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SUPREME COURT  
OF THE STATE OF WASHINGTON

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STEVE SARICH, ET AL.,  
Petitioners

v.

CITY OF KENT, ET AL.,  
Respondents

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**SUPPLEMENTAL BRIEF OF CITY OF KENT**

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 ORIGINAL

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## I. IDENTITY OF PARTIES

The city of Kent (“City”) submits this Supplemental Brief in Response to the Court’s October 9th, 2014, Order Granting Petitioners’ Petitions for Review, submitted separately by Appellants Deryck Tsang (“Tsang Petition”), John Worthington (“Worthington Petition”), and Steve Sarich (“Sarich Petition”). RAP 13.7(d). The city of Kent, a Washington municipal corporation, is a non-charter code city formed under Title 35A of the Revised Code of Washington (RCW). Appellant Tsang maintains a medical marijuana business, self-styled as a “collective garden,” within the City. (Tsang Petition, 5-6). Appellants Worthington and Sarich are not Kent residents, but both “stated in their complaint that they intended to participate in a collective garden in Kent.” *Cannabis Action Coalition, et al., v. City of Kent*, 180 Wn. App. 455, 467, 322 P.3d 1246 (2014).

## II. INTRODUCTION

The Court of Appeals, Division I, issued its unanimous decision in favor of the City based on a record developed by a number of separate parties and multiple *amicus* briefs. *Cannabis Action Coalition, et al., v. City of Kent*, 180 Wn. App. 455, 322 P.3d 1246 (2014). The City submits this Supplemental Brief not to re-tread the established arguments but to assist the Court in focusing on the simple, yet salient points necessary to

make this decision. The City intends that this Brief serve as a useful road map.

### III. STATEMENT OF THE CASE

At its core, this case presents the question of whether the City retained its preexisting regulatory authority to limit or prohibit a specific land use within its boundaries after the passage of ESSSB 5073, the state's Medical Use of Cannabis Act ("MUCA"). Affirming the City's interpretation of the convoluted history of the MUCA and the effect of the partial veto by Governor Gregoire, the Court of Appeals agreed that; (1) the possession and use of medical marijuana, whether individually or through participation in a "collective garden," remains a crime in our state, to which "qualifying patients" may assert a limited affirmative defense; (2) as it prohibits an activity that is also prohibited under state law, the City's ordinance does not conflict with the MUCA; and (3) the MUCA expressly authorizes cities to enact zoning requirements to regulate or exclude collective gardens. *Cannabis Action Coalition, et al., v. City of Kent*, 180 Wn. App. 455, 470, 472, 478, 482; 322 P.3d 1246 (2014).

Pursuant to RAP 13.7(b), the Court reviews "only the questions raised in the . . . petition for review and the answer unless otherwise ordered by the Supreme Court." Here, three separate Petitions for Review were filed and the City responded with one Answer. The City, by this

Supplemental Brief, addresses the various issues raised in Appellants' three petitions.

#### IV. ARGUMENT

##### A. **The Enactment Of The City's Ordinance Was A Valid Exercise Of The City's Inherent Police Power.**

The Court of Appeals correctly noted that the City derives its power to enact zoning ordinances pursuant to article XI, section 11 of the Washington Constitution, rather than from "thin air," as Appellant Worthington suggests (Worthington Petition, 9). *Cannabis Action Coalition* at 480. "The scope of [a municipality's] police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people . . . . Generally speaking, a municipality's police powers are coextensive with those possessed by the State." *Id.* at 482, citing *State v. City of Seattle*, 94 Wn.2d 162, 165, 615 P.2d 461 (1980).

A local ordinance is only unconstitutional if it conflicts with some general law, if it is not a reasonable exercise of police power, or if the subject of the ordinance is not local. *Id.*, citing *Edmonds Shopping Center Assocs. v. City of Edmonds*, 117 Wn. App 344, 351, 71 P.3d 233 (2003). As the Court of Appeals pointed out: "The Challengers do not contend that the Ordinance is unreasonable or not local." *Id.*, n. 17.

Appellants continue to confuse the issues involved in this appeal. This case does not address personal use of medical marijuana. It addresses the City's inherent, traditional, and consistently approved right to enact zoning laws that determine where certain land uses can and cannot be established. This right to regulate and restrict necessarily includes the right to prohibit when a city council determines prohibition best serves the public health, safety and welfare. (Brief of Amicus Curiae Washington State Association of Municipal Attorneys ("WSAMA Brief") 13-14). *See, e.g., Edmonds Shopping Ctr. v. Edmonds*, 117 Wn.App. 344, 71 P.3d 233 (2003); *Rumpke Waste, Inc. v. Henderson*, 591 F.Supp. 521, 530-32 (S.D. Ohio 1984) (recognizing that an Ohio city was not bound to allow sanitary landfills even though they were generally allowed by state law); *See also Town of Beacon Falls v. Fosic*, 212 Conn. 570, 563 A.2d 285, 291-92 (1989). "It cannot be said that every municipality must provide for every use somewhere within its borders." *Fanale v. Borough of Hasbrouck Heights*, 26 N.J. 320, 139 A.2d 749, 752 (1958). That is just what the City did in this instance.

Appellants argue variously that "the issues at stake . . . affect individual patient home grows" (Worthington Petition, 6) and that there should be "[u]niformity in the enforcement of the Uniform Controlled

Substances Act.” (Sarich Petition, 12 (emphasis in original)).<sup>1</sup> The Appellant misses the issue. The City merely seeks to regulate a particular land use. To understand the activity to which the City’s ordinance pertains, one need only look to Appellant Tsang, the only Appellant currently operating a collective garden in Kent:

The collective garden is located within leased property at the north end of West Valley Business Park in an area zoned M1 for Industrial Park. The building is safe and secured with 24-hour video surveillance, alarm monitoring, electric striking door, and neighbors Washington Patrol Unit, a private security firm. The collective garden is minutes from Valley Medical Hospital, walking distance to bus routes, ADA accessible and was in compliance with all zoning laws prior to the City’s adoption of Ordinance 4036.<sup>2</sup>

(Tsang Petition, 6).

Clearly, Appellant Tsang’s business is a land use, and one that requires and deserves scrutiny under the City’s zoning authority. The City’s ordinance does not regulate the use of marijuana itself: it only identifies those zones in which this land use would be appropriate. After

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<sup>1</sup> The uniformity argument is addressed beginning on page 14 of this Brief.

<sup>2</sup> The last statement is patently false, as the City had two moratoria prohibiting the establishment of collective gardens prior to the adoption of Ordinance 4036. Additionally, the City’s zoning code is fashioned in a permissive structure, in that uses are presumed to be prohibited unless expressly authorized by code or by administrative interpretation in response to a request, which Tsang never submitted. (*See, e.g.* Brief of Respondent City of Kent in Response to Brief of Amicus Curiae American Civil Liberties Union of Washington (“City Response to ACLU”), 10-12).

nearly a year spent considering the issue and holding several hearings to elicit public testimony, the Kent City Council determined that there were no zoning districts currently suited to the siting of collective gardens. (CP 666). Zoning powers belong to cities precisely because each city is different and there should not be uniformity among cities when it comes to these land use matters.

**1. The City's Ordinance Is Presumptively Valid Unless Preempted By State Law. The MUCA Contains No Such Preemptive Language.**

Nothing in ESSSB 5073 supports the contention that either the legislature or the governor sought to expressly preempt the City's zoning authority or that its passage signified that the State was fully occupying the field of medical marijuana regulation so that there was no room for cities to exercise concurrent jurisdiction. By comparison, with regard to the state Uniform Controlled Substances Act, this Court previously held that RCW 69.50.608 expressly grants concurrent jurisdiction to local governments, as opposed to preempting them. *City of Tacoma v. Luvone*, 118 Wn.2d 826, 835, 827 P.2d 1374 (1992). The same result should apply to the MUCA.

Appellants maintain that the City's ordinance conflicts with state law and thus is unconstitutional. Appellant Tsang argues that "so long as

[he] . . . complies with the requirements for collective gardens set out in RCW 69.51A.085, [he] may not be subject to criminal or civil consequences.” (Tsang Petition, 12). This leads to the absurd conclusion that even if a collective garden was established by trespassing on someone else’s property, the members of the collective could not be subject to “criminal or civil consequences” for their trespass. RCW 69.51A.085 was never intended to be theoretical get-out-of-jail-free card.

The Court of Appeals concluded its opinion by holding that:

As the plain language of the statute and the governor’s veto message indicate, collective gardens are not legal activity. The Ordinance, by prohibiting collective gardens, prohibits an activity that constitutes an offense under state law. As it prohibits an activity that is also prohibited under state law, the Ordinance does not conflict with the MUCA.

*Cannabis Action Coalition* at 482-483.

**B. The Legislative History Of ESSSB 5073 Shows That Marijuana Use For Medical Purposes Remains Illegal Under State Law.**

ESSSB 5073 originally contained 58 separate sections as part of a comprehensive effort to create a system of medical marijuana legalization under state law through registration with the Department of Health. On April 14, 2011, after the House passed the bill but before passage by the Senate, the United States Attorney sent Governor Gregoire a letter

threatening possible prosecution of state employees under the federal Controlled Substances Act (“CSA”) if state actors became involved in the implementation and regulation of the MUCA. (CP 290-292).

In response to this threatened risk of prosecution, Governor Gregoire vetoed 36 of the 58 sections of ESSSB 5073. Significantly, the governor vetoed Section 901, which was intended to create a state-regulated patient registry. State participation in this registry would have caused the kind of state action that engendered the response from the United States Attorneys’ Office.

What remained of ESSSB 5073 following the governor’s veto is a bill which provides that certain people cannot be subject to criminal sanctions or civil consequences under state law, provided they are registered in accordance with Section 901 of the bill – an impossible scenario, given that Section 901 was never passed into law. Section 401 of the bill (now codified in RCW 69.51A.040) contains six separate requirements that must be met in order for medical use of marijuana to not be considered a crime. Three of these requirements relate to Section 901 or the registry that it would have created. “Qualifying patients” and their designated providers, post-veto, continue to have an affirmative defense to

state criminal charges, but one cannot have an affirmative defense unless the underlying conduct itself is illegal.<sup>3</sup>

The Appellants cite to *State v. Kurtz*, 178 Wn.2d 466, 309 P.3d 472 (2013) for the proposition that medical marijuana is legal to produce, deliver, and possess. No less than one-half of the opinion of Division I in this case is dedicated to the history of ESSSB 5073, and its meaning. This Court eloquently described the complexity involved in resolving legislative intent issues when the legislature and the governor act in opposition, when it noted: "...we concede the divination of legislative intent is on occasion somewhat akin to the difficulties attendant in the elucidation of the Eleusinian mysteries..." *Rozner v. City of Bellevue*, 116 Wn.2d 342, 350, 804 P.2d 24 (1991). If this Court intends to engage in "divination" regarding ESSSB 5073 in order to rule on the case at hand, it will require greater "elucidation" than was undertaken in *Kurtz*, where the Court wrote: "in 2011 the legislature amended the [Medical Use of Cannabis] Act making qualifying marijuana use a legal use, not simply an affirmative defense." *State v. Kurtz*, 178 Wn.2d 466, 476, 309 P.3d 472 (2013). This statement was followed by a simple citation to RCW

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<sup>3</sup> The Court of Appeals similarly held that medical use of marijuana remains a crime under the MUCA, to which one may raise an affirmative defense, in a recent criminal case, *State v. Reis*, 180 Wn. App. 438, 322 P.3d 1238 (2014).

69.51A.040 and a brief explanation of RCW 69.51A.005(2)(a), which partially identifies the legislature's intent of the Chapter. *Id.*

Pursuant to RCW 69.51A.040, in order for the medical use of marijuana to "not constitute a crime," a "qualifying patient" is required to comply with six distinct conditions: one of which being that the person "presents his or her proof of registration with the department of health" and another that the person has documented evidence regarding "the registry established in section 901 of this act." Post-veto, however, there is no registry. Therefore, if a medical marijuana user cannot register, then the user cannot meet all six mandatory conditions of compliance, and the use cannot be legal under state law. In short, marijuana use for medical purposes under Chapter 69.51A RCW remains a crime in this state.

The *Kurtz* decision did not consider whether compliance with all six conditions of 69.51A.040 is factually or legally possible; nor did it need to. In *Kurtz*, this Court addressed only whether the MUCA abrogated the common law defense of medical necessity. It did not need to engage in any statutory analysis of ESSSB 5073 or the governor's vetoes in order to determine that the common law medical necessity defense remained available absent express statutory language to the contrary. Any reference to the legality of medical marijuana use was unnecessary to decide the case, and simply dicta. This Court has held that when dictum in a previous

decision is inconsistent with a later case requiring statutory interpretation of the same act, the first statement may be “repudiated” if necessary. *See, e.g., Oak Harbor Sch. Dist. v. Oak Harbor Educ. Assn.*, 86 Wn.2d 497, 545 P.2d 1197 (1976).

**C. No Matter Whose Intent Is Deemed To Control, Both The Legislature And The Governor Evinced The Same Intent To Preserve Local Police Power Authority Over All Marijuana-Based Land Uses, Including Collective Gardens.**

Among the 22 sections of ESSSB 5073 that the governor did not veto, she retained both Section 403 (now codified as RCW 69.51A.085), regarding “collective gardens,” and Section 1102 (now codified as RCW 69.51A.140), which reaffirmed that cities and towns could exercise their traditional police powers over all marijuana activity. The legislature did allow one exception restraining that authority only as applied to the siting of “licensed dispensers,” a type of entity that cannot legally exist post-veto. RCW 69.51A.140. The governor explained that she was retaining Section 1102 precisely because she wanted to maintain the same “local governments’ authority pertaining to the production, processing or dispensing of cannabis or cannabis products within their jurisdictions” intended by the legislature, recognizing that the restriction regarding licensed dispensers had been rendered meaningless. *Cannabis Action Coalition*, 478-479.

The law as enacted explicitly states that cities may place zoning restrictions on “the production, processing, or dispensing of cannabis or cannabis products . . . .” RCW 69.51A.140. That is all the City has done. The statute merely confirms that nothing in RCW 69.51A.140 limits the expansive right possessed by municipalities to place zoning restrictions on the production, processing or distribution of medical marijuana.

But Appellants insist that RCW 69.51A.085, the collective garden provision that the governor did not veto, granted an express right “to operate [a collective garden] ‘without fear’ of criminal prosecutions or civil law consequences.” (Tsang Petition, 16). Appellants’ assertion conveniently ignores the governor’s full statement that participation in collective gardens should be allowed “without fear *of state law criminal prosecutions.*” (Emphasis added.) The governor did not mention “local laws,” “other state laws,” or “civil violations and penalties.” She limited her comment only to state laws and, even then, only state criminal laws. Absent express language to the contrary, qualifying patients participating in collective gardens must comply with a host of other laws, including local zoning.

Appellants also argue that the words “producing and processing” used with reference to collective gardens in RCW 69.51A.085 bear no relation to the words “production and processing” as they appear in RCW

69.51A.140, insomuch as one should only be read to apply to commercial activity and the other only to non-commercial activity (assuming one accepts the fiction that real-life operations of “collective gardens” actually are “non-commercial” activities.) (Worthington Petition, 10-11). Neither the legislature nor the governor made this distinction, and considering both sections were passed at the same time, there is no legal basis for concluding that they have different operative meanings. As the Court of Appeals stated:

Although RCW 69.51A.085 does not itself grant powers to municipalities, this statutory provision cannot be read in isolation. “We construe an act as a whole, giving effect to all the language used. Related statutory provisions are interpreted in relation to each other and must be harmonized.” *C.J.C. Corp of Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999) (citing *State v. S.P.*, 110 Wn.2d 866, 890, 756 P.2d 1315 (1988)). RCW 69.51A.085 was passed as part of a comprehensive bill amending the MUCA. This provision must therefore be read in conjunction with the other enacted provisions of ESSSB 5073.

*Cannabis Action Coalition, et al., v. City of Kent*, at 477.

- 1. Even If This Court Concludes That Medical Marijuana Use In General Or Participation In A Collective Garden Is A Completely Legal Activity Under State Law, The City’s Ordinance Is Still Valid.**

As Amicus WSAMA notes in its brief to the Appellate Court, a city is free to adopt prohibitive zoning ordinances concerning undesirable

land uses, even if those uses are legal under state law. See *Edmonds Shopping Ctr.*, 117 Wn.App. at 353-54; see also *Rumpke Waste, Inc.*, 591 F.Supp. 521, 530-32; see also *Town of Beacon Falls* 212 Conn. 570, 563 A.2d 285, 291-92; see also *Fanale* 26 N.J. 320, 139 A.2d 749, 752; (WSAMA Brief 13-17). Under the laws of both this state and those of other states, cities can prohibit legal activity altogether, phase-out legal nonconforming land uses over reasonable amortization periods, and generally decide for themselves what land uses are best-suited to their communities. See *Edmonds Shopping Ctr.*, 117 Wn.App. at 353-54; see also *Rumpke Waste, Inc.*, 591 F.Supp. 521, 530-32; see also *Town of Beacon Falls* 212 Conn. 570, 563 A.2d 285, 291-92; see also *Fanale* 26 N.J. 320, 139 A.2d 749, 752; (WSAMA Brief, 13). Furthermore, judicial review of local zoning is not an inquiry into the wisdom of a city's legislative decision, but instead involves abuse of legislative discretion. Where reasonable minds could differ, the ordinance must be sustained. *Anderson v. Island County*, 81 Wn.2d 312, 317, 501 P.2d 594 (1972); see also *Carlson v. Bellevue*, 73 Wn.2d 41, 45-52, 435 P.2d 957 (1968). (WSAMA Brief, 17.)

The California Supreme Court was faced with many of the same arguments when rendering its opinion in the case of *City of Riverside v. Inland Empire*, 56 Cal. 4th 729, 300 P.3d 494 (2013). In upholding a city's

ban on medical marijuana dispensaries, that court enunciated compelling policy reasons to rule in favor of local control when it comes to medical marijuana:

The presumption against preemption is additionally supported by the existence of significant local interests that may vary from jurisdiction to jurisdiction. Amici curiae League of California Cities et al. point out that “California’s 482 cities and 58 counties are diverse in size, population, and use.” As these amici curiae observe, while several California cities and counties allow medical marijuana facilities, it may not be reasonable to expect every community to do so.

For example, these amici curiae point out, “[s]ome communities are predominantly residential and do not have sufficient commercial or industrial space to accommodate” facilities that distribute medical marijuana. Moreover, these facilities deal in a substance which, except for legitimate medical use by a qualified patient under a physician’s authorization, is illegal under both federal and state law to possess, use, furnish, or cultivate, yet is widely desired, bought, sold, cultivated, and employed as a recreational drug. Thus, facilities that dispense medical marijuana may pose a danger of increased crime, congestion, blight, and drug abuse, and the extent of this danger may vary widely from community to community.

*Inland Empire*, 56 Cal. 4th at 755-756.

This cuts to the heart of the matter. The interests of the cities of Seattle or Tacoma are inherently different from Kent’s. The legislature can expressly limit a city’s zoning authority, as it did, for example, by passing RCW 36.70A.200(5): “No local comprehensive plan or development

regulation may preclude the siting of essential public facilities.” Without express limiting language, the constitution requires the presumption that municipal legislative bodies are best-suited to determine the needs and goals of their communities, including the land use policies best designed to implement them. It takes an extraordinary showing to overcome that presumption, and Appellants have not done so.

**D. To Hold That The City Cannot Prohibit Land Uses That Constitute Violations Of The Federal Controlled Substances Act Would Place The MUCA In Direct Conflict With Federal Law.**

The City has explained, in prior briefing, how cases such as *HJS Dev. V. Pierce County* and *Pasado's Safe Haven v. State* require that a reviewing court avoid deciding constitutional issues if a case can be decided on nonconstitutional grounds. 148 Wn. 2d 451, 61 P.3d 1141 (2003); 162 Wn. App. 746, 259 P.3d 280 (2011). While the City is clearly not required to independently enforce federal drug laws, if the City's Ordinance is struck down or ordered to be modified to specifically permit collective gardens in one or more of the City's zoning districts, such a decision would impose affirmative obligations on the part of City officials to knowingly make certain areas of the City available for the commission

of federal drug crimes.<sup>4</sup> In this context, the City may be forced to seek federal review of the decision, questioning the constitutional validity of the MUCA as thus interpreted, potentially undoing the work that other cities have already taken based on the current understanding of the scope and reach of the MUCA. The Court has a duty to harmonize any ambiguities between the MUCA and the City's Ordinance, if at all possible, thus avoiding the federal preemption issue altogether. *State v. Kirwin*, 165 Wn.2d 818, 825-826, 203 P.3d 1044 (2009).

## V. CONCLUSION

This is not a case about denying access to medical marijuana to qualifying patients. The real legal question is not about the use of marijuana – it is about the extent of local land use authority, and whether or not either the legislature or the governor intended that ESSSB 5073 specifically remove or otherwise curtail that authority in any way.

It would be naïve to buy into the fiction that “collective gardens” such as the one owned and operated by Deryck Tsang are simple groups of ten or fewer people working the land to grow marijuana for their own medical use. What Mr. Tsang describes is a business, and a land use that

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<sup>4</sup> Note that the same result would occur if the Court agrees that the use of medical marijuana remains a crime, subject to an affirmative defense, under state law.

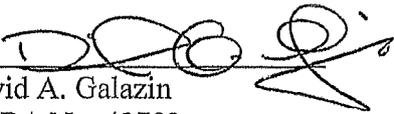
would certainly be inimical in any residential area or within close proximity to sensitive land uses, not to mention one that could be raided by the federal Drug Enforcement Administration at any time. It would be an unreasonable stretch to hold that RCW 69.51A.085 allows Mr. Tsang or other collective garden operators to locate their businesses wherever they want to, leaving cities helpless to do anything about it.

The City is already empowered to make informed land use decisions that certain activities are simply not suitable for Kent. Every city and town is unique, and as the court in *Inland Empire* noted, while some are well-equipped to handle marijuana businesses, “it may not be reasonable to expect every community to do so . . . . [F]acilities that dispense medical marijuana may pose a danger of increased crime, congestion, blight, and drug abuse, and the extent of this danger may vary widely from community to community.” *Inland Empire* at 755-756.

For the foregoing reasons, the City respectfully requests that the rulings of the Superior Court and the Court of Appeals be affirmed, that the injunction against Deryck Tsang be immediately reinstated, and that Ordinance No. 4036 be declared valid and enforceable pursuant to article XI, section 11 of the Washington State Constitution.

DATED this 9<sup>th</sup> day of December, 2014.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Kim Komoto, certify under penalty of perjury of the laws of the State of Washington that on December 9, 2014, I caused copies of the document to which this is attached, to be filed with the Supreme Court of the State of Washington via email at [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov) and to be served on the following individuals in the manner listed below:

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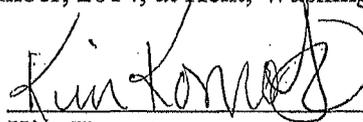
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SIGNED this 9<sup>th</sup> day of December, 2014, at Kent, Washington

A handwritten signature in black ink, appearing to read "Kim Komoto", written over a horizontal line.

Kim Komoto  
Legal Analyst

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Attached is the City of Kent's Supplemental Brief.

Thanks,

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