No. 45565-0-II

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

THE CITY OF BURLINGTON

v.

THE WASHINGTON STATE LIQUOR CONTROL BOARD, HAKAM SINGH AND JANE DOE SINGH, and HK INTERNATIONAL, LLC.

RESPONSE BRIEF OF RESPONDENTS HAKAM SINGH and HK INTERNATIONAL, LLC. To BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS & WASHINGTON STATE ASSOCIATION OF COUNTIES

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I. INTRODUCTION

WSAMA/WSAC commences its *amici curiae* brief with a straw man argument.

The straw man is that Thurston County Superior Court's ruling that the City of Burlington did not establish standing for review somehow makes the ability of other cities or agencies to appeal future or similar Liquor Control Board rulings a "hollow promise" or "unenforceable suggestions." **WSAMA/WSAC Amici Curiae Brief** (hereafter "**Amici Brief**"), 1.

The ability of the City of Burlington (hereafter "**The City**") to appeal the decision of the Liquor Control Board (hereafter "**LCB**") in this case is neither a "hollow promise" nor an "unenforceable suggestion." Rather, The City does have the ability to appeal any relevant LCB decision it chooses—but The City must establish standing in order to do so, as required by law.

The City did not establish standing to appeal the LCB decision in this case. This Court should affirm the Thurston County Superior Court order finding The City did not establish standing, and dismissing The City's appeal.

II. ARGUMENT

Amici curiae states, "LCB argues extensively in its briefing that Burlington's attempt to raise its objections insufficiently met the test to establish its standing under the APA." **Amici Brief**, 4. This is incorrect.

What LCB argues, and what Hakam Singh and HK International join in arguing, is that the mere fact The City is granted a statutory right to object to a proposed LCB administrative decision does not also give The City the right to be heard on appeal, absent an independent showing by The City that it has standing to do so.

Amici curiae then state that their straw man version of the LCB's position should be "rejected, as it unreasonably conflates the relative merits of a local government's arguments with whether the local government can present those arguments in the first place." **Ibid**.

There is no "unreasonable conflation" here. The merits of a local government's arguments have nothing to do with whether the local government may present those arguments on appeal. In order to do so, the local government must establish standing, as demonstrated below.

Amici curiae go so far as to allege that "affirming the trial court here will absolve the LCB of any meaningful checks or balances in both the

liquor and marijuana contexts. It would send a message that local governments are powerless to protect its citizens when the LCB ignores its own procedures and grants liquor or marijuana licenses in a manner not contemplated by the voters." **Amici Brief**, 5.

This is simply not true. The requirement of an appellant to establish standing on appeal is not new. The fact that The City failed to establish standing to appeal the LCB's administrative decision in this case has no bearing whatsoever on any other local governments' ability to appeal future decisions of the LCB, whether involving alcohol or marijuana.

But the local government must establish standing in order to do so. This is a far cry from leaving local governments "powerless to protect its citizens," nor does it "absolve the LCB of any meaningful checks or balances."

Local governments are not powerless. LCB administrative decisions have meaningful checks and balances.

One of those checks and balances is the ability to appeal LCB decisions. But the appellant must establish standing in order to do so.

The City has failed to establish standing under the facts of this case.

A. Local governments have a procedure to obtain judicial review of adverse LCB administrative decisions—But they must establish standing in order to appeal an LCB decision

Amici Curiae argues that The City's objections were not given adequate weight by the LCB at the administrative level. **Amici Brief**, 6-7.

But that is not the issue in this appeal. The issue of this appeal is whether The City established standing to appeal the LCB's decision, regardless of what weight the LCB gave The City's objections.

It should be noted, however, that the LCB did in fact give due consideration to The City's objections.

The Board's Licensing Director reviewed the report of the Licensing Division staff (**AR** 34-35) who investigated the application and the materials submitted with the application. The Licensing Director provided The City with a "Statement of Intent to Approve Liquor License Over the Objection of the City of Burlington" dated August 31, 2012. **AR** 29-31.

The Statement of Intent took into account the issues raised by The City relating to public safety, but found, "In examining the record, there have been no liquor violations at the existing grocery store licensed

premise for the past four years and several compliance checks conducted by the Liquor Control Board resulted in no sale. The City did not demonstrate any conduct that constitutes chronic illegal activity as defined by RCW 66.24.010(12) at this premise. The City of Burlington's objection does not conclusively link the licensee and areas under the licensee's control to the information cited in the city's objection." **AR** 30, paragraphs 3.2, 3.3 and 3.5.

The handwritten decision of the Board Director states in pertinent part, "City's request for an adjudicative hearing is denied as they did not demonstrate conduct related to public safety per WAC 314-07-121(4)." **AR** 35.

Amici curiae continue with a restatement of their hyperbolic argument, "It would be an absurd result—namely denying anyone and everyone the ability to challenge the LCB's failure to follow the law by issuing license contrary to statute and legislative intent." **Amici Brief**, 8.

Yes, that would be an absurd result. But that is not what is happening here. What is happening here is the narrow issue that The City failed to establish standing to challenge the LCB decision on appeal. Nothing more. Nothing less. The City's failure to establish standing to

appeal this LCB decision does not deny "anyone and everyone the ability to challenge" LCB decisions in the future.

B. The City of Burlington failed to establish standing to appeal the LCB decision in this case.

1. The City did not establish standing as required by law

In spite of its previous arguments, amici curiae acknowledge in subsection "B" of its brief that "For one to have standing under the APA, three elements must be present."

These elements are:

(1) The agency action has prejudiced or is likely to prejudice that person;
(2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action. RCW 35.05.530. **Amici Brief**, 9.

Amici curiae is correct that The City must establish all three of those elements before "a right to judicial review exists." **Amici Brief**, 9.

Subsection (2) is termed the "zone of interest" prong, and subsections (1) and (3), taken together, are termed the "injury-in-fact" prongs. *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 327, 997 P.2d 360 (2000). **Amici Brief**, 9.

Amici curiae argue that the "zone of interest" prong "is not meant to be especially demanding," citing to *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987)." **Amici Brief**, 10.

This is correct, and Thurston County Superior Court already found that The City had established the "zone of interest" prong of the standing test. 8-23-13 Hearing, **RP** 16.

It is the "injury-in-fact" prong that The City failed to demonstrate.

But after setting forth the statutory elements required to establish standing, amici curiae lapse once more into their previous arguments that The City's objections were not given sufficient weight by the LCB at the administrative level. **Amici Brief**, 9. Again, that is not the issue before this Court. It is only natural The City disagrees with the LCB's administrative decision. Otherwise The City would not have appealed.

But granting the license over The City's objection is not the "LCB's wholesale disregard of a local government's objection." As shown above, LCB did consider The City's objections, but after giving those objections substantial weight, the LCB concluded that The City's objections were insufficient and ordered the relocation of the liquor store.

Amici curiae then appear to argue that anytime a government organization disagrees with an LCB decision, they have automatic

standing to appeal without separately establishing standing pursuant to RCW 35.05.530: "As a result, so long as the LCB's wholesale disregard of a local government's objections 'has prejudiced or is likely to prejudice' a local government, and a favorable judicial decision 'would substantially eliminate or redress the prejudice to' the local government, there is standing to go to court. RCW 35.05.530(1), (3)." **Amici Brief**, 11.

Amici curiae effectively argue that any time a local government feels the LCB did not give sufficient consideration to its objections in making an administrative decision, the local government is thereby automatically "prejudiced" such as to have standing to appeal the decision.

This is a remarkable and novel statement of law, unsupported by any citation to authority. As such, this argument should not be considered by this Court. See, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate court will not consider arguments not supported by authority or citations to the record); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440, *cert. denied* 498 U.S. 838, 111 S.Ct. 110, 112 L.Ed.2d 80 (1990) (appellate court need not consider claims that are insufficiently argued); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (court need not consider issues that are not supported by adequate argument and authority); *In re Marriage of*

Lindemann, 92 Wn.App. 64, 78, 960 P.2d 966 (1998), *review denied*, 137 Wn.2d 1016 (1999) ("This court will not consider argument unsupported by citations to authority"); *Bryant v. Palmer Coking Coal Co.*, 86 Wn.App. 204, 216, 936 P.2d 1163, *review denied*, 133 Wn.2d 1022 (1997).

Even if the LCB failed to comply with procedural requirements at the administrative level, that alone is not sufficient to confer standing on The City. "Failure to comply with procedural requirements alone is not a sufficient injury to confer standing (under the Administrative Procedure Act). The complaining party must still demonstrate that the agency action has invaded a legally protected interest that is concrete and particularized, rather than conjectural or hypothetical. *Allan v. University of Washington*, 92 Wn.App. 31, 37, 959 P.2d 1184 (1998), *review granted* 137 Wn.2d 1019, 980 P.3d 1280, *affirmed* 140 Wn.2d 323, 997 P.2d 360.

2. <u>*Cases cited by Amici Curiae are inapposite*</u>

a. *Wash. Ass'n for Substance Abuse & Violence Prevention (WASAVP) v. State*, 174 Wn.2d 642, 278 P.3d 632 (2012).

In support of its argument that The City had standing to challenge the LCB decision in this case, amici curiae cites to a case that it admits is "not dispositive" (**Amici Brief**, 11), *Wash. Ass'n for Substance Abuse &*

Violence Prevention (WASAVP) v. State, 174 Wn.2d 642, 278 P.3d 632 (2012).

WASAVP v. State was the case where the constitutionality of I-1183 was challenged, and where our Supreme Court ruled against appellants in finding the initiative passed constitutional muster.

There were two appellants in *WASAVP v. State*—WASAVP and David Grumbois, an individual who leased property to the State for a liquor store.

The goals of WASAVP included "preventing substance abuse." I-1183 required the State to terminate the lease with David Grumbois. *WASAVP v. State*, 174 Wn.2d at 653-54.

The Court found both appellants had suffered injury-in-fact sufficient to allow them standing to appeal. "Grumbois suffered injury because I-1183 required the State to terminate its lease with him. Although WASAVP has not suffered economic loss as a result of I-1183, its goals of preventing substance abuse could reasonably be impacted by I-1183's restructuring of Washington's regulation of liquor. Indeed, intervenors stress the established relationship between public safety and liquor, Br. Of Intervenor-Resp'ts at 19, such that the increase in liquor availability would injure WASAVP's goals." *Ibid.*

WASAVP v. State deals the issue of standing "to seek a declaratory judgment under the Uniform Declaratory Judgment Act, chapter 7.24 RCW," as opposed the instant case which involves an appeal of an LCB administrative decision under the Administrative Procedures Act, chapter 34 RCW. *WASAVP v. State*, at 653.

More to the point than *WASAVP v. State*, *infra*, in this regard, is *Grant County Fire Protection Dist. No.5, v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004), which also deals with the issue of standing under the Uniform Declaratory Judgments Act. There, certain cities sought to annex properties under their then-existing charters and/or noncharter codes. The local fire districts, as well as affected property owners, were involved in the appeal of the matter. The *Grant (II)* Court held that, though the property owners had standing, the fire districts did not.

"The fire districts, however, argue that since they are governed by elected boards of commissioners, they have a duty to their electorate to ensure that the districts maintain the capability to provide emergency fire protection and emergency medical services to the residents of the districts and to represent that electorate in legal challenges of this kind." *Grant II*, at 804.

Though this argument by the fire districts was hypothetically possible, the *Grant II* Court found it insufficient to establish the fire districts' standing because the fire districts presented no evidence to support their allegation of future injury. "There is no evidence in the record to show that the residents would receive less effective fire protection or other emergency services from Moses Lake or Yakima than they now receive from the fire districts." *Ibid.*

This set of facts is virtually identical to the case under consideration. Here, The City alleges hypothetical injury it will suffer due to the LCB's administrative decision, but The City did not present "evidence in the record" to show that any such injury would be suffered. Accordingly, The City has failed to establish the "injury-in-fact" test, and due to this failure, The City does not have standing in this appeal.

Amici Curiae cite to other cases in support of its argument that The City has standing. One case is a federal case and the other is from Colorado, both of which Amici Curiae admit are also "not dispositive." **Amici Brief**, 12.

b. Jackson County v. FERC, 589 F.3d 1284 (D.C. Cir. 2009)

Amici Curiae cite to *Jackson County v. FERC*, 589 F.3d 1284 (D.C. Cir. 2009) in support of their position. This case involved the

removal of a dam and powerhouse and the obvious injury this would cause downstream property owners.

Duke Energy Carolinas, LLC (Duke) owned the Dillsboro project, consisting of a hydroelectric project operating on the Nantahala and Tuckasegee River Basins in Jackson County, North Carolina. The hydroelectric project consisted of a concrete masonry dam and a powerhouse with two generating units on the Tuckasegee River.

Duke filed an application with the Federal Energy Regulatory Commission (FERC) to surrender its license to operate the dam. *Jackson County v. FERC*, 1286. Ultimately, the FERC granted Duke's surrender application, approving removal of the dam and powerhouse." *Jackson County v. FERC*, 1288.

FERC's *Surrender Order* concluded that the removal of the dam and powerhouse would cause "short-term environmental impacts and . . . a loss of 0.225 MW of capacity." *Ibid.*

Petitioner Jackson County filed a timely petition for review of FERC's orders.

Duke challenged the standing of Jackson County under Article III of the U.S. Constitution to bring the action, which requires, among other things, the petitioners to establish injury. "To establish injury, a petitioner

must, *inter alia*, show . . . it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Ibid*, (quotation marks and brackets removed, ellipses in original.)

The Court found Jackson County "had alleged a sufficient injury-in-fact, namely 'the threatened physical destruction of property within its borders,' which will substantially alter Jackson County's geography by converting a dammed lake into a free flowing river and eliminate a possible power source." *Ibid.*

The injury to downstream property owners when a dam is removed is neither speculative nor conjectural. This is precisely the type of future injury that has not been shown by The City in the case under review. The City has alleged nothing but speculation and conjecture. The City has shown no injury-in-fact and therefore has no standing.

c. *Bd. of County Comm'rs of Adams County v. Dep't of Pub. Health & Env't*, 218 P.3d 336 (2009)

Amici Curiae also cite to *Bd. of County Comm'rs of Adams County v. Dep't of Pub. Health & Env't*, 218 P.3d 336 (2009) in support of their position. There, federal law required an applicant for a license and permit from the Department of Public Health & Environment (DPHE) to dispose

of radioactive waste to first obtain from the county a Certificate of Designation ("CD") allowing for the disposal of the materials contemplated by the license or permit.

The applicant did not obtain (or even request) from Adam's County the legally required CD, before applying to the DPHE for the license and permit. The DPHE nevertheless issued the license and permit to the applicant.

Adams County appealed.

The Colorado Supreme Court held Adams County had standing because, "In this case, the County has alleged that, notwithstanding the fact that Clean Harbors (the applicant) never applied for nor received such a CD, the Department (of Public Health & Environment) issued such a license and permit to Clean Harbors. The County has therefore alleged an injury in fact to its authority to issue (or to refuse to issue) a CD for the disposal of the materials in question prior to the Department's issuance of a license or permit." *Bd. of County Comm'rs of Adams County v. Dep't of Pub. Health & Env't*, 218 P.3d 336, 341 (2009).

This case is inapposite to the issue under consideration.

There is no law requiring Hakam Singh and/or HK International to obtain from The City a "Certificate of Designation" before requesting permission from the LCB to move the location of its liquor license.

The City has failed to demonstrate any injury-in-fact, and accordingly, the Thurston County Superior Court's ruling that The City did not have standing to appeal the LCB administrative decision should be affirmed.

III. Conclusion

The City failed to establish it had standing to bring its appeal of the Board's administrative decision in this matter. Through the entirety of the "briefing phase" on appeal, the City elected to rest on the record developed at the administrative level to establish standing; this in spite of the fact The City knew, or should have known, that it had the duty on appeal to establish its standing to do so.

Accordingly, Thurston County Superior Court correctly held The City had not established standing and dismissed the case.

The fact The City did not establish standing to bring this case has no bearing or precedential value on the ability of other governmental agencies to bring challenges to LCB administrative decisions in the future, as argued by amici curiae. This is true regardless of whether such

potential challenges relate to LCB administrative decisions relating to liquor or marijuana.

The Court of Appeals should affirm Judge Schaller's order that The City does not have standing to be heard in this matter.

DATED this 26th day of August, 2014.

Respectfully submitted,

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STATE OF WASHINGTON COURT OF APPEALS
DIVISION 2

THE CITY OF BURLINGTON, Appellant, v. WASHINGTON STATE LIQUOR CONTROL BOARD; HAKAM SINGH; and HK INTERNATIONAL, LLC, Respondents.	COA No: 45565-0-II **DECLARATION OF SERVICE**

TO: THE CLERK OF THE COURT

I, Corbin T. Volluz, declare under penalty of perjury under the laws of the state of Washington that I have placed in the United States Mail on the below date with sufficient postage affixed copies of the foregoing document to each and every attorney of record herein, as identified below:

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