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NO. 90204-6

SUPREME COURT
OF THE STATE OF WASHINGTON

STEVE SARICH, JOHN WORTHINGTON, and DERYCK TSANG,

Petitioners,

v.

CITY OF KENT, et al.,

Respondents.

DERYCK TSANG'S SUPPLEMENTAL BRIEF

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 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ISSUES PRESENTED FOR REVIEW..... 2

III. STATEMENT OF THE CASE..... 2

IV. STANDARD OF REVIEW 5

V. ARGUMENT 5

 A. Kent City Code 15.08.290 prohibits activities expressly
 authorized by State law..... 5

 B. The Court of Appeals Erred in Upholding the City’s Ban
 on Collective Gardens..... 8

 1. ESSSB 5073 legalized qualifying medical marijuana
 use 8

 2. RCW 69.51A.085 is a stand-alone statute that
 authorizes collective gardens 13

 3. RCW 69.51A.140 does not authorize local
 governments to outright ban collective gardens..... 16

VI. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 169 P.3d 14 (2007) 18

Cannabis Action Coalition et al. v. City of Kent, 180 Wn. App. 455, 322 P.3d 1246 (2014)..... 4, 8, 9, 11, 16

City of Olympia v. Drebeck, 156 Wn.2d 289, 126 P.3d 802 (2006)..... 5

Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 43 P.3d (2002)..... 13

Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004)..... 5

Kennedy v. City of Seattle, 94 Wn.2d 376, 383, 617 P.2d 713 (1980) 5

Kilian v. Atkinson, 147 Wn.2d 16, 50 P.3d 638 (2002) 13, 17

Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) 5

State v. J.P., 149 Wash.2d 444, 69 P.3d 318 (2003)..... 11

State v. Kurtz, 178 Wash.2d 466, 476, 309 P.3d 472 (2013)..... 1, 8, 9

State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) 11

Weden v. San Juan Cy, 135 Wn.2d 678, 958 P.2d 273 (1998). 5

Statutes

Laws of 2011, Ch. 181 (Engrossed Second Substitute Senate Bill ("ESSSB") 5073 *passim*

Chapter 69.51A RCW,.....	7, 12
RCW 69.51A.002.....	13
RCW 69.51A.005(2)(a)	11, 15
RCW 69.51A.010.....	19
RCW 69.51A.010(7).....	17
RCW 69.51A.010(32)(a)	9
RCW 69.51A.025.....	20
RCW69.51A.040.....	12
RCW 69.51A.085.....	11, 12, 17, 20
<u>Municipal Laws</u>	
KCC 1.04.030	8
KCC 15.08.290.....	4, 8

I. INTRODUCTION

This case asks whether 2011 amendments to Washington's Medical Use of Cannabis Act ("MUCA") legalized the establishment of collective gardens and prohibit local jurisdictions from outright banning their establishment and threatening otherwise lawful, qualified patients participating with criminal and civil liability.

In stark contrast with this Court's statement in *State v. Kurtz*, 178 Wn.2d 466, 476, 309 P.3d 472 (2013), Division 1 of the Court of Appeals, determined that the 2011 amendments did not legalize the use of medical cannabis. Based on that determination, the court erroneously concluded that collective gardens, even when operated in compliance with state law, were illegal and could be outright banned by local governments.

This Court should clarify and declare that the intent of the 2011 amendments were to legalize both the use of medical cannabis and the participation in collective gardens by qualified patients. The Court should further declare that because State Law authorizes collective gardens and prohibits imposing criminal or civil liability upon participating qualified patients, local jurisdictions are pre-empted from outright banning collective gardens.

II. ISSUES PRESENTED FOR REVIEW

1. RCW 69.51A.085 creates an express right for qualifying patients to create and participate in “collective gardens.” The City of Kent adopted zoning regulations prohibiting collective gardens and threatens violators with civil and criminal liability. Is the City pre-empted from banning collective gardens and threatening qualified patients participating in a collective garden with criminal or civil liability?

2. Whether the court of appeals erred in concluding that the plain language of RCW 69.51A.005 and RCW 69.51A.040, as amended by ESSHB 5073 did not legalize the use of medical marijuana?

3. Whether the court of appeals erred in concluding that RCW 69.51A.085 did not create a right to participate in a collective garden without fear of criminal or civil prosecution?

4. Whether the court of appeals erred in concluding that RCW 69.51A.140 authorizes local jurisdictions to ban collective gardens throughout their jurisdiction?

III. STATEMENT OF THE CASE

In April 2011 the Legislature passed Engrossed Second Substitute Senate Bill 5073, Laws of 2011, ch. 181 (“ESSSB 5073”), substantially amending Washington’s laws concerning medical cannabis. ESSSB 5073,

as originally passed by the Legislature, set up a state regulatory licensing scheme for the growth and production of medical cannabis through commercial “licensed producers” and then distribution of the medical cannabis, including seeds, plants, usable cannabis and cannabis products, through commercial “licensed dispensaries.” In response to an advisory letter from the U.S. Attorneys in Seattle and Spokane, however, Governor Gregoire vetoed all of the licensing and registration processes set up in ESSSB 5073. *See* Laws 2011, ch. 181, pp 1374-76.

Relevant to this appeal, the Governor did not veto ESSSB 5073, § 403, codified at RCW 69.51A.085, which established a new right for qualified patients to create and participate in “collective gardens for the purpose of producing, processing, transporting, and delivering cannabis for medical use.”¹ The Governor also did not veto ESSSB 5073 § 401, which amended RCW 69.51.040. While previously RCW 69.51A.040 provided only an affirmative defense against charges of violating state

¹ So long as each “collective garden:” (a) is limited to no more than ten qualifying patients; (b) contains no more than 15 plants per person or up to a total of 45 plants; (c) contains no more than 24 ounces of usable cannabis per patient; (d) keeps a copy of each qualifying patient’s “valid documentation *or* proof of registration; and (e) ensures that no usable cannabis from the collective garden is delivered to anyone other than the qualifying patients participating in the collective garden. RCW 69.51A.085.

Because the registration process was vetoed, the collective garden must keep a copy of each qualifying patient’s “valid documentation” as defined by ESSSB 5073, § 103, codified at RCW 69.51A.010(32)(a).

law, ESSSB 5073 § 401 amended RCW 69.51A.040 and declared that qualifying patients acting in compliance with Washington's medical cannabis laws are exempt from prosecution for criminal or civil consequences.

On June 5, 2012, the City of Kent ("City") adopted Ordinance 4036 (codified as part of Kent City Code "KCC" Title 15). KCC 15.08.290.A outright prohibits collective gardens in all zoning districts within the City. KCC 15.08.290.B establishes that violation of the prohibition against collective gardens is a "public nuisance" and subject to mandatory abatement, as well as civil and criminal penalties.

In response to a challenge by petitioners, on March 31, 2014, the Court of Appeals, Division I, upheld City's ban on collective gardens. *Cannabis Action Coalition et al. v. City of Kent*, 180 Wn. App. 455, 322 P.3d 1246 (2014). The decision contains three significant holdings; (1) RCW 69.51A.040 did not legalize the use of medical marijuana by qualified patients; (2) RCW 69.51A.085 does not authorize collective gardens; and (3) RCW 69.51A.140 authorizes local jurisdictions to ban collective gardens throughout their jurisdiction.

The Court granted Tsang's Petition for Review on October 9, 2014.

IV. STANDARD OF REVIEW

This Court reviews questions of statutory interpretation and claimed errors of law de novo. *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006). When reviewing a summary judgment, this Court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.3d 1373 (1993)).

V. ARGUMENT

A. **Kent City Code 15.08.290 prohibits activities expressly authorized by State law**

The City's ban of collective gardens and threat of civil and criminal prosecution, for participating qualified patients is pre-empted by State law. Preemption may occur when the Legislature states its intention by necessary implication to preempt the regulated field. *Kennedy v. City of Seattle*, 94 Wn.2d 376, 383, 617 P.2d 713 (1980). The test for whether an ordinance is in conflict with a general law promulgated by the Legislature is simply whether the ordinance permits that which the statute

Simply because the registration system was vetoed does not mean that the entirety of RCW 69.51A.040 is void. Again, RCW 69.51A.040 provides:

[t]he medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences..

The plain language of RCW 69.51A.040 thus protects “qualifying patients” who are “in compliance with” Ch. 69.51A from civil or criminal liability.

Contrary to Division I’s opinion, the vetoed registration system is not required in order to be in compliance with the collective garden provision in RCW 69.51A.085. RCW 69.51A.085 requires only that the qualifying patient participating in a collective garden maintain *either* valid documentation *or* proof of registration at the premises of the collective garden. *See* RCW 69.51A.010(7). A qualifying patient, participating in a collective garden while maintaining valid documentation is in full compliance with RCW 69.51A.085 and must be afforded the additional protections created by RCW 69.51A.040.

forbids or forbids what is permitted by the statute. *Weden v. San Juan Cy*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998).

Even with the Governor's partial veto, ESSSB 5073, as codified in Ch. 69.51A RCW, contains at least three provisions that cumulatively confirm a right for qualified patients to establish collective gardens and prohibit local governments from banning their existence. First, RCW 69.51A.085 expressly authorizes qualified patients the right to establish 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

RCW 69.51A.085.

Second, the Legislature declared in RCW 69.51A.005(2)(a) that:

[q]ualifying 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.

And finally, in RCW 69.51A.040, the Legislature created a new express shield against criminal and civil prosecution:

[t]he medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, or have real or personal property seized or forfeited for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, and investigating peace officers and law enforcement agencies may not be held civilly liable for failure to seize cannabis in this circumstance,

RCW 69.51A.040. (emphasis added).

Thus, so long as a qualified patient complies with Chapter 69.51A RCW, and specifically the requirements for collective gardens set out in RCW 69.51A.085, they may not be subject to criminal or civil consequences. KCC 15.08.290 directly conflicts with RCW 69.51A.005, .040, and .085 by banning collective gardens within the City and declaring any violation a “public nuisance” subject to both civil and criminal

liability.² Because KCC 15.08.290 forbids locally what is expressly allowed by state statute it is pre-empted.

B. The Court of Appeals Erred in Upholding the City's Ban on Collective Gardens

In upholding the City's ban of collective gardens Division I erred by concluding that: (1) the plain language of RCW 69.51A.002 and RCW 69.51A.040 did not create a shield against criminal or civil liability for qualified medical marijuana users, including collective gardens; (2) the plain language of RCW 69.51A.085 did not authorize collective gardens and shield lawful participants from criminal or civil liability; and (3) RCW 69.51A.140 authorizes cities and counties to ban collective gardens despite the Legislature leaving non-commercial collective gardens out of the statute.

1. ESSSB 5073 legalized qualifying medical marijuana use

Division I's opinion is premised in large part on its conclusion that "medical marijuana use, including collective gardens, was not legalized by the 2011 amendments to [Ch. 69.51A]." *Cannabis Action Coalition*, 180

² KCC 15.08.290.B declares any violation of the zoning code to be a public nuisance subject to mandatory abatement under KCC Chapter 1.04. KCC 1.04.030 declares any violation of a City regulation to be unlawful and subject to both civil and criminal liability.

Wn App. At 470-476, 482. This conclusion is in direct conflict with the plain language of the *un-vetoed* statute and with this Court's interpretation of Ch. 69.51A in *State v. Kurtz*:

Moreover, in 2011 the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense. RCW 69.51A.040. A necessity defense arises only when an individual acts contrary to law. Under RCW 69.51A.005(2)(a), a qualifying patient "shall not be arrested, prosecuted, or subject to other criminal actions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of law." One who meets the specific requirements expressed by the legislature may not be charged with committing a crime and has no need for the necessity defense. Only where one's conduct falls outside of the legal conduct of the Act, would a medical necessity defense be necessary. The 2011 amendment legalizing qualifying marijuana use strongly suggests that the Act was not intended to abrogate or supplant the common law necessity defense.

178 Wash.2d 466, 476, 309 P.3d 472 (2013) (Emphasis added).

Division I dismissed *Kurtz* as *dicta* based on its belief that this Court's reliance on the plain language of RCW 69.51A.040 and the amended legislative intent section in RCW 69.51A.005 was misplaced.

Cannabis Action Coalition, 180 Wn. App. At 472, n. 13. According to Division I, the Governor's veto message over-rode the legislature's stated intent in RCW 69.51A.005 to shield qualified patients from arrest, prosecution or other criminal or civil consequence. *Id.* at 473-76. The court erred.

RCW 69.51A.005 was amended to specifically *add* the express legislative intent that qualified patients be shielded against criminal and civil consequences. RCW 69.51A.005(2)(a).³ Where previously use of medical marijuana by qualified patients provided only an affirmative defense to prosecution, the Legislature opted to extend protection to a full shield. This statement of legislative intent was *not* vetoed by the Governor. Indeed, the Governor's message supports the stated intent:

Today, I have signed sections of [ESSSB 5073) that retain the provisions of Initiative 692 and provide additional state law protections. Qualifying patients or their designated providers may grow cannabis for the patient's use or participate in a collective garden without fear of state law criminal prosecutions. Qualifying patients or their designated providers are also protected from certain state civil law consequences.⁴

³ ESSB 5073 § 102.

⁴ Laws of 2011, ch. 181, governor's veto message at 1374-75 (emphasis added).

The Governor confirmed that, even as vetoed, ESSSB 5073 added “additional” protection over that provided by the original statute, and confirmed that qualifying patients and collective gardens could operate “without fear” of criminal or civil consequences.

Division I, however, concluded that without the vetoed registration system, “no individual is able to meet the requirements of RCW 69.51A.040.” 180 Wn. App. At 471. According to the court, because RCW 69.51A.040 contained six listed requirements and one of those requirement included presenting valid documentation under the vetoed registration system, RCW 69.51A.040(2), it meant that “no individual is able to meet the requirements of RCW 69.51A.040.” Thus, according to the court, the only protection left for qualified users is an affirmative defense – just as it existed prior to adoption of ESSSB 5073.

It is axiomatic that “statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *See e.g., State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005), quoting *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003). Division I’s interpretation renders RCW 69.51A.040 meaningless and superfluous.

Division I erred in concluding that combined effect of RCW 69.51A.005(2)(a) and RCW 69.51A.040 did not legalize use of medical marijuana, including collective gardens, and protect qualified patients from criminal and civil prosecution.

2. RCW 69.51A.085 is a stand-alone statute that authorizes collective gardens

The starting point for interpreting a statute is the plain language. If a statute is clear on its face, “its meaning is to be derived from the language of the statute alone.” *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). The court turns to legislative intent only when the plain language of the statute does not answer the question. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d (2002).

There is no ambiguity in RCW 69.51A.085. The statute contains three clear provisions: subsection (1) establishes that qualified patients may create and participate in collective gardens subject to five equally clear conditions; subsection (2) is the self-contained definition of a “collective garden”; and subsection (3) confirms that anyone violating the requirements of subsection (1) is not entitled to protections in Ch. 69.51A RCW. Because there is no ambiguity, there is no need to look beyond the

plain language. RCW 69.51A.085 establishes the right for qualifying patients to participate in collective gardens within the state.

Even if the Court finds it necessary to look beyond the plain language, a review of ESSSB 5073, as vetoed, demonstrates that RCW 69.51A.085 was adopted as a stand-alone provision of the law. As a whole, ESSSB 5073 *would* have authorized the Department of Health to issue licenses and regulate the commercial production, processing and dispensing of medical cannabis. But Governor Gregoire's veto eliminated the entire licensing and regulatory scheme.

As written, ESSSB 5073 established a clear distinction between non-commercial "collective gardens" and "licensed" commercial producers, processors, and dispensers. The two entities were defined and addressed in different sections and treated differently. For example, Section 201, which would have amended RCW 69.51A.010 to create definitions for "produce," "production facility," "process," "processing facility," "dispense," and "licensed dispenser." These terms and their variations were terms used throughout other sections in ESSSB 5073, including Section 1102 (codified at RCW 69.51A.140). Section 201 was vetoed. In contrast, collective gardens were not defined within the vetoed

Section 201. Collective gardens were defined in only one location – Section 403 (codified at RCW 69.51A.085).

“Collective gardens” also are distinct because they are, by definition, *not commercial*, profit-making entities. Rather, as reflected in the statute, they are a method for resource pooling by members to provide medical cannabis only to the qualifying patients participating in the garden. *See* RCW 69.51A.085(1)(e) (“no useable cannabis from the collective garden is delivered to anyone other than one of the qualifying patients participating in the collective garden”). *See also* RCW 69.51A.085(2) (definition does not include commercial sales). In contrast, the vetoed portions of ESSSB 5073 would have allowed licensed dispensers to operate *commercial* for-profit businesses and “deliver, distribute, dispense, transfer, prepare, package, repackage, label, relabel, sell at retail, or possess ...” medical cannabis for qualifying patients. ESSSB 5073.⁵

Perhaps most importantly, collective gardens were excluded from the state licensing framework. Had ESSSB 5073 been signed in full, “licensed dispensers” would have been required to obtain state licenses.

⁵ The Legislature’s intent to distinguish commercial operations from private non-commercial operations is also evident in RCW 69.51A.025.

ESSSB 5073, Section 701. Collective gardens, however, were not subject to this same requirement. RCW 69.51A.085. If the Legislature had intended licensing requirements to carry over to collective gardens, it could have either included a licensing requirement within RCW 69.51A.085, or identified collective gardens as needing a license under the vetoed Part VII of ESSSB 5073. It did neither. Instead, the Legislature imposed five specific conditions on the operation of collective gardens. RCW 69.51A.085(1)(a)-(f) and nothing more.

RCW 69.51A.085 provides unambiguous authority for qualifying patients to participate in collective gardens. It is not necessary to look beyond the plain language of the statutory language. But if this Court does look beyond the plain language, even when read in context with the remainder of ESSSB 5073, it is clear that the Legislature opted to treat collective gardens distinctly from licensed and regulated commercial production, processing, and dispensing operations.

3. RCW 69.51A.140 does not authorize local governments to outright ban collective gardens

Division I concluded that RCW 69.51A.140 provides authority for Cities ban collective gardens. *Cannabis Action Coalition*, 180 Wn. App. 478-480. Although RCW 69.51A.140 references the ability for cities to

adopt zoning, licensing, health and safety and taxing requirements, when viewed in context, this provision was part of the larger extensive regulatory scheme that ESSSB 5073 sought to establish. The plain language of RCW 69.51A.140, read in context with ESSSB 5073, demonstrates that the Legislature intended to give local governments authority to impose regulations and conditions upon the *commercial* producers, processors, or dispensaries *that would have been licensed* under the proposed regulatory scheme. However, as a result of the partial veto, licenses will not be issued. Without licenses, “producers,” “processors,” and “dispensars” simply do not exist. Consequently, the first sentence of RCW 69.51A.140 is of no effect. Because all provisions in ESSSB 5073 related to commercial and licensed producers, processors, and dispensars were vetoed, RCW 69.51A.140 is an orphaned section without effect.

More importantly, nothing in RCW 69.51A.140 provides authority for local governments to regulate or impose additional conditions on the separately defined “collective gardens.” Had that been the intent, the Legislature could easily have added the term “collective gardens” to RCW 69.51A.140. Instead, the Legislature defined “collective gardens” separately from producers, processors, and dispensars, and imposed

express conditions on their operation within RCW 69.51A.085. “Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.” *Killian*, 147 Wn.2d at 20). Further, “[c]ourts will not expand the powers of local government beyond express delegations.” *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 694, 169 P.3d 14 (2007).

RCW 69.51A.140 provides local government authority to enact zoning for “producers, processors, or dispensers” – entities that, after the Governor’s partial veto, do not exist. The Legislature did not grant zoning authority over “collective gardens” and certainly the Legislature did not grant authority in RCW 69.51A.140 for local governments to ban non-commercial collective gardens.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals and superior court and declare that cities and counties are pre-empted from banning law abiding collective gardens and that the City of Kent's Ordinance 4035 is null and void.

Respectfully submitted this 10th day of December, 2014.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that I caused this document to be filed with the Washington Supreme Court via email at supreme@courts.wa.gov and to be served on the following individuals in the manner listed below:

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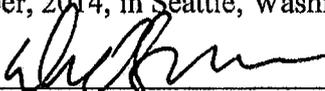
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Attached is Petitioner Deryk Tsang's Supplemental Brief

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