NO. 44700-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

v.

WAHKIAKUM COUNTY, a political subdivision of Washington State,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The issue in this case is whether Wahkiakum County's biosolids ordinance thwarts Washington's biosolids law, preventing it from accomplishing its full purpose. While the County suggests that its ordinance can be harmonized with the biosolids statute, under established Washington case law a local government cannot legislate so as to prevent a law from achieving its purpose. Here, the ordinance prohibits essential and substantial elements of the statutorily mandated biosolids program–land application of Class B biosolids and septage–thereby frustrating the full implementation of the law.

The County's reliance on biosolids management "options" other than land application ignores the terms of the statute: the law is comprehensive with respect to the field of biosolids management, and land application is the sole biosolids management approach embraced by the statute. Within that approach, state regulations authorize distinct land application regimes for Class B biosolids and septage, designed specifically for areas where access restrictions are practicable, such as farms, forests, and land reclamation sites. These are activities that the regulations specifically authorize, conditioned on the issuance of a permit; to prohibit them as the County does conflicts with that authorization.

The County's reliance on a state regulation acknowledging that local ordinances may apply to land application of biosolids is misplaced. The plain language of the statute requires that biosolids be applied to the land "to the maximum extent possible." By arguing that a local ordinance is applicable even when it shrinks "the maximum extent possible" to a sliver, the County twists the meaning of those words, attempting to redefine state policy and the purpose of the statute.

The County's contention that the land application of Class A biosolids is safer than the land application of Class B is incorrect. The very purpose of the more stringent land application regime required for Class B biosolids (restricting public access and crop harvesting for certain periods) is to ensure that their use is just as protective of human health as is the use of Class A biosolids.

The County's suggestion that the economic difficulties for local governments and ratepayers created by bans of Class B biosolids are somehow irrelevant to this preemption analysis is contrary to the express purpose of the law. The Legislature stated that it created the biosolids program in large part to alleviate the financial burdens that sludge management was placing on local governments and ratepayers; it also provided for certain narrow exemptions from program requirements based

on economic feasibility. Facts about financial burdens are very much to the point.

Because the County's ordinance operates to thwart the state policy and legislative purpose of the state biosolids law, it is conflict preempted. The February 22, 2013, decision of the Cowlitz County Superior Court upholding the ordinance should be reversed.

II. ARGUMENT

A. The Standard of "Beyond a Reasonable Doubt" Does Not Raise the Bar in a Conflict Preemption Case

Whether an ordinance conflicts with a general law for purposes of article XI, section 11 of the state constitution is purely a question of law subject to de novo review. *Weden v. San Juan Cnty.*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998). A legislative enactment is presumed constitutional and the burden is on the challenger to show its unconstitutionality beyond a reasonable doubt. *Island Cnty. v. State*, 135 Wn.2d 141, 955 P.2d 377 (1998). Throughout its brief, the County contends, without support, that establishing conflict with the general laws is more difficult under a "beyond a reasonable doubt" burden than without reference to such a burden. *See, e.g.*, Respondent's Brief (Resp'ts Br.) at 19–20. To the contrary, showing such a conflict between a local ordinance and state law establishes as a matter of law that the ordinance is unconstitutional beyond a reasonable doubt. *See, e.g., Parkland Light & Water Co. v. Tacoma-*

Pierce Cnty. Bd. of Health, 151 Wn.2d 428, 434, 90 P.3d 37 (2004) ("A local regulation that conflicts with state law fails in its entirety"); *Diamond Parking, Inc. v. City of Seattle*, 78 Wn.2d 778, 781, 479 P.2d 47 (1971) ("If the ordinance is given the effect for which the appellant contends, the legislative purpose is necessarily thwarted"); *Ritchie v. Markley*, 23 Wn. App. 569, 597 P.2d 449 (1979); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007).

The County also contends that, where other state and federal conflict preemption cases are cited, these cases are not relevant unless it is also shown that they imposed a similar burden of proof. Resp'ts Br. at 37–38, 42. But, again, the standard of "beyond a reasonable doubt" is necessarily met when it is shown that an irreconcilable conflict exists between a local ordinance and a statute.

The County relies on *Johnson v. Johnson*, 96 Wn.2d 255, 263, 634 P.2d 877 (1981) in support of its contention that this standard raises the bar. At issue in *Johnson* was whether a statute failed to further a public purpose. *Johnson*, 96 Wn.2d at 259. The challenger contended that the statute's stated public purpose was not its real purpose, which was, allegedly, to benefit a private party. *Id.* This was a factual dispute in which the burden on the challenger was to prove its allegation by producing "evidence which establishes . . . the actual, only, or even

primary intent of the legislature." *Id.* The Court stated that it would sustain the statute if it could conceive of any facts that supported the statute's constitutionality. *Id.* at 258. The standard for the challenger was to disprove, beyond a reasonable doubt, any legislative declaration of the statute's purpose. *Id.*

In the present case, by contrast, Ecology does not seek to disprove the stated legislative purpose of the biosolids statute or to question the plain language of the County's prohibitions. Rather, it embraces the statute's express declarations, takes the ordinance at its face, and argues that the ordinance is invalid because it conflicts irreconcilably with the plainly stated legislative purpose.

B. The Ordinance's Prohibitions Cannot Be Harmonized With the Biosolids Law

The Washington Legislature requires that biosolids be applied to the land "to the maximum extent possible," and not, as the County implies, "to the extent deemed preferable by local government." By arguing that its ordinance is valid and applicable even though it shrinks "the maximum extent possible" to a sliver, the County necessarily implies that a local government has the power to redefine state policy and the purpose of the statute.[1]

[1] The County also suggests incorrectly that the legislative findings at RCW 70.95J.005 do not indicate the legislative purpose of the statute. Resp'ts Br. at 20.

The County offers three arguments in an effort to show that the law must make room for its ordinance. Resp'ts Br. 9–18. One is built on a misreading of *Weden*, 135 Wn.2d 678; a second on a misreading of *Welch v. Board of Supervisors of Rappahannock County, Va.*, 888 F. Supp. 753 (W.D. Va. 1995); and a third on a mistaken view of the role of "savings clauses" as they bear on conflict preemption.

1. *Weden* provides no support for the position that the biosolids law can accommodate the County's ordinance

The County's ordinance eliminates activities that are essential to, and constitute the substantial core of, Washington's biosolids program. This is apparent from a review of the program's legislative mandate and regulatory structure; it is also apparent from the program's actual, physical implementation. The law is concerned with applying biosolids on farms, forests, and land reclamation sites. RCW 70.95J.005(1)(d), (2). The rules for applying Class B biosolids are specifically designed for these areas, where it is practical to restrict public access and crop harvesting. WAC 173-308-210(5). Although Class A biosolids may be land applied at such sites as well, their treatment is designed for a different, much smaller

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To the contrary, the Washington Supreme Court has used legislative findings to determine the intent of a law. *See, e.g., State v. Shawn P.*, 122 Wn.2d 553, 561–62, 859 P.2d 1220 (1993) ("The purpose of this legislation is stated in the following legislative findings . . . ."). Moreover, the County also misreads the statute because the statement of purpose to maximize beneficial use of biosolids is in a free-standing subsection after the findings wherein "[t]he legislature *declares* that . . . the program shall, to the maximum extent possible, ensure that municipal sewage sludge is reused as a beneficial commodity." RCW 70.95J.005(2) (emphasis added).

niche where access and harvesting restrictions are impractical, such as lawns and home gardens. WAC 173-308-250, -260. With respect to the program's actual implementation, it is undisputed that at least 88 percent of biosolids managed in the state are Class B or septage, CP 148, that almost all wastewater treatment facilities and infrastructure across the state are designed to produce Class B but not Class A biosolids, *id.*, that Class A biosolids cannot be produced on a large scale without a massive rebuilding of facilities and infrastructure, and that none at all can be produced in Wahkiakum County. CP 150–60. Thus, what remains after eliminating land application of Class B biosolids and septage is, at best, an inconsequential sliver of the statutorily required biosolids program.[2]

The County argues that reducing the program in this way is not in conflict with the law. Resp'ts Br. at 13. First, the County contends, or at least implies, that *Weden* stands for the proposition that a local ordinance conflicts with the state law authorizing an activity only when it totally bans the authorized activity. Resp'ts Br. at 11, 13. Then, the County contends that its ordinance is not a total ban. Resp'ts Br. at 13. From these premises, it concludes that its ordinance does not conflict with state law. This view of Washington preemption law is mistaken: neither

[2] As Ecology shows by its argument at Section II.D below, even this sliver is illusory: the practical effect of the ordinance is to virtually eliminate the land application of biosolids in Wahkiakum County.

Weden nor any other Washington case holds that a local ordinance is in conflict with a state law authorizing an activity only if it totally bans the authorized activity.

Weden addressed the legality of a county ordinance prohibiting the use of motorized personal watercraft (PWCs) on marine waters and a lake in the county. *Weden*, 135 Wn.2d at 684. At issue was whether the ordinance conflicted with a statute requiring registration of such watercraft. *Id.* at 694. The Court held that it did not: "The statute was enacted to raise tax revenues and to create a title system for boats. . . . No unconditional right is granted by obtaining such registration." *Id.* at 694–95. The Court further reasoned: "Registration of a vessel is nothing more than a precondition to operating a boat. No unconditional right is granted by obtaining such registration. . . . Reaching the age of 16 is a precondition to driving a car, but reaching 16 does not create an unrestricted right to drive a car however and wherever one desires." *Id.* at 695.

Contrary to the County's representation, the majority opinion in *Weden* does not support a proposition that a local ordinance is in conflict with a state law authorizing an activity only if it totally bans the authorized activity. Nor does the dissent, which the County actually cites, put forward such a principle. Resp'ts Br. at 11. Instead, the dissent

explains, "[w]here a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders but they may not prohibit same outright."[3] *Weden*, 135 Wn.2d at 720. But this language does not support the County's position that an ordinance is in harmony with a law so long as it does not totally ban what the law authorizes or requires. *See* Resp'ts Br. at 13, 47. If an ordinance prevents a law from achieving its purpose, there is irreconcilable conflict, whether or not it is a total prohibition that creates the frustration. *Diamond Parking*, 78 Wn.2d at 781; *Ritchie*, 23 Wn. App. at 574; *Biggers*, 162 Wn.2d at 699. *See also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992).

The distinctions between the present case and *Weden* are stark. Washington's biosolids program requires detailed investigation and rigorous planning before a farm, forest, or land reclamation site is permitted for biosolids application; applying for such a permit bears no resemblance to registering personal watercraft. *See* WAC 173-308-90001 (minimum content for a permit application); WAC 173-308-90003 (minimum content for a site specific land application plan); WAC 173-308-90005 (procedures for issuing permits). Allowing local governments to regulate a watercraft that has been registered merely for tax purposes is

[3] As the *Weden* dissent points out, had that principle been taken to be relevant to the matter, it would have dictated a different outcome.

in no way resembles allowing local governments to ban land application projects that have been permitted through the rigorous, often multi-year application process.

2. *Welch* provides no support for the position that the ordinance can be harmonized with the biosolids law

The County's reliance on *Welch v. Board of Supervisors of Rappahannock County, Va.*, 888 F. Supp. 753 (W.D. Va. 1995), actually works against its own position, because that case recognizes that an ordinance is preempted where it conflicts with a statute that contains a strong, express preference for a method that the ordinance bans.

Citing *Welch*, the County argues that its ordinance can be harmonized with the state biosolids law because there are alternatives to applying Class B biosolids and septage to land in Wahkiakum County: they can be dumped into a landfill, incinerated, shipped to another county, or treated to Class A standards and land applied. Resp'ts Br. at 12, 13. However, *Welch* provides no support for this argument: the federal Clean Water Act, which is *Welch's* concern, lacks the mandated preference of the Washington biosolids law; and both landfilling and incineration of biosolids run counter to that mandate.

In *Welch*, a federal district court held that the federal Clean Water Act did not preempt a county ordinance banning land application of

sewage sludge.[4] *Welch*, 888 F. Supp. at 757–58. The issue was whether the Clean Water Act encourages the land application of biosolids to such an extent that a ban on such application is preempted. *Id.* at 755. The court held that it did not because the Clean Water Act does not express any preference for land application at all. The *Welch* court distinguished its case from *ENSCO, Inc. v. Dumas*, 807 F.2d 743 (8th Cir.1986). There, by contrast, the Eighth Circuit found that a county ordinance banning the storage, treatment, or disposal of certain "acute hazardous waste" within the county's boundaries conflicted with the Resource Conservation and Recovery Act's objective of encouraging the safe disposal and treatment of hazardous waste. *Welch*, 888 F. Supp. at 757 (citing *ENSCO*, 807 F.2d at 745). Thus, in contrast to *ENSCO*, where a county banned the treatment and disposal of a substance that federal law affirmatively instructed it to treat and dispose of safely, in *Welch* a county had banned one of three possible methods of use or disposal, where the Clean Water Act preferred none of the methods over the others. *Welch*, 888 F. Supp. at 757.

This analysis shows the decisive importance of a strong, express preference for a particular method. The Washington biosolids law includes such a strong, express preference. It requires Ecology to implement a comprehensive program that will ensure, to the maximum

[4] The court also held that the Commerce Clause of the U.S. Constitution did not preempt the ordinance's ban. *Welch*, 888 F. Supp. at 760.

extent possible, that sewage sludge is safely reused on farms, forests, and in land reclamation. RCW 70.95J.005. Far from offering land application as merely one of several equally acceptable options, the biosolids law requires it to the maximum extent possible, the corollary of which is that alternatives to it should be avoided to the extent possible.[5]

Ecology's regulations authorize distinct land application regimes for Class B biosolids and septage, designed specifically for areas where access restrictions are practicable, such as farms, forests, and land reclamation sites. WAC 173-308-210(5), -270. These are activities that the regulations specifically authorize, conditioned on the issuance of a permit. Prohibiting them throughout the County conflicts with that authorization and the statute's maximum reuse policy.

3. WAC 173-308-030(6) provides no support for the position that the biosolids law accommodates the County's ordinance

The County argues incorrectly that WAC 173-308-030(6), which allows for traditional local regulation, somehow provides a loophole for the County to undermine the state biosolids program. Resp'ts Br. at 13–18. WAC 173-308-030(6) provides: "Facilities and sites where biosolids

[5] State law expressly discourages landfill burial and the biosolids law leaves incineration unmentioned altogether. It is beyond the pale to suggest, as the County does, that one "option" offered by the law for the disposition of Wahkiakum County's biosolids is to let them be land applied in other counties. *See* Resp'ts Br. at 12. It is true that Wahkiakum County's biosolids may be land applied in other counties. But that is not an option for what can be done with them in Wahkiakum County.

are applied to the land must comply with other applicable federal, state and local laws, regulations, and ordinances, including zoning and land use requirements." The County contends that its ban is an "applicable ordinance" under this provision and thus "[t]hat is the end of the inquiry." Resp'ts Br. at 15.

WAC 173-308-030 recognizes, unremarkably, that other federal, state and local laws, regulations and ordinances might apply to biosolids or sewage sludge transportation, facilities, or land application sites. The regulation even mentions specific examples, including state regulations pertaining to transportation, the State Environmental Policy Act, the state Water Pollution Control Act, the federal biosolids regulations, and local zoning and land use requirements. WAC 173-308-030(1)–(6). Other examples would include time, place, and manner restrictions, such as restrictions on night and weekend applications and notice requirements for neighbors and local governments. This regulation, consistent with state preemption law, allows for reasonable local laws that do not conflict with state law.[6]

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[6] *See, e.g., Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410, 419 (M.D. Pa. 2003) ("[M]unicipal regulations [of land application of biosolids] are permissible if they further the goals of [the state biosolids law and], such regulations cannot impose onerous requirements that stand as obstacles 'to the accomplishment and execution of the full purposes and objectives of the legislature.' ") (granting summary judgment striking down local regulations that impeded land application and upholding in part regulations pertaining to registration, testing, and hours of hauling). *See also Blanton v. Amelia Cnty.*, 261 Va. 55, 540 S.E.2d 869 (2001). In *Blanton*, the state's Biosolids Use

WAC 173-308-030(6) does not reserve to local governments substantive authority over land application, which is the purpose of a savings clause. Savings clauses are a routine feature in federal and state environmental statutes and expressly reserve authority to the locality, typically to enact more stringent standards on the activity in question. However, even if WAC 173-308-030(6) were interpreted to be a savings clause, it could not authorize a local government to adopt an ordinance that conflicts with state law. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000) ("saving clause . . . does not bar the ordinary working of conflict pre-emption principles").

Moreover, the County offers no response to the point that the biosolids law already expressly provides for a local role. Local jurisdictions may seek delegation of portions of program authority. RCW 70.95J.080. Delegated localities can then, on a site-specific basis and subject to Ecology review, impose additional requirements that recognize the specific needs and values of local communities in regard to land application of biosolids. *Id.* Wahkiakum County has not sought delegated authority. Nor does the County rebut that the state biosolids law

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Regulations required compliance with "local government zoning and applicable ordinances." Despite this, the Virginia Supreme Court held that a local ordinance banning land application was invalid because it was inconsistent with the state biosolids law, which "expressly authorized the land application of biosolids conditioned upon the issuance of a permit." *Blanton*, 261 Va. at 874.

was enacted in 1992 against a backdrop of local control over land application, affirmatively moving regulatory authority over biosolids management from local governments to the state. Appellant's Brief (App. Br.) at 6–9.

C. The Biosolids Statute Does Not Require Deference to Local Authority Either on Its Own Terms or Because It References the Federal Regulations

The County argues, mistakenly, that the Clean Water Act and its regulations somehow authorize local governments to ban the land application of biosolids, even where this obviously conflicts with state law, in violation of the state constitution. No court has adopted this position, and the references to federal regulations in the biosolids law provide no support for this interpretation.

There are two provisions in the biosolids law referencing federal regulations. The first announces the Legislature's intent to provide the authority and direction that will allow Ecology to seek delegation to administer the federal sludge program. RCW 70.95J.007. The second directs Ecology to adopt rules for a biosolids management program that will, at a minimum, conform to federal technical standards at 40 C.F.R. § 503 for the use and management of sewage sludge. RCW 70.95J.020(1).

Both the Clean Water Act, 33 U.S.C. § 1345(e), and its rules at 40 C.F.R. § 503 contain a savings clause allowing more stringent or extensive

state or local regulations. From this, the County concludes that the State is required to do the same. Resp'ts Br. at 18–27. The argument fails. Merely because the Clean Water Act and its regulations do not preempt local bans on land application does not mean that it expressly authorizes them despite state constitutional limitations to the contrary.[7]

The County cites *Welch v. Board of Supervisors of Rappahannock County, Va.*, 888 F. Supp. 753 (W.D. Va. 1995), *U.S. v. Cooper*, 173 F.3d 1192, 1201 (9th Cir. 1999), and *County Sanitation District 2 of Los Angeles County v. County of Kern*, 127 Cal. App. 4th 1544, 1610, 27 Cal. Rptr. 3d 28, 76 (2005), in support of its argument. Resp'ts Br. at 23, 24, 25. Each of these cases held that both the Clean Water Act and 40 C.F.R. § 503 expressly decline to preempt state and local governments from adopting more stringent sludge management standards. This, of course, is not what is at issue here. Federal law and regulations relating to sludge management establish minimum standards and leave it to the states to adopt their own policies and programs, so long as the minimum standards are met.

[7] At least one court has encountered the argument and called it bizarre: "[The County of] Kern argues bizarrely that if the [state law] were construed to prohibit local bans on land application, it would somehow 'conflict' with the federal Clean Water Act." *City of L.A. v. Cnty. of Kern*, 509 F. Supp. 2d 865, 894 (2007), *dismissed in part, vacated in part and remanded on prudential standing grounds*, 581 F.3d 841 (2009) (absence of a restriction is not an express grant of authority).

None of these three cases has any bearing on the issue of whether Wahkiakum County's ban conflicts with state law. In *Welch*, a federal district court held that a county ordinance banning the land application of sewage sludge did not violate the Commerce Clause of the U.S. Constitution and was not preempted by the federal Clean Water Act. *Welch*, 888 F. Supp. at 756. The case does not apply here because Ecology does not argue that Wahkiakum County's ordinance violates the federal Commerce Clause or that the federal Clean Water Act preempts the County's ordinance.

In *U.S. v. Cooper*, a federal appeals court held that neither the federal Clean Water Act nor EPA sludge management regulations preempted the requirements of a city NPDES permit. *Cooper*, 173 F.3d at 1201. Again, Ecology does not argue that either the Clean Water Act or EPA sludge management regulations preempt the County's ordinance. And, in *County Sanitation District 2 of Los Angeles County v. County of Kern*, the California Court of Appeal held that Kern County's ordinance restricting the land application of biosolids did not violate the federal Commerce Clause. *Cnty. Sanitation Dist.*, 127 Cal. App. 4th at 1610.[8]

[8] Earlier this year, the California Court of Appeal affirmed a preliminary injunction against a local biosolids ban because it was likely preempted by the California Integrated Waste Management Act's mandate that localities recycle biosolids and other solid waste "to the maximum extent feasible." *City of L.A. v. Kern Cnty.*, 214 Cal. App. 4th 394, 416, 154 Cal. Rptr. 3d 122, 138 (2013), *petition for review granted on other*

Here, the state Legislature has established a biosolids management program that meets the federal minimum requirements, and has further declared its policy that the program shall, to the maximum extent possible, reuse municipal sewage sludge as a beneficial commodity. The County's ordinance, because it frustrates state law, is invalid.

D. Costs of Converting Facilities From Class B Production to Class A Production Are Highly Relevant

The statewide economic and infrastructure ramifications of a ruling allowing local governments to undermine the state biosolids program are both significant and highly relevant. The County's argument to the contrary ignores the Legislature's purpose to alleviate economic burdens on local governments and ratepayers. Resp'ts Br. at 27–34.

Undisputed facts show that the County's ordinance effectively eliminates the possibility of applying biosolids to land within its borders, leaving no room for the state to permit and regulate it. App. Br. at 29–30. Biosolids generated in Wahkiakum County consist entirely of Class B biosolids and septage. CP 27, 317–18. At least 88 percent of biosolids managed in the state are Class B or septage. CP 148. Almost all wastewater treatment facilities and infrastructure across the state are designed to produce Class B, but not Class A, biosolids. *Id.* Class A

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grounds, 302 P.3d 572 (Ca. 2013). The recycling directive for biosolids in the California Waste Management Act is remarkably similar to the Washington biosolids law's requirement that the biosolids be beneficially used "to the maximum extent possible."

biosolids cannot be produced on a large scale without a massive rebuilding of facilities and infrastructure and none at all are produced in Wahkiakum County. CP 150–60. Numerous facilities in the state have considered and evaluated converting to Class A biosolids production and almost all have found the economic and practical obstacles prohibitive. CP 150.

The County argues that information about the expense of converting a public wastewater treatment facility from Class B production to Class A production cannot be used to support the argument that its ordinance is a de facto ban, citing *Johnson*, 96 Wn.2d at 263, in support. Resp'ts Br. at 29, 33. Yet *Johnson* does not support the County's position. In that case the Department of Social and Health Services had tried to collect overdue child support from Mr. Johnson. Mr. Johnson complained that the provision of this service to his ex-wife, at state cost, was a gift of public funds for private purpose, and that the statute authorizing it was unconstitutional. The Court found that the collection program did further public purposes, preventing ten percent of participants from going on welfare. The Court held: "Although a more cost effective program may be conceivable, that does not render RCW 74.20.040 unconstitutional." *Johnson*, 96 Wn.2d at 263. *Johnson* has no relevance to the present case. Ecology argues that Wahkiakum County's ordinance is unconstitutional because it conflicts with state law, not because it fails to use public funds

in a cost-effective way or because there are more cost effective ways to ban biosolids.

The Legislature created the biosolids program because it found that "[s]ludge management is often a financial burden to municipalities and to ratepayers," and that "[p]roperly managed municipal sewage sludge is a valuable commodity and can be beneficially used in agriculture, silviculture, and in landscapes as a soil conditioner." RCW 70.95J.005. Moreover, the Legislature authorized Ecology to prohibit the disposal of sewage sludge in landfills, but allowed for case-by-case exemptions when land application is economically infeasible. RCW 70.95.255. Far from finding financial burdens irrelevant, the Legislature actually created the biosolids program and its exemptions in large part to alleviate the financial burdens that sludge management was placing on local governments and ratepayers. By prohibiting land application of Class B biosolids throughout Wahkiakum County, the ordinance essentially creates or exacerbates the very financial burdens the Legislature sought to alleviate. The ordinance frustrates the legislative purpose to alleviate those burdens.

E. Ecology's Cited Cases Support Finding the Ordinance Unconstitutional

Ritchie, *Diamond Parking*, and *Biggers* establish that a local ordinance conflicts with a statute when it thwarts the state's policy or the

Legislature's purpose. App. Br. at 17. The County attempts to distinguish *Diamond Parking* and *Biggers*, but its attempts fail. Resp'ts Br. at 43–45.

The County asserts that in *Diamond Parking*, "[t]here was no conflict to resolve because . . . the ordinance that was passed was beyond the purview of the police power." Resp'ts Br. at 45. The County is mistaken. *Diamond Parking* addressed the legality of a city ordinance prohibiting transfer of licenses without the permission of the licensing agency. *Diamond Parking*, 78 Wn.2d at 779. The Court concluded that the ordinance conflicted irreconcilably with a statute providing that all rights, privileges, and franchises are transferred to the surviving corporation upon a corporate merger. *Id.* at 781. Beginning with the principle that a city's article XI, section 11 police power ceases when the state enacts a general law on the subject, unless there is room for concurrent jurisdiction, the Court held that, "the conflict here is irreconcilable" because "the legislative purpose is necessarily thwarted." *Id.*

The County asserts that *Biggers* was not decided on grounds that the County had violated article XI, section 11 of the state constitution. Resp'ts Br. at 43–44. Again, the County is mistaken. *Biggers* addressed the legality of a rolling moratorium on dock construction imposed by the City of Bainbridge Island. In this split 4-1-4 decision, the four-justice lead

opinion concluded that the local moratorium was invalid because the City lacked statutory and constitutional authority to impose it and because it thwarted state law, in violation of article XI, section 11 of the state constitution. *Biggers*, 162 Wn.2d at 685–702. Thus, according to the lead opinion, the moratorium thwarted state law because it effectively prohibited that which state law allowed–namely, applications for dock construction. *Id.* at 698.

A four-justice dissent concluded that local governments *do* have constitutional police authority to adopt moratoria and that the City's moratorium was reasonable and not in conflict with state law. *Id.* at 712. The concurrence contributing to the plurality decision agreed with the dissent that the local governments have constitutional police power to adopt moratoria, but disagreed with the dissent regarding the validity of the City's moratorium, concluding that it was invalid because it was unreasonable, in violation of article XI, section 11 of the state constitution. *Id.* at 705–06. Because the concurring justice explicitly agreed with the reasoning of the dissent and disagreed with the reasoning of the lead opinion, the holding is simply that the moratorium violated article XI, section 11.[9]

[9] *See W.R. Grace & Co.-Conn. v. Dep't of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999) ("[w]here there is no majority agreement as to the rationale for a

Finally, *Ritchie* addressed the legality of a county ordinance that failed to exempt agricultural activities from permit requirements, in conflict with the state Shoreline Management Act which did exempt agricultural activities. The court held that, "[t]he two laws conflict because they reflect opposing policies," and because "[t]he ordinance thwarts the state's policy." *Ritchie*, 23 Wn. App. at 574.

These cases establish that a local ordinance conflicts with state law, in violation of article XI, section 11 of the state constitution, when it thwarts the state's policy or the legislative purpose.

F. The County Attempts to Exercise a Power That Could Not Be Conferred on All Counties in the State Without Destroying the Biosolids Program

If this Court were to hold that the County is empowered to effectively ban the land application of biosolids, it would empower all counties to do the same. This would be inconsistent with the mandate of the state biosolids law. App. Br. at 30-31.

The County argues that this is unpersuasive unless Ecology can prove that all counties would actually follow suit. Resp'ts Br. at 35–36. But Ecology's argument does not rely on whether any county actually follows suit and enacts an ordinance similar to Wahkiakum's. Ecology's argument is that, regardless of what other counties may do, a holding in

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decision, the holding of the court is the position taken by those concurring on the narrowest grounds").

favor of Wahkiakum here would frustrate the legislative purpose behind the state biosolids law by enabling or empowering other counties to follow suit. Enabling or empowering other counties to enact a similar ordinance–whether they actually do so or not–is contrary to the legislative purpose. It would put the statutorily mandated state biosolids program at the mercy of local legislatures, essentially making the program a voluntary one that local governments may choose to follow or not. Such a result is clearly not what the Legislature intended by its mandate.

III. CONCLUSION

Because the County's ordinance thwarts state policy and the purpose of the state biosolids law, it is conflict preempted. The February 22, 2013, decision of the Cowlitz County Superior Court upholding the ordinance should be reversed.

RESPECTFULLY SUBMITTED this 22nd day of October 2013.

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NO. 44700-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant, v. WAHKIAKUM COUNTY, a political subdivision of Washington State, Respondent.	CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 22nd day of October 2013, I caused to be served a true and correct copy of Appellant Department of Ecology's Reply Brief in the above-captioned matter upon the parties herein as indicated below:

DANIEL H. BIGELOW WAHKIAKUM COUNTY PROSECUTING ATTORNEY 64 MAIN STREET, P.O. BOX 397 CATHLAMET, WA 98612	[x] U.S. Mail [ ] By Fax [ ] By Email

the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22 day of October 2013, at Olympia, Washington.

TERESA L. TRIPPEL, Legal Assistant