NO. 94083-5

SUPREME COURT OF THE STATE OF WASHINGTON

DOWNTOWN CANNABIS CO., LLC; MONKEY GRASS FARMS, LLC; and JAR MGMT, LLC, d/b/a/ RANIER ON PINE,

Intervenor-Appellants,

v.

CITY OF FIFE,

Respondent,

and

ROBERT W. FERGUSON, Attorney General of the State of Washington,

Intervenor-Respondent.

INTERVENOR FERGUSON'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This appeal is not what it once was. It began as an action that squarely presented the question of whether Initiative 502 (I-502) preempted cities and counties from banning state-licensed marijuana businesses from operating within their local boundaries. This petition, however, merely presents a pedestrian quibble from parties who lack standing to pursue what has now become a moot controversy. Intervenor-Appellants contest the Court of Appeals decision dismissing this appeal when the original parties resolved their dispute, leaving no other parties affected by Fife's ordinance. This appeal does not merit review.

II. COUNTERSTATEMENT OF THE CASE

This case was originally filed in superior court as a challenge by MMH, LLC, and Graybeard Holdings, LLC (collectively MMH) to the City of Fife's local prohibition against marijuana businesses. Fife adopted its Ordinance 1872 to ban the production, processing, and retail sale of marijuana in Fife. CP at 98-106. The original plaintiffs in this case challenged that ordinance because MMH was an applicant for a state license to operate a retail store selling marijuana in Fife. CP at 196, 207. MMH contended that Fife's ordinance was preempted by I-502. CP at 161-88. Fife responded that I-502 did not preempt its ordinance, but also contended in the alternative that if its ordinance was preempted then I-502 was in turn preempted by federal law. CP at 15-41.

The superior court granted two motions to intervene. First, the Attorney General intervened, agreeing with Fife that I-502 did not preempt its ordinance, but also to defend against Fife's alternative argument that federal law preempts I-502. CP at 686-706. Next, a group of three marijuana businesses located outside of Fife moved to intervene in support of the original plaintiffs. Intervenor-Appellant Downtown Cannabis Company desired to open a marijuana business in Pacific, Washington. CP at 1421. Intervenor-Appellant Monkey Grass Farms, LLC, wanted to open a marijuana business in Wenatchee, Washington. CP at 1422. Intervenor-Appellant JAR MGMT, LLC, wanted to open a marijuana business in Tacoma, Washington. CP at 1422. Thus none of them were affected by Fife ordinance.

The superior court granted summary judgment in favor of Fife and the Attorney General, concluding that I-502 does not preempt Fife's ordinance. Having reached this conclusion, the court found it unnecessary to consider Fife's argument that federal law preempts I-502. CP at 1435-52.

Both MMH and the Intervenor-Appellants appealed. After briefing, this Court denied direct review and transferred the appeal to Division II of the Court of Appeals. Order June 3, 2015. The Court of Appeals heard oral argument.

After the case was submitted, but before the Court of Appeals rendered a decision, MMH voluntarily dropped its appeal based upon a settlement with Fife. The Court of Appeals dismissed this appeal the next

day. Order Oct. 4, 2016. Intervenor-Appellants objected to the dismissal, but the Court of Appeals reiterated that the appeal was dismissed. Order Nov. 3, 2016; Order Jan. 3, 2017.

Intervenor-Appellants now appeal from the orders dismissing the appeal. The present petition, therefore, raises none of the original issues presented by this case, but only the question of whether the court followed the proper procedure in dismissing this appeal.

III. COUNTERSTATEMENT OF ISSUES

1. Did the Court of Appeals properly dismiss this appeal under RAP 17.4(e) on the request of the only plaintiff who had standing to challenge Fife's ordinance?
2. Did the Court of Appeals err under RAP 18.2 in dismissing the entire appeal, and not merely the appeal of the only party with standing to challenge Fife's ordinance?

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

None of the limited grounds set forth in RAP 13.4(b) under which this Court grants review are present here. Intervenor-Appellants seek review only on narrow procedural questions regarding claims for which they lack standing and which have become moot. *See* Respondent Fife's Answer to Petition for Discretionary Review at 7-9. This petition does not raise the now-moot issues regarding Washington's marijuana laws that were once presented in this case. Because those issues are no longer presented, this case does not merit review.

Intervenor-Appellants do not specify which considerations from RAP 13.4(b) support their petition. They note only that the underlying dispute might be a question of broad public import. *See* RAP 13.4(b)(4). But the original question of whether Fife's ordinance is preempted is not presented on this petition. Rather, the only issue is whether the Court of Appeals properly dismissed this appeal upon the request of MMH. If this Court were to grant review, it would accordingly be treated to debate around the meaning of RAP 17.4(e) and voluntary dismissal of appeals.

The petition also fails to raise an issue worthy of review because the Court of Appeals followed the proper procedure in dismissing the appeal. Additionally, with the Intervenor-Appellants as the only remaining parties asserting that Fife's ordinance is preempted, this appeal is not a good vehicle for that appeal. This is so because events have rendered the original dispute moot and the Intervenor-Appellants lack standing.

A. The Court's Decision Was Procedurally Proper

Intervenor-Appellants make two arguments that the court's decision to dismiss this appeal was procedurally improper. Both fail.

Intervenor-Appellants first argue that the court's decision was procedurally improper because the court ruled on MMH's motion to dismiss one day after the motion was served on all parties. Resp. at 5. They assert that this was contrary to RAP 17.4(e), which provides that an interested party may submit an answer to the motion no later than 10 days after the motion is served on the answering party. Resp. at 5. But RAP 17.4(e) simply provides the timeframe for submitting a written

answer to a motion and a reply to the answer. It does not set forth a timeframe for the court to rule on a motion. Nothing in this rule prohibited the court from ruling on the motion before receiving an answer.

Intervenor-Appellants next assert that the court's decision was procedurally improper and contrary to RAP 18.2 because not all parties to the appeal stipulated to dismissal. Resp. at 5-6. But the court has discretion to dismiss an appeal without a stipulation from all parties:

> The appellate court on motion may, in its discretion, dismiss review of a case on stipulation of all parties and, in criminal cases, the written consent of the defendant, if the motion is made before oral argument on the merits. *The appellate court may, in its discretion, dismiss review of a case on the motion of a party who has filed a notice of appeal, a notice for discretionary review, or a motion for discretionary review by the Supreme Court.* Costs will be awarded in a case dismissed on a motion for voluntary withdrawal of review only if the appellate court so directs at the time the motion is granted.

RAP 18.2 (emphasis added).

As *Washington Practice* explains, under the emphasized sentence, the court "may dismiss review on the motion of a party who unilaterally wants to withdraw after initiating review proceedings." 3 Karl B. Tegland, *Washington Practice: Rules Practice* RAP 18.2, cmt. 1 at 470 (8th ed. 2014). MMH filed a notice of appeal in this case. Accordingly, the Court acted within its discretion under RAP 18.2 when it granted MMH's motion.

B. This Case No Longer Presents a Vehicle for Considering Whether I-502 Preempted Fife's Ordinance Because No Remaining Plaintiff is Affected By that Ordinance

Intervenor-Appellants assert that MMH's motion to withdraw the appeal does not affect their own appeal of the superior court's order. 3 Tegland, RAP 18.2, cmt. 1. They are incorrect. While it is possible to imagine circumstances where an intervenor could continue an appeal after withdrawal of the primary party (*e.g.*, where the intervenor could have brought the original case in the first place), that course is inappropriate in this case because none of the Intervenor-Appellants have standing to maintain this appeal and because this appeal is moot.

1. Intervenor-Appellants Lack Standing

An intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent on a showing by the intervenor that it meets the standing requirements. *See Diamond v. Charles*, 476 U.S. 54, 68, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 963 (9th Cir. 2015). Here, because none of the Intervenor-Appellants have standing to pursue this appeal, dismissal was proper.

A fundamental aspect of standing is that a party show some injury from the action it seeks to challenge. *See, e.g.*, *City of Seattle v. State*, 103 Wn.2d 663, 681, 694 P.2d 641 (1985). But Intervenor-Appellants have not shown and cannot possibly show that they are injured in any way by Fife's ordinance. None of them seek to operate in Fife or are otherwise affected by Fife's zoning rules. This was unimportant in the superior court, as

MMH plainly had standing, so there was no need to assess Intervenor-Appellants' standing. But now that MMH has withdrawn, Intervenor-Appellants must show standing in their own right. *See, e.g.*, *Diamond*, 476 U.S. at 68; *Organized Vill. of Kake*, 795 F.3d at 963.

The requirement to show standing and injury persists on appeal. "Only an aggrieved party may seek review by the appellate court." RAP 3.1. An "aggrieved party" is "one whose personal right or pecuniary interests have been affected." *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003). In a case predating the RAP, our Supreme Court explained:

> [N]o one can appeal to an appellate court unless he has a substantial interest in the subject matter of that which is before the court and is aggrieved or prejudiced by the judgment or order of the court. Some personal right or pecuniary interest must be affected. The mere fact that one may be hurt in his feelings, or be disappointed over a certain result, or feels that he has been imposed upon, or may feel that ulterior motives have prompted those who instituted proceedings that may have brought about the order of the court of which he complains does not entitle him to appeal. He must be aggrieved in a legal sense.

Sheets v. Benevolent & Protective Order of Keglers, 34 Wn.2d 851, 855, 210 P.2d 690 (1949) (internal quotation marks omitted) (quoting *State ex rel. Simeon v. Superior Court*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944)).

Here, Intervenor-Appellants are not aggrieved parties for purposes of appellate standing. None of the Intervenor-Appellants conduct business or seek to conduct business in Fife. CP at 1421-22. The superior court's order upholding Fife's ordinance does not affect any of their personal

rights or pecuniary interests. In short, because Intervenor-Appellants lack standing, it would be improper for the appeal to continue in the absence of MMH.

2. This Appeal Is Also Moot

As a general rule, courts do not consider cases that are moot or present only abstract questions. *State v. Beaver*, 184 Wn.2d 321, 330, 358 P.3d 385 (2015). "'A case is technically moot if the court can no longer provide effective relief.'" *Id*. (quoting *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012)); *see also Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005) (an appeal is moot when the substantial questions originally presented in the trial court no longer exist or a court can no longer provide effective relief).

MMH and Fife reached a settlement. Because the issues underlying the appeal have been resolved by this settlement agreement, this Court can no longer provide effective relief. The appeal is moot.

Further, this Court need not decide this moot appeal. Although courts have discretion to decide a moot appeal if the question is one of continuing and substantial public interest, *Beaver*, 184 Wn.2d at 330, this Court should decline to do so here. In addition to the fundamental problem that Intervenor-Appellants lack standing, there are two reasons for this Court to decline to decide this moot appeal.

First, the state legislature has amended I-502 repeatedly since its enactment, *see, e.g.*, Laws of 2015, ch. 70; Laws of 2015, 2d Spec. Sess., ch. 4, and there is no sign of that trend slowing. Given these frequent

changes, it would be a mistake for this Court to attempt to offer a definitive interpretation of I-502 when no aggrieved party would benefit.

Second, a number of cities and counties across Washington that had previously imposed moratoriums or bans on marijuana businesses now allow such businesses.[1] It now appears that Fife itself is another example. Respondent Fife's Answer to Petition for Discretionary Review, Appendix (Exhibit A to Declaration of Woods). Thus, while there was an initial flurry of litigation challenging such ordinances in 2014, most of those cases have now been dismissed, and few if any new cases challenging local bans have been filed.[2] *See, e.g.*, *City of Clarkston v. Valle Del Rio*, No. 33682-4-III, 2016 WL 6459839 (Wash. Ct. App. Nov. 1, 2016) (unpublished)[3] (court dismissed appeal as moot because the city had repealed its ban, despite the parties urging the court to decide it). Thus, this issue is of rapidly diminishing public significance. To the extent these questions may continue to arise, they should be litigated by parties with a direct interest in the matter.

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[1] *See, e.g.*, Pierce County Ordinance 2015-27s (repealing prior ban on marijuana businesses in unincorporated Pierce County); Wenatchee Ordinance 2014-19 (repealing prior ban on marijuana businesses in Wenatchee).

[2] *See, e.g.*, *Green Collar, LLC v. Pierce County*, No. 14-2-11323-0 (Pierce County Superior Court) (appeal dismissed, Court of Appeals No. 47140-0-II); *SMP Retail, LLC v. City of Wenatchee*, No. 14-2-00555-0 (Chelan County Superior Court) (appeal dismissed, Court of Appeals No. 32911-9-III); *Americanna Weed, LLC v. City of Kennewick*, No. 14-2-02226-1 (Benton County Superior Court) (appeal dismissed, Wash. Sup. Ct. No. 91127-4); *Emerald Enterprises, LLC, v. Clark County*, No. 14-2-00951-9 (Cowlitz County Superior Court; appeal pending, Court of Appeals No. 47068-3-II).

[3] This unpublished opinion is cited pursuant to GR 14.1. It has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

V. CONCLUSION

For these reasons, this Court should deny the Intervenor-Appellants' petition for review.

RESPECTFULLY SUBMITTED this 15th day of March 2017.

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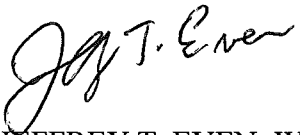

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, by agreement of the parties, a true and correct copy of the foregoing document, upon the following:

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March 15, 2017 - 1:37 PM

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