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**SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE**

MMH, LLC, a Washington limited liability
company,

Plaintiff,

and

CITY OF FIFE, a Washington municipal
corporation

Defendant.

No. 14-2-10487-7

**PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

**Hearing Date: August 29, 2014
Time: 8:30 a.m.**

COMES NOW MMH, LLC, by and through attorneys Davies Pearson, P.C., and pursuant to Rule 56 of the Superior Court Civil Rules ("CR") moves this court for an order on summary judgment declaring Fife Ordinance No. 1872 ("Ordinance") to be unconstitutional as it is expressly preempted by state law, is in conflict with state law, and constitutes an impermissible taking. Pursuant to CR 56, Plaintiffs¹ may file additional motions with respect to claims not addressed herein.

¹ As there is presently a Motion to Consolidate pending before the court and all Parties have agreed to consolidation, the term "Plaintiff" is used in the plural herein.

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I. STATEMENT OF FACTS

A. Washington's citizens legalize the sale of recreational marijuana.

On November 6, 2012, Washington citizens approved Initiative Measure No. 502 ("I-502"), the legalization of recreational marijuana.² I-502 passed in Pierce County by a majority of 54 percent.³ As codified, I-502 legalizes the use and possession of marijuana for Washingtonian's over the age of 21. RCW 69.50.4013. It also legalizes and regulates the production, manufacture, and retail sales of marijuana throughout the state of Washington. RCW 69.50.354 - .369.

The stated intent of I-502 is to decriminalize the use and possession of marijuana to (1) allow law enforcement resources to be focused on violent and property crimes; (2) generate new state and local tax revenue for education, health care, research, and substance abuse prevention; and (3) take marijuana out of the hands of illegal drug organizations and bring it under a tightly regulated, state-licensed system similar to that used for controlling hard alcohol. (Dec. of Nelson, **Exhibit 1**).

I-502 is codified in Chapter 69.50 RCW *et seq.* and WAC 314-55 *et seq.*⁴ The statutes require the Washington State Liquor Control Board ("WSLCB") to establish and implement procedures for the licensing of marijuana producers, processors, and retailers. RCW 69.50.345(1). The WSLCB is required to determine the maximum number of retail outlets that may be licensed in each county by taking into consideration

² *November 6, 2012 General Election Results*, Washington Secretary of State, <http://vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana.html> (last visited July 30, 2014).

³ *County Results*, Washington Secretary of State, http://vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana_ByCounty.html (last visited July 30, 2014).

1 (a) population distribution, (b) security and safety issues, and (c) the provision of
2 adequate access to licensed sources of useable marijuana and marijuana-infused
3 products to discourage purchases from the illegal market. RCW 69.50.345(2). I-502,
4 RCW 69.50 *et seq.*, and WAC 314-15 *et seq.* do not contain a single provision that
5 expressly allow a city or a county to prohibit the production, processing, or retailing of
6 marijuana.
7

8 In order to effectuate the purposes and intent of I-502, as well as to remedy any
9 deficiency therein, RCW 69.50.342 explicitly empowers the WSLCB to adopt rules with
10 regard to the location of retail marijuana outlets. RCW 69.50.342(6). In addition, RCW
11 69.50.354 specifically authorizes the WSLCB to license retail marijuana outlets in “no
12 greater number in each of the counties of the state than as the state liquor control board
13 shall deem advisable.” RCW 69.50.354 also decriminalizes the sale of marijuana by
14 licensed retailers.
15

16 In October 2013, the WSLCB promulgated rules setting forth the application
17 requirements for a marijuana retailer license and the method by which retail locations
18 will be apportioned throughout the state,

19 The number of retail locations will be determined using a method that
20 distributes the number of locations proportionate to the most populous
21 cities within each county. Locations not assigned to a specific city will be
22 at large. At large locations can be used for unincorporated areas in the
23 county or in cities within the county that have no retail licenses
24 designated. Once the number of locations per city and at large have been
25 identified, the eligible applicants will be selected by lottery in the event the
number of applications exceeds the allotted amount for the cities and
county.

⁴ Chapter 69.50 RCW is the Uniform Controlled Substances Act. (“UCSA”)

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2 WAC 314-55-081(1). Following these guidelines, the WSLCB determined that there
3 would be thirty one (31) retail licenses in Pierce County, which includes seventeen (17)
4 at large retail licenses and zero (0) retail licenses assigned to the City of Fife. (Dec. of
5 Nelson, **Exhibit 2**).

6 **B. Plaintiffs are awarded licenses for retail outlets**

7 In April 2014, Plaintiffs were awarded Pierce County at large retail licenses in the
8 WSLCB lottery. (Dec. of Henery, at ¶ 6); (Dec. of Wetherbee, at ¶ 6). Plaintiffs executed
9 a lease at 4500 Pacific Highway East, Fife, Washington for the purpose of operating a
10 retail marijuana outlet. (Dec. of Nelson, at ¶ 8); (Dec. of Wetherbee, at ¶ 8). While RCW
11 69.50.331(7)(b) gives a city the right to file a written objection against an applicant or
12 against the specific location, no such objection was filed by the City of Fife against Mr.
13 Henery or Mr. Wetherbee. (Dec. of Henery, at ¶ 8); (Dec. of Wetherbee, at ¶ 8).
14 However, Plaintiffs have twice been denied a business license by the City of Fife. (Dec.
15 of Henery, at ¶¶ 9, 10); (Dec. of Wetherbee, at ¶¶ 9, 10).

16
17 **C. The Planning Commission recommends the implementation of I-502**

18 The City of Fife is a municipal corporation validly formed and existing as a
19 noncharter code city under Chapter 35A.13 RCW. Fife Municipal Code ("FMC") §
20 1.08.010. On August 13, 2013, the Fife City Council passed Emergency Ordinance No.
21 1841, which imposed a one year moratorium on the establishment, location, permitting,
22 licensing, or operation of marijuana production, processing, and retailing. (Dec. of
23 Nelson, **Exhibit 3**). Ordinance No. 1841 includes a one year Work Program in which the
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City of Fife was instructed to prepare appropriate regulations for the establishment of retail marijuana outlets. *Id.* In addition, at the August 13, 2013 meeting, the Planning Commission was directed to make a recommendation to the Fife City Council with regard to the zoning and licensing of marijuana related land uses. (Dec. of Nelson, **Exhibits 4 and 5**).

On January 27, 2014, the City of Fife Planning Commission held a special meeting to take public comment on how the City of Fife should proceed with regard to regulating marijuana. (Dec. of Nelson, **Exhibit 6**). Studies related to secondary effects of marijuana land uses were compiled and presented to the Planning Commission. (Dec. of Nelson, **Exhibit 7**). Subsequently, a draft ordinance was prepared for the Planning Commission's April 7, 2014, public meeting to accept comment on the issue. (Dec. of Nelson, **Exhibit 11**).

The draft ordinance recommended by the Fife Planning Commission on April 7, 2014, allowed retail marijuana outlets and set forth the siting requirements for marijuana business in the City of Fife. *Id.* For example, the Fife Planning Commission recommended amendments to the definition of "permitted uses" in the Regional Commercial zone to include marijuana retailing. *Id.* The ordinance defined where production, processing, and retail could occur in the City and imposed a 2500 foot buffer between retail establishments. *Id.*

The Fife Community Development Director recommended that the Planning Commission adopt the written findings of the March 31, 2014, staff report and recommend adoption of the draft ordinance dated April 7, 2014. *Id.* Based on the April

1 7, 2014, Planning Commission public meeting, a revised draft ordinance was prepared
2 for any additional public comment at the Planning Commission's May 5, 2014, meeting.
3 (Dec. of Nelson, **Exhibit 13**). The revised draft ordinance, dated April 25, 2014, again
4 allowed marijuana retail outlets in certain zoning districts in the City of Fife. *Id.*
5

6 At the May 5, 2014, Fife Planning Commission meeting, the Planning
7 Commission voted 5-1 to recommend the April 25, 2014, ordinance to the Fife City
8 Council. (Dec. of Nelson, **Exhibit 13**).

9 FMC § 19.92.040 identifies the criteria that must be met for the Planning
10 Commission to recommend approval of a zoning code text amendment. Those
11 requirements were satisfied. On March 24, 2014, the City of Fife transmitted the
12 proposed development regulation amendment to the Washington State Department of
13 Commerce for the purpose of State agency review requesting 14-day expedited review.
14 (Dec. of Nelson, **Exhibit 10**). Expedited review was granted and no comments from
15 State agencies were received. *Id.* On March 27, 2014, the City of Fife State
16 Environmental Policy Act ("SEPA") Responsible Official issued notices required under
17 SEPA on the proposed ordinance. (Dec. of Nelson, **Exhibit 10**). The Responsible
18 Official issued a SEPA Determination of Non Significance on the proposed code
19 amendment with a 14-day comment period. *Id.*
20

21 **D. The Fife City Council bans all marijuana uses in the City**

22 On June 10, 2014, the Fife City Council held a hearing on the ordinance as
23 recommended by the Planning Commission and accepted public testimony. (Dec. of
24 Nelson, **Exhibit 16**). It was again reiterated that the Fife Planning Commission
25

1 recommended permitting retail stores in specific areas. *Id.* On June 24, 2014, the Fife
2 City Council held a public hearing on the Ordinance (now designated Ordinance No.
3 1872), which would allow retail marijuana outlets in the City of Fife. (Dec. of Nelson,
4 **Exhibit 18**). The ordinance was approved as presented for first reading. *Id.*

5
6 After a short deliberation, Fife Councilmember Johnson moved to amend the
7 ordinance from its original intent of allowing marijuana uses in the City to an outright
8 ban on the production, processing, and retail sales of marijuana in the City of Fife. *Id.*
9 The City Council voted 5-2 in favor of the amendment. *Id.* Subsequently, on July 8,
10 2014, the Community Development Director and the City Attorney presented Ordinance
11 No. 1872, which prohibits marijuana production, processing, and retail sale in the City of
12 Fife. (Dec. of Nelson, **Exhibit 20**). The Ordinance became effective on July 15, 2014.
13 (Dec. of Nelson, **Exhibit 21**). The Ordinance is codified in the Fife Municipal Code and
14 establishes a total ban on the lawful production, processing, and retail sales of
15 recreational marijuana in the City of Fife.
16

17 The City will not accept applications for or issue business licenses for lawful
18 marijuana businesses. (Dec. of Henery, at ¶¶ 9, 10); (Dec. of Wetherbee, at ¶¶ 9, 10). In
19 addition, under the Fife Municipal Code, it is a misdemeanor to operate a business
20 without a license in the City of Fife. FMC § 5.01.200.

21 II. STATEMENT OF ISSUES

22 1. Under RCW 69.50.608, does the state of Washington fully occupy and
23 preempt the entire field of setting penalties for violations of the Washington Uniform
24 Controlled Substances Act ("UCSA") when (1) cities may enact only those laws and
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1 ordinances relating to controlled substances that are consistent with RCW 69.50 *et*
2 *seq.*; (2) local laws and ordinances that are inconsistent with the requirements of State
3 law cannot be enacted and are preempted and repealed, regardless of the nature of the
4 code, charter, or home rule status of the city, town, county, or municipality; (3) Fife
5 Ordinance No. 1872 prohibits the issuance of a business license for marijuana
6 business; and (4) operating a business in the City of Fife without a Fife business license
7 is punishable by 90 days in jail and a \$1,000.00 fine under FMC § 5.01.200.

9 2. Under article XI, section 11 of the Washington State Constitution, does
10 Ordinance No. 1872 conflict with State law when (1) a city may make and enforce within
11 its limits all such local police, sanitary, and other regulations that do not conflict with
12 general laws, (2) an ordinance conflicts with general laws if it prohibits that which a
13 statute permits, and (3) Ordinance No. 1872 prohibits what RCW 69.50 *et seq.* allows.

14 3. Under article I, section 16 of the Washington State Constitution, does
15 Ordinance No. 1872 constitute an unlawful taking when (1) Ordinance No. 1872
16 derogates the Plaintiffs' ability to make economically viable use of their property; (2)
17 Ordinance No. 1872 impairs the public interest in health, safety, the environment, and
18 the fiscal integrity of the area by circumventing Washington's interest in reducing crime,
19 generating tax revenue, and eradicating illegal drug organizations; (3) Ordinance No.
20 1872 does not advance a legitimate state interest; and (4) any interest advanced by
21 Ordinance No. 1872 is outweighed by its adverse economic impact to the Plaintiffs and
22 the citizens of Fife.

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III. EVIDENCE RELIED UPON

The files and records herein including, but not limited to the following:

1. Declaration of Mark D. Nelson in Support of Plaintiffs' Motion for Partial Summary Judgment, with Exhibits.
2. Declaration of Edward Weatherbee in Support of Plaintiffs' Motion for Partial Summary Judgment, with Exhibits.
3. Declaration of Mike Henery in Support of Plaintiffs' Motion for Partial Summary Judgment, with Exhibits.

IV. AUTHORITY

A. SUMMARY JUDGMENT STANDARD

CR 56(c) directs a court to grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A material fact is one upon which the outcome of the litigation depends. *Ruff v. Cnty. of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). Summary judgment is not proper if "reasonable minds could draw different conclusions from undisputed facts, or if all of the facts necessary to determine the issues are not present." *Ward v. Coldwell Banker/San Juan Props., Inc.*, 74 Wn. App. 157, 161, 872 P.2d 69 (1994). Summary judgment is proper in an action for declaratory judgment. *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358, 362 (1998).

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1 **B. INTRODUCTION**

2
3 I-502, approved by Washington's citizens and codified by the State Legislature at
4 RCW 69.50 *et seq.* and WAC 314-55 *et seq.*, does more than create a narrow defense
5 to marijuana use and possession. It provides a statutory right to obtain marijuana legally
6 through large-scale commercial production, processing, and retail operations. The law
7 requires the "provision of adequate access to licensed sources of useable marijuana
8 and marijuana-infused products to discourage purchases from the illegal market." RCW
9 69.50.345. These provisions are intended to be applied uniformly throughout the state.

10 Despite the express intent I-502, the City of Fife passed Ordinance No. 1872.
11 Ordinance No. 1872 as codified amends numerous sections of the Fife Municipal Code
12 to define marijuana related land uses as prohibited uses in each of Fife's zoning
13 districts.

14 In passing Ordinance No. 1872, the City of Fife disregards the will of the voters
15 and the intent of our Legislature. Municipalities generally possess constitutional
16 authority to enact zoning ordinances as an exercise of their police power. article XI,
17 section 11. However, a municipality may not enact a zoning ordinance that is either
18 preempted by or in conflict with state law. *HJS Dev., Inc. v. Pierce County ex rel. Dep't*
19 *of Planning & Land Servs.*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003). Ordinance No.
20 1872 is both preempted by and in conflict with state law.

21 Moreover, Ordinance No. 1872 unconstitutionally destroys individuals' ability to
22 make economically viable use of their property interests. In violation of Washington
23 State Constitution article I, section16, Ordinance No. 1872 impairs the public interest in
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1 health and safety by circumventing Washington's interest in reducing crime, generating
2 tax revenue, and regulating the marijuana market. Because the ordinance deprives
3 individual property rights without advancing a legitimate state interest, Ordinance No.
4 1872 is an unconstitutional regulatory taking.
5

6 No opt out powers are expressly offered to local governments by I-502 as
7 codified. The voters and Legislature expressly tasked the State with jurisdiction over the
8 recreational marijuana trade. The general law is thorough and creates a pervasively
9 regulated industry to which the Legislature did not leave room for localities to interfere.
10 "The interests of all Washington residents, codified by statute, cannot be impliedly
11 abdicated to the purview of local governments." *Biggers v. City of Bainbridge Island*,
12 162 Wn.2d 683, 687, 169 P.3d 14, 17 (2007). Because Ordinance No. 1872 directly
13 conflicts with state law and constitutes an unlawful taking, this Court should declare the
14 ordinance invalid.
15

16 C. THE COURT SHOULD DECLARE ORDINANCE 1872 STATUTORILY
17 PREEMPTED BY STATE LAW BECAUSE THE STATE OF
18 WASHINGTON EXPRESSLY PREEMPTS THE FIELD OF
19 REGULATION OF RECREATIONAL MARIJUANA.

20 Preemption occurs when the Legislature states its intention either expressly or by
21 necessary implication to preempt the field. *Brown v. City of Yakima*, 116 Wn.2d 556,
22 559, 807 P.2d 353 (1991). If the Legislature is silent as to its intent to occupy a given
23 field, the court may look to the purposes of the statute and to the facts and
24 circumstances upon which the statute was intended to operate. *Lenci v. Seattle*, 63
25 Wn.2d 664, 669, 388 P.2d 926 (1964). If, however, the Legislature "affirmatively

1 expresses its intent, either to occupy the field or to accord concurrent jurisdiction, there
2 is no room for doubt." *Id.* at 670. Here, there is no room for doubt.

3
4 The legislature is not silent as to its intent to occupy the field of recreational
5 marijuana regulation. The state of Washington fully occupies and preempts the entire
6 field of setting penalties for violations of the State's controlled substances act and only
7 authorizes cities to enact ordinances relating to controlled substances that are
8 consistent with RCW 69.50 *et seq.* RCW 69.50.608. In addition to the Legislature's
9 express declaration, their intent to preempt the field can be implied from the subject
10 matter and the intent of the act.

11 **a. State law expressly preempts the field of setting penalties for**
12 **violations of Washington's Uniform Controlled Substances Act.**

13 RCW 69.50.608 expresses the Legislature's intent to preempt the field of setting
14 penalties for violations of the controlled substances act. The statute states:

15 The state of Washington fully occupies and preempts the entire
16 field of setting penalties for violations of the controlled substances act.
17 Cities, towns, and counties or other municipalities may enact only those
18 laws and ordinances relating to controlled substances that are consistent
19 with this chapter. Such local ordinances shall have the same penalties as
20 provided for by state law. Local laws and ordinances that are inconsistent
21 with the requirements of state law shall not be enacted and are preempted

22 RCW 69.50.608.

23 A similar preemption clause appears in RCW 35A.11.020, the statute which
24 defines the powers vested in a city council. A city may adopt and enforce ordinances.
25 However, the punishment for any criminal ordinance shall be the same as the
punishment provided in state law for the same crime. RCW 35A.11.020. Thus, under

1 RCW 69.50.608 and RCW 35A.11.020, a city may not enact an ordinance which
2 imposes criminal penalties for conduct which is not criminal under State law.

3
4 **b. Fife Ordinance No. 1872 creates criminal penalties for violations of
Washington's Uniform Controlled Substances Act.**

5 Under State law, there is not a penalty for producing, processing, or selling
6 recreational marijuana. However, Fife Ordinance No. 1872 makes such conduct a
7 criminal misdemeanor. Specifically, the Ordinance prohibits the issuance of a Fife
8 business license to a WSLCB licensed producer, processor, or retailer. Therefore, if a
9 WSLCB licensee operated their business in the City of Fife, they would be subject to 90
10 days in jail and a \$1,000.00 fine for each day that they do not comply with Fife's
11 licensing requirements. See FMC § 5.01.200. The Ordinance creates criminal penalties
12 that do not exist under State law. Such penalties are expressly preempted by RCW
13 69.50.608 and RCW 35A.11.020.

14
15 **c. Fife Ordinance No. 1872 is not consistent with RCW 69.50 et seq. and
16 is thus preempted.**

17 The City relies on *City of Tacoma v. Luvene* to support its position that the
18 Legislature did not expressly preempt the field of recreational marijuana regulation. 118
19 Wn.2d 826, 827 P.2d 1374 (1992). The City's reliance is misplaced. In *Luvene*, our
20 Supreme Court determined that RCW 69.50.608 expressly preempts the field of setting
21 penalties for violations of the UCSA. While the Court found the statute grants *some*
22 *measure* of concurrent jurisdiction to municipalities, any ordinance adopted in the
23 exercise of this jurisdiction must be "*consistent with the UCSA.*" *Id.* at 834. Ordinance
24 No. 1872 is not consistent with the UCSA. An ordinance which outright bans and
25

1 completely subverts the tightly regulated state licensing scheme set forth in RCW 69.50
2 *et seq.* cannot be deemed consistent with Washington law.

3
4 **d. RCW 69.50 does not grant municipalities concurrent authority.**

5 While RCW 69.50.608 contemplates the existence of “ordinances relating to
6 controlled substances that are consistent,” there is no express grant of concurrent
7 jurisdiction within the UCSA. *Id.* The grant of jurisdiction in RCW 69.50.608 is
8 conditional; any enacted ordinance must be consistent with the rest of the Act. There is
9 no express nod to localities as to how they will be involved in zoning, administration, or
10 taxation or any other subject that is not consistent with the UCSA.

11 This silence with regard to the extent of a municipality’s authority is in sharp
12 contrast to the Washington Medical Use of Cannabis Act (“MUCA”). The MUCA,
13 codified at RCW 69.51A *et seq.*, establishes a regulatory scheme for qualifying patients
14 to lawfully use marijuana for medical purposes. Unlike I-502, the MUCA includes a
15 section specifically granting regulatory powers to municipalities.

16
17 Cities and towns may adopt and enforce any of the following
18 pertaining to the production, processing, or dispensing of cannabis or
19 cannabis products within their jurisdiction: Zoning requirements, business
20 licensing requirements, health and safety requirements, and business
21 taxes. Nothing in chapter 181, Laws of 2011 is intended to limit the
22 authority of cities and towns to impose zoning requirements or other
23 conditions upon licensed dispensers, so long as such requirements do not
24 preclude the possibility of siting licensed dispensers within the jurisdiction.

25
26 RCW 69.51A.140(1); *See Cannabis Action Coal. v. City of Kent*, 180 Wn. App. 455, 322
27 P.3d 1246, 1257 (2014). The MUCA expressly authorizes cities to enact zoning
28 requirements to regulate or exclude medical uses. A similar grant of express authority is

1 absent from RCW 69.50.

2 This legislative silence cannot be ignored. The court cannot add words or
3 clauses to an unambiguous statute when the Legislature has chosen not to include that
4 language. We assume the Legislature "means exactly what it says." *Davis v. Dep't of*
5 *Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999). Here, the Legislature
6 unambiguously elected not to grant cities specific authority to restrictively zone or the
7 authority to ban I-502 uses. Because the plain language of the UCSA lacks such
8 authorization, the City's authority must be limited to ordinances *consistent* with the
9 UCSA.
10

- 11 **e. The Legislature's intent to preempt the field is implied by the**
12 **purposes of the statute and by the facts and circumstances upon**
13 **which the statute was intended to operate.**

14 The court considers several factors when examining whether the Legislature has
15 preempted an area by implication. One factor evincing legislative intent to preempt is
16 whether the Legislature has created a single uniform standard intended for state-wide
17 application. *Spokane v. Portch*, 92 Wn.2d 342, 348, 596 P.2d 1044 (1979) (need for a
18 single standard defining obscenity was a factor indicating preemption by implication in
19 the area). The greater the local concern in a particular area of legislation, the less likely
20 a single uniform state-wide standard is needed and the less likely a local ordinance will
21 be preempted by state legislation in the area. *Pasco v. Ross*, 39 Wn. App. 480, 482,
22 694 P.2d 37 (1985) (subject of criminal assault one of mixed state and local concern;
23 therefore local assault ordinance not preempted by state criminal statute). Here, the
24 statewide production and distribution of marijuana requires a uniform standard. Thus,
25

1 the state preemption is implicated.

2 The court may also look to the purposes of the statute and to the facts and
3 circumstances upon which the statute was intended to operate. *Lenci*, 63 Wn.2d at 669.
4 I-502 was enacted by a majority of the voters of in Washington. The stated intent in
5 enacting I-502 was as follows:
6

7 [T]o stop treating adult marijuana use as a crime and try a new approach that:

- 8 (1) Allows law enforcement resources to be focused on violent and property
9 crimes;
10 (2) Generates new state and local tax revenue for education, health care,
11 research, and substance abuse prevention; and
12 (3) Takes marijuana out of the hands of illegal drug organizations and brings it
13 under a tightly regulated, state-licensed system similar to that for controlling
14 hard alcohol.

15 Laws of 2013, ch. 3, § 1 (Initiative 502, Part I "Intent," Section 1). This measure
16 authorizes the Washington State Liquor Control Board to regulate and tax marijuana for
17 persons twenty-one years of age and older and it adds a new threshold for driving under
18 the influence of marijuana. *Id.* Allowing bans such as Fife Ordinance No. 1872 renders
19 this intent meaningless.

20 The State of Washington Voters' Pamphlet for the November 6, 2012, General
21 Election, also provides extrinsic evidence of the voters' intent. *See Roe v. TeleTech*
22 *Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 752, 257 P.3d 586 (2011).
23 Here, the voters' pamphlet reinforces what has already been determined above. The
24 pamphlet specifically states that "[a] license to process marijuana would make it legal
25 under state law to process and package marijuana . . . Licensed retailers could sell
marijuana, and products containing marijuana, to consumers at retail." The pamphlet

1 continues, providing that “[t]he state could deny, suspend, or cancel licenses. Local
2 governments could submit objections for the state to consider in determining whether to
3 grant or renew a license.” A holistic review of the voters’ pamphlet makes it clear that
4 the intent was that the Washington State Liquor Control Board would be the regulatory
5 authority and that the voters’ intended that marijuana be accessible and sold at retail
6 without interference from local authorities. The Legislature has stated its intention
7 expressly and by necessary implication to preempt the field. Ordinance No. 1872 thus
8 exceeds the City’s authority and should be invalidated.
9

10 **D. THE COURT SHOULD DECLARE ORDINANCE 1872 TO BE**
11 **CONSTITUTIONALLY PREEMPTED BECAUSE IT CONFLICTS WITH**
12 **STATE LAW.**

13 An ordinance that is not expressly preempted may nevertheless be invalid if it
14 conflicts with state law. Under article XI, section 11, a city may make and enforce within
15 its limits all such local police, sanitary, and other regulations that do not conflict with
16 general laws. A city ordinance is unconstitutional under article XI, section 11, if “(1) the
17 ordinance conflicts with some general law; (2) the ordinance is not a reasonable
18 exercise of the city’s police power; or (3) the subject matter of the ordinance is not
19 local.” *Edmonds Shopping Ctr. Assocs. v. City of Edmonds*, 117 Wn. App. 344, 351, 71
20 P.3d 233 (2003). Here, Ordinance No. 1872 is invalid because it conflicts with the
21 UCSA, unreasonably exceeds the authority of the City’s police powers, and undermines
22 a subject of state-wide importance.

23 //

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1 a. **Ordinance No. 1872 is unconstitutional because it conflicts with**
2 **State law.**

3 An ordinance conflicts with state law if it permits what state law forbids or forbids
4 what state law permits. *Parkland Light & Water Co. v. Tacoma–Pierce County Bd. of*
5 *Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004). The focus of the inquiry is on the
6 substantive conduct proscribed by the two laws. *State v. Kirwin*, 165 Wn.2d 818, 826,
7 203 P.3d 1044, 1048 (2009). A conflict arises when the two provisions are contradictory
8 and cannot coexist. *Parkland Light*, 151 Wn.2d at 433. If an ordinance conflicts with a
9 statute, the ordinance is invalid. *Id.* at 434. Ordinance No. 1872 is wholly contradictory
10 to the statutes providing for the production and sale of marijuana under RCW 69.50 *et*
11 *seq.* Therefore, the ordinance is invalid.

12
13 At issue in *State v. Kirwin* was a city ordinance and a state statute that prohibited
14 littering. The ordinance and statute contained virtually identical language with the
15 exception that the city ordinance imposed a harsher penalty for littering than did the
16 statute. 165 Wn.2d at 825. Using an article XI, section 11 analysis, the Court found that
17 the different penalties did "not create an impermissible direct conflict." *Id.* at 827. The
18 Court held as follows:

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

24 *Id.* Here, the conflict is evident. The Fife Ordinance prohibits the precise conduct that
25 the State statute permits: the production, processing, and sale of marijuana. Under,

1 *Kirwin*, the City's prohibition of the conduct permitted by the state give rise to an
2 irreconcilable conflict which invalidates the ordinance.⁵
3

4 City of *Seattle v. Eze* provides a similar analysis. 111 Wn.2d 22, 33, 759 P.2d
5 366 (1988). There, the court reviewed a challenge to the constitutionality of an
6 ordinance prohibiting disorderly conduct on a bus. Eze argued that the ordinance
7 unconstitutionally conflicted with the state law because the Seattle ordinance prohibited
8 a wider range of activity than did the state statute. In holding that no conflict existed, the
9 court found that a conflict between an ordinance and a statute will not exist where,

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

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

17 The Washington Supreme Court also found impermissible conflict in *Parkland*
18 *Light & Water Co. v. Tacoma–Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90
19 P.3d 37 (2004) as well. That case involves a dispute over the Tacoma–Pierce County
20 Board of Health's resolution requiring municipal water districts to fluoridate their water.
21 The Court held that the resolution conflicted with a statute which gave water districts the
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23 ⁵ While concurring with the majority with regard to the underlying search incident to arrest, Justice
24 Madsen found an irreconcilable conflict between the ordinance and the statute under article 1, section 12.
25 See *State v. Mason*, 34 Wh.App. 514, 663 P.2d 137 (1983) (ordinance invalid where it contravenes the
penalty provisions chosen by the Legislature to punish the crime of promoting prostitution).

1 power to control the content of their water systems and, with that power, the authority to
2 fluoridate their water. *Id.* at 434. The Court took great exception to the fact that the
3 resolution deprived the water districts the specific statutory power and discretion
4 provided by the Legislature. *Id.* Similarly, the Ordinance here divests the WSLCB of its
5 statutory grant of authority to regulate the siting of marijuana production and retail. As in
6 *Parkland Light*, the Ordinance fails in its entirety because of this conflict.
7

8 In *Entertainment Indus. Coal. v. Tacoma-Pierce County Board of Health*, 153
9 Wn.2d 657, 105 P.3d 985 (2005), businesses filed an action challenging a county
10 resolution banning smoking in all public establishments. The Court held that the Health
11 Board resolution irreconcilably conflicted with specific state statutory provisions which
12 allowed smoking areas to be designated in a public place by the owner of an
13 establishment. *Id.* at 664. The resolution, by imposing a complete smoking ban,
14 prohibited what was permitted by state law. The Court found this conflict irreconcilable
15 and concluded that “[b]y prohibiting what the statute allows, the Health Board’s
16 resolution is invalid.” *Id.* Similarly, Fife Ordinance No. 1872 cannot stand.
17

18 **b. Enactment of Ordinance No. 1872 exceeds the authority of the City’s**
19 **police powers and as such is unreasonable.**

20 The Ordinance must be a “reasonable” exercise of the City’s police power in
21 order to pass muster under article XI, section 11 of the Washington State Constitution.
22 *City of Seattle v. Montana*, 129 Wn.2d 583, 591, 919 P.2d 1218 (1996). A two-part test
23 applies to determine whether a law is a reasonable exercise of the police power. *Weden*
24 *v. San Juan County*, 135 Wn.2d 678, 692, 958 P.2d 273 (1998). First, the regulation
25

1 "must promote the health, safety, peace, education, or welfare of the people." *Id.* at 700.
2
3 Second, the requirements of the regulation "must bear some reasonable relationship to
4 accomplishing the purpose underlying the statute." *Id.* An ordinance may be struck
5 down if it is shown that it is unreasonable, arbitrary, or capricious.

6 Ordinance No. 1872 undermines the health and safety of the people. As argued
7 herein, I-502 creates statewide DUI laws and generates new state and local tax revenue
8 for education, health care, research, and substance abuse prevention. I-502 will allow
9 law enforcement to focus on violent and property crimes and combat the illegal drug
10 market, and it will bring marijuana under a tightly regulated, state-licensed system. Five
11 Ordinance No. 1872 does nothing but undermine the State effort to take a new
12 approach to curing Washington's failed marijuana policies. As such the ordinance is not
13 a reasonable use of the City's police power.

14 **c. The statewide distribution of Marijuana is not of Just Local Concern.**

15 I-502 clearly references the regulation and distribution of marijuana in the context
16 of a statewide, general concern. I-502 authorizes the state liquor control board to
17 regulate and tax marijuana for persons twenty-one years of age and older and creates
18 statewide DUI laws to combat driving under the influence of marijuana. I-502 was
19 enacted to generate new state and local tax revenue for education, health care,
20 research, and substance abuse prevention. Moreover, the law was enacted to take
21 "marijuana out of the hands of illegal drug organizations and bring it under a tightly
22 regulated, state-licensed system similar to that for controlling hard alcohol." Laws of
23 2013, ch. 3, § 1 (Initiative 502, Part I "Intent," Section 1).
24
25

1 Ordinance No. 1872 does not merely supplement or add to the regulatory
2 scheme established by I-502, it flatly prohibits any of the uses that are expressly
3 provided for in RCW 69.50 *et seq.* Fife's ordinance renders the state regulations
4 meaningless. A local municipality usurping the authority of the State on an issue of
5 statewide importance is not permissible under article XI, section 11.
6

7 **E. FIFE ORDINANCE NO. 1872 IS AN UNJUST TAKING BECAUSE IT**
8 **DEROGATES PLAINTIFFS' ABILITY TO MAKE ECONOMICALLY**
9 **VIABLE USE OF THEIR PROPERTY AND IT CANNOT BE JUSTIFIED**
10 **BY ANY LEGITIMATE EXERCISE OF POWER FOR THE PUBLIC**
11 **INTEREST IN HEALTH, SAFETY, OR WELFARE.**

12 The Washington Supreme Court has established a two-part test to determine if a
13 claim is for a taking of property for which compensation must be paid or is a claim for
14 deprivation of substantive due process. *See Robinson v. City of Seattle*, 119 Wn.2d 34,
15 49, 830 P.2d 318, 327 (1992); *Presbytery of Seattle v. King County*, 114 Wn.2d 320,
16 329, 787 P.2d 907, 912 (1990); *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993).

17 At the threshold level, two questions must be addressed: (1) does the regulation
18 destroy or derogate any fundamental attribute of property ownership, including the right
19 to possess, to exclude others, to dispose of property, or to make some economically
20 viable use of the property; and (2) does the regulation protect the public interest in
21 health, safety, the environment, or fiscal integrity or does the regulation go beyond
22 prevention of a harm and impose on those regulated the requirement of providing an
23 affirmative public benefit. *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318
24 (1992).
25

1 If either of the threshold questions are answered affirmatively, the court
2 considers two additional points. *Robinson*, 119 Wn.2d at 50. First, the court examines
3 whether the regulation substantially advances a legitimate state interest. *Id.* If it does
4 not, the regulation automatically constitutes a taking. *Id.* Second, the court conducts a
5 balancing test to determine if the state interest in the regulation is outweighed by its
6 adverse economic impact to the landowner. *Guimont*, 121 Wn.2d at 604. The court
7 must pay attention to the regulation's economic impact on the property, the extent the
8 regulation interferes with investment-backed expectations, and the character of the
9 government action. *Id.* Because Ordinance No. 1872 destroys a fundamental property
10 interest, undermines the public interest in public health, safety, and welfare, and fails to
11 advance a legitimate state interest, a taking has occurred.

12
13 **a. Ordinance No. 1872 derogates Plaintiffs' ability to make**
14 **economically viable use of their property.**

15 The first threshold question is whether the regulation destroys or derogates a
16 fundamental attribute of the property, including the ability to make some economically
17 viable use of the property. *Guimont*, 121 Wn.2d at 602. Ordinance No. 1872 eliminates
18 Plaintiffs' ability to make economic use of their state licenses. Not only does the
19 Ordinance prevent Plaintiffs from obtaining a Fife business license, but FMC § 5.01.200
20 makes it a misdemeanor to operate an unlicensed business in the City of Fife. As a
21 result, Plaintiffs are precluded from operating the businesses that they have invested
22 substantial time and money into, including the time and resources necessary to obtain
23 state licenses and to establish their businesses.

1 **b. Ordinance No. 1872 impairs the public interest in health, safety, the**
2 **environment, and the fiscal integrity of the area by circumventing**
3 **Washington's interest in reducing crime, generating tax revenue, and**
4 **eradicating illegal drug organizations.**

5 The second threshold question is whether the regulation protects the public
6 interest in health, safety, the environment, or fiscal integrity of the area or if it goes
7 beyond prevention of a harm and imposes on those regulated the requirement of
8 providing an affirmative public benefit. *Robinson v. City of Seattle*, 119 Wn.2d 34, 830
9 P.2d 318 (1992); *See also Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 14-15 (1992).

10 Ordinance No. 1872 directly circumvents the public interest in reducing crime,
11 generating tax revenue, and eradicating illegal drug organizations. Thus, it impairs the
12 public interest in health, safety, the environment, and the fiscal integrity of the area.

13 The stated intent of I-502, as approved by the citizens of Washington is to (1)
14 allow law enforcement resources to be focused on violent and property crimes; (2)
15 generate new state and local tax revenue for education, health care, research, and
16 substance abuse prevention; and (3) take marijuana out of the hands of illegal drug
17 organizations and bring it under a tightly regulated, state-licensed system similar to that
18 for controlling hard alcohol. There is no question that the purpose for legalizing
19 recreational marijuana and making it widely available is to not only produce tax
20 revenues that will be used to support education and prevention programs, but also to
21 reduce illegal activities associated with marijuana.

22 In *Weden v. San Juan County*, the Washington Supreme Court concluded that
23 "the State may interfere wherever the public interest demand it, and in this particular a
24

1 large discretion is necessarily vested in the legislature to determine, not only what the
2 interests of the public require, but what measures are necessary for the protection of
3 such interests." 135 Wn.2d 678, 958 P.2d 273 (1998). The court continued, stating that
4 "[i]n determining whether . . . particular legislation tends to promote the welfare of the
5 people of the State of Washington, [the court] must presume that if a conceivable set of
6 facts exists to justify the legislation, then those facts do exist and the legislation was
7 passed with reference to those facts." *Id.* at 705. Here, I-502 was passed in an effort to
8 reduce criminal enterprises revolving around marijuana. Specifically, our Legislature
9 determined that marijuana needed to be widely available to the public in order to
10 achieve the State's objective of reducing criminal enterprises. By prohibiting marijuana
11 in cities and counties, those cities and counties are destroying the purposes upon which
12 I-502 was passed.
13

14 In *Edmonds Shopping Center Associates and Paradise, Inc.*, localities passed
15 ordinances banning social card rooms. 117 Wn. App. 344 (2003); 124 Wn. App. 759
16 (2004). To support the determination that the ordinances protected the public health,
17 safety, and welfare, the courts looked to the language of the governing statutes. The
18 courts noted that the statutes specifically authorized municipalities to "absolutely
19 prohibit" gambling activities. *Edmonds*, 117 Wn. App. at 241; *Paradise*, 124 Wn. App. at
20 771. Here, the Ordinance is distinguishable from the laws in *Edmonds* and *Paradise* in
21 that the Ordinance directly conflicts with RCW 60.50 *et seq.* RCW 69.50 *et seq.*
22 decriminalizes recreational marijuana possession and use and allows for the
23 establishment of state-regulated, revenue-generating retail marijuana outlets.
24
25

1 By enacting RCW 69.50 *et seq.*, the citizens of Washington sought to reduce
2 crime, generate revenue, and protect resources. To accomplish these goals, it is
3 necessary to ensure that marijuana is widely available to the public via a highly
4 regulated, state run distribution system. Ordinance No. 1872 directly conflicts with these
5 stated purposes.

6
7 **c. Ordinance No. 1872 does not advance a legitimate state interest.**

8 Ordinance No. 1872 does not advance a legitimate state interest and, in fact,
9 directly contradicts the interests of the citizens of the State of Washington in as
10 expressed in I-502. Throughout the rule making process, members of the Fife City
11 Council voiced their dissatisfaction with the lack of tax revenues and financial benefit
12 flowing to the individual cities. However, such dissatisfaction is not a legitimate state
13 interest and any such concerns are insufficient justifications for enacting an ordinance
14 that conflicts with voter-approved legislation and circumvents the state's legitimate
15 interest in regulating recreational marijuana.

16
17 Ordinance No. 1872 purports to "promote the public health, safety, morals, and
18 general welfare." However, it offers no support for the position that banning licensed
19 retail marijuana outlets will promote such interests. Rather, Fife's own Planning
20 Commission, after a year of compiling studies on the secondary effects of marijuana,
21 recommended an ordinance allowing the production, processing, and retail of marijuana
22 within the City of Fife. The Planning Commission's conclusion was consistent with the
23 voter's approval of I-502 and the State's subsequent codification of RCW 69.50 *et seq.*
24 As Ordinance No. 1872 directly conflicts with the State's conclusion as to what the
25

1 interests of the public require, the ordinance cannot be said to advance any legitimate
2 state interest.

3
4 **d. Any interest advanced by Ordinance No. 1872 is outweighed by its
adverse economic impact to the Plaintiffs.**

5 Finally, the court must determine if any alleged state interest in the regulation is
6 outweighed by its adverse economic impact to the landowner. *Edmonds*, 117 Wn. App.
7 at 362-63. In particular, the court considers: (1) the regulation's economic impact on the
8 property; (2) the extent of the regulation's interference with investment-backed
9 expectations; and (3) the character of the government action. *Guimont*, 121 Wn.2d at
10 604. As previously discussed, the Ordinance advances no legitimate state interest
11 because it directly conflicts with the state interest as codified by RCW 69.50 *et seq.*

12
13 Any interest the City of Fife may allege is outweighed by the significant adverse
14 economic impact to the Plaintiffs. Plaintiffs have invested significant time, energy, and
15 finances into developing state-licensed retail marijuana outlets. Plaintiffs made
16 substantial investments in acquiring the state licenses and obtaining a location for their
17 business. They also had a reasonable investment-backed expectation that their retail
18 marijuana outlets would be operational given their compliance with all licensing
19 procedures specified in RCW 69.50 *et seq.* and the WSLCB Rules. The economic
20 impact of Ordinance No. 1872 effectively destroys the value of their investment despite
21 the fact that the City of Fife has no legitimate interest in enforcing the Ordinance.
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V. RELIEF REQUESTED

The Court should grant summary judgment to Plaintiffs and enter judgment declaring Fife Ordinance No. 1872 to be unconstitutional as it is expressly preempted by state law, is in conflict with state law, and constitutes an impermissible taking. Additionally, the Court should enjoin the City from enforcing the Ordinance against the Plaintiffs and Issue a Writ commanding the City to issue Plaintiffs' business license.

RESPECTFULLY SUBMITTED this 1st day of August, 2014.

DAVIES PEARSON P.C.



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