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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

COUNTY OF RIVERSIDE,

Plaintiff and Appellant,

v.

HAZY COLITAS et al.,

Defendants and Respondents.

E057522

(Super.Ct.No. RIC1201222)

OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed in part and dismissed in part.

Pamela J. Walls, County Counsel, Patti F. Smith, Deputy County Counsel, Best Best & Krieger, Jeffrey V. Dunn, and Lee Ann Meyer for Plaintiff and Appellant.

Law Offices of J. David Nick and J. David Nick for Defendants and Respondents Hazy Colitas, Relevance Alternative Health Care, David Cervantes, Elena Cervantes, and Anthony K. Pagnini.

Law Office of James DeAguilera and James DeAguilera for Defendants and Respondents Creating a Safe Alternative and Nicholas Matthew Ogelsby.

D | R Welch Attorneys at Law and David R. Welch for Defendants and Respondents J&M Cooperative, Peoples' Medicinal Cooperative, and Jon Doll.

Matthew Pappas, Charles Schurter, and Lee Durst for Defendant and Respondent Gerald Norman.

In this action, the County of Riverside (County) seeks to abate the operation of medical marijuana dispensaries, as a public nuisance, in unincorporated areas of the County. The Riverside County Code prohibits all such medical marijuana dispensaries. (Riverside Co. Code, §§ 17.12.040, 17.12.050.)¹ The trial court denied the County's request for a preliminary injunction, ruling that the state-wide Compassionate Use Act (Act) (Health & Saf. Code, § 11362.5) and Medical Marijuana Program (Program) (Health & Saf. Code, § 11362.7 et seq.) preempted the County's abatement authority.

While this appeal was pending, the California Supreme Court decided *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729 (*City of Riverside*), holding that the Act and the Program do not preempt local bans on medical marijuana dispensaries. (*Id.* at pp. 737, 744-763.) *City of Riverside* requires us to reverse, but a few subsidiary contentions also require brief further discussion.

¹ The County's request for judicial notice of the relevant portions of the Riverside County Code, as well as other materials, is unopposed and is hereby granted.

PROCEDURAL BACKGROUND

The County filed this action in January 2012. The complaint asserted three causes of action: (1) abatement of zoning violations, (2) abatement of public nuisances, and (3) “drug den” abatement. It named some 45 defendants, who allegedly owned or operated some 21 marijuana dispensaries in unincorporated areas of the County. Later, the County named additional defendants as “Does.”

Also in January 2012, the County filed a motion for a preliminary injunction, seeking to enjoin defendants from “possessing, cultivating, or distributing marijuana” at the subject dispensaries. Eighteen defendants filed oppositions to the motion.²

In August 2012, after hearing argument, the trial court denied the motion. It ruled that the Act and the Program preempted the County’s ban on marijuana dispensaries.

² Of the eighteen defendants who filed oppositions below, only three (J&M Cooperative, Peoples’ Medicinal Cooperative, and Jon Doll) filed respondent’s briefs in this appeal.

Another four (Hazy Colitas, Relevance Alternative Health Care, David Cervantes, Anthony K. Pagnini) filed a motion to dismiss the appeal. (See part II, *post*.) One defendant who did not file an opposition (Elena Cervantes) joined in the motion to dismiss.

Finally, three defendants who did not file oppositions below (Creating a Safe Alternative, Nicholas Matthew Ogelsby, and Gerald Norman) filed respondent’s briefs. While their failure to file oppositions could theoretically raise forfeiture issues, they have standing to appear as respondents in this appeal. (See *Senter v. De Bernal* (1869) 38 Cal. 637, 640-641 [every party whose interest is adverse to or will be affected by reversal or modification of judgment or order appealed from is a respondent].)

No other defendants have appeared in this appeal.

The County filed a timely notice of appeal from the order denying a preliminary injunction. In February 2013, it filed a petition for a writ of supersedeas. In May 2013, the Supreme Court decided *City of Riverside*. In August 2013, we granted the petition for a writ of supersedeas; thus, we enjoined respondents from using property in unincorporated areas of the County in violation of the relevant provisions of the Riverside County Code while the appeal was pending.

II

MOOTNESS

Five respondents (Hazy Colitas, Relevance Alternative Health Care, David Cervantes, Elena Cervantes, and Anthony K. Pagnini) (moving parties) have moved to dismiss the appeal as to them as moot. In support of the motion, they submitted evidence that, in response to *City of Riverside*, the particular dispensary that they were associated with had “permanently closed.”

The County opposes the motion, on three grounds.

First, the County argues that it was improper to submit evidence by way of a declaration, rather than a motion to augment. Not so. California Rules of Court, rule 8.54(a)(2) expressly authorizes the use of declarations in support of a motion. (See also *Norco Delivery Service, Inc. v. Owens-Corning Fiberglas, Inc.* (1998) 64 Cal.App.4th 955, 961, fn. 3.)

Second, the County argues that the appeal is not moot because it is still entitled to a permanent injunction, to ensure that the moving parties do not reopen a dispensary. This appeal, however, is from the denial of a preliminary injunction. The issue of the County's entitlement to a preliminary injunction against these parties is clearly moot. (*Epstein v. Superior Court* (2011) 193 Cal.App.4th 1405, 1410.) On remand, the County will be entitled to argue that it is entitled to a permanent injunction against the moving parties. At the same time, the moving parties will be entitled to argue that the entire action is moot as to them. We express no opinion on this point.

Third, the County argues that the case is within the exception that allows us to review even moot cases when the issues are of broad public interest and likely to recur. (See *Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358, 365, fn. 5.) This overlooks the fact that there are several other respondents, and the appeal is not moot as to them.³ Accordingly — while we do not necessarily agree that, in the wake of *City of Riverside*, the issues in this appeal are of “broad public interest” — we must decide those issues. At the same time, however, these five respondents should be dismissed.

³ The County seems to believe that granting the motion would require dismissal of the appeal as a whole. The motion is very clear, however, that it is seeking dismissal of the appeal as to the moving parties only.

III

PREEMPTION AND SUBSIDIARY ISSUES

The County contends that the trial court erred by ruling that the County's abatement power was preempted.

In light of *City of Riverside*, the County's argument is well-taken. Moreover, *City of Riverside* is dispositive of almost all of the respondents' arguments in favor of affirmance.

If only out of an excess of caution, we ordered the County to file a letter brief stating how it believed *City of Riverside* affected the appeal, and we allowed the respondents to file a reply. The County took the position that *City of Riverside* "compels reversal of the trial court's ruling." Only three respondents disagreed, and they identified only two remaining issues. We will discuss those issues below.

A. *Application to the CASA Defendants.*

Creating a Safe Alternative and Nicholas Matthew Ogelsby (collectively CASA defendants) contend that there is no evidence that they provide medical marijuana, and therefore no evidence they operate a medical marijuana dispensary. They claim that they operate a medical marijuana *collective*, rather than a medical marijuana *dispensary*.⁴

⁴ The CASA defendants also claim, in passing, that the County lacks the power to regulate their premises. However, this claim is based on their underlying contention that they operate a collective, rather than a dispensary. They appear to concede that the County can regulate a dispensary.

Because this is essentially a claim of insufficiency of the evidence, the CASA defendants forfeited it by failing to discuss *any* of the relevant evidence, much less *all* of the relevant evidence. “A party challenging sufficiency of the evidence must set forth all material evidence, including evidence harmful to the party’s position. [Citation.] Failure to do so results in the claim being deemed waived. [Citations.]” (*Estate of Bonzi* (2013) 216 Cal.App.4th 1085, 1107, fn. 7.)

Separately and alternatively, the County introduced ample evidence that the CASA defendants were operating a dispensary. The Riverside County Code defines a “medical marijuana dispensary” as “any facility or location . . . where medical marijuana is made available [or] distributed” (Riverside Co. Code, § 17.12.050.) A code enforcement officer testified that, when he inspected the CASA defendants’ premises, he saw marijuana displayed for sale. He also saw “more than four” customers buy marijuana. The premises were advertised as a marijuana dispensary on legalmarijuanadisensary.com; there were special offers for new “patients.” (Capitalization altered.)

We therefore conclude that the County’s ban on medical marijuana dispensaries applied to the CASA defendants.

B. *Application to J&M.*

J&M Cooperative (J&M) contends that it is exempt from the County’s ban on medical marijuana dispensaries.

The Riverside County Code provides that “[a] ‘medical marijuana dispensary’ shall not include . . . a residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the Health and Safety Code” (Riverside Co. Code, § 17.12.050.)

According to evidence introduced below, an entity called Marsha’s Manor Inc. (Marsha’s Manor) is licensed as a residential care facility for the elderly. Its license authorizes it to have up to four residents.

J&M is a nonprofit agricultural cooperative. It has approximately 2,500 members, to whom it provides medical marijuana. Some of these members are elderly residents of Marsha’s Manor. The vast majority, however, are not.

J&M assertedly “operates as a subsidiary” of Marsha’s Manor. However, because an agricultural cooperative must be owned by its crop-producing members (Food & Agr. Code, §§ 54231, 54237), it could not literally *be* a subsidiary. In any event, no matter what the relationship between them may be, it is clear that J&M is a separate entity from Marsha’s Manor, and J&M itself is not licensed to operate a residential care facility for the elderly. Hence, J&M is fully subject to the County’s ban on medical marijuana dispensaries.

IV

DISPOSITION

With respect to defendants Hazy Colitas, Relevance Alternative Health Care, David Cervantes, Elena Cervantes, and Anthony K. Pagnini, the appeal is dismissed.

The order denying a preliminary injunction is reversed. The trial court is directed to grant the motion for a preliminary injunction against all other defendants forthwith. In the interest of justice, all parties shall bear their own costs on appeal.

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RICHLI
J.

We concur:

McKINSTER
Acting P. J.

KING
J.