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Court of Appeals
Division III
State of Washington

NO. 33682-4-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

CITY OF CLARKSTON,
a Washington municipal corporation,

Respondent,

v.

VALLE DEL RIO, LLC, a Washington limited liability company,
d/b/a GREENFIELD COMPANY; MATT PLEMMONS,
individually and as a member of VALLE DEL RIO, LLC; and
AARON TATUM, individually and as a member of VALLE DEL
RIO, LLC,

Appellants.

BRIEF OF RESPONDENT CITY OF CLARKSTON

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I. INTRODUCTION

The City of Clarkston has land use authority to zone recreational marijuana businesses within the city limits. Based on this authority, the City obtained a temporary restraining order (later, a preliminary injunction) against Valle Del Rio, LLC, and its principals, Matt Plemmons and Aaron Tatum (collectively “Valle”) when Valle opened its marijuana retail sales business in an unlawful zone and without an appropriate business license. There has never been any dispute that Valle lacked both zoning approval and an appropriate business license.

II. SUMMARY OF RESPONSE ARGUMENT

This matter began as a routine request for equitable relief to enjoin a business that violated municipal zoning and business license codes. Two main characteristics of Valle’s position have emerged as this case has developed.

First, Valle has never shown a right to operate its recreational marijuana business in a zone where it was not permitted and in the absence of an appropriate business license. Valle’s opening brief dwells on issues of constitutional preemption of municipal zoning authority, which is an argument that has been consistently discredited.

Valle fails to brief virtually any other theory to support reversal of the trial court's preliminary injunction. The Supreme Court's recent decision on municipal authority in the analogous context of medical marijuana is not persuasively distinguished by Valle. *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 351 P.3d 151 (2015).

A second main characteristic of this case relates to the tactics Valle has pursued while this matter is litigated. Valle has never acknowledged any obligation to comply with facially valid municipal laws. Valle did not initiate its own court challenge to the City's ordinances before commencing business. Valle instead took the calculated risk to open its business in the hope that the ordinances would prove to be unenforceable. Valle's risk under these circumstances was heightened because the same superior court judge presiding over Valle's case had issued a TRO against an almost identically situated recreational marijuana retailer three weeks earlier.

Valle cannot demonstrate that the trial court's preliminary injunction was an abuse of discretion under these circumstances.

III. STATEMENT OF THE CASE

A. Background of I-502 and local zoning authority.

Initiative 502 (“I-502”) decriminalized under state law the possession of limited amounts of marijuana. It established a detailed licensing program for certain categories of marijuana businesses. *See generally* WAC 314-55.

The receipt of a license from the Washington State Liquor and Cannabis Board does not entitle a licensee to locate or operate a marijuana retail business in violation of local rules or in the absence of any necessary approval from local jurisdictions. WAC 314-55-020(11).

In a decision filed on May 21, 2015, the Supreme Court considered the relationship between Washington’s Medical Use of Cannabis Act (“MUCA”), Ch. 69.51A RCW, and its potential conflict with municipal land use controls (i.e., zoning). *Cannabis Action Coalition*, 183 Wn.2d 219. The Court held that Kent’s zoning ordinance, which prohibited collective gardens in every zoning district within the city and deemed any violation a nuisance per se subject to abatement, was not in conflict with the MUCA. *Id.* at 232. The Kent ordinance addressed a land use matter rather than the personal use of medical marijuana. *Id.* at 231-32.

The Court noted that its decision concerned Washington’s medical marijuana system and not the type of recreational marijuana activities authorized by I-502. *Id.* at 222-23.

B. The City of Clarkston’s response to I-502.

On November 24, 2014, the City of Clarkston passed Ordinance No. 1532. CP 100-101. The ordinance was not intended to regulate individual use of marijuana. *Id.* Marijuana retail sales became a prohibited land use within the city limits. *Id.* The ordinance precluded issuance of business licenses for such uses. *Id.*

Ordinance No. 1532 was enacted following several hearings of the Clarkston City Council, including on October 27, 2014. CP 238-245. Matt Plemmons provided comments to the City Council. CP 243. Ordinance No. 1532 was never appealed, despite a provision in the Clarkston Municipal Code providing for a timely challenge within 15 days after enactment. Clarkston Municipal Code (“CMC”) 17.40.050.

C. Related case.

In a matter filed in Asotin County Superior Court in 2014 the City of Clarkston and four of its councilmembers were sued regarding the City’s regulation of recreational marijuana.¹ The plaintiffs in that

¹ Asotin County Superior Court cause no. 14-2-00284-5, styled *Canna4Life, LLC, et al. v. City of Clarkston, et al.*

lawsuit challenged Ordinance No. 1532 after opening a retail store for the sale of marijuana within the City. The City obtained a temporary restraining order against the plaintiffs on June 8, 2015. CP 93-96. The TRO has been converted to a preliminary injunction and the underlying action remains pending.

D. Circumstances of present controversy.

On or about March 29, 2015, Mr. Plemmons filed an application for a business license. CP 98, 104. In this application, Mr. Plemmons explained that Valle intended to engage in “retail sales of paraphernalia for use with tobacco and cannabis products.” CP 104. No mention was made of the retail sale of marijuana. CP 104. The retail sale of such paraphernalia was a permitted use in the City’s zoning district where the proposed business was to be located. CP 98. On May 5, 2015, the City issued a business license to Valle consistent with the application of Mr. Plemmons. CP 98, 103.

On June 29, 2015, three weeks after the trial court issued the TRO in the related case, the City learned that Valle had opened a retail marijuana sales business despite lacking a business license² or zoning

² Business licenses are required in the City by Ch. 5.02 CMC.

approval³ and further despite the ongoing validity of Ordinance No. 1532. CP 23. Law enforcement officers walked into the business and purchased a gram of dried cannabis from the clerk staffing the counter. CP 108. The clerk stated that “the City hasn’t allowed their license yet but [we] are going to sell products any ways [sic].” CP 108. The purchased cannabis was logged into evidence and no other action was taken. *Id.*

The next day law enforcement officers returned to the store. CP 115. A clerk stated that Valle had been “asked politely by [the city attorney] to stop selling their product.” *Id.* The clerk stated that “they were going to continue to sell their product until they were forced to stop.” *Id.* Marijuana was purchased. Again, no further action was taken by law enforcement. *Id.*

The evening of June 30, 2015, City Attorney Todd Richardson exchanged electronic messages with attorney Scott Broyles. CP 28. Mr. Richardson informed Mr. Broyles that he intended to appear in court the following day in order to obtain a TRO. *Id.* On July 1, 2015, the City filed a complaint seeking a declaratory judgment regarding its

³ Only those uses expressly permitted by the City’s zoning regulations are allowed; uses not enumerated are prohibited. Ch. 17.05 CMC.

zoning and licensing regulations. CP 1-9. The complaint also requested temporary and permanent injunctive relief. *Id.* at ¶ 3.6.

On July 2, 2015, the trial court granted the TRO. CP 122-125. The trial court found that the defendants lacked a business license for recreational marijuana sales and further found that the business was not allowed by the zoning ordinance. *Id.* The court found that the City had “demonstrated a substantial likelihood of success on the merits of its claims” but the court did not make a final decision on any underlying issue. *Id.* A motion for reconsideration was filed by Mr. Plemmons because his lawyer “backed out” at 5:30 a.m. before the hearing. CP 126. The trial court preserved the TRO in force and rescheduled the hearing on show cause for August 5, 2015. CP 131-132. New counsel appeared for defendants and for the City. CP 128-129; 267-268. On August 5, 2015, after a further hearing, the trial court converted the TRO into a preliminary injunction. CP 276-279.

Valle filed a notice of discretionary review. CP 280-286. In the Court of Appeals, Valle moved to stay enforcement of the injunction, for discretionary review, and for accelerated review. The Court of Appeals’ Commissioner issued a ruling finding that Valle’s appeal was one of right under RAP 2.2, staying the injunction, and setting the

matter for accelerated review on September 14, 2015. Appendix 1.

The City filed a motion to modify the Commissioner's ruling as to the injunction stay only. The Court of Appeals reversed the Commissioner and reinstated the injunction. Appendix 2.

Valle next filed motions with the Supreme Court seeking an emergency order staying the injunction and seeking discretionary review of the Court of Appeals' decision modifying its Commissioner's ruling. The Supreme Court Commissioner denied Valle's emergency motion to stay the injunction in a ruling dated December 8, 2015.

Appendix 3. Valle asked the Supreme Court to modify the December 8, 2015, ruling of the Supreme Court Commissioner. The Supreme Court unanimously affirmed the ruling of its Commissioner in an order dated January 6, 2016. Appendix 4. In a ruling dated January 8, 2016, the Supreme Court Commissioner also denied Valle's request for discretionary review. Appendix 5.

IV. STANDARD OF REVIEW

Valle fails to address the applicable standard of review. An order granting a preliminary injunction is reviewed for abuse of discretion. *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 261 (1998). A trial court abuses its discretion only when its decision is manifestly

unreasonable or is based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In support of the preliminary injunction, the trial court made findings of fact. CP 277-278. Valle fails to assign error to any of these findings. Accordingly, the trial court's findings are verities on appeal. *Adams v. Washington State Dep't of Corr.*, 189 Wn. App. 925, 939, 361 P.3d 749 (2015).

Much of Valle's argument claims that the City's ordinance is preempted by state law and thus is unconstitutional. In evaluating such claims, the Supreme Court has repeatedly held that "a heavy burden rests upon the party challenging the local ordinance." *HJS Dev., Inc., v. Pierce County*, 148 Wn.2d 451, 477 n. 113, 61 P.3d 1141 (2003) (quoting *Lenci v. City of Seattle*, 63 Wn.2d 664, 667-68, 388 P.2d 926 (1964)). In general, "[a] statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated." *State ex rel. Schillberg v. Everett Dist. Justice Court*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979).

This Court may affirm the trial court on any grounds supported by the record. *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696 (2003).

V. LEGAL ARGUMENT

A. **Background legal principles.**

Municipal zoning ordinances are a valid exercise of the police power. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Washington municipalities may enact and enforce business license ordinances. *See* RCW 35A.82.020; *City of Port Angeles v. Hadsell*, 25 Wn. App. 210, 214, 607 P.2d 314 (1980) (conviction for conducting business without city license where ordinance valid on its face).

The Washington Attorney General has written persuasively on the matter of preemption in this context. 2014 Op. Att’y Gen. No. 2. “Washington courts have consistently upheld local ordinances banning an activity when state law regulates the activity but does not grant an unfettered right or entitlement to engage in that activity.” *Id.* at 6. The Attorney General observed that “nothing in [Ch. 69.50 RCW] expresses an intent to preempt the entire field of regulating business licenses under I-502.” *Id.* at 5.

The Supreme Court found the absence of preemption in the related matter of medical marijuana regulations in *Cannabis Action*. As pointed out above, the medical marijuana statute analyzed in *Cannabis Action* is different from I-502. But the Court’s analysis of preemption

is equally persuasive as to recreational retail marijuana sales. *Cannabis Action*, 183 Wn.2d at 226-32.

Preemption arguments in a different context surely might require a different result. But Valle has never persuasively explained how I-502 presents an irreconcilable conflict with municipal zoning power over local land uses. *Cf. Dep't of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 378-81, 337 P.3d 364 (2014), *review denied*, 182 Wn.2d 1023 (2015) (comprehensive permitting scheme for land application of municipal biosolids results in preemption of countywide regulations banning the same).

Virtually all of Valle's arguments on appeal assume the conclusion that Valle wishes to prove. Valle claims that the existence of unconstitutional preemption is the basis of error by the trial court. But Valle never cites any authority that demonstrates such preemption exists in this situation. Valle apparently believes that it is sufficient to state that its "main contention" is the theory that the trial court's preliminary injunction was based on "gauzy shrouds of licensing and zoning violations" which are "quite simply, unenforceable." Br. 9. More is needed to show that the trial court abused its discretion in

enjoining Valle's business from deliberately operating in an unlawful zone and without an appropriate business license.

B. The trial court did not abuse its discretion in granting a preliminary injunction.

The City's Ordinance No. 1532 was duly enacted and was lawful on its face. The ordinance's enactment predated this action. The existence of the ordinance -- and its prohibition against recreational marijuana land uses as a zoning and business license matter -- was the status quo before Valle intentionally opened its business in defiance of the law. Under established precedent, the status quo for injunction purposes should be evaluated in light of the "last actual, peaceable, noncontested condition which preceded the pending controversy." *Gen. Tel. Co. of the NW, Inc. v. Wash. Utils. & Transp. Comm'n*, 104 Wn.2d 460, 466, 706 P.2d 625 (1985).

In order to show abuse of discretion under these circumstances, Valle must overcome a difficult problem. At the moment the City filed suit Valle's store was operating in an unlawful zone and without an appropriate business license. In its brief, as before the trial court, Valle repeatedly disparages the importance of complying with the City's municipal law. Valle contends that its violation of local ordinances represents only a "theoretical harm" that is not "otherwise specific and

articulable” and Valle impugns the City’s “specious” claim of harm based merely on its “ability to enforce its laws.” Br. 9, 10, 13. Valle’s theory is brazen self-justification contrary to the rule of law. The trial court did not abuse its discretion to uphold the City’s ordinances by issuing injunctive relief.

1. The preliminary injunction properly restored the status quo.

The preliminary injunction recognized that the status quo to be preserved was the last undisputed state of affairs that existed before the events that gave rise to the pending controversy occurred. Valle’s initial actions were unlawful. Valle’s recreational marijuana sales within the city limits were almost immediately contested by the City.

Valle’s decision to open a recreational marijuana store was prohibited from the outset. The “peaceable” and “uncontested” state of affairs between the parties terminated the moment Valle began operating its business in violation of applicable ordinances. There is no dispute as to the factual events of when and how Valle opened its business.

The effect of the trial court’s preliminary injunction was to preserve the circumstances that existed seven months before Valle commenced business operations prohibited by ordinance. This result is

consistent with the City's general purpose of uniformly applying its laws.

Any other result by the trial court would have resulted in a state of affairs the law seeks to avoid. The trial court was not required to reward Valle for surreptitiously commencing prohibited land use and business operations. The City had no equitable right to enjoin illegal business activities that had not yet occurred. A key decision that stands for an orderly approach to measuring the status quo in injunction cases is *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 98 P.2d 680 (1940) (injunction should not issue to alter the status quo). The *Pay Less* decision cites a treatise regarding the measurement of the status quo as follows: "...equity will not permit a wrongdoer to shelter himself behind a suddenly and secretly changed status, although he succeeded in making the change before the hand of the chancellor has actually reached him." *Pay Less*, 2 Wn.2d at 528-29 (quoting 1 *High on Injunctions*, 4th ed., 9, § 5a).

2. The injunction was procedurally proper.

The injunction was obtained in a regular manner. Notice to opposing counsel was provided prior to the TRO hearing. Valle has no basis in the record for its claim that the trial court "improperly conflated

the preliminary hearing with a trial on the merits” and its criticism is refuted by the terms of the trial court’s order itself. Br. 11. The motion for TRO was supported by competent declarations. Unlike in *Pay Less*, the trial court here did not accept mere ex parte allegations as the basis for issuing the TRO.

Communications between Valle and law enforcement officers revealed Valle’s clear awareness of the terms of the ordinance. Valle claims in its statement of facts that law enforcement officers entered Valle’s store without an administrative search warrant. Br. 6. This assertion is never developed by any legal argument or citation to authority. Valle never claims that there was a custodial interrogation. The law allows undercover officers to question persons who are free to go. *Hoffa v. United States*, 385 U.S. 293 (1966). There was never any search either. All that the officers did was enter Valle’s retail establishment during normal business hours and purchase a product offered for sale. CP 108, 115. Valle emphasizes that I-502 created an “extraordinary” level of regulatory detail. Br. 6. It is likely that even an actual search would not have required an administrative search warrant under the “pervasively regulated industries” doctrine. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (portion

of liquor licensee’s store open to the public was subject to administrative search without warrant).

3. The injunction was for a legally permissible subject.

The Clarkston Municipal Code states that the use of land in violation of the City’s zoning code “shall constitute a nuisance” and provides, as alternative remedies, that the City may “institute injunction, abatement or other appropriate proceedings to prevent, enjoin temporarily or permanently, abate or remove the unlawful location, construction, maintenance, repair, alteration or use.” CMC 17.50.020. A local legislative finding may declare that a particular activity is a nuisance. *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 138-39, 720 P.2d 818 (1986). “[E]ngaging in any business or profession in defiance of law regulating or prohibiting the same is a nuisance per se” *State v. Boren*, 42 Wn.2d 155, 163, 253 P.2d 939 (1953).

Valle is fond of quoting a statute cited in *Kitsap County v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 281, 337 P.3d 328 (2014), *review denied*, 183 Wn.2d 1008 (2015) (“nothing which is done or maintained under express authority of a statute, can be deemed a nuisance.”) *Kitsap Rifle & Revolver Club*, 106 Wn.2d at 277 (citing RCW 7.48.160). Valle quotes this phrase three different times. Br. 10,

12, 14. But Valle never acknowledges another principle expressed in *Kitsap Rifle & Revolver Club*: “A nuisance per se is an activity that is not permissible under any circumstances, such as an activity forbidden by statute *or ordinance*.” *Kitsap County*, 184 Wn. App. at 277 (emphasis added).

4. The equities favored the City, and strongly disfavored Valle.

The decision of Valle to open and operate its business entailed substantial risk. Valle appears to believe that this risk, and its acceptance of it, is equivalent to a favored position on the equities of the case as a whole. Valle aggressively extended its position again and again beyond any legal merits that it could articulate. Placing reliance on legal theories out of proportion to their merits is not the essence of equity. Valle’s position was due to no wrongful or inconsistent conduct on the part of the City.

Consistent enforcement of municipal codes represents a value that cannot be measured or remediated once disrupted. The trial court found that “[t]here is no way to fix a value on the blatant noncompliance with legitimate laws and ordinances.” CP 278 (trial court finding of fact no. 6). This finding indicates precisely the type of

non-monetary irreparable harm traditionally meriting injunctive relief.

Rabon, 135 Wn.2d at 284.

C. The recent Supreme Court decision in *Cannabis Action Coalition v. City of Kent* confirms that nothing in state law requires local governments to allow marijuana businesses.

In 2015 the Supreme Court decided *Cannabis Action*, which upheld Kent’s ban on medical marijuana “collective gardens.” 183 Wn.2d at 232. The Court’s decision confirms the proper analysis of state preemption of local ordinances and illustrates ways in which the legislature’s 2015 acts clarify that state law does not preempt local bans on marijuana businesses. *See id.* at 225-32.

In *Cannabis Action*, the Court first restated the law regarding preemption of local ordinances. “We will find state law to preempt an ordinance only if the ordinance ‘directly or irreconcilably conflicts with the statute.’” *Id.* at 227 (quoting *HJS Dev., Inc., v. Pierce County*, 148 Wn.2d 451, 482, 61 P.3d 1141 (2003)). “[A] heavy burden rests upon the party challenging [the ordinance’s] constitutionality’ and ‘[e]very presumption will be in favor of constitutionality.’” *Id.* at 226 (quoting *HJS Dev.*, 148 Wn.2d at 482 (alterations in original)). “Under our conflict preemption precedents, a state law preempts a local ordinance ‘when an ordinance permits what state law forbids or forbids what state

law permits.” *Id.* at 227 (quoting *Lawson v. City of Pasco*, 168 Wn.2d 675, 682, 230 P.3d 1038 (2010)).

In challenging Kent’s ban on collective gardens, the plaintiffs in *Cannabis Action* cited RCW 69.51A.085, which states: “Qualifying patients may create and participate in collective gardens.” The plaintiffs argued that state law thus “allowed” collective gardens and the city could not ban them. But the Supreme Court rejected the plaintiffs’ simplistic analysis. *Id.* at 227. Instead, the Court found that RCW 69.51A.140, which allowed local governments to impose zoning, licensing, and “health and safety requirements” on “the production, processing or dispensing of cannabis” allowed local governments to ban collective gardens altogether, even though it never explicitly mentioned a ban as an option. *Id.* (citing RCW 69.51A.140 (1)). Here, Valle is no less simplistic in its claim that the “city declares regulated marijuana businesses to be wrong, while the state says they are right.” Br. 16. Valle’s reasoning is spurious and is not the analysis that actually governs preemption.

Although the legislature has now created a more detailed framework for regulating medical and recreational marijuana, there is still no basis for arguing that state law “preempts the field” of

marijuana regulation. The *Cannabis Action* decision recognized that “when a state statute expressly provides for local jurisdiction over a subject, state law does not impliedly preempt the field of that subject.” *Id.* at 226-227. That is, state law does not preempt a local ordinance when a state law “expressly contemplates local regulation of” the subject. *Id.* at 227.

D. 2015 legislation reinforces the holding of *Cannabis Action*.

New marijuana legislation passed in 2015 contemplates the exercise of zoning by local jurisdictions by recognizing local authority to ban marijuana businesses and conditioning tax distribution on whether a ban is in place. There is no basis to argue that state law preempts the field of marijuana regulation.

The 2015 legislature addressed these and other issues through two new acts. The first, the Cannabis Patient Protection Act, consolidated the production, processing, and sale of medical marijuana into the licensed and regulated recreational marijuana system. Laws of 2015, ch. 70. The second comprehensively reformed the laws governing the marijuana market. Laws of 2015, 2d Spec. Sess., ch. 4. The latter act also provided for the distribution of limited revenue from the marijuana excise tax to cities and counties. *Id.* §§ 206, 1603. The

law contemplates that some cities and counties may choose to prohibit marijuana businesses.

As the legislature was considering these bills, it was presumptively aware that various cases in which plaintiffs have challenged local bans on marijuana businesses were working their way through the appellate courts.⁴

The legislature's actions amended the statute governing the distribution of marijuana excise tax revenue to provide some of that revenue to counties, cities, and towns. It does so, however, only as to cities and counties that have not prohibited operating such businesses. Under the new system an amount of money determined by statutory formula is set aside for distribution to cities and counties. Laws of 2015, 2d Spec. Sess., ch. 4, § 206(2)(g)(i) (amending RCW 69.50.540). Thirty percent of that amount is distributed to local governments in which marijuana retailers are physically located. *Id.* § 206(2)(g)(i)(A). The remaining seventy percent is distributed to local governments without regard to whether a retailer is physically located within the jurisdiction. But the legislature explicitly limited that distribution such that: "*Funds may only be distributed to jurisdictions that do not*

⁴ E.g., *MMH, LLC v. City of Fife*, No. 46723-II; *Emerald Enter. v. Clark County*, No. 47068-3-II; *Green Collar, LLC v. Pierce County*, No. 47140-0-II.

prohibit the siting of any state licensed marijuana producer, processor, or retailer.” Laws of 2015, 2d Spec. Sess., ch. 4, § 206(2)(g)(i)(B) (emphasis added). While the legislature created a new disincentive for local governments to ban marijuana businesses, it also recognized their authority to do so. The legislature would not have created a funding distribution scheme oriented to whether a local jurisdiction has prohibited marijuana sales if the legislature understood such prohibitions to be unlawful.

The legislature explained that amending the distribution formula for marijuana excise tax revenue was designed in part to strengthen “a partnership with local jurisdictions” in marijuana policy. Laws of 2015, 2d Spec. Sess., ch. 4, §101. This partnership recognizes that local governments may ban marijuana businesses, but gives them a financial incentive not to do so. The legislature considered more restrictive measures, such as requiring local governments to allow marijuana businesses unless local voters approved a ban, but ultimately rejected that approach.⁵ The legislature thus confirmed that it did not

⁵ See E2SHB 2136, § 1301. That version passed the House but not the Senate. The provision requiring a public vote for a local ban was removed before final passage. See 2E2SHB 2136. The bill’s history, including the text of both versions, is online at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2136&year=2015> (history of H.B. 2136, Laws of 2015, 2d Spec. Sess., ch. 4 (last visited February 3, 2016)).

intend to intrude into local power. *See Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 470, 139 P.3d 1078 (2006) (courts “may consider sequential drafts of a bill in order to help determine the legislature’s intent”).

E. Valle relies on an array of unpersuasive inferential arguments because it lacks any direct authority to support its main premise of preemption.

Valle raises various theories of preemption, none of which sheds any new light on the issues addressed and resolved by *Cannabis Action*.

1. No authority states that local zoning “eviscerates” I-502.

Valle relies extensively on the theme that I-502 constitutes a pervasive statewide legislative scheme. Br. 17-32. In support of this argument, Valle cites the recent Court of Appeals decision in *Wahkiakum County*, 184 Wn. App. at 337. But the *Wahkiakum County* case involved a statute and regulations quite different from I-502.

At issue in *Wahkiakum County* was an ordinance that prohibited application of “Class B biosolids” (treated municipal sewage) anywhere within the county. The Court of Appeals held that this ordinance conflicted with the state biosolids statute. That statute directs the Department of Ecology to establish a program to manage

biosolids so that, “to the maximum extent possible, . . . municipal sewage sludge is reused as a beneficial commodity” RCW 70.95J.005(2). Applying that legislative directive, “Ecology adopted a regulatory scheme that specifically grants permits for land application of Class B biosolids and . . . created a right to land application of Class B biosolids when a permit is acquired.” *Wahkiakum County*, 184 Wn. App. at 381. Because the statutory and permitting scheme “created a right to land application of Class B biosolids when a permit is required” and because the local ordinance precluded Ecology from meeting its mandate under state law to maximize the beneficial use of biosolids, the court found irreconcilable conflict with state law. *Id.* at 374.

Here, by contrast, the Washington State Liquor and Cannabis Board itself does not consider a license issued under I-502 a right to operate regardless of local law. WAC 314-55-020(11). Unlike the state law at issue in *Wahkiakum County*, I-502 contains no directive to the Board to maximize marijuana use or sales. On the contrary, I-502 directs the Board to limit the number of marijuana retailers, tightly restrict marijuana advertising, and direct some of the taxes generated by marijuana sales to advertising campaigns aimed at reducing marijuana abuse. RCW 69.50.354, .357, .540(2)(b). Far from setting forth the

kind of state mandate at issue in *Wahkiakum County*, I-502 merely provides that when licensed marijuana businesses produce, process, and sell marijuana, their actions “shall not be a criminal or civil offense under Washington state law.” RCW 69.50.325.

Wahkiakum County provides no support for Valle because the statutes and regulations at issue there differ dramatically from I-502. *Wahkiakum County*, 184 Wn. App. 380-81. In addition, and somewhat obviously, the effect of Clarkston’s codes is intensely local and confined to the Clarkston city limits. Marijuana retail sales opportunities in surrounding Asotin County are unaffected.

Valle also makes reference to decisions from California, South Dakota, and Massachusetts but never explains whether any statutory scheme in those jurisdictions is similar to Washington’s handling of marijuana. Valle’s use of non-Washington authority is occasionally unreliable. One California case is cited by Valle in two different sections of its brief in a manner to imply that California courts have reached a result that supports Valle’s position here. Br. 28, 33 (citing *City of Riverside v. Inland Empire Patients Health & Wellness, Inc.*, 56 Cal. 4th 729, 300 P.3d 494 (2013)). Valle neglects to mention, though, that the California Supreme Court actually held that state law did not

preempt Riverside’s zoning ordinance, which declared medical marijuana dispensaries to be a prohibited use and a nuisance anywhere in the city. *City of Riverside*, 56 Cal. 4th at 752.

2. Valle’s strained efforts to find conflicts between local and state law raise irrelevant points where the Court’s obligation is to find grounds to harmonize local and state law.

Valle cannot point to any provision of Washington marijuana law that “clearly and expressly” states an intent to override longstanding authority of local jurisdictions to regulate zoning and land use matters. *See Schillberg*, 92 Wn.2d at 108. “[I]t is important to remember that cities, towns, and counties derive their police power from article XI, section 11 of the Washington Constitution, not from statute. Thus, the relevant question is not whether [I-502] provided local jurisdictions with such authority, but whether it removed local jurisdictions’ preexisting authority.” 2014 Op. Att’y Gen. No. 2, at 9.

Valle is correct that RCW 69.50.608, a preexisting section of the Controlled Substances Act, in which I-502 is codified, provides that the Act “preempts the entire field of setting penalties for violations of the” Act. Br. 25. But Valle must concede that the City’s ordinance does not “set penalties for violations of” the Controlled Substances Act. What Valle’s argument really illustrates is the pervasive effort of Valle

to scavenge for any possible points of contention between Clarkston's ordinance and any other source of state law. The applicable test is the obverse of Valle's approach: there is no preemption if a local ordinance and state statute can possibly be harmonized. *Entm't Indus. Coal. v. Tacoma-Pierce County Board of Health*, 153 Wn.2d 657, 663, 105 P.3d 985 (2005).

The same tactic of raising pseudo-preemption claims can be found in Valle's reference to the provisions of RCW 69.50.331(7)(b) and (c). Br. 30. This statute allows a local jurisdiction to file an objection with the Liquor and Cannabis Board and request a hearing on whether a particular license application should be granted or denied. This issue was persuasively addressed in the Attorney General's opinion, which noted that the same essential scheme is present with liquor license applications. 2014 Op. Att'y Gen. No. 2, at 9. There is no credible claim -- and certainly no citation to authority by Valle -- that local jurisdictions are preempted from zoning and licensing of liquor-related land uses simply because they may also invoke an administrative hearing process as to any particular license applicant. The same type of administrative process should not have any different effect on local authority in the context of marijuana sales.

Valle's references to *State v. Kirwin*, 165 Wn.2d 818, 203 P.3d 1044 (2009), and *City of Seattle v. Eze*, 111 Wn.2d 22, 759 P.2d 366 (1988), are of little use because in both cases the Court held that state law *did not* conflict with the local ordinance in question. Valle cites *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 432, 90 P.3d 37 (2004), but the Court's finding of preemption in that case was due to a provision in state law that "expressly provide[d] that water districts ha[d] the authority to decide whether to fluoridate their water systems." Valle's citation to *Entm't Indus. Coal.*, 153 Wn.2d at 664, is also unpersuasive because the state law at issue entitled certain business owners to designate smoking locations, which was directly contradicted by a local ordinance that prohibited smoking in all public places.

At most, Valle can point to the fact that state law now permits various forms of marijuana sales. But the Supreme Court has never held that any time state law permits an activity in some general sense local governments must allow it. Indeed, the Court has held that even "[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law." *Rabon*, 135 Wn.2d at 292; *see also Weden v. San Juan County*, 135 Wn.2d

678, 695, 958 P.2d 273 (1998) (registration of vessel is not an unabridged right to operate in all waters); *Lawson*, 168 Wn.2d at 682-83 (municipal ban of RVs from mobile home park upheld despite provisions of Mobile Home Landlord Tenant Act, RCW 59.20).

VI. CONCLUSION

No Washington marijuana law expressly creates a right to engage in the retail sale of marijuana regardless of local zoning and business licensing codes. It is implausible that marijuana retail sales would have been singled out by the legislature, among virtually all other land uses, as a type of use that supplants local land use authority entirely. It is even more implausible that the legislature was content to take this action by implication in its most recent 2015 enactments.

The legislature may yet consider bills addressing this subject, and would seemingly have every reason to do so if the thrust of *Cannabis Action* was in error. However, in the meantime, there is no basis to find that the trial court erred in issuing the preliminary injunction in this case.

The trial court's preliminary injunction should be affirmed. For the same reasons, Valle's request for reasonable attorneys' fees pursuant to RAP 18.1 should be denied.

RESPECTFULLY SUBMITTED this 18th day of February, 2016.

Menke Jackson Beyer, LLP

A handwritten signature in blue ink, consisting of several overlapping loops and a final horizontal stroke.

Kenneth W. Harper, WSBA 25578

Attorneys for Respondent
City of Clarkston

APPENDICES

INDEX TO APPENDICES

Appendix	Document Description
Appendix 1	Commissioner's Ruling dated September 14, 2015
Appendix 2	Order Granting Motion to Modify dated October 28, 2015
Appendix 3	Supreme Court Ruling Denying Emergency Stay dated December 8, 2015
Appendix 4	Supreme Court Order dated January 6, 2016
Appendix 5	Supreme Court Ruling Denying Review dated January 8, 2016

Appendix 1

The Court of Appeals
of the
State of Washington
Division III

FILED

SEP 14 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

CITY OF CLARKSTON,)	No. 33682-4-III
)	
Respondent,)	
v.)	COMMISSIONER'S RULING
)	
VALLE DEL RIO, INC., et al.,)	
)	
Petitioner.)	

Valle del Rio, Inc., et al. (Valle) seeks review of the Asotin County Superior Court's August 5, 2015 Order on Motion for Preliminary Injunction that barred operation of Valle's existing marijuana sales store pending trial of the City's action against Valle. The City's action had sought declaratory relief – i.e. that its zoning ordinance 1532, enacted in November 2014, did not allow the business operation. It also asked for an injunction.

The superior court's Order states, as follows:

1. The City has banned the retail sale, processing and production of recreational marijuana within city limits, which ban was and remains a lawful exercise of the City's municipal powers granted it by statute and other applicable

authority.

2. Defendants . . . have engaged and continue to engage in the retail sale of marijuana at 728 Sixth Street in the City of Clarkston. Defendants lack a municipal business license to sell marijuana at this location, which is a requirement for any person desiring to do business within the City. Defendants are in violation of applicable municipal codes as a result of the foregoing.

3. The City has demonstrated a substantial likelihood of success on the merits of its claims.

4. The rights of the City with respect to enforcement of its municipal codes and regulations are being and will continue to be violated by defendants unless defendants are restrained therefrom.

5. The City will suffer irreparable harm and loss if defendants are permitted to continue the retail sale of marijuana at 728 Sixth Street in violation of municipal ordinances and without a municipal business license. The public interest in orderly and consistent application of the City's ordinances, including its zoning and business license provisions, requires that the business operations of defendants comply with all applicable municipal codes and regulations.

6. The City has no adequate remedy at law because money damages are not designed to cure ongoing violations of law. The City does not seek money damages but, rather, preservation of the orderly affairs of businesses within the City as regulated by its local ordinances. There is no way to affix a value on blatant noncompliance with legitimate laws and ordinances.

7. Greater injury will be inflicted upon the City of Clarkston and the public interest by the denial of temporary injunctive relief than would be inflicted upon defendants by granting such relief. Defendants could have, but did not, otherwise move against the adoption of Ordinance No. 1532 prior to commencing their business unlawfully. The abrupt opening of the business by defendants is not supported by any exigency on their part, whereas the City's interest in preserving the status quo is consistent with the City's general purpose of consistently applying its laws.

In general, a preliminary injunction is not appealable as a matter of right because it is not a final order. Rather, the goal of a preliminary injunction is to *maintain the status quo* until the trial court can conduct a full hearing on the merits of the complaint. See RAP 2.2(a)(1); and *Northwest Gas Ass'n v. Wash. Utilities & Transp. Comm'n*, 141 Wn.

No. 33682-4-III

App. 98, 115–16, 168, 168 P.3d 443 (2007). But here, the superior court altered the status quo when it barred Valle from its existing business operations. Accordingly, this Court holds that review of the preliminary injunction against Valle is one of right under RAP 2.2.

Valle also asks this Court to stay enforcement of the preliminary injunction pending this appeal. *See* RAP 8.1(b)(3). And, it seeks accelerated review. *See* RAP 18.12.

This Court grants Valle’s motion for accelerated review. The Clerk of Court is directed to set an accelerated perfection schedule for this appeal.

Valle also asks this Court to stay enforcement of the preliminary injunction pending review in this Court, as well as a stay of any penalty imposed as a result of the alleged illegality of its operation of the store.

On a motion for stay, RAP 8.1(b)(3) directs this Court to consider whether debatable issues exist and to “compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the non-moving party if a stay were imposed.” As set forth in Valle’s memoranda, debatable issues exist. And, having reviewed the record and the parties’ briefs, this Court concludes that any comparison of injuries weighs in favor of a stay. Valle’s injury is financial, but it is a significant financial injury in light of Valle’s representation that to

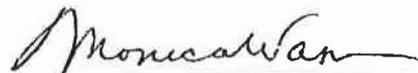
No. 33682-4-III

keep its position as I-502 licensee it has expended thousands of dollars on construction and security, signed a long term commercial lease, and paid for insurance and software contracts as well as state licensing fees. And, because this Court has granted Valle's motion for accelerated review, any interference with the City's interest in the even-handed enforcement of its municipal code will be of a relatively short duration if it prevails here.

Finally, Valle requests attorney fees for the work it performed relative to this motion. This Court refers that motion to the panel of judges that decides the appeal.

IT IS ORDERED, the matter is appealable as a matter of right. The motion for accelerated review is granted. The Clerk of Court shall set an accelerated perfection schedule for this appeal. The motion for stay is granted. Valle's motion for attorney fees is referred to the panel.

September 14 , 2015



Monica Wasson
Commissioner

Appendix 2

FILED
Oct 28, 2015
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

CITY OF CLARKSTON,)	No. 33682-4-III
)	
Respondent,)	
)	
v.)	ORDER GRANTING
)	MOTION TO MODIFY
VALLE DEL RIO, INC. et. a l.,)	
)	
Petitioner.)	

On September 14, 2015, this court's Court Commissioner entered an order granting petitioner Valle Del Rio, Inc. an appeal as a matter of right and granting the petitioner's motion for accelerated review and a stay of a preliminary injunction entered by the Asotin County Superior Court. In turn, respondent City of Clarkston filed a motion before this court to modify the Court Commissioner's grant of a stay of the preliminary injunction. Therefore,

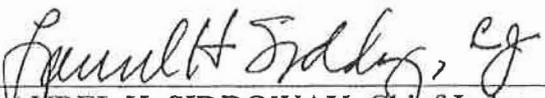
IT IS ORDERED, with one dissenting judge, that the motion to modify that portion of the Court Commissioner's order staying the Superior Court's preliminary injunction is granted. The Superior Court's preliminary injunction is reinstated. The

Court Commissioner's order granting an appeal as a matter of right and granting accelerated review remains in full force and effect.

DATED: October 28, 2015

PANEL: Judges Fearing, Brown, Korsmo

FOR THE MAJORITY:


LAUREL H. SIDDOWAY, Chief Judge

Appendix 3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Filed *E*
Washington State Supreme Court
DEC - 8 2015
Ronald R. Carpenter *bjh*
Clerk

CITY OF CLARKSTON, a Washington
Municipal Corporation,

Respondent,

v.

VALLE DEL RIO, LLC, a Washington
Limited Liability Company, dba
Greenfield Company; MATT
PLEMMONS, individually and as a
member of Valle Del Rio, LLC; and
AARON TATUM, individually and as a
member of Valle Del Rio, LLC,

Petitioners.

NO. 92515-1

RULING DENYING EMERGENCY
STAY

Valle Del Rio, LLC, and its members seek an emergency order staying a preliminary injunction prohibiting them from operating a retail recreational marijuana sales establishment within the city of Clarkston and staying an order of Division Three of the Court of Appeals modifying a ruling by Commissioner Wasson of that court staying the injunction pending appellate review. Petitioners ask this court to stay these matters pending the court's discretionary review of the Court of Appeals modification order. For reasons discussed below, the motion for an emergency stay is denied and the temporary stay previously imposed by this court is lifted.

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On November 24, 2014, the city of Clarkston enacted an ordinance prohibiting recreational marijuana retail sales within any zone within city limits and prohibiting the issuance of business licenses for any recreational marijuana sales businesses. Subsequently, despite this prohibition, and without a proper city business license for doing so, petitioners opened and operated a retail recreational marijuana sales store within city limits. On July 1, 2015, the city filed a complaint in Asotin County Superior Court for declaratory and injunctive relief against petitioners, and the following day it obtained a temporary restraining order against petitioners' operation of their store. After a hearing on August 5, 2015, the superior court issued a preliminary injunction prohibiting petitioners from engaging in the retail sale of recreational marijuana within city limits.

Petitioners sought discretionary review of the preliminary injunction in Division Three of the Court of Appeals. Commissioner Wasson determined that the preliminary injunction order was appealable as a matter of right, granted accelerated review, and granted petitioners' motion to stay enforcement of the preliminary injunction pending review. The city moved to modify the commissioner's ruling granting a stay. A panel of judges granted the city's motion and reinstated the preliminary injunction in an order issued on October 28, 2015.

On November 23, 2015, petitioners filed in this court an emergency motion to stay the preliminary injunction and stay the Court of Appeals order modifying Commissioner Wasson's stay ruling, apparently pending a motion in this court for discretionary review of the Court of Appeals modification order. I issued a temporary stay of the preliminary injunction pending a ruling on petitioners' emergency motion, and the clerk's office set an accelerated briefing schedule and informed petitioners that if they wished to seek review of the Court of Appeals modification order, they had to file a motion for discretionary review by November 30, 2015. On that date

petitioners filed a motion for discretionary review. Now before me for determination is whether to grant petitioners' emergency motion to stay the preliminary injunction and to stay the Court of Appeals order modifying the commissioner's ruling granting a stay.¹

In civil cases not involving money judgments or rights to real property, including cases involving the grant of equitable relief, an appellate court may, before or after accepting review, stay enforcement of a lower court decision on such terms as are just. RAP 8.1(b)(3). The court also generally has the authority to issue orders pending review to ensure equitable and effective relief, including authority to grant injunctive relief. RAP 8.3. In evaluating whether to grant a stay under RAP 8.1(b)(3), the court is to "(i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed." RAP 8.1(b)(3); *see also Purser v. Rahm*, 104 Wn.2d 159, 177-78, 702 P.2d 1196 (1985) (stating that whether a stay should be granted pending appeal depends on whether the issue presented on appeal is debatable). Debatability and consideration of the equities are also relevant to whether injunctive relief pending review should be granted. *Shamley v. City of Olympia*, 47 Wn.2d 124, 126, 286 P.2d 702 (1955); *see Purser*, 109 Wn.2d at 159 (construing RAP 8.1(b)(3), which is instructive by analogy). The "debatability" standard contemplates a limited inquiry, not an extensive assessment of the merits, but debatability must be shown before the relative harm to the parties or the equities are weighed. 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 8.1, at 602 (8th ed. 2014).

Only the Court of Appeals order modifying Commissioner Wasson's stay order and reinstating the preliminary injunction is currently before this court for possible

¹ The motion for discretionary review is set for consideration on January 7, 2016.

review, and thus it is that order against which the debatability standard is to be primarily applied. At this preliminary stage, I am not persuaded that the propriety of the Court of Appeals refusal to stay the preliminary injunction is debatable so as to justify staying the court's order or the superior court's preliminary injunction pending a decision on petitioners' motion for discretionary review. In considering whether to stay the injunction, the Court of Appeals was itself faced with the debatability of the superior court's order granting injunctive relief, and it could have reasonably determined that the superior court did not debatably abuse its discretion so as to justify a stay pending appeal. *See Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998) (grant or denial of preliminary injunction reviewed for abuse of discretion). The proper criteria are whether the party seeking injunctive relief has a clear legal or equitable right, whether there is a well-grounded fear of immediate invasion of that right, and whether the acts complained of will cause actual and substantial injury. *Id.* The first criterion, in turn, depends on the likelihood the moving party will prevail on the merits. *Id.* at 285. And as with equitable remedies generally, the criteria must be viewed in light of equity, balancing the relative interests of the parties and the interests of the public, if appropriate. *Id.* at 284.

A preliminary review indicates that the city has a strong likelihood of prevailing in enforcing its ordinance. *See Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 232, 351 P.3d 151 (2015) (in analogous case, court upheld local ban on collective medical marijuana gardens as not in conflict with or preempted by state medical marijuana law allowing such gardens); 2014 Op. Att'y Gen. No. 2 (opining that municipalities may wholly prohibit recreational marijuana retail sales within their boundaries despite state regulation and licensing of retail sellers). And petitioners' store clearly constitutes an immediate and continuing violation of that ordinance. Further, the superior court could have reasonably determined that allowing retail

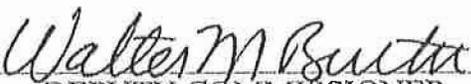
marijuana sales to continue in violation of the ordinance causes the city actual and substantial injury in the form of a continuing nuisance. *See* CLARKSTON MUNICIPAL CODE 17.50.020 (building or land used in violation of municipal code is a nuisance; city may seek injunctive relief in addition to other available forms of relief); *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 138-41, 720 P.2d 818 (1986) (engaging in business in violation of law prohibiting the same is a nuisance, and may be so declared by ordinance and properly enjoined).

Citing *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn. App. 252, 277, 337 P.3d 328 (2014), *review denied*, 183 Wn.2d 1008 (2015), petitioners argue that a lawful business may not in itself be a nuisance per se. Further, they urge that their business is lawful, and thus necessarily cannot be a nuisance, because they have a state retail marijuana seller's license pursuant to RCW 69.50.325(3). *See* RCW 7.48.160 ("Nothing which is done or maintained under express authority of a statute, can be deemed a nuisance."). But petitioners neglect to make reference to another principle expressed in *Kitsap County*: "A nuisance per se is an activity that is not permissible under any circumstances, such as an activity forbidden by statute *or ordinance*." *Kitsap County*, 184 Wn. App. at 277 (emphasis added). There, for instance, the county code, as does the city code here, made any use in violation of the zoning code a public nuisance, which the Court of Appeals found "consistent with the principle that one type of public nuisance involves an activity that is forbidden by statute or ordinance." *Id.* at 288-89. Although petitioners may have a state retail seller's license, under regulations promulgated pursuant to the recreational marijuana statute, that license expressly does not entitle them to operate a business in violation of local rules, including zoning ordinances and business licensing regulations. WAC 314-55-020(11).

And finally, the superior court (and the Court of Appeals in denying a stay of the injunction) could have reasonably found that the equities overall favor the city. Petitioners allege substantial economic harm, but that harm is largely of their own making and assumed at their own risk. Petitioners made no evident effort to pursue available legal avenues to challenge the city's ordinance after it was enacted, but instead, in April 2015 (nearly five months after the city enacted the ordinance), they chose to enter into a lease for the store building and conduct a business expressly prohibited. Petitioners apparently took on further financial obligations in reliance on Commissioner Wasson's stay order, but again, they did so knowing that the commissioner's decision was subject to a motion to modify. Further, petitioners first sought emergency relief in this court nearly four weeks after the Court of Appeals issued its order modifying the commissioner's ruling and reinstating the injunction, undermining their claim that a true "emergency" exists.

In sum, I cannot conclude that an emergency stay issued before this court decides whether to grant discretionary review is necessary to insure effective and equitable review or is otherwise justified.

Accordingly, the motion for an emergency stay is denied and the temporary stay previously issued is lifted. Nothing in this ruling precludes a motion for a stay under the rules if discretionary review is granted.²


DEPUTY COMMISSIONER

December 8, 2015

² In light of this ruling, petitioners' request for costs and attorney fees for filing this emergency motion is denied.

Appendix 4

THE SUPREME COURT OF WASHINGTON

CITY OF CLARKSTON,

Respondent,

v.

VALLE DEL RIO, LLC, et al.,

Petitioners.

NO. 92515-1

ORDER

C/A NO. 33682-4-III

Department II of the Court, composed of Chief Justice Madsen and Justices Owens, Stephens, González and Yu, considered this matter at its January 5, 2016, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner’s Motion to Modify the Deputy Commissioner’s Ruling Denying Emergency Stay is denied.

DATED at Olympia, Washington this 6th day of January, 2016.

For the Court

Madsen, C.J.
CHIEF JUSTICE

Appendix 5

Filed E
Washington State Supreme Court

JAN - 8 2016

Ronald R. Carpenter
Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF CLARKSTON, a Washington
Municipal Corporation,

Respondent,

v.

VALLE DEL RIO, LLC, a Washington
Limited Liability Company, dba
Greenfield Company; MATT
PLEMMONS, individually and as a
member of Valle Del Rio, LLC; and
AARON TATUM, individually and as a
member of Valle Del Rio, LLC,

Petitioners.

NO. 92515-1

RULING DENYING REVIEW

Valle Del Rio, LLC, and its members seek discretionary review of an order of Division Three of the Court of Appeals modifying a commissioner's ruling staying a preliminary injunction against petitioners pending appellate review of the injunction. The court ordered the injunction reinstated. For reasons discussed below, the motion for discretionary review is denied.

On November 24, 2014, the city of Clarkston enacted an ordinance prohibiting recreational marijuana retail sales within any zone within city limits and prohibiting the issuance of business licenses for recreational marijuana sales businesses. Subsequently, despite this prohibition, and without a proper city business

729 / 132

license for doing so, petitioners opened and operated a retail recreational marijuana sales store within city limits. On July 1, 2015, the city filed a complaint in Asotin County Superior Court for declaratory and injunctive relief against petitioners, and the following day it obtained a temporary restraining order against petitioners' operation of their store. After a hearing on August 5, 2015, the superior court issued a preliminary injunction prohibiting petitioners from engaging in the retail sale of recreational marijuana within city limits.

Petitioners sought discretionary review of the preliminary injunction in Division Three of the Court of Appeals. Commissioner Wasson determined that the preliminary injunction order was appealable as a matter of right, granted accelerated review, and granted petitioners' motion to stay enforcement of the preliminary injunction pending review. The city moved to modify the commissioner's ruling granting a stay. A panel of judges, with one dissenting judge, granted the city's motion and reinstated the preliminary injunction in an order issued on October 28, 2015.

On November 23, 2015, petitioners filed in this court an emergency motion to stay the preliminary injunction and stay the Court of Appeals order modifying Commissioner Wasson's stay ruling pending a motion in this court for discretionary review of the Court of Appeals modification order. I issued a temporary stay of the preliminary injunction pending a ruling on petitioners' emergency motion, and the clerk's office set an accelerated briefing schedule and informed petitioners that if they wished to seek review of the Court of Appeals modification order, they had to file a motion for discretionary review by November 30, 2015. On that date petitioners filed a motion for discretionary review. I subsequently denied the emergency motion to stay the Court of Appeals modification order, and this court denied petitioners'

emergency motion to modify my ruling. Now before me for determination is whether to grant discretionary review of the Court of Appeals modification order.

To obtain this court's discretionary review, petitioners must show (1) that the Court of Appeals committed obvious error that renders further proceedings useless, (2) that it committed probable error that substantially alters the status quo or substantially limits the freedom of a party to act, or (3) that it so far departed from the usual course of proceedings, or so far sanctioned such a departure by the trial court, as to call for this court's review. RAP 13.5(b). Petitioners rely on the second basis for review, urging that the Court of Appeals committed probable error that substantially alters the status quo or limits the freedom of a party to act.

The Court of Appeals was faced with whether to stay the preliminary injunction against petitioners' business pending appellate review of the injunction. In civil cases not involving money judgments or rights to real property, including cases involving the grant of equitable relief, an appellate court may, before or after accepting review, stay enforcement of a lower court decision on such terms as are just. RAP 8.1(b)(3). The court also generally has the authority to issue orders pending review to ensure equitable and effective review, including authority to grant injunctive relief. RAP 8.3. In evaluating whether to grant a stay under RAP 8.1(b)(3), the court is to "(i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed." RAP 8.1(b)(3); *see also Purser v. Rahm*, 104 Wn.2d 159, 177-78, 702 P.2d 1196 (1985) (stating that whether a stay should be granted pending appeal depends on whether the issue presented on appeal is debatable). Debatability and consideration of the equities are also relevant to whether injunctive relief pending review should be granted. *Shamley v. City of Olympia*, 47 Wn.2d 124, 126, 286 P.2d

702 (1955); *see Purser*, 109 Wn.2d at 159 (construing RAP 8.1(b)(3), which is instructive by analogy). The “debatability” standard contemplates a limited inquiry, not an extensive assessment of the merits, but debatability must be shown before the relative harm to the parties or the equities are weighed. 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 8.1, at 602 (8th ed. 2014).

The Court of Appeals did not indicate in its modification order whether it believed petitioners’ challenge to the preliminary injunction presented no debatable issues, whether it believed the equities favored the city even if the issues were debatable, or whether it found neither debatability nor a balance of equities in favor of petitioners. But in any case petitioners demonstrate no probable error. As to debatability, the court could have reasonably determined that in issuing a preliminary injunction the superior court did not debatably abuse its discretion so as to justify staying the injunction pending appeal. *See Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998) (grant or denial of preliminary injunction reviewed for abuse of discretion). The proper criteria are whether the party seeking injunctive relief (in this case the city) has a clear legal or equitable right, whether there is a well-grounded fear of immediate invasion of that right, and whether the acts complained of will cause actual and substantial injury. *Id.* The first criterion, in turn, depends on the likelihood the moving party will prevail on the merits. *Id.* at 285. And as with equitable remedies generally, the criteria must be viewed in light of equity, balancing the relative interests of the parties and the interests of the public, if appropriate. *Id.* at 284.

To the extent the Court of Appeals believed that the city is likely to prevail in enforcing its ordinance, it did not probably err. *See Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 232, 351 P.3d 151 (2015) (in analogous case, court upheld local ban on collective medical marijuana gardens as not in conflict with or preempted by

by state medical marijuana law allowing such gardens); 2014 Op. Att’y Gen. No. 2 (opining that municipalities may wholly prohibit recreational marijuana retail sales within their boundaries despite state regulation and licensing of retail sellers). I am aware that *Cannabis Action* involved a different statute and thus does not directly control this case, but as in that case (and in every case challenging an ordinance as conflicting with state law), the city’s ordinance here is cloaked with a strong presumption of constitutionality, and petitioners bear a heavy burden in showing that it is unconstitutional. *Cannabis Action*, 183 Wn.2d at 226. And as in *Cannabis Action* in relation to the medical marijuana statute, to satisfy their burden petitioners must show that the recreational marijuana statute expressly or impliedly preempts the field so as to leave no room for local regulation or that a local ordinance that prohibits recreational sales establishments within all city zones directly and irreconcilably conflicts with the statute. *Id.* at 226-27. The attorney general employed precisely this analysis in persuasively opining that the recreational marijuana statute does not prohibit municipalities from effectively banning retail recreational marijuana sales within their boundaries through zoning and local business license laws.

As for other elements of the injunctive relief analysis, petitioners’ establishment clearly constitutes an immediate and continuing violation of the city’s ordinance, and it is not probable error to conclude that allowing retail marijuana sales to continue in violation of the ordinance causes the city actual and substantial injury in the form of a continuing nuisance. *See* CLARKSTON MUNICIPAL CODE 17.50.020 (building or land used in violation of municipal code is a nuisance; city may seek injunctive relief in addition to other available forms of relief); *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 138-41, 720 P.2d 818 (1986) (engaging in business in violation of law prohibiting the same is a nuisance, and may be so declared by ordinance and properly enjoined).

Citing *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn. App. 252, 277, 337 P.3d 328 (2014), *review denied*, 183 Wn.2d 1008 (2015), petitioners argue that a lawful business may not in itself be a nuisance per se. Further, they urge that their business is lawful, and thus necessarily cannot be a nuisance, because they have a state retail marijuana seller's license pursuant to RCW 69.50.325(3). See RCW 7.48.160 ("Nothing which is done or maintained under express authority of a statute, can be deemed a nuisance."). But petitioners fail to note another principle expressed in *Kitsap County*: "A nuisance per se is an activity that is not permissible under any circumstances, such as an activity forbidden by statute or ordinance." *Kitsap County*, 184 Wn. App. at 277. (emphasis added). There, for instance, the county code, as does the city code here, made any use in violation of the zoning code a public nuisance, which the Court of Appeals found "consistent with the principle that one type of public nuisance involves an activity that is forbidden by statute or ordinance." *Id.* at 288-89. Although petitioners may have a state retail seller's license, under regulations promulgated pursuant to the recreational marijuana statute, that license expressly does not entitle them to operate a business in violation of local rules, including zoning ordinances and business licensing regulations. WAC 314-55-020(11).

Petitioners further argue that the propriety of the trial court's preliminary injunction is debatable because it altered, rather than maintained, the status quo. See *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 528-29, 98 P.2d 680 (1940) (since object of preliminary injunction is to maintain status quo, injunction will not be issued where it would alter the status quo). But the "status quo" in this context is "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Id.* at 529 (quoting 1 J. High, *Injunctions* § 5a, at 10 (4th ed. 1905)); see also *Gen. Tel. Co. of the Nw., Inc. v. Washington Utils. & Transp. Comm'n*, 104

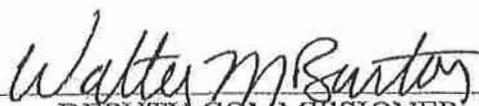
Wn.2d 460, 466, 706 P.2d 625 (1985). The last “noncontested” condition was that which existed before petitioners opened their store in violation of the ordinance. As the court explained in *Pay Less*, quoting the same treatise, “equity will not permit a wrongdoer to shelter himself behind a suddenly and secretly changed *status*, although he succeeded in making the change before the hand of the chancellor has actually reached him.” *Pay Less*, 2 Wn.2d at 529 (quoting 1 J. High, *Injunctions* § 5a, at 10). Thus, in opening a retail establishment in direct violation of the ordinance, petitioners did not obtain a “status” that entitled them to equitable protection.

Petitioners also cite *Pay Less* for the proposition that a preliminary injunction ordinarily will not be issued if it has the practical effect of granting all of the relief that could be obtained by a final decree and effectively disposes of the case. *Pay Less*, 2 Wn.2d at 532. But the preliminary injunction here has no such effect. The superior court at most determined that the city is likely to prevail on the merits; it has issued no final determination on the validity of the ordinance, and thus it is possible petitioners may yet prevail and be able to do business.

Finally, petitioners demonstrate no probable error in the Court of Appeals order to the extent the court balanced the overall equities in favor of the city. Petitioners allege substantial economic harm, but as I noted in denying petitioners’ motion for an emergency stay, they largely assumed the risk of harm by opening a business expressly disallowed by the ordinance well after the ordinance was enacted. Petitioners mainly lament their assumption of financial obligations in reliance on Commissioner Wasson’s stay order, but they are presumed to have known that the commissioner’s ruling was subject to modification by the judges of the Court of Appeals. RAP 17.7.

In sum, petitioners demonstrate no probable error in the Court of Appeals order modifying the commissioner's stay order and reinstating the preliminary injunction pending appellate review.

Accordingly, the motion for discretionary review is denied.


DEPUTY COMMISSIONER

January 8, 2016

