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December 10, 2013

Mr. Jeff Even, Deputy Solicitor General
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P.O. Box 40100
Olympia, WA 98504-0100

Re: Attorney General Office's Request for Public Input, Opinion Docket No. 13-11-01,
Request by Sharon Foster, Chair, Washington State Liquor Control Board (WSLCB) –
Response of City of Yakima

Dear Mr. Even:

The City of Yakima appreciates the opportunity to respond to the Request for Public Input issued November 5, 2013, by your office. The Request for Public Input invited affected parties to submit analysis and argument pertaining to certain land use jurisdiction questions arising out of the passage of Initiative 502, the "recreational marijuana" initiative approved by the voters on November 6, 2012. The specific questions posed are:

1. Are local governments preempted by state law from outright banning the location of a WSLCB licensed marijuana producer, processor, or retailer within their jurisdiction?
2. May a local government establish land use regulations (in excess of the I-502 buffer and other WSLCB requirements) or business license requirements in a fashion that makes it impractical for a licensed marijuana business to locate within their jurisdiction?

The City of Yakima answers that cities in the State of Washington are not preempted by state law from outright banning of WSLCB-licensed marijuana production, processing, and retailing uses within their respective jurisdictions, and are not preempted from establishing land use regulations such as zoning limiting or regulating location of such uses.¹

A. Land Use Regulatory Authority of Cities.

Any analysis of the issues presented begins with the land use regulatory authority given to cities under the Washington State Constitution. The ability of cities to make and impose land use regulations is established in the state constitution. Constitution Article 11, § 11 provides: "Any county, city, town or township may make and enforce within its limits all such local police,

¹ As further noted below, the City of Yakima's analysis is limited to the jurisdiction of cities (and towns), and is not intended to address the land use jurisdiction of counties or other municipal corporations of the State of Washington. A different analysis may well apply to counties, especially as it relates to land use regulation of WSLCB-licensed marijuana retailers.

sanitary and other regulations as are not in conflict with general laws.” This authority, and the interplay with other state legislation, was explained as follows:

Municipalities are constitutionally vested with the authority to enact ordinances in furtherance of the public health, safety, morals, and welfare. However, “the plenary police power in regulatory matters accorded municipalities by Const. Art. 11, § 11, ceases when the state enacts a general law upon the particular subject, unless there is room for concurrent jurisdiction.” *Lenci v. Seattle*, 63 Wash.2d 664, 669, 388 P.2d 926 (1964). Whether there is room for concurrent jurisdiction depends upon the legislative intent to be ascertained from an examination of the statute involved and the interaction between the state and local provisions. Where the Legislature does not specifically state its intent to occupy a given field, such intent can be inferred from “the purposes of the legislative enactment and the facts and circumstances upon which the enactment was intended to operate.” *Lenci*, at 670, 388 P.2d 926.

Baker v. Snohomish County Dept. of Planning and Community Development, 68 Wash.App. 581, 585, 841 P.2d 1321, review denied, 121 Wash.2d 1027, 854 P.2d 1085 (1993); *Brown v. City of Yakima*, 116 Wash.2d 556, 807 P.2d 353 (1991) (citations omitted). These principles were also reiterated in a recent Attorney General’s Opinion, *The Honorable Deborah Eddy*, Wash. AGO 2012 No.1 (2012), pages 2-3:

You have asked whether RCW 49.60.218 would preempt a first class city’s local ordinance requiring accommodation of additional types of animals in food establishments. Consideration of this question begins with the principle that first class cities may make laws consistent with and subject to the Constitution and laws of this state[.] Const. art. XI, § 10. Cities have constitutional authority to enact local police, sanitary and other regulations as are not in conflict with general laws. Const. art. XI, § 11. This constitutional grant of authority is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation reasonable and consistent with the general laws. *Lenci v. City of Seattle*, 63 Wn.2d 664, 667, 388 P.2d 926 (1964) (quoting *Detamore v. Hindley*, 83 Wash. 322, 326, 145 P. 462 (1915)). Ordinances are presumed valid and grants of municipal power are liberally construed. *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709 (2001). An ordinance will be deemed invalid if (1) the legislature expressed an intent to occupy the field addressed by the ordinance or (2) the ordinance conflicts with a statute. *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009). If the legislature has expressed its intention to occupy an entire field or if such intent is necessarily implied, ordinances enacted on the same topic are preempted. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010). If the legislature has not expressed an intent to occupy an entire field, the purpose of the statute and the facts and circumstances to which the statute was intended to apply must be considered. *Id.* The Washington Supreme Court will not interpret a statute to deprive a municipality of the power to legislate on a particular subject unless that clearly is the legislative intent. *Kirwin*, 165 Wn.2d at 826 (quoting *HJS Dev., Inc. v. Pierce Cnty.*, 148 Wn.2d 451, 480, 61 P.3d 1141 (2003)).

In *Weden v. San Juan County*, 135 Wash.2d 678, 958 P.2d 273 (1998), the county commissioners adopted a ban on motorized personal watercraft (“PWC”) in the marine waters of San Juan County. Owners of PWCs filed suit contending that the ban conflicted with the state’s Recreational Vehicle Registration Law, Chapter 88.02 RCW and was thus in violation of Constitution Article XI, Section 11. The *Weden* court observed:

Article XI, section 11 requires a local law yield to a state statute on the same subject matter if that statute “preempts the field, leaving no room for concurrent jurisdiction,” or “if a conflict exists such that the two cannot be harmonized.” *Brown v. City of Yakima*, 116 Wash.2d 556, 559, 561, 807 P.2d 353 (1991). Respondents do not argue that the Legislature has preempted the field of conduct governed by the Ordinance but, rather, contend the Ordinance conflicts with various state laws.

‘ “In determining whether an ordinance is in ‘conflict’ with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.” *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 [(1923)]. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits,’ *State v. Carran*, 133 Ohio St. 50, 11 N.E.2d 245, 246 [(1937)].

City of Bellingham v. Schampera, 57 Wash.2d 106, 111, 356 P.2d 292, 92 A.L.R.2d 192 (1960). An ordinance must yield to state law only “if a conflict exists such that the two cannot be harmonized.” *Brown*, 116 Wash.2d at 561, 807 P.2d 353; accord *Schampera*, 57 Wash.2d at 111, 356 P.2d 292 (“Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail. *Bodkin v. State*, [132 Neb. 535], 272 N.W. 547 [(1937)].”). In this case, we must examine whether the Ordinance conflicts with chapter 88.02 RCW, chapter 88.12 RCW, chapter 90.58 RCW, chapter 43.99 RCW, or the public trust doctrine.

Weden, *supra* at 693. Addressing the claims of the PWC owners, the court held:

The trial court found the Ordinance conflicted with chapter 88.02 RCW, the state vessel registration statute. In essence, the trial court found that the Ordinance forbid an activity the statute impliedly allowed.

We have previously addressed a similar argument and established an analysis to be followed. In *State ex rel. Schillberg v. Everett Dist. Justice Court*, 92 Wash.2d 106, 594 P.2d 448 (1979), we reviewed a Snohomish County ordinance that prohibited the use of internal combustion motors on “certain lakes” in Snohomish County. *Schillberg*, 92 Wash.2d at 107, 594 P.2d 448. A person charged with violating the statute challenged the law “on the ground that it conflict[ed] with [chapter 88.12 RCW].” *Schillberg*, 92 Wash.2d at 107, 594 P.2d 448. We found no conflict and stated:

The provisions of [chapter 88.12 RCW] are concerned with safe operation of motor boats and do not in any way grant permission to operate boats in any place. A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated....

There being no express statement nor words from which it could be fairly inferred that motor boats are permitted on all waters of the state, no conflict exists and the ordinance is valid.

Schillberg, 92 Wash.2d at 108, 594 P.2d 448 (citations omitted). *Schillberg* certainly lays to rest any claim that the Ordinance conflicts with chapter 88.12 RCW. However, we hold *Schillberg* controls the discussion of whether the Ordinance conflicts with the state's vessel registration statute, chapter 88.02 RCW.

The Legislature did not enact chapter 88.02 RCW to grant PWC owners the right to operate their PWC anywhere in the state. The statute was enacted to raise tax revenues and to create a title system for boats. See RCW 88.02.120. RCW 88.02.020 provides, in pertinent part: "Except as provided in this chapter, no person may own or operate any vessel on the waters of this state unless the vessel has been registered and displays a registration number and a valid decal in accordance with this chapter...." On its face, the statute prohibits operation of an unregistered vessel. Nowhere in the language of the statute can it be suggested that the statute creates an unbridged right to operate PWC in all waters throughout the state.

Registration of a vessel is nothing more than a precondition to operating a boat. No unconditional right is granted by obtaining such registration. Statutes often impose preconditions which do not grant unrestricted permission to participate in an activity. Purchasing a hunting license is a precondition to hunting, but the license certainly does not allow hunting of endangered species, RCW 77.16.120, or hunting inside the Seattle city limits, see Seattle Municipal Code 12A.14.071 (banning discharge of a firearm). Reaching the age of 16 is a precondition to driving a car, but reaching 16 does not create an unrestricted right to drive a car however and wherever one desires.

Schillberg states that the Legislature must *expressly* indicate an intent to preempt a particular field. In this case, the registration statute does not contain language preempting the regulation of this activity to the State. See RCW 46.08.020. We "will not interpret a statute to deprive a municipality of the power to legislate on particular subjects unless that clearly is the legislative intent." *Southwick, Inc. v. City of Lacey*, 58 Wash.App. 886, 891-92, 795 P.2d 712 (1990). The San Juan County Ordinance does not conflict with the state's vessel registration statute; it is a routine application of the police power.

Weden, supra at 694-95 (footnotes omitted).

B. Initiative 502.

On November 6, 2012, voters in the State of Washington approved Initiative 502. The Initiative decriminalized possession, delivery, and use of specified amounts of marijuana, and authorized the Washington State Liquor Control Board to promulgate regulations pertaining to licensing of marijuana producers, processors, and retailers, as well as testing, advertising, packaging, and security of marijuana products.

New Section 6(8) and New Section 18 of I-502 set forth some limitations:

NEW SECTION. Sec. 6.

(8) The state liquor control board shall not issue a license for any premises within one thousand feet of the perimeter of the grounds of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older.

NEW SECTION. Sec. 18.

(1) No licensed marijuana producer, processor, or retailer shall place or maintain, or cause to be placed or maintained, an advertisement of marijuana, useable marijuana, or a marijuana-infused product in any form or through any medium whatsoever:

- (a) Within one thousand feet of the perimeter of a school grounds, playground, recreation center or facility, child care center, public park, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older;
- (b) On or in a public transit vehicle or public transit shelter; or
- (c) On or in a publicly owned or operated property.

(2) Merchandising within a retail outlet is not advertising for the purposes of this section.

(3) This section does not apply to a noncommercial message.

(4) The state liquor control board shall fine a licensee one thousand dollars for each violation of subsection (1) of this section. Fines collected under this subsection must be deposited into the dedicated marijuana fund created under section 26 of this act.

Additional rules are required to determine the amounts of marijuana and marijuana-infused products that can be held by marijuana producers, processors, and retailers. Rules must be developed regarding packaging, THC levels, classes of marijuana and marijuana-infused products, establishing "reasonable time, place and manner" restrictions regarding advertising, times for transport and delivery of marijuana and marijuana-infused products, and establishing criteria for testing laboratories.

New Section 13 pertains to retail outlets:

NEW SECTION. Sec. 13.

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, retail outlets established for the purpose of making useable marijuana and marijuana-infused products available for sale to adults aged twenty-one and over. Retail sale of useable marijuana and marijuana-infused products in accordance with the provisions of this act and the rules adopted to implement and enforce it, by a validly licensed marijuana retailer or retail outlet employee, shall not be a criminal or civil offense under Washington state law.

(Emphasis added.) Also, New Section 10 further describes the methodology to be used by the WSLCB to determine the “maximum number of retail outlets that may be licensed in each county:”

NEW SECTION. Sec. 10.

The state liquor control board, subject to the provisions of this act, must adopt rules by December 1, 2013, that establish the procedures and criteria necessary to implement the following:

- (1) Licensing of marijuana producers, marijuana processors, and marijuana retailers, including prescribing forms and establishing application, reinstatement, and renewal fees;
- (2) Determining, in consultation with the office of financial management, the maximum number of retail outlets that may be licensed in each county, taking into consideration:
 - (a) Population distribution;
 - (b) Security and safety issues; and
 - (c) The provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market...

(Emphasis added). This section does not, by its terms, limit the ability of a city to impose zoning restrictions on the location of such establishments. Also, it is important to note that the law does not mandate that marijuana retail outlets be located in any city; rather, the law requires the WSLCB to determine a “maximum” number of retail outlets “that *may* be licensed in each county.”

It is also important to note that there is no provision in Initiative 502 limiting the number of licenses for marijuana *production* and/or *processing* operations within each county. Thus, while the number of marijuana *retail outlets* is subject to a maximum number per county, there is no similar limitation for production or processing.

C. Liquor Control Board Rule-Making.

Initiative 502 directed the WSLCB to develop and promulgate rules implementing Initiative 502. These rules were issued on or about November 18, 2013, and codified at Chapter 314-55 WAC. In June 2013, the WSLCB issued the following "FAQ" and response:

Can local jurisdictions prevent me from opening a location?

The LCB has no authority to dictate zoning requirements to local governments. Municipalities could conceivably zone marijuana/related businesses out of their geographical area, check with your local authority to understand their requirements.

This particular FAQ and response was subsequently withdrawn from the WSLCB web site. The WSLCB proceeded to propose and adopt regulations. WAC 314-55-020(11) describes the license permit process and includes the following limitation:

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

(Emphasis added.) In short, issuance of a license by WSLCB does not constitute approval of a marijuana production, processing, or retail facility at a location banned by the city. This is a significant recognition by WSLCB of the land use regulation authority of cities and counties. The interpretation of the code and regulations by the agency charged with enforcing such codes and regulations is given deference by the courts. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wash.2d 568, 90 P.3d 659 (2004) ("...the agency charged with interpreting and applying the water code, its interpretation of a provision deserves deference, so long as that interpretation is not contrary to the plain language of the statute"); *Cobra Roofing Service, Inc. v. Department of Labor and Industries*, 122 Wash. App. 402, 97 P.3d 17 (2004). WAC 314-55-081 pertains to designation of the maximum number of retail outlets per county:

WAC 314-55-081 Who can apply for a marijuana retailer license?

(1) Using estimated consumption data and population data obtained from the office of financial management (OFM) population data, the liquor control board will determine the maximum number of marijuana retail locations per county.

The number of retail locations will be determined using a method that distributes the number of locations proportionate to the most populous cities within each county. Locations not assigned to a specific city will be at large. At large locations can be used for unincorporated areas in the county or in cities within the county that have no retail licenses designated. Once the number of locations per city and at large have been 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. Any lottery conducted by the board will be witnessed by an independent third party.

(2) The number of marijuana retail licenses determined by the board can be found on the liquor control board web site at www.liq.wa.gov.

(3) Any entity and/or principals within any entity are limited to no more than three retail marijuana licenses with no multiple location licensee allowed more than thirty-three percent of the allowed licenses in any county or city.

(4) The board will initially limit the opportunity to apply for a marijuana retailer license to a thirty-day calendar window beginning with the effective date of this section. In order for a marijuana retailer license application to be considered it must be received no later than thirty days after the effective date of the rules adopted by the board. The board may reopen the marijuana retailer application window after the initial evaluation of the applications received and at subsequent times when the board deems necessary.

Under these rules, if a city enacts a ban on marijuana production, processing, and retailing, the effect would be to convert the number of "assigned" retail licenses to "at large" licenses. These "at large" locations could be sited in unincorporated areas of the county "or in cities within the county that have no retail licenses designated." Thus, the enactment of a city-wide ban would not change the number of "maximum" retail licenses attributed to the county, but would simply rearrange "location" of the licensed sites and convert status of such licenses from "assigned" to "at large."

D. Preemption Issues.

1. No Express Preemption.

There is no provision in Initiative 502 stating that the State of Washington preempts local land use regulation of marijuana production, processing and retail uses. As held in the case of *Weden v. San Juan County*, 135 Wash.2d 678, 695, 958 P.2d 273 (1998):

[*State ex rel. Schillberg v. Everett Dist. Justice Court*, 92 Wash.2d 106, 594 P.2d 448 (1979)] states that the Legislature must *expressly* indicate an intent to preempt a particular field. In this case, the registration statute does not contain language preempting the regulation of this activity to the State. See RCW 46.08.020. We "will not interpret a statute to deprive a municipality of the power to legislate on particular subjects unless that clearly is the legislative intent." *Southwick, Inc. v. City of Lacey*, 58 Wash.App. 886, 891-92, 795 P.2d 712 (1990).

There is no provision in Initiative 502 that mandates location of licensed marijuana production or processing uses in any county or city within the state. The only direction (provided in Sections 10 and 13 of Initiative 502) states that retail uses "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...." Even for retail licenses, there is no mandated "minimum" number of establishments anywhere in any county or city. The Initiative's requirement that there "may" be a "maximum"

number of licensed marijuana retail outlets “in each county” cannot be construed to require a “minimum” number of retail outlets in any “city.”

Moreover, there is express recognition of the land use regulatory authority of local governments in the regulations implementing Initiative 502. WAC 314-55-020(11) describes the license permit process and includes the following limitation:

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

The issuance of a marijuana license is expressly made subject to the local government’s zoning codes, building and fire codes and business licensing requirements. In other words, the issuance of a marijuana license does not “preempt” the local jurisdiction’s land use regulations. As noted above, the interpretation of the code and regulations by the agency charged with enforcing such codes and regulations is given deference by the courts. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wash.2d 568, 90 P.3d 659 (2004); *Cobra Roofing Service, Inc. v. Department of Labor and Industries*, 122 Wash. App. 402, 97 P.3d 17 (2004).

2. No Implied Preemption.

As previously quoted above, the principles of local legislation and preemption under state law are summarized as follows:

Ordinances are presumed valid and grants of municipal power are liberally construed. *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709 (2001). An ordinance will be deemed invalid if (1) the legislature expressed an intent to occupy the field addressed by the ordinance or (2) the ordinance conflicts with a statute. *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009). If the legislature has expressed its intention to occupy an entire field or if such intent is necessarily implied, ordinances enacted on the same topic are preempted. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010). If the legislature has not expressed an intent to occupy an entire field, the purpose of the statute and the facts and circumstances to which the statute was intended to apply must be considered. *Id.* The Washington Supreme Court will not interpret a statute to deprive a municipality of the power to legislate on a particular subject unless that clearly is the legislative intent. *Kirwin*, 165 Wn.2d at 826 (quoting *HJS Dev., Inc. v. Pierce Cnty.*, 148 Wn.2d 451, 480, 61 P.3d 1141 (2003)).

The Honorable Deborah Eddy, Wash. AGO 2012 No.1 (2012), pages 2-3. The “purpose” of Initiative 502 and “the facts and circumstances to which the statute was intended to apply” must be addressed.

Section 1 of Initiative 502 states the “intent” of the law:

NEW SECTION. Sec. 1.

The people intend to stop treating adult marijuana use as a crime and try a new approach that:

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

This measure authorizes the state liquor control board to regulate and tax marijuana for persons twenty-one years of age and older, and add a new threshold for driving under the influence of marijuana.

Nothing in a city’s ban of marijuana licenses conflicts with the above purposes of the legislation. A ban would as easily allow law enforcement to focus on violent and property crimes. Transactions in marijuana by illegal drug organizations would remain illegal. New state revenues would not be affected because the number of licensed retail outlets assigned to each county would remain unchanged. The city that bans retail marijuana outlets may be deprived of its share of local retail sales tax, but there is no mandate under law requiring a city to accept a land use it has the right to refuse, and no law requiring acceptance of a land use because of the retail sales tax it might generate.

A city’s decision to ban marijuana licensed uses for production, processing and retailing does not mean that individuals in that city will be subject to criminal or civil prosecution for individual possession, use and consumption of marijuana that is in compliance with state law. The integrity of the state’s criminal and civil penalty codes will remain intact.

It may be assumed that opponents of local government’s ability to adopt a local ban of marijuana licenses will argue that one of the purposes, or “facts and circumstances” in which the legislation was intended to apply, is found in Section 10(2) of the Initiative:

NEW SECTION. Sec. 10.

The state liquor control board, subject to the provisions of this act, must adopt rules by December 1, 2013, that establish the procedures and criteria necessary to implement the following:

- (1) Licensing of marijuana producers, marijuana processors, and marijuana retailers, including prescribing forms and establishing application, reinstatement, and renewal fees;
- (2) Determining, in consultation with the office of financial management, the maximum number of retail outlets that may be licensed in each county, taking into consideration:
 - (a) Population distribution;
 - (b) Security and safety issues; and
 - (c) The provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market...

It should be noted that the “provision of adequate access to licensed sources” of marijuana is a factor to be used to determine the “maximum number of retail outlets that may be licensed in each county.” Nothing in Section 10 mandates location of retail outlets in any city within each county. Nothing in Section 10 creates a “right” of access to any licensed marijuana retail outlet in any city. See, *City of Riverside v. Inland Empire Patients Health and Welfare Center*, 56 Cal.4th 729, 300 P.3d 494 (2013) (upholding City of Riverside’s ban of medical marijuana dispensaries). The provision of “adequate access” to licensed sources of marijuana is premised upon an allocation of sources of licensed marijuana “in each county.”

According to WAC 314-55-081, the allocation of licensed marijuana retail outlets is determined as follows:

- (1) Using estimated consumption data and population data obtained from the office of financial management (OFM) population data, the liquor control board will determine the maximum number of marijuana retail locations per county.

The number of retail locations will be determined using a method that distributes the number of locations proportionate to the most populous cities within each county. Locations not assigned to a specific city will be at large. At large locations can be used for unincorporated areas in the county or in cities within the county that have no retail licenses designated. Once the number of locations per city and at large have been 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. Any lottery conducted by the board will be witnessed by an independent third party.

If a city acts to ban licensed marijuana retail outlets, the effect is to convert the city allocation to “at large” licenses. These can then locate in “unincorporated areas of the county or in cities within the county that have no retail licenses designated.” *Id.* Market factors likely would operate so that these “at large” retail outlets would choose to locate in areas of the unincorporated county in the

vicinity of the city that elects to ban such operations. Persons desiring to purchase marijuana would have “adequate access” to legal sources of marijuana.

The convenience of “adequate access” does not demand immediate access in each city. Indeed, both Initiative 502 and the implementing regulations restrict the location of licensed marijuana businesses. The term “adequate access” is subjective and invites a construction justifying restriction of access. Initiative 502 contains the following restrictions regarding location of licensed uses:

NEW SECTION. Sec. 6.

(8) The state liquor control board shall not issue a license for any premises within one thousand feet of the perimeter of the grounds of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older.

The question is whether such restrictions are sufficient and globally effective to address all secondary effects associated with marijuana production, processing and retailing in every city. They are not. “Residential areas” or “residential zoned districts” are not included in the list of protected areas – areas typified by homes for families with children.² As observed by the court in *City of Riverside v. Inland Empire Patients Health and Welfare Center*, 56 Cal.4th 729, 755-56, 300 P.3d 494 (2013):

The presumption against preemption is additionally supported by the existence of significant local interests that may vary from jurisdiction to jurisdiction. Amici curiae League of California Cities et al. point out that “California’s 482 cities and 58 counties are diverse in size, population, and use.” As these amici curiae observe, while several California cities and counties allow medical marijuana facilities, it may not be reasonable to expect every community to do so.

For example, these amici curiae point out, “[s]ome communities are predominantly residential and do not have sufficient commercial or industrial space to accommodate” facilities that distribute medical marijuana. Moreover, these facilities deal in a substance which, except for legitimate medical use by a qualified under a physician’s authorization, is illegal under both federal and state law to possess, use, furnish, or cultivate, yet is widely desired, bought, sold, cultivated, and employed as a recreational drug. Thus, facilities that dispense medical marijuana may pose a danger of increased crime, congestion, blight, and drug abuse,³ and the extent of this danger may

² Nor is “advertising” of marijuana restricted within 1,000 feet of residential areas. Initiative 502(18).

³ Footnote 9 to the *City of Riverside* decision. This footnote states:

vary widely from community to community.

Thus, while some counties and cities might consider themselves well suited to accommodating medical marijuana dispensaries, conditions in other communities might lead to the reasonable decision that such facilities within their borders, even if carefully sited, well managed, and closely monitored, would present unacceptable local risks and burdens. (See, e.g., *Great Western Shows*, *supra*, 27 Cal.4th 853, 866–867, 118 Cal.Rptr.2d 746, 44 P.3d 120 [noting, in support of holding that state gun show regulations did not occupy field, so as to preclude Los Angeles County’s complete ban of gun shows on county property, that firearms issues likely require different treatment in urban, as opposed to rural, areas].) Under these circumstances, we cannot lightly assume the voters or the Legislature intended to impose a “one size fits all” policy, whereby each and every one of California’s diverse counties and cities must allow the use of local land for such purposes.

By way of further example, the regulations define “public park” as follows:

(17) "Public park" means an area of land for the enjoyment of the public, having facilities for rest and/or recreation, such as a baseball diamond or basketball court, owned and/or managed by a city, county, state, federal government, or metropolitan park district. Public park does not include trails.

WAC 314-55-010(17). Many communities have publicly owned recreational trails intended for use by children and families. Many communities also benefit from baseball fields and facilities owned and operated by private nonprofit organizations such as Little League. Under the above definition of “public park,” location of marijuana businesses and stores in the vicinity of such facilities would not be restricted.

For example, when considering the 2011 amendment to section 11362.83, as proposed by Assembly Bill No. 1300 (2011–2012 Reg. Sess.), the Senate Committee on Public Safety noted the bill author’s assertions about the “controversial picture of dispensaries,” as revealed in “[a] scan of headlines.” As reported by the committee, the bill author recounted that some dispensaries “have been caught selling marijuana to people not authorized to possess it, many intentionally operate in the shadows without any business licensure or under falsified documentation, and some have been the scene of violent robberies and murder.” (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1300 (2011–2012 Reg. Sess.), as amended June 1, 2011, pp. E–F.) Courts of Appeal dealing with local regulation of medical marijuana dispensaries have cited similar concerns. (See, e.g., *Hill*, *supra*, 192 Cal.App.4th 861, 871, 121 Cal.Rptr.3d 722 [because of evidence that the “ ‘cash only’ ” nature of most medical marijuana dispensary operations presents a disproportionate target for robberies and burglaries, and that such facilities affect neighborhood quality of life by attracting loitering and marijuana smoking on or near the premises, they are not similarly situated to pharmacies for public health purposes and need not be treated equally]; *Kruse*, *supra*, 177 Cal.App.4th 1153, 1161, 100 Cal.Rptr.3d 1 [noting local findings of a correlation between medical marijuana dispensaries and increased crime].)

Initiative 502 and the implementing regulations include significant requirements regarding licensing of proposed marijuana businesses. However, such requirements are not exhaustive and cannot address all secondary effects associated with production, processing and retailing of marijuana. Secondary effects associated with production, processing, and sale of recreational marijuana have (understandably) not been documented with the depth and scope afforded medical marijuana facilities because recreational or "adult marijuana" has only recently been legalized in two states, Colorado and Washington. However, important studies have been made regarding secondary effects associated with medical marijuana dispensaries and grow operations. In 2009, the "White Paper on Marijuana Dispensaries," California Police Chiefs Association's Task Force on Marijuana Dispensaries (April 22, 2009) was issued ("CAPCA White Paper"). As stated in the Executive Summary in the CAPCA White Paper:

Marijuana dispensaries are commonly large money-making enterprises that will sell marijuana to most anyone who produces a physician's written recommendation for its medical use. These recommendations can be had by paying unscrupulous physicians a fee and claiming to have most any malady, even headaches. While the dispensaries will claim to receive only donations, no marijuana will change hands without an exchange of money. These operations have been tied to organized criminal gangs, foster large grow operations, and are often multi-million-dollar profit centers.

Because they are repositories of valuable marijuana crops and large amounts of cash, several operators of dispensaries have been attacked and murdered by armed robbers both at their storefronts and homes, and such places have been regularly burglarized. Drug dealing, sales to minors, loitering, heavy vehicle and foot traffic in retail areas, increased noise, and robberies of customers just outside dispensaries are also common ancillary byproducts of their operations. To repel store invasions, firearms are often kept on hand inside dispensaries, and firearms are used to hold up their proprietors. These dispensaries are either linked to large marijuana grow operations or encourage home grows by buying marijuana to dispense. And, just as destructive fires and unhealthful mold in residential neighborhoods are often the result of large indoor home grows designed to supply dispensaries, money laundering also naturally results from dispensaries' likely unlawful operations.

While the regulatory scheme adopted under Initiative 502 should operate to eliminate the more outrageous secondary effects associated with medical marijuana dispensaries described above, the risks of robberies, burglaries, drug dealing, sales to minors, loitering, heavy foot and vehicle traffic, increased noise, and odors remain.⁴ It should be emphasized that the secondary effects

⁴ There are serious environmental impacts to be considered in the field of marijuana production, processing and retailing. Environmental review by the WSLCB was limited in scope. It did not address at

described above arose under a system where medical marijuana dispensaries were authorized by California state law.⁵

The holding of the California court in *City of Riverside, supra*, is worthy of emphasis:

Thus, while some counties and cities might consider themselves well suited to accommodating medical marijuana dispensaries, conditions in other communities might lead to the reasonable decision that such facilities within their borders, even if carefully sited, well managed, and closely monitored, would present unacceptable local risks and burdens....Under these circumstances, we cannot lightly assume the voters or the Legislature intended to impose a "one size fits all" policy, whereby each and every one of California's diverse counties and cities must allow the use of local land for such purposes.

City of Riverside v. Inland Empire Patients Health and Welfare Center, 56 Cal.4th 729, 756, 300 P.3d 494 (2013).

E. Banning and "Prohibitive Zoning."

The two questions posed by the Attorney General's Office differentiate between the authority of a city to enact an outright ban, or to enact such restrictive zoning or business regulations that operation or location of a marijuana business is impractical. If the Attorney General's Office concludes that cities retain the ability under its land use jurisdiction to ban such businesses

all the impacts associated with processing, distributing or retailing, and its review of impacts associated with cultivation was in many cases based upon unsupported statements of a general nature. For example, the WSLCB admits in its SEPA checklist that cultivation is "water-intensive", but made no effort to acknowledge that water is simply not available for marijuana cultivation in all parts of the state. Moreover, rather than stating the likelihood that the proposal would cause water quality decreases, the WSLCB states a number of facts that apply to any situation ("current indoor cultivation often employs pesticides and herbicides"). In terms of intense energy usage of indoor cultivation, the WSLCB's only proposed mitigation is to *allow* outdoor cultivation as well. That does not address the impacts at the local level of a *proposed* indoor grow operation. In terms of toxic wastes, the WSLCB reduced this to an issue of light bulb disposal, and suggested that it may implement a light bulb recycling program sometime in the future. That does not address what may be proposed at the local level in terms of pesticides, insecticides and other potential pollutants associated with *outdoor* grow operations. Odors are also an expected impact that may be particularly offensive in locations proximate to certain uses such as residential areas. These impacts were not addressed by the WSLCB. Impacts on increased demands for public services including police and fire were also not addressed, even though the WSLCB acknowledged that "areas can experience home invasion robberies, theft and murders related to marijuana cultivation which impacts local law enforcement." These and similar impacts were not, and in many cases cannot be fully addressed or mitigated at the State level, demonstrating the need for local government to evaluate, regulate, and if necessary, ban marijuana at the local level.

⁵ In 1996, California voters approved a ballot initiative, Proposition 215, referred to as the "Compassionate Use Act of 1996." (Cal. Health & Safety Code § 11362.5.) In 2003, the California legislature adopted the Medical Marijuana Program (MMP) (Cal. Health & Safety Code §§ 11362.7–11362.83).

outright, the logical answer is that such power extends to imposition of land use regulations that make operation or location of a marijuana business impractical.

In this context, it is important to note that manufacture, possession, delivery, sale, and use of marijuana is illegal under the federal Controlled Substances Act, 21 U.S.C. Sections 801-97. Federal law prevails over any conflicting state law under the Supremacy Clause of the United States Constitution. *Gonzalez v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed. 2d 1 (2005). Any ban of marijuana is in compliance with federal law. Likewise, any restriction of marijuana that has the effect of banning the Schedule I controlled substance is in compliance with federal law.

There are no recognized First Amendment or “free speech” protections associated with the manufacture, possession, delivery, sale, or use of marijuana. This distinguishes production, processing, and retailing of marijuana from rules applicable to regulation of adult business. If there is no “right” to access recreational “adult marijuana” in any particular city, there is no restriction on the ability of a city to ban such use and businesses, or to regulate such uses to the effect that such regulation constitutes a *de facto* ban.

It is also important to note that nothing in Initiative 502 or the implementing regulations prevents a city from “regulating” marijuana production and/or processing uses different from retail outlets. No provision in the Initiative or regulations states that any city or county is “allocated” a minimum or maximum number of production or processing licenses. Thus, a city could ban marijuana production, processing, or retailing uses within its jurisdiction – or all three.⁶

F. Conclusions.

There is no express or implied preemption of a city’s constitutional land use authority under the provisions of Initiative 502. The Initiative was not intended or drafted to create a “one size fits all” cram down. Cities within the State of Washington retain their authority to regulate land uses within their respective jurisdictions – including the ability to ban or to establish restrictive land use regulations.

The exercise of a city’s authority to ban adult marijuana production, processing, and retailing does not impair the application or enforcement of Initiative 502 or its implementing regulations. Any city’s “allocated” retail licenses simply become “at large” licenses available for location within the unincorporated areas of the county or in any other city that was not allocated retail licenses. There is no reduction in the maximum number of retail licenses allocated to each county.

There is no preemptive “right” of access to adult marijuana. The purposes of Initiative 502 are satisfied with provision of “adequate access.” Adequate access is satisfied by locations within the unincorporated areas of the county or in other cities that elect not to ban. Market conditions and basic economic self-interest will operate so that “at large” retail outlets will locate in the

⁶ Counties may require a different analysis. Initiative 502 authorizes the WSLCB to allocate the “maximum number of retail licenses” for “each county.” There is no allocation authority pertaining to cities within each county. A county would have the additional burden to show that the Initiative does not preempt the county’s ability to ban retail outlets within the unincorporated areas of the county. However, even for counties, there is no express or implied mandate within the Initiative requiring the county to allow production or processing uses within its jurisdiction.

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unincorporated areas of the county, or in other cities, within a reasonable distance of larger cities.

There are no mandates in Initiative 502 requiring any city or county to allow marijuana production or processing within their jurisdictions.

There are documented environmental and secondary effects associated with analogous medical marijuana dispensaries that strongly support the local government's ability to control land uses within its jurisdiction.

There is no intent within Initiative 502 to support a conclusion that the people intended a "one size fits all" mandate preempting a city's ability to honor and protect local conditions. In fact, the adopted regulations establish that any license issued for marijuana production, processing or retailing is subject to the zoning laws of the local jurisdiction. Local needs, such as protection of residential zones, can only be protected through the exercise of zoning and land use regulation.

Marijuana remains a controlled substance illegal under controlling federal law. The August 29, 2013 memorandum issued by the U.S. Attorney's office is an exercise of prosecutorial discretion. It is not a legislative act. Prosecutorial discretion can be altered or withdrawn if the federal enforcement agency determines in any case that the state's law or enforcement falls short of the federal government's interest. In fact, the August 29, 2013 memorandum specifically referenced this ability.

We appreciate the ability to respond to your request. We would be happy to supplement or provide further comment.

Very truly yours,

A handwritten signature in black ink that reads "Jeff Cutter". The signature is written in a cursive, flowing style.

Jeff Cutter
City Attorney