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IN THE SUPERIOR COURT OF LEWIS COUNTY

IN AND FOR THE STATE OF WASHINGTON

PERRY NELSON Petitioner, vs. CITY OF CENTRALIA, Respondent	Case No.: COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF FROM CENTRALIA'S LEGAL MARIJUANA PROHIBITION

To: Thurston County Court Clerk

CC: CITY OF CENTRALIA, WASHINGTON ATTORNEY GENERAL

COMES NOW, Petitioner, PERRY NELSON, proprietor of "RIU420", Centralia, Washington, a resident of Lewis County, and an applicant for an Initiative 502 (I-502) marijuana retail license, by and through his attorney, ELIZABETH HALLOCK, and petitions the above-named Court under RCW 2.08.10, RCW 7.24.010, RCW 7.16.150 for injunctive, declarative, and mandamus relief from Respondent city's I-502 land use moratorium and obstruction of his lawful marijuana business. He seeks a declaration that he may conduct his trade within city limits as authorized by the state and permitted by federal law; that the city's prohibition on his trade is pre-empted by and in conflict with the general law; that the city has violated the procedures of state statutory moratorium law; and that the city has violated his substantive and procedural due process rights in its adoption and application of a land use decision-making tool to make no decisions, but rather, serve political ends.

Petitioner asserts that the moratorium, which prevents him from obtaining a local and state business license, is an unconstitutional ban on a legal activity within the purview of the state alone to regulate. He argues that Centralia's attempt to essentially criminalize the tightly-regulated state system through prohibition within its borders not only directly contravenes state criminal and constitutional law, it contravenes federal mandates that state a preference for regulation over the dangerous and systemic violence of the black market. Petitioner argues that invocation of federal law in local marijuana prohibition is both irrational and arbitrary in that it rests on considerations not intended by the governing law, but instead upon the criminal "nature" of the marijuana plant, in name alone, rather than upon federal criminal enforcement priorities.

Most importantly, he argues that Centralia's rolling moratorium is essentially a permanent prohibition based on political speculations and contingencies outside of its jurisdiction and control, with no timeline for resolution. He argues the moratorium is merely a pretext for assuaging strident community opposition, based on unsubstantiated fears, and a political device for blackmailing the state legislature into a greater share of the I-502 revenue pie. Centralia does all this, Petitioner argues, while holding his legitimate business interests and the safety of the citizens of the rest of Washington hostage. Respondent city has formally adopted within its moratorium a provision to reject all applications related to I-502 businesses during the moratorium time frame, thus, Petitioner has exhausted all of his administrative remedies and/or any attempt to exhaust them would be futile.

I. FACTUAL BACKGROUND

Respondent city has prohibited all uses related to I-502, an initiative passed by Washington voters to legalize the use and business of marijuana and codified in Washington's Controlled Substance Act at RCW 69.50.354, via a land use moratorium, Ordinance 2322-A, originally enacted on October 13, 2013, adopted on 27 January 2014, and extended again on April 27 and May 27, 2014. The moratorium is now a rolling moratorium, which, in theory, is temporary, but in practice, grants no such certainty. For all intents and purposes, the moratorium is Prohibition for all those within Centralia's jurisdiction, quite different from the times of the Great Gatsby, in that it is the re-criminalization of the state regulated, federal government supported, legal marijuana trade.

The city planning department recommended final zoning amendments that would have ended the moratoria in both January and April. In January, the city council passed the zoning

code upon a first reading, but at the next city council meeting, was advised by the city attorney that the Washington Attorney general had issued an opinion that cities could zone out legal marijuana completely. She also addressed the adoption of a house bill that would offer cities a larger share of I-502 tax revenue. In an abrupt about-face, and with a five-minute public hearing that Petitioner contends was not properly noticed, the city balked on the zoning provisions and voted to adopt its moratorium. Again, in April, with recognizance that the moratorium was up for its six-month expiration, the city voted down the planning department's recommended zoning amendments again and re-issued its moratorium. A public hearing on the matter was not held until May 13th. On May 27th, 2014, the city revised much of the language in its moratorium, without a public hearing, and voted to clarify that it would not be accepting any requests for permits, licenses, or applications during the moratorium.

In October 2013, the Liquor Control Board (LCB) adopted WAC 314-55-081, setting forth the procedures in which the board would license retailers in each locality to satisfy the mandates of I-502. Petitioner applied for and won the lottery for a retail store in Centralia. In order to be awarded the state license, he must begin physical work on his storefront, including, but not limited to modification of the premises for safety and security. This is to enable the LCB to do a walk-through and ensure his site fits the licensing requirements. Centralia's Building Division currently has a warning on its website that the city is currently under a moratorium for I-502 related business; thus, he will not be able to get the required building permits he needs to complete the state licensing process.

He has also spent countless hours preparing his operating plans, business plans, employee handbook, filling out applications, and paying licensing fees. Without permission to operate or

even do construction on his site from the city, all of his time, money, and efforts will have been and will continue to be wasted. The city's rolling moratorium prevents him from being able to get a business license, make business decisions, as well as prevents him from making modifications to his storefront to comply with state licensing requirements.

Applicants for I-502 producing and processing in Centralia have been vetted by the Liquor Control Board, and the board has sent letters requesting approval from the city. The city has responded with objections to these businesses operating within city limits based on the moratorium. On May 15, 2014, the city voted to clarify its moratorium. The city attorney stated, "This was just done to clarify the city will not be accepting or processing any requests for permits, licenses or applications during this moratorium period." Thus, an attempt by the petitioner to exhaust administrative remedies would be futile.

II. SUMMARY OF ARGUMENTS

Moratoria are unique in land use practice as they invoke a jurisdiction's local police powers to confront a dire land use emergency. In practice, they strip all rights to development in a given domain. The Revised Code of Washington grants cities the authority to enact moratoria if they adhere to specific substantive and procedural due process requirements codified in state law. (RCW 35A.63.220, moratoria for code cities; RCW 35.63.200, moratoria for planning commissions, which petitioner will argue, applies.) The code sets out some basic guidelines, and cities must be on guard not to violate other aspects of procedural and substantive due process rights, as a moratorium takes away a citizen's right to any development. As land use actions, the moratoria must also meet constitutional requirements for local ordinances set out under Article XI, Section 11 of the Washington constitution; they may not conflict with or be pre-empted by

the general law. A moratorium is a land use decision-making tool that allows a locality time to address a land use problem, take public comment, gather reports and studies, and provide a solution.

A locality may not be dilatory in both addressing the problems and finalizing its decision through a more permanent ordinance. A moratorium is a land use tool used only in rare cases for *making* decisions, and in order to satisfy substantive due process requirements, must be for a legitimate public purpose and reasonably applied. A local moratorium was never intended by the legislature to be used as a stall tactic or a holding place for speculative lawsuits or legislation, as a pretext to assuage the demands of strident opposition, and above all, not as a weapon to blackmail the state legislature into filling the city's coffers. There are other more appropriate forums for such discussions than the land use forum.

Petitioner argues that it is a statutory procedural violation for a locality to extend a land use moratorium once viable options to address the emergency have been presented, without any concrete timeline and working plan to continue to address the issues as required under RCW 35.63.200 (which he will argue, in this case, applies). He also argues it is a statutory violation under RCW 35.63A and a violation of the most basic elements of procedural due process and the right to continuous citizen participation for the city to have failed to hold a public hearing in adopting the moratorium, holding a hearing on the moratorium extension two weeks after the extension was already adopted, and not holding any hearing at all on the adoption of a subsequent revised moratorium.

Petitioner contends that invoking hypothetical state legislation and speculative lawsuits outside of locality's jurisdiction and control, and a "wait and see," or rather, "wait and do

nothing" approach, are not legitimate public purposes for which imposing a land use moratorium is either reasonable or appropriate. A land use moratorium is related to decision-making around development and should be based on immediate, substantive evidence on the record, not anecdotes or hopes. Petitioner contends it is unreasonable, arbitrary, and a substantive due process violation to refuse to adopt a viable land use solution and instead, extend a planning moratorium in the name of political contingencies that may not be resolved for years.

Furthermore, a basis for a land use moratorium that cites community opposition to the general law, or dissatisfaction with a desired share of tax revenue, is not rational. A city cannot hold an applicant hostage in the name of land use decision making while it plays political football with the state legislature. The council's "wait and see" mentality is not a valid justification for extending its moratorium, and that approach is anathema to a working plan. In sum, a land use moratorium may not be used as an arbitrary political holding place without a good faith effort to resolve the emergency land use issues.

If the city truly believed the Attorney General's opinion, then they should have ended the moratorium and attempted to enact a permanent ban. The fact that the city has no working plan to address the land use issues shows bad faith on its part, evidencing its intent to use the moratorium not as a land use device, but as a stall tactic to save political face through inaction. The difference between a moratorium and ban in Centralia is one of semantics alone. Because the city is no longer using the moratorium as simply a timeframe within which it can create and make land use decisions, the city of Centralia's "moratorium" is now effectively a ban with the end goal of illegalizing the legal I-502 marijuana business and trade within its borders.

The legal basis for the moratorium first and foremost relies on the criminal illegality of marijuana at the federal level, despite the fact that Washington as a state has legalized marijuana use and business, and its cities have no duty to enforce federal criminal marijuana law, nor right to, as the Washington's Controlled Substance Act expressly pre-empts local criminal law. The fear of federal enforcement of federal criminal law against a tightly-controlled, state-regulated recreational marijuana system is unfounded. Petitioner will demonstrate that the government has specifically stated such enforcement is outside of its priorities. Thus, fear of federal intervention in the distant future, or the federally criminal "status" of marijuana, in name alone, are irrational bases upon which to base a land use regulation. Centralia's prohibition against the legal marijuana trade, without a rational basis or legitimate public purpose, and without any framework for an end other speculative political outcomes, has been arbitrarily applied in direct violation of petitioner's substantive due process rights.

Furthermore, a ban which would continue to allow the black market to flourish in this locality is in direct contravention of the directives of the federal government's Department of Justice, which prefers a tightly regulated state-controlled system to the illegal drug trade. Allowing a dangerous black market and its systemic violence, turfs wars, and human trafficking to continue serves no legitimate public purpose and, again, violates petitioner's substantive due process.

In reality, the city has no constitutional or statutory basis upon which to invoke either express or implied police power over I-502 operations. By effectively illegalizing the marijuana trade through its moratorium, the city is in conflict with and pre-empted by the general state law codifying I-502. It is possible that the city is aware that, while the judiciary may be more

sympathetic to a rolling moratorium and the "wait and see" approach, a permanent ban would be so clearly in opposition to state law that the city fears losing on that issue. It perhaps would rather place business applicants in perpetual legal limbo than have to address the issue head on and risk losing political support from opponents of I-502.

I-502, as codified under Washington state law within its Controlled Substances Act, clearly expresses the intent of the state to pre-empt the field of marijuana regulation. The subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern, and so paramount to state concerns that the law will not tolerate opposing local action. Any moratorium or ban is unconstitutional under Article XI, as local land use ordinances may not conflict with or be pre-empted by the general law.

Furthermore, the text, purpose, and legislative history of the I-502 law offers localities neither express nor implied police powers over I-502 land uses, regardless of the opinion of the Attorney General. The issue is of such great import and of state concern that the legislature did not leave room for localities to interfere, in contrast with the state's medical marijuana act, which expressly allowed localities zoning authority. The legislative history shows that the legislature's intent was to exclude localities from exercising police power over the issue; to be effective, the law requires the complete participation of all areas within state boundaries in order to undermine the marijuana black market. Nor can there be implied local police power from the text or intent of the statute. The interests of all Washington residents, codified by statute, cannot be impliedly abdicated to the purview of local governments. While the city insists it is protecting the health, welfare, and safety or its own denizens, it cannot do so at the expense of the rest of the citizens of Washington or interfere with the state's right to protect its people as a whole.

III. MORATORIUM VIOLATES SUBSTANTIVE AND PROCEDURAL DUE PROCESS REQUIREMENTS CODIFIED IN STATE PLANNING LAWS

Washington's test for whether or not a land use ordinance adheres to substantive due process rights is (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, *cert. denied*, 498 U.S. 911 (1990); *Guimont v. Clarke*, 121 Wn.2d 586 (1993), *cert. denied*, 510 U.S. 1176 (1994).

A land use moratorium is the most oppressive tool available to a city under its local police powers, because it can be used to completely strip an individual of his development rights. It is used in cases of dire emergencies to give a locality more time to create a plan to remedy that emergency. The legislature codified specific procedures in 1992 under RCW Chapter 35 in order to guide cities towards moratoria that do not violate substantive due process and use only means that are "reasonably necessary." Limiting its duration, requiring public hearing and comment upon enactment and renewal, and requiring a working plan from the planning department were procedures that the legislature indicates will attest to the reasonableness of the moratorium method.

In enacting its moratorium, Centralia invoked RCW chapter 35.63A. Under that same chapter, a code city may create a planning agency or commission. (RCW 35A.63.020.) The planning agency "shall have such other powers and duties as shall be provided by ordinance." Centralia created a planning "commission" by ordinance 848, now City Municipal Code 2.16. The duties of the planning commission include, but are not limited to: "formulate and

recommend to the city council goals related to the comprehensive plan and development regulations for the city in a structured framework providing both time and measurement criteria" (2.16.030A); "formulate and recommend to the city council new land use and development regulations, plans, policies and strategies for the purpose of assuring achievement of the comprehensive plan goals approved by the city council" (2.16.030C); "review and provide recommendations to the city council on the city's zoning map, proposed zone changes and zoning recommendations" (2.16.040G). The Centralia planning agency, created under RCW 35A.63, functions no differently than a planning commission regulated by RCW 35.63, whose power is to "act as the research and fact-finding agency of the municipality. To that end, it may make such surveys, analyses, researches and reports as are generally authorized or requested by its council or board…" (RCW 35.63.060.)

RCW 35A.63.140, within the chapter for code cities, states within the subsection "Duties and responsibilities imposed by other acts," that: "Any duties and responsibilities which by other statutes are imposed upon a planning commission may, in a code city, be performed by a planning agency, as provided in this chapter." Centralia decided to straightforwardly dub its agency a "planning commission," evidencing the intent of granting it all the rights and responsibilities therein. By using the phrase "rights and responsibilities," in 35A.63.140, the Washington legislature made it clear that a local planning agency could not be delegated the powers of a planning commission without the attached restrictions and rules. Thus, petitioner argues that RCW 35.63, the rules for planning and zoning for planning commissions, applies to

all cities that have a planning agency granted by ordinance the same statutory duties as a planning commission, even non-chartered code cities such as Centralia.

Under RCW 35.63.200, "City" includes every incorporated city and town; "Commission" means a city or county planning commission; "Council" means the chief legislative body of a city. The code states:

> A council or board that adopts a moratorium or interim zoning control, without holding a public hearing on the proposed moratorium or interim zoning control, shall hold a public hearing on the adopted moratorium or interim zoning control within at least sixty days of its adoption… A moratorium or interim zoning control adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. A moratorium or interim zoning control may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.

No public hearing was held within 60 days of adopting the moratorium, and no public hearing was held at its six month renewal, as required under both chapters 35 and 35A. The only public hearing was held two weeks after the moratorium was already renewed. The renewed moratorium was subsequently revised at the next city council meeting without a public hearing; one of the councilman went on record questioning whether or not they should be revising it without public input. No work plan for related studies adopted after moratorium renewal as required under chapter 35, and the planning commission has not been directed to do more. These are direct violations of the statute crafted by the legislature to ensure city moratoria were reasonable, timely, and not arbitrarily applied.

The fundamental requirement of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. (*Rabon v. Seattle*, 107 Wn. App. 734, 34 P.3d 821, Div. I, 2001.) On January 13, 2014 the city was about to adopt a zoning amendment based on the

recommendations of the city planner, voting on a first reading of the code to end the moratorium. Two weeks later, upon the recommendations of the city attorney, armed with her new information from the Attorney General's office and speculation about a house bill, the council tabled the zoning plan and adopted the moratorium. There was no public notice that new arguments would be made in favor of the moratorium, or that the moratorium was even still an option. This move was a clear violation of basic fairness and the requirements of RCW 35A to promote early and continuous public participation.

The city will argue that the moratorium never lapsed, yet most citizens who attended the first reading the proposed I-502 zoning code, which passed during the first council meeting uneventfully, would not have suspected such an abrupt change of policy. Once a potential solution was partially adopted, there should have been public notice that the city attorney was about to recommend an about face, so that citizens would have been given the opportunity to comment and respond.

On April 27, 2014, the moratorium was extended beyond its sixth month expiration. Once again, the city was deficient in following RCW 35A and procedural due process because there was no notice or public hearing. The only public hearing followed two weeks later, which is not what the code requires; the code requires a hearing *before* voting to adopt a moratorium, "prior to each renewal." (RCW 35A.63.220.)

Mayor Bonnie Canaday said after the public hearing on the moratorium in May, "We don't feel like we have all the answers to the direction that we want to go yet. The moratorium makes the opportunity to look at things." What those "things" are have not been delineated by the city council or the planning commission. A locality cannot employ a land use moratorium to

stall while awaiting the results of political contingencies and hypothetical legislation outside of its jurisdiction, beyond its control, and with no timeline for resolution, without violating the reasonableness standard of Washington substantive due process.

Nor can a city invoke a moratorium in the name of decision making while it awaits the results of speculative lawsuits. Speculative lawsuits are not a "legitimate public purpose" for keeping a moratorium and not moving forward with adopting a zoning code. The city attorney essentially balked on making any more decisions until the city was sued. In response to the argument that the rights of cities in the legal recreational marijuana context differed from their powers under the illegal medical marijuana regime, she stated, "We have our theories…Those questions won't be answered until we're in a court of law."

Nationscapital Mortgage Corporation v. Dep't of Financial Institutions, (133 Wn. App. 723, 758-759, 137 P.3d 78 (2006)), held that, under the procedural due process appearance of fairness doctrine, proceedings before administrative tribunals acting in a quasi-judicial capacity are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. Councilman John Elmore stated at the conclusion of the re-adoption of the moratorium (which lacked a public hearing, but this fact should not scourge the Petitioner's right to a neutral hearing, even if no hearing existed): "As a councilor, my community doesn't want it and I'm responding to my community." Once again, a land use moratorium is the wrong forum to assuage strident community opposition, and the councilman violated the fundamental right of the petitioner to have the moratorium decided by an unbiased decision-maker. Under *Nationscapital*, Petitioner need not prove Mr. Elmore's affected the outcome of the hearings, only that these biases could have.

Elmore continued, "We get no financial benefit, other than a utility tax (on would be producers' energy usage)." A land use moratorium is the wrong forum in which to address dissatisfaction with a general law crafted by the state legislature. Petitioner is caught in the middle of what amounts to political blackmail of the state legislature by a locality that wants a larger share of the revenue pie. Under the requirements of substantive due process, such political blackmail cannot possibly be seen as a "legitimate public purpose" under which a land use ordinance may be an enacted. To be sure, when the legislature codified the explicit right of cities to enact moratoria into law, it did not imagine or intend that localities use the device to contravene future laws they might craft or hold the will of the people hostage.

In sum, Centralia has already created its zoning code as it relates to I-502. Yet the city council has stalled its vote on adopting the code, and offers no timelines or plans for working on resolving the moratorium. That semi-final zoning plan is not easily accessible on the city website for review, or easily available to the petitioner to review to see if he meets city zoning criteria additional to the state requirements of being 1,000 feet as the crow flies from restricted entities, such as parks, outdoor places of recreation that resemble parks, schools, daycares, youth recreation sites, arcades, and libraries. The city has commissioned no studies or sought expert advice to ascertain how the sale of marijuana will affect their land use goals, despite referencing medical marijuana in its moratorium, which Washington and other states have a long history of incorporating into their local zoning codes. Without a working plan in place to move forward, the city is procedurally violating RCW 35.63.200.

Even if the planning commission regulations do not apply, the legislature inserted the responsibilities of a working plan into their code section for a reason. While councils typically

have the final say over an ordinance, it is the planning commission that must do the brunt of the work and has the power to commission related studies. Thus, they are the most appropriate agency to create and adhere to deadlines and research what further studies need to be undertaken. Hence, the timeline requirement was added to the planning commission code. Regardless of where the working plan requirement appears, these codes were enacted with a specific purpose in mind: to assist cities in ensuring that their moratoria exhibit characteristics that a judge would consider as evidence that the moratoria were both rationally and reasonably applied and did not violate substantive due process rights.

Regardless of any state statutory provision, the moratorium can still be seen as unreasonable and arbitrarily applied in violation of both procedural and substantive due process rights due to the city's failure to demonstrate that it is of limited duration and not endlessly rolling; that progress is being made on resolving the emergency issue through a timeline or working plan; that the city supports early and continuous public participation through notice and holding of public hearings; and that strident opposition from the losing voters or a political blackmail for a greater share of tax revenue are "legitimate public purposes."

While deference is given to cities as to what is reasonable based on the record, the moratorium adoption in January was clearly not based on substantive land use information and public comment, but instead on speculation about what the Attorney General's office, other cities, and state legislature *might* do. The council was literally one vote away from passing an acceptable zoning code ordinance, yet was persuaded by the hypothetical that cities *might* be able to zone out marijuana completely. Rather than basing the renewal of the moratorium on factual information regarding *how* legalized marijuana business would affect land use, the new

moratorium was based on hypotheticals that would only resolve themselves in the distant future, with no plan to move forward other than to "wait and see." Without a more concrete basis for re-adopting the ordinance, it is clear that the moratorium has been arbitrarily and irrationally applied and extended based on speculation, political indecision, and the mistaken notion that a city can ban a legal business just through inaction. The moratorium, at this juncture, is founded on fear, preconceived biases, and political indecisiveness, not substance or fact.

If the city is waiting for scientific data from other cities on how recreational marijuana affects their land use goals, it should make that clear and create a timeline and set aside funds for commissioning that study. If the city's only contention is that it will need more police protection, it should commission a study in tandem with the police department. Since the moratorium references medical marijuana, it should take active steps to study how that business affects localities' land use goals. Otherwise, the city lacks a believable rational basis under which it has chosen to continue its moratorium. By not having a clear plan for moving forward and limiting the ban's duration, the city further fails to evidence that the moratorium is reasonable and not arbitrarily applied in violation of substantive due process, in addition to the clear violation of statutory planning commission work plan requirements.

IV. INVOCATION OF FEDERAL CRIMINAL LAW AGAINST FEDERALLY PERMITTED AND LEGAL STATE CONDUCT IRRATIONAL BASIS, RESTS ON CONSIDERATIONS NOT INTENDED BY THE GOVERNING LAW; ENABLING BLACK MARKET WHILE PROHIBITING THE TIGHTLY REGULATED LEGAL TRADE SERVES NO LEGITIMATE PUBLIC PURPOSE

The I-502 legislation, approved by the people and codified by the state legislature at RCW 69.50, *et sequential*, and WAC 314-55, *et seq.*, does more than create a narrow defense to

marijuana use and possession. It contains a statutory right to obtain marijuana legally through large-scale commercial production, processing, and retail operations. In fact, the general law *requires* the "provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market." (RCW 69.50.345).

The intent of I-502 as stated in Part I "Intent," is "…to stop treating adult marijuana as a crime;" "Allow law enforcement resources to be focused on violent and property crimes;" and "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…" [I-502, Part I, Section 1].

RCW 35A.11.020, laws governing non-charter and charter code cities, states that a city "may adopt and enforce ordinances…However, the punishment for any criminal ordinance shall be the same as the punishment provided in state law for the same crime." The code expressly states that the city is pre-empted by state criminal law, thus prohibiting Centralia from criminalizing the marijuana trade, as it is legal under state law. By extension, the city council cannot invoke the criminal "nature" of marijuana as a reasonable basis for prohibiting the legal trade within its boundaries.

Nothing in Centralia's code states that an ordinance shall not be in conflict with federal law, or that provisions cannot be implemented or enforced because of federal law. Under Washington State law, the operation of regulated commercial marijuana operations is permitted conduct. Furthermore, the federal government has stated that it in fact *prefers* to state regulated marijuana operations to the black market.

In August, 2013, the U.S. Department of Justice released a memo, known as the Cole memo, that states, "the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws…enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity."

Most strikingly, the Cole memo contradicts the notion that retail outlets and the cities they are located in would be violating any federal laws. The memo states, "a robust system [of regulation] may affirmatively address [federal] priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for." If anything, the I-502 system furthers federal priorities, rather than detracting from them, by providing a tightly regulated system designed to ultimately excoriate the black market and its ancillary ills.

There is, in truth, no federal or state criminal legal basis upon which the city of Centralia should be interpreting and applying its land use and zoning code with regards to I-502 business entities. Even if marijuana is considered illegal at the federal level, localities are not required to enforce that law, and in Washington State, they are prohibited from doing so. It is furthermore the documented intent of the federal government to *prefer* regulated systems, such as that in Washington, to the black market, and to shift enforcement priorities elsewhere. There is no indicia of truth in the idea that by allowing state regulated marijuana businesses to operate within its borders, the city would be violating any law. Its assets would not be seized, its city hall would

not be raided, and there is absolutely no evidence it would lose federal funding. A city regulation cannot be based on irrational non-evidence without any legitimate legal or factual basis, no matter how rational such anxiety provoking arguments may sound to the confirmation biases of the fearful.

The record fails to demonstrate any substantive evidence that marijuana's *inherent* illegality would affect land use. Merely stating that a product is "illegal" is not a legitimate public purpose upon which to base a ban, and therefore violates petitioner's substantive due process rights. I-502 was incorporated into the Washington Controlled Substance Act, which eliminates the sale of marijuana as a criminal or civil offense. The sale "by a validly licensed marijuana retailer or retail outlet employee, shall not be a criminal or civil offense under Washington state law." (RCW 69.50.354.) Under the WA Controlled Substances Act, state law pre-empts local law. (RCW 69.50.608.) Because marijuana is legal at the state level, its federal illegality is a non-issue to local governments, who have neither the duty nor the right to enforce such federal law.

Thus, not only is the conduct of commercial marijuana operations permitted at the federal level, the city of Centralia would actual be *in conflict* with the federal mandate if it permitted the black market to continue. Centralia has adopted a prohibition that is inconsistent with both state and federal law.

While the federal government cannot force a locality to allow legal marijuana operations, Petitioner argues that the state, by express requirements codified in the I-502 statute, does require that the localities do *not* adopt ordinances that conflict with the text and intent of the general law in the name of local welfare. The application of criminal federal law into the local land use

decision-making policy is merely a pre-text to assuage strident community opposition. This rationale is based on fear, not facts, and it is an arbitrary and unreasonable basis for the application of a prohibition.

V. MORATORIUM BASED ON ZONING UNCONSTITUTIONAL, PRE-EMPTED BY AND CONFLICTS WITH GENERAL STATE LAW

Generally, municipalities possess constitutional authority to enact zoning ordinances as an exercise of their police power. (Washington Constitution Article XI, § 11). RCW 35.11.020 states that "the legislative body of each code city shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law." Any express or implied grant of police power to local government is subject to constitutional limitation, which is judicially enforced. (*Biggers v. City of Bainbridge*, 162 Wash.2d 683, 2007; *Petstel, Inc. v. County of King,* 77 Wash.2d 144, 154, 459 P.2d 937 (1969), *see also, e.g., HJS Dev., Inc. v. Pierce County,* 148 Wash.2d 451, 482, 61 P.3d 1141 (2003)). Municipalities possess only those powers given by the legislature. (*Id.)* If not expressly granted power by the legislature, "Local jurisdictions may enact ordinances upon subjects already covered by state legislation if their enactment does not conflict with state legislation" (*Bainbridge, at 694 citing Lenci v. Seattle,* 63 Wash.2d 664, 670, 388 P.2d 926 (1964)).

Petitioner argues that localities have neither express nor implied police power to issue moratoria on I-502 development. The legislature expressly tasked the state with jurisdiction over the legal marijuana trade. The affirmative requirement that the LCB create retail stores in order to subvert the black market in combination with RCW 69.50.608 requires that localities comply with the LCB's efforts. RCW 69.50.608 states that "local laws and ordinances that are

inconsistent with the requirements of state law shall not be enacted and are pre-empted and repealed, regardless of the nature of the code, charter or home rules status of the city, town, county, or municipality." It is therefore inconsistent with this requirement to allow localities to prohibit I-502 enterprises.

No powers are expressly offered to local government within the I-502 statutes. The legislature expressly tasked the state with jurisdiction over the legal marijuana trade. No powers are expressly offered to local government within the statute. Nor can any police powers be implied. The general law is so thorough that the issue clearly falls squarely within the exclusive purview of the state, and the issue is of such great import and of great state concern that the legislature did not leave room for localities to interfere. "The interests of all Washington residents, codified by statute, cannot be impliedly abdicated to the purview of local governments." (*Biggers v. City of Bainbridge*, 162 Wash.2d 683, 2007.)

Petitioner contends that the city's I-502 moratorium is unconstitutional and invalid because the city's express police powers under RCW 35A.63.220, to enact land use moratoria, and Article XI of the Washington constitution, to enact zoning ordinances, are pre-empted by and in conflict with the state's general law with regards to I-502. He further contends that the legislature never expressly or impliedly conferred police power on localities to exercise land use authority over I-502, in the form of either moratoria, bans, or any zoning regulations beyond what is required by the state, and thus, the city lacks any authority under the I-502 related statutes to enact a moratorium or any land use decision that conflicts with state legislation.

A. PRE-EMPTION OF LOCAL PROHIBITIONS BY EXCLUSIVE AND PARAMOUNT CONCERNS OF THE STATE

Municipalities may not enact a zoning ordinance which is either pre-empted by or in conflict with state law. (*HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003)). State law pre-empts a local ordinance when "the legislature has expressed its intent to pre-empt the field or that intent is manifest from necessary implication." (*HJS Dev*., 148 Wn.2d at 477, citing *Rabon v. City of Seattle*,135 Wn.2d 278, 289, 957 P.2d 621 (1998); Brown v. City of Yakima, 116 Wn.2d 556, 560, 807 P.2d 353 (1991)). Otherwise, municipalities will have concurrent jurisdiction over the subject matter. (*HJS Dev*., 148 Wn.2d at 477.)

I-502 as codified under WA state law within its controlled substances act clearly expresses the intent of the state to pre-empt the field of marijuana regulation. The subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern, and/or so paramount to state concerns that the law will not tolerate opposing local action.

Respondents will argue that a code section to expressly deny localities zoning powers was required to show pre-emption. Article XI of the State Constitution is clear that pre-emption intent can be manifested by implication. The state has so fully occupied the area of marijuana regulation, that the legislature's intent to pre-empt local law is more than implied, it is crystal clear. Not only do the I-502 amendments to the WA controlled substances act prevent localities from criminalizing marijuana uses, the code now provides for the exclusive administration, by a state agency alone, of an expansive and tightly-controlled regulatory framework, taxation, and traceability scheme. The statute explicitly states that the framework was designed to protect the

general welfare of citizens of the entire state by undermining the black market, allowing police to focus on more serious crime, and try a "new approach" to marijuana regulation. Any local attempts to interfere with that system and new approach through local zoning regulations under local police powers are pre-empted by state law.

The fact that there is *not* an express nod to localities as to how they will be involved in zoning, administration, taxation, and health and safety is evidence that the legislature intended the state and the general law to take center stage. In this case, the silence with regards to localities is a "pregnant" silence, as it is in direct contrast to the Washington Medical Use of Cannabis Act (MUCA). [*Elkins v. Moreno*, 435 U.S. 647, 666 (1978) (absence of reference to an immigrant's intent to remain citizen of foreign country is "pregnant" when contrasted with other provisions of "comprehensive and complete" immigration code); *Meyer v. Holley*, 537 U.S. 280 (2003) (ordinary rules of vicarious liability apply to tort actions under the Fair Housing Act; statutory silence as to vicarious liability contrasts with explicit departures in other laws)].

MUCA contains an express provision entitled "counties, cities, towns – authority to adopt and enforce requirements" and states: "Nothing in this act is intended to limit the authority of cities and towns to impose zoning requirements or other conditions upon licensed dispensers, so long as such requirements do not preclude the possibility of siting licensed dispensers within the jurisdiction." (RCW 69.51A.140). The MUCA subsection also expressly authorizes localities to tax and address health and safety issues with regards to medical marijuana. Such express delegations of police powers to localities are glaringly absent from the recreational marijuana statute.

The rules of statutory construction provide an assumption that when enacting a law, the legislature understands the law and the legislation that has come before it. The presence of express local police powers in the earlier medical marijuana law (in which large scale commercial operations are not considered legal and are not tightly regulated), and its absence in the recreational marijuana law (in which commercial operations are considered legal and the state administers, regulates, and taxes the industry), suggests that the legislature intentionally denied express police powers for localities on the recreational marijuana issue with a very pregnant silence. With this express *denial*, no implied police powers over the recreational marijuana issue can be inferred from the intent of the law.

Indeed, one of the authors of the bill, ACLU Drug Policy Director Alison Holcomb was quoted as saying, "The initiative specifically gives the Liquor Control Board, in determining the number of stores per county, the task of providing 'adequate access to licensed sources … to discourage purchases from the illegal market.' It's hard to see how allowing counties to ban stores outright doesn't directly conflict with state law." (*Associated Press,* January 16th, 2014, by Gene Johnson.) It was never the intent of the I-502 authors to give localities the express or implied police power to undermine the statewide approach necessary to tackle the statewide illegal marijuana trade and its statewide ancillary dangers. If the Washington legislature had intended such an irrational result, "surely it would have expressed it in straightforward English." (*FMC Corp. v. Holliday*, 498 U.S. 52, 66 (1990) (Justice Stevens, dissenting, objecting to Court's interpretation of convoluted preemption language in ERISA)).

1.STATE PRE-EMPTION PREVENTS ENDANGERMENT OF TRANSIENT CITIZENS AND CITIZENRY IN GENERAL

FROM "SYSTEM-RELATED" CRIME, i.e., TURF WARS AND TRAFFICKING VIOLENCE

State law legalizing the marijuana business can pre-empt local ordinances that effectively illegalize the marijuana trade because the issue is of such a nature that the adverse effect of local bans would endanger the transient citizen, neighboring localities, and all Washington citizens.

The seminal 1985 study by economist Paul Goldstein recognized three types of drug-related crimes, a tripartite system taught in the most introductory criminal justice courses: Use-Related crime (crimes that result from or involve individuals who ingest drugs, and who commit crimes as a result of the effect the drug has on their thought processes and behavior); Economic-Related crime (crimes where an individual commits a crime in order to fund a drug habit, including theft and prostitution); and System-Related crime (crimes that result from the structure of the drug system). [Paul Goldstein, "The Drug Violence Nexus," *Journal of Drug Issues*, Fall 1985, 15(4)(493-506).] System-Related crime includes production, manufacture, transportation, and sale of drugs, and also includes violence related to the production or sale of drugs, such as a turf war. Goldstein concluded that drug crimes that occur in the most frequency and severity are System-Related crimes, not Use-Related crimes as the layman's unscientific bias would predict. In his famous study commissioned by the New York State Division of Criminal Justice, Goldstein discovered that in New York City drug-related homicides, over 70% of the victims were drug traffickers. (Goldstein, "Drug Related Crime Analysis: Homicide," Report to National Institute of Justice, July, 1987). To put it simply, marijuana is deadly because when unregulated, it leads to senseless and violent turf wars. Transient and neighboring citizens may be caught in the crossfires of these turf wars.

Furthermore, without participation of the entire state, the efficacy of I-502 everywhere will be threatened. Moratoria without working plans are effectively bans that conflict with the general law by illegalizing the legal trade and encouraging the black market to flourish. Economist Benjamin Powell explains that the drug business is violent "precisely because it is illegal." He continues: "Illegal businesses can't settle disputes in court, so they do so through violence. If drugs were legalized, drug suppliers could settle disputes by turning to courts and arbitrators…When alcohol was prohibited in the early twentieth century, violent criminal gangs catered to the nation's thirst for alcohol. When Prohibition ended, normal businesses returned to the market and violence subsided." (Benjamin Powell. "The Economics Behind the U.S. Government's Unwinnable War on Drugs." July 1, 2013. Library of Economics and Liberty.)

Economist Jeffery Miron found that both alcohol prohibition and drug prohibition enforcement efforts have increased the homicide rate in the United States. He estimates that the homicide rate is 25-75 percent higher due to prohibition. (Jeffery Miron, "Violence and the U.S. Prohibition of Drugs and Alcohol." *NBER Working Paper No. 6950*, 1999) Miron also concludes, in an exhaustive study, "a relatively free market in drugs is likely to be vastly superior to the current policy of prohibition." (Miron, Jeffrey A., and Jeffrey Zwiebel. 1995. "The Economic Case against Drug Prohibition." *Journal of Economic Perspectives*, 9(4): 175-192.)

Powell concludes, "In short, the violence associated with drugs, both by users to support their habit and by gangs supplying the drugs, is a product of prohibition rather than a rationale for prohibition." (*Ibid.*)

Furthermore, economist Bruce Benson argues that drug prohibitions actually increase violent and property crimes, because criminal justice resources are scare. As resources are shifted

into drug policy enforcement, fewer resources are available to control non-drug crime. Imagine a local or transient citizen travelling through Centralia who is being robbed at gunpoint, unable to get through to 9-1-1, because the police are busy dealing with complaints about marijuana drug traffickers. Benson argues "when other determinants of crime are considered the correlation between drug enforcement and crime is reversed and it appears that drug enforcement actually causes non-drug crime… drug prohibition creates large negative externalities…" (Bruce Benson, *The War On Drugs*, *A Public Bad*, presented at Research Symposium on Bad Public Goods, Northwestern University School of Law, Chicago campus, September 14-16, 2008.)

The scholarly and scientific evidence has been clear for years: a regulated marijuana trade will *reduce* crime, not increase it. This is why the state decided not only to legalize marijuana's use, but to regulate its production, transport, and sale. This is why the I-502 legislation does not incorporate language into its code that requires the approval of localities in order to move forward with its ultimate end goal of protecting Washington citizens – without incorporating the entire market for marijuana within Washington's boundaries into a regulatory scheme, the unregulated black market will still thrive in pockets of the state and engender System-related violence that will spillover even into regulated areas. Speculative predictions and anecdotal accounts of increased crime under a tightly-controlled, regulatory scheme are not a rational basis for Centralia's moratorium. Nor is strident community opposition, based largely on unfounded fears, an appropriate basis for this most restrictive of land use tools. Local governments have no constitutional right to put transient citizens at risk by effectively illegalizing the marijuana business in a state in which it has been declared legal.

2. STATE PRE-EMPTION PREVENTS SPILLOVER EFFECT AND PROTECTS NEIGHBORING LOCALITIES

A locality's decision to ban the state's regulated market not only encourages the unregulated market to flourish within that locality, it creates a geographic "spillover effect" of the black market into neighboring communities, even ones in which the regulated market is welcome. The "Not in My Backyard" mentality of localities with bans will greatly affect the safety and security of all Washington citizens.

Criminologist John Lott examines the "spillover effect" of crime in his analysis of local bans on concealed handguns. Regardless of one's stance on second amendment rights, there has been evidence that bans on handgun ownership in one locality affect criminality in neighboring regions, known as the John Lott Effect. "Criminals are said to move from one community to another more in response to changes in concealed handgun laws than in response to arrest rates. The spillovers are largest for property crimes and happen immediately and continue to increase over time after adoption of the law." (Stephen Bronars and John Lott, *Criminal Deterrence, Geographic Spillovers, and Right-to-Carry Concealed Handguns*, American Economic Review, Vol. 88, no. 2, May 1998). Lott notes that criminals often use one locality as a "staging" area for crime into surrounding communities. Localities that ban marijuana uses could potentially become staging areas for the underground market into neighboring areas, threatening to undermine the state regulatory system and endanger the health, safety, and welfare of all Washington citizens.

Although localities may have the best intentions of protecting their own citizens by enacting marijuana moratoria and bans, local governments are putting their constituents at

greater risk of System-Related drug violence. Such a misguided application of local police powers not only endangers their own local citizens, it endangers all Washington citizens, traveler and non-traveler alike. I-502 as codified expressly and impliedly attempts to curb System-Related drug crime by regulating the system of production, manufacture, transport and sale of marijuana. Local bans and moratoria interfere with the state's general law requiring the regulation of the marijuana trade, threaten to undermine the state's regulatory effort, and promote, rather than diminish, the System-Related drug crime that is at the heart of I-502 and the legislature's efforts. Because the moratoria will have such an adverse effect on the welfare of transient citizens and citizens at large, state law must pre-empt local ordinances.

B. UNCONSTITUTIONAL CONFLICT OF MARIJUANA PROHIBITIONS WITH STATE LAW

There is a conflict when local law contradicts state legislation. Local legislation is in contradiction when it is inimical thereto. A city ordinance is unconstitutional under Washington Constitution Article XI, Section 11 if "(1) the ordinance conflicts with some general law; (2) the ordinance is not a reasonable exercise of the city's police power; or (3) the subject matter of the ordinance is not local." (*Edmonds Shopping Ctr. Assocs. v. City of Edmonds*, 117 Wn. App. 344, 351, 71 P.3d 233 (2003)). Whether a local ordinance is valid under the state constitution is a pure question of law. (*Edmonds Shopping Ctr*., 117 Wn. App. at 351.)

"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." (*City of Tacoma v. Luvene*, 118 Wn.2d 826, 834-35, 827 P.2d 1374 (1992), quoting *City*

of Bellingham v. Schampera, 57 Wn.2d 106, 111, 356 P.2d 292 (1960)). "The conflict must be direct and irreconcilable with the statute, and the ordinance must yield to the statute if the two cannot be harmonized." (*Luvene*, 118 Wn.2d at 835.)

"The scope of [a municipality's] police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of substantial relation to promotion of the general welfare of the people." (*State v. City of Seattle*. 94 Wn.2d 162, 165, 615 P.2d 461 (1980)). Generally speaking, a municipality's police powers are coextensive with those possessed by the State. (*City of Seattle*, 94 Wn.2d at 165). However, when state law is trying to achieve the promotion of the health, safety, and general welfare of all the people of the state by creating a regulated system of marijuana trade, and the local ordinances are inimical to those goals in the name of promoting the local general welfare, a conflict arises. In such a conflict, state law prevails, because "the ordinance must yield to the statute if the two cannot be harmonized." (*Luvene*, 835).

Invoking inherent local police powers to undermine a state regulatory scheme with the explicit goal of deterring the black market in marijuana and its associated crime is an understandable, but misdirected, use of local police powers. Any ordinance based on subverting the state's scheme to protect the general welfare is an unreasonable exercise of police power, and therefore, unconstitutional. I-502 already carefully invokes set-backs to multiple restricted areas, resulting in already narrow and usually undesirable locations for retail marijuana. Further local zoning restrictions, including bans and moratoria, based on the unreasonable exercise of police powers, are not appropriate under Article XI.

Finally, and again under Article XI, the subject matter of the I-502 statutes are not local. The state is attempting to address the problems associated with the war on marijuana at a state, not local, level. If it were interested on in local marijuana issues, it would have addressed policing or recreational schemes only in specific cities. Yet the people voted for and the legislature enacted a law that legalizes marijuana uses throughout the state. As mentioned in the pre-emption argument above, localities that do nothing to address the black market in their territories endanger the safety and welfare of the transient citizen. Furthermore, the continuation of the black market endangers the success of the regulated market, putting the safety of *all* Washington citizens in jeopardy. It is unconstitutional for local governments to invoke the police powers to ostensibly protect their own citizens, but endanger the safety of citizens outside their locality.

VI. CONCLUSION AND RELIEF REQUESTED

In order to protect the people of Washington from violence related to the production, transport, and sale of marijuana, the state has developed a strict regulatory framework that pre-empts and overrules local zoning attempts to undermine that system. By refusing to allow retail marijuana facilities, even in the name of an allegedly temporary moratorium, one that lacks a requisite working plan, the City of Centralia is encouraging a black market for marijuana which endangers the public health, safety, and welfare of citizens within its own community and the welfare of transient citizens.

The city's rolling moratorium, which is different from prohibition only semantically, will have a dangerous spillover effect into neighboring communities and threatens to immobilize the entire state regulatory scheme designed to quash the ills of underground drug trafficking. A land use moratorium cannot be used as a pretext for strident community opposition based on fear rather than fact, or as a political holding place based on speculative contingencies outside of a locality's control. Nor can it be so antithetical to the general law that the interests of all Washington residents, codified by statute, are abdicated to the purview of local governments.

WHEREFORE, the premises considered, Petitioner prays that the Court grant the petition for injunctive, declaratory, and mandamus relief and declare the city's prohibition on state-licensed marijuana businesses a violation of Petitioner's due process rights, a violation of state moratorium law, pre-empted by and in conflict with the general state law, and thereby, unconstitutional as applied to businesses licensed by the state to produce, process, and sell marijuana in compliance with Chapter 69.60 RCW and Chapter 314-55 WAC. Enclosed is a copy of the record essential to understanding the matters set forth above. Petitioner requests costs, damages, and attorney fees in the manner set forth in RCW 4.84.370, RCW 7.16.260.

Respectfully Submitted this 10th of June, 2014

Elizabeth Hallock, WSBA# 41825

VERIFICATION AND AFFADAVIT

I, Perry Nelson, am the named Petitioner in the above action. Based on my knowledge, the facts contained in the above action are true. I have exhausted the administrative remedies available to me, and there is not plain, speedy, or adequate remedy available to me. I declare under penalty under the laws of the State of Washington that the foregoing is true and correct.

Signed on this day, 6/10/2014, under penalty under the laws of the State of Washington that the foregoing is true and correct:

_____

Perry Nelson

Address:

Phone:

IN THE SUPERIOR COURT OF THURSTON COUNTY

IN AND FOR THE STATE OF WASHINGTON

Perry Nelson, PETITIONER

vs.

City of Centralia, RESPONDENT

Case No.:

RE: Injunctive and Declaratory Relief

ORDER

Based on the foregoing, it is hereby ORDERED that Respondent's prohibition on allowing legal marijuana businesses within its borders is statutorily and constitutionally void and Petitioner may not be obstructed from operating his duly authorized and state licensed business within Centralia city limits. Relief is as follows:

Dated this ____ day of June, 2014,

_____

Judge's Signature