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2022 FRANK HOMAN AWARD GOES TO LARRY BERG!

By Eileen Keiffer

In a reception on Dec. 12, 2022, at Mercato Ristorante in Olympia, Larry Berg, retired, was presented with the Section's 2022 Frank Homan Award. The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law. Larry's family, friends, and colleagues were in attendance. Following the presentation, Penny Allen, of the Washington Attorney General's Office, presented the Washington Cannabis Law Mini-CLE. *Congratulations Larry!*

Larry Berg's nomination for the Homan Award gives you more background on Mr. Berg, and reads as follows:

The Frank Homan Award is presented annually by the WSBA Administrative Law Section to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law. **We nominate Larry Berg for the 2022 Frank Homan Award.**

Larry was first admitted to the Washington bar in 1992, and had a long career dedicated to administrative law. One practitioner before the Washington Utilities and Transportation Commission says about Larry: "he was fair, even-handed and always exhibited a good sense of humor. Of the ALJs I worked with, he was one of the best." At the end of his career, Larry worked as a staff attorney for the Department of Health and the Washington Medical Commission for several years before finally retiring in late 2021.

In addition to his work as an adjudicator and practitioner of administrative law, Larry served in various roles on the Administrative Law Section's board of trustees (which is now called the executive committee) from 2002 to 2012. According to WSBA records, Larry served a term as chair, three terms as treasurer, one term as secretary (while he was also serving as treasurer), and several terms as newsletter editor. Larry helped establish the Leadership Committee, which consisted of all past Section chairs.

During his decade of service on the Administrative Law Section board, Larry was a leader whose energy and ideas inspired many projects that improved the practice of administrative

law in Washington. For example, he was involved in negotiations with the WSBA and with Lexis to publish the first edition of the Public Disclosure Act Deskbook. As part of his work on the Public Service Project committee, Larry worked devotedly on a project to donate copies of the section's Administrative Law Practice Manual to county law libraries around the state.

Former board members recall Larry's hard work and dedication to the Section, particularly for the continuing legal education (CLE) seminars put on by the Section and the publication of the Section's newsletter. Larry was consistent in his leadership and dedicated countless hours to Section work, including mentorship of new attorneys. Another contemporary board member described Larry as "a good and energetic partner who always had astute ideas and capable production efforts. I always appreciated Larry's law smarts and his committed service to the Section."

When the Section established the Frank Homan Award in 2005, Larry was on the board and instrumental in establishing the award. Since its inception, 13 remarkable individuals have been honored with the Frank Homan Award. We urge the committee to consider Larry Berg for the 2022 Frank Homan Award for his extensive contributions to the practice of administrative law through a lifetime of government service and a decade of fruitful service to the Administrative Law Section.

Richard Potter and Richelle Little,
with input from Judy Endejan, Mike Bahn,
and Tom Kalenius

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The Administrative Law Section welcomes articles and items of interest for publication. The editors and Executive Committee reserve discretion whether to publish submissions.

Send submissions to: Lea Anne Dickerson (lea.dickerson@oah.wa.gov).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association or its officers or agents.

Help us Make this Newsletter MORE RELEVANT to Your Practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please email Bill Pardee at Bill.Pardee@bta.wa.gov.

2023 LEGISLATIVE SESSION REPORT

By Richard E. Potter, Chair, Legislative Committee

During the 2022 session of the Washington Legislature, the Administrative Law Section's Legislative Committee reviewed 70 bills (not counting companion bills).

The areas of interest to the committee were the Administrative Procedure Act (34.05 RCW), the Public Records Act (42.56 RCW), the Open Public Meetings Act (42.30 RCW), the Office of Administrative Hearings law (34.12 RCW), and other statutes that affect administrative agency procedures, processes, hearings, rulemakings, appeals/judicial review, etc. (as opposed to the substantive law implemented by agencies). Thirteen bills of interest were passed by the Legislature. Except as otherwise noted, the bills' effective dates are July 23, 2023. The text of bills and committee reports are available on the Legislature's website at apps.leg.wa.gov/billinfo/.

Bills Relating to Administrative Procedure

House Bill 1066 Section 2013 of the bill amends RCW 34.05.330 (5) in the Administrative Procedure Act to update a reference to the Department of Commerce.

House Bill 1210 This bill establishes new requirements for the recording of school board meetings. It adds a new section to the Public Records Act and amends RCW 42.30.035 the Open Public Meetings Act.

House Bill 1221 This bill amends RCW 42.56.230 in the Public Records

Act to exempt from disclosure personal and financial information concerning a player that is received or maintained by the state lottery or any contracted lottery.

House Bill 1301 This bill directs the Department of Licensing to review and analyze 10 percent of professional licenses each year and to submit an annual report to the Legislature with recommendations as to whether the professional licenses reviewed should be terminated, continued, or modified.

Senate Bill 5192 This bill amends RCW 79.100.120 (Public Lands: Derelict vessels; which cross-references RCW 43.21B.305 in the Environmental and Land Use Hearings Office—Pollution Control Hearings Board Act) to authorize administrative law judges to substitute for Pollution Control Hearings Board members in deciding derelict vessel appeals.

Senate Bill 5459 This bill concerns requests for records containing election information. In the Public Records Act it moves disclosure exemption provisions about election documents from RCW 42.56.420(7) to a new section, changing and adding verbiage.

Legislative Session Report

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Bills affecting the Public Records Act

House Bill 1370 This bill provides awards to whistleblowers who report violations of state or federal securities laws and provides protection to whistleblowers and internal reporters. It includes amending RCW 42.56.400(6) in the Public Records Act to exempt from disclosure “information that could reasonably be expected to reveal the identity of a whistleblower under section 10 of this act.”

House Bill 1533 This bill amends RCW 42.56.250 in the Public Records Act to exempt personally identifying information of public employees from disclosure if the employee provides a sworn statement, subject to renewal every two years, that the employee or a dependent is a survivor of domestic violence, sexual assault or abuse, stalking, or harassment, or demonstrates that the employee or dependent participates in the Address Confidentiality Program; creates an exception to the exemption for disclosure to the news media; and requires a Joint Legislative Audit and Review Committee report to the Legislature on the impacts of the exemption. Effective immediately.

House Bill 1599 This bill amends RCW 71.05.620 (Behavioral Health Disorders, Court files and records closed—Exceptions—Rules) to allow the Washington State Patrol Firearms Background Check Division to access files and records of Involuntary Treatment Act court proceedings for conducting background checks for firearms transfers, firearm rights restoration petitions, firearms-related licenses, and release of firearms from evidence.

Senate Bill 5153 This bill concerns the Future Voters Program [[www.sos.wa.gov/elections/future-voter-](http://www.sos.wa.gov/elections/future-voter-program.aspx)

[program.aspx](#)]. Section 14 amends RCW 42.56.230 of the Public Records Act to exempt from disclosure certain information relating to a future voter.

Senate Bill 5421 This bill amends RCW 42.56.250 in the Public Records Act to exempt benefit enrollment information collected and maintained by the health care authority from public inspection and copying.

Senate Bill 5518 This bill concerns the protection of critical constituent and state operational data against the financial and personal harm caused by ransomware and other malicious cyber activities. Section 4 adds a new section to the Public Records Act exempting from disclosure the

reports required by the bill and by RCW 43.105.220(3) [re the Consolidated Technology Services Agency].

Senate Bill 5081 This bill concerns notifying crime victims regarding the parole, release, community custody, work release placement, furlough, or escape of a specific inmate convicted of certain violent offenses. Section 2 of the bill adds a new section to the Public Records Act that exempts from disclosure certain crime victim information.

The Code Reviser will add these new exemptions to its list of disclosure exemptions, which is available at www.atg.wa.gov/sunshine-committee (scroll down). ■

NOMINATIONS OPEN FOR THE 2023 FRANK HOMAN AWARD

By Bill Pardee

The Frank Homan Award is presented annually by the Administrative Law Section to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law. Only Administrative Law Section members can nominate, but a nominee does not have to be an attorney or a Section member. Nominations for the 2023 award are due by June 30, 2023. For nominations, send an email to Eileen Kieffer at eileen@madronalaw.com, and include:

- Your name and contact information
- Information about the person being nominated (name, position, affiliation)
- Why you think this person should be recognized

Frank Homan was a dedicated teacher and mentor passionate about improving the law. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name. Past recipients of the Frank Homan Award include:

2022 Larry Berg	2016 John F. Kuntz	2010 Jeffrey Goltz
2021 John Gray	2015 Ramsey Ramerman	2008 Kristal Wiitala
2020 Richard Potter	2015 Eric Stahl	2007 C. Dean Little
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CASE LAW UPDATE

Bass v. City of Edmonds,
199 Wn.2d 403, 508 P.3d 172 (2022)

By William Pardee

FOLLOWING A MASS SHOOTING at the nearby Marysville Pilchuk High School, the Edmonds City Council adopted an ordinance (Ordinance 4120) requiring residents to safely store their firearms when not in use. Ordinance 4120 contained two operative provisions, a "storage" provision and an "unauthorized access" provision. Under the "storage" provision:

It shall be a civil infraction for any person to store or keep any firearm in any premises unless such weapon is secured by a locking device, properly engaged so as to render such weapon inaccessible or unusable to any person other than the owner or other lawfully authorized user.

Notwithstanding the foregoing, for purposes of this section, such weapon shall be deemed lawfully stored or lawfully kept if carried by or under the control of the owner or other lawfully authorized user.

Under the "unauthorized access" provision:

It shall be a civil infraction if any person knows or reasonably should know that a minor, an at-risk person, or a prohibited person is likely to gain access to a firearm belonging to or under the control of that person, and a minor, an at-risk person, or a prohibited person obtains the firearm.

Violation of either provision carried a fine. At around the same time, Washington voters enacted Initiative 1639 (RCW 9.41.360), that among other things, criminalized unsafe storage of firearms, but in more limited circumstances than Ordinance 4120. Specifically, Initiative 1639 did not "mandate how or where a firearm must be stored." RCW 9.41.360(6).

The plaintiffs challenged Ordinance 4120 as preempted by state law. The City of Edmonds moved to dismiss on the theory that the challengers did not have standing. Later, both sides moved for summary judgment. The trial court renewed its earlier determination that the plaintiffs had standing to challenge the safe storage portion of the ordinance (ECC 5.26.020), but not the unauthorized access portion of the ordinance (ECC 5.26.030). The trial court concluded that only the storage portion of the ordinance was preempted by state law.

Both sides appealed. The Court of Appeals concluded that the plaintiffs had standing to challenge the entire ordinance and that the ordinance was preempted by state law. We then granted review. The City of Edmonds is supported by the cities of Seattle, Walla Walla, Olympia,



WSBA Sections

Case Law Update

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Kirkland, Brady, and the Washington Alliance for Gun Responsibility.

Municipal ordinances are presumed valid, and the burden is on the challenge to establish otherwise. *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 624 (1958).

We conclude the plaintiffs have standing. We use the common law test for standing to determine whether someone has standing under this act. *Wash. State Hous. Fin. Comm'n v. Nat'l Homebuyers Fund, Inc.*, 193 Wn.2d 704, 711, 445 P.3d 533 (2019). Under that test, a person has standing if (1) the interest they seek to protect "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" and (2) "the challenged action has caused injury in fact, economic or otherwise, to the party seeking standing." Courts take a more liberal approach to standing for questions of major public importance. See *Farris v. Munro*, 99 Wn.2d 326, 330 (1983). And standing under the Uniform Declaratory Judgments Act "is not intended to be a particularly high bar. Instead, the doctrine serves to prevent a litigant from raising another's legal right." Plaintiffs plainly meet the first element of the common law test – the plaintiffs own and store firearms. They are within the zone of interests regulated. And plaintiffs have testified they keep firearms unsecured and unlocked even when children are in their homes. Should a prohibited person get access to their firearms, the plaintiffs could be charged with a civil infraction that carries a potentially heavy penalty. These consequences are sufficient to establish the injury-in-fact element of standing. Therefore, the plaintiffs have standing to bring this challenge.

We turn now to whether state law has occupied the field or otherwise preempts Ordinance 4120. Municipal exercises of police power, however, may "not conflict with general laws." WASH. CONST. art. XI, § 11; *Cont'l Baking Co. v. City of Mt. Vernon*, 182 Wash. 68, 72 (1935). The plaintiffs contend that both operative provisions of Ordinance 4120 are preempted by RCW 9.41.290. "A state statute preempts an ordinance if the statute occupies the field or if the statute and the ordinance irreconcilably conflict." *Watson v. City of Seattle*, 189 Wn.2d 149, 171 (2017). We have found that the intent to occupy the field may be implied. *Watson*, 189 Wn.2d at 171.

Our Legislature has limited local firearm regulation for decades. The current preemption statute reads:

The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition

and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter. Such local ordinances shall have the same penalty as provided for by state law. Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.

RCW 9.41.290. See also Laws of 1983, ch. 232, § 12.

While the Legislature's intent to occupy the entire field of firearm regulation is clear, not every municipal action that touches on firearms is within that field. For example, RCW 9.41.290 does not prevent a municipality from barring its employees from carrying concealed weapons while on duty. *Cherry v. Municipality of Metropolitan Seattle*, 116 Wn.2d 794, 800 (1991). Since this personnel policy was a law of general application, it was not preempted by RCW 9.41.290. Similarly, RCW 9.41.290 did not prevent a city from imposing strict rules on a gun show held at a municipal convention center. See *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 356-57 (2006). Not only were the restrictions not laws of general application, but cities also have specific authority to regulate gun possession in municipal convention centers and general proprietary authority to limit how their convention centers could be used. *Id.* at 355-356 (citing RCW 9.41.300), 357 (citing *Cherry*,

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The Section also has six committees whose members are responsible for planning CLE programs, publishing this newsletter, tracking legislation of interest to administrative law practitioners, and more.

Feel free to contact the chair of any committee you have an interest in or for more information.

Committee chairpersons are listed on page two of this newsletter, and on the Section's website.

Case Law Update

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116 Wn.2d at 802). And not all rules of general application that touch on firearms are preempted by RCW 9.41.290. For example, RCW 9.41.290 does not prevent a city from taxing firearms and ammunition. *Watson*, 189 Wn.2d at 156. While we acknowledge that some regulations could masquerade as taxes, the Watson plaintiffs failed to show that the particular tax was a regulation. *Id.* Since RCW 9.41.290 preempted only firearm regulations, not taxes, the tax was not preempted. *Id.* Similarly, the Court of Appeals found that RCW 9.41.290 did not preempt a county ordinance requiring shooting facilities to obtain operating permits. *Kitsap County Rifle & Revolver Club*, 1 Wn. App. 2d 393, 399 (2017). The court noted that on its fact, the preemption statute did not reference regulating shooting facilities. *Id.* at 406. The court also noted that the ordinance “imposed requirements only on owners and operators of shooting facilities, not on the individuals who discharge firearms at those facilities.” *Id.* at 407. The court also noted (among many other things) that the Legislature had explicitly given municipalities the power to “enact ordinances restricting the discharge of firearms ‘where there is a reasonable likelihood that human, domestic animals, or property will be jeopardized.’” *Id.* at 409 (quoting RCW 9.41.300(2) (a)). Taken together, these cases establish that RCW 9.41.290 broadly preempts local ordinances that directly regulate firearms themselves, but not necessarily ordinances that have an incidental effect on the use and enjoyment of firearms or exercises of municipal authority that do not establish rules of general application to the public.

The City of Edmonds argues that the Legislature intended only to preempt regulation in the nine statutorily enumerated areas: “registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms.” RCW 9.41.290. But the preemption statute begins with “the state of Washington fully occupies and preempts the entire field of firearms regulation.” *Id.* Given that broad introductory phrase, we conclude the list is illustrative, not exclusive.

In the alternative, they city argues that RCW 9.41.290 does not preempt storage and unauthorized access regulations under the principles of *eiusdem generis*. “The rule of *eiusdem generis* requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest similar items to those designated by specific terms.” *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 882 (2007). The city suggests the nine enumerated items in RCW 9.41.020 into two topics: firearms transactions and active use of firearms. Since the ordinance does not apply to guns in the owner’s possession, the city argues that ordinances pertaining to storage are not preempted. We decline to limit the preemption statute

to firearms’ transactions and active use. That limitation is not consistent with the words of the statute as a whole. Under RCW 9.41.020, “the state of Washington hereby fully occupies and preempts the entire field of firearms regulation.” [Emphasis added.] The key question is whether the ordinance regulates firearms—not whether it regulates firearm transactions or active use.

The Legislature plainly meant to broadly preempt local lawmaking concerning firearms except where specifically authorized in chapter 9.41 RCW or other statutes. The City of Edmonds was acting in its regulatory, not proprietary, role and without the sort of explicit or necessarily implied authorization present in *Watson*, 189 Wn. 2d 149, *Pacific Northwest Shooting Park*, 158 Wn.2d 342, or *Kitsap Rifle & Revolver Club*, 1 Wn. App. 2d 393. Nor was the city acting as an employer as in *Cherry*, 116 Wn.2d 794. Accordingly, we hold that Ordinance 4120 is preempted by state law based upon field preemption.

Ladyhelm Farm LLC v. Washington State Liquor and Cannabis Bd., ___ Wn. App.2d ___, 524 P.3d 700 (2023)

By William Pardee

WSLCB REGULATIONS INCLUDE detailed traceability requirements for cannabis “to prevent diversion and to promote public safety.” WAC 314-55-083(4). Cannabis licensees must provide up-to-date specified information on when plants will be partially or fully harvested on an electronic traceability system chosen by the WSLCB. “Cannabis seedlings, clones, plants, lots of useable cannabis or trim, leaves, and other plant matter, batches of extracts, cannabis-infused products, samples, and cannabis waste must be traceable from production through processing, and finally into the retail environment including being able to identify which lot was used as base material to create each batch of extracts or infused products.” *Id.* The traceability regulations also require that “all cannabis ... must be physically tagged with the unique identifier generated by the traceability system and tracked.” WAC 314-55-083(4)(h).

Ladyhelm Farm, LLC (Ladyhelm) was a licensed cannabis producer and processor. A WSLCB enforcement officer conducted an unannounced premises check at Ladyhelm. During the check, the officer observed large quantities of cannabis without traceability numbers or tags, including hundreds of five-pound bags and large amounts of cannabis hanging and set on drying tables. At the time of the premises check, the WSLCB traceability system

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stated that Ladyhelm had 843 growing plants and 619 harvested plants. However, there were no growing plants at the facility, and all plants had been harvested. Due to the large amount of non-compliant cannabis, the officer was unable deal immediately with the violations. The officer decided to place Ladyhelm “into an Administrative Hold until a plan could be formulated to deal with the numerous violations and large amounts of untagged product. The officer said in his report that he anticipated returning to seize the cannabis within three or four days. Four days later, the officer returned to Ladyhelm with additional law enforcement personnel and seized roughly 1,720 pounds of cannabis that did not have traceability numbers or tags.

Eight days after the seizure, the WSLCB issued an administrative violation notice to Ladyhelm for failing to maintain traceability requirements. The WSLCB then assigned the matter to an administrative law judge (ALJ). The WSLCB moved for summary judgment, arguing there was no genuine issue of material fact as to whether Ladyhelm had failed to maintain the traceability of the cannabis. And the WSLCB maintained that it had properly seized the cannabis because it was possessed in violation of Washington law. Ladyhelm responded, arguing that it kept its own inventory log for cannabis during harvesting that was sufficient to meet traceability requirements. The ALJ granted the WSLCB’s motion for summary judgment. Ladyhelm appealed to the WSLCB’s administrative board (Board), and the Board affirmed, adopting the findings and conclusions of the ALJ. The Board determined that cannabis was a schedule I controlled substance under the Uniform Controlled Substances Act (UCSA), ch. 69.50 RCW. Accordingly, as a schedule I controlled substance, cannabis possessed in violation of Washington law is subject to seizure. The Board determined that Ladyhelm neither physically tagged nor tracked the cannabis in the traceability system as required, and the physical logbook Ladyhelm said it had maintained did not satisfy the traceability requirements. The Board concluded that Ladyhelm’s possession of the cannabis violated the WSLCB’s regulations, and therefore was subject to seizure under RCW 69.50.505(1)(a). Ladyhelm then appealed to superior court. The superior court affirmed the Board. Ladyhelm appeals.

This court’s review of the Board’s final order is governed by Washington’s Administrative Procedure Act (APA), ch. 34.05 RCW. RCW 34.05.570.

The Legislature classified cannabis as a schedule I controlled substance under the UCSA. As a schedule I controlled substance, cannabis is subject to seizure under RCW 69.50.505(12) unless it is possessed in compliance with the WSLCB regulations. Ladyhelm argues that the seizure of its cannabis was not authorized by RCW 69.50.505(12)

because the classification has been impliedly repealed by the Legislature’s authorization of recreational cannabis use. We disagree.

We review interpretation of statutes de novo. *State v. Hanson*, 138 Wn. App. 322, 328 (2007). Washington law strongly disfavors the implied repeal of statutes. *Id.* “The legislature is presumed to be aware of its own enactments.” *Id.* (quoting *Amalgamated Transit Union Legis. Council v. State*, 145 Wn.2d 544, 552 (2002)). There are two ways implied repeal can occur. *Id.* “First, the subject matter of the subsequent legislation must cover the entire scope of the earlier one.” *Id.* “Or second, the legislative acts can be so inconsistent that they cannot be reconciled to give effect to both.” *Id.* The Legislature has designated cannabis as a schedule I controlled substance under the UCSA. *Seeley v. State*, 132 Wn.2d 776, 784 (1997). However, the pharmacy commission has the authority to change the designation under the UCSA. RCW 69.50.201; *Id.* Ladyhelm argues that, by implication, the Legislature’s classification of cannabis as a schedule I controlled substance has been repealed. It maintains that the Legislature’s explicit finding in the Washington State Medical Use of Cannabis Act, ch. 69.51A RCW, that cannabis has accepted medical uses is not reconcilable with the classification of cannabis as a schedule I substance. The court in *Hanson* determined that “the subject matter of the Medical Cannabis Act is to allow patients with terminal or debilitating illness to legally use cannabis when authorized by their physician.” *Id.* at 329. The statute recognized that cannabis may provide some relief for certain diseases. Additionally, the court pointed out that the statute “only provides an affirmative defense to the drug crime” and was not inconsistent with the schedule I classification because it did not negate the elements of the crime, rather it excused the conduct. *Id.* at 330-31. Accordingly, the court determined that the Medical Cannabis Act did not impliedly repeal the classification of cannabis as a schedule I controlled substance. *Id.* at 332.

Ladyhelm argues that the Medical Cannabis Act, combined with the creation of a regulatory system for the recreational use of cannabis, impliedly repeals cannabis’ schedule I classification. However, Ladyhelm points to no specific provisions that would create an implied repeal. Ladyhelm seems to argue that *Hanson* was wrongly decided because it specifically stated that patients with specific ailments may benefit from the use of medical cannabis. However, Washington law strongly disfavors an implied repeal, and as *Hanson* explained, this is insufficient to establish such. Moreover, the Legislature has also added provisions to the UCSA explaining how the statute interacts with the recreational regulation of cannabis, demonstrating an intent that the two statutes remain compatible. *See* RCW

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69.50.366, .325(1). Accordingly, we disagree with Ladyhelm's argument.

Ladyhelm challenges the seizure of its cannabis, arguing that even if cannabis is still a schedule I controlled substance, Ladyhelm complied with the traceability requirements, and thus the WSLCB did not have authority to seize and destroy the cannabis.

The requirement information for traceability must be kept "completely up-to-date." WAC 314-55-083(4). In certain situations, "the WSLCB may seize, destroy, confiscate, or place an administrative hold on cannabis, useable cannabis, cannabis concentrates, and cannabis-infused products." WAC 314-55-210. This includes "any product not properly logged in inventory records or untraceable product required to be in the traceability system." WAC 314-55-210(2). Additionally, "the WSLCB may destroy any cannabis, cannabis concentrate, useable cannabis, and/or cannabis-infused products in its possession that is not identifiable through the Washington cannabis traceability system or otherwise in a form that is not compliant with Washington's cannabis statutes or rules." WAC 314-55-210(5).

Ladyhelm argues that the WSLCB did not have authority to seize and destroy the cannabis because the requirement that traceability be "completely up-to-date" does not necessarily mean contemporaneous and must be understood in the context of the process to which the requirement is applied. Moreover, Ladyhelm maintains that if cannabis is traceable, it may not be seized even though it is untagged.

The traceability system must be updated even where the cannabis is simply being moved within the licensed premises. The Board determined that Ladyhelm neither physically tagged nor tracked the cannabis in the traceability system as required, and the inventory log that Ladyhelm said it had maintained did not satisfy the requirements.

Ladyhelm does not dispute that some of its cannabis was untagged and not properly logged in the traceability system specified by the WSLCB. Instead, it maintains that it kept information required for traceability in a logbook, which was sufficient for compliance with the regulations. Accordingly, Ladyhelm maintains that the WSLCB did not have the authority to seize the cannabis because the cannabis was actually traceable.

The Board determined that an inventory log is insufficient to comply with the law and regulations and that traceability requirements are not suspended during harvest. We agree with the Board's interpretation and application of the regulations. As a result, even though Ladyhelm may have been able to trace the cannabis using its logbook, there is no genuine issue of material fact that it failed to comply with traceability requirements in the WSLCB system and

also failed to tag the cannabis. Thus, under the statutes and regulations, the WSLCB was authorized to seize and destroy the cannabis.

Without specifying, Ladyhelm argues that some of the information in the traceability system cannot be provided until harvesting is complete. However, Ladyhelm, does not explain how or whether this prevented Ladyhelm from entering the information it could provide into the traceability systems or how they were prevented from tagging the cannabis.

There is no genuine issue of material fact regarding whether the WSLCB had authority to seize and destroy the cannabis because it was not properly tagged and traceable in the online system. We affirm the Board's entry of summary judgment for the WSLCB.

Seattle Events v. State of Washington, 22 Wn. App. 2d 640, 512 P.3d 926 (2022)

By Bill Pardee

IN 2012, WASHINGTON VOTERS PASSED Initiative 502, which allows licensed retailers to sell marijuana to customers. Initiative 502, LAWS OF 2013, ch. 3. Initiative 502 required the Liquor and Cannabis Board (Board) to create "reasonable time, place, and manner restrictions and requirements regarding advertising of marijuana, useable marijuana, and marijuana-infused products." LAWS OF 2013, ch. 3, § 10(9). The initiative stated that these restrictions should be designed to "minimize exposure of people under twenty-one years of age to marijuana advertising. LAWS OF 2013, ch. 3, § 10(9)(b).

The Legislature enacted restrictions on marijuana advertising in 2013 and amended those restrictions in 2017. See former RCW 69.50.369 (2017). Relevant here, these amended restrictions include a ban on marijuana advertising within 1,000 feet of schools, playgrounds, recreation centers, childcare centers, parks, libraries, and game arcades, unless that location is restricted to people aged 21 or older. Former RCW 69.50.369(1). Further, outdoor signs are prohibited in arenas, stadiums, shopping malls, fairs that receive state allocations, farmers markets, and video game arcades, unless that location is restricted to adults. Former RCW 69.50.369(7)(b)(1).

However, licensed retail stores can use billboards or outdoor signs that state the business name, nature of the business, and directions to the business. Former RCW 69.50.369(7)(c). And the restrictions on outdoor advertising

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do not apply to brand advertisements at facilities that are being used for adult-only events, or to in-store advertisements, as long as those advertisements are not in a window facing outward. Former RCW 69.50.369(7)(c).

The Board issued parallel regulations providing that marijuana advertisements cannot be placed within 1,000 feet of school grounds, playgrounds, recreation centers, childcare centers, parks, libraries, or game arcades unless the location is restricted to persons aged 21 or older, or if a physical marijuana store exists within that 1,000-foot buffer. WAC 314-55-155(1)(b)(i). In addition, the regulations provide that marijuana businesses can display two permanent outdoor signs at their store, as long as the signs are each 1,600 square inches or less and only state the name, nature, and location of the business. WAC 314-55-155(2)(a)(i). The regulations also allow marijuana advertising signage at adult-only events, as long as those signs are not visible outside the event and only state the brand's name. WAC 314-55-155(2)(d).

Seattle Events, individually, is a nonprofit organization and does business as Seattle Hempfest. Multiverse Holdings, LLC (Multiverse), and Universal Holdings, LLC (Universal), are licensed marijuana retailers.

Seattle Hempfest's annual production cost is paid in part by donations and contributions. Other parts of the production cost are paid by vendors who rent space at the event and advertise their businesses, subject to compliance with state and city regulations.

In April 2019, the Board issued Bulletin 19-01 (later withdrawn and superseded), which stated that marijuana businesses could not advertise in certain locations. This bulletin cited RCW 69.50.369 and WAC 314-55-155 and stated that marijuana licensees "cannot have any sign or advertisement at any event, if the event is located at or within 1,000 feet of one of the listed restricted areas."

Multiverse and Universal both wanted to support Seattle Hempfest 2019 as contributors and have booths at the event. But due to Bulletin 19-01, both were unsure whether their booth could bear their business names, logos, or address without violating former RCW 69.50.369 and WAC 314-55-155. Other sponsors and participants expressed similar concerns and chose not to participate in Seattle Hempfest 2019. Ultimately, Multiverse and Universal participated in Seattle Hempfest 2019.

Seattle Events sued the State, the Board, and several Board members when Bulletin 19-01 was still in effect. After the suit was filed, the Board issued Bulletin 19-03, which superseded Bulletin 19-01 in June 2019. Bulletin 19-03 clarified that non-commercial speech was exempt from the advertising restrictions. The parties stipulated that Bulletin 19-03 resolved issues raised in Seattle Events' motion for preliminary injunction against the Board's enforcement

of Bulletin 19-01 at Seattle Hempfest. Seattle Events then filed a second amended complaint, which no longer challenged the Board's bulletins, but instead challenged former RCW 69.50.369(1), and (7)(b) and (e), along with WAC 314-55-155(1)(a)(iii), (1)(b)(i), (2)(a)(i), and (2)(d). The second amended complaint sought injunctive relief under the First Amendment to the United States Constitution and article I, sections 1, 4, and 5 of the Washington Constitution. The parties filed cross-motions for summary judgment. Both parties argued that the *Central Hudson* test for commercial speech under the First Amendment applied. The superior court granted summary judgment in favor of the State "for the reasons articulated by the State, with the sole exception being that the Court finds that the regulations at issue are of a "lawful activity." Seattle Events then sought direct review from the Washington Supreme Court, which transferred the case to this court. Here there are no genuine issues of material fact, and the State is entitled to judgment as a matter of law.

Seattle Events argues that the superior court erred by failing to apply a heightened standard for commercial speech claims under the state constitution because article I, section 5 of the Washington Constitution provides greater protection for commercial speech than the First Amendment. Further, Seattle Events argues that this court should perform a *Gunwall* analysis to determine the scope of that broader protection and then apply a new proposed test for commercial speech. We disagree.

Article I, section 5 does not require a more protective analysis for commercial speech than the First Amendment. *See State v. Living Essentials, LLC*, 8 Wn. App. 2d 1, 23-24 (2019), cert. denied, 141 S.Ct. 234 (2020). In *Living Essentials*, the court held that "our Supreme Court has already answered that question regarding commercial speech," declined to undergo the *Gunwall* analysis, and instead applied the *Central Hudson* test. *Id.* at 23-25. In its reasoning, the *Living Essentials* court relied on *National Federation of Retired Persons v. Insurance Comm'r*, 120 Wn.2d 101 (1992). *Id.* at 23-34. In *National Federation*, our Supreme Court determined that because "Washington case law provides no clear rule for constitutional restrictions on commercial speech ... we therefore follow the interpretative guidelines under the federal constitution." 120 Wn.2d at 119. Therefore, Seattle Events' argument that the state constitution requires the application of a different standard for commercial speech than under the federal constitution fails.

Courts apply a four-part test to First Amendment challenges to commercial speech regulations. *Central Hudson*, 447 U.S. at 566. This test asks whether (1) the speech being restricted concerns lawful activity and is not misleading, (2) the asserted governmental interest is substantial, (3) the regulation directly advances that

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governmental interest, and (4) the regulation is not more extensive than necessary to serve that interest. *Id.* Our Supreme Court has adopted *Central Hudson's* four-part test. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 512 (2005) (plurality opinion).

Because Seattle Events has not identified a compelling reason to depart from application of the traditional *Central Hudson* four-part test for commercial speech claims made under the First Amendment and to apply strict scrutiny instead, the superior court did not err by not applying strict scrutiny.

Seattle Events argues that the superior court erred by concluding that the challenged restrictions satisfy the traditional *Central Hudson* test for commercial speech regulations. We disagree. First, to receive First Amendment protections, the commercial speech “must concern lawful activity and not be misleading.” *Central Hudson*, 447 U.S. at 566. There does not appear to be binding case law explicitly holding that advertising for activity that is legal under state law and illegal under federal law is “lawful” for purposes of the *Central Hudson* test. The United States Court of Appeals for the First Circuit considered a similar question in dicta. *See New England Trade Ass’n, Inc. v. City of Nashua*, 679 F.2d 1 (1st Cir. 1982). In dicta, the First Circuit noted that “if New York, or some other state, decided to legalize the sale and use of marijuana, New Hampshire would have greater difficulty ... prohibiting an advertisement pertaining to marijuana.” *Id.* at 4. This statement implies that the court would extend constitutional protection to advertising for activities that are legal in the state where the transaction would occur. That implication is further bolstered by *Washington Mercantile Ass’n v. Williams*, where the United States Court of Appeals for the Ninth Circuit held that:

Sale or delivery of drug paraphernalia is illegal in Washington, so advertisement for sales in or mail order from Washington are unprotected speech. In contrast, the advertiser who proposes a transaction in a state where the transaction is legal is promoting a legal activity. Its speech deserves First Amendment protection.

733 F.2d 687, 691 (9th Cir. 1984).

On the other hand, the Montana Supreme Court has held that medical marijuana advertising does not concern lawful activity and, therefore, is not afforded constitutional protection. *Mont. Cannabis Indus. Ass’n v. State*, 2016 MT 44, ¶ 66, 382 Mont. 256, 368 P.3d 1131, cert. denied, 579 U.S. 930 (2016). The court reasoned:

Because federal law governs the analysis of this issue, we conclude that an activity that is not permitted by federal law – even if permitted by state law – is not a “lawful activity” within the

meaning of *Central Hudson's* first factor. As such, the advertisement of marijuana is not speech that concerns lawful activity. There is no First Amendment violation and our analysis under *Central Hudson* therefore ends here.

Id. In *Montana Cannabis*, the plaintiffs “relied exclusively on federal law in their argument on this issue” and did not bring a claim under the free speech provision of the Montana Constitution. *Id.* at ¶ 65.

The sale of marijuana remains illegal under federal law. 21 U.S.C. §§ 812(c)(10), 841. In addition to a challenge under the Federal Constitution, Seattle Events brought a claim under the state constitution, which invokes state law. Therefore, this case is distinguishable from *Montana Cannabis*, where the appellants relied solely on the protections of the United States Constitution and invoked only federal law.

Here, the licensed sale of marijuana is legal in Washington. Former RCW 69.50.325(1) (2018). And the commercial speech at issue proposes marijuana transactions within Washington. Because existing case law supports extending constitutional protections to advertising for activities that are legal in the state where the transaction would occur, we hold that restricted marijuana advertising from licensed retailers in Washington concerns lawful activity. Therefore, because the restricted commercial speech, marijuana advertising, concerns lawful activity and is not misleading, the restricted commercial speech satisfies the first step of the *Central Hudson* test in determining whether the challenged restrictions receive constitutional protection.

The second step of the *Central Hudson* test asks whether the asserted governmental interest is substantial. Seattle Events does not dispute that the State has an interest in preventing youth marijuana use. Like the State’s interest in preventing underage tobacco and alcohol use, the State has a substantial interest in preventing underage marijuana use and thereby protecting children’s health. *See Lorillard*, 533 U.S. at 564; *Anheuser-Busch*, 101 F.3d 329-30; *H.W.*, 70 Wn. App. at 555. Therefore, the State has asserted a substantial government interest in preventing underage marijuana use and satisfies the second step of the *Central Hudson* test.

Central Hudson's third step requires courts to ask if the challenged restrictions “directly advance the government interest.” To satisfy this step, the State “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Lorillard*, 533 U.S. at 555. The record contains several sources that show advertisements for certain substances are linked to underage use of that substance. Common sense leads to the conclusion that minimizing marijuana advertising in areas where children congregate regularly would decrease their

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exposure to that advertising. And common sense, studies, and anecdotes from other jurisdictions allow the State to conclude that less exposure to marijuana advertising would make minors less likely to use marijuana, especially since the same is true about other regulated products like alcohol and tobacco. Therefore, the State has shown that the challenged restrictions minimize marijuana advertising near children and directly advance the State's substantial interest in preventing underage marijuana use. *See Fla. Bar*, 515 U.S. at 628. Thus, the State has satisfied the third *Central Hudson* step.

The fourth and final step of the *Central Hudson* analysis determines whether the challenged restrictions are not more extensive than necessary. At this step, the State must show "a 'fit between the legislature's ends and the means chosen to accomplish those ends.'" *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). That fit can be "not necessarily perfect, but reasonable," and must be "in proportion to the interest served." *Id.* This analysis does not require the State to employ the least restrictive means, but instead "a means narrowly tailored to achieve the desired objective." *Id.*

Seattle Events relies heavily on *Lorillard*, 533 U.S. 525. In *Lorillard*, the court struck down outdoor advertising regulations prohibiting smokeless tobacco or cigar advertising within 1,000 feet of a school or playground. Unlike the restrictions in *Lorillard*, the challenged restrictions do not include an outright ban on outdoor advertising. No matter where a marijuana store is located, the challenged restrictions ensure that the business can use two signs to advertise its name, location, and nature of the business. Former RCW 69.50.369(7)(c). The challenged restrictions only restrict in-store advertising that is in a window and facing outward, as opposed to all

advertisements that could be seen outside. Former RCW 69.50.369(7)(c)(1); *see Lorillard*, 533 U.S. at 562. The challenged restrictions do not create an outright ban on outdoor advertising but instead list specific public areas (i.e., where one can reasonably assume that children congregate – e.g., schools, playgrounds, recreation centers, childcare centers, parks, etc.) that marijuana advertising generally cannot be placed near. Former RCW 69.50.369(1), (7)(b). Importantly, the challenged restrictions allow marijuana advertising, even in such public areas, as long as the location is being used for an adults-only event. Former RCW 60.50.369(7)(e) (ii); WAC 314-55-155(2)(d). The challenged restrictions also allow physical storefronts to have two signs advertising their business by using their name, location, and the nature of their business. Former RCW 69.50.369(2), (7)(c). The advertising restrictions merely minimize advertising "in particular areas where children are expected to walk to school or play in their neighborhood." *Anheuser-Busch*, 101 F.3d at 327. This shows that the challenged restrictions are carefully crafted to minimize exposure of children to marijuana advertising while still allowing adults to see those advertisements. Thus, the statutory scheme is "narrowly tailored to achieve the desired objective," preventing underage marijuana consumption. *Fox*, 492 U.S. at 480. Therefore, the challenged commercial speech restrictions satisfy the fourth and final step of the *Central Hudson* analysis.

Therefore, the superior court did not err in concluding that the challenged commercial speech restrictions do not violate the Washington or United States Constitution. Accordingly, we affirm both the superior court's order granting the State's summary judgment motion for dismissal of all claims against the State and denying Seattle Events' cross-motion for summary judgment. ■

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