No. 45565-0-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

THE CITY OF BURLINGTON,
a Washington Municipal Corporation,

Appellant,

v.

THE WASHINGTON STATE LIQUOR CONTROL BOARD,
a Washington Agency; HAKAM SINGH AND JANE DOE SINGH,
and the marital community composed thereof; and
HK INTERNATIONAL, LLC,
a Washington Limited Liability Company,

Respondents.

REPLY BRIEF OF APPELLANT CITY OF BURLINGTON

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A. INTRODUCTION

Respondents Hakam Singh and HK International, Inc. ("HK") and the Washington State Liquor Control Board ("WSLCB") have submitted their responsive briefs in this case in which they both argue that the trial court was correct in dismissing the City of Burlington's ("City") request for judicial review of the WSLCB's on the basis of standing and that the WSLCB's decision to allow the relocation of HK's liquor license was proper.

The respondents' position on standing is not only unsupported in Washington law, it is counterintuitive; a municipality, in exercising its extensive police powers on behalf of its citizens, plainly has an interest in the location of liquor outlets within its boundaries. The very fact that RCW 66.24.010 requires the WSLCB to notify municipalities of liquor applications says no less.

Further, on the merits, the WSLCB's decision, made after arbitrarily denying the City's request for a public hearing at which a more ample factual record could be made, is *unsupported*. Nothing in Initiative 1183 ("I-1183"), the Liquor Act, or WSLCB regulation authorized the WSLCB to relocate the situs of a liquor license. An interim policy of the WSLCB lacks the force of law. The WSLCB should not have authorized

HK to relocate its liquor license to its mini-mart site, particularly where it was in close proximity to Burlington High School and a city park.

B. RESPONSE TO RESPONDENTS' STATEMENTS OF THE CASE

HK's statement of the case is unduly argumentative and not appropriate for an appellate brief. RAP 10.3(a)(5) (a statement of the case must be a "fair statement of the facts and procedure..., without argument."). As such, the City requests that it be disregarded. Based upon the record, the following facts are significant and undisputed. When spirit liquor sales were legalized by the adoption of I-1183, a license could be issued for those retailers whose premises were comprised of "at least ten thousand square feet of fully enclosed retail space within a single structure." I-1183 § 103(3)(a); RCW 66.24.630(3)(a). An exception to the minimum square foot requirement was provided for former state liquor and contract liquor stores. RCW 66.24.630(3)(c). The exception was necessary by I-1183's direction that the WSLCB auction off the right to operate state stores at the same location as the stores had previously been operated. AR 1; I-1183 § 102(2)(c); RCW 66.24.620. The precise language of the statutory adoption directed the WSLCB to sell by auction the right to "operate a liquor store upon the premises" of each "state-owned store location." I-1183 § 102(4)(c); RCW 66.24.620(4)(c).

There is no dispute that the WSLCB did not follow those requirements. Instead, on its own, without *any* authority, it simply decided that a winning bidder at an auction for a state store could move the premises one mile from the location of the former state store. It was on that basis that HK, an auction bidder, was granted a license to operate premises, not at the site of the former state store, but at a mini-mart by Burlington High School. Both HK and the WSLCB *admit* that there were no regulations allowing this. The WSLCB asserts this was done pursuant to an "interim policy" allowing this action. Yet, Policy BIP-04-2012, which purports to provide guidelines as to the relocation of liquor stores, never became effective until two months *after* the WSLCB approved the transfer of the license at issue here. AR 23; CP 133-37.

It is undisputed that the City was given notice of the proposed transfer. However, the transmittal from the WSLCB to the City states it was being provided "as an informational courtesy" and "The Board may not deny a Spirits Retailer license to an otherwise qualified bidder..." Br. of Appellant, Appendix C.[1]

There is no dispute that the City timely objected. It did so in a letter. Its objection related not only to the legally improper actions being

[1] From these actions, it can be reasonably be concluded that the WSLCB was going to approve the license no matter what the City said or did.

taken by the WSLCB, but it also raised the issues of "the site of numerous activities requiring law enforcement," that a liquor store is "incompatible with the land use in the area, and particularly incompatible with the Burlington High School, which is situated just beyond 500 feet[2] from the entrance to the proposed location." AR 37-39, 41.

The staff report *misrepresented* the location relative to the high school. Officer Johnson reported: "The issue I have is that it is next to the high school, just over the 500 feet." AR 41. The staff report states she said: "the school is well over 500' from the proposed location." AR 34. The City requested a hearing which would have allowed it to expand these facts but the WSLCB denied such a hearing for unspecified reasons. AR 28. It finalized the application, even though its own enforcement officer told the Board of deep concerns about the location:

> I watched the store one afternoon, and saw a stream of kids from the high school go into the store. I didn't see any come out with beer, but they all had back packs, and the bought or stolen beer could very easily be hidden in the back pack.
>
> As a liquor officer and a parent I am concerned with a spirits license for this premises is an invitation to add to the serious problem of youth access to alcohol.

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[2] If it was 500 feet or less, the WSLCB admits it would have had to deny the license. RCW 66.24.010.

AR 41. Officer Johnson's investigative aide reported that he knew "kids who buy alcohol from [the HK Mini-Mart] all the time."[3] AR 41.

After the WSLCB granted the license, the City appealed to the Thurston County Superior Court. For the first time, in responding to the City's opening brief, did the WSLCB challenge the City's standing. When the trial court considered the issue at oral argument, it asked the parties to "supplement the record." RP (7/19/13) 40. The City did so with three declarations. The court then struck the declarations as "too late," although it said such evidence would have been allowed with the City's reply. RP 21. The City did raise the issue that it had been denied a hearing by the WSLCB which would have allowed it to make a record if there was an issue as to the sufficiency of the showing it made for standing. CP 196-97.

C. SUMMARY OF ARGUMENT

Nothing presented in the briefs of respondents HK or WSLCB should deter this Court from reversing the trial court's judgment.

The City had standing in the trial court to present its concerns regarding the relocation of HK's liquor license to site near a park and

[3] In its brief, the WSLCB casts aspersions on its own enforcement officers, discounting this information as "double hearsay." Yet hearsay is allowed in an administrative proceeding, particularly of the type, as here, customarily relied upon by the agency. RCW 34.05.452. The Board specifically asked Officer Johnson to comment. AR 34, 41. WSLCB enforcement officers routinely rely on their investigative aides. AR 41.

Burlington High School. The City met the test for standing on its own and in an associational capacity, and evidence would have further reinforced that position had WSLCB and the trial court not abused their discretion in curtailing the development of a record on standing.

WSLCB lacked authority to permit the relocation of HK's license obtained pursuant to I-1183. The *only* basis for WSLCB's grant of relocation, an interim policy, was not even in effect when WSLCB authorized the relocation of the HK license.

D. ARGUMENT

(1) The City Had Standing to Attack the Legality of the WSLCB Decision to Relocate HK's Liquor License[4]

The parties here all agree that the applicable standard for addressing standing is derived from RCW 34.05.530. Under that statute, the City had standing.

(a) WSLCB Abused Its Discretion in Failing to Conduct a Hearing on HK's Relocation

Both WSLCB and HK harp on the alleged lack of evidence to support the City's position on standing. HK br. at 2-13,15-20; WSLCB br.

[4] The City noted in its opening brief at 22 n.16 that standing is a legal issue reviewed de novo by this Court. WSLCB agrees. WSLCB br. at 12. Despite the unambiguous authority cited by the City and the WSLCB, HK insists on asserting that an abuse of discretion standard applies. HK br. at 13-14. HK is plainly wrong in making this argument in light of *In re Estate of Becker*, 177 Wn.2d 242, 246, 298 P.3d 720 (2013), a controlling Supreme Court case it makes no effort to distinguish. *See* RPC 3.3(a)(1).

at 11-22. There is an element of hypocrisy in this argument. The City's objection was a letter submitted by the City's Mayor. AR 36-39. Any letter to WSLCB by the City opposing HK's relocation of its license was never meant to be an exhaustive recitation of the City's factual basis for opposing license relocation. Yet that is what the responding parties contend had to be submitted as they parse why the exact number of police calls to the site is not laid out in detail. *That type of evidence would have been developed at a hearing with all parties having the opportunity to present and cross-examine witnesses.* The concerns expressed by WSLCB enforcement officer Johnson could also have been further developed. Her concerns and knowledge of the situation was not communicated to the City until the present appeal. Yet, the WSLCB cannot deny it was provided information of numerous police calls, the incompatibility of the new site for the liquor license with land use, particularly its proximity to the high school (being located just beyond the prohibited zone), that it own field officer had concerns, and that minors bought beer there "all the time." Yet with all that information, it refused to grant a hearing so that these legitimate concerns of its local government partner and staff in enforcing the Liquor Act could be developed.

The WSLCB claims that "chronic illegal activity" was not proved. A hearing might have allowed for that to occur. But the WSLCB's

reference indicates a belief that "chronic illegal activity" had to be established in an initial submission, or the license must be approved. That is not the law. RCW 66.24.010(10) only provides that when "chronic illegal activity" is present, the concerns of local government are given additional weight. That does not mean that there is no basis to deny a license if there is less than "chronic illegal activity." In light of the evidence that was supplied, the apparent misapplication of the legal standard applicable to the City's concerns, and the apparent determination by the WSLCB to just proceed no matter what, WSLCB abused its discretion in failing to conduct a hearing. By denying the City's due process right to a hearing, and by acting in an arbitrary and capricious manner in refusing a hearing, that alone establishes standing under Washington law. *Allen v. University of Washington,* 140 Wn.2d 323, 329-30, 997 P.2d 360 (2000); *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council,* 129 Wn.2d 787, 795, 920 P.2d 581 (1996).

WSLCB never articulates in its brief the precise circumstances that support the convening of a hearing on a liquor license. WSLCB br. at 9, 26-27. This is not a case where the concerns about the license are flimsy or frivolous. Where a municipality has raised colorable concerns

regarding a license application, as here, WSLCB abuses its discretion in failing to convene an RCW 66.24.010 hearing.

(b) The Trial Court Abused Its Discretion in Failing to Take Further Evidence on Standing

This case presents the unusual situation of a trial court ruling on the merits in favor of the City while simultaneously dismissing its petition on the basis of standing and excluding evidence that would have established standing. The trial court abused its discretion in the exclusion of the evidence for several reasons. First, it specifically asked the parties to "supplement the record." That may not have been the court's intention, and it apologized for the confusion its choice of words engendered, but the City appropriately, if mistakenly, believed additional evidence could be submitted and considered. Second, the evidence that HK's mini-mart is adjacent to a park is a matter of which the trial court could have taken judicial notice. ER 201.[5] Both responding parties are familiar with the location, so that was no surprise. Third, the Court indicated the evidence would have been considered if the City had submitted the three

[5] ER 201(b) states that a court may take judicial notice of facts "not subject to reasonable dispute." Geography or location is frequently noticed judicially. Long ago, our Supreme Court upheld judicial notice of the fact that the Snohomish River empties into Puget Sound. *Vail v. McGuire*, 50 Wash. 187, 96 Pac. 1042 (1908). *See also*, *State v. Hardamon*, 29 Wn.2d 182, 186 P.2d 634 (1947) (Seattle is in King County); *Lofberg v. Viles*, 39 Wn.2d 493, 236 P.2d 768 (1951) (Chehalis is in Lewis County); *State v. Portnoy*, 43 Wn. App. 455, 718 P.2d 805, *review denied*, 106 Wn.2d 1013 (1986) (Bonney Lake is in Pierce County). The court below could have taken judicial notice of the park's location in proximity to HK's mini-mart.

declarations with its reply brief. If such evidence had been supplied on reply, the responding parties would have had the same opportunity to address them as they did when they were submitted. Thus, if submitting them on reply was appropriate, it was arbitrary to exclude them when they were submitted. Fourth, case law specifically provides for the submission of such material during the briefing phase, which was just concluding. Finally, there is no harm done by allowing this case to be resolved on the merits. If the WSLCB acted illegally and HK's mini-mart is an inappropriate place for a liquor store, it makes little sense to exalt differences between a reply and further court-invited submissions.

This case involves genuine concerns of a municipality regarding the WSLCB acting illegally and effectively creating opportunities for criminal and undesirable social effects from alcohol sales to minors. In light of the fact that the City has raised the WSLCB's abuse of discretion in refusing to conduct a hearing, excluding the evidence was an abuse of discretion.

(c) The City Met the Test for APA Standing

The submissions of both HK and the WSLCB *concede* that the City is in the "zone of interest" to be protected. The concession is required in light of the numerous statutory requirements relating to the interests of local government and the citizens it represents, including the

statutory notice requirements, under the Liquor Act. However, the WSLCB wants to quibble as to the relative importance of the zone of interest requirement, and in doing so misapprehends the role of local government and its own role in regard to liquor enforcement.

It is axiomatic that before any injury can be considered, the law requires that the petitioner be in the zone of interests that are protected. That alone establishes the primacy of this factor in regard to standing. As for the special role of local government in regard to enforcement of the Liquor Act, the WSLCB tries to distinguish *Sukin v. Wash. State Liquor Control Board,* 42 Wn. App. 649, 710 P.2d 814 (1985), *review denied,* 105 Wn.2d 1017 (1986). WSLCB asserts that the Liquor Act is to be liberally construed to accomplish its own purpose of allowing the Board to protect the welfare, health, peace, morals, and safety of the people. WSLCB br. at 24. But *Sukin* considered the purpose of the Act in deciding whether the Board could extend the time to file objections to a license by the City of Spokane. The City brought forth the problems associated with the premises operated by the Sukins. Division III appropriately recognized that local government is a partner of the Board in enforcing the Act. The problems the City had with the premises in *Sukin* were why the license denial was not arbitrary and capricious. In its brief, the WSLCB arrogated to itself the sole right to determine the purpose the

Liquor Act. But local government has the right and duty to enforce portions of the Act and does so. *Sukin* stands for the proposition that removing procedural bars to concerns of local government related to problematical liquor licenses effectuates the purpose of the Liquor Act.

Both HK and the WSLCB in their responses *concede* that the City was a party to the administrative proceedings and had administrative standing. Perhaps the most galling argument advanced by HK and WSLCB to support their position that the City lacked standing is their citation to *Patterson v. Segale*, 171 Wn. App. 251, 289 P.3d 657 (2012) to overcome the customary principle that a party in the administrative process has standing to pursue an adverse administrative in court. HK br. at 20; WSLCB br. at 22. Both grossly distort the meaning of that case by failing to describe its facts. In *Patterson*, a neighboring landowner challenged the City of Burien's issuance of a substantial development permit to replace a bulkhead. The Shorelines Hearing Board and the trial court affirmed the City's decision. While the case was on appeal, the two landowners settled, making the permit decision final. Thus, any actual "harm" to the landowner's property was out of the case. The appealing landowner then sought declaratory relief on appeal that King County's shoreline master program applied by Burien was inapplicable to Burien. Division I stated:

> Under these circumstances, Patterson and Engdahl have failed to demonstrate that they are aggrieved or adversely affected within the meaning of the APA. With regard to the SHB's legal conclusion that the King County shoreline master program remains applicable within the city limits of Burien, neither Patterson nor Engdahl is situated differently than is any other member of the public. Because nonspecific and conjectural injuries do not satisfy the injury-in-fact requirement for APA standing, Patterson and Engdahl lack standing to seek further judicial review of the SHB's decision.

Id. at 254. The court's analysis of injury-in-fact was clear:

> Here, Patterson and Engdahl must demonstrate both that they are prejudiced by the SHB's order and that such prejudice would be redressed by a favorable decision by this court. Two aspects of the administrative order are at issue. The first source of potential prejudice stems from the SHB's determination that King County SMP continues to apply within the city limits of Burien following the City's incorporation. However, this injury does not satisfy the prejudice requirement of the injury-in-fact test. In essence, Patterson and Engdahl assert only that they may be harmed by a future permitting decision in which the City utilizes the King County SMP as its own SMP. Such a nonspecific and conjectural injury is insufficient to impart standing as an aggrieved party. Indeed, with respect to this aspect of the SHB's decision, Patterson and Engdahl are no differently situated than are any other members of the public.
>
> The second source of possible prejudice is the SHB's affirmance of the City's permitting decision. In their appearance before the SHB, Patterson and Engdahl asserted standing based upon the potential of the proposed bulkhead to produce "a negative effect on the Petitioners' esthetic enjoyment of the shoreline in this area." Given the SHB's resolution of their claims, this injury is all the more immediate, concrete, and specific. However, with regard to this aspect of the order, a favorable decision by this court

> cannot redress the asserted injury. Because Patterson and Engdahl have settled their claims against Segale and no longer seek judicial review of the City's decision to grant the permit, a decision by this court will not remedy the asserted negative effects of the replacement bulkhead on Patterson's or Engdahl's aesthetic enjoyment of the shoreline. The replacement bulkhead has been constructed and will remain in place regardless of our decision in this appeal.
>
> Neither aspect of the SHB's order now gives rise to an injury-in-fact. Accordingly, Patterson and Engdahl lack standing to seek judicial review of this administrative order.

Id. at 259-60.

Similarly, the WSLCB misrepresents the injury requirement in *Trepanier v. City of Everett,* 64 Wn. App. 380, 824 P.2d 524, *review denied*, 119 Wn.2d 1012 (1992). WSLCB br. at 13-14. *Trepanier* involved a statutory certiorari challenge by land use consultant to a determination of non-significance by the city with respect to its zoning code. The challenge lacked a property interest. Rather, his was a generalized claim that the zoning densities being adopted by Everett would push more development into unincorporated Snohomish County. Trepanier claimed he had an "academic and professional" interest on such matters. As such, the Court concluded he did not have any specific harm associated with him and he lacked standing.

By contrast, the City's injury here is neither non-specific nor hypothetical. The Liquor Act specifically prohibits liquor stores within 500 feet of schools. HK's mini-mart location is just a few feet over that demarcation. A few feet does not obviate the harm the statute is attempting to prohibit. A high school with adolescents who are of the age that they try to buy intoxicating liquors will be affected by a nearby liquor license. They are not preschoolers. HK's license is adjacent to a park where minors can drink, or adults who are intoxicated can hang out. The Board's own enforcement officer told the WSLCB that minors buy beer there "all the time." The City told the WSLCB "The Burlington Police Department has logged many calls to the proposed license location reflecting the high level of crime that occurs at the licensee's location," and its location will "bring children into close contact with those individuals who commit crimes that plaque the Skagit Big Mini-Mart." AR 39. None of that is "hypothetical." That crime causes the expenditure of law enforcement resources is not a "hypothetical" loss. It costs the City taxpayers real money. The fact there has been on-going crime at the location and that it is likely to continue or increase because spirits are now available is hardly conjectural. The fact that the premises did not have specific enforcement citations appears from Officer Johnson's comments to be simply a matter that HK did not get caught. The responding parties

also attempt to equate beer and wine sales with highly intoxicating liquors. The fact that for decades the WSLCB treated spirits differently from beer and wine alone demonstrates that the Board never thought the products comparable. Neither should the Court.

Obviously, this location is unique. It is not a spot for a liquor store. A decision precluding the license being issued at this location will take care of the problem. It is a "likely," as opposed to a "merely speculative," outcome that a judgment in the City's favor would substantially eliminate or redress the prejudice to the City that has been caused, or is likely to be caused, by agency action, as required by RCW 34.05.530(3).

Finally, City does have associational standing. It represents the interests of its citizens and property owners. Contrary to the implication in the WSLCB's brief at 25, public entities are allowed to assert associational standing, as was the case with the Washington Apple Commission in *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

In sum, the trial court erred in ruling that the City lacked standing to challenge the HK license in this APA judicial review proceeding.

(2) The WSLCB Had No Legal Authority Upon Which to Allow Relocation of HK's License

WSLCB contends that it did not err in granting HK the relocation of its liquor license to its mini-mart site. WSLCB br. at 33-34. It asserts that this authority is somehow derived from an "ambiguity" it claims exists in the language of Initiative 1183. *Id.*

In making this argument, WSLCB effectively *concedes* that it has *no express authority* anywhere in statute for its alleged relocation authority. Moreover, it does not even have a regulation as authority. It notes that it is *currently* in the process of rulemaking on its relocation authority. WSLCB br. at 5 n.5. At the time of its relocation decision as to HK, the WSLCB claims the *only* basis for its authority to relocate HK's license was an "interim policy," which it *concedes* is not a rule. WSLCB br. at 41.[6] This "interim policy" *was not even in effect at the time WSLCB decided to grant HK the license*. Thus, WSLCB had no basis to do what it did other than it decided to do so. Its "interim policy," even if it existed, had no legal effect and did not provide legal authority for its action here.

It is a cardinal principle of administrative law that an agency only has those powers conferred upon it by statute or fairly implied from that statutory grant of authority. *Tuerk v. State, Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994). Here, there is no grant of authority to

[6] This issuance of a policy is far less stringent in terms of procedure than the usual rule making process where public hearings are required. CP 133-37. *See, e.g.*, RCW 34.05.325.

WSLCB to authorize the relocation of a license. There is no authority conferred upon WSLCB by the Legislature anywhere in the extensive provisions of Title 66 RCW granting it the authority to relocate a license without an entirely new application. Licenses are only allowed at *specific sites*. RCW 66.24.010(9)(a).

Similarly, despite the *extensive* provisions of Initiative 1183, nothing in that measure provides that once a private entity acquires a formerly WSLCB-operated outlet, the WSLCB could freely allow the successful bidder to move the license to another site.

WSLCB correctly notes in its brief at 2-5 that the initiative provided for a public bidding process as to the State's operating rights. But the language of RCW 66.24.620(4)(c) makes clear that the decision relates exclusively to the location of the former WSLCB-run liquor store:

> The board must sell by auction open to the public the right at each state-owned store location of a spirits retail licensee to operate a liquor store *upon the premises*. Such right must be freely alienable and subject to all state and local zoning and land use requirements applicable to the property. Acquisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store and does not confer any privilege conferred by a spirits retail license. Holding the rights does not require the holder of the right to operate a liquor-licensed business or apply for a liquor license.

The operating rights were at the WSLCB-run store location. The bidder had *no guarantee* of an actual license.

The trial court considered the same arguments made here by the WSLCB. It found "Nothing in the initiative allows relocation." RP 30. It found no ambiguity. "The term 'freely alienable" does not create ambiguity. It simply means that the winning bidder can sell the right to another person." *Id.* In regard to the arguments advanced here, the trial court properly analyzed and rejected them, finding as follows:

> The Board primarily argues that state-owned store location creates ambiguity because the state did not own any of the stores. The question is about which words modify the other as it relates to this language, and there are two possibilities: One, the words "state-owned: and "store" both modify location; or, two, the phrase state-owned store" modifies location. The Board assumes that the first possibility is required, but there is no argument to support that. Under this reading, the clause is ambiguous, because the State did not own the location. However, the phrase can be read differently, and it can be read to mean the location at which a state-owned store was operated. The sate did own the store; it just did not own the location. It owned the business. It owned the inventory and the equipment. And, further, at least from my perspective, the liquor stores have been called in the past, at least, state-run liquor stores and state-owned liquor stores. The plain meaning of this initiative is clear, and the phrase does not create ambiguity.
>
> The Board also argues that it was required to auction the rights for the highest value possible. Clearly, the right to obtain operating rights in the exact location of the state-run store is worth less than the right to obtain operating rights with a possibility of moving the store within one mile. The duty to obtain the highest value does not allow the Board to change the legal mandate to locate the store at the location of the store.

RP 31-32.

Far from ambiguous, each bidder clearly understood its risks. A bidder might acquire operating rights and not actually get a license to operate a liquor outlet for a variety of reasons. As found below, the initiative proponents did not confer authority on the WSLCB to relocate licenses without the usual process for license applicants.

Contrary to WSLCB's argument in its brief at 40, there is no reason to defer to the WSLCB's "expertise" in this matter, as might be the usual case if that agency were interpreting well-understood liquor law principles. It had no experience in privatization, and its lack of experience and expertise shows in its claim that it was acting pursuant to a non-existent policy. There was no rule with the force of law allowing such relocation at the time WSLCB's approved HK's relocation. WSLCB's interim policy did not have the force of law.

RCW 34.05.010(16) defines a "rule" for purposes of the APA as

> any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any

> mandatory standards for any product or material which must be met before distribution or sale.

Under a reading of the statute's plain language,[7] a rule is only present if the action is of general applicability and the 5 enumerated outcomes are present.[8] *See State v. Straka*, 116 Wn.2d 859, 868, 810 P.2d 888 (1991) ("one of the five categories in the definition must be involved, regardless of whether a 'directive' is at issue"); *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 322, 12 P.3d 144 (2000).[9]

RCW 34.05.230(1) provides in pertinent part that agency policy statements and interpretive rules or guidelines are not rules under the APA as they are advisory only:

> An agency is *encouraged* to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. To better inform and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules.

(emphasis added).

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[7] This Court should apply the statute as it was written by the Legislature. *Dep't of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

[8] The core feature of the APA's definition of a rule is whether the agency action was a one of general applicability. William R. Andersen, *The 1988 Washington Administrative Procedure Act -- An Introduction*, 64 Wash. L. Rev. 781, 790-91 (1989).

[9] The label affixed to an agency action is not determinative for purposes of RCW 34.05.010(16)'s definition of a rule. *McGee*, 142 Wn.2d at 322.

A policy statement is defined in RCW 34.05.010(15) as:

> A written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to the implementation of a statute or other provision of law, or a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

Similarly, an interpretive statement is defined as "a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provisions of law, of a court decision, or of an agency order." RCW 34.05.010(8). Such statements sometimes are adopted as rules.[10] These policy statements do not have the force of law.

Professor Andersen, one of the key participants in the multi-year process leading to the enactment of the APA in 1988, stated that policy and interpretive statements were not rules under the APA:

> Interpretive statements are agency statements about the meaning of an agency statute, regulation, judicial decision, or other provision of law. Policy statements are agency descriptions of its current approach to implementing provisions of law. As discussed below, these tools are part of the Act's general effort to encourage and empower

[10] Such interpretive rules are described in RCW 34.05.328(5)(c)(ii). *Ass'n of Wash. Business v. State Dep't of Revenue*, 155 Wn.2d 430, 449, 120 P.3d 46 (2005) (DOR had authority to adopt interpretive regulations on tax code and such interpretive rules did not fit within the definition of a rule in RCW 34.05.010(16)); *Serres v. Wash. Dep't of Retirement Sys.*, 163 Wn. App. 569, 261 P.3d 173 (2011), *review denied,* 173 Wn.2d 1014 (2012) (regulations regarding retroactive salary increases for pension purposes were interpretive). Interpretive rules or statements describe how an agency will enforce a statute.

> agencies to give the public reliable advice about the likely course of agency action.

64 Wash. L. Rev. at 788-89.

In *Wash. Education Ass'n v. Wash. State Public Disclosure Comm'n*, 150 Wn.2d 612, 618-19, 80 P.3d 608 (2003), our Supreme Court held that guidelines issued by the Public Disclosure Commission regarding the use of school district facilities for campaign purposes were not a rule under the APA because they carried no legal or regulatory effect ("a person cannot violate an interpretive statement and conduct contrary to the agency's written opinion does not subject a person to penalty or administrative sanctions."). *See also, Teamsters Local Union No. 117 v. State Human Rights Comm'n*, 157 Wn. App. 44, 235 P.3d 858 (2010) (opinion letter was advisory interpretive statement not subject to APA judicial review). The critical point here is that an interim policy lacks the force of law and does not confer authority on the WSLCB to relocate HK's license. That is particularly true where the "interim policy" was not even in place when WSLCB made its decision.

(3) The City Has No Raised New Issues On Appeal

In its responsive brief at 26, HK asserts that the City raised "new" issues on appeal. But the issues raised on appeal by the County were argued below. The City addressed standing, asserted that the WSLCB had

no legal authority to allow for the relocation of liquor stores to facilities less than 10,000 square feet, and complained that the Board failed to grant its request for hearing. HK fails to appreciate the distinction between raising a new issue with presenting new arguments relative to issues already raised. Indeed, Washington appellate courts have made clear that a party may even raise an issue for the first time on appeal if it is "arguably related to the issues raised in the trial court..." *Mavis v. King Cnty. Pub. Hosp. Dist. No. 2*, 159 Wn. App. 639, 651, 248 P.3d 558 (2011). Here, the City merely amplified on issues squarely presented to the trial court, something it was entitled to do.

E. CONCLUSION

Nothing provided in the WSLCB or HK briefs should dissuade this Court from reversing the trial court's erroneous decision that the City lacked standing to challenge WSLCB's illegal grant of relocation of a liquor license to HK at a mini-mart site close to Burlington High School and a City park.

This Court should reverse the trial court's order and remand the case to the WSLCB with directions to deny the license applicant's request to relocate the license. Costs on appeal should be awarded to the City.

DATED this 28th day of May, 2014.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Reply Brief of Appellant City of Burlington in Court of Appeals Cause No. 45565-0-II to the following parties:

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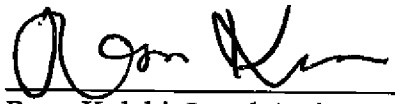
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 28th, 2014, at Seattle, Washington.



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May 28, 2014 - 10:18 AM

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