Case No. 93606-4

In the Supreme Court of the State of Washington

No. 73646-9-I
Court of Appeals, Division I of the State of Washington

GREENSUN GROUP LLC,

Respondent

vs.

CITY OF BELLEVUE,

Petitioner

RESPONDENT GREENSUN'S ANSWER TO PETITIONER CITY OF BELLEVUE'S PETITION FOR REVIEW

SENT ON OCTOBER 10, 2016 VIA E-MAIL SUPREME@COURTS.WA.GOV FOR FILING IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

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III. Introduction

This case is *sui generis* and does not meet any of the criteria of RAP 13.4(b) for acceptance and review by the Supreme Court. It involves mid-level staff at the City of Bellevue creating a rule without following the rule-making procedures set forth in the Bellevue City Code and then using that rule to deny Greensun Group LLC ("Greensun") a business license for its retail marijuana store.

The Bellevue City's Land Use Code ("LUC") allows the director of the Planning Department to adopt rules for implementation of the zoning code, "provided the director shall first hold a public hearing". LUC 20.40.100. The code further provides that the public hearing be preceded by publication of the proposed rule, notice of the hearing and opportunity for persons to submit written comments or testimony. Without following the requirements for a hearing and notice set forth in LUC 20.40.100, members of the planning staff devised their so-called First-In-Time Rule. They then used the First-In-Time Rule to deny a business license agreement to Greensun to operate a marijuana retail store following its receipt of a license from the Washington State Liquor Control Board.

It is an undisputed fact in this case that Greensun would have opened for business in the week following issuance of its marijuana

retailer license on July 7, 2014, but for the refusal of the City staff to issue a business license. If it had opened at that time, it would not have been in violation of the zoning ordinance prohibiting a retail marijuana store from operating within 1,000 feet of another retail marijuana store, because no other marijuana retailer was in operation in Bellevue at the time. In this action, Greensun challenged use of the First-In-Time Rule to deny it a business license and seeks injunctive relief to put it in the position it would have been, but for the improper action of mid-level City staffers. In its Opinion reversing the trial court, the Court of Appeals succinctly stated its ruling on the central issue in this case as follows:

> Under the unique circumstances here, LUC 20.40.100's rule making procedures apply to the City's first-in-time rule. Because the City's first-in-time decisions were made without rule-making, the rule and these decisions must be invalidated. *Hillis v. Dep't of Ecology*, 131 Wn.2d. 373, 400, 932 P.2d 139 (1997).

The decision of the Court of Appeals in this case does not meet any of the criteria of RAP 13.4(b) for acceptance and review by the Supreme Court. Contrary to assertions in Bellevue's petition for review, the Court's decision does not conflict with any decision of the Supreme Court or another decision of the Court of Appeals. The petition fails to identify a "significant question of law under the constitution of the State of Washington or of the United States." This case does not involve "an issue of substantial public interest", but rather a unique and isolated

circumstance of City staff attempting to impose rules which were not adopted pursuant to rule-making procedures established by the City Council. It has no impact beyond the boundaries of the City of Bellevue and within the City of Bellevue impacts only Greensun.

IV. Statement of Case

On July 7, 2014, the WSLCB issued its first batch of retail marijuana licenses in the State of Washington. Greensun was among the applicants to receive a license on July 7. CP 373. Its premises at 10400 Main Street for operating of a retail marijuana store under its license were ready for operation. Greensun only needed to move into the premises some furniture, equipment and inventory in order to begin operations. CP 358-359. It also needed to receive a business license from the City of Bellevue. Under Bellevue City Code, operation of a business without a business license is punishable as a misdemeanor and through civil sanctions. In May, Bellevue had received Greensun's application for a business license, but by letter from Riley Pitman, a City Planner, Greensun was advised that the business license would not be issued until Greensun had received its marijuana retailer license from WSLCB. Thus, when it received notification of the issuance of its license by WSLCB, Seth Simpson, one of Greensun's owners and managers, went to City Hall to pick up the business license. CP 358. However, he was told by City

Planner, Catherine Drews, that Bellevue would not issue Greensun a business license under their so-called First-In-Time Rule.

Under its Ordinance No. 6156, Bellevue City Council had adopted a simple prohibition which restricted one marijuana retailer from being located within 1,000 feet of another marijuana retailer. CP 82. Mid-level city planners began to try to devise ways of determining in advance of issuance of marijuana retailer licenses by the WSLCB which licensee might have priority for purposes of enforcing the 1,000 foot separation requirement in the City Council's ordinance. However, nothing in the ordinance required such a determination in advance. This zoning restriction could have been enforced through various enforcement procedures in the zoning code if and when a marijuana retailer opened a store within 1,000 feet of an existing marijuana retail store. Nevertheless, members of the planning staff attempted to establish rules and procedures for determining priority between applicants whose proposed locations may be within 1,000 feet of each other. At first, city planners advised applicants that an applicant could "lock down" a store location based on being the first to submit a building permit application. CP 416-417; CP 426; CP 427. This approach was abandoned in the middle of the application process and replaced by a rule announced in a letter by Catherine Drews, a planner, to all of the pending applicants for marijuana

retailer licenses dated June 24, 2014. In that letter she announced what became known as the First-In-Time Rule, which stated that the date of the issuance a letter from the WSLCB granting the marijuana retailer license would be the basis for establishing priority as between two licensees with proposed stores located within 1,000 feet of each other. This First-In-Time Rule did not address the situation in which two licensees are licensed by the WSLCB on the same date. CP 405-406.

In this case, the WSLCB issued marijuana retailer licenses to both Greensun and Par 4 on July 7, 2014—the first day in which any licenses were issued in the State of Washington. CP 373. Catherine Drews advised Greensun that Bellevue had determined that Par 4 had priority under the First-In-Time Rule, because it appeared that it received its letter via e-mail approximately an hour before Greensun had received its letter by e-mail. CP 5067-509. When Greensun protested that both Par 4 and Greensun had been licensed at the same time and that its business license should be issued, Ms. Drews referred this matter to assistant city attorney, Chad Barnes. Mr. Barnes invited counsel for Greensun and Par 4 to submit relevant information on the issue and conducted his own investigation into the licensing process at WSLCB. CP 740. He acknowledged in a letter he had been advised by an assistant attorney general representing the WSLCB, Kim O'Neal, that the WSLCB had no means of determining the

priority among the batch of 26 licenses issued on July 7 and could not state that one license was issued before another. *Id.*

Despite the information from counsel for WSLCB, Mr. Barnes wrote a letter to Greensun dated July 29, 2016 advising Greensun that Bellevue would not issue it a business license for its marijuana retailer store on Main Street because of application of the First-In-Time Rule and further warned of legal action in the event Greensun attempted to open its store without a business license. CP 408-409.

The undisputed facts in this case are that Greensun was prepared to open its store within the week following the issuance of its WSLCB license on July 7, while Par 4 would not be ready to open its store for two months. CP 358-359. Greensun's premises were ready for occupancy and, if its business license had been issued by Bellevue, it would have moved in equipment and inventory and opened for business within the week. If it had opened for business at that time it would not have been in violation of Ordinance No. 6156 since there were no other marijuana retail stores in Bellevue at that time. The proposed site for Par 4's store was in the beginning stages of renovation and would not be ready for operation as a marijuana retail store for over two months.

V. Argument

A. Bellevue fails to identify any actual conflict between the Opinion and precedence of the Washington State Supreme Court.

With respect to subsection (1) of RAP 13.4(b), the petition fails to identify a conflict with a decision of the Supreme Court. Rather, Bellevue cites two Supreme Court cases which the Court of Appeals correctly distinguished as not applicable to the case at hand: *Earl M. Jorgensen Co. v. City of Seattle,* 99 Wn.2d 861, 665 P.2d 1328 (1983) and *Hama Hama Co. v. Shorelines Hr'gs Bd.*, 85 Wn.2d 441, 536 P.2d 157 (1975).

Jorgensen involved whether or not a decision made by the Seattle City Council to set electricity rates fell within the City Council's inherent legislative authority, or whether or not the Seattle City Code, adopted by the City Council, intended the decision to fall within in the City Code's administrative procedures act. Bellevue raised this argument in its briefing and the Court of Appeals properly considered this argument and dismissed it. The City now seeks to repeat those arguments without addressing the Opinion of the Court of Appeals or acknowledging it considered and rejected Bellevue's argument.

In its analysis of *Jorgensen*, Bellevue conflates the legislative authority of the Seattle City Council with the administrative authority of city staff members to promulgate rules. *Bellevue's Petition for Review at 12.* Unlike a City Council, administrative employees have only that

authority which is granted to them by the city code, they do not have inherent authority to legislate rules. In this case, the Court of Appeals properly recognized this fact and focused its analysis on the staff's authority and the restrictions contained in the Bellevue City Code.

In doing so, the Opinion properly distinguished the *Jorgensen* decision from the case before the Court. The Court properly analyzed traditional rules of statutory interpretation to the Bellevue City Code, including the Code's own guidance, to determine what the city council intended to be a rule within the rule-making authority of the city staff.

The Court of Appeals applied the provisions of BCC 1.04.040 to arrive at two definitions of a "Rule:" A technical and general definition. The Court then analyzed the effect of the first-in-time rule and held that it affected the siting of the City's marijuana stores presently and in the future. *The Opinion at 14.* The Court then addressed Bellevue's arguments regarding *Jorgensen* as unpersuasive. Unlike a city council, city staff only have authority which is granted to them by legislative enactments. Staff are not granted inherent authority to adopt rules. When this Court decided *Jorgensen*, the Seattle Municipal Code could be read in a way that made every enactment or ordinance of the City Council was an administrative decision, rather than a legislative enactment. In contrast, this case involves the definition of a rule within the meaning of the Bellevue City Code, the

authority granted to staff to adopt such a rule, and the process the staff must use when doing so. The staff does not possess any inherent legislative authority to balance with the administrative authority granted by the City Code.

Bellevue then proceeds to argue that the intent of the city staff is determinative of whether or not the city staff intended a rule to be a rule, again relying on the *Jorgensen* opinion. This position fails to acknowledge the differences between city staff and a city legislative authority. Intent was relevant in Jorgensen, because the Seattle City Council *was the legislative authority.* Legislative intent was relevant in interpreting the meaning of the Seattle City Code. In contrast, the city staff's intent is irrelevant in interpreting the definition of a rule within the meaning of the Bellevue City Code and the scope of its own authority conveyed by that code. Bellevue continues to argue acts and authority of a city council and a city staff are one and the same and fails to draw any distinction between the two, generalizing it as simply "city authority." The Opinion properly rejected these arguments as unpersuasive.

Even if the Opinion failed to properly analyze what limits to the definition of a rule should be in place, Bellevue has offered no argument on what the limits should be or how the Opinion failed reflect them. The Opinion properly analyzed the effect of the rule in question and

specifically pointed out that the City Staff communicated the rule to all applicants as a rule of general application. Bellevue refused to issue a business license based upon this rule and because of Bellevue's refusal, Greensun was unable to open when it was ready. In every reasonable, common-sense meaning of the term, a rule that prevents one store from opening while allowing another store months of additional, protected preparation time, constitutes a rule.

Likewise, Bellevue also argues that the Opinion improperly analyzed *Hama Hama Co. v. Shorelines Hr'gs Bd.*, 85 Wn.2d 441, 536 P.2d 157 (1975) and failed to defer to City Staff. The Opinion properly rejected the application of *Hama Hama*, however, because Bellevue does not allege any ambiguity in the ordinance adopting a 1,000-foot separation requirement. This Court has explicitly held that the *Hama Hama* deference rule only applies when a statute is ambiguous: "The specific rule set out in Hama Hama applies when the statutory language is ambiguous." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549, 556 (1992). Likewise, Bellevue cites to *Sleasman v City of Lacey* 159 Wn.2d 639, 646, 151 P.3d 990 (2007) and *Ellensburg Cement Prod., Inc. v. Kittitas Cnty.*, 179 Wn.2d. 737, 317 P.3d. 1037 (2014) in a new argument that it was not required to adopt a formal rule to interpret an ordinance. Both those cases, however, support that Bellevue is not

entitled to any deference. In both those cases, this Court explicitly held that the local entity was not entitled to deference in the interpretation of a local ordinance when the ordinance was unambiguous and there was no history or pattern of practice for enforcing the ordinance. Again, affirming the *Hama Hama* rule only attaches when there is an ambiguity. Bellevue ignores this well-established precedent and Bellevue fails to point to either a history of enforcement that predates the current litigation or ambiguity in the ordinance. The Opinion properly rejected these arguments and held the *Hama Hama* deference rule was inapplicable.

B. The Court of Appeals properly invalidated a rule adopted by City Staff without authority.

With respect to subsection (2) of RAP 13.4(b), the petition suggests that the decision improperly relied on *Hillis* in invalidating Bellevue's first in time rule. Having found that the first in time rule was improperly adopted, Bellevue now asks this court to review the Opinion on the premise that the *Hillis* decision involved the State's Administrative Procedures Act while Bellevue's rule making does not. But the *Hillis* principle stands. In the event that a rule is adopted without authority, the only remedy is to invalidate the action. This is a well-established legal principle and does not just exist within the bounds of the administrative procedures act, *Hillis v. Dep't of Ecology*, 131 Wn.2d. 373, 400, 932 P.2d

139 (1997), but in any municipal act which is ultra vires and not just based upon the statutory language of the administrative procedures act. Bellevue provides no support for its position that if a rule was adopted improperly, the Court lacks the authority to invalidate the rule.

C. Bellevue fails to demonstrate that the Court of Appeals improperly applied the plain language of the LUPA statute.

The Court of Appeals Opinion sets forth a straight forward interpretation of the definition of a land use decision under the Land Use Petition Act ("LUPA") which, contrary to petitioner's assertion, does not conflict with any decision of the Court of Appeals or the Supreme Court. The Opinion correctly states that whether an action is a "land use decision" subject to LUPA's 21-day statute of limitation is governed by the language of the statute. The relevant statutory provision states:

> *"Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:*
>
> (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; *and excluding applications for business licenses.*
>
> (b) An *interpretive or declaratory decision* regarding the application to a specific property of zoning or other ordinances or rules

> regulating the improvement, development, modification, maintenance, or use of real property; and
>
> (c) The *enforcement* by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.020(2) (emphasis added).

The Court of Appeals concluded that denial of the application for a business license was not a "land use decision" under LUPA because business license applications are explicitly excluded from the definition of "land use decision" under subsection (a) cited above.

The Court of Appeals then addressed Bellevue's arguments that Mr. Barnes' letter was alternatively an "interpretive" decision under subsection (b) or an "enforcement" decision under subsection (c) of the statute cited above. The Court concluded that those arguments fail because the statute defines land use decisions as a "final determination by the jurisdiction's body or officer with the highest level of authority to make the determination" and Mr. Barnes was not that officer. Rather, under the Bellevue City Code the official with the highest level of authority to make interpretative decisions or commence enforcement actions is the Director of the Development Services Department, *see* BCC 20.40.100. Moreover, the Court of Appeals noted Mr. Barnes' was an

assistant city attorney and his letter was clearly written in anticipation of litigation

At page 18, the petition for review alleges that Court of Appeals decision conflicts with *Asche v. Bloomquist*, 132 Wn. App 784, 791, 133 P3d 475 (2006) *as amended* (April 4, 2006) because it does not recognize each subsection of RCW 36.70C.020(2) is independently sufficient for LUPA to apply. That assertion is not true. To the contrary, the Court of Appeals addressed each of the subsections in its Opinion. It found that the action announced in attorney Barnes' letter did not fit within the statutory definition of a "land use decision" subject to LUPA. Moreover, *Asche v. Bloomquist* is clearly distinguishable because it involved an application for a building permit, not a business license, and there was no question that the permit had been issued by the official with highest authority to do so.

At page 18, the petition goes on to assert that decision conflicts with "precedent confirming that LUPA applies to decisions even where a city or its official fail to follow prescribed process" and cites *Habitat Watch v. Skagit*, 155 Wn. 2d 397, 406, 120 P3d 56 (2005). This assertion is also groundless. Habitat Watch involved issuance of special use permits for construction of a golf course and two extensions of those permits, not a business license application. The plaintiff in *Habitat* argued that the

extensions of the permit was void because the hearing examiner failed to provide notice of a public hearing. The Court ruled that the extensions were nevertheless subject to LUPA's 21-day statute of limitations. Thus, *Habitat* presents a different set of facts and did not turn on whether the action fit within the statutory definition of a "land use decision." It is clearly distinguishable and not in conflict with the decision in this case.

D. Bellevue fails to demonstrate any significant issue of constitutional law.

In a brief paragraph at the bottom of page 19 of the petition the petitioner makes a bare assertion of a significant issue of constitutional law without a single citation or further elaboration. Rather, the conclusory argument is presented that the interpretation and application of the Bellevue City Code presents a significant constitutional issue. In support of this position, Bellevue continues to conflate the City Council's authority to adopt an ordinance imposing requirements on marijuana retailers in Bellevue with the city staff's authority to adopt rules and regulations under the Bellevue City Code. In no way does the opinion limit a city's enforcement power under Article XI, Section 11 of the Washington Constitution, it simply requires a city to follow the Washington Constitution, State Law and its own ordinances when it does so.

In this case, there is the basic constitution principle of separation of powers which recognizes that the role of the administrative branch is to carry out laws adopted by the legislative branch and not to attempt to legislate new policy. The legislative branch may delegate authority to the administrative agencies to adopt administrative rules and establish procedures for doing so. At the state government level rules may be adopted pursuant to the Washington State Administrative Procedures Act ("APA"). At the municipal level in this case, the Bellevue City Council authorized the director of development services to adopt rules for administration of the zoning code and established rule-making procedures, which are similar to the APA. In *Hillis v. Dep't of Ecology*, 131 Wn.2d. 373, 400, 932 P.2d 139 (1997), the Court held that a rule adopted by the Department of Ecology without following required rule making procedures was invalid and action under the rule was likewise invalid. Following the same principle, the Court of Appeals ruled invalid the action of city staff under a rule they created without following the rule-making procedures required under the Bellevue City Code.

Contrary to the petitioner's assertion, the Court of Appeals was not "second guessing" Bellevue's enforcement of its zoning code, but rather applying the well-settled principle that administrative staff may not adopt

rules without following procedures established by the legislative branch in its delegation of rule-making authority to administrative officials.

The conduct of mid-level staff in this case is quite similar to the conduct of Bellevue planners which this Court reversed it *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954). In that case, Mr. Ogden submitted a building permit application which met the parking requirement of the zoning code by showing parking on an adjoining tract of land he had leased for off-street parking. The city staff found that the use of this lot for off-street parking did not represent the highest and best use for the property and that such use would constitute "bad city planning". For these reasons they refused to issue the building permit. In its ruling that the City be compelled to issue a building permit, the Washington State Supreme Court set out the following analysis on the constitutional limits on administrators enforcing municipal codes:

> The respondents did not and do not assert that the tracts of land proposed by appellant for off-street business parking, do not meet the standards of the ordinance. Instead, they contend for the right to exercise discretion in approving the sites for off-street parking facilities. This is tantamount to administering the entire zoning ordinance upon a discretionary basis, since off-street business parking must be approved as a prerequisite to the issuance of every business building permit.... Administrative authorities are properly concerned with questions of compliance with the ordinance, not its wisdom. To subject individuals to questions of policy in administrative matters would be unconstitutional. *Id at 495.*

E. The Decision Affects Only the Parties to the Case and Does Not Involve an Issue of Substantial Public Interest Justifying Review Under RAP 13.4(b).

In two sentences on page 20 of the petition, the petitioner makes the unsupported claim that the decision raises issues of substantial public interest. The petitioner erroneously claims first that the decision of the Court of Appeals "imposes significant additional rulemaking requirements on municipalities." The decision simply holds that where a city council grants rule-making authority to an administrator, the rule-making procedures established by ordinance must be followed. Second, the petitioner falsely asserts that the "scope of the City's authority to enforce zoning restrictions on marijuana businesses" is at issue and a matter of substantial public interest. The decision of the Court of Appeals in this case in no way affects the scope of a city's authority to enforce any zoning restriction.

Rather, it is limited to the basic proposition that city administrators must follow rule-making procedures adopted by the city council when adopting rules to be imposed upon the public. This case does not involve a matter of substantial public interest, but is rather limited to an isolated incident of mid-level staff over-stepping their authority and failing to follow their own city code.

Finally, the issues at stake in this case only apply to Greensun's application. Subsequent to this litigation, Bellevue adopted an ordinance which codified a new procedure for determining which application was first. BCC 20.20.535. Greensun's application is the sole application which is affected by the old system and the holding of the Court of Appeals will be limited to this case.

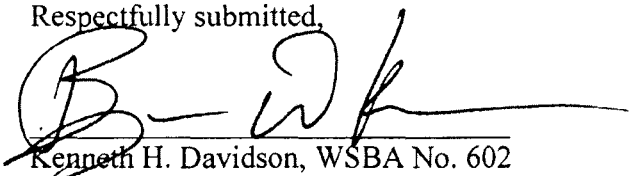
VI. Conclusion

The Supreme Court has outlined the criteria for its acceptance of the review of a decision of the Court of Appeals. Rather than address these criteria, Bellevue has rehashed arguments made before the Court of Appeals which were properly dismissed and asserted claims that its staff should be free from any requirement to follow the City Code. These are not sufficient grounds for a review of the Opinion.

The Court of Appeals properly applied the facts of this case to the Bellevue City Code, this Court's existing precedent, and the Washington Constitution and Bellevue has not presented any reason within RAP 13.4(b) why this Court should accept discretionary review of the decision. Absent that showing, the petition should be denied.

DATED October 10, 2016, at Kirkland, Washington.

Respectfully submitted,



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DECLARATION OF SERVICE

SENT ON OCTOBER 10, 2016 VIA E-MAIL SUPREME@COURTS.WA.GOV FOR FILING IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

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I, Abigail A. Landes, declare under the penalty of perjury that on October 10, 2016, I caused a true and correct copy of Respondent Greensun's Answer to Petitioner City of Bellevue's Petition for Review to be served via e-mail and on October 11, 2016 via legal messenger, upon and addressed to the following individuals:

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And on October 10, 2016, I caused a copy of the Respondent Greensun's Answer to Petitioner City of Bellevue's Petition for Review to be served via e-mail upon and addressed to the following individual:

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I, Abigail A. Landes, also declare under the penalty of perjury that I filed a true and correct copy of Respondent Greensun's Answer to Petitioner City of Bellevue's Petition for Review with the Clerk of the

Supreme Court of the State of Washington by e-mailing said document to supreme@courts.wa.gov .

Dated: October 10, 2016, at Kirkland, Washington.

Abigail A. Landes, Paralegal