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NO. 70396-0-I

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

STEVE SARICH, ARTHUR WEST, JOHN WORTHINGTON,
and DEREK TSANG,

Appellants,

v.

CITY OF KENT, a local municipal corporation,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF KING
COUNTY

The Honorable Jay White

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KING COUNTY
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APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The issues raised in Appellant's brief have not been squarely addressed by the City. Appellants rely on our assignments of error and our statement of the case from our brief. This appeal concerns the City's ban on collective gardens, which is in conflict with several state laws and the intent of chapter 69.51A, as well as, arguably, the intent of the voters passing the original initiative. The City banned collective gardens despite the awareness that the state law allowed them, and despite the fact that the City admits it is an affirmative defense in any event.

Appellants will address the issues in the order the City raises them, following their brief, rather than trying to address discrete arguments. Courts may use canons of statutory construction only if a statute is ambiguous. Courts are required to give effect to a statute's plain meaning unless that cannot be determined. There is no ambiguity here and the legislature clearly and cleanly distinguished between licensed commercial entities and collective gardens. There is no statutory language that authorizes the City to ban collective gardens and it is absolutely clear that there is no legislative intent to do so. The City imposed civil and criminal penalties for participating in collective gardens despite the fact that the legislature clearly intended to render the conduct legal in and of itself, or at worst provide an affirmative defense, a fact the City seems to concede

at numerous points throughout their brief. The legislature did not delegate any authority over collective gardens to anyone.

II. ARGUMENT

A. DECIDING THE LEGAL STATUS OF MEDICAL MARIJUANA ACTIVITIES AND FEDERAL PREEMPTION ISSUES IS UNECESSARY

Respondent argues that medical cannabis activities in Washington State remain illegal, citing State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010), and argues that ESSB 5073 should not alter this, and then argues that any other interpretation would result in federal preemption. The question of what effect is to be given to the modifications made by the legislature in ESSB 5073, and the Governor's subsequent veto, is an open one that has not been decided. The Court does not need to decide this issue to render a decision in this case. Appellants have argued that the legislative intent and plain language of the statute must be given effect and that this language conflicts with the City's ordinance. How the Court rules on these issues may affect the application of preemption doctrine, or it may not. To essentially threaten the Court that any interpretation not consistent with Fry will guarantee federal preemption is ludicrous. The question of whether the Federal law will preempt State law is an incredibly complex thicket, full of contradictory case law and the like. In San Diego County v. San Diego NORML, 165 Cal.App.4th 798, 81 Cal.Rptr.3d.,(2008)., the

issue of federal preemption was addressed as it relates to medical marijuana. The case addressed whether California's medical use act and a medical marijuana program that required counties to issue id cards for patients was preempted by the federal controlled substances act. The Court ruled that object preemption did not apply as the two laws, state and federal, could co-exist and the state's laws did not present a significant burden on the federal law's purpose. This case was appealed extensively and the Supreme Court denied cert. This decision, and others, indicates that the issue of preemption in the context of medical marijuana is far from clear, and preemption doctrines may not even apply.

The recently decided State v. Kurtz,_ Wn. 2d __, (No. 87078-1, September 19, 2013) this case seems to suggest that the Supreme Court is aware of the changes to the medical cannabis laws, and that they may be leaning towards the plain language interpretation of the statute which would result in giving effect to the legislature's intent to make medical cannabis use not a crime. In our view, the Court does not need to decide this issue to render a decision in the present case.

B. THE PLAIN LANGUAGE OF THE STATUTE
CONTROLS

Respondents argue the Court must consider vetoed language to construe the statute but point to no specific ambiguity and no problematic or obfuscatory language, no contradictory sections, and no argument as to why the statute cannot be interpreted by plain language on its face. The fact that the Governor used the sectional veto, does not, by itself, make the statute ambiguous. The plain language of the statute does not in any way authorize the City's ban on collective gardens.

The Senate bill 5073 made clear distinctions between licensed dispensers and collective gardens and treated the two very differently. Separate law was created for collective gardens and collective gardens were not included, but were specifically excluded, from the state licensing scheme.

C. RCW 69.51A.085 DOES NOT CONTEMPLATE OR
EVEN MENTION LOCAL JURIDICTION OR LAWS
AND STANDS ALONE

The collective garden section, originally section 403, defined five conditions and imposed them on collective gardens, the list is exhaustive. There are no references to other rules or conditions, these five enumerated conditions means there are no other requirements for collective gardens. There is no reference to local laws or complying or not complying with

local regulation, the statute section is complete and self-contained. No mention was ever made, in any draft version of this section, of any local laws or jurisdiction. This demonstrates, under the case law cited in Appellant's brief at 25, 6 and again at 33-38, that no reference to local laws or government or jurisdiction means that it does not grant any authority to local governments. The specific clear grant of legislative authority for cities is contained in RCW 69.51A.140, and is entirely absent from 69.51A.085. A legislative grant to local governments cannot be implied, it must be stated. Municipal corps and Cities are creatures of the State and derive all power from the legislative body of the state. Absent specific grants of legislative power the City's ability to legislate ends when the legislature adopts a law concerning a particular interest.

**D. LOCAL GOVERNMENTS CANNOT LEGISLATE
MEDICAL MARIJUANA REGULATIONS WITHOUT A
SPECIFIC GRANT OF AUTHORITY AND BECAUSE
THE STATE HAS PREEMPTED THE FIELD**

Medical marijuana law was created by the passage of a state wide initiative. Since 1998 medical marijuana has been the exclusive province of state law. It is state law which determines and defines who a patient is and who a provider is and who is authorized to possess and to grow, in short, everything. The availability of the affirmative defense is entirely governed by state law. A city or county could not alter or add

requirements to the affirmative defense; this would result in unsolvable equal protection problems under the criminal law. The state has preempted the field on penalties with 69.50.608, to ensure no equal protection violations, and the defenses must follow, and the defense must be available to everyone state wide. Given the need for uniformity state wide, the constitutional right to the affirmative defense, the legislative intent to preclude penalties both civil and criminal for medical marijuana, the Court should conclude that the field is preempted. Absent any reference to local laws or jurisdictions, the Court should further conclude there is no concurrent jurisdiction and any legislation concerning collective gardens is preempted by state law.

E. THE CIYT'S ORDINANCE CONFLICTS WITH MULTIPLE STATE LAWS

If an ordinance conflicts with state law, the ordinance is without effect. Wash. Const., Art. XI, sect. 11. The test is whether the ordinance prohibits or licenses something the state forbids or allows and vice versa. City of Tacoma v. Luvene, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992). RCW 69.51A.085 is a permissive statute, patients MAY participate in collective gardens. State law permits participation in collective gardens. The City's ordinance prohibits the same participation. What the state law allows, the City forbids. The City's ordinance modified and added to the

state law, and the effect is the elimination of the affirmative defense. This would result in a very clear equal protection violation.

Another conflict with state law is the decision to penalize participation in a collective garden. The City did not just ban the collective gardens; they penalize participation by subjecting garden participants to civil and criminal penalties. This clearly also violates the state preemption of penalties in RCW 69.50.608 for controlled substance violations.

The language of the City's ordinance creates an irreconcilable conflict with state law. The very ordinance itself admits that the state law allows qualifying patients to create collective gardens and then bans them in the City of Kent. The City has admitted the ban. This puts the ordinance in direct and unavoidable conflict with state law.

F. THE CITY'S ORDINANCE VIOLATES
CONSTITUTIONAL EQUAL PROTECTION
GUARANTEES BY REMOVING THE AFFIRMATIVE
DEFENSE

There is no constitutional right to use marijuana in Washington state. However, uniformity is desirable and necessary to avoid equal protection concerns, and outright removal of the affirmative defense by the ordinance is an equal protection violation. The City cannot burden the defense in any way by requiring acts that would not be required of others

within the state, based solely on location. The availability of the affirmative defense cannot depend on where one lives within the state. The City's troubling notion, at several points in their brief, that they do not have to follow or allow the protections of state law, or that state law that includes the affirmative defense does not apply to them, simply does not comport with any accepted notion or requirements of equal protection doctrine. The ordinance and City code do not allow, or even mention the affirmative defense. The City has adopted numerous sections from 69.50, but not a single one from 69.51A. KCC 9.02.150. The ordinance conflicts with state law and violates equal protection by depriving those charged of the affirmative defense that is constitutionally guaranteed.

G. THE COURT ERRED IN ISSUING A PERMANENT INJUNCTION

A party seeking an injunction, an extraordinary remedy, must show that he has a clear and well defined legal right, has a well-grounded fear of that right being immediately invaded, and that the acts sought to be enjoined will result in actual and substantial injury. The City cannot establish a clear legal right to ban collective gardens, as is shown by this very lawsuit. The City cannot show clear legal authority, it cannot show any authority from the legislature that would enable it to ban an affirmative defense and permissive right to establish collective gardens.

The City also cannot show that it did not possess other remedies, as it clearly did, and just as clearly used them against Mr. Tsang. The injunction is also unreasonable as it prohibits behavior that state law allows, and may affect property rights as to Mr. Sarich.

H. THE COURT ERRED IN CONCLUDING THAT APPELLANT LACKED STANDING

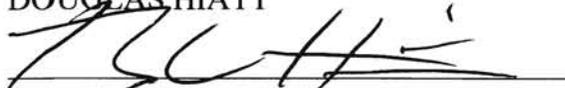
Washington Courts have a well-established record of granting standing, even if arguable, when the issues involve matters of great public interest or concern. P 19 Appellant's brief. Courts have employed a more liberal and less rigid approach when matters of public interest are involved or the question is one which will affect the rights of many similarly situated individuals. The UDJA also makes it easier to find standing here and applying the standards of the act it is clear this case is tailor made for a declaratory judgment. It would be difficult, if not impossible, to imagine an issue that is more in the public eye in Washington state than matters concerning marijuana and medical marijuana in particular. This area is now of great public interest and many citizens are awaiting guidance and clarity from the Courts. Many other cities have enacted marijuana land use and zoning laws and the ability of local governments to regulate marijuana is a significant question, these laws have proliferated in the absence of Court guidance. The Court should decide this case on the merits.

III. CONCLUSION.

For all the reasons set forth above, the Court should hold Ordinance 4036 is not authorized by SB 5073, is preempted by state law, and conflicts with state law. Appellant respectfully requests the Court declare the ordinance void and constitutional and dissolve the permanent injunction.

DATED at Seattle Washington on this 12 day of December, 2013.

DOUGLAS HIATT

A handwritten signature in black ink, appearing to read 'D. Hiatt', written over a horizontal line.

Douglas Hiatt, WSBA # 21017
Attorney for Appellant Steve Sarich

DECLARATION OF SERVICE

I, Cynthia Grill, declare as follows:

I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness herein, and have personal knowledge of the facts stated below.

On December 13th, 2013, I caused to be filed the foregoing Appellant's Reply Brief, on behalf of the Appellate, Steve Sarich, with the Clerk of the Court via personal service.

On this same date, and in the manner indicated below, I caused the City's Brief and this appended Declaration of Service to be served upon:

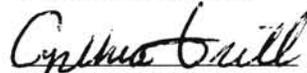
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DATED at Seattle, Washington on this 13th day of December, 2013.

CYNTHIA GRILL


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