not intend to impose marijuana businesses where they are otherwise banned.

ii. Conflict Preemption

Conflict preemption may arise "when an ordinance permits what state law forbids or forbids what state law permits." *Lawson v City of Pasco,* 168 Wn.2d 675, 682, 230 P3d 1038 (2010), but, in light of the fact that "every presumption will be in favor of constitutionality," courts make every effort to reconcile state and local law. *HJS Dev., Inc. v. Pierce County,* 148 Wash.2d 451, 477, 61 P.3d 1141 (2003), (internal citations omitted). Therefore, a local ordinance is only constitutionally invalid if it directly and irreconcilably conflicts with an unfettered right created by a statute such that the two cannot be harmonized. *Id.* and *Rabon v. City of Seattle,* 135 Wn.2d 278, 292, 957 P.2d 621 (1998). The question is not whether a state law permits an activity in some general sense; because even "[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law," *Rabon* at 292.

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

> The statutory definitions in RCW 59.20.030 apply to any RV used as a permanent residence once a landlord-tenant relationship is established, but they do not require Mr. Lawson to lease a lot designed for a mobile home to the owner of such an RV. Nothing in the statute prevents landowners from choosing to whom they lease lots, and nothing in it prevents municipalities from regulating that choice. The statute simply regulates

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> recreational vehicle tenancies, where such tenancies exist. Because Pasco's ordinance, former PMC 25.40.060, may be harmonized with the MHLTA, the two laws do not conflict. *Lawson* at 168 Wn.2d 692 and 230 P3d 1043.

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

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

Ordinance 1872 places no more burdens on marijuana businesses than Pasco's ordinance placed on RV owners. The Legislature, in its amendments to RCW 69.50, allowed an activity, e.g., operating a retail marijuana outlet, but did not prohibit a local jurisdiction from excluding that activity. This is quite similar to the interaction between the MHLTA and the City of Pasco's local mobile home park ordinance in *Lawson, supra*. Under state law, siting RVs in mobile home parks was allowed, but, under local law, RVs could be excluded. Likewise, under state law, marijuana businesses are allowed to operate, but can also, under local law be excluded.

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

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In making its ruling, the *Weden* Court expressly rejected the argument that the regulation of vessels constituted permission to operate them anywhere in the state, saying, "[n]owhere in the language of the statute can it be suggested that the statute creates an unabridged right to operate [personal watercraft] in all waters throughout the state." *Weden*, 135 Wn.2d at 695. The "[r]egistration of a vessel is nothing more than a precondition to operating a boat" and "[n]o unconditional right is granted by obtaining such registration." *Id.*

So, while obtaining registration with the state was a necessary precondition to being able to operate a personal watercraft, (just as obtaining a state license is necessary for a marijuana business), it did not grant carte blanche to the owner to ignore local regulations, nor did requiring state registration strip local municipalities of their constitutional right to regulate the same activity. The same is the case here. One must obtain a license from the WSLCB, but obtaining that license does not grant a business owner the right to set up shop wherever and however he/she likes. He/she must comply with local restrictions and requirements.

b. The state legislature acquiesced to the WSLCB's interpretation that state law did not preempt local power to impose zoning ordinances and business licensing requirements.

When an agency has been delegated rule making authority and has adopted rules pursuant to this authority, the regulations are presumed valid. *Armstrong v. State*, 91 Wn.App. 530, 537 (1998). Not only are the regulations presumed valid, they are also given great weight, *Id.,* because, while a regulation is not a statute, "it has been established in a variety of contexts that properly promulgated substantive agency regulations have the force and effect of law." *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445, (1997), *cert. denied* 118 S.Ct. 1574 (1998). As a result, WAC 314-55-020 has the same force and effect of a statute, and, since its adoption on November 11, 2013, it has stated that state marijuana business licenses must comply with local rules and regulations.

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> The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances, including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements. WAC 314-55-020(11)

(Emphasis added.)

If the state legislature did not agree with the WSLCB's interpretation of I-502's meaning, it had ample opportunity to make that disagreement known. Since November 2013, the state legislature has made several changes to RCW 69.50, specifically relating to the sections on marijuana. ESHB 2304, for example, was approved on April 2, 2014 and went into effect on June 12, 2014.[24] None of the post-November 2013 changes disturbed WAC 314-55-020. This constitutes legislative acquiescence because "[t]he Legislature's failure to amend a statute interpreted by administrative regulation constitutes legislative acquiescence in the agency's interpretation of the statute [and] [t]his is especially true when the Legislature has amended the statute in other respects without repudiating the administrative construction." *Manor*, 131 Wn.2d 439, n.2 (1997).

c. The state legislature acquiesced to the Attorney General's interpretation that state law did not preempt a local jurisdiction's right to ban marijuana businesses.

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

As stated above, the Attorney General opined in January 2014 that local governments may ban marijuana businesses within their jurisdictions and there is no field nor conflict preemption. Also

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[24] Declaration of Jennifer Combs, Exhibit D

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as stated above, the Legislature has amended certain provisions of RCW 69.50 as recently as April 2014, and clearly had an opportunity to modify or overturn the Attorney General's opinion by statute. The Legislature did not do so. Therefore, the Courts should conclude that the Legislature has consented to the interpretation.

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

"It is not the role of the judiciary to second-guess the wisdom of the legislature." *Northwest Animal Rights Network v. State*, 158 Wn.App 237, 245, 242 P.3d 891 (2010). "Indeed, the judiciary's making such public policy decisions would not only ignore the separation of powers, but would stretch the practical limits of the judiciary." *Id.* at 246. The courts are "not equipped to legislate what constitutes a 'successful' regulatory scheme by balancing public policy concerns, nor can [courts] determine which risks are acceptable and which are not. … Such is beyond the authority and ability of the judiciary." *Id.* (internal citations omitted).

The citizens of Washington passed I-502 without any language regarding preemption. The WSLCB has specifically stated that any state marijuana license it issues does not authorize a business license at the local level or authorize noncompliance with local zoning or building codes. The Attorney General has specifically stated, in his opinion, that I-502 does not preempt, either via field preemption or conflict preemption, local governments from banning marijuana businesses within their jurisdictions. And finally, the Legislature, in the face of these specific statements of non-preemption, has spoken by acquiescing to their interpretations and not taking any legislative action to overturn them. The courts should, therefore, not undo what the Legislature clearly wishes to remain in place.

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B. Federal law prohibits granting Plaintiffs' desired relief

The Washington State laws regarding medical marijuana (RCW 69.51A) and recreational marijuana (RCW 69.50), if viewed in a vacuum, allow, but do not require, local jurisdictions to license and zone for collective gardens and marijuana businesses. However, the United States Congress has expressed its intent to have marijuana remain a Schedule I controlled substance and to occupy the regulation and taxation of marijuana, an area which the State of Washington is now attempting to occupy. Under the Supremacy Clause, U.S. Constitution, Art. VI, Clause 2, however, the states are forbidden from frustrating the purposes of federal law and, when there is a conflict between federal and state law, courts must follow federal law. The Supremacy Clause and Object Preemption doctrine have been codified in 21 U.S.C. 801 et. seq.

1. The Federal Controlled Substances Act and the Washington Uniformed Controlled Substances Act are in conflict

The Federal Controlled Substance Act of 1970, ("CSA"), clearly sets forth the extent to which it preempts other laws.

> 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. (emphasis added by memorandum drafter).

The CSA defines marijuana as:

> All parts of the plant cannabis sativa l., whether growing or not; the seeds thereof, the resin extracted [etc. etc.]; 21 U.S.C. 802(16),

and contains criminal provisions, such as:

- 21 U.S.C. § 841 (making it illegal to manufacture, distribute, or possess with intent to distribute any controlled substance including marijuana);

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- 21 U.S.C. § 856 (making it unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances, including marijuana);

- 21 U.S.C. § 860 (making it unlawful to distribute or manufacture controlled substances within 1,000 feet of schools, colleges, playgrounds, and public housing facilities, and within 100 feet of any youth centers, public swimming pools, and video arcade facilities);

- 21 U.S.C. § 843 (making it unlawful to use any communication facility to commit felony violations of the CSA); and

- 21 U.S.C. § 846 (making it illegal to conspire to commit any of the crimes set forth in the CSA and making it illegal to attempt to commit any of the crimes set forth in the CSA).

Finally, the CSA states, in 21 U.S.C. 848(c)(1) and (2), that a person is engaged in a "continuing criminal enterprise" if:

> (a) He/she violates any provision of this subchapter or subchapter II, the punishment for which is a felony, and
>
> (b) Such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter
>
> (i) Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (ii) From which such person obtains substantial income or resources

As a result, RCW 69.50 et seq and RCW 82.14 et seq create the "positive conflict" described in 21 U.S.C. 903 because zoning for, permitting, and collecting revenue from marijuana businesses aids and abets in the violation of Federal drug laws. This subjects City employees to potential prosecution because following state law compels the City to participate in producing, selling, and collecting revenue from marijuana. (See the U.S.

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Attorneys' 4/14/11 Letter and the U.S. DOJ's 8/29/13 Letter in the "Statement of Facts").

These practices, even if conducted through indirect action, constitute participating in:

(1) a continuing criminal enterprise

and

(2) money laundering, as those crimes are defined within18 U.S.C. 1962 and 21 U.S.C. 801 et seq.

In other words, a Court mandate to participate in the state's scheme places the City at risk of facing a federal civil forfeiture action and places City employees at risk of prosecution when they zone for and/or permit entities which intend to sell, and collect revenue from, marijuana. This places a significant burden, without a corresponding benefit, on the City and its employees if they comply with the state scheme because the City cannot receive any legal remuneration from it but still places its employees at risk of criminal prosecution. In addition, this burden is not alleviated by the federal government's current policy of minimal enforcement of federal marijuana laws against entities participating in a state scheme because, in the absence of a grant of immunity, no person is safe from prosecution for acts committed within applicable limitation periods.

The risk of incrimination from prospective acts is what determines whether a privilege against self-incrimination applies, *Marchetti v United States*, 390 U.S. 39, 51 (1968), and the risk of indictment for participation in a criminal act also operates prospectively since it is rare, if not impossible, for any criminal defendant to be indicted simultaneously while he/she is committing a criminal act. Therefore, there is no guarantee that acts committed today will never be prosecuted.

This point was emphasized when the U.S. attorneys for the Eastern and Western Districts of Washington took the position that "state employees" who conduct activities which would establish a

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licensing scheme would not be immune from liability under the CSA.[25] Therefore, any City employee aiding and abetting in retail marijuana sales, production or processing, faces a risk because the state's laws do not preempt the Federal criminal code, e.g., 21 U.S.C. 801, 21 U.S.C. 841(a)(1), and 21 U.S.C. 844(a).

3. Forced compliance with RCW 69.50 will compel the City and City employees to aid and abet in the creation of Fourth, Fifth and Sixth Amendment defenses for federal and state criminal defendants by compelling marijuana businesses to provide the incriminating information required for zoning, permitting, and tax collection.[26]

Certain forms which solicit information and make the production of information mandatory are likely to violate an individual's Fifth Amendment right against self-incrimination. See *Leary v United States*, 395 U.S. 6 (1969), *Haynes v United States*, 390 U.S. 85 (1968), *Marchetti v United States*, 390 U.S. 39 (1968), and *Grosso v United States*, 390 U.S. 62 (1968).

In *Leary*, the Supreme Court reversed a federal conviction based under the Marijuana Tax Act due to its requirement for persons not otherwise authorized to possess marijuana to register their possession with federal officials for tax purposes. *Leary* at 28-29. The registration of marijuana possession, for tax purposes, though, is a complete confession and, therefore, violates Fifth and Sixth Amendment protections. *Id.* As a result, *Leary* abrogated the then-existing Marijuana Tax Act. (Ruling there can be no requirement that a taxpayer complete a tax form where doing so would reveal income from illegal activities). See also *Alberson v Subversive Activities Control Board*, 382 U.S. 70, 77-79 (1965).

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[25] Declaration of Jennifer Combs, Exhibit A

[26] An employee, manager, or owner of a State-licensed marijuana entity who is not following all of RCW 69.50's requirements can be criminally indicted under State law for marijuana sales. As a result, motions for exclusion of the evidence made available, or derived through, the state scheme's mandated self-reporting could certainly be made, especially in light of the expanded privacy rights granted by Article I, Section 7 of the

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Any City zoning, permitting, or tax collection forms would do the same thing, i.e., produce a compelled confession that violates an individual's constitutional rights and privileges. Therefore, mandating City participation in the State scheme would definitely be in conflict with federal laws preempting the field.

Likewise, in *Marchetti*, the Federal defendant was a gambler required to report certain items to the government which would be incriminatory. The government argued that no mandate existed to incriminate oneself because Marchetti could simply choose not to gamble and, therefore, avoid the reporting requirement. This argument was rejected by the Supreme Court:

> The question is not whether the petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has been historically guaranteed and withheld from those who most require it. *Marchetti* at 51. (emphasis added by drafter of this memorandum).

If the City participates in the State's scheme, a marijuana business owner/employee will always have such defenses available to him/her during a criminal prosecution. This would lead to the ironic outcome that, under the state's scheme, the City would not only be compelled to participate in the commission of a federal criminal offense, but also in creating procedural defenses for those indicted.

4. Ignoring the City's core functions by simply refusing to regulate marijuana businesses at all is not a viable option

It should be noted that doing nothing, i.e., refusing to grant permits and licenses but otherwise ignoring marijuana sales, would possibly comply with federal law, (except for exposing City

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Washington State Constitution which grant additional protections in State criminal prosecutions.

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employees to the risk of being charged with misprision of a felony),[27] but doing nothing is not an option the City, itself, can exercise without ignoring its core duties, (zoning, health, and safety), and its primary funding source for performing such duties, (retail sales taxes). Therefore, the City would be compelled to participate in a real dilemma if the relief sought by Plaintiff(s) is granted.

It could either: (a) comply with the statute, thereby creating defenses for anyone indicted under federal or state law and placing itself at risk of revenue forfeitures and employee prosecutions OR (b) not comply with the statute and face contempt sanctions from any state court mandating compliance. This is no choice at all. It is a burden compelled at the behest of others who decided, without compulsion, to take their chances on being prosecuted.

IV. CONCLUSION

Ordinances are given presumptions of validity and constitutionality when they are enacted. A person challenging those presumptions has a heavy burden to meet. The Plaintiffs allege that Ordinance 1872 is preempted by state law and unconstitutional under the Washington State Constitution. However, the Plaintiff(s) cannot meet its/their heavy burden of overcoming the presumptive constitutionality of Ordinance 1872 because the Plaintiff(s) cannot show either field or conflict preemption.

The WSLCB, the AG, and the state legislature through its acquiescence to the interpretations of the both, affirmed local jurisdictions' rights, under State law, to ban marijuana businesses. Therefore, the City's ban is lawful and should be acknowledged by the Court as valid, constitutional, and enforceable. Overarching all of that, federal law prohibits the business the Plaintiffs seek to engage in. The City does not desire to be, and cannot be made to be, a party to the commission of federal crimes.

For all of the above stated reasons, the City has satisfied its burden to show that there are no

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[27] A federal misdemeanor charge for failing to report a felony.

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material issues of fact and it is entitled to judgment as a matter of law. Therefore, the City respectfully requests that the Court grant its Motion for Summary Judgment and dismiss Plaintiffs' case with prejudice in its entirety.

DATED at Tacoma, Washington, this 31st day of July, 2014.

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