HEARING EXAMINER DAVID SPOHR

BEFORE THE OFFICE OF THE
KING COUNTY HEARING EXAMINER

In re the matter of the Appeal by Cougar Hills LLC, d/b/a Crest Estate Winery, and Stephen and Sheri Lee, and Cave B LLC, d/b/a Cave B Estate Winery, and Larry P. and Jane E Scrivanich, Appellants vs. KING COUNTY, Respondent	**BUSINESS LICENSE APPEAL** **NO. BUSL200009** **CONSOLIDATED WITH NO. BUSL200029** **INTERVENORS' OPPOSITION TO APPELLANTS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Appellants move for summary judgment "that the Department does not have the authority to require, much less deny, business licenses for Appellants' wine tasting rooms"[1] on

[1] Appellants' Motion for Summary Judgment ("Motion") at 12.

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the theory that the County's requirement for a business license is preempted by state law. This motion must be summarily denied because: 1) the King County Hearing Examiner has no authority or jurisdiction to entertain the motion, let alone grant it, and because 2) even if the Examiner *could* entertain and decide this claim, it is without merit.

II. ARGUMENT AND AUTHORITY[2]

A. The Examiner Does Not Have Jurisdiction Over Preemption Claims.

Preemption is a constitutional claim. Local governments are constitutionally vested with significant regulatory powers under article XI, section 11 of the Washington Constitution, which provides that "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." *See* Wash. Const. art. XI, § 11; *Emerald Enters., LLC v. Clark Cty.*, 2 Wn. App. 2d 794, 803, 413 P.3d 92 (2018). "The scope of [a county's] police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people." *Id.* Accordingly, when a county adopts an ordinance, it is presumed to have the regulatory authority to do so and the adopted ordinance is valid *unless* it is constitutionally preempted. *Id.* at 803-804.

The limitation on this broad local authority requiring that such regulations not be "in conflict with general laws" means that state law can preempt local regulations and render them unconstitutional either by occupying the field of regulation, leaving no room for concurrent local jurisdiction, or by creating a conflict such that state and local laws cannot be harmonized.

[2] The Motion is not fact intensive; key facts are called out where relevant within the arguments that follow.

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Lawson v. City of Pasco, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010); *see also Emerald Enters., LLC v. Clark Cty.*, 2 Wn. App. 2d 794, 814, 413 P.3d 92 (2018).[3]

The jurisdiction of the Hearing Examiner, a creation of the King County Council, is explicitly limited to matters specifically identified in the King County Code (KCC). That jurisdiction does not include application of laws other than those specified by County Code and, in any event, explicitly excludes constitutional claims such as preemption.

The framework of Rules and Code that constrain the Examiner's jurisdiction could not be clearer. This includes the Hearing Examiner Rules of Procedure and Mediation ("ROP") which provide in ROP III.A.1:

> III. JURISDICTION AND INITIATION OF PROCEEDINGS
>
> A. Jurisdiction
>
> 1. Dependent upon Specific Delegation
>
> The examiner's jurisdiction is limited to matters specifically identified in the KCC or assigned to the examiner by County ordinance or Council motion. Equitable defenses **or claims based on the constitutionality of County regulations** may be raised to exhaust administrative remedies and make a record for judicial review, **but they are beyond the examiner's jurisdiction to decide**.

ROP III.A.1 (emphasis added).

ROP III.A.1 is consistent with KCC 20.22.020.A, which governs here and which provides: "[t]he office of hearing examiner is created and shall act on behalf of the council in considering and applying adopted county policies and regulations as provided in this chapter."

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[3] Appellants cite *Emerald Enters., LLC v. Clark Cty.*, 2 Wn. App. 2d 794, 413 P.3d 92 (2018) and *Brown v. City of Yakima*, 116 Wn.2d 556, 807 P.2d 353 (1991). Motion at 6-7. Both cases acknowledge that preemption is a constitutional claim.

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KCC 20.22.020.A (emphasis added). It is also consistent with KCC 20.22.030 *et seq.* which identify the Hearing Examiner's limited and prescribed powers and duties with regard to specific matters, none of which include the authority to adjudicate constitutional issues.

KCC 20.22.090 also expressly requires that the Hearing Examiner dismiss matters that "are beyond the examiner's jurisdiction."

These jurisdictional limitations are not unique to the King County Hearing Examiner. Washington law unequivocally holds that the power to decide constitutional issues rests exclusively in the courts:

> A. AUTHORITY TO RULE ON CONSTITUTIONAL ISSUES
>
> Dotson argues that the Hearing Examiner erred in ruling that he did not have authority to rule on constitutional issues. We disagree.
>
> The County's hearing examiners have statutory authority to issue final decisions on land use matters including, as relevant here, (1) "[a]ppeals from any final administrative order or decision related to the administration, interpretation or enforcement of the Pierce County Code" and (2) "any order or decision of the Planning Department under the Critical Areas and Natural Resource Lands Regulations." PCC 1.22.080(B)(1)(g), (p). As such, a hearing examiner's "determination is limited to an administrative proceeding to determine whether or not a particular piece of property is subject to a county land ordinance." *Chaussee v. Snohomish Cty. Council*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984).
>
> The hearing examiner reviewing a PALS order or decision may not rule on constitutional issues. *See Exendine v. City of Sammamish*, 127 Wn. App. 574, 586-87, 113 P.3d 494 (2005); *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 146, 995 P.2d 33 (2000). An administrative agency has no authority to determine whether the statute it administers is facially constitutional or constitutional as applied. *See Exendine*, 127 Wn. App. at 586-87 (city council has no power to enforce, interpret, or rule on constitutional issues and therefore cannot delegate such power to hearing examiner). Only the judiciary may resolve constitutional questions. *See Prisk v. Poulsbo*, 46 Wn. App. 793, 798, 732 P.2d 1013 (1987) (when the issue raised is the constitutionality of the law

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> sought to be enforced, only the courts have the power to decide). Accordingly, the Hearing Examiner properly declined to rule on constitutional issues.

Dotson v. Pierce Cty. Dep't of Planning & Land Servs., No. 50860-5-II, 2018 Wash. App. LEXIS 2795, at *27-29 (Ct. App. Dec. 11, 2018).[4]

Because preemption is a constitutional claim beyond the jurisdiction of the Hearing Examiner to decide, Appellants' Motion must be denied. Contrary to Appellants' suggestion,[5] neither ROP I.B nor the Washington Administrative Procedure Act, Ch. 34.05, authorize the Hearing Examiner to go beyond his jurisdiction to decide preemption – which is a manifestly constitutional issue. In fact, ROP I.B. when presented in its entirety reaffirms the limits on the Hearing Examiner's jurisdiction:

> B. Interpretation
>
> These Rules will be applied to accomplish the above-stated purposes. These Rules' jurisdictional framework derives principally from KCC chapter 20.22. These Rules shall be interpreted consistently with relevant code provisions. Examiners also are guided, where appropriate, by provisions and interpretations of the Washington Administrative Procedure Act (chapter 34.05 RCW), the Rules of Civil Procedure (CR), and the Rules of Evidence (ER) applicable in Washington's superior courts. If two Rules appear to conflict, or when the need for interpretation arises, the more specific statement governs, and headings may be considered in determining a Rule's applicability.

ROP I.B (emphasis added). In short, the Hearing Examiner lacks authority to decide preemption.

Appellants' motion goes beyond just noting the potential existence of a preemption claim that might be presented in an appropriate forum. However, the King County Hearing

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[4] The authorities *Dotson* relies upon are all published and binding precedent. *Dotson* is unpublished, but appropriately cited in Washington courts per GR 14.1.

[5] Motion at 5-6.

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Examiner does not have jurisdiction to decide such a claim. It can only be adjudicated in the first instance in a forum of competent jurisdiction.

B. RCW 66.08.120 Does Not Preempt the Business License Requirements Adopted by the County in Ordinance 19030.

The Hearing Examiner lacks jurisdiction to decide the preemption issue raised by Appellants' Motion. Any adjudication in the context of these Hearing Examiner appeals of the Appellants' preemption claims would be ultra vires, outside of the Examiner's jurisdiction, arbitrary and capricious, and void ab initio, as well as a wasteful extra-legal imposition on the public and on public resources. Appellants should have, when it arose, raised this threshold claim in superior court if they believed it had merit.

Even if the Hearing Examiner could decide the preemption issue, which he cannot, Appellants' Motion is without merit.[6] RCW 66.08.120 does not preempt local jurisdictions from enacting business license requirements like Ordinance 19030 which are not in conflict with Title 66 or with the regulations of the Washington State Liquor and Cannabis Board ("Board").[7]

As discussed above, the police power of local jurisdictions is exceptionally broad. Accordingly, local ordinances are entitled to a presumption of constitutionality. *State v. Kirwin,* 165 Wn.2d 818, 825, 203 P.3d 1044 (2009). Those bringing challenges to a local ordinance,

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[6] Because the preemption claims were not dismissed at the outset per ROP III.A.1 and KCC 20.22.090 and were instead made the subject of an extended briefing schedule, Intervenors will below brief the merits of those claims. However, while doing so, Intervenors emphasize that they do not waive and assert continuously that there is no jurisdiction for such an adjudication by the Examiner.

[7] Although not relevant to the pending motion, Appellants indicate that they intend to argue later that the County cannot apply the licensing requirements of Ordinance 19030 because other non-licensing portions of Ordinance 19030 were invalidated by the Growth Management Hearings Board. Motion at 2, n.3. Intervenors will address that argument if and when it is properly made, but note that it is without legal merit.

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including challenges based on preemption, bear a heavy burden of proving it unconstitutional. *Id.* "Every presumption will be in favor of constitutionality." *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.,* 148 Wn.2d 451, 477, 61 P.3d 1141 (2003) (internal quotation marks omitted). Unconstitutionality must be proven "beyond a reasonable doubt." *Emerald Enters., LLC v. Clark Cty.*, 2 Wn. App. 2d 794, 804, 413 P.3d 92, 97-98 (2018).

"Field preemption" arises when a state regulatory system occupies the entire field of regulation on a particular issue, leaving no room for local regulation. *Lawson,* 168 Wn.2d at 679. Field preemption may be expressly stated or may be implicit in the purposes or facts and circumstances of the state regulatory system. *Id.* RCW 66.08.120, relied upon by Appellants,[8] was adopted in 1933. It does not impose field preemption precluding local police power regulation of adult beverage business uses. The statute provides only:

> No municipality or county shall have power to license the **sale of**, or **impose an excise tax upon**, liquor as defined in this title, or to license the sale or distribution thereof in any manner; and any power now conferred by law on any municipality or county to license premises which may be licensed under this section, or to impose an excise tax upon liquor, or to license the sale and distribution thereof, as defined in this title, shall be suspended and shall be of no further effect: PROVIDED, **That municipalities and counties shall have power to adopt police ordinances and regulations** not in conflict with this title or with the regulations made by the board.

RCW 66.08.120 (emphasis added).

Per the Washington Supreme Court's construction of RCW 66.08.120, which binds here, its preemption provision "does not come into play unless the ordinance in question may be said to impose an 'excise tax upon liquor.'" *Ropo, Inc. v. Seattle*, 67 Wn.2d 574, 578, 409 P.2d 148, (1965). RCW 66.08.120's narrow and specific prohibition on licensing the sale of or

[8] Motion at 7.

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imposing an excise tax upon liquor does not preclude local jurisdictions from imposing basic license requirements on a business.

The second type of preemption, "conflict preemption" arises "when an ordinance permits what state law forbids or forbids what state law permits." *Lawson,* 168 Wn.2d at 682. An ordinance is constitutionally invalid if it directly and irreconcilably conflicts with the statute such that the two cannot be harmonized. *Id.; Weden v. San Juan County,* 135 Wn.2d 678, 693, 958 P.2d 273 (1998). Because "[e]very presumption will be in favor of constitutionality," courts make every effort to reconcile state and local law if possible. *HJS Dev.*, 148 Wn.2d at 477 (internal quotation marks omitted).

There are essentially two lines of cases concerning conflict preemption. The two lines of cases are discussed in detail in Attorney General Opinion (AGO) 2014 No.2 about Initiative 502 which established a licensing and regulatory system for marijuana. The AGO concluded that the Initiative does not preempt local jurisdictions from banning such businesses within their jurisdictions or imposing regulations that make such operations impractical. As the AGO explains, the two lines of cases – one of which finds conflict preemption and one of which does not – are distinguished by whether state law provides an absolute entitlement to engage in an activity in circumstances in which the activity is prohibited by local ordinance. There is no preemption when a state licensing system with regard to certain activities does not create an unabridged right to engage in them and instead just adopts preconditions to engaging in them. In such cases, local regulations, such as Ordinance 19030, are not preempted. As the AGO explains:

> Accordingly, the question whether "an ordinance . . . forbids what state law permits" is more complex than it initially appears. *Lawson,* 168 Wn.2d at 682.

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> **The question is not whether state law permits an activity in some places or in some general sense; even "[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law." *Rabon v. City of Seattle,* 135 Wn.2d 278, 292, 957 P.2d 621 (1998) (finding no preemption where state law authorized licensing of "dangerous dogs" while city ordinance forbade ownership of "vicious animals"). Rather, a challenger must meet the heavy burden of proving that state law creates an entitlement to engage in an activity in circumstances outlawed by the local ordinance.** For example, the state laws authorizing business owners to designate smoking areas and water districts to decide whether to fluoridate their water systems amounted to statewide entitlements that local jurisdictions could not take away. But the state laws requiring that vessels be registered and operated safely and regulating recreational vehicles in mobile home tenancies simply contemplated that those activities would occur in some places and established preconditions; they did not, however, override the local jurisdictions' decisions to prohibit such activities.

AGO 2014 No.2 at Original Page 7 (emphasis added).[9] *Emerald Enters., LLC v. Clark Cty.*, 2 Wn. App. 2d 794, 413 P.3d 92 (2018), which upheld Clark County's ban of the retail sale of marijuana, is consistent with AGO 2014 No.2 and tracks its reasoning.

As the Washington Supreme Court has explained:

> When considering whether an ordinance violates article XI, section 11, the court will consider an ordinance to be invalid on grounds of conflict only if the ordinance "directly and irreconcilably conflicts with the statute." Similarly, a statute will not be construed as restricting a municipality's authority to enact an ordinance if the ordinance and the statute can be harmonized.

Heinsma v. City of Vancouver, 144 Wn.2d 556, 564, 29 P.3d 709, 713 (2001) (internal citations omitted).

C. Ordinance 19030 Does Not Conflict with RCW 66.08.120, with Title 66 or with Any Regulations of the Board.

Ordinance 19030 does not impose an excise tax upon liquor nor does the Ordinance

[9] A copy of this AGO is attached as Exhibit 1 to the Declaration of Joshua A. Whited in Support of Intervenors' Opposition to Appellants' Motion for Summary Judgment ("Whited Dec.").

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license the sale of liquor. Ordinance 19030 was adopted pursuant to the County's police power, as Section 4 of the Ordinance makes clear:

> It is the purpose of this chapter to establish business licensing standards for adult beverage businesses located in unincorporated King County, in order to promote and protect the health, safety and general welfare of unincorporated King County's residents.

Ordinance 19030, Sec. 4 (emphasis added). While leaving untouched the Board's authority, Ordinance 19030, consistent with King County's police power, focuses on whether the location proposed for the business complies with requirements in KCC Title 21A:

> There is hereby added to the chapter established in section 3 of this ordinance a new section to read as follows:
>
> The director shall deny, suspend or revoke a license issued under this chapter if the Washington state Liquor and Cannabis Board does not issue a license to the business, or if the department of local services, permitting division receives notice that the state license issued to the business is suspended or revoked, or was not reissued, or if, after an investigation, the director determines that the proposed business location does not comply with K.C.C. Title 21A. A business owner whose application for a business license has been denied or whose license has been suspended or revoked may appeal the decision to the office of the hearing examiner in accordance with K.C.C. 6.01.150.

Ordinance 19030, Sec. 9 (emphasis added).

KCC Title 21A is adopted pursuant to the County's police power constitutional authority:

> **21A.02.020 Authority to adopt code.** The King County Zoning Code is adopted by King County ordinance, pursuant to Article XI, Section 11 of the Washington State Constitution; and Article 2, Section 220.20 of the King County Charter. (Ord. 10870 § 12, 1993).

Its purposes are explicitly to exercise that authority with regard to zoning, land use, development standards and regulation of environmental impacts, as well as with regard to the King County

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Comprehensive Plan, adopted pursuant to and mandated by the State's Growth Management Act, RCW Ch. 36.70A. *See* KCC 21A.02.030 Purpose. (all subsections).

> In keeping with this, Finding W of Ordinance 19030 recognizes:
>
> This ordinance establishes a business license for the adult beverage industry to provide greater certainty about where adult beverage uses are located, so that King County agencies can more easily educate business owners and verify that they are in compliance with county land use, health and safety regulations.

Ordinance 19030, Sec. 1, Finding W (emphasis added).[10] This licensing scheme is within the County's police power and does not conflict with Title 66 or any regulations of the Board.[11] The $100 County fee[12] is nominal (especially in this day and age) and not even close to a revenue measure or tax upon liquor.[13] The fee and the license requirement imposed by the County are for the privilege of doing business in King County. Even if the nominal fee could be considered as some type of a tax, it would not be preempted here as it is not an excise tax upon liquor. *See, e.g., P. Lorillard Co. v. Seattle*, 83 Wn.2d 586, 590-92, 521 P.2d 208, 210-11 (1974) (Seattle business and occupancy tax upon cigarette wholesalers not preempted even

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[10] Finding V of Ordinance 19030 explains: "[d]uring the study period preceding adoption of this ordinance, many adult beverage industry uses were found to be unaware of local health and building codes." Ordinance 19030, Sec. 1, Finding V (emphasis added).

[11] Appellants assert that "County staff itself has conceded" the Department's authority to require adult beverage business licenses is preempted. Motion at 12. However, there is no such concession. Appellants quote a staff report for proposed legislation, not adopted, that simply acknowledges "state law specifically prohibits regulations that conflict with the Washington State Liquor and Cannabis Board's licensing requirements." Motion at 12. However, there are no conflicts here. In any event, the constitutional preemption question is decided by the courts based on the content of the laws in question -- not by County staff or by Appellants' extraction of an out of context sentence from a staff report.

[12] *See* Ordinance 19030, Section 8.

[13] Excise taxes are typically based on volume. The license fee imposed by the County here is so low it is unlikely that it even covers the administrative costs actually incurred by the County in reviewing whether a business complies with KCC Title 21A.

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though state preempted field of imposing taxes upon cigarettes; "[w]hat is being taxed is the privilege of doing business within the city").

The state liquor licensing scheme only serves as a precondition to engaging in such activities – not as an absolute entitlement. Ordinance 19030 appropriately applies the County's police power to ensure that basic zoning and developments standards are met. This is consistent with AGO 2014 No.2 and *Emerald Enters., LLC v. Clark Cty, supra.*

It is also consistent with the Hearing Examiner decision in *Four Horsemen Brewery* in a different, but instructive context:

> 10. Appellants next assert that they should be allowed a tasting room because the Washington State Liquor and Cannabis Board (Board) permits this without requiring an additional tasting room or retail license (on top of a brewery license), and so Appellants should be allowed to exercise these state-granted "privileges." WAC 314-20-015(1) ("A licensed brewer may sell: (a) Beer of its own production at retail on the brewery premises"); Ex. A16-002. That the Board may authorize something as a matter of state *licensing* law does not mean that the County allows (or has to allow) it as a matter of local *zoning* law.
>
> 11. In the words of our most recent appellate decision interpreting the analogous question of whether a county must sanction marijuana businesses the Board accepts, "the fact that an activity can be licensed under state law does not mean that the activity must be allowed under local law." *Emerald Enterprises, LLC v. Clark County*, 2 Wn. App. 2d 794, 805, 413 P.3d 92 (2018). The Board's powers are "distinct from the County's zoning authority," and a Board license is "an additional requirement for opening a new business." Id. at 817, 806. We assume, for purposes of our discussion, that the Board would license any of the alternatives in today's discussion. Our question is what KCC Title 21A allows.

Four Horsemen Brewery, Department of Permitting and Environmental Review File No. PREA170313, King County Hearing Examiner Report and Decision (Oct. 3, 2018), at 3-4 (underlined emphasis added).

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Finally, the County's decisions denying Appellants' license applications demonstrate unequivocally that the County appropriately applied its police power authority. The denial decision for Cave B Estate Winery explains:

> To qualify as a remote tasting room use, you need to obtain a building permit to convert the use of the building from residential to commercial remote tasting room and demonstrate that it meets the standards in Title 21A zoning, including but not limited to:
>
> - Nonresidential uses in the RA zone are subject to a 30-foot setback from all property lines, per King County Code 21A.12.220. This standard is not met.
>
> - Landscaping is required for a commercial use. This includes ten feet of type III landscaping along street frontages and twenty feet of type I landscaping along any portion of the property adjacent to a residential development, per King County Code 21A.16. This standard is not met.
>
> - Parking and circulation standards in King County Code 21A.18 are required to be met at the time of a commercial building permit. This includes, but is not limited to a 24 foot drive aisles for two-way traffic or 12 foot drive aisles for one-way traffic, minimum parking space dimensions of at least 8 feet by 16 feet, dust-free, all-weather surfacing off- street parking areas, and accessibility standards.

Exhibit D to Declaration of Janet Bryan, Adult Beverage Business License Denial dated March 29, 2022, Case #BUSL20-0029, at 1.

Similarly, the denial decision for Cougar Crest Estate Winery explains:

> To qualify as a remote tasting room use, you need to obtain a building permit to convert the use of the building from residential to commercial remote tasting room and demonstrate that it meets the standards in Title 21A zoning, including but not limited to:
>
> - Nonresidential uses in the RA zone are subject to a 30-foot setback from all property lines, per King County Code 21A.12.220. This standard is not met.

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- Nonresidential uses in the RA zone are subject to a maximum impervious surface allowance of 40% of the site area, per King County Code 21A.12.220. The impervious surface percentage on the site exceeds 40%.

- Landscaping is required for a commercial use. This includes ten feet of type III landscaping along street frontages and twenty feet of type I landscaping along any portion of the property adjacent to a residential development, per King County Code 21A.16. This standard is not met.

- Parking and circulation standards in King County Code 21A.18 are required to be met at the time of a commercial building permit. This includes, but is not limited to a 24 foot drive aisles for two-way traffic or 12 foot drive aisles for one-way traffic, minimum parking space dimensions of at least 8 feet by 16 feet, dust-free, all-weather surfacing off-street parking areas, and accessibility standards.

Exhibit F to Declaration of Deborah Hansen, Adult Beverage Business License Denial dated March 17, 2022, Case #BUSL20-0009, at 1.

In other words, the County's reviews focused on ensuring that the businesses would be in compliance with applicable zoning and development standards.

D. The Authorities Appellants Rely Upon Do Not Support Preemption Here.

Appellants assert that the Board "maintains complete authority to license and regulate establishments under the Statute." Motion at 7. In support of this assertion Appellants provide a partial quote from *Corral, Inc. v. Wash. State Liquor Control Bd.*, 17 Wn. App. 753, 566 P.2d 214 (1977). However, the *Corral* case does not even address preemption in the context raised by Appellants here. Further, Appellants, in quoting *Corral*, leave out the language, underlined below, which undercuts their broad assertion:

> The Corral directs our attention to two statutes, RCW 66.28.080 and RCW 66.08.120, in support of its contention that local authorities, and not the Board, have been delegated authority to regulate personal conduct within licensed premises. We recognize, as did the court in *Seattle v. Hinkley,* 83 Wn.2d 205,

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> 517 P.2d 592 (1973) that the valid power of the state to promulgate liquor regulations has been extended to local authorities to the extent specified by both these statutes.
>
> RCW 66.08.120, however, merely extends to municipalities and counties the power to adopt police ordinances and regulations "*not in conflict*" with Title 66 or "*with the regulations made by the board*." (Italics ours.) Indeed, the entire thrust of the statute is to declare the state's presumptive control over all facets of liquor traffic, to suspend any power previously conferred upon local authorities to license, regulate, or tax that traffic, but nevertheless to grant limited police power to municipalities and counties over that traffic, exercisable only when it is not in conflict with statutes enacted by the legislature as augmented by validly promulgated regulations of the Board.

Corral, Inc. v. Wash. State Liquor Control Bd., 17 Wn. App. 753, 758-59, 566 P.2d 214 (1977) (underlined emphasis added). *Hinckley,* cited in *Corral,* in turn, confirms that the "PROVIDED" language at the end of RCW 66.08.120 [14] affirms local jurisdictions' regulatory power. *Seattle v. Hinkley*, 83 Wn.2d 205, 208-09, 517 P.2d 592 (1973) ("[t]he valid power of the state to promulgate liquor regulations has been extended to cities and municipalities to the extent specified by RCW 66.08.120. . ."). Even prior to adoption of RCW 66.08.120 in 1933, the police power authority of local jurisdictions was recognized in case law. *Seattle v. Hinkley*, 83 Wn.2d 205, 208-09, 517 P.2d 592 (1973). In other words, local jurisdictions have always retained police power authority that does not conflict with state liquor laws.

Appellants refer to RCW 67.14.040 and Attorney General Letter Opinion (AGLO) 1981 No. 23 about it as if they are somehow relevant here. They are not. First, contrary to Appellants' suggestion,[15] AGLOs (as opposed to AGOs) have little, if any, authority because they are not

[14] "PROVIDED, That municipalities and counties shall have power to adopt police ordinances and regulations not in conflict with this title or with the regulations made by the board"

[15] Motion at 10, n. 7.

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formal opinions of the Attorney General.[16] In any event, RCW 67.14.040 concerns the issuance of retail liquor licenses.[17] AGLO 1981 No.23 concludes only that RCW 66.08.120 precludes the issuance of retail liquor licenses by counties which had been previously authorized under RCW 67.14.040.

Appellants also cite and describe *Century Brewing Co. v. City of Seattle*, 177 Wash. 579, 32 P.2d 1009 (1934) as if it supports their position here. It does not: Appellants' description is drastically at variance with the decision's holding. In *Century Brewing Co.*, the Washington Supreme Court **upheld** the City of Seattle's police power authority to require a license for distributors of alcoholic beverages and to require payment of a $500 annual fee by such businesses. *Century Brewing Co. v. Seattle*, 177 Wash. 579, 584-87, 32 P.2d 1009 (1934). The Court also concluded that "so-called additional fees" sought by the City, including a $2 per barrel fee, were impermissible and preempted excise taxes. *Id.* at 588 (emphasis added). *Century Brewing* does not support Appellants' preemption arguments here; to the contrary, it supports Intervenors' position that Ordinance 19030's business license requirements and fee are not preempted.

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[16] https://www.atg.wa.gov/AGOopinions/opinion ("Informal opinions are letters that present the considered legal analysis of the Assistant Attorneys General who write them. . . . They are not personally approved by the Attorney General. . . . Informal opinions should not be described or cited as 'Attorney General Opinions', since only formal opinions represent the official view of the Attorney General. An informal opinion should be cited as a letter of the attorney who signed the opinion, with a notation of the date and the addressee.");

https://libguides.law.gonzaga.edu/waattorneygeneral/authority ("It is important to distinguish between formal opinions (cited as AGOs) and Attorney General Letter Opinions (AGLOs). AGLOs are not officially approved by the Attorney General and have little, if any, authority. The Attorney General's Office ceased publishing AGLOs in 1983. Care should be taken to properly cite a formal opinion as an AGO and a letter opinion as an AGLO.").

[17] The statute is literally titled "Retail liquor license."

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Appellants' reliance[18] on AGO 53-55 No. 2, issued in 1953, is also misplaced. AGO 53-55 No. 2 concerned whether municipal corporations could impose a "business tax" upon taverns and "H" licensed premises. AGO 53-55 No. 2 at 1. The AGO concluded that RCW 66.08.120 precluded the business tax. AGO 53-55 No. 2 at 2. In reaching that conclusion, the AGO explained:

> The only exception under the statute is that municipalities still have the power to adopt police ordinances not in conflict with the act or with the regulations of the board.
>
> The business tax here proposed is a revenue measure enacted pursuant to the taxing power, and is not an exercise of the police power. The ordinance cannot be sustained under the statutory exception.

AGO 53-55 No. 2 at 2. Ordinance 19030 is not a revenue measure enacted pursuant to the taxing power, nor is it calculated for or intended to raise revenue. It does not tax liquor by the barrel, box, or bottle. Per its terms, it is instead a police power measure intended to ensure compliance with the standards set out in KCC Ch. 21A.

AGO 53-55 No. 2, which recognizes the distinction, supports Intervenors' position.

E. The Board Recognizes the Authority of Local Jurisdictions to Require Business Licenses and to Exercise Police Power.

The liquor licenses issued by the Board to Appellants include the following language:

> This document lists the registrations, endorsements, and licenses authorized for the business named above. By accepting this document, the licensee certifies the information on the application was complete, true, and accurate to the best of his or her knowledge, and that business will be conducted in compliance with all applicable Washington state, county, and city regulations.

[18] Motion at 11.

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Whited Dec., Ex. 2 (State of Washington Business License for Cave B LLC/Cave B Estate Winery (Supplement #17)) at 1; Whited Dec. Ex. 3 (State of Washington Business License for Cougar Hills, LLC/Cougar Crest Estate Winery (Supplement #44)) at 1 (emphasis added).

The Board's website also indicates:

> - **City or County Requirements**
> It's important to check with the city or county for building permits, zoning, and other local area requirements.
>
> These common resources can help with your questions:
>
> - Contact the city or county office where your business will be located.
> - Business Licensing Services now processes business license applications for many cities. A list of partnering cities is available on their **website**.

Whited Dec., Ex. 4 (https://lcb.wa.gov/llg/preparing-application) (emphasis added).

If one clicks on the "website" link on the Board's website, the link opens up a Washington State Department of Revenue webpage. From there, one can click on "Open a business" followed by "Get licensing requirements" to arrive at a Washington State Department of Revenue "Business Licensing Wizard". Whited Dec. at 2. The "Business Licensing Wizard" lets one put in the type of business they wish to open and what city they wish to open it in; it then returns information about local licensing requirements to the extent the city requirements have been incorporated into the state's "Business Licensing Wizard" system. Not all local requirements are reflected in the system.

However, if one looks up the requirements for opening a winery business in the City of Seattle, the largest city in the state by far, it is clear that the Board recognizes the authority of local jurisdictions to require business licenses for adult beverage businesses. Specifically, using

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the "Business Licensing Wizard", if one selects that they are opening a "Winery, In-State" as a "Sole Proprietorship" that will employ "Adults" in the City of Seattle without entering a specific address, a summary is generated. *See* Whited Dec. at 2, Ex. 5. The summary includes the following disclosures:

> THE CITY OF SEATTLE requires all businesses located within the city limits, or who conduct business within the city limits, to be licensed with the city. Certain licenses may require approval through city police, planning, fire and building departments.
> BUSINESS AND OCCUPATION TAXES: Washington cities tax private businesses, municipal, and private utility companies within their boundaries. Contact each city in which business will be conducted.
>
> Please be advised that you should contact any incorporated city or any county in which you perform your work to determine if there are additional licensing or zoning requirements. Additional items you need to inquire about are:
> * A building permit for any construction or modification to a building.
> * The local codes before making or ordering a sign for your business because cities often restrict location, size, etc.

Whited Dec., Ex. 5 at 4. Analogous results are obtained from the "Business Licensing Wizard" if one indicates that they are opening a winery in Bellevue:

> THE CITY OF BELLEVUE requires all businesses located within the city limits, or who conduct business within the city limits, to be licensed with the city.

Whited Dec. at 2. Thus, the Board clearly acknowledges that local jurisdictions can require business licenses for adult beverage businesses and may also enforce local zoning and building/development standards.

III. CONCLUSION

Because the Hearing Examiner lacks jurisdiction to decide constitutional issues, the Hearing Examiner must deny Appellants' preemption Motion without addressing its merits. Even if the Hearing Examiner had the jurisdiction and authority to decide the preemption issue,

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which he does not, Appellants' claim of preemption is without merit and their summary judgment motion must be denied.

Dated this 22nd day of August, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 22nd day of August, 2022, the undersigned caused the following documents to be served on the persons listed below in the manner shown: **(1) Intervenors' Opposition to Appellants' Motion for Summary Judgment, and (2) Declaration of Joshua A. Whited in Support of Intervenors' Opposition to Appellants' Motion for Summary Judgment with Exhibits 1-5.**

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Signed and certified on August 22, 2022.

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