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A. ASSIGNMENT OF ERROR

1. The court erred in failing to invalidate TMC 8.30.045 as violative of the substantive due process requirements attendant to legislative action.

Issues Pertaining to Assignments of Error

1. Tacoma's newly enacted TMC 8.30.045 declares that virtually all aspects of the medical marijuana framework created by initiative and codified into state law are a public nuisance and illegal, despite the findings set forth in state statute and acknowledged in the Tacoma ordinance that recognize the clear health benefits of medical marijuana for a number of serious health problems. Given that the ordinance substantially interferes with Tacoma citizens' ability to access medical marijuana as prescribed by their health care provider to address serious, personal and fundamental medical concerns, does the ordinance intrude into the penumbral area of privacy applicable to medical decisions made by qualifying patients in consultation with a health care provider with regard to their medical care assured as a fundamental right by the United States and Washington state constitutions, does strict scrutiny analysis apply in determining whether the Tacoma City Council's legislative action in enacting TMC 8.30.045 violate the protective requirement of substantive due process? Yes.

2. In that the reasons articulated by the Tacoma City Council in Substitute Ordinance NO. 28083 as evidencing the concerns sought to be addressed by the enactment of TMC 8.30.045 are false, nonexistent and/or unsubstantiated, do compelling governmental objectives exist for the ordinance? No.

3. Assuming *arguendo* that the City has established legitimate and compelling objectives of its legislation, are the provisions of the ordinance absolutely necessary to achieve those objectives? No.

4. Even under a substantive due process rational basis analysis, given that the reasons articulated by the Tacoma City Council as evidencing the concerns sought to be addressed by the enactment of TMC 8.30.045 are false, nonexistent and/or unsubstantiated and that no facts actually exist that evidence appropriate goals of the ordinance, is the ordinance truly aimed at achieving a legitimate public purpose? No.

5. Assuming *arguendo* that the ordinance is considered to be aimed at achieving a legitimate public purpose, does the ordinance use means that are reasonably necessary to achieve that purpose? No.

6. Given the findings in the state medical marijuana statute that recognize the clear health benefits of medical marijuana for a number of serious health problems and the appropriateness of the prescribing and use of medical marijuana, which are likewise acknowledges in the Tacoma

ordinance, and given the comprehensive statutory framework that has legalized and embraced the prescription and use of medical marijuana, are the provisions of TMC 8.30.045 that declare that virtually all activities related to the production, dispensing and use of medical marijuana are public nuisance, which inhibit qualifying patient's access to medical marijuana, unduly oppressive? Yes.

7. Given that the Ordinance's declaration that any place bearing a sign or placard advertising cannabis for sale or delivery is a public nuisance despite the fact that such signs or placards relate to non-commercial, lawful activity and given that the ordinance can only be read to address the "green cross" signs or placards seen throughout the city, is the statute an unconstitutionally overbroad restriction on protected free speech and violative of substantive due process. Yes.

STATEMENT OF THE CASE

3. Procedural Facts

Each of the appellants in this case appealed adverse administrative rulings of the City of Tacoma Hearing Examiner to the Pierce County Superior Court.

With regard to Cannatronics, the City had issue to Appellant a Notice of Violation and Abatement with regard to its collective garden operating 708 Broadway in downtown Tacoma. In response, Appellant filed a timely

request for hearing and a hearing was held before City of Tacoma Hearing's Examiner Gregory Jacoby on February 13, 2013. On February 27, 2013, the Hearing Examiner entered his decision, ruling in favor of the City of Tacoma. Cannatonics appealed the Hearing Examiner's Decision to Pierce County Superior Court, which was filed under Cause No. 13-2-07417-1.

Appellant T-Town, addressed at 4826 S. 66th Street in Tacoma, also received a Notice of Violation and Abatement, and likewise filed a timely request for hearing before the City of Tacoma Hearings Examiner. Hearing was held on January 16, 2013. On May 9, 2013, the Hearing Examiner entered a decision in favor of the City of Tacoma. On May 21, 2013 T-Town appealed the Hearing Examiner's decision to Pierce County Superior Court, which was filed under Cause No. 13-2-09406-7.

By order of July 5, 2013, the cases were consolidated for appeal before the honorable Vicki L. Hogan under the 13-2-07417-1 cause number. On February 14, 2014, after hearing the consolidated appeal, Judge Hogan affirmed the rulings of the Tacoma Hearing Examiner with regard to each appellant. On March 4, 2014, Appellants filed their notice of appeal.

4. Substantive Facts

On July 31, 2012, through the passage of Substitute Ordinance No. 28083, the City of Tacoma created a new section of the Tacoma Municipal Code, TMC 8.30.045 Cannabis. The new ordinance declares that essentially

every aspect of the use, production and dispensing of medical marijuana as approved by the citizens of the State of Washington through the initiative process and passed into state law is a public nuisance.

a. Medical Marijuana in Washington--Background.

In 1998 the state of Washington enacted the Medical Marijuana Act codified as RCW 69.51A. The new law permitted patients with certain medical conditions to grow, possess, and use marijuana.

In 1998, Washington's medical marijuana act stated that patients could possess a sixty day supply of marijuana. The act did not say what a sixty day supply was, nor did it say where patients were to get marijuana, or seeds, or any of the other materials necessary to grow marijuana.

In 2008, ten years after the enactment of the medical marijuana act, The Department of Health declared that a sixty day supply was fifteen plants and twenty-four ounces. However, to this day the medical marijuana act remains, silent as to where patients were to procure marijuana, or seeds, or any of the other materials necessary to grow marijuana.

Approximately five years ago, also 2008, the State witnessed a proliferation of medical marijuana "dispensaries." These dispensaries provided access to medical marijuana for medical marijuana patients who needed a reliable source for their medical marijuana as authorized in RCW 69.51A.

As a legal matter, most of these dispensaries operated under of RCW 69.51A.010(1) which permitted patients to have a “designated provider.” At that time, a designated provider was a person who was eighteen years of age or older; was designated in writing by a patient to serve as a designated provider; was prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and was the designated provider to only one patient at any one time.

The dispensaries read the statute literally, giving ordinary meaning to ordinary words. When a patient entered the dispensary, they would appoint the attendant, in writing, as their designated provider. After receiving their medicine, that patient would “de-designate” the designated provider in writing, leaving the designated provider without a patient. When another patient came to the dispensary, that patient would appoint the attendant, in writing, as a designated provider. The process would repeat itself many times per day.

In 2010 the City of Tacoma revoked the business licenses of those dispensaries primarily on the grounds that, because RCW 69.51A.010(1) limited a designated provider to only one patient at any one time, and because these designated providers were servicing many more than one

patient, they were not operating lawfully, and therefore, could not have a license to do business in the City of Tacoma.¹

Many of the dispensaries protested the City's move and appealed the revocation of their business license. During the pendency of the appeal, the dispensaries remained open and continued to service their patients. The appeals to the City became moot when the legislature rewrote RCW 69.51A.

In Senate Bill 5073, the State Legislature created a comprehensive regulatory scheme for growing, processing, and delivering medical marijuana. Unfortunately, Governor Gregoire vetoed some thirty sections of the bill. The Governor vetoed those sections of the bill which required state employees to participate in the regulation of growing, processing, and delivery of medical marijuana.

The Governor did however leave intact the most important change which establishes that, under the *revised* medical marijuana act, growing, processing, delivering, possessing, and using medical marijuana act is now a *lawful* activity as opposed to an unlawful activity which requires an "affirmative defense."

¹ In December 2012, Division III Court of appeals ruled that the dispensaries were reading the law correctly and that the City was wrong. *State v. Shupe*, 172 Wn.App 341, 289 P.3d 741 (2012); *rev denied*, 177 Wn.2d 1010; 302 P.3d 180 (2013). The *Shupe* court held that RCW 69.51A.010(1) permitted the defendant to have more than 1,000 patients as long as he serviced only one patient at any one at a time.

a *lawful* activity as opposed to an unlawful activity which requires an “affirmative defense.”

The Governor left intact those sections of the bill which permitted patients to *lawfully* engage in growing, processing and delivery of medical marijuana so long as it did not involve state employees in the administration and regulation of the activity. To that end, the Governor left intact that section of the bill which modified the designated provider rule, and left intact that section of the bill which created an entirely new way for patients to obtain medical marijuana, the collective garden.

RCW 69.51A.085 (See Appendix C) authorizes qualifying patients to create and participate in collective gardens for the purpose of producing, processing, transporting, and delivering cannabis for medical use. A collective garden may have up to ten qualifying patients participating in a single collective garden at any time; may contain up to fifteen plants per patient up to a total of forty-five plants; may contain up to twenty-four ounces of useable cannabis per patient up to a total of seventy-two ounces of useable cannabis; and useable cannabis from the collective garden may be delivered to anyone of the qualifying patients participating in the collective garden. RCW 69.51A.085.

RCW 69.51A.085 does not require a collective garden to be registered or licensed in any way. A collective garden is neither an entity

delivery of medical marijuana.

RCW 69.51A.085 does not limit the number of collective gardens to which a patient may belong. Nor does it prevent new patient members from participating in the garden when other patient members resign and no longer participate in that collective garden. The statute does not impose length of membership requirements or any waiting period before admitting a new member who replaces a withdrawing or resigning member.

b. Action by the City of Tacoma.

When the new and improved RCW 69.51A took effect in July 2011 the City of Tacoma began the process of writing an ordinance specific to the needs of the City of Tacoma. To that end, the City Council appointed a task force which was given the task of writing a model ordinance by which the City could regulate medical marijuana. The City Council also tasked the City's Planning Commission with writing a model ordinance regulating medical marijuana in the City of Tacoma. The Task Force and the Planning Commission were given nine months to complete their task. At the end of the nine month period, the City Council would take the best of both and enact a new ordinance for the City of Tacoma.

At the end of the nine month period, the City Council prepared to enact the new ordinance. The new ordinance licensed, regulated, and zoned the growing, processing, and delivery of medical marijuana in the

City. The City scheduled a first reading of the new ordinance.

Unfortunately, at five minutes before 5:00 p.m. on the day of the first reading, the City Council struck the reading from the Council's agenda.

Apparently, after hearing from the City Manager and the City Attorney, and for reason unknown and unarticulated, the Council decided that the City should not enact the ordinance. The City then redirected its efforts and moved in an entirely different direction.

In just two weeks' time, the City Attorney hastily drafted a new ordinance. The new ordinance, TMC 8.30.045, purports to establish under what circumstances medical marijuana is a public nuisance. As supporting its passage of Substitute Ordinance No. 28083, the Tacoma City Council provided the following eighteen "WHEREAS" statements (see Appendix A), none of which provided accurate factual support for the need for the ordinance. Based upon these statements, the Tacoma City Council added a new section to the City Code chapter entitled "Public Nuisances" at TMC 8.30.045. See Appendix B.

C. ARGUMENT

Appellants request that this court grant their appeal and invalidate Tacoma Municipal Court section 8.30.045 as a violation of the substantive due process protections provided by both the state and federal constitutions.

The 14th Amendment's Due Process Clause states in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14, § 1. Similarly, the Washington State Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. art. I, § 3. Implicit within those provisions is the right of substantive due process, which protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures. *Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir.1994).

In passing Substitute Ordinance No. 28083, which enacted TMC 8.30.045, the City of Tacoma failed to articulate legitimate facts in support of the goals of the legislation and failed to consider and/or disregarded actual facts which indicated that the ordinance does not forward any legitimate governmental goals.. What the City did do was create "facts" of their own invention and imagination. And, as might be expected, the imaginary facts created an imaginary problem which begged a solution. Unfortunately, the solution is, unlike the imaginary problem, very real, and which has real consequences for real people. The City's arbitrary and

capricious actions in creating Tacoma Municipal Code § 8.30.045 violate the tenets of substantive due process requiring that the new section be invalidated.

1. THE TACOMA CITY COUNCIL'S PASSAGE OF SUBSTITUTE ORDINANCE NO. 28083 VIOLATED SUBSTANTIVE DUE PROCESS UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS.

Every law must meet the basic requirements of substantive due process, which protects against arbitrary and capricious government action, even when the decision to take action is pursuant to constitutionally adequate procedures. *Amunrud v. Bd. of Appeals*, 158 Wash. 2d 208, 218-19 (2006)(citing *Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir.1994)). The substantive due process inquiry is whether the government's use of its police power has exceeded its constitutional limits. *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 330-31(1990).

The first step in a substantive due process analysis of legislative action is determining what standard of review applies. The answer to that question depends upon whether or not the law impinges on a fundamental or non-fundamental right. 16A Am.Jur.2d Constitutional Law, § 912. Laws impacting fundamental rights face a detailed and stringent review referred to as "strict scrutiny." If a law is deemed to regulate a fundamental right, it will be found unconstitutional unless the governmental objective in question is

compelling and the regulation is *absolutely necessary* to achieve that compelling objective. 16A Am.Jur.2d Constitutional Law, § 403 (emphasis added). Alternatively, the standard of review applicable to a non-fundamental-right is referred to as “rational basis” analysis. *Id* at §403.

a.. In that TMC 8.30.045 Impedes Patients’ Access to Medical Care as Recommended by Their Health Care Provider, Strict Scrutiny Analysis is the Appropriate Standard of Review. Under that Analysis, the Ordinance Must be Invalidated.

Strict scrutiny analysis has been applied when laws have impinged on privacy or autonomy interests. Such questions have included what limitations, if any, may be placed on personal liberty: *see, eg., Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down ordinance restricting access to contraceptives), *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the Texas statute declaring abortion a crime to be unconstitutional, recognizing that the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman and her attending physician), *Moore v. City of Easts Cleveland*, 431 U.S. 494 (1977) (invalidating a statute limiting occupancy of any dwelling unit to members of the same family); *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing a fundamental right to marry by invalidating an anti-miscegenation law); *Traxel v. Granville*, 530 U.S. 57 (2000)(recognizing a “fundamental right of parents to make decisions concerning the care, custody, and control of their children.”). They also make it clear that the right has some extension to activities relating to

procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-542, (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453-454; family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

The Court in *Griswold v. Connecticut*, *supra*, found that “strict scrutiny” was the appropriate substantive due process standard of review applicable to a doctor’s relationship with his patient with regard to prescribing prophylactics. In *Griswold*, doctors were found guilty of giving contraceptive advice to married couples in violation of a Connecticut statute that prohibited any person from using “any drug, medicinal article or instrument for the purpose of preventing contraception.” *Griswold*, 381 U.S. at 480. The Supreme Court invalidated the law, finding that many of the rights specifically guaranteed by the Constitution could not be given their full intended force without a penumbral right of privacy into which government may not intrude, and that penumbra included the relationship between a doctor and his or her patient regarding contraception. *Id* at 484.

The same acknowledgment of the inherent fundamental liberty interests in the relationship between a doctor and his or her patient is likewise central to the Court’s decision in *Roe v. Wade*, *supra*, where the court held that the penumbral right of privacy, like in *Griswold*, also included the abortion decision and its effectuation, which (up until

approximately the end of the first trimester) must be left to the medical judgment of the pregnant woman and her attending physician without governmental interference. *Id.*

Like in *Griswold* and *Roe, supra*, the City of Tacoma, through its enactment of TMC 8.30.045, unconstitutionally intrudes into the penumbra of privacy attendant to the relationship between health care providers and patients by regulating away patients' ability to implement the medical care recommended by their health care provider.² Accordingly, strict scrutiny

² (1) The legislature finds that:

(a) There is medical evidence that some patients with terminal or debilitating medical conditions may, under their health care professional's care, benefit from the medical use of cannabis. Some of the conditions for which cannabis appears to be beneficial include, but are not limited to:

- (i) Nausea, vomiting, and cachexia associated with cancer, HIV-positive status, AIDS, hepatitis C, anorexia, and their treatments;
- (ii) Severe muscle spasms associated with multiple sclerosis, epilepsy, and other seizure and spasticity disorders;
- (iii) Acute or chronic glaucoma;
- (iv) Crohn's disease; and
- (v) Some forms of intractable pain.

(b) Humanitarian compassion necessitates that the decision to use cannabis by patients with terminal or debilitating medical conditions is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion.

(2) Therefore, the legislature intends that:

(a) Qualifying patients with terminal or debilitating medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of cannabis, shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of law;

(b) Persons who act as designated providers to such patients shall also not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law, notwithstanding any other provision of law, based solely on their assisting with the medical use of cannabis; and

(c) Health care professionals shall also not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law for the proper authorization of medical use of cannabis by qualifying patients for whom, in the health care professional's professional judgment, the medical use of cannabis may prove beneficial.

should be applied to the City of Tacoma's legislation, which requires the ordinance be found unconstitutional unless the City can establish that its objective sought to be remedied is *compelling* and its enacted regulation is *absolutely necessary* to achieve that compelling objective. In no way can the City meet that burden.

Although not dealing with the health care provider/patient relationship addressed in *Griswold* and *Roe* and applicable here, in *Lawrence v. Texas*, 539 U.S. 558, 563 (2003), the Court applied strict scrutiny analysis in an area, like here, is considered intensely morally objectionable by many and, historically, an appropriate subject of governmental regulation. The defendant in *Lawrence* was convicted of "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)," a crime under Tex. Penal Code Ann. § 21.06(a) (2003). *Id.*

In its summation, the Court in *Lawrence* made a number of observations regarding the Texas statute, analogous here, which underscored the absence of legitimate governmental concern for regulating the subject conduct:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or

RCW 69.51A.005.

prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey, supra*, at 847, 112 S.Ct. 2791. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Id at 578. Similarly here, the Tacoma City Council's tortured attempt to manufacture, without evidence, legitimate reasons for regulating medical marijuana as a "public nuisance" by essentially stating that "medical marijuana is a public nuisance because we say it's so" is overwhelmed by the unspoken cascade of evidence that it is not, evidence acknowledged in the state statute that makes collective gardens and medical marijuana legal.

In *Lawrence*, in order to reach its decision, the Court had to specifically address its earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) in which the facts were similar. The opinion in *Lawrence* acknowledged the moral and ethical issues perceived by the Court in

Bowers in reaching its decision, but dismissed them in face of the privacy interests at stake:

[T]he Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

Lawrence, at 569-71. In her concurring opinion, Justice O'Connor succinctly rejected Texas' attempt to justify its law and the effects of the law by arguing that the statute satisfies rational basis review because the legislation furthered the legitimate governmental interest of the promotion of morality. As Justice O'Connor noted, "[W]e have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id* at 582 (J.O'CONNOR, concurring); *See also Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (BRENNAN, J., dissenting from denial of certiorari)

“Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly . . . it is fair to say that discrimination against homosexuals is ‘likely . . . to reflect deep-seated prejudice rather than . . . rationality.’”) (internal citation omitted).³

Since the time of “Reefer Madness” to today’s “Drug War,” many in society, despite overwhelming evidence to the contrary believe that the use of cannabis for any purpose is immoral and simply wrong--whether for recreation, medicine or clothing. Given the absence of any legitimate bases cited by the Tacoma City Council justifying its characterization of essentially any activity related to medical marijuana as being a “public nuisance,” the Council’s true motive and rationale are simply the same as cited by Texas in support of its statute struck down in *Lawrence v. Texas*—the promotion of a misguided attitudes of morality. Such a purpose is not legitimate governmental concern, without more, and it is certainly not a compelling interest able to withstand strict scrutiny.

As noted by the Court, the Constitution is a living instrument:

Had those who drew and ratified the Due Process Clauses
of the Fifth Amendment or the Fourteenth Amendment

³ This view is consistent with the Model Penal Code, promulgated in 1955, which made clear it did not recommend or provide for “criminal penalties for consensual sexual relations conducted in private.” ALI, Model Penal Code § 213.2, Comment 2, p. 372 (1980). The American Law Institute justified its decision on three grounds: “(1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail.” ALI, Model Penal Code, Commentary 277–280 (Tent. Draft No. 4, 1955).

purpose is not legitimate governmental concern, without more, and it is certainly not a compelling interest able to withstand strict scrutiny.

As noted by the Court, the Constitution is a living instrument:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence, at 578-79.

- a. Even Under Rational Basis Analysis, TMC 8.30.045 Violates the Requirements of Substantive Due Process and Must be Invalidated.

In determining whether legislation satisfies the requirements of substantive due process, the court engages in a 3-prong test, considering whether the regulation: (1) is aimed at achieving a legitimate public purpose; (2) uses means that are reasonably necessary to achieve that purpose; and (3) is not unduly oppressive. *Presbytery, supra*, at 330 (citing *Orion Corp. v. State*, 109 Wash.2d 621, 646-47 (1987), cert. denied, 486 U.S. 1022; *Goldblatt v. Hempstead*, 369 U.S. 590, 594-95 (1962); *Lawton v. Steele*, 152 U.S. 133, (1894); *West Main Assocs. v. Bellevue*, 106 Wash.2d 47, 52, 720 P.2d 782 (1986)). If the legislation is not aimed at a legitimate public

aims to achieve within the eighteen “WHEREAS” statements set forth in Substitute Ordinance No. 28083. On their face, these legislative pronouncements paint a picture that suggests a need for regulation. The statements, however, are almost all wrong, either in whole or in part. If the false statements were removed, and the remaining statements were corrected, the language left would not provide a legitimate the rational for the ordinance, nor can one be imagined.

c. There is Neither a Compelling Objective nor a Legitimate Public Purpose for the City’s Cannabis Nuisance Ordinance.

Absent in the legislative history of the ordinance and in the parade of whereases is any articulated reason for the ordinance that constitutes either a compelling objective or legitimate public purpose for the legislation. Nor can a justification for the City’s blanket characterization of all medical marijuana activity as a “public nuisance” be conceived of.

- i. Contrary to the city’s assertion, the manufacture, delivery, and possession of cannabis is not a crime; it is entirely lawful under RCW 69.51A.

Several of the City’s “WHEREAS” statements, and therefore TMC 8.30.045 itself, are based, at least in part, upon a critical mistake of law. Contrary to the City’s assertion, the manufacture, delivery, and possession of cannabis is not a crime under state law. The manufacture, delivery, and possession of cannabis is entirely lawful under RCW 69.51A.

RCW 69.51A states: “Qualifying patients with terminal or debilitating medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of cannabis, *shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law* based solely on their medical use of cannabis, notwithstanding any other provision of law.” RCW 69.51A.050(2)(a). RCW 69.51A.050 also protects Designated Providers and Health care professionals. (See RCW 69.51A.050(2)(b)(c))(emphasis added). The Legislature refers to the *lawful* use, possession, manufacture, and/or delivery of medical marijuana in numerous places in RCW 69.51A; for example, 69.51A.050 is entitled *Medical marijuana, lawful possession*, and RCW 69.51A.045 is entitled *Possession of cannabis exceeding lawful amount*. (emphasis added).

- ii. The City’s reliance on the notion of an “affirmative defense” is wrong as that was no longer the law when the city drafted and then relied upon that statement.

RCW 69.51A, as revised and enacted in July 2011, changes the legal status of medical marijuana. Prior to July 2011 revisions, growing, processing, and possessing medical marijuana was a crime which could be forgiven under the legal requirements of an affirmative defense. However, the July 2011 revisions converted what had been an affirmative defense to the general controlled substances statute.

In *United States of America v. Kynaston et.al.*, CR-12-0016-WFN, United States District Court Eastern District of Washington, May 31, 2012 (attached), U.S. Federal District Court held that when after the state legislature rewrote Washington's medical marijuana act in July 2011, they converted what had been an affirmative defense to an exception to the general controlled substances statute. The *Kynaston* Court rejected the government's position that Washington's medical marijuana act does not decriminalize possession, manufacture, or delivery of marijuana. The Court wrote:

In July of 2011, the Washington State Legislature amended the medical marijuana statute *converting what had been an affirmative defense to an exception to the general controlled substances statute* (emphasis added). ... *While the old statute makes explicit reference to an affirmative defense, the new statute clearly states that, "[t]he medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime...."* (emphasis added). This statute provides an exception to the general controlled substances statute which makes possession, use, and manufacture of marijuana a crime. ... Contrary to the Government's assertion, a state crime has not been committed simply by possessing or manufacturing marijuana in Washington. If the person complies with the medical marijuana statute, they have not committed a state crime. The

Government's briefing suggests that despite the clear language decriminalizing medical marijuana, law enforcement officers may still arrest those possessing or manufacturing medical marijuana due to the choice of the phrase "*may not* be arrested, prosecuted, or subject to other criminal sanctions" rather than shall not (emphasis added). This tortured reading of the statute contradicts the plain language of the statute making it internally inconsistent. Alternatively, the Government argues that Washington's controlled substances provision should be viewed exclusively without reference to the medical marijuana exception. *Essentially, the Government proposes treating the medical marijuana exception as a type of affirmative defense despite the drastic rewriting of the law. The Court finds that the statute is clear on its face and that the medical marijuana exception and the general controlled substance statute must be read together in a manner that gives effect to both.* (emphasis added).

More precisely, what had been an affirmative defense is now more accurately described as a special defense almost identical to another special defense, self-defense.

In *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984) and *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983) our State Supreme Court held that the burden of proving a defense may not be placed on the defendant if proof of the defense would negate an element of the crime, as this would

unconstitutionally shift the burden of disproving an element of the crime to the defendant.

In a criminal case, the defendant is charged with *unlawful* possession. When the defense is a medical marijuana defense, the defendant avers that he *lawfully* possessed marijuana. When there is sufficient evidence to support the defendant's theory of lawful possession, the Court must give a jury instruction on lawful use or possession. (See *State v. Arth*, 121 Wn.App. 205, 87 P.3d 1206 (2004) applying this statement to self-defense)(the self-defense instruction is necessary to inform the jury that the State has the burden of proving the *absence* of self-defense. Washington cases clearly require that self-defense instructions tell the jury the State has the burden of proving the elements of the crime charged *and* the absence of self-defense. Denying the instruction is not harmless beyond a reasonable doubt).

Medical marijuana defense and self-defense are the same in a very important way. In self-defense, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense (lawful use of force); and, in medical marijuana defense, the State must prove beyond a reasonable doubt that the possession was not medical (lawful possession).

In a self-defense case, a defendant is typically charged with unlawfully assaulting another. The defendant pleads an affirmative defense of self-defense a.k.a. the lawful use of force. Because the defense negates an

element of the crime, i.e. unlawful assault, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense.

Similarly, a defendant is charged with unlawful possession of a controlled substance (or manufacturing, delivery, or possession with intent to deliver). The defendant pleads an affirmative defense of medical marijuana a.k.a. the lawful possession of marijuana. Because the defense negates an element of the crime, i.e. unlawful possession, the State must prove beyond a reasonable doubt that the defendant did not lawfully possess medical marijuana.

The City's reliance on a statement which refers to an affirmative defense is misplaced and inappropriate. The City's WHEREAS statement is misleading as it is used to support the notion that medical marijuana is a crime which may be forgiven only if the requirements of an affirmative defense are met.

When read correctly, the law at the time the WHEREAS statement was drafted clearly and plainly states that medical marijuana is not a crime. Accordingly, the City's ordinance is based upon a critical misreading, misunderstanding, and misapplication of state law.

- iii. Contrary to the city's whereas statement, RCW 69.51A does not prohibit dispensaries, cooperatives, patient cooperatives, or patient networks.

Contrary to the city's WHEREAS statement, dispensaries, cooperatives, patient cooperatives, or patient networks are not illegal under RCW 69.51A. If the drafters of the City's ordinance would have taken the time to actually read RCW 69.51A in its entirety, they would have seen, as can anybody that can read, that RCW 69.51A does not even mention dispensaries, cooperatives, patient cooperatives, or patient networks much less prohibit them.

RCW 69.51A.010 explicitly states that qualifying patients may lawfully possess a sixty day supply of marijuana. A sixty day supply of marijuana is defined as twenty-four ounces and fifteen plants. RCW 69.51A.085 explicitly authorizes qualifying patients to participate in collective gardens where they may lawfully possess up to seventy-two ounces and up to forty five marijuana plants.

Washington's medical marijuana act authorizes the lawful production, processing and possession of medical marijuana. However, Washington's medical marijuana act offers no guidance as to how or where qualifying patients may obtain marijuana. Most importantly however, Washington's medical marijuana act does not prohibit or foreclose ANY possibilities.

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Simple logic informs a reasonably intelligent mind that when a law authorizes people to possess something, that law presupposes a lawful genesis of the something to be possessed. If the legislature which passes the law intends to prohibit, foreclose, or restrict a particular avenue or source, the legislature could and would clearly state as much in the statute. However, when that legislature intentionally omits any prohibitions or restrictions, there are no prohibitions or restrictions. In other words, absent explicit prohibitions or restrictions, if the law says people can lawfully possess it, then other people may lawfully supply it without restriction.

- iv. Collective gardens are a lawful activity explicitly authorized under RCW 69.51A.085; therefore, the city's whereas statement in which the city declares that collective gardens are a criminal activity and therefore endanger the comfort, repose, health, and safety of citizens and therefore constitute a nuisance, is a gross bastardization of law and fact.

As discussed above, the dispensaries, cooperatives, patient cooperatives, or patient networks which help qualifying patients with medicinal marijuana are not prohibited by RCW69.51A. Therefore, if they

If the City wishes to make a case against a particular collective garden alleging that that specific garden somehow endangers the comfort, repose, health, and safety of citizens, and therefore constitutes a nuisance, the City will have the burden of proving the allegations. The City cannot make a broad general sweeping allegation against all collective gardens and not present any specific evidence of the allegation as to even one of those collective gardens.

RCW 69.51A.085(2) defines a collective garden as qualifying patients sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use such as, for example, a location for a collective garden; equipment, supplies, and labor necessary to plant, grow, and harvest cannabis; cannabis plants, seeds, and cuttings; and equipment, supplies, and labor necessary for proper construction, plumbing, wiring, and ventilation of a garden of cannabis plants. RCW 69.51A.085(1) establishes that collective gardens exist for the purposes producing, processing, transporting, and delivering cannabis for medical use.

First, a collective garden is not a “place.” Under RCW 69.51A.085 “collective garden” is a term of art. As a term of art, the meaning of “collective garden” is completely different from the colloquial lay meaning of garden i.e. “a place where plants grow.” As a term of art, a collective

garden is *an activity* shared by the participating patients. Under 69.51A.085(2) the activities of a collective garden are “share responsibility,” “acquire and supply resources,” required for the activities of “producing and processing.”

Similarly, RCW 69.51A.085(1) also explains the purpose of a collective garden in terms of activities. That purpose includes the activities of producing, processing, transporting, and delivering cannabis for medical use. Again, RCW 69.51A.085 uses “collective garden” as a term of art and does not contemplate that a collective garden is merely a place where plants grow; instead, “collective garden” includes a range of activities conducted simultaneously in various places.

Given that collective garden is a term of art used to describe a group of related activities conducted by groups of qualifying patients, it should not be surprising that a vibrant collective garden may need an office or meeting place from which to coordinate the numerous people and the various activities. Further, RCW 69.51A.085 does not prohibit a collective garden from having administrative offices, business offices, or meeting places. Therefore, the City’s assertion that business or administrative offices are illegal is not supported by law. In fact, a straight forward reading of RCW 69.51A.085 indicates exactly the opposite.

- v. The city does not and cannot produce evidence that collective gardens endanger public safety or produce odor; the city does not and cannot produce evidence that minors need protection from collective gardens; the city does not and cannot produce evidence that collective gardens cause or are even associated with secondary impacts.

There is no factual data which supports the assertion that collective gardens endanger public safety or produce odors which rise to the level of nuisance. The statement that collective gardens endanger public safety and produce odor is a hasty generalization which is not supported by statistics.

Generally, hasty generalizations not supported by statistics are regarded as a special type of logical fallacy. Racism is the most obvious example, especially when exposure to other races or groups is filtered through the media, and so you have only seen a very small percentage of the actual group and what you've seen has been carefully chosen rather than due to random chance. For example, if you grow up in the very white state of Idaho and only see blacks on television, you are likely to think most black men are athletes, gangster rappers, or comedians. Other examples include:

Most complain about how badly women drive, and if one examines the driving habits of women one finds that indeed they do get in many accidents. However, they get in *fewer* accidents than men.

Assuming you are likely to be shot if you visit New York City, when, in fact, fewer people are murdered, per capita, in New York City than in most rural American small towns.

And so it is with marijuana in general, and here, with medical marijuana and collective gardens. The City makes assertions which are not based upon empirical data. The City is merely repeating what they have heard and/or been told to believe. And what they have heard and

been told to believe is carefully filtered by people who are afraid of, and therefore oppose, medical marijuana.

The assertion that minors need protection from collective gardens is another such hasty generalization which is not based upon empirical data.

People who smoke marijuana get high. However, there is no data which supports the allegation that these people are a threat to public safety or minors.

There is data that marijuana use by minors is increasing. However, there is no data which supports the allegation that increased use of marijuana is related to the legalization and/or acceptance of medical marijuana or collective gardens.

The City's WHEREAS statement that collective gardens present issues of public safety and odor, and issues of public welfare and the protection of minors is a logical fallacy, i.e. a hasty generalization which is not supported by statistics.

Similarly, the assertion that the City must ensure that any potential secondary impacts arising from the operation of collective gardens can be adequately regulated is another logical fallacy. First, the City fails to state what a secondary impact is: second, the City fails to produce any evidence that these imaginary secondary impacts actually exist: and third, if these imaginary secondary impacts actually do exist, that medical marijuana, or more specifically, collective gardens have anything whatsoever to do with them.

- d. Even If the Ordinance Were Considered to Address Legitimate Governmental Concerns, It Still Violates Substantive Due Process Because the Means Utilized by the Statute—Declaring Virtually All Activity Related to Medical Marijuana-- Are Not

Reasonably Necessary to Achieve That Purpose and Are Unduly Oppressive.

The Municipal Research and Services Center (MRSC) is a private, non-profit organization based in Seattle, Washington. Its stated mission is “supporting effective local government in Washington through trusted consultation, research, training, and collaboration.”

<http://www.mrsc.org/about.aspx>. It provides guidance to its member municipalities as to what public nuisance is under Washington law:

A nuisance involves an *unreasonable or unlawful use of property* that results in *material* annoyance, inconvenience, discomfort, or injury to another person or to the public.

<http://www.mrsc.org/subjects/legal/nuisances/nu-what.aspx> (emphasis added). The essence of nuisance is that: (1) the complained of property owner is using his property *unreasonably or unlawfully* and (2) the use has a *material detrimental effect* on his or her neighbors or the community as a whole.

Consistent with that general principal, the Tacoma Municipal Code likewise defines nuisance generally in terms of a property owner’s unlawful or unreasonable use which impacts others:

Public nuisance defined.

A public nuisance consists of doing an unlawful act, or omitting to perform a duty, or permitting an action or condition to occur or exist which:

- A. Unreasonably annoys, injures, or endangers the comfort, repose, health, or safety of others; or
- B. Is unreasonably offensive to the senses; or
- ...
- F. In any way renders other persons insecure in life or the use of property; ...

TMC 8.30.030. Otherwise, reference is made to “the specific nuisances identified in this chapter.” TMC 8.30.030(I). Under the following code section, entitled, “Specific Public Nuisances Declared,” a list of specific defined nuisances is set forth that, unlike new section .045, describe uses of property we could all agree would meet the general test of being an *unlawful or unreasonable use of property that materially annoys, inconveniences, discomfits or injures another person or the public:*

- A. Excavations or naturally occurring holes...
- B. The discharge of sewage, human excrement, or other wastes; filthy, littered, trash-covered, or overgrown premises...
- C. The existence of any screening which is in a falling, decayed, dilapidated, or unsafe condition...
- D. Any unsightly, abandoned, or deteriorated building; any building or structure where construction was commenced and the building or structure was left unfinished..
- E. Animal waste, manure or excreta in sufficient ...; and the parking or storage of vehicles on single-family residential tax parcels in violation of the parking standards...; and Graffiti...

TMC 8.30.040

The City argues that because one of the thirty-seven specifically enumerated powers granted to it under RCW 35.22.280 is “to declare what shall be a nuisance, and to abate the same” provides it *carte blanche* to

declare any property use a nuisance, whether or not unreasonable or unlawful and whether or not it has any material detrimental effect on anyone. This is exactly what the City has done here. In what can only be considered an appeasement of some segment of Tacoma's citizenry's moral views toward marijuana, the City has declared virtually all use of property associated with medical marijuana to be "a nuisance" despite the reasonableness and lawfulness of the property's use and despite the absence of any material detrimental effect on neighbors or the community as a whole.

This regulatory framework—defining virtually all use of property related to medical marijuana to be a nuisance per se--does not meet the substantive due process requirement, even under the "rational basis" test, that the means used to address whatever goals the City has in mind "are reasonably necessary to achieve that purpose and are not unduly oppressive." Moreover, to declare a property's use to be a nuisance, despite that use being reasonable and lawful and despite that use having no material detrimental effect on anyone is unduly burdensome on affected property owners like Appellants here.

This conclusion is particularly appropriate given that the state statute that addresses medical marijuana specifically authorizes municipalities to

enact reasonable and appropriate legislation to address legitimate public purposes and concerns:

Cities and towns may adopt and enforce any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction: Zoning requirements, business licensing requirements, health and safety requirements, and business taxes. Nothing in chapter 181, Laws of 2011 is intended to limit the authority of cities and towns to impose zoning requirements or other conditions upon licensed dispensers, so long as such requirements do not preclude the possibility of siting licensed dispensers within the jurisdiction. If the jurisdiction has no commercial zones, the jurisdiction is not required to adopt zoning to accommodate licensed dispensers.

RCW 69.51A.140. Instead the City has applied a moralistic label to the lawful activity and, rather than regulate it like other lawful and reasonable activities, has declares it to be a nuisance implying that the use is unlawful or unreasonable and has a materially detrimental impact on the community—without any evidence to support that implication.

2. SUBSTANTIVE DUE PROCESS HAS ALSO BEEN DENIED BECAUSE THE LANGUAGE OF TMC 8.30.045 IS UNCONSTITUTIONALLY OVERBROAD.

In American jurisprudence, the overbreadth doctrine is primarily concerned with facial challenges to laws under the First Amendment. Because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others. See, e.g., *Board of Trustees*

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The essence and bulk of the challenged statute need not implicate the First Amendment in order to challenge the statute for overbreadth so

The following was prepared and promulgated by the Village Attorney, defining the items that required a license in order to sell:

"LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS"

"Paper -- white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered."

"Roach Clips -- designed for use with illegal cannabis or drugs and therefore covered."

"Pipes -- if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered."

"Paraphernalia -- if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs, it is covered."

Hoffman Estates, 455 U.S.at 492, n.2. The District Court had found that:

[Flipside] sold literature that included 'A Child's Garden of Grass,' 'Marijuana Grower's Guide,' and magazines such as 'National Lampoon,' 'Rolling Stone,' and 'High Times.' The novelty devices and tobacco use-related items plaintiff displayed and sold in its store ranged from small commodities such as clamps, chain ornaments and earrings through cigarette holders, scales, pipes of various types and sizes, to large water pipes, some designed for individual use, some which as many as four persons can use with flexible plastic tubes. Plaintiff also sold a large number of cigarette rolling papers in a variety of colors. One of plaintiff's displayed items was a mirror, about seven by nine inches with the word 'Cocaine' painted on its surface in a purple color. Plaintiff sold cigarette holders, 'alligator clips,' herb sifters, vials, and a variety of tobacco snuff.

Id., at 491, n.1 (citing 485 F.Supp. 400, 403 (ND Ill.1980)). Like in *Hoffman*, because the City of Tacoma's new ordinance's includes language which impacts property owner's First Amendment right of free speech, the ordinance becomes subject to scrutiny as being overbroad.

The Court in *Hoffman* found that the ordinance at issue in that case did not violate substantive due process as an overbroad restriction on free speech because it the ordinance was addressing illegal activity.

The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563–564, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973).

Hoffman, 455 U.S. at 496. Here, however, the activities addressed by the ordinance are legal activity sanctioned by the legislature and the citizens of Washington. Tacoma's new ordinance simply states that "[a]ny place bearing a sign or placard advertising cannabis for sale or delivery." TMC 8.30.045(C)(10).

Likewise, while the overbreadth doctrine does not apply to commercial speech, *Id* at 497 (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 565, n. 8 (1980), the Tacoma ordinance at issue here encompasses more than commercial

speech. The lawful delivery of medical marijuana from a designated provider to his or her designee or the lawful “delivery” of medical marijuana from one member of a collective garden to another member are not commercial activities and any placard or sign communicating the location of those activities is not commercial speech.

Ostensibly, with this provision of the ordinance, the City is trying to eliminate the “green cross” placards ubiquitous in every Washington community today. Again, the legislative record is unclear. The ordinance creates a chilling effect on the protected exercise of free speech in that persons with no motive other than to express their appreciation and support for the new medical marijuana laws by hanging a green cross sign or flag on their property risk City nuisance action.

Overbreadth is closely related to vagueness in that if a prohibition is expressed in a way that is too unclear for a person to reasonably know whether or not their conduct falls within the law, then to avoid the risk of legal consequences they often stay far away from anything that could possibly fit the uncertain wording of the law. Ambiguous meanings cause citizens to “steer far wider of the unlawful zone” . . . than if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U. S. 360, 372 (1964), quoting *Speiser v. Randall*, 357 U. S. 513, 526 (1958).

Finally, the fact that the appellants herein were not asked to abate their “nuisance based upon signage does not mean that they do not have standing to raise overbreadth here. In the First Amendment area, the Court permits ‘attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.’ *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Because of the importance of First Amendment rights an enactment may be invalidated for overbreadth where it would be unconstitutional as applied to others even if not as applied to the litigant. *State v. Motherwell*, 114 Wn.2d 353, 370–71 (1990). Here, First Amendment activities are implicated by the Tacoma drug loitering ordinance, including freedom of expressive association and freedom of movement. We do not require others to risk criminal sanction or forgo constitutionally protected conduct. The ordinance can be read as prohibiting loitering done without the intent to commit an illegal act. Moreover, the act of mere loitering is an inherent component of political canvassing and other non-political forms of expressive association. Also unclear from the face of the ordinance is whether or not any conduct typically associated with the buying, selling or use of illegal drugs done in addition to mere loitering is required for the police to arrest someone for drug loitering.

City of Tacoma v. Luvene, 118 Wash. 2d 826, 839-41 (1992).

The ordinance here violates substantive due process because its restriction on Tacoma citizens' right of free speech is overbroad and violative of the state and federal constitutions. As such it must be invalidated.

D. CONCLUSION

At the outset it was noted that the essence of the substantive due process protection provided by the state and federal constitutions is guard against arbitrary and capricious governmental conduct. Our State Supreme Court defines arbitrary and capricious as willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached. *Freeman v. State of Washington*, 178 Wash.2d 387 (2013); citing *Pierce County Sheriff v. Civil Service Com* (1980).

In the case at bar, the City of Tacoma failed to consider and then disregarded real facts. The City either created "facts" of their own invention and imagination, or thoughtlessly repeated what they had heard and/or been told to believe. The *real* facts are as follows:

The manufacture, delivery, and possession of medical cannabis is not a crime under local or state law.

The assertion that RCW 69.51A created an affirmative defense to cannabis crimes for “qualifying patients” and “designated providers” meeting certain criteria has not been the law since July 2011.

Collective gardens, dispensaries, cooperatives, patient cooperatives, or patient networks which assist qualifying patients are not illegal under local or state law.

The activities of these groups are not unlawful and therefore are not criminal activity.

There is no evidence that the activities of these groups endanger the comfort, repose, health, and safety of citizens, and constitute a nuisance.

The business and/or administrative offices maintained by some collective gardens are not illegal and therefore do not constitute a nuisance.

There is no evidence that collective gardens present issues of public safety and odor.

There is no evidence of a threat to public welfare creating a need to protect minors when located near schools, daycare facilities, parks, libraries, youth centers, drug treatment facilities, and other lawful uses.

There is no description of what a secondary impact is and no evidence of secondary impacts arising from the operation of collective gardens which cannot be adequately regulated by the City.

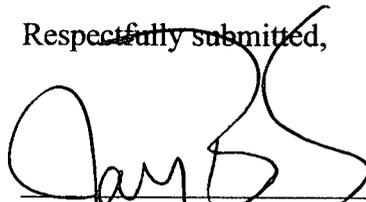
In the case at bar, the City disregards real facts preferring instead to invent facts of their own. These new imaginary “facts” create an imaginary problem. Unfortunately however, the solution, unlike the imaginary problem, is very real. TMC 8.30.045 is a very real ordinance which has very real consequences for very real people; people with terminal illnesses and debilitating conditions.

In passing Substitute Ordinance No. 28083, the Tacoma City Council ignored and distorted reality with regard to medical marijuana to justify an all-encompassing and mystifying assertion that essentially all medical

marijuana activity—activity specifically authorized by the state statute—as “per se public nuisance.”. Instead of passing sensible land use codes and business regulations that might have reasonably addressed appropriate legislative goals, the council enacted legislation which violates the protection of substantive due process provided under both the state and federal constitutions. Accordingly, the statute must be invalidated as unconstitutional.

DATED this 9th day of September, 2014.

Respectfully submitted,



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APPENDIX A

WHEREAS RCW 35.22.280(30) grants the City extensive power to declare what constitutes a nuisance, and to abate the same, and to impose fines upon parties who may create, continue or suffer nuisances to exist, and

WHEREAS RCW 69.51A.140 authorizes cities to adopt and enforce health and safety requirements related to cannabis, including medical cannabis, within their jurisdictions, and

WHEREAS the manufacture, delivery, and possession of cannabis is a crime under local, state, and federal law, and

WHEREAS Initiative Measure No. 692, approved by the voters of Washington state in 1998 and now codified as amended by the Legislature as Chapter 69.51A RCW, created an affirmative defense to cannabis crimes for “qualifying patients” and “designated providers” meeting certain criteria, and

WHEREAS the City does not currently have regulation or requirements for cannabis, except criminal penalties, and

WHEREAS the City acknowledges the needs of persons suffering from debilitating or terminal conditions and the benefits that some qualifying patients experience from the medical use of cannabis, and

WHEREAS the City has seen the establishment of cannabis-related businesses within the City limits that offer cannabis and cannabis products to numerous persons that they are operating as designated providers or collective gardens within the meaning of Chapter 69.51A RCW, which businesses are variously referred to as dispensaries, cooperatives, patient cooperatives, or patient networks, and designates as both for-profit and not-for-profit, and

WHEREAS these businesses are illegal under local, state and federal law, and the City has provided notice to some of these businesses that they must cease illegal activity, and

WHEREAS there is no affirmative defense under Chapter 69.51A RCW for these businesses, and

WHEREAS as a criminal activity, these businesses endanger the comfort, repose, health, and safety of citizens, and constitute a nuisance, and

WHEREAS RCW 69.51A.085 provides an affirmative defense to qualifying patients participating in a “collective garden” provided that: (1) no more than then patients participate in the garden; (the garden contain no more than 15 plants per patient and no more than 45 plants total; (3) the garden contain no more than 24 ounces of useable cannabis per patient and no more than 72 ounces usable cannabis total; (4) proof of qualification for all participating patients is available on the garden premises; and (5) no useable cannabis is delivered to anyone other than the qualified participating patients, and

WHEREAS there is no set limit to the number of collective gardens that may be located at any site, nor any restriction as to where collective gardens may be located in relation to other uses, and

WHEREAS many persons and entities are operating as “collective gardens” with a “business’ or “administrative” office at the same location where a dispensary was located and the City believes that cannabis is being delivered at these locations, and

WHEREAS such offices are illegal and constitute a nuisance, and

WHEREAS collective gardens and other production, processing, dispensing, and delivery of cannabis for medical use present: (1) issues of public safety and odor for surrounding properties, as well as for the property on which the uses and/or facilities exist; and (2) issues of public welfare and the protection of minors when located near schools, daycare facilities, parks, libraries, youth centers, drug treatment facilities, and other lawful uses, and

WHEREAS the City must ensure that any potential secondary impacts arising from the operation of collective gardens can be adequately regulated, and

WHEREAS, because there can be no lawful business enterprise associated with these activities, the City is precluded from licensing and/or otherwise permitting these activities, and as a result cannot use the regulatory tools associated with licensing and permitting, and

WHEREAS, unless regulations declaring certain activities a nuisance are adopted, the City lacks the necessary tools to address the effect on public health, safety, and welfare of collective gardens and other activities relating to cannabis.

APPENDIX B

TMC 8.30.045 -- Cannais

A. Relationship with other laws.

Producing, manufacturing, processing, delivering, distributing, possessing, and using cannabis are crimes under federal law and may be crimes under the municipal code and state law. This section is a civil remedy and does not affect any state or federal law governing the production, manufacture, processing, delivery, distribution, possession, or use of cannabis.

B. Definitions.

1. "Cannabis" or "Marijuana" means all parts of the plant Cannabis, commonly known as marijuana, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.
2. "Cannabis garden" means any place, area, or garden where cannabis is produced or processed and either (a) the person producing or processing the cannabis is not a qualifying patient or designated provider or (b) a copy or copies of the valid documentation of the qualifying patient(s) who own or share responsibility for the garden is not available at all times on the premises or (c) the number of plants or useable cannabis on the premises exceeds the limits set forth in RCW 69.51A.040(1)(a), RCW 69.51A.040(1)(b), or RCW 69.51A.085, or the garden is not otherwise in full compliance with RCW 69.51A.040(1)(a), RCW 69.51A.040(1)(b), or RCW 69.51A.085. Cannabis garden does not include a state-licensed marijuana producer, processor, or retailer as authorized by RCW 69.50 and operating in compliance therewith.
3. "Collective garden" means any place, area, or garden where qualifying patients (as defined in RCW 69.51A.010) share responsibility and engage in the production, processing, and delivery of cannabis for medical use as set forth in RCW 69.51A.085 and in full compliance with all limitations and requirements set forth in RCW 69.51A.085. "Collective garden" does not include any office, meeting place, or club associated with a collective garden which is not located within the same structure as the collective garden itself.

4. “Child care center” means an entity that regularly provides child day care and early learning services for a group of children for periods of less than 24 hours licensed by the Washington State Department of Early Learning under chapter 170-295 WAC.
5. “Dispensary” means any place where cannabis is delivered, sold, or distributed or offered for delivery, sale, or distribution. Dispensary does not include a state-licensed marijuana retail establishment as authorized by RCW 69.50 and operating in compliance therewith. Dispensary does not include a private residence where a designated provider delivers medical cannabis to his or her qualifying patient or a private residence where a member of a collective garden delivers medical cannabis to another member of the same collective garden. Dispensary does not include a collective garden, but does include any office, meeting place, club, or other place which is not located within the same structure as the collective garden itself where medical cannabis is delivered regardless of whether the delivery is made to another member of the collective garden.
6. “Drop-in center for youth” means an establishment operated by a social service or charity organization that is designed to provide recreational, educational, or counseling services to youth.
7. “Drug rehabilitation facility, substance abuse facility, or detoxification center” means any facility licensed by the Washington State Department of Social and Health Services whose primary focus is treatment for a person with a chemical or drug dependency, whether on an outpatient or inpatient basis.
8. “Elementary school” means a school for early education that provides the first four to eight years of basic education and recognized by the Washington State Superintendent of Public Instruction.
9. “Game arcade” means an entertainment venue featuring primarily video games, simulators, and/or other amusement devices where persons under 21 years of age are not restricted. Tacoma Municipal Code City Clerk’s Office 8-93 (Revised 7/2014)
10. “Library” means an organized collection of resources made accessible to the public for reference or borrowing supported with money derived from taxation.

11. “Medical cannabis garden” means any place, area, or garden where a qualifying patient or designated provider (as defined in RCW 69.51A.010) produces or processes cannabis for medical use as set forth in RCW 69.51A.040 and in full compliance with all limitations and requirements set forth in RCW 69.51A.040.
12. “Perimeter” means a property line that encloses an area.
13. “Playground” means a public outdoor recreation area for children, usually equipped with swings, slides, and other playground equipment, owned and/or managed by a city, county, state, or federal government.
14. “Processor” or “licensed processor” shall mean a marijuana processor licensed by the state pursuant to RCW 69.50.325(2).
15. “Producer” or “licensed producer” shall mean a marijuana producer licensed by the state pursuant to RCW 69.50.325 (1).
16. “Public park” or “park” means an area of land for the enjoyment of the public, having facilities for rest and/or recreation, such as a baseball diamond or basketball court, owned and/or managed by a city, county, state, federal government, or metropolitan park district. Public park does not include trails.
17. “Public transit center” means a facility located outside of the public right-of-way that is owned and managed by a transit agency or city, county, state, or federal government for the express purpose of staging people and vehicles where several bus or other transit routes converge.
18. “Recreation center or facility” means a supervised center that provides a broad range of activities and events intended primarily for use by persons under 21 years of age, owned and/or managed by a charitable nonprofit organization, city, county, state, or federal government.
19. “Retailer” or “licensed retailer” shall mean a marijuana retailer licensed by the state pursuant to RCW 69.50.325(3).
20. “Secondary school” means a high and/or middle school: a school for students who have completed their primary education, usually attended by children in grades 7 to 12 and recognized by the Washington State Superintendent of Public Instruction.

21. The definitions contained in Chapter 69.50 RCW, Chapter 69.51A RCW, and WAC 314-55 shall be used to define any term in this section not otherwise defined herein.

C. The following specific acts, omissions, places and conditions are declared to be a public nuisance, including, but not limited to, any one or more of the following:

1. Any cannabis garden is a nuisance per se.
2. Any dispensary is a nuisance per se.
3. Any place where cannabis is to the public or is visible from property owned or leased by another person or entity. This includes smoking cannabis in a manner that it is visible from public property or from property owned or leased by another person or entity.
4. Any place where cannabis can be smelled from a public place or from a property owned or leased by another person or entity,
5. Any collective garden located closer than the distance noted below to any of the following, whether in or out of the City:
 - a. Within 600 feet of any public or private elementary or secondary school;
 - b. Within 600 feet of any of any daycare, nursery, or preschool;
 - c. Within 600 feet of any park;
 - d. Within 600 feet of any library;
 - e. Within 600 feet of any drug rehabilitation facility, substance abuse facility, or detoxification center; or
 - f. Within 600 feet of any drop-in center for youth./the separation required between the collective garden and other uses identified in this subsection shall be measured from the nearest edge or corner of the property of each use.
6. Any collective garden where any person under the age of eighteen years is present or is permitted to be present.
7. Any collective garden or medical cannabis garden that is not fully enclosed within a structure.

8. Any parcel containing more than one collective garden, medical cannabis garden, or combination of collective garden and medical cannabis garden.
9. Any collective garden or cannabis garden where any violation of Chapter 69.50 RCW occurs and for which the affirmative defense created by Chapter 69.51A RCW would not apply.
10. Any place bearing a sign or placard advertising cannabis for sale or delivery.
11. Any place where any production, manufacture, processing, delivery, distribution, possession, or use of cannabis occurs for which there is not an affirmative defense under state law.
12. Any place other than a private residence where is smoked or ingested.

APPENDIX C

RCW 69.51A.085 -- Collective Gardens

(1) Qualifying patients may create and participate in collective gardens for the purpose of producing, processing, transporting, and delivering cannabis for medical use subject to the following conditions:

- (a) No more than ten qualifying patients may participate in a single collective garden at any time;
- (b) A collective garden may contain no more than fifteen plants per patient up to a total of forty-five plants;
- (c) A collective garden may contain no more than twenty-four ounces of useable cannabis per patient up to a total of seventy-two ounces of useable cannabis;
- (d) A copy of each qualifying patient's valid documentation or proof of registration with the registry established in *section 901 of this act, including a copy of the patient's proof of identity, must be available at all times on the premises of the collective garden; and
- (e) No useable cannabis from the collective garden is delivered to anyone other than one of the qualifying patients participating in the collective garden.

(2) For purposes of this section, the creation of a “collective garden” means qualifying patients sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use such as, for example, a location for a collective garden; equipment, supplies, and labor necessary to plant, grow, and harvest cannabis; cannabis plants, seeds, and cuttings; and equipment, supplies, and labor necessary for proper construction, plumbing, wiring, and ventilation of a garden of cannabis plants.

(3) A person who knowingly violates a provision of subsection (1) of this section is not entitled to the protections of this chapter.

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SUPERIOR COURT – STATE OF WASHINGTON
PIERCE COUNTY

CANNATONICS, DR. CHAMBERS, LLC)
and)
T-TOWN, JOH SERVICES, LLC)
Appellant (s),)
vs.)
CITY OF TACOMA,)
A municipal corporation,)
Respondent.)

NO. 13-2-07417-1
(No.13-2-09406-7 consolidated with
the above)
Ct. App. No. 45999-0-II
DECLARATION OF SERVICE

FILED
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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

DECLARATION

I declare under penalty of perjury of the laws of the State of Washington that the following is true and correct.

On this date I personally filed with the Court of Appeals Division II, Appellants Brief in the above encaptioned case.

DATED this 8th day of September, 2014.

/s/ Kym Schodron
Kym Schodron
Manager, Law Office of Jay Berneburg
Attorney for Appellants WSBA 2716

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CERTIFICATE

I certify that on September 8, 2014, I served a copy of the foregoing document by email */mail*
to coa2filings@courts.wa.gov, and by email to the following parties at the addresses/fax */address*
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