Honorable Judge Culpepper

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

MMH, LLC, a Washington Limited liability Company and GRAYBEARD HOLDINGS, LLC, a Washington Limited Liability Company Plaintiff, vs. CITY OF FIFE, a Washington municipal corporation, Defendant.	No. 14-2-10487-7 (Companion Case 14-2-10485-1) DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW, the City of Fife (hereafter "City"), by and through its attorneys of record, Loren D. Combs, Gregory F. Amann, and Jennifer Combs of VSI Law Group, LLC, and submits this Response to the Plaintiff's Motion for Partial Summary Judgment.

I. INTRODUCTION

The questions before the Court are as follows:

1. Does the City of Fife have the legal right under state law to ban marijuana land uses within its city limits or does a state marijuana land use law exist which preempts it?

2. Is any ban of marijuana land uses within the city limits an impermissible taking?

3. If the City of Fife's marijuana land use laws are otherwise preempted by state

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

marijuana land use law, does the federal Controlled Substances Act, in turn, preempt, and nullify, the State's marijuana land use laws?

4. Is it within the Court's equity power to compel the City of Fife to permit land uses and actions that are explicitly criminal under federal law and expose the City of Fife to criminal prosecution?

The above are all questions of law. There are no questions of material fact. The brief answers are:

1. Yes, the City of Fife has the legal right under state law to ban marijuana land uses because there is no state marijuana land use law which preempts it from doing so.
2. No, the City of Fife's ban on marijuana land uses is not an impermissible taking.
3. Yes, the CSA does preempt the state's marijuana land use laws.
4. No, it is not within the Court's equity power to compel the City of Fife to permit land uses and actions that are explicitly criminal under federal law and expose the City of Fife to criminal prosecution.

II. STATEMENT OF FACTS

A. US Federal Government Makes Marijuana A Federally Regulated Controlled Substance

The Controlled Substances Act ("CSA") was passed as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and was signed into law by President Nixon. The CSA is the U.S. federal drug policy under which the manufacture, importation, possession, use, sale, and distribution of certain substances is regulated. One of those substances is marijuana and its cannabinoids. There are five classifications of drugs under the CSA, called "schedules", with Schedule 5 being the least

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

regulated, and Schedule 1 being the most regulated. Marijuana and its cannabinoids are classified in the CSA as a Schedule 1 drug.

The CSA contains several sections relating directly to controlled substances like marijuana, including criminal provisions. 21 USC 841(a) states that "it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." The CSA is current federal law and in effect today.

B. Washington Governor Vetoes State Dispensary Licensing Scheme For Medical Marijuana On Federal Illegality And Liability Concerns

In April 2011, then-Washington Governor Christine Gregoire vetoed large portions of a bill (E2SSB 5073) that was designed to create a state licensing scheme and dispensary system for medical marijuana.[1] She vetoed any parts of the bill that involved state licensing and regulating of medical marijuana after receiving the opinions of the U.S. Attorneys for the Western and Eastern Districts of Washington that marijuana remained illegal under federal law, via the CSA, and "[S]tate employees who conduct activities mandated by the Washington legislative proposals w[ill] not be immune from liability under the CSA."[2] Nothing in the bill, either pre- or post-line-item veto claimed to legalize marijuana under federal law.

C. Washington State Legalizes Recreational Marijuana In Conflict With Federal Law

On November 6, 2013, Washington citizens approved Initiative 502 ("I-502"), which created a state licensing and regulatory scheme for the production, processing, and retail sale of recreational

---

[1] Declaration of Jennifer Combs, Exhibit B

[2] Id., Exhibit A

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

marijuana. The Initiative contained no language regarding the issue of state preemption. The Initiative was codified in RCW 69.50, which does have a preemption section as part of the chapter. RCW 69.50.608 states that "The state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act." (emphasis added) I-502 directed the Washington State Liquor Control Board (WSLCB) to adopt rules and procedures for the licensing of recreational marijuana producers, processors, and retailers. RCW 69.50.354 states: "There may be licensed, in no greater number in each of the counties of the state than as the state liquor control board shall deem advisable." (emphasis added). There was no minimum number of licenses required.

D. WSLCB Acknowledges Local Municipal Authority To Regulate Marijuana Land Uses

Part of the rules and procedures adopted by the WSLCB regarding marijuana license qualifications and application process is the statement that "The issuance or approval of a license [from the WSLCB] shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements." (WAC 314-55-020(11). Nothing in I-502, or the adopted rules of the WSLCB, claimed to legalize marijuana under federal law.

E. Washington State Attorney General Acknowledges Local Municipal Authority To Regulate Marijuana Land Uses

On January 16, 2014, at the request of the WSLCB, the Washington State Attorney General's office issued an Opinion (AGO 2014 No. 2) regarding the issue of local governments banning marijuana

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

businesses within their jurisdictions.[3] It was the conclusion of the Attorney General that local government bans of marijuana businesses were neither field preempted nor conflict preempted, and thus, valid and constitutional.

F. Plaintiff Participates In The City Of Fife Land Use Regulation Process

While under a year long moratorium, the City of Fife engaged in a process of evaluating the issue of marijuana land uses within the city limits. This process involved Planning Commission meetings, direct mass emails from Community Planning Director David Osaki, staff reports and presentations, and City Council meetings.[4] The Plaintiff, Tedd Wetherbee, was an attendee at almost every Planning Commission and City Council meeting on the subject, was a recipient of the direct mass emails from the Community Planning Director, and exchanged direct correspondence with the Community Planning Director on the subject.[5] Community Planning Director David Osaki repeatedly warns members of the public, and Tedd Wetherbee directly, that the Planning Commission is an advisory body only, that the City Council is not bound by whatever the Commission recommends, and that any actions taken based on the Commission were done so at a person's own risk.[6] Tedd Wetherbee directly acknowledges any actions he would take based on Planning Commission actions were at his own risk and that he understood the City Council was not bound by a Commission recommendation.[7]

G. After Consideration Of All Issues, City Of Fife Bans Marijuana Land Uses Within

---

[3] Id, Exhibit G

[4] Declaration of David Osaki

[5] Id, Declaration and Exhibits B & C

[6] Id, Exhibit C

[7] Id.

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

City Limits

The Fife City Council held a study session and a public hearing on the subject of marijuana land use, reviewed the Planning Commission recommendation, took public testimony, heard staff reports, and engaged in debate on the possible impacts on the City of Fife if such a land use was allowed. Ultimately, the Fife City Council found that it would not be in the best interest of the City of Fife to allow business uses involving marijuana, nor medical marijuana collective gardens, and that such a prohibition promoted the public health, safety, morals and general welfare and was consistent with the goals and policies of the Fife Comprehensive Plan. Thus, under the authority granted to it by Article XI, Section II of the Washington Constitution, RCW 69.51A.170, and the interpretation both of the State Attorney General and the WSLCB, the City of Fife voted on June 24, 2014 to ban all marijuana land uses within the city limits via Ordinance 1872[8].

III. RESPONSE TO ISSUES

A. The City's Ordinance Is Valid And Enforceable.

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

The City's Ordinance Is Presumed Constitutional

---

[8] Id, Exhibit E

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

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

B. The City Of Fife Is Not Preempted From Banning Marijuana Land Uses

A municipality can be preempted by the state in regard to making laws one of two ways: either field preemption or conflict preemption. Neither type of preemption is present, or applicable, regarding the local regulation of marijuana land use.

Field Preemption

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

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

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

The only explicit preemption clause anywhere in RCW 69.50 indicates an intent for the State to preempt the field of penalties for violations of the Uniform Controlled Substances Act, ("UCSA"), nothing else. RCW 69.50's preemption section, RCW 69.50.608, states "The state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act." (Emphasis added)

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

In addition, the failure to preempt must be construed as intentional. The state legislature has amended certain provisions of I-502 since it was first adopted. The most recent amendment, ESHB 2304, was approved on April 2, 2014, and took effect on June 12, 2014.[9] None of the Legislature's RCW 69.50 amendments include language regarding preemption of any kind. None of the Legislature's RCW 69.50 amendments state there must be a minimum number of marijuana businesses within a County or City, nor that there is any right for a marijuana businesses to be located within any incorporated city. If RCW 69.50 had listed these as explicit rights, then its intent would have been clear, but the Legislature's only directive in this area was to, by statute, delegate authority to the WSLCB to determine the maximum number of licenses that may (not must) be issued in one county, not set a minimum.[10] WSLCB then adopted WAC 314-55-020(11). The text of which reads:

> The issuance or approval of a license shall not be construed as a license for, or an approval of any violations of local rules or ordinances, including, but not limited to: Building and fire codes, zoning

---

[9] Declaration of Jennifer Combs, Exhibit D

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

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

ordinances, and business licensing requirements. WAC 314-55-020(11) (Emphasis added.)

Therefore, to the extent that the Legislature expressed intent at all, its apparent intent was to delegate authority to the WSLCB for decisions on local bans. As a result, the plaintiffs' claims of field preemption fail. The Legislature clearly did not intend to impose marijuana businesses where they are otherwise banned.

Conflict Preemption

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

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

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

> The statutory definitions in RCW 59.20.030 apply to any RV used as a permanent residence once a landlord-tenant relationship is established, but they do not require Mr. Lawson to lease a lot designed for a mobile home to the owner of such an RV. Nothing in the statute prevents landowners from choosing to whom they lease lots, and nothing in it prevents municipalities from regulating that choice. The statute simply regulates recreational vehicle tenancies, where such tenancies exist. Because Pasco's ordinance, former PMC 25.40.060, may be harmonized with the MHLTA, the two laws do not conflict. *Lawson* at 168 Wn.2d 692 and 230 P3d 1043.

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

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

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

Finally, in *Weden v. San Juan County*, the Supreme Court upheld a local limitation on an activity, (jet ski riding), otherwise allowed under State law. The Washington Supreme Court ruled that San Juan County's prohibition on motorized personal watercraft in certain waters presented no conflict with State law, even though the state law at issue created mandatory registration and safety

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

requirements for such watercraft, and expressly prohibited the operation of unregistered vessels. *Weden v. San Juan County*, 135 Wn.2d 678, 709-10, 958 P.2d 273 (1998).

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

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

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

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

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

and effect of a statute, and, since its adoption on November 11, 2013, it has stated that state marijuana business licenses must comply with local rules and regulations.

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

(Emphasis added.)

If the state legislature did not agree with the WSLCB's interpretation of I-502's meaning, it had ample opportunity to make that disagreement known. Since November 2013, the state legislature has made several changes to RCW 69.50, specifically relating to the sections on marijuana. ESHB 2304, for example, was approved on April 2, 2014 and went into effect on June 12, 2014.[11] None of the post-November 2013 changes disturbed WAC 314-55-020. This constitutes legislative acquiescence because "[t]he Legislature's failure to amend a statute interpreted by administrative regulation constitutes legislative acquiescence in the agency's interpretation of the statute [and] [t]his is especially true when the Legislature has amended the statute in other respects without repudiating the administrative construction." *Manor*, 131 Wn.2d 439, n.2 (1997).

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

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

---

[11] Declaration of Jennifer Combs, Exhibit D

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

Famers, 173 Wash.2d 296 at 308.

As stated above, the Attorney General opined in January 2014 that local governments may ban marijuana businesses within their jurisdictions and there is no field nor conflict preemption. Also as stated above, the Legislature has amended certain provisions of RCW 69.50 as recently as April 2014, and clearly had an opportunity to modify or overturn the Attorney General's opinion by statute. The Legislature did not do so. Therefore, the Courts should conclude that the Legislature has consented to the interpretation.

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

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

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

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

therefore, not undo what the Legislature clearly wishes to remain in place.

Fife Ordinance No. 1872 Does Not Create Criminal Penalties For Violations Of The Washington Uniform Controlled Substances Act.

Ordinance 1872 does not create criminal penalties for violations of the Washington Uniform Controlled Substances Act. Nowhere in the text of the ordinance does the word "criminal" or the word "penalty" even appear.[12] Fife Municipal Code (FMC) contains a facially neutral provision which states that:

> It is unlawful for any person to engage in business within the city without first procuring a license therefor from the city and paying the fees prescribed in this code. (FMC 5.01.020).

Failure to comply with FMC Chapter 5.01 Business and Special License Code is a misdemeanor, (FMC 5.01.200), but this does not create a criminal penalty for the producing, processing or selling of recreational marijuana. It, instead, creates a criminal penalty for operating a business within the City of Fife without a valid license, nothing more. The nature of the business is irrelevant, and to attempt to construe a general requirement for a business license otherwise is to stretch the plain meaning of the code to reach an absurd result.

Fife's Ordinance 1872 Promotes The Public Health, Safety, Morals, And General Welfare And Is Consistent With The Goals And Policies Of The Fife Comprehensive Plan

Plaintiffs correctly state the two-part test under *Weden v. San Juan County* to determine whether a law is a reasonable exercise of the police power granted by the Washington State Constitution. (135

---

[12] Declaration of David Osaki, Exhibit E

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

Wn.2d 678, 692, 958 P.2d 273 (1998). That test is:

1. does "the regulation promote the health, safety, peace, education, or welfare of the people," and

2. does "the regulation bear some reasonable relationship to accomplishing the purpose underlying the statute." (*Id.* at 700).

The Fife City Council considered its decision in accordance with the above criteria by taking testimony, reviewing staff reports, and debating the merits of allowing marijuana land use within the city limits. Specifically, it considered the fact that, while I-502 created a generous tax scheme for the state, with a 25% tax on production, a 25% tax on processing, and a 25% tax on retail sales all going into the state coffers, it provides for 0% (zero percent) tax revenues going to local municipalities. Income to the City would be relegated to a small amount of sales tax generated, and nothing more.

The City weighed this fact against the anticipated impacts on police and other City funded services and its citizens' wishes. Several citizens of Fife gave testimony at Planning Commission and City Council hearings stating their worry of increased crime, due to the presence of drugs, and the fact that these businesses are almost exclusively cash based. They also stated their worry of such businesses being in proximity to extended stay hotels and single-family residences where children live. Finally, they stated their worry of increased accidents and property damage due to increased incidents of driving while impaired by marijuana. All of these are valid considerations for the City Council and allaying these worries and mitigating potential negative impacts are valid and proper uses of a City's police powers. Therefore, the City of Fife was well within its rights to enact Ordinance 1872 after considering them.

The City's Ban Takes Nothing From The Plaintiffs

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

A marijuana retail license issued by the WSLCB does not automatically grant the recipient a business license, or the right to a business license, in any jurisdiction the recipient may desire. The WSLCB explicitly acknowledges this in WAC 314-55-020(11), "The issuance or approval of a license [from the WSLCB] shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements." (emphasis added). In fact, Plaintiff Tedd Wetherbee was warned by Community Development Director David Osaki, on multiple occasions, that buying or leasing property with the intent to locate a marijuana business before the City Council had adopted an ordinance regarding marijuana land uses was an inherently risky proposition. He was warned that any such action would be done by Mr. Wetherbee at his own risk. In fact, Mr. Wetherbee acknowledged this risk.[13] Nevertheless, Mr. Wetherbee decided, with full knowledge of the risk, to proceed with investing money into a lease before the City Council had made a decision. He cannot now claim he justifiably relied on assertions from the City, nor can he claim anything has been taken from him.

The plaintiffs are free to locate their retail marijuana establishments in any jurisdiction where they would be in compliance with that jurisdiction's building codes, fire codes, zoning ordinances, and business licensing requirements. Just as they would not be in compliance with Fife's zoning ordinances if they attempted to locate a bar in a single-family residential district, they are not in compliance with Fife's zoning ordinances if they attempt to locate a marijuana business within the city limits. Neither restriction is a taking.

A taking must destroy or derogate any fundamental attribute of property ownership, including

---

[13] Declaration of David Osaki, Exhibits B & C

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

the right to possess, to exclude others, to dispose of property, or to make some economically viable use of the property." (*Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992). Note, the test is that a taking must destroy or derogate the ability to make *some* economically viable use of the property. The test is not, nor ever has been, that a person must be allowed to make *whatever* economically viable use of the property that person may desire.

Plaintiff Wetherbee is free to apply for a business license, and operate any type of business he likes in the City of Fife, as long as it is allowed by local business license laws and zoning ordinances. The fact that he is prohibited via zoning ordinance from one solitary type of economically viable use does not, in any way, destroy his ability to make some economically viable use of the property. Finally, in order to be a taking, an ordinance must go beyond protecting the public interest in health, safety, the environment, or fiscal integrity. *(Id.)* It must instead, impose the burden of providing an affirmative public benefit on the party claiming to be a victim of an unlawful taking. Ordinance 1872 does not do this. The ordinance stands squarely within the City of Fife's legitimate governmental interest of protecting the public interest in health, safety, and fiscal integrity. Ordinance 1872 is not a taking.

Federal law prohibits granting Plaintiffs' desired relief

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

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

courts must follow federal law. The Supremacy Clause and Object Preemption doctrine have been codified in 21 U.S.C. 801 et. seq., (see Section 2, below), but, perhaps more importantly, the meaning of this codification and its preemptive effect on state marijuana law has already been ruled upon by the United States Supreme Court, so there is no question that state law does not protect marijuana users, let alone businesses, and does not control regulation in any situation except where it joins federal law in criminalizing possession, distribution, use, and use of proceeds.

1. The United States Supreme Court Has Affirmatively and Unmistakably Ruled that Federal Law Preempts the Field and State Law Offers No Protection to Anyone, Period. Including Those Possessing, Cultivating, and Using Marijuana in Compliance with State Law.

In *Gonzales v Raich*, 545 U.S. 1, 125 SCt 2195 (2005), the United States Supreme Court affirmed that the personal cultivation, possession, and use of six marijuana plants, which were, indisputably, never transported, or intending to be transported, between states was a criminal offense regardless of the fact that the plants were for medicinal purposes and otherwise cultivated and possessed in accordance with state law. (*Id.*) As a result, the findings of Congress in making marijuana a Schedule I drug for purposes of the Controlled Substances Act, ("CSA"), could not be disturbed and federal criminal prosecution of the offender, in Raich, was a valid and constitutional use of resources and the offender's activity was well within Congress' Commerce Clause authority to criminalize. (*Id.*)

To state otherwise, according to the majority opinion, "logically ... place[s] *any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the " 'outer limits' " of Congress' Commerce Clause authority." *Id.* at 28.

This is not a place, according to *Raich*, what the Congress intended.

One need not have a degree in economics to understand why a nationwide exemption for

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

> the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but "visible to the naked eye," under any commonsense appraisal of the probable consequences of such an open-ended exemption. *Id.* at 28-29, (internal citation omitted).

"'Limiting [their] activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is " 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be." *Id.* at 29, (internal citations omitted).

Indeed, the Supreme Court has so directly demolished the arguments against claims of state preemption, that the *Raich* opinion needs no explanation. It can simply be quoted, beginning with page 29 and ending with page 33:

> [The power to criminalize marijuana] is so even if California's current controls (enacted eight years after the Compassionate Use Act was passed) are "effective," as the dissenters would have us blindly presume, *post,* at 2227 (opinion of O'CONNOR, J.); *post,* at 2232, 2235 (opinion of THOMAS, J.). California's decision (made 34 years after the CSA was enacted) to impose "stric[t] controls" on the "cultivation and possession of marijuana for medical purposes," post, at 2232 (THOMAS, J., dissenting), cannot retroactively divest Congress of its authority under the Commerce Clause. Indeed, Justice THOMAS' urgings to the contrary would turn the Supremacy Clause on its head, and would resurrect limits on congressional power that have long since been rejected. See*post*, at 2219 (SCALIA, J., concurring in judgment) [internal citations omitted] (" 'To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution' ").
>
> ...

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

[U]nder [dissenting Justice Thomas'] reasoning, Congress would be equally powerless to regulate, let alone prohibit, the intrastate possession, cultivation, and use of marijuana for *recreational* purposes, an activity which all States "strictly contro[l]." Indeed, his rationale seemingly would require Congress to cede its constitutional power to regulate commerce whenever a State opts to exercise its "traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens." *Post,* at 2234 (dissenting opinion).

Respondents acknowledge this proposition, but nonetheless contend that their activities were not "an essential part of a larger regulatory scheme" because they had been "isolated by the State of California, and [are] policed by the State of California," and thus remain "entirely separated from the market." Tr. of Oral Arg. 27. The dissenters fall prey to similar reasoning. See n. 38, *supra* this page. The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected:

Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just "plausible" as the principal dissent concedes, *post,* at 2229 (opinion of O'CONNOR, J.), it is readily apparent. The exemption for physicians provides them with an economic incentive to grant their patients permission to use the drug. In contrast to most prescriptions for legal drugs, which limit the dosage and duration of the usage, under California law the doctor's permission to recommend marijuana use is open-ended. The authority to grant permission whenever the doctor determines that a patient is afflicted with "any other illness for which marijuana provides relief," Cal. Health & Safety Code Ann. § 11362.5(b)(1)(A) (West Supp.2005), is broad enough to allow even the most scrupulous doctor to conclude that some recreational uses would be therapeutic. [footnote omitted]. And our cases have taught us that there are some unscrupulous physicians who overprescribe when it is sufficiently profitable to do so. [footnote omitted].

California's Compassionate Use Act has since been amended, limiting the catchall category to "[a]ny other chronic or persistent medical symptom that either: ... [s]ubstantially limits the ability of the person to conduct one or more major life activities as defined" in the Americans with Disabilities Act of 1990, or "[i]f not alleviated, may cause serious harm to the patient's safety or physical or mental health." Cal. Health & Safety Code Ann. §§ 11362.7(h)(12)(A)-(B) (West Supp.2005). [footnote and internal citations omitted].

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. [footnote omitted]. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

> obvious. [footnote omitted]. Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so. [footnote omitted] Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, a fact Justice O'CONNOR's dissent conveniently disregards in arguing that the demonstrated effect on commerce while admittedly "plausible" is ultimately "unsubstantiated," *post,* at 2229, 2227-2228, Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.
>
> So, from the "separate and distinct" class of activities identified by the Court of Appeals (and adopted by the dissenters), we are left with "the intrastate, noncommercial cultivation, possession and use of marijuana." [internal citation omitted], Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim.
>
> Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases. We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress. Under the present state of the law, however, the judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion.
>
> *It is so ordered.*

The reasons for the U.S. Supreme Court's insistence that federal criminal laws can still be enforced against State-regulated marijuana operations, even medical marijuana for chronic sufferers, should be plain. (See below).

2. The Federal Controlled Substances Act and the Washington Uniformed

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

Controlled Substances Act are in conflict

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

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together. 21 U.S.C. 903. (emphasis added by memorandum drafter).

The CSA defines marijuana as:

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

and contains criminal provisions, such as:

- 21 U.S.C. § 841 (making it illegal to manufacture, distribute, or possess with intent to distribute any controlled substance including marijuana);
- 21 U.S.C. § 856 (making it unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances, including marijuana);
- 21 U.S.C. § 860 (making it unlawful to distribute or manufacture controlled substances within 1,000 feet of schools, colleges, playgrounds, and public housing facilities, and within 100 feet of any youth centers, public swimming pools, and video arcade facilities);
- 21 U.S.C. § 843 (making it unlawful to use any communication facility to commit felony violations of the CSA); and
- 21 U.S.C. § 846 (making it illegal to conspire to commit any of the crimes set forth in the CSA and making it illegal to attempt to commit any of the crimes set forth in the CSA).

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

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

(a) He/she violates any provision of this subchapter or subchapter II, the punishment for which is a felony, and

(b) Such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter

(i) Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(ii) From which such person obtains substantial income or resources

As a result, RCW 69.50 et seq and RCW 82.14 et seq create the "positive conflict" described in 21 U.S.C. 903 because zoning for, permitting, and collecting revenue from marijuana businesses aids and abets in the violation of Federal drug laws. This subjects City employees to potential prosecution because following state law compels the City to participate in producing, selling, and collecting revenue from marijuana. (See the U.S. Attorneys' 4/14/11 Letter and the U.S. DOJ's 8/29/13 Letter in the "Statement of Facts").

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

(1) a continuing criminal enterprise

and

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

In other words, a Court mandate to participate in the state's scheme places the City at risk of facing a federal civil forfeiture action and places City employees at risk of prosecution when they zone for and/or permit entities which intend to sell, and collect revenue from, marijuana. This places a significant burden, without a corresponding benefit, on the City and its employees if they comply with the state scheme because the City cannot receive any legal remuneration from it but still places its

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

employees at risk of criminal prosecution. In addition, this burden is not alleviated by the federal government's current policy of minimal enforcement of federal marijuana laws against entities participating in a state scheme because, in the absence of a grant of immunity, no person is safe from prosecution for acts committed within applicable limitation periods.

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

This point was emphasized when the U.S. attorneys for the Eastern and Western Districts of Washington took the position that "state employees" who conduct activities which would establish a licensing scheme would not be immune from liability under the CSA.[14] Therefore, any City employee aiding and abetting in retail marijuana sales, production or processing, faces a risk because the state's laws do not preempt the Federal criminal code, e.g., 21 U.S.C. 801, 21 U.S.C. 841(a)(1), and 21 U.S.C. 844(a).

3. Forced compliance with RCW 69.50 will compel the City and City employees to aid and abet in the creation of Fourth, Fifth and Sixth Amendment defenses for federal and state criminal defendants by compelling marijuana businesses to provide the incriminating information required for zoning, permitting, and tax collection.[15]

---

[14] Declaration of Jennifer Combs, Exhibit A

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

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

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

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

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

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

> The question is not whether the petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

> to abrogate the privilege's protection, it would be excluded from the situations in which it has been historically guaranteed and withheld from those who most require it. *Marchetti* at 51. (emphasis added by drafter of this memorandum).

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

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

It should be noted that doing nothing, i.e., refusing to grant permits and licenses but otherwise ignoring marijuana sales, would possibly comply with federal law, (except for exposing City employees to the risk of being charged with misprision of a felony),[16] but doing nothing is not an option the City, itself, can exercise without ignoring its core duties, (zoning, health, and safety), and its primary funding source for performing such duties, (retail sales taxes). Therefore, the City would be compelled to participate in a real dilemma if the relief sought by Plaintiff(s) is granted.

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

IV. CONCLUSION

---

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

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848

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

The WSLCB, the AG, and the state legislature through its acquiescence to the interpretations of the both, affirmed local jurisdictions' rights, under State law, to ban marijuana businesses. Therefore, the City's ban is lawful and should be acknowledged by the Court as valid, constitutional, and enforceable. The City's Ordinance is a legitimate use of its police powers, and does not constitute a taking. In addition, a facially neutral ordinance requiring a business license to operate a business cannot be construed as creating a criminal penalty under the Washington State Uniform Controlled Substances Act.

Overarching all of the above is the fact that federal law prohibits the business the Plaintiffs seek to engage in. The City does not desire to be, and cannot be made to be, a party to the commission of federal crimes.

For all of the above stated reasons, City respectfully requests that the Court deny the Plaintiff's Motion for Partial Summary Judgment.

DONE IN OPEN COURT this 18th day of August, 2014.

Presented by:

VSI LAW GROUP, PLLC

By: _____
Jennifer Combs, WSBA No. 36264
Attorney for the Defendant, City of Fife

VSI LAW GROUP, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
Phone: 253.922.5464 Fax: 253.922.5848