Superior Court of California
County of San Bernardino
247 W. Third Street, Dept. S-26
San Bernardino, CA 92415-0210

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT

MIKE HARRIS,

v.

CITY OF FONTANA

Case No.: CIVDS 1710589

RULING ON SUBMITTED MATTER:

PETITION FOR WRIT OF MANDATE GRANTED IN PART

I

Introduction

On November 8, 2016, California voters approved Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (the "AUMA"), decriminalizing the possession and use of small quantities of marijuana for recreational use. Specifically, the AUMA allows adults, twenty-one years of age and over, to grow up to six cannabis plants at their residences for their own recreational use. The state does not require a license or permit to grow the plants, nor did it adopt any regulations, as it did extensively

for *commercial* cannabis production. The AUMA does, however, allow cities and counties to enact "reasonable regulations" to regulate cannabis cultivation for personal use.

The issue in this case is how far a city can restrict the *category* of persons who are entitled to grow marijuana plants, and the *circumstances* under which they may grow the plants, without running afoul of the AUMA's requirement that regulations be "reasonable." The City of Fontana has gone too far.

Fontana adopted Ordinance, No. 1758, which defines the group of persons who may grow cannabis plants more restrictively than the AUMA's only limitation that they be at least twenty-one years of age. The Ordinance also imposes onerous restrictions that bear little or no relationship to the activity supposedly being regulated. While many of the provisions in the Ordinance are reasonable, the effect of the Ordinance *as a whole* is not to *regulate* cannabis cultivation for personal use, but to stamp it out entirely. Indeed, counsel informs the court that no one has even bothered to apply for the permit required by the Ordinance.[1]

Petitioner Mike Harris, a Fontana resident, seeks a writ of mandate to prohibit Fontana from enforcing the Ordinance (and its implementing Resolution 2017-105). For the reasons explained more fully below, the court grants the petition in part, barring Fontana from enforcing those provisions of the Ordinance which the court finds to be invalid.[2] The remainder of the Ordinance may remain, although Fontana may wish to draft a less onerous ordinance instead.

---

[1] This information provided by counsel is not part of the administrative record.

[2] The Ordinance contains a severability clause: "If any section, sentence, clause or phrase of this Ordinance or the application thereof to any entity, person, or circumstance is held for any reason to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application and to this end the provisions of

II

The Standard of Review

The "adoption of an ordinance is a legislative act." (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 173, fn. 2.) As such, it can be challenged by a petition for a writ of mandate under Code of Civil Procedure section 1085. (*Western States Petroleum Assn. v. Superior Court (Air Resources Board)* (1995) 9 Cal.4th 559, 566-568 [quasi-legislative action adopting regulations reviewable by traditional mandamus].) Judicial review under section 1085 "is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support." (*Weinstein v. County of Los Angeles* (2015) 237 Cal.App.4th 944, 964.) "This test has also been formulated to add an inquiry whether the agency's decision was 'contrary to established public policy or unlawful or procedurally unfair.'" (*Ibid.*) "Normally, mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner. However, it will lie to correct abuses of discretion." (*Id.* at p. 965.). Even under the "arbitrary and capricious" standard, however, the court "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1265.) Nevertheless,"[t]he court does not 'weigh the evidence . . . or substitute its judgment for that of the agency . . . .'" (*Ibid.*) "While the intent or purpose of the legislative body must be considered in construing an ambiguous statute or ordinance, the motive of the legislative body is generally irrelevant to the validity of

---

this Ordinance are severable." "Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable...." (*Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 714.)

the statute or ordinance." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1093, citation omitted.)[3]

Although a law or ordinance might be "inexpedient, or even foolish," it "cannot be invalidated upon that ground." (*Ex parte Anderson* (1901) 134 Cal. 69, 75.) "They are only invalid when the legislature has exceeded its powers in attempting to enact them." (*Ibid.*) "[I]f reasonable minds may differ as to the wisdom of the action of the local board or agency, its action is conclusive and the courts should not substitute their judgment for that of the local authority." (*United Clerical Employees v. County of Contra Costa* (1977) 76 Cal.App.3d 119, 125.)

III

The Adult Use of Marijuana Act (the AUMA)

Proposition 64, the AUMA, is codified in Health and Safety Code section 11362.1 *et seq.*[4] Section 11362.1 provides in relevant part:

> (a) Subject to 11362.2, . . . , but notwithstanding any other provision of law, if shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to:
>
> . . .
>
> (3) Possess, plant, cultivate, harvest, dry, or process not more than six living cannabis plants and possess the cannabis produced by the plants;
>
> . . .
>
> (c) Cannabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest.

---

[3] While it seems reasonably clear from the administrative record that the purpose of Fontana's Ordinance is to prevent Fontana residents from doing what the AUMA authorizes them to do—grow a small quantity of marijuana plants for personal use (see e.g., AR 312:3-5)—strictly speaking, Fontana's motivation is not relevant to a judicial determination whether the Ordinance is valid or invalid.

[4] All cited Code sections are found in the Health and Safety Code.

Section 11362.2 provides in relevant part:

> (a) Personal cultivation of cannabis under paragraph (3) of subdivision (a) of Section 11362.1 is subject to the following restrictions:
>
> (1) A person shall plant, cultivate, harvest, dry, or process plants in accordance with local ordinances, if any, adopted in accordance with subdivision (b).
>
> (2) The living plants and any cannabis produced by the plants in excess of 28.5 grams are kept within the person's private residence, or upon the grounds of that private residence (e.g., in an outdoor garden area), are in a locked space, and are not visible by normal unaided vision from a public place.
>
> (3) Not more than six living plants may be planted, cultivated, harvested, dried, or processed within a single private residence, or upon the grounds of that private residence, at one time.
>
> (b) (1) A city . . . may enact and enforce reasonable regulations to regulate the actions and conduct in paragraph (3) of subdivision (a) of Section 11362.1.
>
> (2) A city . . . may enact and enforce reasonable regulations to regulate the actions and conduct in paragraph (3) of subdivision (a) of Section 11362.1.
>
> (3) Notwithstanding paragraph (1), a city . . . shall not completely prohibit persons engaging in the actions and conduct under paragraph (3) of subdivision (a) of Section 11362.1 inside a private residence, or inside an accessory structure to a private residence located upon the grounds of a private residence that is fully enclosed and secure.
>
> . . .
>
> (5) For purposes of this section, "private residence" means a house, an apartment unit, a mobile home, or other similar dwelling.

IV

Ordinance No. 1758

Pursuant to the authorization in section 11362.2, subdivision (b)(1), Fontana adopted Ordinance No. 1758, which requires Fontana residents who wish to grow cannabis plants at their residence to obtain a permit from the city. The Ordinance adds section 30-7(B) to the Fontana Municipal Code. (See AR000409, p. 2 of the Ordinance.)

A. Restrictions on *Who* Can Obtain a Permit

Among other requirements and conditions for issuance of a permit, the Ordinance imposes restrictions on *who* may grow cannabis plants for personal use, well beyond the single statutory limitation that the person be at least twenty-one years of age.

Under section 30-7(B).060(A)(2-6) of the Ordinance, applicants for a permit must:

> . . .
>
> 2. Complete a Live Scan with the California Department of Justice, at the applicant's own cost.
>
> 3. Have no felony convictions for the illegal possession for sale, manufacture, transportation, or cultivation of a controlled substance within the last five (5) years[.]
>
> 4. Have no pending code enforcement actions with the City.
>
> 5. Have no outstanding payments due to the City.
>
> 6. Provide a signed, notarized affidavit of any landlord or property owner other than the applicant that acknowledges and grants permission for cultivation to occur on the property.

These restrictions on *who* may cultivate cannabis for personal use in Fontana are arbitrary and capricious because they disallow certain persons from doing what state law specifically allows them to do. The only restriction under the AUMA is that a person must be at least twenty-one years old. Fontana's Ordinance, however, excludes (1) certain felons, (2) anyone with a pending Code enforcement action (*e.g.,* violation of a property set-back requirement), (3) anyone who owes money to Fontana (e.*g.,* an unpaid parking ticket), and (4) anyone who cannot obtain permission of a landlord. These are not reasonable restrictions, because they conflict with the broad permission granted by the AUMA and, in the case of the Code enforcement and unpaid obligation provisions, are wholly unrelated to the activity supposedly being regulated.[5]

B. Restrictions on Physical Aspects of Residences that Qualify for a Permit

The Ordinance imposes other unreasonable conditions as well, by restricting aspects of the physical residence where the plants may be grown to an extent that is unrelated or only tangentially related to the small amount of cannabis cultivation authorized under the AUMA. The residence and "all plumbing, electrical, and other utilities must be properly permitted . . . ." (§ 30-7(B).060(C)(1)(a).) The residence must not include more than one "cultivation area." (§ 30-7(B).060(B)(2).) "The cultivation area" must be used *exclusively* for the marijuana, and "may not be shared with any space used for sleeping, cooking, eating, bathing, or other residential activities." (§ 30-(B).060(C)(1)(b).) Designated chemicals, including explosive gasses and dangerous poisons, cannot be located in the cultivation area, and if stored *elsewhere* in the residence, must be stored in leak and fireproof containers. (§ 30-7(B).060(C)(1)(d)(i) and (ii).) The area of cultivation must be accessible by only one lockable door. (§ 30-

[5] While the Live Scan requirement does not restrict who may obtain a permit, its only purpose would be to verify the absence of the prohibitory felony convictions.

7(B).060(C)(2)(a).) Access to the area must be restricted only to a permit holder. (§ 30-7(B).060(C)(2)(b).)

Certainly a city can *separately* require that all plumbing, electrical, and other utilities be properly permitted. But those requirements are presumably addressed already (or could be addressed) by other portions of the City Municipal Code having nothing to do with marijuana. Imposing such a requirement as a "reasonable" condition of permitting six marijuana plants to be grown is not demonstrated by the record. The arguments advanced by counsel for Fontana about plumbing and electricity focused on concerns that apply to large-scale *commercial* production, not to six or fewer marijuana plants.

Similarly, imposing restrictions on the use and storage of dangerous poisons and explosive gasses is a reasonable subject of municipal regulation. But the *nexus* of such a restriction with growing six marijuana plants is not demonstrated in the record. (*See Carrancho v. California Air Resources Board*, *supra*, 111 Cal.App.4th at p. 1265 (the court "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a *rational connection between those factors, the choice made, and the purposes of the enabling statute*." Emphasis added.)

Additionally, restricting the area where the plants can be grown to a single area, in a separate room, with a lockable door, where no other residential activities can occur, removes all but the wealthiest Fontana residents from obtaining a permit. Few residents have an extra room, unneeded for other residential purposes, to devote entirely to growing six marijuana plants. The need for such segregation is not demonstrated in the record.

C. Property Inspections

The petition seeks to invalidate the requirement for property inspections altogether. (*See* § 30-6(B).060(C)(3)(a).) As the Ordinance was written, requiring inspections made sense, to enable Fontana to assure that the property was in compliance with all the requirements. But this court finds the portions of the Ordinance that would justify a property inspection to be arbitrary and capricious, because they impose restrictions that are unrelated (or only tangentially related) to the activity that is supposedly being regulated, and by excluding those persons who qualify to grow cannabis under state law, but who are unable to modify their residences to match Fontana's onerous conditions. Once the ordinance is purged of the unreasonably restrictive provisions, there is no longer a need for property inspections at all, let alone inspections on the scale presently contemplated by Fontana, which would require inspecting plumbing, wiring, other utilities, and searching every cabinet and closet for regulated chemicals and poisons to assure that they are properly stored.

Once the unreasonable provisions of the Ordinance are removed, the only remaining purpose of a property inspection would be to assure that only six plants are being grown, which is the limitation imposed by the AUMA. But section 11362.1 of the AUMA provides that "no conduct deemed lawful by this section shall constitute the basis for . . . search." If Fontana's contemplated inspection reveals plants in excess of the six allowable plants—in other words, conduct that is *not* deemed lawful by the AUMA, the inspection amounts to a search that could lead to a criminal prosecution. A search warrant is required for that.

Therefore, Fontana has not justified the need for interior inspections of the residences of permit holders. Exterior inspections, however—to assure the plants are

not visible or otherwise perceptible to the public—do not require inspectors to enter the premises.

D. The Cost of the Permit

If a city is going to regulate an activity, it is reasonable for the city to know who is being regulated. But this permit is expensive—$400 for the original permit and $230 for annual renewals. Fontana justifies the high cost because an in-depth inspection is required for issuance or renewal of a permit. (See § 30-7(B).060(C)(3).) Presumably, Fontana would also need to verify that the applicant has no outstanding Code violations and owes no money to the city. Thus the cost is based on the amount of effort required to assure compliance with the onerous permit conditions set forth in the Ordinance. Since these restrictions are stricken on the ground that they are unreasonable, the cost ceases to be justified. If Fontana intends to assess an initial fee or a renewal fee in a *lesser* amount, it will need to reevaluate the necessary cost in light of the eliminated provisions of the Ordinance.

V.

Conclusion

For the reasons explained above, the following provisions are stricken from Fontana Ordinance 1758, enacting section 30-7 B) of the Fontana Municipal Code:

1. § 30-7(B).030(B)(4);
2. § 30-7(B).060(A)(2), (3), (4), (5), and (6);
3. § 30-7(B).060(B)(2);
4. § 30-7(B).060(C)(1)(a)(second sentence only), (b), and (d)(i) and (ii);
5. § 30-7(B).060(C)(2)(a) and (b);
6. § 30-7(B).060(C)(3)(a).

Additionally, the permit fees currently adopted by the City Council are disallowed, though subject to reassessment in light of the corrected Ordinance.

Dated: November 2, 2018.

David Cohn,
Judge of the Superior Court