

NO. 46723-2

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MMH, LLC and GRAYBEARD HOLDINGS, LLC,
Appellants,

and

DOWNTOWN CANNABIS CO., LLC; MONKEY GRASS
FARMS, LLC; and JAR MGMT, LLC, d/b/a/ RAINIER ON PINE,
Intervenor-Appellants,

v.

CITY OF FIFE,

Respondent,

and

ROBERT W. FERGUSON, Attorney General of the
State of Washington,
Intervenor-Respondent.

SUPPLEMENTAL BRIEF OF ATTORNEY GENERAL

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I. INTRODUCTION

Plaintiffs claim that Initiative 502 (I-502) requires cities and counties to allow marijuana businesses. To prevail on this argument, plaintiffs bear a heavy burden of proving that local bans on marijuana businesses are “irreconcilable” with state law. *E.g., HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003). As the Attorney General explained in prior briefing and as every superior court to consider the question has found, plaintiffs could not meet this burden based on I-502’s language. Now two recent acts of the legislature and a recent Supreme Court decision make it even clearer that plaintiffs’ claim fails.

In 2015, the legislature passed two bills that reconciled the State’s medical and recreational marijuana regulations and revised how marijuana excise taxes are distributed. These bills expressly contemplate that local governments may ban marijuana businesses, refuting any claim that such bans are irreconcilable with state law.

Also in 2015, our Supreme Court decided *Cannabis Action Coalition v. City of Kent*, ___ Wn.2d ___, 2015 WL 2418553, *2 (May 21, 2015), which upheld Kent’s ban on medical marijuana “collective gardens.” The Court’s reasoning further confirms that nothing in state law requires local governments to allow marijuana businesses.

II. BACKGROUND

Until 2015, Washington’s statutes governing the licensing and regulation of recreational marijuana existed uneasily alongside an earlier act relating to medical use of marijuana. Laws of 1999, ch. 2 (I-692). I-502 established a regulated marketplace for recreational marijuana, under which marijuana businesses could be licensed and taxed. RCW 69.50.325 (licensing system); RCW 69.50.535 (establishing marijuana excise tax). No such system of regulation, licensing, and taxation applied to medical marijuana. *See* RCW 69.51A.085(1) (allowing qualifying medical marijuana patients to pool resources and grow marijuana through “collective gardens,” but authorizing no commercial distribution).¹

The operation of two systems side-by-side produced a disparity. While recreational marijuana was licensed and regulated with applicable quality standards, medical marijuana was not. *See* Laws of 2015, ch. 70, § 2 (intent section of Cannabis Patient Protection Act). Licensed and regulated recreational marijuana businesses were placed at a disadvantage compared to medical marijuana because the marijuana excise tax imposed under I-502 on recreational marijuana did not apply to medical marijuana. Laws of 2015, 2d Spec. Sess., ch. 4, § 101 (intent section of marijuana market reform act).

¹ The 2015 legislature repealed RCW 69.51A.085. Laws of 2015, ch. 70, § 49.

The 2015 legislature addressed these and other issues through two new acts. The first, the Cannabis Patient Protection Act, consolidated the production, processing, and sale of medical marijuana into the licensed and regulated recreational marijuana system. Laws of 2015, ch. 70. The second comprehensively reformed the laws governing the marijuana market. Laws of 2015, 2d Spec. Sess., ch. 4. The latter act also provided for the distribution of limited revenue from the marijuana excise tax to cities and counties. *Id.* §§ 206, 1603. It also addressed local zoning authority regarding marijuana businesses. *Id.* §§ 301, 1001. In both instances, the law contemplates that some cities and counties may choose to prohibit marijuana businesses.

As the legislature was considering these bills, it was well aware that this case and others in which plaintiffs challenged local bans on marijuana businesses were working their way through the courts. This case is the most procedurally-advanced case of those.²

Finally, in May the Washington Supreme Court issued a decision rejecting an argument that Washington’s medical marijuana laws preempted cities and counties from banning marijuana “collective gardens” within their boundaries. *Cannabis Action*, 2015 WL 2418553, at

² Two other similar appeals are currently stayed in this Court pending resolution of this case. *Emerald Enter. v. Clark County*, No. 47068-3-II; *Green Collar, LLC v. Pierce County*, No. 47140-0-II.

*2. The court's decision confirms the proper analysis of state preemption of local ordinances and illustrates ways in which the legislature's 2015 acts clarify that state law does not preempt local bans on marijuana businesses.

III. ARGUMENT

I-502 markedly changed Washington's approach to marijuana, but was silent 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. As the Attorney General explained in prior briefing, I-502's silence as to local authority provided no basis to infer state preemption of local bans, especially given the strong presumption that Washington courts apply against finding state preemption of local rules. In amending I-502 and reconciling it with the State's medical marijuana system, the legislature provided further confirmation that state law does not require local governments to allow marijuana businesses. And the Supreme Court confirmed that the Attorney General has properly articulated the approach to finding state preemption of local law.

Starting with the legislature, two acts passed in 2015 are relevant. First, the 2015 legislature amended the statute governing the distribution of marijuana excise tax revenue to provide some of that revenue to counties, cities, and towns. It does so, however, only as to cities and

counties that have not prohibited operating such businesses.³ Under the new distribution system, an amount of money determined by statutory formula is set aside for distribution to cities and counties. Laws of 2015, 2d Spec. Sess., ch. 4, § 206(2)(g)(i) (amending RCW 69.50.540). Thirty percent of that amount is distributed to local governments in which marijuana retailers are physically located. *Id.* § 206(2)(g)(i)(A). The remaining seventy percent is distributed to local governments without regard to whether a retailer is physically located within the jurisdiction.

³ The legislature amended RCW 69.50.540 to add a new subsection (2)(g)(i):

(g) At the end of each fiscal year, the treasurer must transfer any amounts in the dedicated marijuana account that are not appropriated pursuant to subsection (1) of this section and this subsection (2) into the general fund, except as provided in (g)(i) of this subsection (2).

(i) Beginning in fiscal year 2018, if marijuana excise tax collections deposited into the general fund in the prior fiscal year exceed twenty-five million dollars, then each fiscal year the legislature must appropriate an amount equal to thirty percent of all marijuana excise taxes deposited into the general fund the prior fiscal year to the treasurer for distribution to counties, cities, and towns as follows:

(A) Thirty percent must be distributed to counties, cities, and towns where licensed marijuana retailers are physically located. Each jurisdiction must receive a share of the revenue distribution under this subsection (2)(g)(i)(A) based on the proportional share of the total revenues generated in the individual jurisdiction from the taxes collected under RCW 69.50.535, from licensed marijuana retailers physically located in each jurisdiction. For purposes of this subsection (2)(g)(i)(A), one hundred percent of the proportional amount attributed to a retailer physically located in a city or town must be distributed to the city or town.

(B) Seventy percent must be distributed to counties, cities, and towns ratably on a per capita basis. Counties must receive sixty percent of the distribution, which must be disbursed based on each county's total proportional population. *Funds may only be distributed to jurisdictions that do not prohibit the siting of any state licensed marijuana producer, processor, or retailer.*

Laws of 2015, 2d Spec. Sess., ch. 4, § 206(2)(g)(i) (emphasis added).

But the legislature explicitly limited that distribution such that: “*Funds may only be distributed to jurisdictions that do not prohibit the siting of any state licensed marijuana producer, processor, or retailer.*” Laws of 2015, 2d Spec. Sess., ch. 4, § 206(2)(g)(i)(B) (emphasis added). Thus, while the legislature created a new disincentive for local governments to ban marijuana businesses, it also expressly recognized their authority to do so. If the legislature wanted to prohibit local bans or thought that I-502 already did so, why would it create a funding distribution scheme that turns on whether a local ban is in place?

The legislature explained that amending the distribution formula for marijuana excise tax revenue was designed in part to strengthen “a partnership with local jurisdictions” in marijuana policy. Laws of 2015, 2d Spec. Sess., ch. 4, § 101. This partnership recognizes that local governments may ban marijuana businesses, but it gives them a financial disincentive. The legislature considered more restrictive measures, such as requiring local governments to allow marijuana businesses unless local voters approved a ban, but it ultimately rejected that approach.⁴ The legislature thus confirmed that it did not intend to intrude into local power.

⁴ See E2SHB 2136, § 1301. That version passed the House but not the Senate. The provision requiring a public vote for a local ban was removed before final passage. See 2E2SHB 2136. The bill’s history, including the text of both versions, is online at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2136&year=2015> (history of H.B. 2136, Laws of 2015, 2d Spec. Sess., ch. 4 (last visited Aug. 4, 2015)).

See Lewis v. Dep't of Licensing, 157 Wn.2d 446, 470, 139 P.3d 1078 (2006) (courts “may consider sequential drafts of a bill in order to help determine the legislature’s intent”).

The second way in which the 2015 legislature expressly contemplated local regulation further demonstrates that state law does not impliedly preempt local ordinances prohibiting marijuana businesses. The 2015 legislation expressly contemplates that local jurisdictions will apply their zoning authority to marijuana businesses. Laws of 2015, 2d Spec. Sess., ch. 4, § 301 (amending RCW 69.50.331 to add a new subsection (9) authorizing local governments to prohibit marijuana producers or processors in certain residential and rural zones); *id.* § 1001(3)(c) (precluding medical marijuana cooperatives from being located “[w]here prohibited by a city, town, or county zoning provision”).

The legislature’s express recognition of local zoning and regulatory authority in these two acts provides further confirmation that nothing in state law requires local governments to allow marijuana businesses. That conclusion is buttressed by the Supreme Court’s recent decision in *Cannabis Action*.

The Court there first reiterated the law regarding preemption of local ordinances. “We will find state law to preempt an ordinance only if the ordinance ‘directly and irreconcilably conflicts with the statute.’”

Cannabis Action, 2015 WL 2418553, at *4 (quoting *HJS Dev., Inc.*, 148 Wn.2d at 482). “‘[A] heavy burden rests upon the party challenging [the ordinance’s] constitutionality’ and ‘[e]very presumption will be in favor of constitutionality.’” *Id.* at *3 (quoting *HJS Dev.*, 148 Wn.2d at 482 (alterations in original)). “Under our conflict preemption precedents, a state law preempts a local ordinance ‘when an ordinance permits what state law forbids or forbids what state law permits.’” *Id.* at *4 (quoting *Lawson v. City of Pasco*, 168 Wn.2d 675, 682 230 P.3d 1038 (2010)). Echoing a point in the Attorney General’s main brief in this case, the court acknowledged that, “[t]hough the rule may be easily stated, the analysis is often nuanced.” *Id.*; *see also* Br. Att’y Gen. as Intervenor at 10-13; Hugh D. Spitzer, “Home Rule” vs. “Dillon’s Rule” for Washington Cities, 38 Seattle U. L. Rev. 809, 824-28 (2015) (discussing local home rule).

In challenging Kent’s ban on collective gardens, the plaintiffs in *Cannabis Action* cited RCW 69.51A.085, which said: “Qualifying patients may create and participate in collective gardens.” They argued that state law thus “allowed” collective gardens, and the city could not ban them. But the Court rejected that simplistic analysis. *Cannabis Action*, 2015 WL 2418553, at *5 & n.5. Instead, the Court found that RCW 69.51A.140, which allowed local governments to impose zoning, licensing, and “health and safety requirements” on “the production, processing, or dispensing of

cannabis” allowed local governments to ban collective gardens altogether, even though it never explicitly mentioned a ban as an option. *Cannabis Action*, 2015 WL 2418553, at *3 (citing RCW 69.51A.140(1)).

Similarly here, plaintiffs concede that I-502 allows local governments to impose “reasonable” zoning, licensing, and health or safety requirements on marijuana businesses, but they claim that it prohibits outright bans. MMH Br. at 20 (“nothing in I-502 . . . expressly state[s] that a city or a county may ban I-502 businesses from their jurisdiction”). *Cannabis Action* makes that argument even less tenable than it was before. *See* Br. Att’y Gen. as Intervenor at 2 (explaining why this argument failed even before *Cannabis Action*).

The Supreme Court’s analysis also made clear that although the legislature has now created a more robust framework for regulating medical and recreational marijuana, there is still no basis for arguing that state law “preempts the field” of marijuana regulation. Plaintiffs had abandoned their field preemption argument in their briefs to this Court, but if they seek to revive it based on the recent legislative acts, *Cannabis Action* is an insurmountable obstacle.

The decision recognized that “when a state statute expressly provides for local jurisdiction over a subject, state law does not impliedly preempt the field of that subject.” *Cannabis Action*, 2015 WL 2418553, at

*3. That is, state law does not preempt a local ordinance when the state law “expressly contemplates local regulation of” the subject. *Cannabis Action*, 2015 WL 2418553, at *3. The 2015 legislation “expressly provides for local jurisdiction” over marijuana businesses in the two ways described above: (1) by recognizing local authority to ban marijuana businesses and conditioning tax distribution on whether a ban is in place; and (2) by recognizing local zoning authority as to both recreational and medical marijuana. There is thus no basis to argue that state law preempts the field of marijuana regulation.

IV. CONCLUSION

Cannabis Action and the 2015 legislation confirm that state law does not preempt the authority of cities and counties to prohibit marijuana businesses. For the reasons set forth here and in the Attorney General’s prior brief, this Court should affirm the superior court.

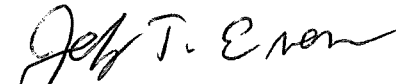
RESPECTFULLY SUBMITTED this 5th day of August 2015.

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CERTIFICATE OF
SERVICE

I certify, under penalty of perjury under the laws of the state of
Washington, that I served, via electronic mail, by agreement of the parties,
a true and correct copy of the Supplemental Brief of Attorney General,
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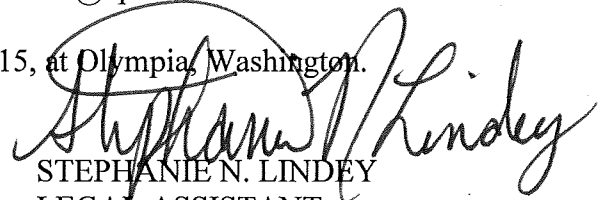
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