The Honorable Ronald e. Culpepper
Hearing Set: August 29, 2014 at 9:00 a.m.

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

MMH, LLC, a Washington Limited Liability Company, Plaintiff, v. CITY OF FIFE, Defendant ROBERT W. FERGUSON, Attorney General of the State of Washington, Intervenor.	NO. 14-2-10487-7 ATTORNEY GENERAL'S MEMORANDUM RESPONDING TO CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

In passing Initiative 502 (I-502), Washington voters took a significant step, decriminalizing the use of marijuana under state law and setting up a state-regulated system for the production, processing, and retail sale of marijuana. I-502 is silent, however, as to its impact on the broad, preexisting authority of local governments. That authority comes directly from article XI, section 11 of the Washington Constitution, which provides that "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Applying this section, Washington courts have long adopted a strong presumption against finding state preemption of local authority.

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Exercising its constitutional authority, the City of Fife has enacted a series of local ordinances prohibiting marijuana-related businesses within the city. Nothing in state statute expressly or impliedly preempts that authority. While the voters or the Legislature could have overridden that authority, or could override it in the future, they have not yet done so. Thus, ordinances like Fife's remain a policy choice available to local governments. While the Attorney General takes no position on the merits of such choices as a policy matter, the Attorney General respectfully requests that this Court grant summary judgment upholding Fife's action as within the City's legal power.

If the Court disagrees, however, and concludes that I-502 does require Fife to allow marijuana-related businesses, the Court should reject Fife's claim that such a requirement is preempted by federal law. There is a strong presumption against finding that federal law overrides state authority, and the City has failed to demonstrate that Congress intended to override any requirements I-502 may impose on Fife.

II. STATEMENT OF THE CASE

Washington voters approved I-502 at the November 2012 general election. Laws of 2013, ch. 3 (codified as part of RCW 69.50). I-502 decriminalized under state law the possession of limited amounts of useable marijuana and marijuana-infused products by persons twenty-one years or older. RCW 69.50.4013(3). The initiative also established a detailed licensing program for three categories of marijuana businesses: production, processing, and retail sales. RCW 69.50.325. I-502 decriminalized such activities as producing, processing, and selling marijuana if done within the regulatory and licensing system established by the act, although these actions remain criminal outside that regulatory process. RCW 69.50.401(3).

By statute, the Washington State Liquor Control Board (the Board) is authorized to issue licenses to a limited number of retail outlets. RCW 69.50.354. This licensing program, as supplemented through administrative rules of the Board, also explains that receipt of a

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license from the Liquor Control Board does not entitle the licensee to locate or operate a marijuana processing, producing, or retail business in violation of local rules or without any necessary approval from local jurisdictions. WAC 314-55-020(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.").

Fife has enacted a series of ordinances in recent years, first in contemplation of medical marijuana and more recently relating to I-502. *See* Defendant's Memorandum in Support of Summary Judgment at 1-8 (reciting history of Fife's enactments). Plaintiffs commenced these consolidated actions to challenge the validity of Fife's most recent ordinance, which bans all collective gardens and all marijuana production, processing, and retail businesses within the city.

This case comes before the Court on Fife's Motion for Summary Judgment and on Plaintiffs' Motion for Partial Summary Judgment. Fife seeks summary judgment upholding the validity of its ban on marijuana-related businesses. Fife first contends that its ordinance should be upheld because it falls within the city's inherent legislative authority under article XI, section 11, of the Washington Constitution, and because it is not preempted by state law. Fife raises a second argument, to be reached only if this Court concludes that state law preempts its ordinance. In that unlikely instance, Fife asks this Court to declare that the city cannot be compelled, consistent with federal law, to allow plaintiffs to operate marijuana-related businesses within the city. This alternative request essentially purports to challenge the validity of I-502 under federal law. *See generally*, Defendant's Memorandum in Support of Summary Judgment.

The Plaintiffs seek partial summary judgment, asking this Court to invalidate Fife's ordinance. They contend that Fife's ordinance is expressly preempted by RCW 69.50.608, a provision of the state controlled substances act that predates I-502 and does not address local

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land use and business licensing ordinances. They also contend that Fife's ordinance conflicts with I-502 more generally. Finally, they argue that Fife's ordinance constitutes a taking of property.[1] *See generally,* Plaintiffs' Motion for Partial Summary Judgment.[2]

The Attorney General intervened in this action in order to defend the will of the voters in enacting I-502. The Attorney General respectfully requests that this Court enter an order declaring Fife's ordinance valid, and not preempted by state law, and granting summary judgment in favor of Fife. However, if this Court concludes that state law does preempt Fife's ordinance, it should award summary judgment in favor of the Plaintiffs, upholding I-502 from the city's federal law arguments.

III. AUTHORITY AND ARGUMENT

A. Standard of Review

Summary judgment is appropriate when there are no disputes of material fact and the moving party is entitled to judgment as a matter of law. CR 56. A material fact for purposes of summary judgment is "one upon which the outcome of the litigation depends." *Eriks v. Denver,* 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). Summary judgment can be granted to a non-moving party when the facts are not in dispute. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992).

As a matter of law, local ordinances are entitled to a presumption of constitutionality. *State v. Kirwin,* 165 Wn.2d 818, 825, 203 P.3d 1044 (2009). Challengers to a local ordinance bear a heavy burden of proving it unconstitutional. *Id.* Plaintiffs cannot meet this burden, and the Court should grant summary judgment upholding the challenged ordinance.

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[1] The Attorney General takes no position regarding Plaintiffs' taking argument.

[2] The Plaintiffs incorrectly assert that they have been awarded licenses by the Washington State Liquor Control Board. Plaintiffs apparently misconstrue letters they received from the Board, overlooking language explicitly informing them that the letters merely concerned the order of processing applications and they "are not guaranteed to receive a license" and "must undergo our rigorous investigation process and pass a final inspection prior to issuance." Declaration of Henery, ¶ 6 and ex. 2; Declaration of Wetherbee, ¶ 6 and ex. 2.

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B. Initiative 502 Does Not Preempt Cities From Banning Marijuana Producers, Processors, or Retailers Within Their Jurisdiction[3]

1. Cities Derive Broad Authority to Legislate Directly From the Washington Constitution, Encompassing Local Legislation That Is Not In Conflict With General Laws

Cities derive their authority to legislate directly from the Washington Constitution, requiring no affirmative statutory grant of authority from the legislature. This authority comes from article XI, section 11 of the Washington Constitution, which provides that "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

Plaintiffs construe too narrowly the legislative authority of cities under article XI, section 11. Plaintiffs argue that Fife's ordinance falls within that authority only if it promotes Plaintiffs' view of public health and safety. Plaintiffs' Summary Judgment Memo at 20-21. But legislative judgments about public health and safety are quintessentially matters for the elected legislative body, here the city council. "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." *State v. City of Seattle*, 94 Wn.2d 162, 165, 615 P.2d 461 (1980). "Municipal police power is as extensive as that of the legislature, so long as the subject matter is local and the regulation does not conflict with general laws." *Id*. An ordinance's validity therefore depends neither upon an affirmative grant of statutory authority to the city, nor upon the subject matter being purely local in nature. Without a preemptive statute, cities retain concurrent jurisdiction with the state over the subject matter. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003); *Cannabis Action Coalition v. City of Kent*, 180 Wn. App. 455, 478, 322 P.3d 1246 (2014).

[3] The Attorney General issued a formal opinion earlier this year concluding that I-502 does not preempt local ordinances banning the siting of marijuana-related businesses. AGO 2014 No. 2. This section (B) of this memorandum tracks the analysis of that formal opinion, but with additional arguments pertinent to this action.

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Of course, state law can preempt local regulations and render them unconstitutional either by occupying the field of regulation, leaving no room for concurrent local jurisdiction, or by creating a conflict such that state and local laws cannot be harmonized. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010). Neither type of preemption applies here, and we consider each in turn.

2. The State Has Not Preempted the Field of Municipal Business Licensing and Zoning Regulation For Marijuana-Related Businesses

Field preemption arises when a state regulatory system occupies the entire field of regulation on a particular issue, leaving no room for local regulation. *Id.* at 679. Field preemption may be expressly stated or may be implicit in the purposes or facts and circumstances of the state regulatory system. *Id.*

Plaintiffs base their argument for field preemption on the notion that RCW 69.50.608 preempts local governments from enacting ordinances relating to recreational marijuana. Plaintiff's Motion at 11-17. RCW 69.50.608 is not a provision of I-502, but a preexisting statute codified in the same RCW chapter as 1-502's licensing provisions. But that section makes clear that state law only "fully occupies and preempts the entire field of *setting penalties* for violations of the controlled substances act." RCW 69.50.608 (emphasis added).[4] RCW 69.50.608 otherwise preserves local jurisdictions' concurrent authority to regulate drug-related activity. *See City of Tacoma v. Luvene*, 118 Wn.2d 826, 835, 827 P.2d 1374 (1992).

Plaintiffs' argument based on RCW 69.50.608 fails for several reasons. First, Fife's ordinance does not "set[] penalties for violations of the controlled substances act." RCW 69.50.608. Indeed, application of the ordinance does not depend at all on whether a

[4] RCW 69.50.608 provides: "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."

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person has violated the state controlled substances act. This case is easy proof of that: Plaintiffs' proposed activity—licensed operation of a marijuana retail store—would not violate the controlled substances act as amended by I-502. Thus, describing the ordinance as setting a penalty for violating the statute makes no sense. *See, e.g.*, *Luvene*, 118 Wn.2d at 834 (RCW 69.50.608 allows local governments to regulate "drug-related activity" not prohibited by the controlled substances act). In reality, Fife's ordinance exercises its power to issue local business licenses and to set local zoning requirements. Defendant's Summary Judgment Memorandum at 3-4, 8. A business might be penalized as a secondary effect of violating business licensing and zoning requirements, but this does not extend state preemption to such quintessentially local matters. To construe RCW 69.50.608 this broadly would deny effect to the statute's very language, which prohibits only local ordinances "setting penalties for violations of the controlled substances act" while expressly preserving other local authority. RCW 69.50.608; *Luvene*, 118 Wn.2d at 834 (RCW 69.50.608 "expressly grants some measure of concurrent jurisdiction to municipalities").

Accepting Plaintiffs' argument would also lead to absurd results. Plaintiffs suggest that if the controlled substances act imposes no penalty for drug-related activity, then local governments likewise can impose no "penalty" for that activity, even in the form of a zoning rule. Plaintiff's Motion at 13. That would mean, for example, that even if a city allowed I-502 licensees, it could not penalize them for gross violations of local building or fire codes, noise ordinances, or other health and safety rules, unless there was an identical penalty in state law. Nothing in RCW 69.50.608 or I-502 suggests such an intent to free I-502 licensees from local regulation. Looking beyond I-502, the controlled substances act also regulates many prescription drugs dispensed by pharmacies. *See, e.g.*, RCW 69.50.308 (addressing prescriptions); 69.50.302 (addressing manufacture of controlled substances). Under Plaintiffs' reading, RCW 69.50.608 would preclude local governments from implementing or enforcing

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zoning or other regulations on pharmacies or pharmaceutical companies. Nothing in chapter 69.50 RCW suggests that was the Legislature's intent.

Plaintiffs also argue that a preemptive effect for I-502 can be inferred by contrasting its provisions with those of chapter 69.51A RCW. The latter act, relating to medical marijuana, provides that local governments retain their normal zoning and other powers as to medical marijuana dispensaries, but cannot "preclude the possibility of siting licensed dispensers within the jurisdiction." RCW 69A.51A.140(1). Plaintiffs claim that because I-502 contains no similar provision, the proper inference is that I-502 revokes local government powers. Plaintiffs' Summary Judgment Memorandum at 14 (quoting RCW 69A.51A.140(1)).

There are three fundamental flaws in this argument. First, if the lack of an affirmative statement preserving local authority supported an inference of preemptive intent, then *every* state law would preempt local legislation unless it expressly disclaimed such intent. But the Washington Constitution provides the opposite, directly granting local authority to legislate unless local provisions conflict with general law. Const. art. XI, § 11; *see also* AGO 2014 No. 2 at 9 (rejecting a possible argument in favor of giving preemptive effect to I-502 based on a comparison between I-502 and statutes relating to liquor). Second, Washington courts only consider "those extrinsic statutes which disclose legislative intent about the provision in question." *Jametsky v. Olsen*, 179 Wn.2d 756, 765, 317 P.3d 1003 (2014) (internal quotation omitted). To suggest that a statute enacted by the Legislature in 2011 relating to medical marijuana (RCW 69A.51A.140(1)) discloses the legislative intent of the people in adopting I-502 in 2012 would be to assume a degree of consistency that is not reasonable to expect of different legislative drafters writing at different times and about different subjects. *See Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007) (applying the maxim that a difference in phrasing indicates a difference in meaning only "in the same statute"). Finally, even if the contrast with RCW 69A.51A.140(1) were intentional, its import could just as easily be used to argue the opposite of Plaintiffs' point. RCW 69A.51A.140(1) explicitly

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says that local governments may not "preclude the possibility of siting licensed dispensers within the jurisdiction." I-502 contains no such provision. If the difference was really meant to say something, the more plausible interpretation is that cities may preclude the possibility of citing licensed recreational marijuana businesses in their jurisdictions.

With respect to implied field preemption, the "legislative intent" of an initiative is derived from the collective intent of the people and can be ascertained by material in the official voter's pamphlet. *Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973); *see also Roe v. TeleTech Customer Care Mgmt., LLC*, 171 Wn.2d 736, 752-53, 257 P.3d 586 (2011). Such intent becomes relevant to the inquiry only if the statutory language is ambiguous, which is not the case here. *See American Legion Post No. 149 v. Dep't of Health,* 164 Wn.2d 570, 586, 192 P.3d 306 (2008) (courts look to legislative intent only if a statute is ambiguous). Even if it were relevant, nothing in the official voter's pamphlet evidences a collective intent for the state regulatory system to preempt the entire field of marijuana business licensing or operation. Voters' Pamphlet 23-30 (2012).

Moreover, if the initiative were ambiguous as to its intended preemptive scope, the Court would need to consider the opinion of the expert agency charged with interpreting and implementing the act, here the Liquor Control Board. *See, e.g.*, *Jametsky*, 179 Wn.2d at 764 n.2 (where an agency "is charged with the administration and enforcement of a statute, the agency's interpretation of an ambiguous statute is accorded great weight in determining legislative intent") (internal quotation marks omitted). And the Liquor Control Board's rules recognize the authority of local jurisdictions to impose regulations on state licensees. WAC 314-55-020(11).

Plaintiffs further contend that field preemption can be inferred from I-502's intent section, because it expresses an objective of displacing the illegal marijuana market. Laws of 2013 ch. 3, § 1. But our Supreme Court has declined to give independent effect to a policy statement set forth in an intent section when the legally binding sections of an initiative fail to

effectuate that policy. *Pierce County v. State*, 150 Wn.2d 422, 433-34, 78 P.3d 640 (2003) (rejecting the argument that a policy statement that was not implemented in the legally binding sections of Initiative 776 constituted a separate subject for purposes of article II, section 19 of the Washington Constitution). Similarly, the California Supreme Court held that even an initiative "stat[ing] an aim to 'ensure' a 'right' of seriously ill persons to 'obtain and use' medical marijuana" did not override local bans on medical marijuana dispensaries absent an operative section carrying out that intent. *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 300 P.3d 494, 506 (Cal. 2013) (copy attached). Moreover, intent to preempt must be "clearly and expressly stated." *State ex rel. Schillberg v. Everett District Justice Court*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979). The intent section describes the objectives of the act, but cannot preempt local legislation.

These facts, in addition to the absence of express intent suggesting otherwise, make clear that I-502 and its implementing regulations do not occupy the entire field of marijuana business regulation.

3. Fife's Ordinance Does Not Directly and Irreconcilably Conflict With I-502

An ordinance is invalid under conflict preemption if it directly and irreconcilably conflicts with the statute such that the two cannot be harmonized. *Lawson*, 168 Wn.2d at 682; *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998). Because "[e]very presumption will be in favor of constitutionality," courts make every effort to reconcile state and local law if possible. *HJS Dev.*, 148 Wn.2d at 477 (internal quotation marks omitted). Conflict preemption arises only "when an ordinance and statute cannot be harmonized." *Entertainment Industry Coalition v. Tacoma-Pierce County Health Dep't*, 153 Wn.2d 657, 663, 105 P.3d 985 (2005).

The principle is sometimes loosely described as providing that an ordinance is preempted "when an ordinance permits what state law forbids or forbids what state law permits." *Lawson*, 168 Wn.2d at 682. But this formulation is misleading if it is read to mean

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that any time the state licenses an activity—thereby "permitting" it in one sense of the word—local government is thereby divested of authority. *See, e.g.*, *Rabon v. City of Seattle*, 135 Wn.2d 278, 292, 957 P.2d 621 (1998) ("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"). More precisely, as the case law described below shows, a state law preempts local legislation only if the state law creates an entitlement to engage in the activity in specific circumstances forbidden by the local legislation. *Weden*, 135 Wn.2d at 694.

In *Weden*, the court upheld the constitutionality of a local prohibition on motorized personal watercraft, even though state law created registration and safety requirements for vessels and prohibited operation of unregistered vessels. The court rejected the argument that state regulation of vessels constituted permission to operate vessels 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 court further explained that "[r]egistration of a vessel is nothing more than a precondition to operating a boat." *Id*. "No unconditional right is granted by obtaining such registration." *Id*. The *Weden* court acknowledged other statutes that simply impose preconditions without granting unrestricted permission to participate in an activity, including: "[p]urchasing a hunting license is a precondition to hunting, but the license certainly does not allow hunting of endangered species or hunting inside the Seattle city limits," and "[r]eaching the age of 16 is a precondition to driving a car, but reaching 16 does not create an unrestricted right to drive a car however and wherever one desires." *Id*. (internal citation omitted).

Relevant here, the dissent in *Weden* contended: "Where a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders but they may not prohibit same outright[,]" and that an ordinance banning the activity "renders the state permit a license to do nothing at all." *Weden*, 135 Wn.2d at 720, 722 (Sanders, J., dissenting). The majority rejected this approach, characterizing the state law

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as creating not an unabridged right to operate personal watercraft in the state, but rather a registration requirement that amounted only to a precondition to operating a boat in the state.

In another case, the Washington Supreme Court similarly upheld a local ban on internal combustion motors on certain lakes. The court explained: "A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated." *Schillberg*, 92 Wn.2d at 108. The court found no conflict because nothing in the state laws requiring safe operation of vessels either expressly or impliedly provided that vessels would be allowed on all waters of the state.

The Washington Supreme Court also rejected a conflict preemption challenge to the City of Pasco's ordinance prohibiting placement of recreational vehicles within mobile home parks. *Lawson*, 168 Wn.2d at 683-84. Although state law regulated rights and duties arising from mobile home tenancies and recognized that such tenancies may include recreational vehicles, the Court reasoned "[t]he statute does not forbid recreational vehicles from being placed in the lots, nor does it create a right enabling their placement." *Id*. at 683. The state law simply regulated recreational vehicle tenancies, where such tenancies exist, but did not prevent municipalities from deciding whether or not to allow them. *Id*. at 684.

California's Supreme Court recently reached a similar conclusion, applying a provision of that state's constitution with language identical to that of Washington's article XI, section 11. *City of Riverside*, 300 P.3d at 499 (quoting Cal. Const. art. XI, § 7). The California court concluded that a state law that provides a state criminal law exemption for the medical use of marijuana did not preempt the "inherent local police power" of a city to determine "appropriate uses of land within a local jurisdiction's borders." *Id.* at 496. The court reasoned that a state medical marijuana law did not conflict with a local ordinance prohibiting medical marijuana dispensaries within a city because it was not impossible to comply simultaneously with both. *Id.* at 507. The California court construed constitutional language the same as Washington's to preempt local ordinances only when "the ordinance

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directly requires what the state statute forbids or prohibits what the state enactment demands." *Id.* at 500; *accord Weden*, 135 Wn.2d at 695 (state law does not preempt a local ordinance unless the local ordinance prohibits an activity to which state law creates an unfettered right); *see also Luvene*, 118 Wn.2d at 835 (conflict between a statute and an ordinance "must be direct and irreconcilable" for preemption to apply).

By contrast, Washington courts find conflict preemption when state law grants a specific entitlement to do something that a local ordinance forbids. For example, in *Entertainment Industry*, the state law in effect at the time banned smoking in public places, but it explicitly entitled owners of certain businesses to designate smoking areas. Former RCW 70.160.040(1) (2004), *repealed by* Laws of 2006, ch. 2, § 7(2) (Initiative Measure 901). The court struck down an ordinance that prohibited smoking in all public places because the state law explicitly entitled some business owners to designate smoking areas, but the ordinance prohibited this. *Entertainment Industry Coalition*, 153 Wn.2d at 664.

Similarly, in *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004), the court invalidated a Tacoma-Pierce County Health Department ordinance requiring fluoridated water. The state law at issue authorized the water districts to decide whether to fluoridate, giving water districts the ability to regulate the content and supply of their water systems. *Id.* at 433 (construing RCW 57.08.012). The local health department's attempt to require fluoridation conflicted with the state law expressly giving that choice to the water districts. As they could not be reconciled, the court struck down the ordinance as unconstitutional under conflict preemption analysis.

In short, in deciding whether "an ordinance . . . forbids what state law permits," *Lawson*, 168 Wn.2d at 682, the question is not whether state law permits an activity in some places or in some general sense. 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*, 135 Wn.2d at 292. Rather, a challenger must meet the heavy burden of proving that state law

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creates an entitlement to engage in an activity in circumstances outlawed by the local ordinance. For example, the state laws authorizing businesses to designate smoking areas and water districts to decide whether to fluoridate their water systems amounted to statewide entitlements that local jurisdictions could not take away. But the state laws requiring that vessels be registered and regulating recreational vehicles in mobile home tenancies simply contemplated that those activities would occur in some places and established preconditions; they did not override local jurisdictions' decisions to prohibit such activities.

Here, I-502 authorizes the Board to issue licenses for marijuana producers, processors, and retailers. RCW 69.50.325. And it exempts licensees from the state law penalties that would otherwise apply to their activities. RCW 69.50.325(1). Nothing in I-502, however, creates an entitlement for licensees to operate regardless of local law. Plaintiffs claim that the mere fact that I-502 enables the "production, processing, and sale of marijuana" by licensees overrides local authority, Plaintiffs' Motion at 18-19, but that argument proves far too much. Accepting Plaintiffs' argument would mean that I-502 overrides any local rule that would prohibit operation of a licensee, e.g., if a marijuana retailer or grower wanted to locate in an area zoned solely for residential use. That is not the law. More broadly, as our Supreme Court has made clear, state law authorizes all sorts of activities by granting licenses, everything from hunting to driving, but that does not mean local governments become powerless to regulate these activities. *See Weden*, 135 Wn.2d at 695. Rather, there must be clear evidence that the legislature intended to allow an activity under specific circumstances barred by the local ordinance. *Id.* ("We 'will not interpret a statute to deprive a municipality of the power to legislate on particular subjects unless that clearly is the legislative intent.'") (quoting *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 891-92, 795 P.2d 712 (1990)). Here, there simply is not the definitive sort of indication that would be necessary to meet the heavy burden of showing state preemption. *See id.*; *Cannabis Action Coalition*, 180 Wn. App.

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at 478 (noting that because medical marijuana law did not expressly preempt local ordinances, it left the city's constitutionally-granted legislative authority intact).

Absent the required clear indication and given that "every presumption" is in favor of upholding local ordinances (*HJS Dev., Inc.*, 148 Wn.2d at 477), there is no irreconcilable conflict between I-502's licensing system and the ability of local governments to prohibit licensees from operating in their jurisdictions.

C. Federal Law Does Not Preempt I-502

If the Court agrees with the Attorney General that I-502 preserves the normal zoning and business licensing authority of local governments regarding marijuana businesses, then the Court need not and should not decide whether I-502 conflicts with federal law. *See Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007) ("'Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented.'") (quoting *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000)). That result would not require the City of Fife to do anything at all, so there would be no occasion to consider whether state law requires the city to do anything that is prohibited by federal law. Even if I-502 requires Fife to allow marijuana businesses, however, such a requirement is not preempted by federal law.

1. Overview of Federal Preemption Rules

Just as there is a strong presumption that state law does not supersede local ordinances, there is a strong presumption that Congress does not intend to override state laws. "'State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress." *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 78, 896 P.2d 682 (1995) (quoting *Progressive Animal Welfare Society v. The University of Washington*, 125 Wn.2d 243, 265, 884 P.2d 592 (1994)). The burden of proof is on the City to prove "beyond a reasonable

doubt" that Congress intended to preempt I-502 as applied here. *See, e.g.*, *State v. Quintero Morelos*, 133 Wn. App. 591, 600, 137 P.3d 114 (2006).

Federal preemption of state law can take three forms: express preemption, field preemption, or conflict preemption. *Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996) (citing *Progressive Animal Welfare Society*, 125 Wn.2d at 265). Express preemption occurs where "Congress passes a statute that expressly preempts state law." *Id.* Field preemption occurs where "Congress occupies the entire field of regulation." *Id.* Conflict preemption occurs when "state law conflicts with federal law," *id.*, and it takes two forms: (a) impossibility preemption, "when compliance with both federal and state laws is physically impossible," or (b) obstacle preemption, "when state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives." *State Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 195, 849 P.2d 646 (1993), *aff'd sub nom. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994).

2. Application of Federal Preemption Rules to Fife's Claim

Fife claims that the Federal Controlled Substance Act of 1970 (CSA) preempts any requirement that Fife zone for or grant business licenses to businesses licensed under I-502. The CSA does no such thing.

As Fife acknowledges, Fife Mot. at 21, the CSA contains a clause expressly describing its preemptive scope:

> 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.

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This statute significantly narrows the range of federal preemption issues relevant here. Because Congress made clear that it only intended to preempt state laws that create a "positive conflict" with the CSA, *id.*, Congress did not "occupy the field" of regulating controlled substances. Field preemption is thus inapplicable under the CSA. Express preemption also effectively becomes irrelevant because it overlaps completely with conflict preemption here, i.e., the statute expressly preempts only state laws that create a "positive conflict." *See, e.g.*, *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 476 (Cal. Ct. App. 2008) ("numerous courts have concluded[ ] that . . . 21 U.S.C. § 903[ ] demonstrates Congress intended to reject express and field preemption of state laws concerning controlled substances") (copy attached). Moreover, as to conflict preemption, because the statute limits preemption to state laws where "there is a positive conflict between . . . [the CSA] and that State law so that the two cannot consistently stand together," 21 U.S.C. § 903, many courts have held that obstacle preemption is irrelevant under the CSA, because the only form of conflict the CSA is concerned with "is a positive conflict," *id. See, e.g., San Diego NORML*, 81 Cal. Rptr. 3d at 481; *People v. Crouse*, ___ P.3d ___, 2013 WL 6673708, at *4 (Colo. Ct. App. Dec. 19, 2013) (same) (copy attached). Indeed, other federal statutes specify that both impossibility and obstacle preemption apply, demonstrating that Congress knows how to write such a clause if that is its intent. *See, e.g.*, 21 U.S.C. § 350e(e).

Thus, as many courts have held, the only type of preemption ultimately at issue under the CSA is the "impossibility preemption" aspect of conflict preemption. *See, e.g., San Diego NORML*, 81 Cal. Rptr. 3d at 480 ("Because Congress provided that the CSA preempted only laws positively conflicting with the CSA so that the two sets of laws could not consistently stand together, and omitted any reference to an intent to preempt laws posing an obstacle to the CSA, we interpret title 21 United States Code section 903 as preempting only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible."); *Crouse*, 2013 WL 6673708 at *4 (same); *cf. S. Blasting Servs., Inc. v.*

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Wilkes County, NC, 288 F.3d 584, 591 (4th Cir. 2002) (reaching same conclusion as to substantively identical preemption clause in 18 U.S.C. § 848) (copy attached).

The question here, then, is solely whether I-502 renders Fife's "compliance with both federal and state laws [ ] physically impossible." *Dep't of Ecology*, 121 Wn.2d at 195. It does not, for at least two reasons.

First, Fife fails to explain what it is that state law requires it to do that would allegedly violate federal law. I-502 itself certainly imposes no requirement that Fife do anything affirmative to facilitate the opening of I-502 licensees. And Fife has cited no other state statute requiring it to do anything to affirmatively assist I-502 licensees. In short, Fife has not shown the sort of positive obligation that the CSA could preempt.

Second, even if I-502 requires Fife to take some action, Fife provides no evidence that it is required to violate federal law. Fife cites a number of provisions of the CSA in making its preemption argument, including 21 U.S.C. § 841 (making it illegal to manufacture, distribute, or possess with intent to distribute any controlled substance), § 856 (making it illegal to "knowingly open, lease, rent, use, or maintain any place . . . for the purpose of manufacturing, distributing, or using any controlled substance"), § 860 (making it illegal to distribute or manufacture controlled substances within specified distances from certain facilities), and § 843 (making it illegal to use communication facilities to violate the CSA). Fife Motion at 21-22. Notably lacking from Fife's brief, however, is any allegation that I-502 requires Fife itself to violate these provisions. For example, nothing in I-502 requires Fife to manufacture, distribute, or possesses marijuana; to own, lease, or maintain property used to grow or sell marijuana; or to use any communication facility to accomplish these objectives itself.

Instead, Fife's claim appears to be that I-502 requires it to "aid and abet" violations of the CSA, or to participate in a conspiracy to violate the CSA. Fife Motion at 22. Neither allegation holds water.

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For the City to be liable for aiding and abetting a violation of the CSA, four elements would have to be established: "'(1) that the [City] had the specific intent to facilitate the commission of a crime by another, (2) that the [City] had the requisite intent of the underlying substantive offense, (3) that the [City] assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense.'" *United States v. Ching Tang Lo*, 447 F.3d 1212, 1227 (9th Cir. 2006) (quoting *United States v. Garcia*, 400 F.3d 816, 818 n. 2 (9th Cir. 2005)) (copy attached). Here, it is obvious that the City has no "specific intent to facilitate the commission of" or intent itself to commit "the underlying substantive offense." If the City grants permits to I-502 licensees, it would only be because state law is interpreted to require it to do so. More generally, in granting a business license, there is no reason to think a city affirmatively intends to help a business succeed—it is merely making it possible for the business to open and suggests no intent as to whether the business succeeds or fails. Under these circumstances, there is no plausible argument that the City is aiding or abetting a violation of the CSA.

City of Garden Grove v. Superior Court, 68 Cal. Rptr. 3d 656 (Cal. Ct. App. 2007) (copy attached), provides helpful guidance on this issue. There, the City argued that state law could not require it to return marijuana to a medical marijuana patient because doing so would require the City to aid and abet a violation of the CSA. The court disagreed, saying:

> To be liable as an aider and abettor, a defendant must not only know of the unlawful purpose of the perpetrator, he must also have the specific intent to commit, encourage or facilitate the commission of the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 561, 199 Cal. Rptr. 60, 674 P.2d 1318.) Stated differently, the defendant must associate himself with the venture and participate in it as in something that he wishes to bring about and seek by his actions to make it succeed. (*Central Bank v. First Interstate Bank* (1994) 511 U.S. 164, 190, 114 S. Ct. 1439, 128 L. Ed. 2d 119.) Even though Kha would be in violation of federal law by possessing marijuana, it is rather obvious the City has no intention to facilitate such a breach.

Id. at 368.

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Similarly, in *San Diego NORML*, local governments in California argued that a state law requiring them to issue identification cards to medical marijuana patients was preempted by federal law. The law at issue there "require[d] counties to provide applications to applicants, to receive and process the applications, verify the accuracy of the information contained on the applications, approve the applications of persons meeting the state qualifications and issue the state identification cards to qualified persons, and maintain the records of the program." *San Diego NORML*, 81 Cal. Rptr. 3d at 469. Nonetheless, the California Court of Appeals held that the CSA did not preempt these requirements because the counties failed to show that any of these requirements forced them to violate the CSA. *Id.* at 481 ("Counties do not identify any provision of the CSA necessarily violated when a county complies with its obligations under the state identification laws.").

Just as Fife cannot show that granting a business license or permit to an I-502 licensee would amount to aiding or abetting a CSA violation, it also cannot show that such actions would subject it to liability for conspiring to violate the CSA. The Ninth Circuit has defined the elements of a drug conspiracy as "(1) an agreement to accomplish an illegal objective, and (2) the intent to commit the underlying offense." *United States v. Herrera-Gonzalez*, 263 F.3d 1092, 1095 (9th Cir. 2001) (copy attached). In zoning for or issuing a permit to an I-502 licensee, Fife would not be agreeing to accomplish an illegal objective or adopting any intent to commit a drug offense; it would simply be complying with state law as interpreted by state courts. This is insufficient to make it a conspirator, for "'simple knowledge, approval of, or acquiescence in the object or purpose of a conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient.'" *United States v. Lennick*, 18 F.3d 814, 818 (9th Cir. 1994) (quoting *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir.1980)) (copy attached).

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In short, Fife cannot show that I-502 would require the City to violate federal law, and thus cannot show that it is impossible for the City to comply with both I-502 and federal law. Accordingly, there is no basis for a finding of federal preemption here.

IV. CONCLUSION

For the reasons stated above, the Attorney General respectfully asks the Court to grant summary judgment declaring Fife's ordinance to be valid and not preempted by state law, granting summary judgment in favor of Fife. However, if this Court concludes that state law does preempt Fife's ordinance, it should award summary judgment in favor of the Plaintiffs, upholding the validity of I-502.

DATED this 18th day of August, 2014.

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