

65123-4

65123-4

NO. 65123-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

CITY OF SEATTLE, MICHAEL MCGINN, SEATTLE DEPARTMENT  
OF PARKS AND RECREATION, and TIMOTHY A. GALLAGHER,  
Appellants

v.

WINNIE CHAN, ROBERT KENRAR, RAYMOND CARTER, GRAY  
PETERSON, GARY G. GOEDECKE, THE SECOND AMENDMENT  
FOUNDATION, INC., CITIZENS COMMITTEE FOR THE RIGHT TO  
KEEP AND BEAR ARMS, WASHINGTON ARMS COLLECTORS,  
INC., and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,  
Respondents

---

BRIEF OF APPELLANT (CORRECTED)

---

Daniel J. Dunne (WSBA No. 16999)  
George E. Greer (WSBA No. 11050)  
David S. Keenan (WSBA No. 41359)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
701 Fifth Avenue, Suite 5600  
Seattle, WA 98104-7097  
(206) 839-4300

Peter S. Holmes (WSBA No. 15787)  
Gary Keese (WSBA No. 19265)  
SEATTLE CITY ATTORNEY  
600 Fourth Avenue, 4th Floor  
Seattle, WA 98124-4769  
(206) 684-8200

Filed  
10-7-10  
S.S.D.

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR.....	5
A. Assignments of Error .....	5
B. Issues Pertaining to Assignments of Error.....	5
III. STATEMENT OF THE CASE.....	6
A. Statement of Facts.....	6
B. Statement of Procedure .....	8
IV. ARGUMENT .....	9
A. Standard of Review.....	9
B. RCW 9.41.290 Does Not Preempt the Parks Policy.....	10
1. The Washington Supreme Court Has Twice Held That RCW 9.41.290 Does Not Preempt Municipal Rules and Policies Restricting Firearms. ....	12
2. Plaintiffs’ Attempts To Distinguish the Parks Policy From the Rules and Permits Considered in <u>Cherry</u> and <u>Sequim</u> Fail.....	17
a. Plaintiffs Were Wrong in Arguing That the Possibility of a Citation for Trespass Requires Preemption .....	18
b. Plaintiffs Were Wrong in Contending That the Parks Policy Is Preempted Because It Applies to the General Public but Is Not an Exercise of “Proprietary” Powers.....	20
3. The Legislature Preempted “Laws and Ordinances,” but Did Not Expressly Preempt “Policies” and “Rules” in RCW 9.41.290.....	25
C. The Trial Court Erred in Granting an Injunction.....	29
1. Plaintiffs Did Not Establish Clear Legal or Equitable Rights.....	29
a. No Private Right of Action Exists Under the Preemption Statute .....	29

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
b.    No Right Under the United States or Washington Constitutions Was Argued, Presented for Decision, or Established. ....	29
2.    There Was a Genuine Issue of Disputed Fact Whether Plaintiffs Suffered Injury, Which Also Requires Reversal of the Injunction. ....	37
3.    The Trial Court Abused Its Discretion in Failing to Consider the Public Interest.....	41
V.    CONCLUSION.....	42
VI.   APPENDIX	
1.    Final Bill Report, SSB 3782, 1983	

## TABLE OF AUTHORITIES

Page

### FEDERAL CASES

<u>Adderley v. Florida</u> , 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966).....	23
<u>District of Columbia v. Heller</u> , __ U.S. __, 128 S. Ct. 2783 (2008).....	34
<u>McDonald v. Chicago</u> , __ U.S. __, 130 S. Ct. 3020 (2010).....	34, 35

### STATE CASES

<u>Applied Indus. Material Corp. v. Melton</u> , 74 Wn. App. 73, 872 P.2d 87 (1994).....	27, 28, 29
<u>Brower v. Ackerley</u> , 88 Wn. App. 87, 943 P.2d 1141 (1997).....	32
<u>Cherry v. Municipality of Metro. Seattle</u> , 116 Wn.2d 794, 808 P.2d 746 (1991).....	<i>passim</i>
<u>City of Seattle v. Montana</u> , 129 Wn.2d 583, 912 P.2d 1218 (1996).....	36
<u>Burns v. City of Seattle</u> , 161 Wn.2d 129, 164 P.3d 475 (2007).....	10
<u>In re Detention of Williams</u> , 147 Wn.2d 476, 55 P.3d 597 (2002).....	26
<u>Kucera v. State Dep't of Transp.</u> , 140 Wn.2d 200, 995 P.2d 63 (2000) .....	10
<u>Mains Farm Homeowners Ass'n v. Worthington</u> , 121 Wn.2d 810, 854 P.2d 1072 (1993).....	10
<u>Pac. Nw. Shooting Park Ass'n v. City of Sequim</u> , 158 Wn.2d 342, 144 P.3d 276 (2006).....	<i>passim</i>
<u>Reynolds v. Hicks</u> , 134 Wn.2d 491, 951 P.2d 761 (1998).....	9, 10

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<u>Sanders v. City of Seattle</u> , 160 Wn.2d 198, 156 P.3d 874 (2007).....	23
<u>State v. Blair</u> , 65 Wn. App. 64, 827 P.2d 356 (1992).....	23
<u>State v. Morgan</u> , 78 Wn. App. 208, 896 P.2d 731 (1995).....	22
<u>State v. Rodgers</u> , 146 Wn.2d 55, 43 P.3d 1 (2002).....	30
<u>State v. Sieyes</u> , 168 Wn.2d 276, 225 P.3d 995 (2010).....	35, 37
<u>State v. Spencer</u> , 75 Wn. App. 118, 876 P.2d 939 (1994).....	36
<u>Tyler Pipe Indus. Inc. v. State Dep't of Revenue</u> , 96 Wn.2d 785, 638 P.2d 1213 (1982) .....	41, 42
<u>Weden v. San Juan County</u> , 135 Wn.2d 678, 958 P.2d 273 (1998).....	26

**STATE STATUTES**

RCW 9.41 .....	10, 13, 26
RCW 9.41.290 .....	<i>passim</i>
RCW 9.41.300 .....	11
RCW 9.94A.8445(1).....	26
RCW 19.190.110 .....	26
RCW 35A.11.010 .....	22
RCW 46.61.667(5).....	26, 27
RCW 80.50.110(1).....	26
RCW Title 9 .....	15

**TABLE OF AUTHORITIES**  
(continued)

**Page**

RCW Title 35 .....14

**OTHER AUTHORITIES**

Act of Apr. 9, 1985, ch. 428, 1985 Wash. Laws 1866.....27

Civil Rule 56.....3, 4, 33

Final Bill Report, SSB 3782, 1983 .....13

Seattle City Charter, Art. I, § 1 .....21

Seattle City Charter, Art. IV, §§ 7 – 12 .....27

Seattle Mun. Code (SMC) 18.12.040.....28

## **I. INTRODUCTION**

The City of Seattle is understandably concerned for the safety and welfare of the thousands of children and youths who congregate at the parks and recreation facilities owned by the City. The City of Seattle Department of Parks and Recreation promulgated a narrowly drawn policy prohibiting the carrying or display of firearms in certain designated areas of parks and park facilities frequented by children. Respondents challenge that policy.

This appeal focuses exclusively on the construction and scope of RCW 9.41.290, a statute in the Washington Uniform Firearms Act that preempts local governments from enacting laws and ordinances regulating firearms. Fundamentally, this appeal asks whether RCW 9.41.290 strips municipalities of local control over the conditions for use of their own property, such as parks facilities. Although this is a case about guns, this appeal does not present any question whether the policy impermissibly infringes federal or state constitutional rights.

The Seattle Parks Department owns and operates numerous parks and park facilities. The City's parks receive nearly two million visitors each year, of whom hundreds of thousands are children. The City's parks host countless activities for the education and recreation of local children and youth. Recently, a dispute that escalated into a shooting, injuring

bystanders, caused the City to become concerned about the danger firearms pose to innocent visitors to its facilities. In response, in 2009, the Parks Department established a new policy to promote the safety of the children who use these facilities for education and recreation. Exercising its right to set the conditions for guests to be permitted to use its facilities, the Parks Department determined that park visitors carrying deadly firearms would not be permitted to use limited parts of City-owned facilities where children are likely to congregate. This policy was not an ordinance or law, carried no civil or criminal penalties, and did not generally regulate firearms throughout the City's jurisdiction in any way. In fact, visitors were still permitted to carry a lawful firearm throughout most of Seattle's parks, for example, on hiking trails or in open areas.

Respondents are six individuals who have sued the City and the Parks Department over the policy. They all want to carry firearms anywhere in City parks without restriction, including at playgrounds, pools, ball fields, and athletic facilities. Plaintiffs sued for a declaratory judgment that the policy is void because it is a "firearms regulation" that is preempted by RCW 9.41.290. While there is no doubt that the Legislature preempted the field of *penal regulation* of firearms in RCW 9.41.290, Plaintiffs contend that RCW 9.41.290 goes much further—that it bars local governments from prohibiting the carrying of firearms as a condition

of use of the City's own properties. Indeed, similar arguments have been rejected twice by the Washington Supreme Court in Pacific Northwest Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 144 P.3d 276 (2006) and in Cherry v. Municipality of Metropolitan Seattle, 116 Wn.2d 794, 808 P.2d 746 (1991).

In both cases, the Washington Supreme Court examined RCW 9.41.290 under closely analogous circumstances and determined that the Legislature intended to preempt municipalities from enacting a host of inconsistent *criminal* firearms regulations. In both cases, the court upheld local rules and use permits restricting firearms. In defining the contours of the Preemption Statute, the supreme court made clear that RCW 9.41.290 does not extend its reach beyond the traditional contours of penal regulation—that RCW 9.41.290 does not intrude into that separate sphere where cities act in a capacity akin to private owners of real property in setting conditions of use for property they own. The policy here is well within the bounds of the supreme court's holdings and clearly beyond the reach of the Preemption Statute.

The City also asks the Court to reverse the trial court's improvident conclusion that Plaintiffs possess constitutionally protected rights to carry guns in City parks. When Plaintiffs moved under Civil Rule 56 for a declaratory judgment that the policy was preempted by

RCW 9.41.290, Plaintiffs did *not* ask the court to rule on any issue under the United States Constitution or the Washington Constitution. Nevertheless, when it issued a permanent injunction against the City's enforcement of its policy, the trial court reached out and recognized constitutional rights to carry firearms in City parks under both the federal and state constitutions as a legal basis to support that injunction. The court ruled without the benefit of a developed factual record or briefing of these complex and controversial issues. That was error. Because the trial court decided constitutional issues that were not ripe and not presented for decision by the motion on which it ruled, its order granting a permanent injunction based on these constitutional rights must also be reversed.

Finally, even if RCW 9.41.290 preempted the Parks Department policy, Plaintiffs are not entitled to a permanent injunction for two reasons. First, Plaintiffs did not prove that there exists a well-established right to carry firearms in publicly owned municipal parks. Plaintiffs relied on RCW 9.41.290 to establish their legal rights to carry firearms in parks, but this Preemption Statute under the Washington Uniform Firearms Act created no individual rights or remedies. Second, accepting all factual inferences in favor of the non-moving party under Rule 56, Plaintiffs suffered no substantial injury in fact because they were free to possess their firearms throughout most of the parks system, including those open

spaces habitually used for “walks in the parks.” For these reasons, and because the trial court abused its discretion by ignoring the public interest in safe park facilities, the permanent injunction must be vacated.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in entering summary judgment that the policy denying visitors carrying guns permission to enter and use designated City-owned Parks facilities where children are likely to be present “is preempted by state law” and is “null and void.” CP 272.

2. The trial court erred and abused its discretion in permanently enjoining the Seattle Department of Parks and Recreation from enforcing its policy against firearms in portions of City parks frequented by children. CP 272.

### **B. Issues Pertaining to Assignments of Error**

1. Whether a policy of the Seattle Department of Parks and Recreation that denies persons carrying firearms permission to enter portions of City parks frequented by children, but that carries no criminal or civil penalties and does not apply outside of the designated City-owned facilities, is a “law or ordinance” regulating firearms that is preempted by RCW 9.41.290 (Assignment of Error 1.)

2. Whether the City may be enjoined from applying its policy where Plaintiffs have no clearly recognized legal or equitable right to carry firearms into City-owned Parks facilities and have not proved that they have suffered substantial injury that outweighs the public interest.

(Assignment of Error 2.)

3. Whether the trial court erred by reaching out to decide the scope of rights to possess firearms under the Constitutions of the United States and Washington when those constitutional issues were not presented for decision. (Assignment of Error 2.)

### **III. STATEMENT OF THE CASE**

#### **A. Statement of Facts**

On October 14, 2009, the Parks Department enacted Rule/Policy Number P 060-8.14 (the “Parks Policy” or the “Policy”) to make certain City-owned Parks facilities were free from dangerous firearms:

The Department, in its proprietary capacity as owner or manager of Department facilities, does not permit the carrying of concealed firearms or the display of firearms . . . at Parks Department facilities at which: 1) children and youth are likely to be present and, 2) appropriate signage has been posted to communicate to the public that firearms are not permitted at the facility.

CP 124 ¶ 4.0. The Parks Department found that in 2008, over 1.8 million people had visited and attended programs in Seattle Parks Department-owned community centers, pools, teen centers, and environmental learning

centers. CP 121 ¶ 1.2. At least tens of thousands of youths visit these same facilities every year. Id. As the owner of these facilities, the Parks Department recognized that it has an abiding interest in ensuring that the facilities are safe and secure places for children to visit. Id. ¶¶ 1.3-1.4. The Parks Department also found that families' safe and secure use of Parks Department-owned facilities is "disturbed by the threat of intentional or accidental discharges of firearms in the vicinity of children." Id. ¶ 1.6.

To promote its interests in providing safe and secure facilities for children and families, the Parks Department issued the Policy, quoted above. CP 121-122 ¶¶ 1.1-1.2. The Parks Department based its Policy on sound public safety considerations, including:

- "In 2008 . . . over 108,000 children and youth visited wading pools; over 59,000 youth events were scheduled at sports fields; and, countless numbers of children and youth visited playgrounds, play areas, and sports courts." CP 121 ¶ 1.2.
- "As the owner and operator of Department facilities at which children and youth are likely to be present, the City has a strong interest in promoting facility users' and visitors' confidence, particularly families with children, that such facilities are safe and secure places to visit." Id. ¶ 1.3.
- "Carrying concealed firearms and displaying firearms at Department facilities at which children and youth are likely to be present threatens the City's interests in promoting the use of those facilities by children, youth and their families." Id. ¶ 1.4.
- The "safe and secure use of Department facilities is

disturbed by the threat of intentional or accidental discharges of firearms in the vicinity of children, which can result from various unforeseen circumstances, (such as the escalation of disputes among individuals carrying firearms . . . .)” Id. ¶ 1.6.

- “Studies demonstrate that individuals possessing firearms are more likely to be shot in an assault than those who do not have a firearm. . . . It is reasonable for the Department to conclude that more firearms in Parks facilities increases the likelihood that someone will be seriously injured.” CP 122 ¶ 1.10.
- “The City’s and Department’s interests will be promoted by . . . [this] policy . . . .” Id. ¶ 1.12.

CP 116-119. After issuing the Policy, the Parks Department then proceeded to post conspicuous signs advising people of its policy prohibiting firearms in those Parks facilities where children were likely to be present. CP 116 ¶ 4.

#### **B. Statement of Procedure**

On October 28, 2009, Plaintiffs filed a complaint for declaratory and injunctive relief, claiming that the Parks Policy was preempted by RCW 9.41.290 (the “Preemption Statute”). CP 1-12. Plaintiffs are individuals claiming that they suffered harm because they were not permitted to bring firearms into certain Parks facilities and community centers. CP 8-10. On January 15, 2010, Plaintiffs moved for summary judgment on the issue of preemption, requesting a declaratory judgment that the Parks Policy was preempted by RCW 9.41.290, and issuance of a permanent injunction prohibiting the City from enforcing its policy. CP

84-101.

At the hearing on Plaintiffs' Motion for Summary Judgment on February 12, 2010, the Honorable Catherine Shaffer, King County Superior Court Judge, granted Plaintiffs' Motion, concluded that the Parks Policy was preempted by RCW 9.41.290, and declared the Parks Policy null and void. Judge Shaffer also permanently enjoined the Parks Department from enforcing the Parks Policy, finding that: (1) Plaintiffs have a "clear legal or equitable right to carry firearms under federal and state constitutions"; (2) Plaintiffs established a well-grounded fear of invasion of that right; and (3) Plaintiffs established that they had suffered substantial injury. CP 272-73. Defendants timely appealed.

In opposing the motion for summary judgment, Defendants argued that two institutional Plaintiffs—the National Rifle Association and the Second Amendment Foundation—lacked standing to participate as party plaintiffs. CP 156. The trial court agreed, ruled that both institutional plaintiffs lacked standing, and dismissed their claims. CP 273. Neither institutional plaintiff has filed a timely notice of appeal as to that decision.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

An appellate court engages in the "same inquiry as the trial court" when it reviews an order on summary judgment. Reynolds v. Hicks, 134

Wn.2d 491, 495, 951 P.2d 761 (1998). Summary judgment is only appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Id. The motion cannot be granted unless, after considering the facts in the light most favorable to the nonmoving party, reasonable persons could reach but one conclusion. Id. Appellate courts review questions of statutory interpretation de novo. Burns v. City of Seattle, 161 Wn.2d 129, 140, 164 P.3d 475 (2007) (citation omitted). Ordinarily, a trial court's decision to grant an injunction is reviewed for abuse of discretion. Kucera v. State Dep't of Transp., 140 Wn.2d 200, 209, 995 P.2d 63 (2000). However, where the injunction was granted in the summary judgment context, review is de novo. Mains Farm Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 813, 854 P.2d 1072 (1993). Here, the Court is presented with a question of statutory interpretation and an injunction that were decided on summary judgment. Thus, review is de novo.

**B. RCW 9.41.290 Does Not Preempt the Parks Policy**

There is no question that the Washington Uniform Firearms Act, RCW Chapter 9.41, contains a provision that preempts local governments from enacting laws and ordinances regulating firearms:

The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge,

and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter. Such local ordinances shall have the same penalty as provided for by state law. Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.

RCW 9.41.290 (emphasis added). Under this statute, the City of Seattle readily concedes that if it had enacted an ordinance that made it a crime to carry or display a firearm at any location within the city limits where children are likely to be found, that ordinance would have amounted to the regulation of firearms preempted by RCW 9.41.290. But that is not at all what the City has done.

The City's Parks Department issued a policy that carries no criminal or civil penalties and does not apply generally outside of the designated City-owned facilities. As explained in the next section, the Parks Policy falls well within established Washington Supreme Court precedent that allows local governments to set rules and policies relating to guns when the City orders its own affairs, on its own property, notwithstanding RCW 9.41.290.

**1. The Washington Supreme Court Has Twice Held That RCW 9.41.290 Does Not Preempt Municipal Rules and Policies Restricting Firearms**

The Washington Supreme Court has been called on to interpret and construe RCW 9.41.290 in two cases, and in these cases it held that local rules or use conditions banning guns were not preempted. The court has construed RCW 9.41.290 in precisely the manner Appellants request here—to apply only to laws and ordinances of general application, but not to rules, policies, or conditions a city imposes on the permissive use of its own property that carry no criminal penalties.

In Cherry v. Municipality of Metropolitan Seattle, 116 Wn.2d 794, 808 P.2d 746 (1991), a Seattle bus driver challenged the termination of his employment for violating a rule prohibiting guns. The supreme court held that Metro’s internal policy prohibiting its employees from possessing concealed weapons while on duty or on Metro property was not preempted by RCW 9.41.290. Like Appellants here, Metro argued that its workplace rules were not “laws and ordinances” within the scope of the statute and that Metro’s rules did not constitute “firearms regulation” within the scope of RCW 9.41.290. The supreme court agreed, attaching significance to the fact that the Legislature included RCW 9.41.290 in the Washington Uniform Firearms Act. The court found that in enacting and later amending the Preemption Statute, the Legislature sought “to reform that

situation in which counties, cities, and towns could each enact conflicting local criminal codes regulating the general public’s possession of firearms.” Cherry, 116 Wn.2d at 801(emphasis added). The court also observed “[a] complete lack of support for [an extension of the scope of the statute to municipal workplace rules] in the legislative history of the 1983 and 1985 amendments to RCW 9.41.” Id. at 800. Not surprisingly then, the court categorically rejected an expansive construction and found a more limited legislative intent—

We hold that the Legislature, in amending RCW 9.41.290, sought to eliminate a multiplicity of local laws relating to firearms and to advance uniformity in criminal firearms regulation. The Legislature did not intend to interfere with public employers in establishing workplace rules. The “laws and ordinances” preempted are laws of application to the general public, not internal rules for employee conduct.

Id. at 801 (emphasis in original).<sup>1</sup>

The supreme court further reasoned that “[a] review of the legislative history makes clear that RCW 9.41.290 is concerned with creating statewide uniformity of firearms regulation of the general public” and “[s]tatutes should be construed to effect their purpose and courts should avoid unlikely, strained, or absurd results in arriving at an

---

<sup>1</sup> The Final Legislative Bill Report that includes the Preemption Statute confirms the Legislature’s focus on crimes, identifying ten “specified crimes of violence” that may result in the loss of a concealed pistol license and devoting eleven paragraphs to criminal firearms laws. Final Bill Report, SSB 3782, 1983 sess. at 1-3 (attached hereto as Appendix A).

interpretation.” Id. at 802 (citation omitted). Applying that reasoning, the supreme court concluded that it would be absurd if private employers could have workplace rules prohibiting firearms, but municipal employers could not, and equally absurd that Mr. Cherry could be discharged for possession of an electronic cattle prod, but not for the “deadliest of the weapons,” firearms. Id.

In Pacific Northwest Shooting Park Association v. City of Sequim, 158 Wn.2d 342, 144 P.3d 276 (2006), the plaintiffs sought a permit to use the city’s convention center for a gun show. Following standard city policies, the permit application was circulated to fire, police, and other departments for comment before issuance. The Sequim Police Department appended a memorandum imposing various conditions on the permit holder, including several restrictions on sales of firearms at the convention center. The permit holder and a gun dealer sued, contending that imposition of the conditions were preempted by RCW 9.41.290. The city moved for summary judgment, arguing that the plain language of the statute reaches only to “laws and ordinances” of general application to the public, and that read properly in context, the statute preempted only inconsistent criminal firearms regulations. Id. at 353.

In agreeing with the city, the court again highlighted the penal nature of the statute. Although RCW Title 35 is the principal source of

grants and limitations on the power of Washington cities, the Preemption Statute was enacted as part of RCW Title 9, the penal code. Thus, the supreme court again “found the penal nature of the Firearms Act . . . to be particularly significant.” Sequim, 158 Wn.2d at 356 (citing Cherry, 116 Wn.2d at 800-01) (emphasis added). The court explained:

We note that the legislature placed the preemption clause in Title 9 of the Washington criminal code rather than in Title 35, which governs activities of cities and towns . . . . Although this placement is not conclusive of the legislature’s intent, it supports our analysis in Cherry regarding the penal focus of the preemption clause.

Id. at 356 n.6. On this basis, the supreme court again rejected an expansive reading of the statute, reaffirming its ruling in Cherry that “the central purpose of RCW 9.41.290 was to eliminate conflicting municipal criminal codes and to ‘advance uniformity in criminal firearms regulation.’” Id. at 356 (quoting Cherry, 116 Wn.2d at 801) (emphasis in original).

The court then turned to another aspect of Cherry—the distinction between municipal action in a regulatory context and in the exercise of property rights. The court recalled that in Cherry, “[w]e construed the [preemption] clause to apply only to laws or regulations of general application.” Id. (emphasis added). The court thus distinguished between municipal “regulations of general application” and restrictions to protect a

municipality's property interests. In this regard, the court recalled with approval its earlier reasoning that RCW 9.41.290 "could not be construed to prohibit a municipality from doing something that a private employer was not prohibited from doing" without leading to a strained interpretation. *Id.* at 356-57. The court then expanded on this point from its earlier ruling, observing that "Cherry supports the general proposition that when a municipality acts in a capacity that is comparable to that of a private party, the preemption clause does not apply." *Id.* at 357 (emphasis added). Construing the statute and applying these basic principles, the court then held that—

The preemption clause does not prohibit a private property owner from imposing conditions on the sale of firearms on his or her property. RCW 9.41.290. Applying our reasoning in Cherry, it follows that a municipal property owner like a private property owner may impose conditions related to firearms for the use of its property in order to protect its property interests.

*Id.* (emphasis added). In other words, the supreme court held that the Preemption Statute does not preclude municipalities from setting policies or rules that restrict firearms as a condition of use of city property in the same manner that a private property owner may do. This is exactly what the City of Seattle Department of Parks and Recreation has done here—nothing more and nothing less.

Thus, in construing RCW 9.41.290, the Washington Supreme

Court has established clear principles to be applied here:

*First*, both Cherry and Sequim hold that the Firearms Act is penal in nature and that the Preemption Statute was “intended to eliminate conflicting municipal criminal codes and to ‘advance uniformity in criminal firearms regulation.’” Supra.

*Second*, when a municipality acts as a property owner, it may restrict guns as a condition of use of its own property.

In consequence, Plaintiffs must prove both (1) that the Parks Policy is a penal regulation of general application that is inconsistent with State criminal law, and (2) that the City is not acting in the exercise of its rights to control the conditions for use of its *own* property. On the record on summary judgment, Plaintiffs have failed to establish either element.

**2. Plaintiffs’ Attempts To Distinguish the Parks Policy From the Rules and Permits Considered in Cherry and Sequim Fail**

In the trial court, Plaintiffs made two principal arguments to avoid the precedential effect of the supreme court’s decisions in Cherry and Sequim. *First*, Plaintiffs argued that a violation of the Parks Policy might lead to a citation for trespass, and so the Parks Policy was in fact a criminal regulation of guns. *Second*, Plaintiffs argued that the Parks Policy applies to any member of the “general public” who may wish to use a Parks facility, and so it is a “regulation of general application.” In this

same vein, Plaintiffs also argued that the Parks Policy did not involve a contract or lease or other recognized “proprietary” activity involving money, and proprietary actions were the only property interests that the Washington Supreme Court carved out in Cherry and Sequim. For reasons discussed in the following subsections, all of these arguments wither under scrutiny.

**a. Plaintiffs Were Wrong in Arguing That the Possibility of a Citation for Trespass Requires Preemption**

The Parks Policy is both a rule and a policy, promulgated by the Superintendent of the Department of Parks and Recreation. It includes no penalties for enforcement, civil or criminal, and because it was not enacted pursuant to ordinance, of course, it could not include penalties. These facts are not contested.

Instead, Plaintiffs argue that the Policy is a “criminal” wolf in sheep’s clothing because if a Plaintiff willfully violated the Policy by refusing a demand to leave a designated facility, then the recalcitrant Plaintiff could be issued a citation for trespass. Following this roundabout path to a criminal citation, Plaintiffs argue that because they might suffer some criminal repercussions if they contravene the Policy and then refuse to leave as requested, the Policy is preempted. That attenuated bootstrap argument lacks merit. A trespass citation to an unlicensed gun dealer at

the gun show in Sequim would not have transformed the city's permit conditions into criminal regulations of firearms, so it follows that the Parks Policy here is no more a criminal regulation of firearms than the rules in Sequim.

The fatal illogic of Plaintiffs' argument is easily demonstrated. A homeowner's policy against guns in his or her house does not become a "criminal regulation" of firearms simply because a gun-toting man may be cited for criminal trespass if he refuses the homeowner's request to leave. Obviously, in this hypothetical, it is the refusal to leave when permission for entry is revoked—not the fact of carrying a weapon—that gives rise to the trespass citation. So too, if a person's permission to remain at a Parks facility were revoked, it would be the refusal to leave the premises, not the carrying of the weapon, that would constitute the violation that may be penalized. The underlying behavior—whether it be carrying a gun, smoking, running on a pool deck, wearing hard-soled shoes on a tennis court, or any other conduct that violates park rules—is not "criminalized" by the ensuing revocation of permission to remain on another person's property. Plaintiffs elide over the important distinction between the property owner's power to set conditions for use of property and the crime of trespass for refusal to leave property after permission is revoked, but the distinction is legally fundamental.

**b. Plaintiffs Were Wrong in Contending That the Parks Policy Is Preempted Because It Applies to the General Public but Is Not an Exercise of “Proprietary” Powers**

Plaintiffs recognized that Sequim created an exception for municipal permits for private use of property, but argued that the Parks Policy is distinguished because it applies to any member of the “general public” who wants to use a designated Parks facility and does not involve a “permit.” In focusing on the persons potentially affected and the presence or absence of leases or permits, however, Plaintiffs mistake the true import of the supreme court’s rulings in Cherry and Sequim.

The crux of the distinction between preempted local regulation and permitted local control is not the identity of the persons affected. After all, in Sequim, any member of the general public, including “unlicensed dealers,” could have attended the gun show for which the permit was issued, and thus been affected by the significant restrictions on gun sales imposed by the city in its permit. The court devoted none of its preemption analysis to identifying exactly who would be affected, the extent of the impact on the public, or the number of persons affected.

Members of the public do not have an unbridled right to use City parks as they see fit. To illustrate this point quite simply, *no one* has a right to use parks after they close at dark. Visitors who use parks do so as

invited guests, subject to the conditions the City establishes. While the parks are nominally open for use by the “general public,” each and every visitor’s entry is permissive, based on compliance with Park rules and policies, and subject to revocation at any time.

In both Cherry and Sequim, the court focused not on the persons affected, but on the *nature* of the city’s power and, in particular, whether it was acting in a capacity akin to a private business or property owner. The court could not have been clearer on this point—

Applying our reasoning in Cherry, it follows that a municipal property owner like a private property owner may impose conditions related to firearms for the use of its property in order to protect its property interests.

Sequim, 158 Wn.2d at 357 (emphasis added). To emphasize this point, the court in Cherry noted the absurdity that would result from a broad construction of RCW 9.41.290 if a private business could prohibit employees from carrying guns at work but a municipal employer could not. Cherry, 116 Wn.2d at 802. The same illogical result would follow if a private property owner could restrict access to a property, but a municipal property owner could not. It was exactly this asymmetrical right of exclusion between public and private property owners that the court in Sequim avoided in its construction of the Preemption Statute. The City’s charter vests the City with “all rights of property,” Seattle City

Charter, Article I, Section 1, and this includes the right to exclude others, which is at the core of the right of ownership. The Parks Policy is a straightforward exercise of the City's core property rights.

In granting summary judgment, the trial court also mistook the import of the Washington Supreme Court's teachings regarding a municipality's "proprietary" activities. The trial court interpreted Sequim to be limited to facts involving a city's issuance of "a permit for money to operate a gun show on its premises." RP 47:1-2 (emphasis added). In other words, the trial court believed that Sequim's permitting activity was a commercial activity and that the commercial aspect mattered to the supreme court's holding. Of course, nowhere in the Sequim court's decision is there any mention that the convention center permit was issued "for money" or that some pecuniary or profit-based motive was the sine qua non of actions beyond the purview of RCW 9.41.290.

To the contrary, the supreme court's broad holding in Sequim that municipal property owners enjoy the same rights to protect their interests as private property owners is unqualified and indisputable. 158 Wn.2d at 356-58. There is no legal question that the City has been granted the power to "control" its own real property. RCW 35A.11.010 (emphasis added). "A city [ ] may control the use of its property," including public parks, "so long as the restriction is for a lawful nondiscriminatory

purpose.” State v. Morgan, 78 Wn. App. 208, 221, 896 P.2d 731 (1995); State v. Blair, 65 Wn. App. 64, 67, 827 P.2d 356 (1992) (citing Adderley v. Florida, 385 U.S. 39, 47, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966)). The Parks Policy is a lawful exercise of Seattle’s power to preserve facilities the City owns for the safe recreational and educational uses of children and youth for which they were intended. See Sanders v. City of Seattle, 160 Wn.2d 198, 210, 156 P.3d 874 (2007).

Although the court in Sequim does refer to “proprietary” activity in setting conditions for use of a convention center, it is simply the specific facts in that case that demonstrate the larger proposition. The fundamental principle that eluded the trial court is that the ability to act in a so-called “proprietary” capacity—for example, by leasing municipal facilities to conventions, associations, and groups, in return for a fee—*derives* from municipalities’ inherent and broader rights to use and control property *they own*. The rights derived from property *ownership* are the *genesis* of the ability to act in a “proprietary” capacity, not *vice versa*. What Cherry and Sequim recognize, then, is not a narrowly defined category of “proprietary” actions that are beyond preemption, but, instead, a sphere of nonregulatory activity where municipalities order their own property and business affairs, akin to the actions of private businesses and property owners.

As explained in more detail in the next section, the sphere of policy-making activity where cities organize their own affairs is distinct from the legislative sphere where municipalities enact regulations of general applicability. In Sequim, the city set conditions for use of its convention center, but did not generally regulate use of other private venues where gun shows occurred or guns were sold. Similarly, in Cherry, the municipality set work rules for its own Metro employees, but did not generally enact laws regulating employees of private taxi or bus companies who also transport members of the public.

Limiting Sequim to “proprietary” activity would lead to irrational results. For example, a city could require that all facilities permits and leases contain conditions that prohibit any person from carrying a gun (as Seattle already does), but then guns would be allowed in all parks in situations not involving permits. Thus, when the neighborhood soccer, baseball, softball, volleyball, and other league and association activities occur on City fields pursuant to permits, guns could be excluded in their permits, but guns must be permitted at pickup games and informal gatherings. Following this logic, the City of Seattle *could* grant a concession to a vendor to operate and manage all of its parks and include as a contractual condition a rule that no guns be permitted anywhere in the parks, but it could not enforce its own policy to this effect if it directly

operated the parks.

These examples reveal the absurd results that would occur if the identification of a “firearms regulation” turned on the presence or absence of a contract, lease, or permit. Cherry instructs that RCW 9.41.290 must be interpreted to avoid “unlikely, strained, or absurd results,” 116 Wn.2d at 802, and so Plaintiffs’ interpretation of the statute must be rejected. The opinion in Sequim holds that one touchstone for determining if something is a law or ordinance regulating firearms is whether it is of general application throughout the jurisdiction, or whether a city is merely exercising its power as a property owner to establish conditions for entry to property it owns. If Cherry and Sequim teach anything, it is that RCW 9.41.290 is to be interpreted to maintain the equivalency between private and municipal powers to control conduct on one’s own property.

**3. The Legislature Preempted “Laws and Ordinances,” but Did Not Expressly Preempt “Policies” and “Rules” in RCW 9.41.290**

The judgment below must also be reversed for another reason that was not previously decided by the Washington Supreme Court in Cherry or Sequim. RCW 9.41.290 preempts certain “laws and ordinances.” Here, the City of Seattle has not enacted “laws and ordinances,” but has implemented a policy setting conditions for visitors to use its park facilities. In addition to the arguments above, as a simple matter of

statutory construction, RCW 9.41 does not apply because, by its express terms, the statute does not preempt “rules” or “policies.” In interpreting a statute, “[o]missions are deemed to be exclusions.” In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

Because preemption deprives local governments of delegated powers, Washington courts require that the “Legislature must *expressly* indicate an intent to preempt a particular field.” Weden v. San Juan County, 135 Wn.2d 678, 695, 958 P.2d 273 (1998) (emphasis in original). In preempting “laws and ordinances” in RCW 9.41.290, the Legislature did not expressly indicate an intent to preempt local policies and rules. But the Legislature certainly knew how to draft statutes to preempt “rules” and other local actions when this was its intent. In contrast to the exclusive references to “laws and ordinances” in RCW 9.41.290, other preemption statutes make express reference to “rules” and other local administrative actions when the Legislature intends broad preemptive effect. *See, e.g.*, RCW 9.94A.8445(1) (“preempt all rules, regulations, codes, statutes, or ordinances of all cities” (emphasis added)); RCW 19.190.110 (“preempts all rules, regulations, codes, ordinances, and other laws adopted by a city . . . .” (emphasis added)); RCW 46.61.667(5) (preempting “any local laws, ordinances, orders, rules, or regulations . . . .” (emphasis added)); RCW 80.50.110(1) (preempting “any

other law of this state, or any rule or regulation” (emphasis added)).

Because “[a] legislative body is presumed not to have used superfluous words,” Applied Indus. Material Corp. v. Melton, 74 Wn. App. 73, 79, 872 P.2d 87 (1994), the Court should presume that when the Legislature specified the preemption of “ordinances, laws, and rules” in some statutes, e.g., RCW 46.61.667(5), but included only “laws and ordinances” in the statute at issue here, those differences were intentional.

Even when the Legislature substantially modified the Preemption Statute, it left intact the limited references to “laws and ordinances” without extending the reach of the statute to “rules” or “policies.” Act of Apr. 9, 1985, ch. 428, 1985 Wash. Laws 1866, CP 164. (amending RCW 9.41.290)). Thus, when it clarified the preemptive effect of RCW 9.41.290, more than tripling the length of the statute, one of the few things the Legislature did *not* modify was the limitation to “laws and ordinances.”

The distinction between “laws and ordinances” and policies is not mere wordplay—there are meaningful differences reflected in the different processes. Every *legislative* act of the City must be by ordinance, approved by a majority vote of the City Council, signed by the President of the Council, and the subject of “favorable action” by the Mayor. Seattle City Charter, Article IV, Sections 7-12. No bill imposing civil or

criminal penalties may be enacted except through this legislative process, in the manner specified in the City Charter. In contrast, in the exercise of its vested power to “control” its own property, the Parks Superintendent has been delegated the power to manage and control the City’s park and recreation system, including the power to regulate use of parks.

SMC 18.12.040. The Superintendent from time to time issues “policies,” including Departmental policies on trees, wildlife, the environment, arts placement, recreation, alcohol, fires, skateboards, public involvement, non-park uses, and sundry other subjects. Policies and Agreements, <http://www.cityofseattle.net/parks/Publications/policy.htm> (last visited Aug. 23, 2010). None of these departmental policies was enacted through an ordinance as a regulation of general applicability, and none carries criminal (or civil) penalties for noncompliance.

Plaintiffs argued on summary judgment that “rules” and “policies” are equivalent to “laws and ordinances,” but they are not, and the courts should not insert terms into a statute that the Legislature has omitted. “In construing a statute, it is always safer not to add to, or subtract from, the language of the statute unless imperatively required to make it a rational statute.” Applied Indus., 74 Wn. App. at 79 (emphasis added). Because Seattle’s Parks Policy does not purport to be a penal regulation or a regulation of general application, it can hardly be said that reading the

Preemption Statute to cover non-penal policies and rules is “imperatively required to make it a rational statute.” Id. (emphasis added).

**C. The Trial Court Erred in Granting an Injunction**

**1. Plaintiffs Did Not Establish Clear Legal or Equitable Rights**

**a. No Private Right of Action Exists Under the Preemption Statute**

Even if RCW 9.41.290 preempted the Policy, it confers no private right of action on any individual and so cannot be the source of a clear legal or equitable right underlying an injunction. Plaintiffs have not alleged any claim for damages arising under RCW 9.41.290, nor could they, because that statute, included in the *criminal* chapter of the Revised Code of Washington concerning firearms, includes no language reflecting legislative intent to create private rights of action in favor of citizens. In the absence of a clear legal or equitable right, it was error for the trial court to issue a permanent injunction.<sup>2</sup>

**b. No Right Under the United States or Washington Constitutions Was Argued, Presented for Decision, or Established**

Though the issue was neither briefed nor argued below, in granting a permanent injunction, the trial court concluded that Plaintiffs had a constitutional right to carry firearms into Parks facilities. CP 273. It did

---

<sup>2</sup> The court retains the inherent power of contempt, so the court is not without power to enforce its ruling under the Declaratory Judgment Act.

so in contravention of the “well-established rule of judicial restraint that the issue of the constitutionality of a statute will not be passed upon if the case can be decided without reaching that issue.” State v. Rodgers, 146 Wn.2d 55, 60, 43 P.3d 1 (2002). The trial court committed error by deciding the scope of constitutional rights that had not been briefed, argued, or presented for decision.

In their Motion for Summary Judgment, Plaintiffs made a passing introductory reference to a “clearly protected right under the United States and Washington Constitutions.” CP 94; 100. Otherwise, Plaintiffs argued exclusively that RCW 9.41.290 entitled them to an injunction. Similarly, Plaintiffs’ reply brief assiduously avoided *any mention whatsoever* of any alleged right under either constitution. CP 264-70. It could not have been more clear that the Plaintiffs presented no argument for recognition of rights under constitutional law in moving for summary judgment.

At argument on the motion, in response to a question from the Judge, Plaintiffs unequivocally confirmed that they were *not* presenting a federal constitutional argument for decision on the pending motion:

The Court: “You are making any argument under the second amendment?”

Mr. Fogg: “None.”

The Court: “Okay. Why not?”

Mr. Fogg: “I don’t think it’s necessary.”

RP 16: 3-7 (emphasis added). The trial court did not need to ask about the assertion of any right to carry firearms under the State Constitution because Plaintiffs had never mentioned it—either in their motion or their reply brief.

The trial court clearly understood that Plaintiffs had not presented the issue whether they possessed a clear legal or equitable right conferred under constitutional law. As the Court commented during the course of its oral ruling—

The Court: “[T]he plaintiffs [are] not arguing it to me, but there is a recent decision out of the U.S. Supreme Court which is very different from anything the U.S. Supreme Court had said in the past.” RP 37:15-18 (emphasis added).

\* \* \*

The Court: “The scope of that right [to bear firearms] is not crystal clear at this point nor was it briefed here.” RP 38:12-14 (emphasis added).

Additionally, the trial court went on to “agree with the City” that the Second Amendment bore no application at all to the Parks Policy. RP

39:13-15. Nevertheless, the trial court proceeded to make constitutional pronouncements, concluding that Plaintiffs have “clear legal rights under Washington state law and under, in all likelihood, both state and federal constitutional provisions.” RP 50:8-12 (emphasis added). Thus, after acknowledging that the constitutional issues were not briefed or argued, and after agreeing that the Second Amendment did not apply, the trial court concluded that Plaintiffs “have a clear legal or equitable right to carry firearms under the federal and state constitutions.” CP 273. Relying in part on this conclusion, the court entered a permanent injunction in favor of the Plaintiffs. Id.

Just as an appellate court should not decide issues that were neither briefed nor argued in the trial court, Brower v. Ackerley, 88 Wn. App. 87, 96, 943 P.2d 1141 (1997), a trial court should not pass upon an issue that a party specifically declined to argue even in the face of the trial court’s invitation. This reluctance to decide cases based upon issues not arguably before the court owes in part to the fact that, without briefing and without argument, the trial court has no record supporting its decision, and the appellate court is left only to guess at the basis for the ruling below. More importantly, courts avoid such decisions because of the risk of a denial of due process, where parties are not afforded the opportunity to develop and present evidence for dispositive issues they decide.

Here, the trial court reached the constitutional issue in the absence of critical facts a court would need to determine the constitutionality of the Parks Policy under Washington law. Had the issue been briefed and argued, and had the trial court inquired, the City could have presented substantial data supporting its position that the Parks Policy is well within the range of reasonable conditions of use relating to firearms. The City could have presented data concerning the limited areas in certain parks and community centers that were affected by the Parks Policy in contrast to the many Parks facilities and private, state, and federal facilities that remained open to Plaintiffs. The City could also have presented information concerning the number of parks visitors impacted by the Parks Policy, expert testimony on the public interest and safety implications, and other data that could be weighed against the minimal burden on Plaintiffs. Yet because the constitutional issues were not raised by Plaintiffs in their motion under Rule 56, the City was not in a position to respond when the trial court decided the issue without briefing or argument.

No federal court has ever found that a local government policy restricting possession of firearms on government property violates the United States Constitution. In consequence, Plaintiff cannot prove, and

did not prove below,<sup>3</sup> that the Parks Policy violated a clearly established legal right under the United States Constitution. Recent decisions by the United States Supreme Court have not held to the contrary. In 2008, the Supreme Court recognized “an individual right to keep and bear arms.” District of Columbia v. Heller, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2783, 2799 (2008). But the Court in Heller expressly limited its decision to hold nothing more than that “the absolute prohibition of handguns held and used for self-defense in the home” violates the Second Amendment. Id. at 2822 (emphasis added). Beyond the home, the Heller Court emphasized:

Like most rights, the right secured by the Second Amendment is not unlimited . . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.

Id. at 2816-17. (emphasis added) (citations omitted). These same limitations on the scope of the Second Amendment were again carefully and clearly delineated last term in McDonald v. Chicago, \_\_\_ U.S. \_\_\_, 130 S. Ct. 3020, 3047 (2010) (“We made it clear in Heller that our holding did not cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . . We repeat those assurances here.”).

---

<sup>3</sup> In finding a federal constitutional right in this case, the trial court acknowledged the limitations on the right in Heller. RP 39:15-23; id. at 39:13-40:8.

(internal quotation omitted.) The Parks Policy at issue here, of course, makes no intrusion into the home, but at most establishes conditions for use of certain government-owned facilities, without the imposition of civil or criminal penalties.

*After* the trial court’s ruling in this case, our Washington Supreme Court also issued an opinion holding that the Second Amendment does apply to the State of Washington. State v. Sieyes, 168 Wn.2d 276, 282, 225 P.3d 995 (2010).<sup>4</sup> Nevertheless, the Sieyes court did not expound on the scope of the Second Amendment or State constitutional rights because those issues had not been adequately briefed or presented. Id. at 293-94. In consequence, the court declined to analyze the constitutionality of a state criminal statute completely prohibiting minors from possessing firearms “under any level of scrutiny.” Id. at 295. In the final analysis, the opinion in Sieyes does not recognize any *particular* individual right to carry firearms, and in upholding criminal penalties against the defendant for simple possession of a firearm, reaffirms that governments retain authority to regulate gun possession outside the home.

While the parties may dispute the scope of the Preemption Statute

---

<sup>4</sup> Any debate over the effect of the State Supreme Court’s decision as to an issue of federal constitutional law is moot, of course, because this principle was subsequently decided by the United States Supreme Court at the end of its current term. McDonald, 130 S. Ct. at 3050.

and its effect, the constitutionality of the Parks Policy independent of the Preemption Statute should not be in doubt. Washington courts have long held that the “public interest in security, and in having a sense of security, outweighs the individual’s interest in carrying weapons under circumstances that warrant alarm in others.” State v. Spencer, 75 Wn. App. 118, 124, 876 P.2d 939 (1994). Consequently, the Washington Supreme Court has “consistently held that the right to bear arms in art. I, § 24 is not absolute, but instead is subject to ‘reasonable regulation’ by the State under its police power.” City of Seattle v. Montana, 129 Wn.2d 583, 593, 912 P.2d 1218 (1996) (citation omitted). Thus, in order to pass constitutional muster, a regulation touching upon firearms need only be “reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought.” Id. at 594 (citation omitted). As already explained above, of course, the Parks Policy at issue here is not a general regulation of firearms, does not impose criminal or civil penalties, and applies only in government-owned facilities where children are likely to be present, so it falls well within the scope of permissible government activity.

On summary judgment, Plaintiffs made no argument as to the scope of any constitutional rights and certainly made no argument explaining how the Parks Policy violated any recognized constitutional

gun rights. These are issues of complexity and great public controversy and should not have been decided on the record in this case. This is the principal lesson handed down by the supreme court in Sieyes. It was clear error for the trial court to draw conclusions of law on constitutional issues on this record, especially in the face of contrary authority from the United States and Washington Supreme Courts, and so the permanent injunction that was issued on such “rights” must be reversed as an abuse of discretion and a clear error of law.

**2. There Was a Genuine Issue of Disputed Fact Whether Plaintiffs Suffered Injury, Which Also Requires Reversal of the Injunction**

The permanent injunction must also be vacated because the record below revealed a genuine issue of disputed fact whether Plaintiffs suffered any injury, let alone an injury sufficiently substantial as to outweigh the public’s interest in safety at City Parks facilities.

Plaintiffs each filed declarations stating that they used to take walks in parks, such as Alki Beach or Capitol Hill, but as a result of the Policy on guns, they believed that they could no longer use the City’s parks for these purposes. CP 90-93. The City presented un rebutted evidence to the contrary. CP 151-156; CP 117 ¶ 5. While many facilities where children and youths are likely to be present were restricted, the majority of walking areas and trails in City parks were not posted with

signs and remained accessible to all users without any conditions concerning firearms. CP 117 ¶ 5. Even in the facilities that had signs restricting the possession of firearms, the areas covered by the restrictions were often limited to only a small portion of the park, leaving tracts of open recreational space available to Plaintiffs. Id.

The evidence shows that Ms. Chan, Mr. Kennar, Mr. Carter, and Mr. Peterson, all of whom testified that they principally use City parks facilities for walking, may continue to walk with lawful firearms at numerous parks, including places such as Lincoln Park and Discovery Park. Indeed, as they admitted in their depositions, none of the Plaintiffs has made a serious inquiry—by physical observation, telephone, or email—to determine whether the Parks facilities they previously used for walking and hiking remained accessible to persons with guns. In consequence, none of them has proved a substantial injury that should be the subject of an injunction.

**a. Plaintiff Carter**

Plaintiff Raymond Carter is not so much a victim of City policy as a man who has been in search of a way to become involved in firearm activism since well before the Policy was issued. As early as July 2008, nearly a year and half before the Policy in dispute here was issued, Mr. Carter received an e-mail from Dave Workman, communications

director for Plaintiff Second Amendment Foundation (“SAF”), stating that SAF founder “Alan Gottlieb would like to invite you to be a plaintiff in a . . . lawsuit against the City of Seattle and Mayor Greg Nickels.” CP 235. In response, Mr. Carter asked what he would need to do to acquire standing in such a suit: “[P]op down to city hall, meander in to check my gun on the way to a city council meeting, get trespassed out, possibly get arrested . . . .” Id.

With respect to the alleged impact of the Policy, Mr. Carter declares that he “no longer visits” parks like Alki Beach “because they are subject to the city’s Firearms Rule and I do not feel safe going there.” CP 45 ¶ 8. However, in his deposition, Carter admitted that there were times when he would voluntarily visit Alki Beach without his firearm when he planned to go straight from the park to a bar because firearms are prohibited *in bars*. CP 224-225. Given Mr. Carter’s admission that he voluntarily walked Alki Beach without a firearm before the Parks Policy when it conflicted with his plans to visit nearby bars, Mr. Carter has not been substantially injured, and any imposition he suffered is substantially outweighed by the public’s interest in creating a safe and secure environment.

**b. Plaintiffs Chan and Kennar**

In their depositions, Ms. Chan and Mr. Kennar testified that they

visited Seattle parks principally to walk with friends and family, but are now prevented from doing so. CP 191:5-19; CP 206-210. But neither Ms. Chan nor Mr. Kennar has contacted the City to determine which portions of parks remain available to persons carrying firearms and whether any of the trails or beaches they have used in the past have been designated under the Policy. At best, there is an issue of fact whether these Plaintiffs have suffered any injury because Defendants have submitted evidence that the trail and walking areas of the parks they testified they used were not designated under the Policy. CP 117 at ¶ 5.

**c. Plaintiff Peterson**

Before the Policy was issued, Mr. Peterson made only a few visits to Seattle Parks. CP 244-249. After the Policy, Mr. Peterson admitted that he made no effort to ascertain whether parks he uses for walks include areas prohibiting firearms. CP 253:5-22. A possible reason, as Mr. Peterson testified, was his belief that guns are banned from *all* areas of *all* City parks. CP 253:11-22. He is simply mistaken. CP 117 ¶ 5. Again, at best, there is a disputed issue of fact whether Mr. Peterson's customary park usage was even affected so that he has suffered any injury, and if he has, whether it is sufficiently compelling to warrant an injunction.

**d. Plaintiff Goedecke**

Mr. Goedecke's declaration indicates that he travels "through"

Victor Steinbrueck Park on his way to or from Pike Place Market approximately once a month. CP 79 ¶ 8. As with all of the individual Plaintiffs, Mr. Goedecke’s “use” of the park as an occasional throughway when sidewalks are available is at best incidental and insubstantial and does not support issuance of an injunction.

For purposes of this appeal of a ruling under Rule 56, then, the Court must assume that there is a disputed issue of fact as to whether any of these Plaintiffs, none of whom are parents of children, have been prevented from using the Parks facilities they have traditionally used for their stated recreational purposes. Under the circumstances, the trial court committed an abuse of discretion and erred by finding substantial injury on a disputed evidentiary record on a motion under CR 56.

**3. The Trial Court Abused Its Discretion in Failing to Consider the Public Interest**

Even if Plaintiffs had established a clear legal or equitable right, the trial court abused its discretion by failing to balance the interests of the public. Because injunctions are addressed to a court’s equitable powers, “the listed criteria must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public.” Tyler Pipe Indus. Inc. v. State Dep’t of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (emphasis added). Here, the City presented evidence that the Parks Policy was grounded in the public’s interest in

conditions for the safe and secure use of Parks facilities by children and families. CP 116-19. Notwithstanding the City's unrebutted presentation of public interest supporting the Parks Policy, the trial court made no mention at all of any public interest factors, unless one counts the trial court's observation that "the only background" it was aware of was from its "general newspaper readings as a member of the informed public." RP 35:19-22.

Thus, the trial court simultaneously found a legal right that was neither briefed nor argued by Plaintiffs and dismissed without findings the policy interests that were presented by the City. The trial court failed to examine all of the factors mandated in Tyler Pipe, and by failing to consider the public interest, it abused its discretion. Finally, even if the trial court were not required to explain on the record its consideration of all relevant factors, its implicit finding that individual "rights" not even argued by Plaintiffs outweigh the public interest was necessarily a clear abuse of discretion.

## **V. CONCLUSION**

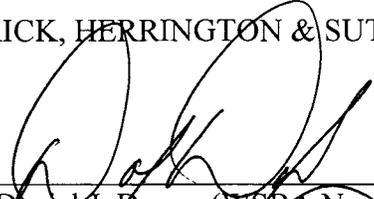
For the reasons stated, Appellants ask that the order granting summary judgment be reversed and that the permanent injunction be vacated.

DATED this 7th day of October, 2010.

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By:



---

Daniel J. Dunne (WSBA No. 16999)  
George E. Greer (WSBA No. 11050)  
David Keenan (WSBA No. 41359)

SEATTLE CITY ATTORNEY  
Peter S. Holmes (WSBA No. 15787)  
Gary Keese (WSBA No. 19265)

Attorneys for Appellants

# ATTACHMENT 2

## REDLINE COMPARISON OF ORIGINAL AND CORRECTED BRIEFS

NO. 65123-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

CITY OF SEATTLE, MICHAEL MCGINN, SEATTLE DEPARTMENT  
OF PARKS AND RECREATION, and TIMOTHY A. GALLAGHER,  
Appellants

v.

WINNIE CHAN, ROBERT KENNER, RAYMOND CARTER, GRAY  
PETERSON, GARY G. GOEDECKE, THE SECOND AMENDMENT  
FOUNDATION, INC., CITIZENS COMMITTEE FOR THE RIGHT TO  
KEEP AND BEAR ARMS, WASHINGTON ARMS COLLECTORS,  
INC., and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,  
Respondents

---

BRIEF OF APPELLANT (CORRECTED)

---

Daniel J. Dunne (WSBA No. 16999)  
George E. Greer (WSBA No. 11050)  
David S. Keenan (WSBA No. 41359)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
701 Fifth Avenue, Suite 5600  
Seattle, WA 98104-7097  
(206) 839-4300

Peter S. Holmes (WSBA No. 15787)  
Gary Keese (WSBA No. 19265)  
SEATTLE CITY ATTORNEY  
600 Fourth Avenue, 4th Floor  
Seattle, WA 98124-4769  
(206) 684-8200

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR.....	5
A. Assignments of Error .....	5
B. Issues Pertaining to Assignments of Error.....	5
III. STATEMENT OF THE CASE.....	6
A. Statement of Facts.....	6
B. Statement of Procedure .....	8
IV. ARGUMENT .....	<u>109</u>
A. Standard of Review.....	<u>109</u>
B. RCW 9.41.290 Does Not Preempt the Parks Policy....	<u>110</u>
1. The Washington Supreme Court Has Twice Held That RCW 9.41.290 Does Not Preempt Municipal Rules and Policies Restricting Firearms. ....	12
2. Plaintiffs’ Attempts To Distinguish <del>The</del> <u>the</u> Parks Policy From <del>The</del> <u>the</u> Rules and Permits Considered in <u>Cherry</u> and <u>Sequim</u> Fail.....	<u>17</u>
a. Plaintiffs Were Wrong <del>In</del> <u>in</u> Arguing That <del>The</del> <u>the</u> Possibility Of <del>A</del> <u>a</u> Citation <del>For</del> <u>for</u> Trespass Requires Preemption .....	18
b. Plaintiffs Were Wrong <del>In</del> <u>in</u> Contending That <del>The</del> <u>the</u> Parks Policy Is Preempted Because It Applies <del>To</del> <u>to</u> <del>The</del> <u>the</u> General Public <del>But</del> <u>but</u> Is Not <del>An</del> <u>an</u> Exercise of “Proprietary” Powers.....	20
3. The Legislature Preempted “Laws and Ordinances,” <del>But</del> <u>but</u> Did Not Expressly Preempt “Policies” <del>And</del> <u>and</u> “Rules” <del>In</del> <u>in</u> RCW 9.41.290 .....	<u>25</u>
C. The Trial Court Erred <del>In</del> <u>in</u> Granting an Injunction.....	29
1. Plaintiffs Did Not Establish Clear Legal or Equitable Rights.....	<u>29</u>
a. No Private Right of Action Exists Under the Preemption Statute .....	<u>29</u>

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
b.    No Right Under the United States or Washington Constitutions Was Argued, Presented for Decision, or Established. ....	<u>3029</u>
2.    There Was Also <del>A</del> <u>a</u> Genuine Issue of Disputed Fact Whether Plaintiffs Suffered Injury, <u>Which Also Requires Reversal of the</u> <u>Injunction</u> . ....	37
3.    The Trial Court Abused Its Discretion in Failing to Consider the Public Interest.....	<u>4241</u>
V.    CONCLUSION.....	<u>4342</u>
<u>VI.    APPENDIX</u>	
<u>1.    Final Bill Report, SSB 3782, 1983</u>	

## TABLE OF AUTHORITIES

Page

### FEDERAL CASES

<u>Adderley v. Florida</u> , 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966).....	23
<u>District of Columbia v. Heller</u> , __ U.S. __, 128 S. Ct. 2783 (2008).....	<u>34, 35</u> <u>34</u>
<u>McDonald v. Chicago</u> , __ U.S. __, 130 S. Ct. 3020 (2010).....	<u>35, 36</u> <u>34, 35</u>

### STATE CASES

<u>Applied Industrial Indus. Material Corp. v. Melton</u> , 74 Wn. App. 73, 872 P.2d 87 (1994).....	27, <u>28</u> , 29
<u>Brower v. Ackerley</u> , 88 Wn. App. 87, 943 P.2d 1141 (1997).....	<u>33</u> <u>32</u>
<u>Cherry v. The Municipality of Metropolitan Metro. Seattle</u> , 116 Wn. 2d 794, 808 P.2d 746 (1991).....	<i>passim</i>
<u>City of Seattle v. Montana</u> , 129 Wn. 2d 583, 912 P.2d 1218 (1996).....	36
<u>Burns v. City of Seattle</u> , 161 Wn. 2d 129, 164 P.3d 475 (2007).....	10
<u>In re Detention of Williams</u> , 147 Wn. 2d 476, 55 P.3d 597 (2002).....	26
<u>Kucera v. State Dep't of Transp.</u> , 140 Wn.2d 200, 995 P.2d 63 (2000) .....	10
<u>Mains Farm Homeowners Ass'n v. Worthington</u> , <u>121 Wn.2d 810, 854 P.2d 1072 (1993).....</u>	<u>10</u>
<u>Pacific Northwest Pac. Nw. Shooting Park Association Ass'n v. City of Sequim</u> , 158 Wn. 2d 342, 144 P.3d 276 (2006).....	<i>passim</i>
<u>Reynolds v. Hicks</u> , 134 Wn. 2d 491, 951 P.2d 761 (1998).....	<u>9</u> , 10

## TABLE OF AUTHORITIES

(continued)

Page

<u>Sanders v. City of Seattle</u> , 160 Wn. 2d 198, 156 P.3d 874 (2007).....	23
<u>State v. Blair</u> , 65 Wn. App. 64, 827 P.2d 356 (1992).....	23
<u>State v. Morgan</u> , <del>209</del> 78 Wn. App. <del>208</del> ..... <u>23208</u> , 896 P.2d 731 (1995).....	<u>22</u>
<u>State v. Rodgers</u> , 146 Wn. 2d 55, 43 P.3d 1 (2002).....	30
<u>State v. Sieyes</u> , 168 Wn. 2d 276, 225 P.3d 995 (2010).....	35, <u>3637</u>
<u>State v. Spencer</u> , 75 Wn. App. 118, 876 P.2d 939 (1994).....	36
<u>Tyler Pipe Indus. Inc. v. State Dep't of Revenue</u> , 96 <del>Wn.</del> 2d 785, 638 P.2d 1213 (1982) .....	<del>42, 43</del> <u>41, 42</u>
<u>Weden v. San Juan County</u> , 135 Wn. 2d 678, 958 P.2d 273 (1998).....	26

## STATE STATUTES

RCW 9.41 .....	10, 13, <u>2526</u>
<del>RCW 9.41.280 .....</del>	<del>35</del>
RCW 9.41.290 .....	<i>passim</i>
RCW 9.41.300 .....	<del>41, 35</del> <u>11</u>
RCW 9.94A.8445(1).....	<u>2726</u>
RCW 19.190.110 .....	<u>2726</u>
RCW 35A.11.010 .....	<u>2322</u>
RCW 46.61.667(5).....	<u>26, 27</u>

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
RCW 80.50.110(1).....	<u>2726</u>
RCW Title 9 .....	15
RCW Title 35 .....	<u>1514</u>

**OTHER AUTHORITIES**

<u>Act of Apr. 9, 1985, ch. 428, 1985 Wash. Laws 1866.....</u>	<u>27</u>
<u>Civil Rule 56.....</u>	<u>3, 4, 33</u>
<u>Final Bill Report, SSB 3782, 1983 .....</u>	<u>13</u>
<u>Seattle City Charter, Art. I, § 1 .....</u>	<u>21</u>
<u>Seattle City Charter, Art. IV, §§ 7 – 12 .....</u>	<u>27</u>
<u>Seattle Mun. Code (SMC) 18.12.040.....</u>	<u>28</u>

## I. INTRODUCTION

The City of Seattle is understandably concerned for the safety and welfare of the thousands of children and youths who congregate at the parks and recreation facilities owned by the City. The City of Seattle Department of Parks and Recreation ~~Department~~ promulgated a narrowly drawn policy prohibiting the carrying or display of firearms in certain designated areas of parks and park facilities frequented by children. Respondents challenge that policy.

This appeal focuses exclusively on the construction and scope of RCW 9.41.290, a statute in the Washington Uniform Firearms Act that preempts local governments from enacting laws and ordinances regulating firearms. Fundamentally, this appeal asks whether RCW 9.41.290 strips municipalities of local control over the conditions for use of their own property, such as parks facilities. Although this is a case about guns, this appeal does not present any question whether the policy impermissibly infringes federal or state constitutional rights.

The Seattle Parks Department owns and operates numerous parks and park facilities. The City's parks receive nearly two million visitors each year, of whom hundreds of thousands are children. The City's parks host countless activities for the education and recreation of local children and youth. Recently, a dispute that escalated into a shooting, injuring

bystanders, caused the City to become concerned about the danger firearms pose to innocent visitors to its facilities. In response, in 2009, the Parks Department established a new policy to promote the safety of the children who use these facilities for education and recreation. Exercising its right to set the conditions for guests to be permitted to use its facilities, the Parks Department determined that park visitors carrying deadly firearms would not be permitted to use limited parts of City-owned facilities where children are likely to congregate. This policy was not an ordinance or law, carried no civil or criminal penalties, and did not generally regulate firearms throughout the City's jurisdiction in any way. In fact, visitors were still permitted to carry a lawful firearm throughout most of Seattle's parks, for example, on hiking trails or in open areas.

Respondents are six individuals who have sued the City and the Parks Department over the policy. They all want to carry firearms anywhere in City parks without restriction, including at playgrounds, pools, ball fields, and athletic facilities. Plaintiffs sued for a declaratory judgment that the policy is void because it is a "firearms regulation" that is preempted by RCW 9.41.290. While there is no doubt that the Legislature preempted the field of *penal regulation* of firearms in RCW 9.41.290, Plaintiffs contend that RCW 9.41.290 goes much further—      that it bars local governments from prohibiting the carrying of firearms as a condition of use

of the City's own properties. Indeed, similar arguments have been rejected twice by the Washington Supreme Court in Pacific Northwest Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 144 P.3d 276 (2006), and in Cherry v. Municipality of Metropolitan Seattle, 116 Wn.2d 794, 808 P.2d 746 (1991).

In both cases, the Washington Supreme Court examined RCW 9.41.290 under closely analogous circumstances, and determined that the Legislature intended to preempt municipalities from enacting a host of inconsistent *criminal* firearms regulations. In both cases, the court upheld local rules and use permits restricting firearms. In defining the contours of the ~~preemption statute, the Supreme Court~~ Preemption Statute, the supreme court made clear that RCW 9.41.290 does not extend its reach beyond the traditional contours of penal regulation—that RCW 9.41.290 does not intrude into that separate sphere where cities act in a capacity akin to private owners of real property in setting conditions of use for property they own. The policy here is well within the bounds of the ~~Supreme Court's~~ supreme court's holdings, and clearly beyond the reach of the ~~preemption statute~~ Preemption Statute.

The City also asks the Court to reverse the trial court's improvident conclusion that Plaintiffs possess constitutionally protected rights to carry guns in City parks. When Plaintiffs moved under Civil Rule 56 for a

declaratory judgment that the policy was preempted by RCW 9.41.290, Plaintiffs did *not* ask the court to rule on any issue under the United States Constitution or the Washington Constitution. Nevertheless, when it issued a permanent injunction against the City's enforcement of its policy, the trial court reached out and recognized constitutional rights to carry firearms in City parks under both the federal and state constitutions as a legal basis to support that injunction. The court ruled without the benefit of a developed factual record or briefing of these complex and controversial issues. That was error. Because the trial court decided constitutional issues that were not ripe and not presented for decision by the motion on which it ruled, its order granting a permanent injunction based on these constitutional rights must also be reversed.

Finally, even if RCW 9.41.290 preempted the Parks Department policy, Plaintiffs are not entitled to a permanent injunction for two reasons. First, Plaintiffs did not prove that there exists a well \_established right to carry firearms in publicly owned municipal parks. Plaintiffs relied on RCW 9.41.290 to establish their legal rights to carry firearms in parks, but this ~~preemption statute~~ Preemption Statute under the Washington Uniform Firearms Act created no individual rights or remedies. Second, accepting all factual inferences in favor of the non-moving party under Rule 56, Plaintiffs suffered no substantial injury in fact because they were free to

possess their firearms throughout most of the parks system, including those open spaces habitually used for “walks in the parks.” For these reasons, and because the trial court abused its discretion by ignoring the public interest in safe ~~parks~~park facilities, the permanent injunction must be vacated.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in entering summary judgment that the policy denying visitors carrying guns permission to enter and use designated City-owned Parks facilities where children are likely to be present “is preempted by state law” and is “null and void.” CP 272.

2. The trial court erred and abused its discretion in permanently enjoining the Seattle Department of Parks and Recreation from enforcing its ~~rule~~policy against firearms in portions of City parks frequented by children. CP 272.

### **B. Issues Pertaining to Assignments of Error**

1. Whether a policy of the Seattle Department of Parks and Recreation that denies persons carrying firearms permission to enter portions of City parks frequented by children, but that carries no criminal or civil penalties and does not apply outside of the designated City-owned

facilities, is a “law or ordinance” regulating firearms that is preempted by RCW 9.41.290 (Assignment of Error 1.)

2. Whether the City may be enjoined from applying its policy where Plaintiffs have no clearly recognized legal or equitable right to carry firearms into City-owned Parks facilities, and have not proved that they have suffered substantial injury that outweighs the public interest. (Assignment of Error 2.)

3. Whether the trial court erred by reaching out to decide the scope of rights to possess firearms under the Constitutions of the United States and Washington when those constitutional issues were not presented for decision. (Assignment of Error 2.)

### **III. STATEMENT OF THE CASE**

#### **A. Statement of Facts**

On October 14, 2009, the Parks Department enacted Rule/Policy Number P 060-8.14 (the “Parks Policy” or the “Policy”); to make certain City-owned Parks facilities were free from dangerous firearms:

The Department, in its proprietary capacity as owner or manager of Department facilities, does not permit the carrying of concealed firearms or the display of firearms . . . at Parks Department facilities at which: 1) children and youth are likely to be present and, 2) appropriate signage has been posted to communicate to the public that firearms are not permitted at the facility.

CP 124 at ¶ 4.0. The Parks Department found that in 2008, over 1.8 million people had visited and attended programs in Seattle Parks Department-owned community centers, pools, teen centers, and environmental learning centers. CP 121 at ¶ 1.2. At least tens of thousands of youths visit these same facilities every year. Id. As the owner of these facilities, the Parks Department recognized that it has an abiding interest in ensuring that the facilities are safe and secure places for children to visit. Id. at ¶¶ 1.3-1.41.4. The Parks Department also found that families' safe and secure use of Parks Department-owned facilities is "disturbed by the threat of intentional or accidental discharges of firearms in the vicinity of children." Id. at ¶ 1.6.

To promote its interests in providing safe and secure facilities for children and families, the Parks Department issued the Policy, quoted above. CP 121-122 at ¶¶ 1.1-1.2. The Parks Department based its Policy on sound public safety considerations, including:

- "In 2008 . . . over 108,000 children and youth visited wading pools; over 59,000 youth events were scheduled at sports fields; and, countless numbers of children and youth visited playgrounds, play areas, and sports courts." CP 121 at ¶ 1.2.
- "As the owner and operator of Department facilities at which children and youth are likely to be present, the City has a strong interest in promoting facility users' and visitors' confidence, particularly families with children, that such facilities are safe and secure places to visit." Id. at ¶ 1.3.

- “Carrying concealed firearms and displaying firearms at Department facilities at which children and youth are likely to be present threatens the City’s interests in promoting the use of those facilities by children, youth and their families.” Id. at ¶ 1.4.
- The “safe and secure use of Department facilities is disturbed by the threat of intentional or accidental discharges of firearms in the vicinity of children, which can result from various unforeseen circumstances, (such as the escalation of disputes among individuals carrying firearms . . . .)” Id. at ¶ 1.61.6.
- “Studies demonstrate that individuals possessing firearms are more likely to be shot in an assault than those who do not have a firearm. . . . It is reasonable for the Department to conclude that more firearms in Parks facilities increases the likelihood that someone will be seriously injured.” CP 122 at ¶ 1.10.
- “The City’s and Department’s interests will be promoted by . . . [this] policy . . . .” Id. at ¶ 1.12.

CP 116-119. After issuing the Policy, the Parks Department then proceeded to post conspicuous signs advising people of its policy prohibiting firearms in those Parks facilities where children were likely to be present. CP 116 at ¶ 4.

#### **B. Statement of Procedure**

On October 28, 2009, Plaintiffs filed a complaint for declaratory and injunctive relief, claiming that the Parks Policy was preempted by RCW 9.41.290 (the “Preemption Statute”). CP 1-12. Plaintiffs are individuals claiming that they suffered harm because they were not permitted to bring firearms into certain Parks facilities and community centers. CP 8-10. On January 15, 2010, Plaintiffs moved for summary judgment on the issue of

preemption, requesting a declaratory judgment that the Parks Policy was preempted by RCW 9.41.290, and issuance of a permanent injunction prohibiting the City from enforcing its policy. CP 84-101.

At the hearing on Plaintiffs' Motion for Summary Judgment on February 12, 2010, the Honorable Catherine Shaffer, King County Superior Court Judge, granted Plaintiffs' Motion, concluded that the Parks Policy was preempted by RCW 9.41.290, and declared the Parks Policy null and void. Judge Shaffer also permanently enjoined the Parks Department from enforcing the Parks Policy, finding that: (1) Plaintiffs have a "clear legal or equitable right to carry firearms under federal and state constitutions"; (2) Plaintiffs established a well-grounded fear of invasion of that right; and (3) Plaintiffs established that they had suffered substantial injury. CP 272-73. Defendants timely appealed.

In opposing the motion for summary judgment, Defendants argued that two institutional Plaintiffs—the National Rifle Association and the Second Amendment Foundation—lacked standing to participate as party plaintiffs. CP 156. The trial court agreed, ruled that both institutional plaintiffs lacked standing, and dismissed their claims. CP 273. Neither institutional plaintiff has filed a timely notice of appeal as to that decision.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

An appellate court engages in the “same inquiry as the trial court” when it reviews an order on summary judgment. Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Summary judgment is only appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Id. The motion cannot be granted unless, after considering the facts in the light most favorable to the nonmoving party, reasonable persons could reach but one conclusion. Id. Appellate courts review questions of statutory interpretation de novo. Burns v. City of Seattle, 161 Wn.2d 129, 140, 164 P.3d 475 (2007) (citation omitted). Ordinarily, a trial court’s decision to grant an injunction is reviewed for abuse of discretion. Kucera v. State Dep’t of Transp., 140 Wn.2d 200, 209, 995 P.2d 63 (2000). However, where the injunction was granted in the summary judgment context, review is de novo. Mains Farm Homeowners Ass’n v. Worthington, 121 Wn.2d 810, 813, 854 P.2d 1072 (1993). Here, the Court is presented with a question of statutory interpretation and an injunction that were decided on summary judgment. Thus, review is de novo.

**B. RCW 9.41.290 Does Not Preempt the Parks Policy.**

There is no question that the Washington Uniform Firearms Act, RCW Chapter 9.41, contains a provision that preempts local governments from enacting laws and ordinances regulating firearms:

The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter. Such local ordinances shall have the same penalty as provided for by state law. Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.

RCW 9.41.290 (emphasis added). Under this statute, the City of Seattle readily concedes that if it had enacted an ordinance that made it a crime to carry or display a firearm at any location within the city limits where children are likely to be found, that ordinance would have amounted to the regulation of firearms preempted by RCW 9.41.290. But that is not at all what the City has done.

The City's Parks Department ~~passed~~issued a policy that carries no criminal or civil penalties, and does not apply generally outside of the

designated City-owned facilities. As explained in the next section, the Parks Policy falls well within well-established Washington Supreme Court precedent that allows local governments to set rules and policies relating to guns when the City orders its own affairs, on its own property, notwithstanding RCW 9.41.290.

**1. The Washington Supreme Court Has Twice Held That RCW 9.41.290 Does Not Preempt Municipal Rules and Policies Restricting Firearms.**

The Washington Supreme Court has been called on to interpret and construe RCW 9.41.290 in two cases, and in these cases it held that local rules or use conditions banning guns were not preempted. The court has construed RCW 9.41.290 in precisely the manner Appellants request here—to apply only to laws and ordinances of general application, but not to rules, policies, or conditions a city imposes on the permissive use of its own property that carry no criminal penalties.

In Cherry v. The Municipality of Metropolitan Seattle, 116 Wn.2d 794, 808 P.2d 746 (1991), a Seattle bus driver challenged the termination of his employment for violating a rule prohibiting guns. The Supreme Court held that Metro’s internal policy prohibiting its employees from possessing concealed weapons while on duty or on Metro property was not preempted by RCW 9.41.290. Like Appellants here, Metro argued that its workplace rules were not “laws and ordinances”

within the scope of the statute; and that Metro’s rules did not constitute “firearms regulation” within the scope of RCW 9.41.290. The ~~Supreme Court~~supreme court agreed, attaching significance to the fact that the Legislature included RCW 9.41.290 in the Washington Uniform Firearms Act. The court found that in enacting and later amending the ~~preemption statute~~Preemption Statute, the Legislature sought “to reform that situation in which counties, cities, and towns could each enact conflicting local criminal codes regulating the general public’s possession of firearms.” Cherry, 116 Wn.2d at 801-801(emphasis added). The court also observed “[a] complete lack of support for [an extension of the scope of the statute to municipal workplace rules] in the legislative history of the 1983 and 1985 amendments to RCW 9.41.” Id. at 800. Not surprisingly then, the court categorically rejected an expansive construction and found a more limited legislative intent—

We hold that the Legislature, in amending RCW 9.41.290, sought to eliminate a multiplicity of local laws relating to firearms and to advance uniformity in criminal firearms regulation. The Legislature did not intend to interfere with public employers in establishing workplace rules. The “laws and ordinances” preempted are laws of application to the general public, not internal rules for employee conduct.

Id. at 801 (emphasis in original).<sup>1</sup>

---

<sup>1</sup> The Final Legislative Bill Report that includes the Preemption Statute confirms the Legislature’s focus on crimes, identifying ten “specified crimes of violence” that may result in the loss of a concealed pistol license; and devoting eleven paragraphs to criminal

The ~~Supreme Court~~supreme court further reasoned that “[a] review of the legislative history makes clear that RCW 9.41.290 is concerned with creating statewide uniformity of firearms regulation of the general public” and “[s]tatutes should be construed to effect their purpose and courts should avoid unlikely, strained, or absurd results in arriving at an interpretation.” Id. at 802 (citation omitted). Applying that reasoning, the ~~Supreme Court~~supreme court concluded that it would be absurd if private employers could have workplace rules prohibiting firearms, but municipal employers could not, and equally absurd that Mr. Cherry could be discharged for possession of an electronic cattle prod, but not for the “deadliest of the weapons,” firearms. Id.

In Pacific Northwest Shooting Park Association v. City of Sequim, 158 Wn.2d 342, 144 P.3d 276 (2006), the plaintiffs sought a permit to use the city’s convention center for a gun show. Following standard city policies, the permit application was circulated to fire, police, and other departments for comment before issuance. The Sequim ~~police~~Police Department appended a memorandum imposing various conditions on the permit- holder, including several restrictions on sales of firearms at the convention center. The permit- holder and a gun dealer sued, contending that imposition of the conditions were preempted by RCW

---

firearms laws. Final Bill Report, SSB 3782, 1983 sess. at 1-3 (attached hereto as Appendix

9.41.290. The city moved for summary judgment, arguing that the plain language of the statute reaches only to “laws and ordinances” of general application to the public, and that read properly in context, the statute preempted only inconsistent criminal firearms regulations. Id. at 353,353.

In agreeing with the city, the court again highlighted the penal nature of the statute. Although RCW Title 35 is the principal source of grants and limitations on the power of Washington cities, the Preemption Statute was enacted as part of RCW Title 9, the penal code. Thus, the ~~Supreme Court~~supreme court again “found the penal nature of the Firearms Act . . . to be particularly significant.” Sequim, 158 Wn.2d at 356 (citing Cherry v. Mun. of Metro. Seattle, 116 Wn.2d at 800-01) (emphasis added).

The court explained:

We note that the legislature placed the preemption clause in Title 9 of the Washington criminal code rather than in Title 35, which governs activities of cities and towns . . . . Although this placement is not conclusive of the legislature’s intent, it supports our analysis in Cherry regarding the penal focus of the preemption clause.

Id. at 356 n.6. On this basis, the ~~Supreme Court~~supreme court again rejected an expansive reading of the statute, reaffirming its ruling in Cherry that “the central purpose of RCW 9.41.290 was to eliminate conflicting municipal criminal codes and to ‘advance uniformity in criminal firearms

---

A).

regulation.” Id. at 356 (quoting Cherry, 116 Wn.2d at 801) (emphasis in original).

The court then turned to another aspect of Cherry—the distinction between municipal action in a regulatory context, and in the exercise of property rights. The court recalled that in Cherry, “[w]e construed the [preemption] clause to apply only to laws or regulations of general application.” Id. (emphasis added). The court thus distinguished between municipal “regulations of general application,” and restrictions to protect a municipality’s property interests. In this regard, the court recalled with approval its earlier reasoning that RCW 9.41.290 “could not be construed to prohibit a municipality from doing something that a private employer was not prohibited from doing” without leading to a strained interpretation. Id. at 356-57. The court then expanded on this point from its earlier ruling, observing that “Cherry supports the general proposition that when a municipality acts in a capacity that is comparable to that of a private party, the preemption clause does not apply.” Id. at 357.357 (emphasis added). Construing the statute and applying these basic principles, the court then held that—

The preemption clause does not prohibit a private property owner from imposing conditions on the sale of firearms on his or her property. RCW 9.41.290. Applying our reasoning in Cherry, it follows that a municipal property owner like a private property owner may impose conditions

related to firearms for the use of its property in order to protect its property interests.

Id. (emphasis added). In other words, the ~~Supreme Court~~supreme court held that the ~~preemption statute~~Preemption Statute does not preclude municipalities from setting policies or rules that restrict firearms as a condition of use of city property in the same manner that a private property owner may do so. This is exactly what the City of Seattle Department of Parks and Recreation has done here—nothing more and nothing less.

Thus, in construing RCW 9.41.290, the Washington Supreme Court has established clear principles to be applied here:

*First*, both Cherry and Sequim hold that the Firearms Act is penal in nature; and that the ~~preemption statute~~Preemption Statute was “intended to eliminate conflicting municipal criminal codes and to ‘advance uniformity in criminal firearms regulation.’” (~~See citations above.~~)Supra.

*Second*, when a municipality acts as a property owner, it may restrict guns as a condition of use of its own property.

In consequence, Plaintiffs must prove both (1) that the Parks Policy is a penal regulation of general application that is inconsistent with ~~state~~State criminal law, and (2) that the City is not acting in the exercise of its rights to control the conditions for use of its *own* property. On the record on summary judgment, Plaintiffs have failed to establish either element.

**2. Plaintiffs' Attempts To Distinguish ~~The~~the Parks Policy From ~~The~~the Rules and Permits Considered in Cherry and Sequim Fail.**

In the trial court, Plaintiffs made two principal arguments to avoid the precedential effect of the ~~Supreme Court~~supreme court's decisions in Cherry and Sequim. *First*, Plaintiffs argued that a violation of the Parks Policy might lead to a citation for trespass, and so the Parks Policy was in fact a criminal regulation of guns. *Second*, Plaintiffs argued that the Parks Policy applies to any member of the "general public" who may wish to use a Parks facility, and so it is a "regulation of general application." In this same vein, Plaintiffs also argued that the Parks Policy did not involve a contract or lease or other recognized "proprietary" activity involving money, and proprietary actions were the only property interests that the Washington Supreme Court carved out in Cherry and Sequim. For reasons discussed in the following subsections, all of these arguments wither under scrutiny.

**a. Plaintiffs Were Wrong ~~In~~in Arguing That ~~The~~the Possibility Of ~~A~~a Citation For ~~for~~ Trespass Requires Preemption.**

The Parks Policy is both a rule and a policy, promulgated by the Superintendent of the Department of Parks and Recreation. It includes no penalties for enforcement, civil or criminal, and because it was not enacted pursuant to ordinance, of course, it could not include penalties. These facts are not contested.

Instead, Plaintiffs argue that the Policy is a “criminal” wolf in sheep’s clothing because, if a Plaintiff willfully violated the Policy by refusing a demand to leave a designated facility, then the recalcitrant Plaintiff could be issued a citation for trespass. Following this roundabout path to a criminal citation, Plaintiffs argue that because they might suffer some criminal repercussions if they contravene the Policy and then refuse to leave as requested, the Policy is preempted. That attenuated bootstrap argument lacks merit. A trespass citation to an unlicensed gun dealer at the gun show in Sequim would not have transformed the city’s permit conditions into criminal regulations of firearms, so it follows that the Parks Policy here is no more a criminal regulation of firearms than the rules in Sequim.

The fatal illogic of ~~Plaintiff’s~~Plaintiffs’ argument is easily demonstrated. A homeowner’s policy against guns in his or her house does not become a “criminal regulation” of firearms simply because a gun-toting man may be cited for criminal trespass if he refuses the homeowner’s request to leave. Obviously, in this hypothetical, it is the refusal to leave when permission for entry is revoked——not the fact of carrying a weapon——that gives rise to the trespass citation. So too, if a person’s permission to remain at a Parks facility were revoked, it would be the refusal to leave the premises, not the carrying of the weapon, that would constitute the

violation that may be penalized. The underlying behavior—whether it be carrying a gun, smoking, running on a pool deck, wearing hard-soled shoes on a tennis court, or any other conduct that violates park rules—is not “criminalized” by the ensuing revocation of permission to remain on another person’s property. Plaintiffs elide over the important distinction between the property owner’s power to set conditions for use of property, and the crime of trespass for refusal to leave property after permission is revoked, but the distinction is legally fundamental.

**b. Plaintiffs Were Wrong In Contending That The Parks Policy Is Preempted Because It Applies To The General Public But Is Not An Exercise of “Proprietary” Powers.**

Plaintiffs recognized that Sequim created an exception for municipal permits for private use of property, but argued that the Parks Policy is distinguished because it applies to any member of the “general public” who wants to use a designated Parks facility and does not involve a “permit.” In focusing on the persons potentially affected, and the presence or absence of leases or permits, however, Plaintiffs mistake the true import of the ~~Supreme Court~~ supreme court’s rulings in Cherry and Sequim.

The crux of the distinction between preempted local regulation and permitted local control is not the identity of the persons affected. After all, in Sequim, any member of the general public, including “unlicensed

dealers,” could have attended the gun show for which the permit was issued, and thus been affected by the significant restrictions on gun sales imposed by the city in its permit. The ~~Supreme Court~~court devoted none of its preemption analysis to identifying exactly who would be affected, the extent of the impact on the public, or the number of persons affected.

Members of the public do not have an unbridled right to use City parks as they see fit. To illustrate this point quite simply, *no one* has a right to use parks after they close at dark. Visitors who use parks do so as invited guests, subject to the conditions the City establishes. While the parks are nominally open for use by the “general public,” each and every visitor’s entry is permissive, based on compliance with Park rules and policies, and subject to revocation at any time.

In both Cherry and Sequim, the court focused not on the persons affected, but on the *nature* of the city’s power; and, in particular, whether it was acting in a capacity akin to a private business or property owner. The court could not have been clearer on this point—

Applying our reasoning in Cherry, it follows that a municipal property owner like a private property owner may impose conditions related to firearms for the use of its property in order to protect its property interests.

Sequim, 158 Wn.2d at 357-357 (emphasis added). To emphasize this point, the court in Cherry noted the absurdity that would result from a broad

construction of RCW 9.41.290 if a private business could prohibit employees from carrying guns at work but a municipal employer could not. Cherry, 116 Wn.2d at 802. The same illogical result would follow if a private property owner could restrict access to a property, but a municipal property owner could not. It was exactly this asymmetrical right of exclusion between public and private property owners that the court in Sequim avoided in its construction of the ~~preemption statute~~ Preemption Statute. The City's charter vests the City with "all rights of property," Seattle City Charter, Article I, Section 1, and this includes the right to exclude others, which is at the core of the right of ownership. The Parks Policy is a ~~straight forward~~ straightforward exercise of the City's core property rights.

In granting summary judgment, the trial court also mistook the import of the Washington Supreme Court's teachings regarding a municipality's "proprietary" activities. The trial court interpreted Sequim to be limited to facts involving a city's issuance of "a permit for money to operate a gun show on its premises." RP 47: 1-2 (emphasis added). In other words, the trial court believed that Sequim's permitting activity was a commercial activity and that the commercial aspect mattered to the ~~Supreme Court~~ supreme court's holding. Of course, nowhere in the ~~Supreme Court~~ Sequim court's decision is there any mention that the

convention center permit was issued “for money;” or that some pecuniary or profit-based motive was the sine qua non of actions beyond the purview of RCW 9.41.290.

To the contrary, the ~~Supreme Court~~supreme court’s broad holding in Sequim that municipal property owners enjoy the same rights to protect their interests as private property owners is unqualified, and indisputable. 158 Wn.2d at 356-58. There is no legal question that the City has been granted the power to “control” its own real property. RCW ~~35A.41.010~~11.010 (emphasis added). “A city [ ] may control the use of its property,” including public parks, “ so long as the restriction is for a lawful nondiscriminatory purpose.” State v. Morgan, 78 Wn. App. 208, 221, 896 P.2d 731 (1995); State v. Blair, 65 Wn. App. 64, 67, 827 P.2d 356 (1992) (citing Adderley v. Florida, 385 U.S. 39, 47, 87 S. Ct. 242, 17 L. Ed. 2d 149, 87 S. Ct. 242149 (1966)). The Parks Policy is a lawful exercise of Seattle’s power to preserve facilities the City owns for the safe recreational and educational uses of children and youth for which they were intended. See Sanders v. City of Seattle, 160 Wn.2d 198, 210, 156 P.3d 874 (2007).

Although the court in Sequim does refer to “proprietary” activity in setting conditions for use of a convention center, it is simply the specific facts in that case that demonstrate the larger proposition. The fundamental principle that eluded the trial court is that the ability to act in a so-called

“proprietary” capacity——for example, by leasing municipal facilities to conventions, associations, and groups, in return for a fee——*derives* from municipalities’ inherent and broader rights to use and control property *they own*. The rights derived from property *ownership* are the *genesis* of the ability to act in a “proprietary” capacity, not *vice versa*. What Cherry and Sequim recognize, then, is not a narrowly defined category of “proprietary” actions that are beyond preemption, but, instead, a sphere of ~~non-regulatory~~nonregulatory activity where municipalities order their own property and business affairs, akin to the actions of private businesses and property owners.

As explained in more detail in the next section, the sphere of policy-making activity where cities organize their own affairs is distinct from the legislative sphere where municipalities enact regulations of general applicability. In Sequim, the city set conditions for use of its convention center, but did not generally regulate use of other private venues where gun shows occurred or guns were sold. Similarly, in Cherry, the municipality set work rules for its own Metro employees, but did not generally enact laws regulating employees of private taxi or bus companies who also transport members of the public.

Limiting Sequim to “proprietary——” activity would lead to irrational results. For example, a city could require that all facilities permits and

leases contain conditions that prohibit any person from carrying a gun (as Seattle already does), but then guns would be allowed in all parks in situations not involving permits. Thus, when the neighborhood soccer, baseball, softball, volleyball, and other league and association activities occur on City fields pursuant to permits, guns could be excluded in their permits, but guns must be permitted at ~~pick-up~~pickup games and informal gatherings. Following this logic, the City of Seattle *could* grant a concession to a vendor to operate and manage all of its parks, and include as a contractual condition a rule that no guns be permitted anywhere in the parks, but it could not enforce its own policy to this effect if it directly operated the parks.

These examples reveal the absurd results that would occur if the identification of a “firearms regulation” turned on the presence or absence of a contract, lease, or permit. Cherry instructs that RCW 9.41.290 must be interpreted to avoid “unlikely, strained, or absurd results,” 116 Wn.2d at 802, and so Plaintiffs’ interpretation of the statute must be rejected. The opinion in Sequim holds that one touchstone for determining if something is a law or ordinance regulating firearms is whether it is of general application throughout the jurisdiction, or whether a city is merely exercising its power as a property owner to establish conditions for entry to property it owns. If Cherry and Sequim teach anything, it is that RCW 9.41.290 ~~are~~is to be

interpreted to maintain the equivalency between private and municipal powers to control conduct on one's own property.

**3. The Legislature Preempted “Laws and Ordinances,” ~~But~~ Did Not Expressly Preempt “Policies” ~~And~~ “Rules” ~~In~~ RCW 9.41.290.**

The judgment below must also be reversed for another reason that was not previously decided by the Washington Supreme Court in Cherry or Sequim. RCW 9.41.290 preempts certain “laws and ordinances.” Here, the City of Seattle has not enacted “laws and ordinances,” but has implemented a policy setting conditions for visitors to use its park facilities. In addition to the arguments above, as a simple matter of statutory construction, RCW 9.41 does not apply because, by its express terms, the statute does not preempt “rules” or “policies.” In interpreting a statute, “[o]missions are deemed to be exclusions.” In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

Because preemption deprives local governments of delegated powers, Washington courts require that the “Legislature must *expressly* indicate an intent to preempt a particular field.” Weden v. San Juan County, 135 Wn.2d 678, 695, 958 P.2d 273 (1998) (emphasis in original). In preempting “laws and ~~ordinances~~ ordinances” in RCW 9.41.290, the Legislature did not expressly indicate an intent to preempt local policies and rules. But the Legislature certainly knew how to draft statutes to preempt

“rules” and other local actions when this was its intent. In contrast to the exclusive references to “laws and ordinances” in RCW 9.41.290, other preemption statutes make express reference to “rules” and other local administrative actions when the Legislature intends broad preemptive effect. *See, e.g.*, RCW 9.94A.8445(1) (“preempt all rules, regulations, codes, statutes, or ordinances of all cities” (emphasis added)); RCW 19.190.110 (“preempts all rules, regulations, codes, ordinances, and other laws adopted by a city . . . .” (emphasis added)); RCW 46.61.667(5) (preempting “any local laws, ordinances, orders, rules, or regulations . . . .” (emphasis added)); RCW 80.50.110(1) (preempting “any other law of this state, or any rule or regulation” (emphasis added)). Because “[a] legislative body is presumed not to have used superfluous words,” Applied Indus. Material Corp. v. Melton, 74 Wn. App. 73, 79, 872 P.2d 87 (1994), the Court should presume that when the Legislature specified the preemption of “ordinances, laws, and rules” in some statutes, e.g., RCW 46.61.667(5), but included only “laws and ordinances” in the statute at issue here, those differences were intentional.

Even when the Legislature substantially modified the Preemption Statute, it left intact the limited references to “laws and ordinances” without extending the reach of the statute to “rules” or “policies.” Act of Apr. 9, 1985, ch. 428, 1985 Wash. Laws 1866, CP 164. (amending RCW

9.41.290)). Thus, when it clarified the preemptive effect of RCW 9.41.290, more than tripling the length of the statute, one of the few things the Legislature did *not* modify was the limitation to “laws and ordinances.”

The distinction between “laws and ordinances” and policies is not mere words—~~play~~—wordplay—there are meaningful differences reflected in the different processes. Every *legislative* act of the City must be by ordinance, approved by a majority vote of the City Council, signed by the President of the Council, and the subject of “favorable action” by the Mayor. Seattle City Charter, Article IV, Sections 7 - 12. No bill imposing civil or criminal penalties may be enacted except through this legislative process, in the manner specified in the City Charter. In contrast, in the exercise of its vested power to “control” its own property, the Parks Superintendent has been delegated the power to manage and control the City’s park and recreation system, including the power to regulate use of parks. SMC 18.12.040. The Superintendent from time to time issues “policies,” including Departmental policies on trees, wildlife, the environment, arts placement, recreation, alcohol, fires, skateboards, public involvement, non-park uses, and sundry other subjects. See Policies and Agreements, <http://www.seattle.gov/cityofseattle.net/parks/Publications/policy.htm> (last visited Aug. 23, 2010). None of these departmental policies was enacted

through an ordinance as a regulation of general applicability, and none carries criminal (or civil) penalties for ~~non-compliance~~noncompliance.

Plaintiffs argued on summary judgment that “rules” and “policies” are equivalent to “laws and ordinances,” but they are not, and the courts should not insert terms into a statute that the Legislature has omitted. “In construing a statute, it is always safer not to add to, or subtract from, the language of the statute unless imperatively required to make it a rational statute.” Applied Indus., 74 Wn. App. at 79-79 (emphasis added). Because Seattle’s Parks Policy does not purport to be a penal regulation or a regulation of general application, it can hardly be said that reading the ~~preemption statute~~Preemption Statute to cover non-penal policies and rules is “imperatively required to make it a rational statute.” Id. (emphasis added).

**C. The Trial Court Erred ~~In~~ Granting an Injunction**

**1. Plaintiffs Did Not Establish Clear Legal or Equitable Rights.**

**a. No Private Right of Action Exists Under the Preemption Statute.**

Even if RCW 9.41.290 preempted the Policy, it confers no private right of action on any individual, and so cannot be the source of a clear legal or equitable right underlying an injunction. Plaintiffs have not alleged any claim for damages arising under RCW 9.41.290, nor could they, because

that statute, included in the *criminal* chapter of the Revised Code of Washington concerning firearms, includes no language reflecting legislative intent to create private rights of action in favor of citizens. In the absence of a clear legal or equitable right, it was error for the trial court to issue a permanent injunction.<sup>2</sup>

**b. ~~No Right Under The~~ the United States  
~~Or~~ Washington Constitutions Was  
~~Argued, Presented For~~ Decision, Or  
~~Established.~~**

Though the issue was neither briefed nor ~~argued~~ argued below, in granting a permanent injunction, the trial court concluded that Plaintiffs had a constitutional right to carry firearms into Parks facilities. CP 273. It did so in contravention of the “well-established rule of judicial restraint that the issue of the constitutionality of a statute will not be passed upon if the case can be decided without reaching that issue.” State v. Rodgers, 146 Wn.2d 55, 60, 43 P.3d 1 (2002). The trial court committed error by deciding the scope of constitutional rights that had not been briefed, ~~argued~~, or presented for decision.

In their Motion for Summary Judgment, Plaintiffs made a passing introductory reference to a “clearly protected right under the United States and Washington Constitutions.” CP 94. ~~Nowhere in their briefing did they~~

---

<sup>2</sup> The court retains the inherent power of contempt, so the court is not without power to enforce its ruling under the Declaratory Judgment Act.

~~even refer to any right to possess firearms under the Washington Constitution. Rather, they~~<sup>94; 100.</sup> Otherwise, Plaintiffs argued exclusively that RCW 9.41.290 entitled them to an injunction. Similarly, Plaintiffs' reply brief assiduously avoided *any mention whatsoever* of any alleged right under either ~~Constitution~~<sup>constitution.</sup> CP 264-70. It could not have been more clear that the Plaintiffs presented no argument for recognition of rights under constitutional law in moving for summary judgment.

At argument on the motion, in response to a question from the Judge, Plaintiffs unequivocally confirmed~~that~~ that they were *not* presenting a federal constitutional argument for decision on the pending motion:

The Court: "You are making any argument under the second amendment?"

Mr. Fogg: "None." (emphasis added).

The Court: "Okay. Why not?"

Mr. Fogg: "I don't think it's necessary."

RP 16: 3-7 (emphasis added).~~RP 16: 3-7.~~ The trial court did not need to ask about the assertion of any right to carry firearms under the State Constitution because Plaintiffs had never mentioned it~~—~~—either in their motion or their reply brief.

The trial court clearly understood that Plaintiffs had not presented the issue whether they possessed a clear legal or equitable right conferred under constitutional law. As the Court commented during the course of its oral ruling—

The Court: “[T]he plaintiffs [are] not arguing it to me, but there is a recent decision out of the U.S. Supreme Court which is very different from anything the U.S. Supreme Court had said in the past.” RP 37:15-18 (emphasis added).

\* \* \*

The Court: “The scope of that right [to bear firearms] is not crystal clear at this point nor was it briefed here.” RP 38:12-14 (emphasis added).

Additionally, the trial court went on to “agree with the City” that the Second Amendment bore no application at all to the Parks Policy. RP 39:13-15. Nevertheless, the trial court proceeded to make constitutional pronouncements, concluding that Plaintiffs have “clear legal rights under Washington state law and under, in all likelihood, both state and federal constitutional provisions.” RP 50:8-12 (emphasis added). Thus, after acknowledging that the constitutional issues were not briefed or argued, and after agreeing that the Second Amendment did not apply, the trial court

concluded that Plaintiffs “have a clear legal or equitable right to carry firearms under the federal and state constitutions.” CP 273. Relying in part on this conclusion, the court entered a permanent injunction in favor of the Plaintiffs. Id.

Just as an appellate court should not decide issues that were neither briefed nor argued in the trial court, Brower v. Ackerley, 88 Wn. App. 87, 96, 943 P.2d 1141 (1997), a trial court should not pass upon an issue that a party specifically declined to argue even in the face of the trial court’s invitation. This reluctance to decide cases based upon issues not arguably before the court owes in part to the fact that, without briefing and without argument, the trial court has no record supporting its decision, and the appellate court is left only to guess at the basis for the ruling below. More importantly, courts avoid such decisions because of the risk of a denial of due process, where parties are not afforded the opportunity to develop and present evidence for dispositive issues they decide.

Here, the trial court reached the constitutional issue in the absence of critical facts a court would need to determine the constitutionality of the Parks Policy under Washington law. Had the issue been briefed and argued, and had the trial court inquired, the City could have presented substantial data supporting its position that the Parks Policy is well within the range of reasonable conditions of use relating to firearms. The City could have

presented data concerning the limited areas in certain parks and community centers that were affected by the Parks Policy in contrast to the many Parks facilities and private, state, and federal facilities that remained open to Plaintiffs. The City could also have presented information concerning the number of parks visitors impacted by the Parks Policy, expert testimony on the public interest and safety implications, and other data that could be weighed against the minimal burden on Plaintiffs. Yet because the constitutional issues were not raised by Plaintiffs in their motion under Rule 56, the City was not in a position to respond when the trial court decided the issue without briefing or argument.

No federal court has ever found that a local government policy restricting possession of firearms on government property violates the United States Constitution. In consequence, Plaintiff cannot prove, and did not prove below,<sup>3</sup> that the Parks Policy violated a clearly established legal right under the United States Constitution. Recent decisions by the United States Supreme Court have not held to the contrary. In 2008, the Supreme Court recognized “an individual right to keep and bear arms.” District of Columbia v. Heller, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2783, 2799 (2008). But the Court in Heller expressly limited its decision to hold nothing more than that

---

<sup>3</sup> In finding a federal constitutional right in this case, the trial court acknowledged the limitations on the right in Heller. RP 39:15-23; id. at 39:13-40:8.

“the absolute prohibition of handguns held and used for self-defense in the home” violates the Second Amendment. Id. at 2822 (emphasis added).

Beyond the home, the Heller Court emphasized:

Like most rights, the right secured by the Second Amendment is not unlimited . . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.

Id. at 2816-17. (emphasis added) (citations omitted). These same limitations on the scope of the Second Amendment were again carefully and clearly delineated ~~this~~last term in McDonald v. Chicago, —     U.S. —    , 130 S. Ct. 3020, 3047 (2010) (“We made it clear in Heller that our holding did not cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . . We repeat those assurances here.”). (internal quotation omitted.) The Parks Policy at issue here, of course, makes no intrusion into the home, but at most establishes conditions for use of certain government-owned facilities, without the imposition of civil or criminal penalties.

*After* the trial court’s ruling in this case, our Washington Supreme Court also issued an opinion holding that the Second Amendment does apply to the State of Washington. State v. Sieyes, 168 Wn.2d 276, 282, 225

P.3d 995 (2010).<sup>4</sup> Nevertheless, the Sieyes court did not expound on the scope of the Second Amendment or State constitutional rights because those issues had not been adequately briefed or presented. Id. at 293-94. In consequence, the court declined to analyze the constitutionality of a state criminal statute completely prohibiting minors from possessing firearms “under any level of scrutiny.” Id. at 295. In the final analysis, the opinion in Sieyes does not recognize any *particular* individual right to carry firearms, and in upholding criminal penalties against the defendant for simple possession of a firearm, reaffirms that governments retain authority to regulate gun possession outside the home.

While the parties may dispute the scope of the Preemption Statute and its effect, the constitutionality of the Parks Policy independent of the Preemption Statute should not be in doubt. Washington courts have long held that the “public interest in security, and in having a sense of security, outweighs the individual’s interest in carrying weapons under circumstances that warrant alarm in others.” State v. Spencer, 75 Wn. App. 118, 124, 876 P.2d 939 (1994). Consequently, the Washington Supreme Court has “consistently held that the right to bear arms in art. I, § 24 is not absolute, but instead is subject to ‘reasonable regulation’ by the State under

---

<sup>4</sup> Any debate over the effect of the State Supreme Court’s decision as to an issue of federal constitutional law is moot, of course, because this principle was subsequently decided by

its police power.” City of Seattle v. Montana, 129 Wn.2d 583, 593, 912 P.2d 1218 (1996) (citation omitted). Thus, in order to pass constitutional muster, a regulation touching upon firearms need only be “reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought.” Id. at 594 (citation omitted). As already explained above, of course, the Parks Policy at issue here is not a general regulation of firearms, does not impose criminal or civil penalties, and applies only in government-owned facilities where children are likely to be present, so it falls well within the scope of permissible government activity.

On summary judgment, Plaintiffs made no argument as to the scope of any constitutional rights, and certainly made no argument explaining how the Parks Policy violated any recognized constitutional gun rights. These are issues of complexity and great public controversy, and should not have been decided on the record in this case. This is the principal lesson handed down by the ~~Supreme Court~~supreme court in Sieyes. It was clear error for the trial court to draw conclusions of law on constitutional issues on this record, especially in the face of contrary authority from the United States and Washington Supreme Courts, and so the permanent injunction that was issued on such “rights” must be reversed as an abuse of discretion and a clear error ~~of~~of law.

---

the United States Supreme Court at the end of its current term. McDonald, 130 S. Ct. at

**2. ~~There Was Also A~~ Genuine Issue of Disputed Fact Whether Plaintiffs Suffered Injury, Which Also Requires Reversal of the Injunction.**

The permanent injunction must also be vacated because the record below revealed a genuine issue of disputed fact whether Plaintiffs suffered any injury, let alone an injury sufficiently substantial as to outweigh the public's interest in safety at City Parks facilities.

Plaintiffs each filed declarations stating that they used to take walks in parks, such as Alki Beach or Capitol Hill, but as a result of the Policy on guns, they believed that they could no longer use the City's parks for these purposes. CP 90-93. The City presented un rebutted evidence to the contrary. CP 151-156; CP 117 at ¶ 5. While many facilities where children and youths are likely to be present were restricted, the majority of walking areas and trails in City parks ~~have~~were not ~~been~~ posted with signs and ~~remain~~remained accessible to all users without any conditions concerning firearms. CP 117 at ¶ 5. Even in the facilities that ~~have~~had signs restricting the possession of firearms, the areas covered by the restrictions ~~are~~were often limited to only a small portion of the park, leaving tracts of open recreational space ~~open~~available to Plaintiffs. Id.

The evidence shows that Ms. Chan, Mr. Kennar, Mr. Carter, and Mr. Peterson, all of whom testified that they principally use City parks facilities

---

3050.

for walking, may continue to walk with lawful firearms at numerous parks, including places such as Lincoln Park and Discovery Park. Indeed, as they admitted in their depositions, none of the Plaintiffs has made a serious inquiry—by physical observation, telephone, or email—to determine whether the Parks facilities they previously used for walking and hiking ~~remain~~remained accessible to persons with guns. In consequence, none of them has proved a substantial injury that should be the subject of an injunction.

**a. Plaintiff Carter**

Plaintiff Raymond Carter is not so much a victim of City policy as a man who has been in search of a way to become involved in firearm activism since well before the Policy was issued. As early as July 2008, nearly a year and half before the Policy in dispute here was issued, Mr. Carter received an ~~email~~e-mail from Dave Workman, communications director for Plaintiff Second Amendment Foundation (“SAF”),<sup>2</sup> stating that SAF founder “Alan Gottlieb would like to invite you to be a plaintiff in a . . . lawsuit against the City of Seattle and Mayor Greg Nickels.” CP 235. In response, Mr. Carter asked what he would need to do to acquire standing in such a suit: “[P]op down to city hall, meander in to check my gun on the way to a city council meeting, get trespassed out, possibly get arrested . . .” Id.

With respect to the alleged impact of the Policy, Mr. Carter declares that he “no longer visits” parks like Alki Beach “because they are subject to the city’s Firearms Rule and I do not feel safe going there.” CP 45 at ¶ 8. However, in his deposition, Carter admitted that there were times when he would voluntarily visit Alki Beach without his firearm when he planned to go straight from the park to a bar because firearms are prohibited *in bars*. CP 224-225. Given Mr. Carter’s admission that he voluntarily walked Alki Beach without a firearm before the Parks Policy when it conflicted with his plans to visit nearby bars, Mr. Carter has not been substantially injured, and any imposition he suffered is substantially outweighed by the public’s interest in creating a safe and secure environment.

**b. Plaintiffs Chan and Kennar**

In their depositions, Ms. Chan and Mr. Kennar testified that they visited Seattle parks principally to walk with friends and family, but are now prevented from doing so. CP 191:5-19; CP 206-210. But neither Ms. Chan nor Mr. Kennar has contacted the City to determine which portions of parks remain available to persons carrying firearms, and whether any of the trails or beaches they have used in the past have been designated under the Policy. At best, there is an issue of fact whether these Plaintiffs have suffered any injury because Defendants have submitted evidence that the

trail and walking areas of the parks they testified they used ~~have~~were not been designated under the Policy. CP 117 at ¶ 5.

**c. Plaintiff Peterson**

Before the Policy was issued, Mr. Peterson made only a few visits to Seattle Parks. CP 244-249. After the Policy, Mr. Peterson admitted that he made no effort to ascertain whether parks he uses for walks include areas prohibiting firearms. CP 253:5-22. A possible reason, as Mr. Peterson testified, was his belief that guns are banned from *all* areas of *all* City parks. CP 253:11-22. He is simply mistaken. CP 117 at ¶ 5. Again, at best, there is a disputed issue of fact whether Mr. Peterson's customary park usage ~~is~~was even affected so that he has suffered any injury, and if he has, whether it is sufficiently compelling to warrant an injunction.

**d. Plaintiff Goedecke**

Mr. Goedecke's declaration indicates that he travels "through" Victor Steinbrueck Park on his way to or from Pike Place Market approximately once a month. CP 79 at ¶ 8. As with all of the individual Plaintiffs, Mr. Goedecke's "use" of the park as an occasional throughway when sidewalks are available is at best incidental and insubstantial, and does not support issuance of an injunction.

For purposes of this appeal of a ruling under Rule 56, then, the Court must assume that there is a disputed issue of fact as to whether any of these

Plaintiffs, none of whom are parents of children, have been prevented from using the Parks facilities they have traditionally used for their stated recreational purposes. Under the circumstances, the trial court committed an abuse of discretion and erred by finding substantial injury on a disputed evidentiary record on a motion under CR 56.

**3. The Trial Court Abused Its Discretion in Failing to Consider the Public Interest.**

Even if Plaintiffs had established a clear legal or equitable right, the trial court abused its discretion by failing to balance the interests of the public. Because injunctions are addressed to a court's equitable powers, "the listed criteria must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public." Tyler Pipe Indus. Inc. v. State Dep't of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (emphasis added). Here, the City presented evidence that the Parks Policy was grounded in the public's interest in conditions for the safe and secure use of Parks facilities by children and families. CP 116-19. Notwithstanding the City's unrebutted presentation of public interest supporting the Parks Policy, the trial court made no mention at all of any public interest factors, unless one counts the trial court's observation that "the only background" it was aware of was from its "general newspaper readings as a member of the informed public." RP 35:19-22.

Thus, the trial court simultaneously found a legal right that was neither briefed nor argued by Plaintiffs, and dismissed without findings the policy interests that were presented by the City. The trial court failed to examine all of the factors mandated in Tyler Pipe, and by failing to consider the public interest, it abused its discretion. Finally, even if the trial court were not required to explain on the record its consideration of all relevant factors, its implicit finding that individual “rights” not even argued by Plaintiffs outweigh the public interest was necessarily a clear abuse of discretion.

#### **V. CONCLUSION**

For the reasons stated, ~~appellants~~Appellants ask that the order granting summary judgment be reversed, and that the permanent injunction be vacated.

DATED this ~~23rd~~7th day of ~~August~~October, 2010.

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: \_\_\_\_\_  
Daniel J. Dunne (WSBA No. 16999)  
George E. Greer (WSBA No. 11050)  
David Keenan (WSBA No. 41359)

SEATTLE CITY ATTORNEY  
Peter S. Holmes (WSBA No. 15787)  
Gary Keese (WSBA No. 19265)

Attorneys for Appellants

NO. 65123-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

CITY OF SEATTLE, MICHAEL MCGINN, SEATTLE DEPARTMENT  
OF PARKS AND RECREATION, and TIMOTHY A. GALLAGHER,  
Appellants

v.

WINNIE CHAN, ROBERT KENRAR, RAYMOND CARTER, GRAY  
PETERSON, GARY G. GOEDECKE, THE SECOND AMENDMENT  
FOUNDATION, INC., CITIZENS COMMITTEE FOR THE RIGHT TO  
KEEP AND BEAR ARMS, WASHINGTON ARMS COLLECTORS,  
INC., and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,  
Respondents

---

CERTIFICATE OF SERVICE

---

Daniel J. Dunne (WSBA No. 16999)  
George E. Greer (WSBA No. 11050)  
David S. Keenan (WSBA No. 41359)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
701 Fifth Avenue, Suite 5600  
Seattle, WA 98104-7097  
(206) 839-4300

Peter S. Holmes (WSBA No. 15787)  
Gary Keese (WSBA No. 19265)  
SEATTLE CITY ATTORNEY  
600 Fourth Avenue, 4th Floor  
Seattle, WA 98124-4769  
(206) 684-8200

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 OCT -7 PM 2:05

I, Charlene L. Bruns, do hereby certify and declare under penalty of perjury under the laws of the State of Washington, as follows:

That I am an employee of Orrick, Herrington & Sutcliffe LLP, 701 5th Avenue, Suite 5600, Seattle, Washington 98104. I caused the following documents to be filed with the Court of Appeals on Thursday, October 7, 2010; and I caused the following documents to be served on counsel of record on Thursday, October 7, 2010, at the address and in the manner described below:

1. Appellants' Motion to File Corrected Brief, with attached Corrected Brief of Appellant, and Redline Copy of Brief of Appellant;
2. Certificate of Service

**Via Messenger on 10/07/2010**

Steven W. Fogg  
Molly A. Malouf  
CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP  
1001 Fourth Avenue, Suite 3900  
Seattle, WA 98154-1051  
(206) 625-8600

Attorneys for Respondents

DATED this 7th day of October, 2010.

  
Charlene L. Bruns