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3 **BEFORE THE OFFICE OF THE**
4 **KING COUNTY HEARING EXAMINER**

5 In re the matter of the Appeal by Cougar Hills
6 LLC, d/b/a Cougar Crest Estate Winery, and
7 Stephen and Sheri Lee,

8 and

9 Cave B LLC, d/b/a Cave B Estate Winery, and
10 Larry P. and Jane E Scrivanich,

11 Appellants,

12 vs.

13 King County,

14 Respondent.

BUSINESS LICENSE APPEAL

NO. BUSL200009

CONSOLIDATED WITH

NO. BUSL200029

APPELLANTS' MOTION FOR
SUMMARY JUDGMENT

15 Appellants Cougar Hills LLC, d/b/a Cougar Crest Estate Winery, Stephen and Sheri Lee
16 (collectively, "Cougar Hills"), and Cave B LLC, d/b/a Cave B Estate Winery, and Larry P. and
17 Jane E Scrivanich (collectively, "Cave B")(Cougar Hills and Cave B referred to collectively as
18 the "Appellants") bring this Motion for Summary Judgment because RCW 66.08.120
19 (the "Statute") preempts the Department's authority to require, let alone grant or deny, a business
20 license and fees for winery tasting rooms. As such, the Examiner should determine that the
21 Department did not have the authority to require or deny a business license for Appellants' wine
22 tasting rooms, and enter summary judgment in favor of Appellants.

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I. FACTUAL SUMMARY

A. Ordinance 19030.

Ordinance 19030¹ (the “Ordinance”), adopted by the King County Council in 2019, “establishes a business license for the adult beverage industry.” Ord., Section 1.W. “[A]dult beverage business” means a winery, brewery, distillery or cidery, and remote tasting rooms for any of those businesses. *Id.*, Ord. Sec. 5, codified as KCC 6.74.020. The Ordinance prohibited “an adult beverage business from operating or maintaining an adult beverage business in unincorporated King County unless the business has obtained a business license issued by the director.” *Id.*, Ord. Sec. 6, codified as KCC 6.74.030. It required an application for the adult beverage business license. *Id.*, Ord. Sec. 7, codified as KCC 6.74.040, and 29.F.1.f, codified as KCC 21A.55.110.L. It also required a business license fee. *Id.* Ord. Sec. 8, codified as KCC 6.74.050. The Ordinance contained requirements regarding sale and distribution of liquor. *See, e.g.* Ord. Sec. 14, codified as KCC 21A.06.1427A; 18.B.3.h, 18.B.4.g and i, codified at KCC 21A.08.080. *Id.*

On January 3, 2022, the Growth Management Hearings Board found Sections 12 through 31 of the Ordinance invalid.² Case No. 20-3-0004c Final Decision and Order. Despite the Board’s invalidation of many of the provisions governing wine tasting rooms, the Department has continued to require, process and ultimately deny business licenses for Appellants’ businesses.³

¹ A copy of the complete Ordinance 19030 can be found at <https://kingcounty.gov/~media/depts/permitting-environmental-review/dper/documents/PublicNotices/2021-19030-Ordinance.ashx?la=en>

² The invalidated sections were primarily those codified within the King County Zoning Code, KCC 21A, including those regulating wine tasting rooms. The sections codified in KCC 6.74 governing Adult Beverage Business Licenses were not invalidated.

³ A determination of invalidity renders an ordinance unenforceable going forward. RCW 36.70A.302; Clark County v. Growth Mgmt. Hearings Bd., 10 Wn. App. 2d 84, 104, 448 P.3d 81 (2019). Here, the Board rendered the Ordinance invalid on January 3, 2022. Case No. 20-3-0004c Final Decision and Order. The Department had no further authority to enforce any provision of the Ordinance after the Board’s decision. Appellants will address this legal issue, if necessary, after the Examiner renders his decision regarding preemption.

1 B. Cougar Hills Business License Denial.

2 On March 5, 2020, Appellant Cougar Hills submitted an application for a County Adult
3 Beverage License in compliance with the Ordinance’s new 2020 County Adult Beverage License
4 requirement. See, Dec. of D. Hansen, Ex. A. The Department approved and issued the Cougar
5 Hills license on May 12, 2020. Dec. of D. Hansen, Ex. B. To grant the license, the Department
6 had to evaluate the business under the various criteria, including documentation either that the
7 business was a legally established nonconforming use or consistent with Title 21A. KCC
8 6.74.040(E).

9 Under the invalidated Code, a business license was good for one year and then needed to
10 be renewed. KCC 6.74.060. The Department extended the Cougar Hills license an additional six
11 months, until November 12, 2021, stating that it was granting the extension due to COVID issues,
12 invalidation of the Ordinance, and a moratorium “prohibiting the expansion of existing or the
13 establishment of new wineries, breweries, distilleries.” Dec. of D. Hansen, Ex. C. Cougar Hills
14 was not expanding or establishing a new winery.

15 On November 3, 2021, the Department informed Cougar Hills that its business license
16 had expired,⁴ and directed Cougar Hills to submit an application to renew its Adult Beverage
17 Business License. Dec. of D. Hansen, Ex. D. Cougar Hills complied, submitting a renewal
18 application on November 8, 2021. Dec. of D. Hansen, Ex. E. Again, as the Department had
19 already issued a business license to Cougar Hills, it had already necessarily concluded the
20 business either was consistent with Title 21A or a legally established nonconforming use. Despite
21 that, and despite the Board’s invalidation of the Ordinance, the Department denied the application
22 via email on March 17, 2022. Dec. of D. Hansen, Ex. F.

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⁴ Although it actually expire until November 12, 2021.

1 C. Cave B License Denial.

2 Appellant Cave B submitted an application dated April 25, 2020, for a County Adult
3 Beverage License in compliance with the Ordinance’s new 2020 County Adult Beverage License
4 requirement. See, Dec. of J. Bryan, Ex. A. The Department extended Appellants’ permit until
5 June 17, 2020, due to COVID. Dec. of J. Bryan, Ex. B. On July 2, 2020, the Department
6 informed Cave B that, due to the challenge of the Ordinance to the Growth Management Hearing
7 Board, Cave B could either have its business license denied and reapply for a new business
8 license under whatever regulations were eventually adopted or have the license placed on hold
9 until the regulations are “re-established.”⁵ Dec. of J. Bryan, Ex. C. Cave B opted to continue its
10 current license by placing it on hold. *Id.*

11 In March 2022, the Department informed Cave B that it expected to deny its Adult
12 Beverage License, but that Cave B could withdraw its application and receive a refund of the fee,
13 or have its application processed and denied. Dec. of J. Bryan, Para., 6. Cave B opted to have
14 the Department complete processing its application. *Id.* The Department denied Cave B’s Adult
15 Beverage License Application on March 29, 2022. Dec. of J. Bryan, Ex. D.

16 **II. ARGUMENT & AUTHORITY**

17 **A. Standard of Review**

18 1. Summary Judgment Under Rules of Procedure.

19 Pursuant to the King County Rules of Procedure and Mediation (“ROP”), a party may
20 bring a motion for summary judgment where:

- 21 a. The relevant matters primarily involve legal interpretations based on facts that are
22 either uncontested or can be determined expeditiously;
23 b. The parties against whom the motion is made will not be unduly inconvenienced or
24 prejudiced by participating in a more legally-complex proceeding; and

25 ⁵Cougar Hills was not offered the option of placing its license on hold. It is unclear why Cougar Hills and Cave B were treated differently.

1 c. The motion can be decided without rescheduling previously established procedural
2 deadlines and hearing dates, or the other parties consent to an extension.

3 ROP VII.B.1.

4 The issue raised in this motion is whether the Department’s right to require, issue or deny
5 an Adult Beverage Business License has been preempted by the Statute. This requires a legal
6 interpretation of the authority of the Department to license Adult Beverage Businesses, or
7 whether such authority was preempted by the Statute. The relevant fact – that the Department
8 required such licenses for winery tasting rooms, and then denied issuance of such licenses to
9 Appellants - is indisputable. Given the issue is a question of law, no more legally-complex
10 proceeding beyond legal briefing should be necessary. Finally, the Examiner has already
11 scheduled the briefing of this issue in his May 19, 2022, Order on Briefing Schedule and Notice
12 of Prehearing Conference; as such, this Motion can be decided without the need for rescheduling
13 or extensions.

14 2. Standard of Review Under Civil Rules and Administrative Procedure Act.

15 The ROPs are to be interpreted consistently with and guided by the Rules of Civil
16 Procedure (“CR”) and the Washington Administrative Procedure Act, Ch. 34.05 RCW (“APA”).
17 ROP I.B. CR 56 governs motions for summary judgment. CR 56(c) requires summary judgment
18 to be rendered if the pleadings and evidence show there is no genuine issue as to any material
19 fact and that the moving party is entitled to judgment as a matter of law.

20 Under the APA, relief may be granted from an agency order if it is determined that the
21 “order is outside the statutory authority or jurisdiction of the agency conferred by any provision
22 of law.” RCW 34.05.570(3)(b). “If a legislature grants a department administrator rule-making
23 authority, courts will presume the administrator’s rules to be valid so long as they are ‘reasonably
24 consistent with the statute being implemented.’ Courts will enforce the plain language of a statute
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1 when the legislature’s intent is made clear in that language.” Stewart v. State, Dep’t of Soc. &
2 Health Servs., 162 Wn. App. 266, 270–71, 252 P.3d 920, 923 (2011) (internal citations omitted).

3 However, “An agency has only the authority that the Legislature grants it by statute. . .
4 [The] agency cannot promulgate rules that amend or change legislative enactments. And the
5 courts must declare an agency’s actions invalid if they exceed the agency’s statutory power.”
6 Edelman v. State ex. rel. Pub. Disclosure Comm’n, 116 Wn. App. 876, 882, 68 P.3d 296, 299
7 (2003), aff’d sub nom. Edelman v. State ex rel. Pub. Disclosure Comm’n, 152 Wn.2d 584, 99
8 P.3d 386 (2004). Although substantial deference is generally accorded to agency decisions,
9 courts “do not defer to an agency the power to determine the scope of its own authority.” In re
10 Elec. Lightwave, Inc., 123 Wn.2d 530, 540, 869 P.2d 1045, 1051 (1994), as amended on denial
11 of reconsideration (Apr. 28, 1994).

12 Here, because the Statute preempted the Department’s right to require Appellants to
13 obtain adult beverage business licenses, the requirements to obtain and the denial of the
14 Appellants’ licenses were outside the statutory authority of the Department.

15 **B. The Statute Preempts the Department’s Authority to Require Business Licenses for**
16 **Adult Beverages.**

17 A county ordinance “must yield” to a statute on the same subject matter if “a conflict
18 exists such that the two cannot be harmonized.” Emerald Enterprises, LLC v. Clark County,
19 2 Wn.App. 2d 794, 804, 413 P.3d 92 (2018). An ordinance “must yield to a statute on the same
20 subject either if the statute preempts the field, leaving no room for concurrent jurisdiction, or if
21 a conflict exists such that the two cannot be harmonized.” Brown v. City of Yakima, 116 Wn.2d
22 556, 559, 807 P.2d 353, 354 (1991) (citing Diamond Parking, Inc. v. Seattle, 78 Wash.2d 778,
23 781, 479 P.2d 47 (1971), Spokane v. J-R Distribs., Inc., 90 Wash.2d 722, 730, 585 P.2d 784
24 (1978)). The State has preempted a subject matter “when the Legislature states its intention either
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1 expressly or by necessary implication to preempt the field.” Brown, 116 Wn.2d at 560 (citing
2 Kennedy v. Seattle, 94 Wash.2d 376, 383-84, 617 P.2d 713 (1980)).

3 The Statute, RCW 66.08.120, was adopted in 1933 shortly after the repeal of prohibition
4 as part of the “Washington State Liquor Control Act”, RCW Ch. 66.08. The Statute is expressly
5 title: “Preemption of Field by State – Exceptions.” The Statute remains unchanged since its
6 original adoption and provides:

7 *No municipality or county shall have power to license the sale of, or impose an excise*
8 *tax upon, liquor as defined in this title, or to license the sale or distribution thereof in*
9 *any manner; and any power now conferred by law on any municipality or county to*
10 *license premises which may be licensed under this section, or to impose an excise tax*
11 *upon liquor, or to license the sale and distribution thereof, as defined in this title, shall*
12 *be suspended and shall be of no further effect: PROVIDED, That municipalities and*
13 *counties shall have power to adopt police ordinances and regulations not in conflict*
14 *with this title or with the regulations made by the board. [1933 ex.s. c 62 § 29; RRS §*
15 *7306-29.]*

16 RCW 66.08.120 (emphasis added).

17 The Statute expressly preempts the Department’s power to license the sale and tax of
18 liquor. The exception aspect of the Statute provides that cities and counties can otherwise
19 regulate, so long as that regulation is not in conflict with the State’s preemption of licensing and
20 taxing. So, for example, cities and counties maintain their abilities to police these establishments.
21 While Appellants’ businesses are legally established under the County’s zoning (as
22 nonconforming uses), the Department cannot legally require Appellants to obtain a business
23 license or pay a tax related to such licensing.

24 The Washington State Liquor and Cannabis Board (the “Board”) maintains complete
25 authority to license and regulate establishments under the Statute. For example, the Board
maintains all regulatory authority, with cities and counties maintaining only derivative powers.
The Statute declares:

1 the state’s presumptive control over all facets of liquor traffic, to suspend any power
2 previously conferred upon local authorities to license, regulate, or tax that traffic, but
3 nevertheless to grant limited police power to municipalities and counties over that
4 traffic, exercisable only when it is not in conflict with statutes enacted by the
5 legislature as augmented by validly promulgated regulations of the Board.

6 Corral, Inc. v. Washington State Liquor Control Bd., 17 Wn.App. 753, 759, 566 P.2d 214 (1977).

7 The Corral Court compared this preemption to other statutory provisions in the chapter which do
8 not similarly preempt local authority. Corral, 17 Wn.App. at 759. The Corral Court describes the
9 Statute as allowing cities/counties to act only within the “narrow confines” given under the
10 Statute. Id.

11 Here, the Ordinance’s attempt to require Appellants to obtain a business license directly
12 conflict with the Statute’s express preemption over these types of business licenses. The
13 Ordinance demands:

14 A person or entity shall not operate or maintain an adult beverage business in
15 unincorporated King County unless the business has obtained a ***business license***
16 ***issued by the director*** as provided by this chapter.”

17 KCC 6.74.030 (Ordinance Sec. 6) (emphasis added).

18 Further, the Ordinance requires remote tasting rooms obtain an adult beverage business
19 license. KCC 21A.55.110 (Ordinance 19030 Sec. 29). These are the very licenses that the Statute
20 expressly preempts. The Statute expressly strips the Department of any “power to license the sale
21 of . . . liquor,⁶ or to license the sale or distribution thereof in any manner.” RCW 66.08.120.

22 The Department has no authority to require Appellants to obtain County-issued adult
23 beverage business licenses.

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25 ⁶RCW 66.04.010 (25) defines “Liquor” as including “the four varieties of liquor herein defined (alcohol, spirits,
wine, and beer).”

1 **C. The Statute Supersedes Other, Earlier County Authority**

2 There is a separate state statute that does authorize counties to license establishments selling
3 alcohol. RCW 67.14.040, adopted in 1873 as a territorial law, authorized counties to issue liquor
4 licenses:

5 The legislative authorities of each county, in their respective counties, shall have the
6 power to grant license to persons to keep drinking houses or saloons therein, at which
spirituous, malt, or fermented liquors and wines may be sold. . .

7 RCW 67.14.040 is clearly in conflict with the Statute, which takes away the Department’s power to
8 license adult beverages. However, because the Statute was enacted after RCW 67.14.040, the
9 Statute thus supersedes the earlier law.

10 The Washington Attorney General has addressed these clearly conflicting provisions,
11 opining that the Statute supersedes RCW 67.14.040. In AGLO 1981 No. 23, the Attorney General
12 was asked: “May a county lawfully grant a ‘retail license’ to establishments selling liquor pursuant
13 to RCW 67.14.040 in light of apparently contrary provisions in RCW 66.08.120?” The Attorney
14 General opined that, given that the Statute was adopted *after* RCW 67.14.040, the Statute supersedes
15 RCW 67.14.040:

16 This statute [RCW 66.08.120] was passed in 1933 as a part of the new State Liquor
17 Code enacted by chapter 62, Laws of 1933, 1st Ex. Sess., following the repeal of
18 Prohibition under the federal constitution. RCW 67.14.040, on the other hand, is
19 basically the codification of a prior, territorial law relating to the issuance of liquor
licenses by counties which thus must be deemed to have been impliedly repealed by so
much of RCW 66.08.120, supra, as reads:

20 “. . . any power now conferred by law on any municipality or county to license
21 premises which may be licensed under this section, or to impose an excise tax upon
22 liquor, or to license the sale and distribution thereof, as defined in this title, shall be
23 suspended and shall be of no further effect: . . .”
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1 AGLO 1981 No. 23 (internal footnotes omitted).⁷ The Statute has not been amended or repealed
2 since its adoption in 1933, reflecting the legislature’s acquiescence to the 1981 AGO.

3 Moreover, a Reviser’s Note to RCW 67.14.040 confirms the AGO interpretation:

4 The territorial act codified in this chapter, though for the most part obsolete, has never
5 been expressly repealed. “An Act in relation to licenses,” it empowers the county
6 commissioners to license hawkers and auctioneers, persons dealing in intoxicating
7 liquors, and persons conducting bowling alleys, billiard tables and other games. . . .
As to the sections relating to intoxicating liquors, it seems clear that this field has
been preempted by the state; see RCW 66.08.120.

8 RCW Ch. 67.14 Reviser’s note.

9 **D. The Statute Also Preempts the County’s Department’s Authority to Impose Adult**
10 **Beverage License Fees.**

11 In addition to the license requirement, the Department also attempts to impose a fee for the
12 adult beverage license. License fees are also impermissible under the Statute. Washington case law
13 as well as Attorney General Opinions have consistently held that a city’s or county’s authority to
14 charge liquor license fees is preempted by the Statute.

15 Shortly after the Washington State legislature adopted the Statute, the Washington Supreme
16 Court held that the Statute preempted the City of Seattle’s ability to impose certain license fees on
17 distributors of alcoholic beverages. Century Brewing Co. v. City of Seattle, 177 Wash. 579, 32 P.2d
18 1009 (1934) (addressing immediate post-prohibition fallout and enactment of the Statute). In
19 Century Brewing, the City had passed an ordinance providing, “among other things, that all
20 distributors of alcoholic beverages doing business in the city of Seattle shall obtain a license therefor,
21 the fee for which shall be \$500 per annum. . . .” Id., 177 Wash. at 584. The Court invalidated the
22 City’s ordinance as being preempted by the Statute’s prohibition against cities’ and counties’ “power

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24 ⁷Although Attorney General opinions are not strictly controlling as precedence, they are given “considerable weight” by
25 courts. Holbrook, Inc. v. Clark Cnty., 112 Wn. App. 354, 362–63, 49 P.3d 142, 147 (2002). Such opinions constitute
notice to the legislature of the department’s interpretation of the law, and greater weight attaches to an agency
interpretation when the legislature acquiesces in that interpretation. Id.

1 to license the sale of, or impose an excise tax upon, liquor as defined in this act, or to license the sale
2 or distribution thereof in any manner.” *Id.*, 177 Wash. at 587. The Court stated that the licensing
3 fee fell within the Statute’s prescription against imposing excise taxes. “That they are called fees
4 for a license is immaterial. . . It is our conclusion that the ordinance, No. 64111, to the extent that it
5 imposes the so-called additional fees, provides for an excise tax, and that the power of the city in
6 that respect has been suspended by the liquor act.” *Id.*, 177 Wash. at 588.

7 Similarly, in the case at hand, the Department attempts to require a fee for the right to operate
8 a wine tasting room. Ord., Sec. 8; KCC 6.74.050. Whether the Department labels it a “licensing”
9 fee or something else is immaterial; the Statute preempts the Department’s attempt to impose a fee
10 on an adult beverage licenses.

11 The Washington Attorney General also determined that, under the Statute, a county was
12 prohibited from requiring a retail license in the guise of fees for alcohol sales. AGO 53-55 No. 2.
13 The Attorney General noted that, “By the enactment of RCW 66.08.120, the state preempted the
14 field with respect to the licensing of ‘any premises which may be licensed under this section.’” *Id.*
15 Although the original question dealt with a city’s authority to impose a business tax, the Attorney
16 General looked at whether the tax required a business license, the requirement of which was
17 preempted. “Ultimately, then, the question is whether the business tax imposed by the city amounts
18 to a license. If so, it would be in direct violation of RCW 68.08.120 which expressly deprives cities
19 of any such power.” *Id.* In determining that such a requirement would be impermissible, the
20 Attorney General opined, “Manifestly, the imposition of a business tax contemplates the issuance
21 of a license, or permit, without which the conduct of the business would be illegal. The issuance of
22 such license or permit by a city is an exercise of the very power which RCW 66.08.120 takes away.”
23 *Id.*

1 **E. County Staff Acknowledged Preemption.**

2 Since the Board's invalidation of the Ordinance, the County has considered new
3 legislation to replace it. While the County did not adopt that new legislation, the underlying staff
4 report to the King County Council acknowledges and puts the County Council on notice of the
5 Statutory preemption. King Co Local Svcs. Staff Report re Proposed Ordinances 2022-0147 &
6 2022-0148 dated 2022-05-11.⁸

7 **Council Considerations.** The Council may want to consider the following as the
8 Committee and full Council deliberate on the proposed changes.

9 Liquor license conflict preemption. In addition to the County's requirements
10 under the Growth Management Act and constitutional considerations, state law
11 specifically prohibits regulations that conflict with the Washington State Liquor and
Cannabis Board's licensing requirements. . .When considering the limitations on
production and on-site tasting and sales, the Council should keep this statute in mind.

12 *Id.* As County staff itself has conceded, the Statute preempts the Department's authority to
13 require adult beverage business licenses.

14 **III. CONCLUSION**

15 Based on the foregoing, Appellants ask the Examiner to find that the Department does
16 not have the authority to require, much less deny, business licenses for Appellants' wine tasting
17 rooms, and enter summary judgment in favor of Appellants.

18 DATED this 20th day of July, 2022.

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21 BY 

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Attorneys for Appellants

24 ⁸A copy of the staff report to Proposed Ordinances 2022-0147 & 2022-0148 can be found at
25 <https://mkcclegisearch.kingcounty.gov/View.ashx?M=F&ID=10875938&GUID=2496E0B0-93C7-4A78-808F-0031BE6B50A4>