Case No. 73646-9-1

In the Court of Appeals of the State of Washington, Division One

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GREENSUN GROUP LLC,

Appellant

vs.

CITY OF BELLEVUE,

Respondent

APPELLANT GREENSUN'S OPENING BRIEF

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III. Introduction

Greensun Group LLC ("Greensun") challenges Bellevue's denial a business license application which has prevented it from opening up a state licensed retail marijuana store in downtown Bellevue.

On July 7, 2014, the Washington State Liquor Control Board ("LCB") issued its first batch of marijuana retailer licenses under Initiative 502. [CP 371] Among the licenses issued simultaneously that day were licenses for Greensun and for Par 4, LLC; stores which would be located across the street from one another. [CP 373] In March of 2014, the Bellevue City Council adopted Ordinance No. 6156 which contained a simple prohibition against a retail marijuana store being located within 1000 feet of another retail marijuana store. [CP 6, 253 ¶25]

It is undisputed that Greensun was ready to open its store within the week following issuance of its retailer marijuana license, while Par 4 required additional work and inspections to do so. [CP 358-359] Greensun contends that had its business tax registration number, commonly called a business license, been issued by the City, it could have opened and no other retail marijuana store would have been within 1000 feet of it.

Nevertheless, City staff declined to issue Greensun a business license, on the grounds that its operation would violate Ordinance No. 6156 under a First-In-Time Rule adopted by the City staff. [CP 408-9]

Under the First-In-Time Rule, staff ruled that Par 4 could operate its store and receive a business license, while Greensun could not. *Id.* Greensun contends that the staff lacked authority to impose the First-In-Time Rule, failed to follow the proper rule making procedures under the Bellevue City Code, and acted contrary to law in denying Greensun a business license.

Alternatively, if the Court holds that City staff had authority to adopt their First-In-Time Rule, Greensun asserts that City staff applied this rule in an arbitrary and capricious manner in violation of its constitutional rights. Under the last version of the Staff's First-in-Time Rule, the date of issuance of the marijuana retailer license by the LCB would determine which licensee was licensed first by the LCB. [CP 405-6]. No other licensee would be allowed to operate within 1,000 feet of the first licensee, even if the first licensee was unable to open or had not completed its final inspection. In this case, both Par 4 and Greensun were licensed on July 7, 2014. [CP 373]

The City had been advised by both the assistant attorney general for the LCB and the attorney for Par 4 that LCB had not established an order of issuance of licenses within the batch of marijuana retailer licenses it issued on July 7, 2014. [CP195-196, 198] The final decision by City staff that Par 4 was licensed first was, therefore, unsupported by the facts

and contrary to the official statements of the LCB. The City's decision was an arbitrary choice made outside their own rule.

IV. Assignments of Error

1. The trial court erred in granting the City's Motion for Summary Judgment; and

2. The trial court erred in denying Greensun's cross-motion for partial summary judgment.

V. Statement of Issues

1. Is the First-in-Time Rule adopted by Bellevue administrative staff without compliance with rule-making procedures established by the City Council void and, if so, was application of the rule to deny Greensun its business license a violation of Greensun's rights?

2. Did Bellevue administrative staff violate Greensun's rights under the State Constitution by failing to carry out their ministerial duty to issue a business license and by attempting to impose new policy to deny Greensun a business license and award one to Par 4?

3. Was Bellevue administrative staff's implementation of its First-in-Time Rule based on date of issuance of marijuana retailer licenses by the LCB arbitrary and capricious when the licenses for Greensun and Par 4 were both dated and issued on July 7, 2014?

4. Does an application for a business license, and the later denial of a business license, when neither a City Code nor a formal rule requires a land use review, constitute a Land Use Decision under the Land Use Petition Act?

VI. Statement of the Case

Greensun Group LLC has two member-mangers, Seth Simpson and David Ahl [CP 28 ¶1]. On November 29, 2012, Seth Simpson leased the retail store premises at 10600 Main Street in Bellevue, Washington

with the intent of opening a licensed retail marijuana store under Initiative 502. At the time, Simpson and Ahl were involved in medical marijuana operations and felt they were well suited to operate an I-502 licensed retail store. [CP 24-25 ¶2].

Pending LCB's adoption of licensing regulations under I-502, Simpson and Ahl planned to operate a patient-to-patient medical marijuana facility at 10600 Main Street. Whether the premises was used for a medical marijuana facility or a retail marijuana store, it needed cosmetic upgrades, such as new carpet and paint and security upgrades such as bullet proof glass and metal security doors [CP 353-354]. They received the business license from the City of Bellevue for a patient-to-patient medical marijuana operation they had planned and then proceeded to make the needed upgrades to the premises [CP 355 ¶4].

Shortly after completing those upgrades, an inspector from the City of Bellevue advised Simpson that he should have obtained a building permit for the installation of bullet proof glass and metal security doors and advised him to obtain a building permit for the work to avoid any problems. On January 8, 2013, Simpson submitted a building permit application for the premises along with plans which showed all interior walls, windows and doors. He was advised by a lead person with the Bellevue Building Department that the application he submitted was

complete and would be reviewed. He never received a notice from the City Bellevue that the application he submitted on January 8 for improvements to the premises was incomplete. Nor did he receive a formal notice that the building permit application had been denied [CP 354 ¶2].

Ahl and Simpson abandoned their plans for a medical marijuana facility after the City obtained a TRO preventing them from opening a collective garden medical marijuana facility and directed their attorneys to advise the City of their decision to pursue only a retail marijuana store at those premises [CP 355-356 ¶5-6]. As soon as the LCB opened up the process for application for retail store licenses, Ahl and Simpson formed Greensun Group LLC and applied for a marijuana retailer license for its store premises at 10600 Main Street in Bellevue. By March 1, 2014, Greensun's application had been screened and it was listed by the LCB as one of the 19 qualified applicants for a retail marijuana store in Bellevue. At that time, the LCB had also allocated four marijuana retailer licenses for issuance within the city limits of Bellevue [CP25 ¶4].

In April, 2014, the LCB issued a public memorandum describing the process it would use for issuing licenses under I-502. [CP 94-95] Among other things, the LCB announced it would issue licenses in batches and that where there were more license applications than the number

allocated for a jurisdiction, a lottery would be conducted to determine which applicants would be allowed complete the licensing process. *Id.*

On May 2, 2014, the LCB conducted a lottery to determine which four of the applicants for marijuana retailer licenses in Bellevue would be issued the first licenses and the order of the runners up. The application Ahl and Simpson had submitted under the name of Greensun was ranked fifth in that lottery. [CP 356-357 ¶7] The application of High Society, Inc. was ranked among the top four in the lottery for Bellevue. In its application, however, High Society had improperly identified as its store location the store premises at 10600 Main Street which were under lease to Simpson and Ahl. *Id.* This error led to the disqualification of High Society and the continued processing of Greensun's application as being among the top four applicants in the City of Bellevue. Par 4 was also one of the top four applicants selected in LCB's lottery for the City of Bellevue. *Id.*

On March 17, 2014, Bellevue City Council adopted Ordinance 6156 which extended its interim zoning ordinance for the regulation of licensed marijuana businesses and added language which stated: "No retail marijuana store may be located within 1,000 feet of any other retail marijuana store." [CP 80]

In early May, 2014, Bellevue staff members announced its first Rule for which marijuana license applicants would be "vested" for purposes of applying the 1,000-foot Separation Rule in Ordinance 6156. In e-mails to High Society and Par 4 and in a meeting with Seth Simpson, Reilly Pittman, an Associate Planner for the City of Bellevue, stated that the applicant who had first submitted a complete application for a building permit for its store would be vested under the 1,000-foot Separation Rule. [CP 403, 356-7]. In a meeting with Pittman on May 19, 2014, Simpson pointed out to him that the building permit application for Greensun's premises had been submitted on January 8, 2013 and that, therefore, Greensun should have priority over Par 4 in application of the 1,000-foot Separation Rule under the vesting rules he had announced. [CP 356-7] Pittman responded that Greensun could not have priority because it had not yet been designated as being among the top four applicants under consideration by the LCB based on the lottery results. *Id.* On June 5, 2014, the City received notice from the LCB that Greensun's application had been moved up to the fourth position in the lottery results for Bellevue [CP 115 ¶13]. On June 11, 2014, Pittman sent an e-mail to the president of High Society stating that Par 4 had already "locked down" its location under City's vesting rules. [CP 417-418]

Later in June the City staff departed from its first ad hoc vesting and announced a new vesting rule in a letter from Catherine A. Drews, a legal planner in the Development Services Department. [CP 26 ¶6, CP 43-44 and CP 115-116 ¶15]. The letter, dated June 24, 2014, stated:

> In the event two or more retail marijuana applicants seek licensing from the LCB and are located within 1000 feet of another potential retail applicant, the City shall consider the entity that is licensed first by the LCB to be the "first-in-time" applicant. Based on information obtained from the LCB, if LCB approves your application, you will receive an electronic billing statement requesting payment of the $1,000 license fee. Once the LCB receives this fee, the City understands the LCB will send you a conditional approval letter that serves as your 30-day marijuana license until you receive your business license with the marijuana endorsement from the Washington State Department of Revenue Business Licensing Service. The issuance date for the letter serving as your 30-day marijuana license will determine which entity is first-in-time in terms of how the City applies the 1000 foot separation requirement for retail outlets. [CP 115-116 ¶15].

Greensun's application for a State master business license and its marijuana retailer license application triggered the electronic submission of an application for a business license for the City of Bellevue [CP 357 ¶8]. Greensun's application for a business license with the City of Bellevue was received by Bellevue in May 2014. In response to that the business license application, Reilly Pittman sent Greensun a letter dated June 3, advising Greensun that the City could only approve business license applications for the four retailers selected by the LCB for the four

marijuana retail licenses allocated to Bellevue. As a result, he advised Greensun that its business license could not be issued at that time [CP 114 ¶11].

On July 7, 2014, the LCB issued its first batch of marijuana retailer licenses, which included licenses for Greensun and Par 4 [CP 27 ¶8]. The LCB staff had been working throughout the holiday weekend to prepare for the issuance of the licenses. On the morning of July 7, Par 4 received an email from a customer service agent from the LCB including a temporary operating permit letter which would function as a license. The first copy of this letter had two major mistakes on it. First it was dated July 3, 2014, before any license had actually been issued by the LCB and, second, it had an incorrect paragraph that described the applicant's responsibility to comply with local zoning ordinances. The same customer service agent corrected the date and resent the letter shortly thereafter and then sent a final version with both corrections that afternoon. [CP 563-5; CP 566-8; CP 569-71]

On the afternoon of July 7, 2014, Ahl received an e-mail from a customer service agent for the LCB with a copy of Greensun's marijuana retailer license with the correct date and language—identical to the final version provided to Par 4. On July 7, Seth Simpson went to Bellevue City Hall to obtain Greensun's business license from the City. He met with

Catherine Drews and Reilly Pittman and gave them a copy of the receipt from the LCB showing that Greensun had paid its licensing fees. He told them that Greensun's retailer marijuana license was being issued as they spoke and that he wanted to pick up its business license and business registration number for its store at 10600 Main Street so that it could open for business. Drews cut him off and told him that the City would not issue a business license to Greensun for its marijuana retail store on Main Street because it would be issuing a business license to Par 4 for its retail marijuana store on Main Street. She explained that the City staff determined that Par 4's license had been issued first and in accordance with her letter of June 24, Par 4 would be entitled to a business license from the City and Greensun would not [CP 27 ¶9].

Simpson responded that the LCB was issuing 25 licenses simultaneously on July 7 and Par 4 and Greensun licenses were issued at the same time. She continued to decline to issue Greensun a business license. Later in the day Greensun filed a copy of its July 7 licensing letter with the City. Through its attorney it protested that the LCB had made no record of the order in which licenses had been issued and its record simply show that both Par 4 and Greensun were issued licenses on July 7 along with 23 other licensees [CP 28 ¶9 and 10].

In response to Greensun's protests, Assistant City Attorney, Chad R. Barnes, sent a letter dated July 11, 2014 to Hilary Bricken as attorney for Par 4 and Zachary L. Fleet as attorney for Greensun. [CP195-196].The letter opens with an acknowledgment that the clients of each attorney is seeking to open a retail marijuana outlet within 1,000 feet of the other and that the City had previously communicated to their clients that the City will accept the retailer that was first-in-time based on the license issued by the Liquor Control Board and that each client claims to be first-in-time. The letter continues to state:

> The LCB issued a letter to Green Theory[1] on July 3, 2014, which appears to grant Green Theory a marijuana retail license; however, Greensun claims that the letter was issued in error. We have spoken with Assistant Attorney General Kim O'Neal who has informed us that the LCB currently takes the position that the July 3, 2014 letter received by Green Theory was not the actual marijuana retail license despite the language contained in the letter. O'Neal stated that the actual licenses were issued following the July 7, 2014 online notice to both your clients. We asked Ms. O'Neal if the LCB had any way to determine which entity was actually first issued a marijuana license, and she indicated that their system was not set up for such a query.

Barnes invites counsel for the two applicants to send additional information they may have on the issue and ends the letter by stating, "If

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[1] Par 4, LLC used Green Theory as its trade name throughout the application process.

the City does not receive additional clarity on this issue soon, we will have no choice but to file an action for declaratory injunctive relief against Greensun, Green Theory and the Liquor Control Board" [CP195-196].

Counsel for both Greensun and Par 4 submitted materials to Barnes. Upon receiving their materials, Barnes forwarded materials from Greensun's counsel to Par 4's counsel with follow-up questions without Greensun's materials. Neither Greensun nor its counsel was included in this communication containing follow up questions to Bricken or provided an opportunity to respond to the questions Barnes raised. [CP 471] Barnes did not have further contact with the LCB to obtain further factual information, nor did he determine why there were multiple letters issued by the LCB. [CP 744] Rather than seek the declaratory judgment referenced in his letter, Barnes proceeded to meet with other Bellevue staff members to reach a final decision on the issuance of business licenses to Par 4 and Greensun. [CP 455]

Although the record is unclear on how the final decision was made, it appears that Barnes met with Catherine Drews and possibly one other staff member to discuss Greensun and Par 4's business license application. There are no minutes from this meeting, nor is it clear who decided that Greensun should not be issued a business license or whether a vote was taken.[CP 745-46]

Following the meeting, emails were sent to the various departments instructing City Staff to deny Greensun's business license application. One of these emails was sent to Richard D'Hondt, in the City Finance Office instructing that office to decline Greensun's business license application. [CP 488] Barnes then wrote Greensun a letter dated July 29 stating that Greensun's business license application was denied. The basis for the decision was that Par 4 was licensed first because an e-mail transmitting Par 4's licensing letter was received by Par 4—1 hour and 56 minutes before Ahl received an e-mail transmitting Greensun's licensing letter [CP 49-50].

The undisputed testimony of Seth Simpson in this case is that Greensun would have opened its retail store on Main Street within one week of the issuance of its marijuana retailer license by the LCB if the City had issued Greensun a business license on or before July 7. Greensun had made all the necessary preparations to begin business operations, including the purchase of necessary display cabinets, security equipment, point-of-sale software, computers and safe, all of which were on the premises. Greensun needed only to move inventory into the store to begin operations [CP 29 ¶13].

In July, 2014, there was no marijuana retailer located within 1,000 feet of Greensun's store at 10600 Main Street. The premises for the

proposed Par 4 retail marijuana store were vacant. The snowboard store which had occupied the premises had moved out on June 30. Some demolition of the snowboard store tenant improvements construction of a new tenant improvements had begun in July, but the premises were not ready to operate as a retail marijuana store in July. The work to prepare Par 4's premises for a retail store was not completed until late September or early October and Par 4 did not begin operation of its store until the first week of October [CP 358-359 ¶10].

VII. Argument

I. When the City failed to follow its own ordinances requiring the DSD to conduct rule making, the City acted arbitrarily and capriciously and in violation of Greensun's rights under the Washington Constitution.

a. *The Trial Court improperly held that the Land Use Director can adopt a rule without following the rule-making provisions of the Bellevue City Code.*

The Trial Court committed reversible error in its May 20, 2015, ruling in two ways: (1) by implying that the Land Use Director could opt out of the rule making provisions of the Bellevue City Code when adopting a rule; and (2) by implying that the first in time rule did not constitute a rule under the Bellevue City Code. Although neither of these holdings are explicit, they are necessary to reach the Court's conclusion. Specifically, the Trial Court stated:

> "The Plaintiff challenges the lack of a formal process to determine the method to determine who was first in time. There does not appear to be a requirement under Bellevue City Code that the Director to promulgate formal rules. The code is permissive. The Director may promulgate rules." [CP 710]

This holding is contrary to the plain language of the Bellevue City Code. The Bellevue City Code delegates the administration of the Land Use Code to the Development Services Director with the authority to implement the Land Use Code. BCC 20.40.100. Further, the Development Services Director "may adopt rules for the implementation of this title; *provided*, the Director shall first hold a public hearing." *Id.* (emphasis added). Agencies only have those powers which are expressly granted or necessarily implied by a grant of authority, meaning any authority of the Development Services Director to adopt rules must have a statutory basis. *Green River Cmty. Coll., Dist. No. 10 v. Higher Ed. Pers. Bd.*, 95 Wn.2d 108, 112, 622 P.2d 826, 829 (1980) *opinion modified on reh'g sub nom. Green River Cmty. Coll. v. Higher Educ. Pers. Bd.*, 95 Wn.2d 962, 633 P.2d 1324 (1981); *see also Ass'n of Washington Bus. v. State of Washington, Dep't of Revenue*, 155 Wn.2d 430, 445, 120 P.3d 46, 53 (2005) (agencies only have express or implied rule-making authority, they do not have inherent rule making authority). To determine whether statutory rule-making procedures must be followed, the Court must first

determine whether or not the contested action is a "rule" within the meaning of the ordinance. *See e.g. Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn. 2d 488, 493, 886 P.2d 147, 150 (1994)

The Bellevue City Code is silent on the definition of the term rule. When a term is not defined by statute, it is given its ordinary, common-law meaning and the court may look to a dictionary to determine a meaning. *Hunter v. Univ. of Washington,* 101 Wn. App. 283, 290-91, 2 P.3d 1022, 1027 (2000). The City Code does provide a rule of construction with respect to interpretations of provisions of the Code:

> "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning." BCC 1.04.040(B).

According to *Merriam-Webster's Dictionary*, a rule is defined as "a regulation or bylaw governing procedure or controlling conduct." While *Black's Law Dictionary, 4th ed.* defines a rule as "An established standard, guide or regulation; a principle or regulation set up by authority, prescribing or directing action or forbearance."

Notwithstanding these dictionary definitions, the term "rule" has a precise meaning within the rule-making context in administrative law. In Washington, the legislature must delegate authority to an agency to adopt

rules in the relevant provisions of the statute. That authority then encompasses a uniform rule-making process which is outlined in the *Administrative Procedures Act*. This act serves as a uniform mechanism for disparate agencies to adopt rules whenever the authority to do so has been delegated by statute. Because of this framework, most cases in Washington include a specific statutory definition of a rule and a determination of whether or not an agency's stated action falls within the scope of that definition.

Greensun does not argue that either the State or Federal *Administrative Procedures Acts* are enforceable against Bellevue, but the definitions contained within those statutes are illustrative of the meaning of the technical definition of a rule and the intent of BCC 1.04.040(b). The Federal Act includes a broad definition meaning of a rule:

> "Rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to *implement, interpret, or prescribe law or policy* or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing. 5 USC §551(4) (emphasis added).
>
> Washington State's definition of rule is more limited:
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> "Rule" means 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 … RCW 34.05.010. (emphasis added)

This First-in-Time rule, adopted and applied by the Bellevue City Staff, meets the definition of a rule under any of these definitions. The staff was not merely applying the language of Ordinance 6156, but rather establishing new regulations of general applicability. They took the Ordinance adopted by the City Council, imposed procedural requirements and hurdles, and conveyed substantive vesting rights to the applicants based upon their regulations. As adopted, the Ordinance included a provision that "No marijuana retailer shall be located within 1,000 feet of any other marijuana retailer." Bellevue Ordinance 6156. The City staff extended this simple prohibition to define a substantive right: at what moment does a marijuana retailer secure a vested right to operate in a location to the exclusion of all other marijuana retailers and when can a business license be issued. The City Staff determined that a licensing date by the State would constitute "locating" a marijuana retailer in a certain location and locking down that location. This would be true whether or not

the retailer was able to open, or had other necessary city permits or was in compliance with other city codes. All other licensees were bound by this rule, which had the force of law.

The First-In-Time rule adopted by the City is akin to that which the Supreme Court reviewed in *Hillis v. State, Dep't of Ecology,* 131 Wn. 2d 373, 401-02, 932 P.2d 139, 153 (1997). In *Hillis*, the Department of Ecology changed its procedure for reviewing applications for groundwater permits due to budget cuts. Rather than processing the applications in the order they were received, the Department began considering them in batches. It also required that certain investigations be conducted by the Agency prior to the Agency reviewing applications that pertain to that area. When adopting this process, the Department did not follow the rule-making procedures outlined in the State's Administrative Procedures Act. The Court found the prioritization constituted a rule within the meaning of the Administrative Procedures Act and since it was adopted without the proper authority, the rule and its application was invalidated. *Id.* In upholding the trial court's invalidation of the rule, the Supreme Court stated "the remedy when an agency has made a decision which should have been made after engaging in rule-making procedures is invalidation of the action." *Id* at 399-400.

There is a similar situation here. The Bellevue City Code includes a provision that allows for the Director of Development Services to adopt rules to implement the Code. The Ordinance makes no reference to a business's right to become vested to a location. It only makes a reference to the prohibition of one marijuana retailer operating within a 1000 feet of another marijuana retailer. The Staff adopted and implemented a rule—without proper notice or a hearing—that established when a marijuana retailer's vested right to a location would come into existence under the Bellevue City Code and would be entitled to protect their location to the exclusion of all other LCB licensees—even if the vested party was not yet in operation or had even completed their build out.

The effect of the rule, like the prioritization in the *Hillis* Case, conveys a substantive right to the applicant. The limited space to locate a retail marijuana store in the City limits means that whoever was licensed first by the City of Bellevue, could effectively obtain a monopoly on a store in Downtown Bellevue. In many ways this rule was more detrimental than the Department of Ecology's rule. This determination conveyed a substantive privilege to the applicant and was not a mere application of the City's ordinance. It created a protection area for an applicant that would allow them weeks or months to prepare to open and deny other applicants the right to open even if they were ready.

Like the *Hillis* case, the First-in-Time Rule was adopted without the proper authority and should be voided. Greensun has demonstrated that but for the application of the First-in-Time Rule, Greensun would have been entitled to a business license on or before July 7, 2014. Because of this, following the *Hillis* Case, this Court should void the First-in-Time Rule and declare that Greensun was entitled to a business license on July 7, 2015.

b. *If a rule is adopted by the DSD, the DSD must follow the rule making procedure outlined in the Bellevue City Code.*

The Trial Court further erred by holding that the Bellevue City Code is permissive on the Development Services Director's obligation to follow the rule-making procedures. The Bellevue City Code is clear. If Development Services Director chooses to adopt a rule, he or she may do so only by following the City's rule making procedure outlined in the Bellevue City Code. BCC 20.40.100. The Trial Court erred when it held that the authority of the Development Services Director was discretionary when it came to implementing the rule making procedure. By doing so, the Trial Court ignored the plain language and statutory framework of the Bellevue City Code.

The trial court's ruling is predicated on a provision in the Bellevue City Code which defines "may" as being "permissive." Its decision in

essence holds that the Director may adopt Rules under the meaning of the Bellevue City Code under whichever process he or she chooses. This is contrary to the plain language and the intent of the Bellevue City Code.

The Director of Development Services does have rule-making authority, but that authority contrasts with the authority of other City Directors with similar rule-making authority. The Bellevue City Council has adopted a much more restrictive procedure for the Development Services Department with respect to rules regarding land use regulations. In other departments the Bellevue City Code gives a general authority to various departments to adopt rules and *does not* prescribe a specific procedure, providing a more flexible framework for those other departments to enact rules. *See* BCC 4.03.160 (Finance director may adopt and publish rules necessary for the administration of the chapter); BCC 4.10.065 (the administering department shall adopt rules and regulations and no rule making procedure is articulated); BCC 8.04.400 (the animal services department is authorized to make and enforce rules); BCC 3.79.020 (the Council delegates to the City Manager authority to make all rules, practices, and procedures necessary or appropriate to implement this code); BCC 3.43.030 (the City Manager may adopt, amend, and rescind rules and regulations to implement the Park's code).

In contrast, the Land Use Code is more restrictive. In three separate places the Code provides a *specific procedure* that the Director of the Department is to follow if he or she is to promulgate a rule and the same process is repeated: in the general administrative section of the Land Use Code. BCC 20.20.128 (Development Services Director may adopt rules to implement the affordable housing code if the Director follows the rule making procedure); BCC 22B.10.170 (Development Services Director may adopt rules to implement the sign code if the director follows a rule-making procedure); BCC 20.40.100 (The Director may implement rules to implement the Land Use Code provided that the Director follows the rule-making procedure). The Code does not include any provision that gives the Director general rulemaking authority akin to that of other City Directors. This runs contrary to both the principals of statutory construction and the basic principal that an administrative agency has only that authority which is granted to it by ordinance.

By holding the rule-making procedure as discretionary, it eviscerated the statutory framework established by the Bellevue City Council and rendered the procedure outlined by the Code completely meaningless. The Trial Court ignored basic principles of statutory construction and provided City Staff with the sole discretion on whether or

not they wanted to follow the rule-making process adopted by the City Council.

c. *The City failed to follow its own code and its failure to do so voids the "first in time rule" and is a violation of Greensun's rights.*

A court has the inherent authority to review an agency's action for its lawfulness. *Pierce Cnty. Sheriff v. Civil Serv. Comm'n of Pierce Cnty.*, 98 Wn.2d 690, 693, 658 P.2d 648, 651 (1983). An agency's action is contrary to law and a violation of a fundamental right if the agency fails to follow the procedure or rules which govern that agency. *Id.* The violation does not require that the City acted with intent or maliciously, but by failing to follow their own Code, they violate the rights of citizens seeking to work in the City. The remedy when an agency has made a decision which should have been made after engaging in rule making procedures is to invalidate the action. *Hillis*, 131 Wn. 2d at 399-400.

By not following their own rule making procedures, the City of Bellevue has violated the rights of Greensun when it refused to issue a business license to them on July 7, 2014. The City's violation of Greensun's rights entitles Greensun to a declaration that the First-in-Time rule was inapplicable and the City should have issued Greensun a business license on or before July 7, 2014.

II. By withholding a business license from Greensun, the City of Bellevue acted arbitrarily and capriciously and violated Greensun's rights under the Washington Constitution.

a. *Greensun has a fundamental right to conduct business in the City of Bellevue.*

The State of Washington and the City of Bellevue both allow for the legal operation of retail marijuana stores. The right to carry on a business is a fundamental right, which has long been recognized as privilege under the state constitution. In *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 450 Wn.2d 791, 83 P.3d 419 (2004), the State Supreme Court stated:

> "...as this court made quite clear early in this State's history, the terms privilege and immunities pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. The terms as they are used in the Constitution of the United States secure in each state to the citizens of all states *the right to remove and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law....*" *State v. Vance*, 29 Wash. 435, 458, 70 P3d 34 (1902). Id at 812-813. [emphasis added]

The actions of the City in refusing to issue a business license and building permit to Greensun prevented it from carrying on its business. It also prevented Greensun from using its leasehold estate to operate the retail marijuana store license by the LCB. Meanwhile, the City issued business licenses and building permits to other marijuana retail licensees and to thousands of other businesses within the City. The City's arbitrary

actions of withholding a business license and building permit to Greensun infringed upon their fundamental rights and constitute a violation of Article I §12 of the Washington State Constitution.

The recent case of *Association of Washington's Spirits and Wine Distributors v. Washington State Liquor Control Board*, reaffirms the existence of a fundamental right to conduct business. 340 P.3d 849, 2015 WL 11436 (2015). In that case, a trade group of distributors challenged the Liquor Control Board's decision to exempt distillers who distribute their own manufactured spirits from contributing to the shortfall in licensing fees. The Court noted cases in which the fundamental right to carry on business is infringed such as *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 209 P.2d 270 (1949) where a city ordinance prevented an out of town photographer from operating his business by imposing prohibitive licensing fees and solicitation restrictions while not opposing those fees and restrictions on resident photographers. The court distinguished *Ralph* where the privileges and immunities clause of the State Constitution is implicated from cases in which the underlying issue was narrower and the plaintiff was not prevented from engaging in business that was allowed under State Law. In this latter category, the court cited *Am. Legion Post No. 149 v. Dept. of Health*, 164 Wn.2d 570, 192 P3d 306 (2008) involving a challenge to a statute prohibiting smoking in public places. In that case,

the Court found that the statute did not prevent any entity from engaging in business and that the right at issue was smoking inside a place of employment which did not involve a fundamental right protected by the State Constitution. The Court then found that the Association's argument to be more akin to the challenge raised in *American Legion Post No. 149* and that the underlying issue it was litigating did not involve the prevention of its members from engaging in business, but rather the amount of fees their class of licensees would be required to pay while conducting their business.

The case before this court involves the arbitrary actions of the City which have absolutely prevented Greensun from engaging in its business and using its leasehold estate to operate a retail marijuana store for which it holds a license from the LCB. Like the Yakima photographer in *Ralph*, Greensun's fundamental rights under the State Constitution have been infringed.

b. *The City's business license process is administrative in nature and the City applied extra-legal standards to the issuance of a Business license.*

This case involves the administration of three codes: Bellevue's tax code, land use code and Ordinance 6156. Under Bellevue's tax code any person engaged in a business which is subject to the City's business and occupation tax first must apply for and receive a business registration

certificate, commonly referred to as a business license. BCC 4.03.025. The stated purpose of this section of the city code is to implement the City's "authority to license for revenue". BCC 4.03.010. The business license or registration provides the business owner with a registration number for purposes of reporting taxes. There are no criteria in the code for denial of an application for a business license, nor is there any reference to compliance with the City Land Use Code. Like the issuance of a tax identification number by the Internal Revenue Service, the issuance of a city business registration number should be a ministerial function.

The City's records show that the City received Greensun's application for a business license electronically in May of 2014. [CP 357] If it had been acted upon in May or early June, Greensun would have been in a position to open its retail marijuana store in the week following the issuance of its marijuana retailer license by the LCB on July 7, 2014. The undisputed facts of this case are that Greensun had the furniture, fixtures and equipment to operate its store in place and was ready to open for business as soon after July 7 as it was able to acquire inventory for sale. It is also undisputed that in July the site identified by Par 4 in its marijuana retailer application was vacant and the only activity therein was demolition of the improvements of the tenant who had vacated on June 30 and construction of new tenant improvements. *Id.*

Greensun would not have been in violation of Bellevue Ordinance No. 6156 if it had been allowed to open in the week after issuance of its LCB license, since there were at that time no marijuana retail stores operating within 1,000 feet of its store. It would have been the first retail marijuana store to open in Bellevue. The sole reason Greensun was unable to open was that the City of Bellevue refused to issue it a business license and declared that Par 4 was entitled to keep its location. Had Greensun opened without the grant of a business license they would have been subject to civil and criminal sanctions under Bellevue's tax code.

Our courts have long held that city and other governmental administrators are limited to carrying out their ministerial duties and enforcing codes and ordinances and that when they attempt to legislate new policy or act arbitrarily, they act unconstitutionally. In this case, mid-level staff within the City's Development Services Department halted the simple ministerial task of issuing a business registration or business license to Greensun.

In *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954), Ogden made a formal application to the City of Bellevue (respondent) for a permit to construct a combination residence and business building on his land which was zoned for such purposes. Bellevue's zoning code required that applicants for building permits for

new buildings submit evidence in writing that arrangements have been made to provide off-street parking required by code. The City's zoning ordinance set specific standards for the location of the parking and the size and number of parking stalls. Ogden addressed the parking requirement in his permit application by leasing an adjoining tract of land and providing parking thereon. The Court noted that his provision of this tract for off-street parking met the requirements of the zoning ordinance, but the City sought to exercise its discretion to weigh the desirability of use of this business tract for off street parking. In its discretion the City found that off-street parking did not represent "the highest and best use to which it could be put, and that such use would be bad city planning. Respondent then refused to issue the building permit because appellant did not have an approved off-street parking facility." *Id.* at 494.

In its ruling that the City be compelled to issue a building permit, the Washington Supreme Court set out the following analysis on the constitutional limits on administration of zoning 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 the off-street business 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.

> A property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto. *State ex rel. Hardy v. Superior Court for King County*, 155 Wash. 244, 284 P.93. A building or use permit must issue as a matter of right upon compliance with the ordinance. 9 Am.Jur. 203, 9 Am.Jur. 203, § 7. The discretion permissible in zoning matters is that which is exercised in adopting the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. To subject individuals to questions of policy in administrative matters would be unconstitutional. Art. I, § 12, of the constitution of the state of Washington, provides; 'No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.' *Id.* at 495.

In *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee,* 50 Wn.2d 378, 312 P.2d 195 (1957), Washington State Supreme Court found that the Board of Adjustment for the City of Wenatchee had acted arbitrarily in its denial of a special use zoning permit for construction of a church and entered an order compelling the issuance of the permit. The Court found that the City's ordinance allowed construction to a church subject to the issuance of a special use permit. It held that denial of a special use permit must be based on valid and substantial evidence showing that granting the permit would be

detrimental to the health safety, morals and general welfare of the community. The Court found that the two reasons for denial of the permit advanced by the Board of Adjustment did not meet the standard and were arbitrary and capricious. Besides the precedence for the principle that arbitrary and capricious actions in enforcement of zoning codes are not permitted, the Court's decision in *Wenatchee Congregation of Jehovah's Witnesses* is significant here for its holding that the burden of proof that a zoning action was not arbitrary and capricious rests with the municipality. In particular, the Supreme Court stated:

> It should also be noted that the ultimate burden of proof relative to alleged arbitrary and capricious zoning action rests upon zoning authorities and not upon a property owner who is seeking a permit. In *State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph*, 139 Ohio St. 229, 39 NE2d 515, 523, 138 A.L.R. 1274, the Ohio court said:
>
> 'In determining whether respondents' administrative acts and policies may be upheld, it should be observed that the usual presumption of the validity of the acts of public acts of public boards and officials does not apply to acts involving forfeiture of an individual's rights or denying him of free use of his property. 22 Corpus Juris 141; *Deaver v. Napier*, 139 Minn. 219, 166 N.W. 187; Christ v. Fent, 16 Ocl. 375, 84P 1074. Applying this exception to a case like the one at bar, where public officials seeking under a zoning ordinance deny a land owner a particular use of his property, the highest court of Delaware has held that the Board of Zoning Appeals has the burden of showing reason sufficient to support its authority in refusing a building permit. *Applestein v. Mayor and City Council of Baltimore*, 156 ND 40, 47, 143A. 666'

*Id.*at 383.

Therefore, under *Wenatchee Congregation of Jehovah's Witnesses*, the City of Bellevue has the burden of proving that its denial of business license to Greensun Group and its withholding of a building permit were not arbitrary and capricious. The trial court's ruling failed to address the City's burden under this case. The City has failed to provide any evidence that it did not act arbitrarily and capriciously and Greensun Group submits that the City cannot carry its burden of proof.

The case most controlling on the issues in this case is this Court's decision in *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 86 P3d 1169 (2004). In that case, WCHS had submitted an application to the Department of Social and Health Services Division of Alcohol and Substance Abuse (DASA) for certification of an opiate substitution treatment center in Snohomish County. WCHS had located a space in the Alderwood Professional Building where medical uses were permitted under Lynnwood's zoning code, and WCHS confirmed with Lynnwood's Planning Manager that its opiate substitution treatment center would be a medical use permitted under zoning code. Relying on this representation, WCHS entered into a lease for space in this building and had permit drawings prepared for a remodel of the space to meet the requirements for DASA inspection and certification. On November 8, 2002, WCHS

submitted a complete application for a building permit to the City of Lynnwood. On November 12, the City Council passed a zoning ordinance which effectively would have precluded WCHS from operating its facility in the Alderwood Professional Building. An initial approval of the building permit was stamped on the plans, but later the City Attorney advised City departments to treat the WCHS application as incomplete and to refuse to process it further. The City claimed that the application could not be considered complete until after WCHS had received DASA certification. *Id.*

On November 19, WCHS applied for a business license for its treatment center. *Id.* A business license is required under Lynnwood's Municipal Code, but the code confers no discretion on the City with respect to approval or issuance of a license. Nevertheless, the City Attorney determined that the license should be denied since, without DASA approval, WCHS's business was not lawful. Additionally, the City Attorney argued that the business license is a higher priority than the building permit under the City's code so that the building permit could not be issued until the business license had been issued. Without a building permit, WCHS could not build out its clinic and meet the DASA's requirement of satisfactory inspection of its facility for issuance of DASA certification. *Id.* The Court of Appeals found that the City's arguments for

withholding the business license and building permit "created its own 'catch-22' and necessarily arbitrary circumstance". *Id.* at 698.

Like the City of Bellevue, the City of Lynnwood argued that WCHS's business license application could not be issued until WCHS had received licensing from the state. In addressing this argument, this Court stated:

> The City makes an absurd argument that WCHS has to obtain state certification before applying for a building permit. To give this argument weight the City would also have to argue the same for the owner/operators of other state-certified business such as day care facilities, hospitals, pharmacies or beauty salons. In fact, as indicated in the record, DSHS cannot certify an opiate substitution treatment facility until it has seen the completed facility. To the extent that state law authorizes a building official to require other data and information, as a matter of due process, such information must be reasonably set forth in local ordinances governing the requirements for a complete application to avoid being unduly vague. Vesting procedures that are vague and discretionary cannot be used to deny an applicant's vested rights. The actual requirements for a fully complete application cannot be vague and discretionary. *Id* at 675.

The Court of Appeals noted that nowhere in state or local criteria for a complete building permit application does it list DASA certification for a treatment center as a prerequisite. *Id.* Similarly, nowhere in criteria for a complete building code application or a business license in Bellevue is the issuance of a marijuana retailer license listed as a prerequisite.

Like Bellevue's municipal code, the Lynnwood municipal code made it illegal for a person to conduct business without first obtaining a business license. This Court pointed out that nothing in the City of Lynnwood's code required state certification of WCHS's business before applying for a business license or indicated that lack of a certification can be a basis for denial of the business license. *Id.* At 678. This Court dispensed with Lynnwood's argument that WCHS's business was illegal without DASA certification by pointing out that the mere proposal of the business operation did not violate state statue and that WCHS was not in violation of state stature when it applied for business licenses and permits from local government in anticipation of obtaining state certification and opening lawful operations after obtaining certification. *Id.*

As in *WCHS*, the Bellevue's tax code requires the registration of a business and makes unlawful the operation of a business without a city business license. Like Lynnwood's, Bellevue's tax code confers no discretion on the City with respect to approval and issuance of a business license. *See* BCC Chapter 4.03 The City of Bellevue withheld the issuance of Greensun's business license on the grounds that Greensun must first receive its marijuana retailer license from the LCB, as in *WCHS*. Like WCHS, Greensun was merely seeking a business license for an anticipated future activity. Greensun had no intent to actually sell

marijuana products prior to receiving its marijuana retailer license. The steps it was taking to prepare for a future operation of its business, including obtaining a business license from the City so that it could report and pay its B&O tax, were all lawful. The City's position that it could withhold issuance of Greensun's business license is identical to that advanced by the City of Lynnwood in *WCHS* which this Court found to be without legal basis. In this case, the City went even further by developing a vesting right for the first applicant which had no basis in either the Bellevue City Code and used that as a basis for withholding a business license. Following *WCHS*, the Court should find that the City had no discretion to withhold Greensun's license until issuance of its license from the LCB and should have completed the ministerial act of issuing a license shortly after receiving the license application in May.

After Greensun had received its marijuana retailer license from LCB, the City continued to withhold the issuance of its business license and told Greensun it was doing so because of City's application of its First-in-Time Rule announced in Catherine Drews letter of June 24. However, nothing in Bellevue's tax code or Ordinance No. 6156 gives the discretion to staff to develop their so-called First-In-Time Rule and use it to withhold issuance of a business license. If DSD found a marijuana retail store operating in violation of this ordinance, it had authority under the

zoning code to halt the operation and assess penalties. Nothing in Ordinance No 6156 grants DSD authority to decide in advance of any operations which marijuana retailer may open for business. Had the City issued Greensun a business license shortly after it applied in May and timely issued the building permit, Greensun would have opened for operations by the week of July 14. [CP 359-360]. Its opening for business in July would not have been in violation of Ordinance No. 6156. At that time no other retail marijuana store existed within 1,000 feet of Greensun's store at 10600 Main Street. *Id.* But for its administrative staff's arbitrary withholding of Greensun's business license and building permit, the City would have had no reason or authority to stop Greensun from opening for business after issuance of its retailer marijuana license from the LCB on July 7, 2014.

c. *The City Staff's constantly changing rules during the application process violate violate Greensun's rights.*

Even if this Court holds that the City properly adopted rules to enforce Ordinance 6156, the constantly changing implementation of the Ordinance during the application process constitutes arbitrary and capricious actions by the City.

In *HC&D Moving & Storage Seal. v. U.S.,* 298 F Supp. 746 (1969), the court ruled that an administrative agency may not arbitrarily

depart from agency practices, even when dealing with the "unique" situation presented in the new state of Hawaii. In *HC&D Moving & Storage*, Hawaii-based carriers appealed an order of the Interstate Commerce Commission granting certificates of public convenience and necessity to 19 mainland-based applicants on the grounds that the Commission's decision was an abuse of discretion and an arbitrary departure from principles of law well-established by the Commission and the courts. *Id.* The three judge federal panel agreed that the Commission had acted arbitrarily and reversed its order. In its ruling the court stated:

> "...consistency of administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. The law does not permit an agency to grant one person the right to do that which it denies another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application but denied outright in a specific case." *Id* at 751.

In this case, the City staff's Rule for Monday was that an applicant for a retail marijuana store could "lock down" its location for purposes of application of the 1,000 foot Separation Rule by submitting a complete building permit. Under this rule, Greensun would have "locked down" its location because it had a complete building permit application for the necessary improvements to its store premises as of February 5, 2013, under RCW 36.70B.070(4)(a).

The staff's Tuesday Rule announced by Pittman was that Greensun's pending building permit application did not apply to the Monday Rule because only the top four LCB lottery winners qualified for it. The staff's Wednesday Rule, adopted shortly after Greensun was designated by the LCB as one of the final four applicants, was set forth by Catherine Drews in her letter to applicants on June 24. Her letter stated that where two applicants proposed to locate within 1,000 feet of each other, the City would determine which could open based on who was "First In Time" and that *the date of the letter* from the LCB granting a temporary license would determine would determine who was "First In Time." This rule overlooked the intention of the LCB to issue licenses in batches and failed to function when both Par 4 and Greensun both received licensing letters from the LCB dated July 7. By the very terms of Drew's June 24 letter, both applicants were first in time.

The staff's Thursday Rule was for assistant city attorneys to decide who was entitled to a business license as between Greensun and Par 4 based on whatever criteria they chose and ignoring the evidence and facts presented to it by both the Liquor Control Board and the Applicants. They made their decision that Par 4 was "First In Time" despite being advised by the LCB that it did not rank the order of issuance of the 25 marijuana retail licenses it issued on July 7 and had no method within its records to

establish which license was issued first, as between Greensun and Par 4. In essence, under this rule, the Staff sought to impose some legal effect to actions by the Liquor Control Board which were not intended to be of any legal consequence or conclusion, such as the time of day emails were received from a customer service agent from the LCB which transmitted copies of the licensing letters to the applicants. [CP 374,376].

The history of the directives given by the DSD staff concerning which marijuana retailer applicants could locate where shows an ever-changing and arbitrary pattern of administration. However, what makes this administrative staff's actions unconstitutional is not only the inconsistency of the various rules they have announced, but that all of their rules and actions sought to exercise discretion they did not have. Nothing in the City's Tax Code allows the Finance Director to withhold issuance of a business registration until DSD staff determines whether the applicant may open for business or until an assistant city attorney decides whether the applicant meets the staff's so-called First-In-Time rule. Nothing in Ordinance No. 6156 authorizes the administrative staff to legislate rules for determining in advance which marijuana retailer licensees may open their store. The City staff has abused its administrative duties by failing to carry out the ministerial tasks of issuing a business license upon application and processing a complete building permit

application submitted by Greensun. They have sought to legislate their own rules to determine which marijuana retailer licensee may operate. Such legislation is beyond their authority.

d. *City Staff had a non-discretionary duty to issue Greensun LLC a business license.*

The issuance of a permit or a business license is a non-discretionary duty and City Staff had no discretion to apply extra legal standards to the issuance of the license. As the Court in *WCHS, Inc. v. City of Lynnwood*:

> The acts of administering a zoning ordinance do not go back to the questions of policy and discretion, which were settled at the time of the adoption of the ordinance. A decision to grant or deny a building permit is ministerial, not discretionary. Any 'anonymous procedures' that can be applied in an uncertain and discretionary fashion would be a violation of an applicant's rights. *Id at 677-678.*

Like Bellevue, the City of Lynnwood withheld issuance of a business license and building permit on the grounds that the applicant had not yet received a state license for its proposed operation. This Court found no such pre-condition in the city codes and that the staff was attempting to exercise discretion it did not have and ordered the processing of the business license and permit. Like the Lynnwood staff, Bellevue staff have sought to add "anonymous procedures" in its ever-changing First-in-Time Rules which they have applied "in a discretionary

and uncertain fashion" to withhold Greensun's business license and building permit. Following *WCHS* this Court should likewise find those actions beyond the ministerial duties of administrators and a violation of the applicant's constitutional rights.

III. Even if the First-in-Time rule was properly developed and implemented, the City of Bellevue failed to enforce it properly.

Even if the City's First-in-Time rule survives its challenge and even if the development services department could apply extra legal standards to the issuance of a business license, the City's enforcement of the First-in-Time Rule was arbitrary, capricious and contrary to law. This Court may review the City's determination and over turn it if it is wilful, unreasoning, and in disregard of facts and circumstances. *Norquest/RCA-W Bitter Lake P'ship v. City of Seattle*, 72 Wn. App. 467, 476, 865 P.2d 18, 23 (1994). A review of the record shows the City's continued disregard of the LCB's announced procedures, the events that occurred on July 7, 2015, and communications with the LCB.

Following the issuance of licenses, the City contacted the LCB and was told that their system was not setup to assign an order to applicants. [CP195-196]. Prior announcements from the Liquor Control Board announced that licenses would be issued in "Batches." [CP 94-95] . Nevertheless, the City operated from the assumption that one applicant

had to be licensed before the other and the designated representative of the City stated that the City felt that there "was going to be a first and there was going to be a second" licensee. [CP 744-745]. In its decision, the City of Bellevue relied on administrative hang-ups and early drafts of a letter. Namely, an early draft of the letter received the morning of July 7, 2015, which does not match the final version of the letter issued to Par 4, and the fact that Par 4 received an email from a customer service agent containing their letter before Greensun received its email. Effectively relying on which company had the faster email service.

The LCB has consistently stated that Greensun and Par 4, LLC were both licensed at the same time. When asked, Rebecca Smith, the LCB's designated representative specifically stated in her deposition:

> **Q**. What do you mean by batches?
>
> **A**. That when I review an application, I don't review one at a time. I usually review five at a time and/or ten at a time depending on how many were ready, and we review those and they move forward.
>
> ...
>
> **Q**. Okay. And were the licenses eventually issued in batches?
>
> **A**. Again, it would depend on how many were ready in a week, so sometimes there's one ready and sometimes there's five ready, and sometimes there's ten ready. So it depends on how much – how many – how many are ready. We don't hold. We just issue once a week.

Q. And when were the first licenses issued by the Board?

A. I believe July 7th, the week after the 4th of July.

Q. And were they issued in a batch?

A. They were.

[CP 737-738].

This is consistent with what the City was told following the issuance of the license during the City's investigation. [CP 740]. In that letter, Barnes specifically states that he was informed that the Liquor Control Board did not have a system in place to determine who was licensed first and that all entities were first licensed on July 7, 2014—something he directly contradicts later in the City's final determination that Par 4 was licensed first.

The City made no provision for the issuance of licenses in batches with respect to applying its zoning ordinance, and the City Staff admitted that they did not conceive of that as a possibility. [CP 744-745]. The City, in contrast, has continued to contest the Board's determination and argues that the licenses were issued sequentially.

If Greensun and Par 4 were licensed at the same time, as stated by the Liquor Control Board, the City's decision to license Par 4 and not Greensun would be contrary to the rule promulgated by the City which relied on the action by the LCB to determine who was licensed first and

thus an arbitrary and capricious treatment of Greensun and should be voided.

IV. The City's denial of a business license does not constitute a land use decision under LUPA or the Bellevue City Code.

The application of the Land Use Petition Act to this case was raised by the City during the case below. It was not specifically ruled on by the trial court and is raised here in anticipation of the City raising it as a jurisdictional issue on Greensun's appeal.

a. *LUPA specifically exempts business licenses from the category of land use decisions under the act.*

The City argued in its motion for summary judgment that Greensun's lawsuit is time barred as the action challenged should be brought under the Land Use Petition Act (LUPA). Contrary to the City's position, however, LUPA is not applicable in this case. LUPA provides a cause of action for judicial review of land use decisions, a term defined by the Act:

> (2) "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 interpretative 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; provision relating to motions for reconsideration omitted). Review is not available through LUPA because the challenge is to the denial of a business license application, an action specifically excluded from the definition of a land use decision. In virtually all prior correspondence, the City made clear that it was denying a business license (not some other land use permit) for Greensun's proposed retail operation. The City does not deny that Greensun had applied for and been refused a business license and in Chad Barnes' final letter from the City to Greensun, he specifically stated that the City was denying a business license. [CP 461] (letter from Chad Barnes stating that the City was denying Greensun a business license).

b. *The Interpretative or Enforcement category of land use decisions does not apply to this case*

The City's refusal to approve a business license for Greensun is not an interpretive decision under RCW 36.70C.020(2)(b) because it did not result from the City's code interpretation process. The Local Project Review statute at RCW 36.70B.110(11) requires that "[e]ach local government planning under RCW 36.70A.040 [of the Growth Management Act] shall adopt procedures for administrative interpretation of its development regulations." The City of Bellevue conducts its land use planning under the GMA and has adopted interpretation procedures at BCC Chapter 20.30K, which specifies application requirements, factors for consideration and the legal effect given to an interpretation. A decision on an application for interpretation is a Process II decision appealable to the City Hearing Examiner, whose decision is in turn appealable to superior court under LUPA. But in this case, Greensun neither requested nor received a code interpretation under BCC Ch. 20.30k, nor did the City follow these procedures. The City's rejection of Greensun's application for a business license is not appealable as a code interpretation.

The City's rejection of Greensun's business license application is also not an enforcement action under RCW 36.70C.020(2)(c). The City enforces violations of its land use code in two ways, as a civil violation

under BCC Chapter 1.18 or through prosecution as a misdemeanor. An alleged civil violation is reviewable by the City's Hearing Examiner and appealable to court; a misdemeanor would be charged in municipal court. BCC 1.18.050. In this case, there is no allegation Greensun violated a land use code, nor did the City commence a civil or criminal enforcement action. The denial of a Greensun's business license application did not result from either of these processes and was thus not enforcement action appealable under LUPA.

The letter from Chad Barnes dated July 29, 2014, setting forth the City's decision to deny Greensun a business license is not a Land Use Decision under RCW 36.70c.020(2) and is, therefore, not subject to LUPA.

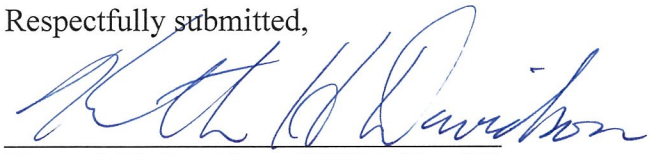
VIII. Conclusion

Greensun is seeking to open a legal, licensed retail marijuana business in the City of Bellevue. They have complied with the state requirements and were included in the first batch of licenses issued by the State of Washington on July 7, 2014. The City's refusal to issue them a business license based upon a rule improperly promulgated by City Staff and then improperly enforced was contrary to law and in violation of Greensun's rights under the Washington State Constitution. Greensun now asks this Court to reverse the trial court's entry of summary judgment

dismissing Greensun's claims and to grant Greensun's cross-motion for partial summary judgment declaring that the City of Bellevue violated Greensun's rights in its withholding of Greensun's business license for its retail marijuana store at 10600 Main Street.

Dated September 21, 2015, at Kirkland, Washington.

Respectfully submitted,



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GREENSUN GROUP LLC, APPELLANT
v.
CITY OF BELLEVUE, RESPONDENT

COURT OF APPEALS CAUSE NO. 73646-9-1

ATTACHMENT to
APPELLANT GREENSUN GROUP LLC
OPENING BRIEF

BCC 1.040.40(B)
BCC 20.20.128
BCC 20.40.100
BCC 22B.10.170
BCC 3.43.030
BCC 3.79.020
BCC 4.03.010
BCC 4.03.025
BCC 4.03.160
BCC 4.10.065
BCC 8.04.400
BCC Ch.20.30K
BCC Ch. 4.03
City of Bellevue, Washington Ordinance No. 6156

1.04.040Construction.

The following rules of construction shall apply:

A. The provisions of the ordinances of the city, and all proceedings under them, are to be construed with a view to effect their objects and to promote justice.

B. All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning.

C. When an act is required by an ordinance, the same being such that it may be done as well by an agent as by the principal, such requirement shall be construed as to include all such acts performed by an authorized agent.

D. Use of Words and Phrases. Words and phrases not specifically defined shall be construed according to the context and approved usage of the language. (Ord. 2079 § 2, 1974.)

20.20.128 Affordable housing.

A. Purpose.

The purpose of this section is to offer dimensional flexibility and density bonuses to encourage construction of housing affordable to low and moderate income households.

B. General.

The provisions of this section are available, at the sole discretion of the property owner, as incentives to encourage the construction of affordable housing in new multifamily residential development.

1. Multifamily Development. One bonus market rate unit is permitted for each affordable unit provided, up to 15 percent above the maximum density permitted in the underlying zoning district.

2. Duration. An agreement in a form approved by the City must be recorded with King County Department of Records and Elections requiring affordable housing units which are provided under this section to remain as affordable housing for the life of the project. This agreement shall be a covenant running with the land, binding on the assigns, heirs and successors of the applicant.

3. In zoning districts where density limitation is expressed as floor area ratio (FAR), density bonuses will be calculated as an equivalent FAR bonus.

C. Dimensional Standard Modification.

The following requirements of the Land Use Code may be modified through the procedures outlined in paragraph D of this section, to the extent necessary to accommodate affordable housing units and bonus units on-site.

1. Lot Coverage. The maximum percent of lot coverage may be increased by up to five percent of the total square footage over the maximum lot coverage permitted by the underlying zoning district for those properties or lots containing affordable housing units.

2. Parking Requirements. For those buildings containing affordable housing, the percent of compact parking stalls may be increased up to 75 percent of the total required parking in non-

Downtown Zoning Districts and up to 85 percent of the total required parking in Downtown Zoning Districts. Tandem parking stalls are permitted to the extent feasible to satisfy required parking ratios.

3. Building Height. Except in Transition Areas, the maximum building height in R-10, R-15, R-20 and R-30 Zoning Districts may be increased by up to six feet for those portions of the building(s) at least 20 feet from any property line.

4. Lot Area. Lots which contain affordable housing units in single-family subdivisions may be reduced by up to 20 percent of the minimum lot area required by the underlying zoning district; provided, that the density in the subdivision does not exceed 15 percent above the maximum permitted by the underlying zoning district.

5. Open Space. The Open and Recreation Space Requirement within a residential planned unit development containing affordable housing may be reduced to 35 percent of gross land area. All other requirements of LUC 20.30D.160shall continue to apply.

D. Applicable Procedures.

1. Dimension Standard Modification. The City will process an application for a dimensional standard modification through the Building Permit review or if the project is being processed through a discretionary land use process, the dimensional standard modification may be reviewed as part of that process. In addition to the decision criteria in the section applicable to the discretionary land use decision, the Director must determine that the modifications are the minimum necessary to accommodate affordable housing units and bonus market rate units on-site.

2. Attached Housing within Subdivisions. Attached affordable housing duplexes on single-family lots are permitted without planned unit development approval provided the units are approved as part of a subdivision proposal. If a property line divides the attached units into separate parcels, there is no setback requirement from that property line, and for purposes of complying with minimum lot size provisions, the separate parcels containing the attached units are considered one lot. In addition to the decision criteria in LUC 20.45A.130, the following criteria shall apply:

a. No more than 15 percent of the approved lots may include attached duplex units and only one lot may contain three dwelling units.

b. The placement and exterior design of the attached units are comparable to and compatible with the surrounding single-family development.

E. Administration.

The Director shall be responsible for administration of this section. The Director may adopt rules for implementation of this section; provided, the Director shall first hold a public hearing. The Director shall publish notice of the intent to adopt any rule, and the date, time, and place of the public hearing thereon in a newspaper of general circulation in the City at least 14 days prior to the hearing date. Any person may submit written comment to the Director in response to such notice, and/or may speak at the public hearing. Following the public hearing, the Director shall adopt, adopt with modification, or reject the proposed rule. (Ord. 4979, 3-17-97, § 5; Ord.4855-C, 2-14-96, § 1; Ord. 4829, 12-5-95, § 1; Ord. 4353, 4-13-92, § 1; Ord.4269, 7-8-91, § 1)

20.40.100Administration of the Land Use Code.

The Director shall be responsible for administration of this title. The Director may adopt rules for the implementation of this title; provided, the Director shall first hold a public hearing. The Director shall publish notice of intent to adopt any rule, and the date, time and place of the public hearing thereon in a newspaper of general circulation in the City at least 14 days prior to the hearing date. Any person may submit written comment to the Director in response to such notice, and any person may speak at the public hearing. Following the public hearing, the Director shall adopt, adopt with modifications, or reject the proposed rule. (Ord. 4973, 3-3-97, § 873; Ord. 4816, 12-4-95, § 973)

22B.10.170Administration, enforcement and sign removal.

A. Administration. The director shall be responsible for administration of this code. The director may adopt rules for the implementation of this code; provided, the director shall first hold a public hearing. The director shall publish notice of intent to adopt any rule, and the date, time and place of the public hearing thereon in a newspaper of general circulation in the city at least 14 days prior to the hearing date. Any person may submit written comment to the director in response to such notice, and any person may speak at the public hearing. Following the public hearing, the director shall adopt, adopt with modifications, or reject the proposed rule.

B. Inspection of Director. The director is empowered to enter or inspect any building, structure or premises in the city, upon which, or in connection with which a sign, as defined by this code, is located, for the purpose of inspection of the sign, its structural and electrical connections, and to insure compliance with the provisions of this code. Such inspections shall be carried out during business hours, unless an emergency exists.

C. Violation – Penalty.

1. The violation of or failure to comply with any provision of this chapter is declared to be unlawful.

2. Any violation of any provision of this chapter is a civil violation as provided for in Chapter 1.18 BCC, for which a monetary penalty may be assessed and abatement may be required as provided therein.

3. In addition to or as an alternative to any other penalty provided by this chapter or by law, any person who violates any provision of this chapter shall be guilty of a misdemeanor. (Ord. 4818 § 17, 1995; Ord. 4216 § 1, 1991; Ord. 3683§ 8, 1986; Ord.3589 § 1, 1986; Ord. 3501 § 1, 1985; Ord. 2953 § 12, 1981; Ord. 2055 § 2, 1974; 1961 code § 17.01.140.)

3.43.030Rulemaking.

The city manager or his or her designee has the power to enforce the provisions of this chapter. The city manager or his or her designee may adopt, amend and rescind rules and regulations consistent with the chapter in order to manage and control the park and recreation system of the city, including rules that:

A. Clarify, interpret or apply this chapter;

B. Regulate the use of parks;

C. Regulate conduct in parks;

D. Designate restricted areas in parks;

E. Regulate recreational programs;

F. Establish times for opening and closing of particular parks or park facilities to public use and/or for entry or use by motor vehicles. (Ord.4480 § 2, 1993; Ord.4071 § 1, 1989.)

3.79.020 Authority of city and delegation.

A. The city retains all rights to manage city operations and affairs in accordance with the powers and authority that an employer possesses including, but not limited to, the right to make work assignments, to determine the number of personnel assigned at any time to any function, to make reductions in force as determined necessary or appropriate subject to the limitations of this code, to develop workplace rules that promote efficiency and productivity in the workplace, and to promote city services to the community.

B. The city council hereby delegates to the city manager or his/her designee the authority to make all rules, practices and procedures necessary or appropriate to implement this code. (Ord. 5263 § 1, 2000; Ord. 5094 § 2, 1998.)

4.03.010 Purpose.

This section implements Washington Constitution Article XI, Section 12and RCW 35A.82.020and 35A.11.020 (code cities); RCW35.22.280(32) (first class cities); RCW35.23.440(8) (second class cities); and RCW35.27.370(9) (fourth class cities and towns), which give municipalities the authority to license for revenue. In the absence of a legal or constitutional prohibition, municipalities have the power to define taxation categories as they see fit in order to respond to the unique concerns and responsibilities of local government. It is intended that this chapter be as uniform as possible among the various municipalities and consistent with the mandatory requirements of Chapter 35.102 RCW for municipalities. Uniformity with provisions of state tax laws should not be presumed, and references in this section to statutory or administrative rule changes do not mean state tax statutes or rules promulgated by the Department of Revenue. (Ord. 5781 § 1, 2007; Ord. 5436 § 1, 2003.)

4.03.025Registration/license requirements.

Any person who engages in any business or performs any act which is subject to the provisions of Chapter4.04 BCC, Admission Tax Code; Chapter 4.09BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; or Chapter 4.14BCC, Gambling Tax Code, even if such person is not subject to any tax imposed thereby, shall apply under such rules and regulations as the department may prescribe and, upon approval, receive from the department a registration certificate applicable to all such business engaged in or activity performed.

No person shall engage in any business without being registered in compliance with the provisions of this section except the following:

A. Any farmer who is exempt from the business and occupation tax pursuant to BCC4.09.090(J); or

B. Any "family" as defined in BCC4.03.020(E).

C. Any person who performs activities subject to the provisions of Chapter 4.09 BCC and meets the requirements of BCC4.09.030(L)(4). This exemption does not apply to any person engaged in activities that are subject to the provisions of other chapters of BCC Title 4. (Ord. 5605 § 1, 2005; Ord. 5436 § 1, 2003.)

4.03.160Administration – Director to make rules.

The administration of this chapter and Chapter4.04 BCC, Admission Tax Code; Chapter 4.09BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; and Chapter 4.14BCC, Gambling Tax Code, shall be accomplished under the direction of the director.

The director may prescribe forms and shall have the power, from time to time, to adopt, publish and enforce rules and regulations necessary for the administration of this chapter and for the administration of Chapters 4.04, 4.09,4.10, and 4.14 BCC, not inconsistent with these chapters or with law. It shall be unlawful to violate or fail to comply with any such rule or regulation. (Ord. 5436§ 1, 2003.)

4.10.065 Claim filing procedures for 1995 and prior years.

A. All claims for relief under BCC 4.10.055(A) and4.10.060(A) must be made annually and filed at any time during the calendar year following the calendar year, or portion thereof, for which a "reimbursement" is requested.

B. All billings for which claim is made under BCC 4.10.055(A) and4.10.060(A) shall be submitted to the Bellevue utilities department as part of the claim for relief.

C. All claims for relief shall be submitted in writing on a form provided by the administering department and certified by the claimant that to the best of the claimant's knowledge, all information provided in the claim is true and correct.

D. The administering department shall adopt rules and regulations to implement this section and BCC 4.10.055,4.10.060 and 4.10.070. (Ord. 4923 § 2, 1996; Ord. 4841 § 3, 1995.)

8.04.400 Additional rules and regulations.

The regional animal service section is authorized to make and enforce rules and regulations not inconsistent with the provisions of this chapter, and it is unlawful to violate or fail to comply with any of such rules and regulations. (Ord. 5957§ 3, 2010.)

Part 20.30K Interpretation of the Land Use Code

20.30K.110 Scope.

SHARE

This Part20.30K establishes the procedure and criteria that the City will use in deciding upon a written request to interpret the provisions of the Land Use Code and in issuing any other written interpretation of the Land Use Code. The interpretation of the provisions of a concomitant agreement will be treated as an interpretation of the Land Use Code.

20.30K.115Applicability.

SHARE

This Part20.30K applies to each written request to interpret the provisions of the Land Use Code and to any other interpretation of the Land Use Code issued by the Director. (Ord.4973, 3-3-97, § 878; Ord. 4816, 12-4-95, § 978)

20.30K.120 Purpose.

SHARE

An interpretation of the provisions of the Land Use Code clarifies conflicting or ambiguous wording, or the scope or intent of the provisions of the Code. A request for a Code interpretation must relate to a specific site, land use district, use or application within the City of Bellevue. An interpretation of the provisions of the Land Use Code may not be used to amend that Code. (Ord. 5232, 7-17-00, § 13; Ord. 4973, 3-3-97, § 879; Ord. 4816, 12-4-95, § 979)

20.30K.130Applicable procedure.

SHARE

A. The Director shall interpret the provisions of the Land Use Code in conformance with this Part 20.30K.

B. A Code interpretation requested by a person other than the project proponent or property owner must be requested prior to the date of expiration of any applicable administrative appeal period for a land use decision on the application to which the request relates. Any Code interpretation requested after the applicable administrative appeal period shall not affect an issued permit or decision.

C. The Department shall determine how to process the Code interpretation request. The request may be:

1. Processed pursuant to Process II, LUC20.35.200 et seq., which shall include notice to the project proponent or property owner; or

2. Consolidated with the process associated with the review of the application. An appeal of a Code interpretation consolidated with the process associated with the review of the application shall be consolidated with the appeal of the decision on the underlying application. (Ord.5481, 10-20-03, § 12; Ord. 4973, 3-3-97, § 881; Ord.4816, 12-4-95, § 981; Ord. 4255, 6-3-91, § 13; Ord.3913, 5-23-88, § 2; Ord. 3848, 11-16-87, § 9)

20.30K.135Submittal requirements.

SHARE

Any person requesting an interpretation of the Land Use Code shall submit a written request specifying each provision of the Land Use Code for which an interpretation is requested, why an interpretation of each provision is necessary and any reasons or material in support of a proposed interpretation.

20.30K.140 Factors for consideration.

SHARE

In making an interpretation of the provisions of the Land Use Code, the Director shall consider the following:

A. The applicable provisions of the Land Use Code including their purpose and context; and

B. The impact of the interpretation on other provisions of the Land Use Code; and

C. The implications of the interpretation for development within the City as a whole; and

D. The applicable provisions of the Comprehensive Plan and other relevant codes and policies. (Ord. 4973, 3-3-97, § 882; Ord.4816, 12-4-95, § 982)

20.30K.150 Effect of interpretation.

An interpretation of the Land Use Code issued under this part shall have the same effect as any provision of the Land Use Code. (Ord.4973, 3-3-97, § 884; Ord. 4816, 12-4-95, § 984)

20.30K.155 Time limitation.

An interpretation of the Land Use Code remains in effect until rescinded in writing by the Director. (Ord. 4973, 3-3-97, § 885; Ord. 4816, 12-4-95, § 985)

4.03.010 Purpose.

This section implements Washington Constitution Article XI, Section 12and RCW 35A.82.020and 35A.11.020 (code cities); RCW35.22.280(32) (first class cities); RCW35.23.440(8) (second class cities); and RCW35.27.370(9) (fourth class cities and towns), which give municipalities the authority to license for revenue. In the absence of a legal or constitutional prohibition, municipalities have the power to define taxation categories as they see fit in order to respond to the unique concerns and responsibilities of local government. It is intended that this chapter be as uniform as possible among the various municipalities and consistent with the mandatory requirements of Chapter 35.102 RCW for municipalities. Uniformity with provisions of state tax laws should not be presumed, and references in this section to statutory or administrative rule changes do not mean state tax statutes or rules promulgated by the Department of Revenue. (Ord. 5781 § 1, 2007; Ord. 5436 § 1, 2003.)

4.03.015 Application of chapter stated.

The provisions of this chapter shall apply with respect to the taxes imposed under Chapter 4.04BCC, Admission Tax Code; Chapter 4.09BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; Chapter 4.14BCC, Gambling Tax Code, and to such other chapters and sections of the Bellevue City Code in such manner and to such extent as expressly indicated in each such chapter or section. (Ord.5436 § 1, 2003.)

4.03.020 Definitions.

For purposes of this chapter:

The definitions contained in Chapter4.04 BCC, Admission Tax Code; Chapter 4.09BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; and Chapter 4.14BCC, Gambling Tax Code, shall apply equally to the provisions of this chapter unless the term is defined otherwise in this chapter. In addition, the following definitions will apply.

A. "Chapter," unless otherwise clearly indicative by the context, means Chapter 4.03BCC, as it may be amended from time to time.

B. Cost of Living Adjustment. Whenever a "cost of living adjustment" is required or permitted pursuant to any section of BCC Title4, such adjustment shall be an amount equal to the amount and direction of change determined by reference to the U.S. City Average Urban Wage Earners and Clerical Workers Consumer Price Index (CPI) for each 12-month period ending on September 30th as published by the United States Department of Labor. To calculate this adjustment, the current rate will be multiplied by one plus or minus, as the case may be, the annual change in the CPI.

C. "Department" means the finance department or successor department.

D. "Director" means the director of the finance department or his or her designee or other person designated by the city manager.

E. "Family" means one or more persons (but not more than six unrelated persons) living together as a single housekeeping unit. For purposes of this definition, children with familial status within the meaning of Title 42 U.S.C., Section 3602(k) and persons with handicaps within the meaning of Title 42 U.S.C., Section 3602(h) will not be counted as unrelated persons.

F. "Reporting period" means:

1. A one-month period beginning the first day of each calendar month (monthly); or

2. A three-month period beginning the first day of January, April, July or October of each year (quarterly); or

3. A 12-month period beginning the first day of January of each year (annual).

G. "Return" means any document a person is required by the city to file to satisfy or establish a tax or fee obligation that is administered or collected by the city and that has a statutorily defined due date.

H. "Successor" means any person to whom a taxpayer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys, directly or indirectly, in bulk and not in the ordinary course of the taxpayer's business, any part of the materials, supplies, merchandise, inventory, fixtures, or equipment of the taxpayer. Any person obligated to fulfill the terms of a contract shall be deemed a successor to any contractor defaulting in the performance of any contract as to which such person is a surety or guarantor.

I. "Tax year" or "taxable year" means the calendar year. (Ord.5436 § 1, 2003.)

4.03.021 Definitions – References to Chapter 82.32 RCW.

Where provisions of Chapter82.32 RCW are incorporated by reference in this chapter or any chapter to which these administrative provisions apply pursuant to BCC4.03.015, "department" as used in the RCW shall refer to the "director" as defined in BCC 4.03.020(D) and "warrant" as used in the RCW shall mean "citation or criminal complaint." (Ord. 5781§ 2, 2007.)

4.03.025Registration/license requirements.

Any person who engages in any business or performs any act which is subject to the provisions of Chapter4.04 BCC, Admission Tax Code; Chapter 4.09BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; or Chapter 4.14BCC, Gambling Tax Code, even if such person is not subject to any tax imposed thereby, shall apply under such rules and regulations as the department may prescribe and, upon approval, receive from the department a registration certificate applicable to all such business engaged in or activity performed.

No person shall engage in any business without being registered in compliance with the provisions of this section except the following:

A. Any farmer who is exempt from the business and occupation tax pursuant to BCC4.09.090(J); or

B. Any "family" as defined in BCC4.03.020(E).

C. Any person who performs activities subject to the provisions of Chapter 4.09 BCC and meets the requirements of BCC4.09.030(L)(4). This exemption does not apply to any person engaged in activities that are subject to the provisions of other chapters of BCC Title 4. (Ord. 5605 § 1, 2005; Ord. 5436 § 1, 2003.)

4.03.030Registration/license certificates.

A registration fee of $80.00 shall be due at the time of filing of the application. Such registration certificate shall be personal and nontransferable and shall be valid as long as the taxpayer continues in such business and pays any tax imposed by the city.

The registration fee shall be administratively adjusted by the director on January 1, 2012, and annually thereafter, in an amount equal to the cost of living adjustment, as defined in BCC4.03.020(B), applicable for the immediately preceding year. The amount of the registration fee so calculated shall be rounded to the nearest $1.00.

In the event business is transacted at two or more separate places by one taxpayer, a separate registration certificate

for each place at which business is transacted shall be required. Such additional certificates shall be issued at no additional fee. Where a taxpayer changes the nature of business conducted or conducts additional activities upon which a tax is imposed by Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; or Chapter 4.14BCC, Gambling Tax Code, such taxpayer shall apply for and receive a new registration certificate at no additional fee.

Each registration certificate shall be numbered and shall show the name, business location, mailing address and such other information as the department deems necessary. The certificate of registration shall be posted in a conspicuous place at the place of business for which it is issued.

Where a place of business of the taxpayer is changed, the taxpayer shall notify the department and upon approval a new certificate will be issued free of charge for the new place of business. (Ord. 5986 § 1, 2010; Ord. 5436 § 1, 2003.)

4.03.035 City subject to tax.

Whenever the city through any department or division engages in any business activity taxable under Chapter4.10 BCC, Utility Occupation Tax Code, which if engaged in by any person would require a certificate of registration, the filing of returns and the payment of a registration fee or tax by such person, the city department or division engaging in such business activity shall, at the same time and in the same manner as persons are required hereunder, prepare returns and pay the registration fees or taxes imposed in Chapter 4.10BCC, unless specifically exempted in the applicable tax code. (Ord. 5436 § 1, 2003.)

4.03.040 When due and payable – Reporting periods – Monthly, quarterly, and annual returns – Threshold provisions or relief from filing requirements – Computing time periods – Failure to file returns.

A. Other than any annual license fee or registration fee assessed under this chapter, the taxes imposed by Chapter4.04 BCC, Admission Tax Code; Chapter 4.09BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; and Chapter 4.14BCC, Gambling Tax Code; shall be due and payable in quarterly installments. At the director's discretion, businesses may be assigned to a monthly, annual, or active nonreporter reporting period depending on the tax amount owing or type of tax; provided, however, that the director may only assign a monthly reporting period for purposes of Chapter 4.09 BCC where the taxpayer is remitting excise tax to the state on a monthly basis. Tax payments for monthly, quarterly and annual taxpayers are due as described for such reporting frequencies in RCW82.32.045, as it now exists or as it may be amended.

B. Taxes shall be paid as provided in this chapter and accompanied by a return on forms as prescribed by the director. The return shall be signed by the taxpayer personally or by a responsible officer or agent of the taxpayer. The individual signing the return shall swear or affirm that the information in the return is complete and true to the best of their belief and knowledge.

C. Tax returns must be filed and returned by the due date whether or not any tax is owed.

D. Notwithstanding subsection A of this section, the director may relieve any person of the requirement to file returns if the person meets exemption criteria under BCC 4.04.035(B),4.04.035(C),4.09.090(A),4.14.040(A), or4.14.040(B).

E. A taxpayer that commences to engage in business activity shall file a return and pay the tax or fee for the portion of the reporting period during which the taxpayer is engaged in business activity subject to the conditions set forth in subsection D of this section.

F. Except as otherwise specifically provided by any other provision of this chapter, in computing any period of days prescribed by this chapter the day of the act or event from which the designated period of time runs shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or city or federal legal holiday, in which case the last day of such period shall be the next succeeding day which is neither a Saturday, Sunday, or city or federal legal holiday.

G. If any taxpayer fails, neglects or refuses to make a return as and when required in this chapter, the director is authorized to determine the amount of the tax or fees payable by obtaining facts and information upon which to base the director's estimate of the tax or fees due. Such assessment shall be deemed prima facie correct and shall be the amount of tax owed to the city by the taxpayer. The director shall notify the taxpayer by mail of the amount of tax so determined, together with any penalty, interest, and fees due; the total of such amounts shall thereupon become immediately due and payable. (Ord.6091 § 1, 2012; Ord.5781 § 3, 2007; Ord.5436 § 1, 2003.)

4.03.050 Payment methods – Mailing returns or remittances – Time extension – Deposits – Recording payments – Payment must accompany return – NSF checks.

A. Taxes shall be paid to the director in United States currency by bank draft, certified check, cashier's check, personal check, money order, cash, or by wire transfer or electronic payment if such wire transfer or electronic payment is authorized by the director. If payment so received is not paid by the bank on which it is drawn, the taxpayer, by whom such payment is tendered, shall remain liable for payment of the tax and for all legal penalties, the same as if such payment had not been tendered. Acceptance of any sum by the director shall not discharge the tax or fee due unless the amount paid is the full amount due.

B. A return or remittance that is transmitted to the city by United States mail shall be deemed filed or received on the date shown by the cancellation mark stamped by the post office upon the envelope containing it. The director may allow electronic filing of returns or remittances from any taxpayer. A return or remittance which is transmitted to the city electronically shall be deemed filed or received according to procedures set forth by the director.

C. If a written request is received prior to the due date, the director, for good cause, may grant, in writing, additional time within which to make and file returns.

D. The director shall keep full and accurate records of all funds received or refunded. The director shall apply payments first against all penalties and interest owing, and then upon the tax, without regard to any direction of the taxpayer.

E. For any return not accompanied by a remittance of the tax shown to be due thereon, the taxpayer shall be deemed to have failed or refused to file a return and shall be subject to the penalties and interest provided in this chapter.

F. Any payment made that is returned for lack of sufficient funds or for any other reason will not be considered received until payment by certified check, money order, or cash of the original amount due, plus a "nonsufficient funds" (NSF) charge of $20.00 is received by the director. Any license issued upon payment with an NSF check will be considered void, and shall be returned to the director. No license shall be reissued until payment (including the $20.00 NSF fee) is received.

G. The director is authorized, but not required, to mail tax return forms to taxpayers, but failure of the taxpayer to receive any such forms shall not excuse the taxpayer from filing returns and making payment of the taxes or fees, when and as due under this chapter. (Ord. 5436 § 1, 2003.)

4.03.060 Records to be preserved – Examination – Estoppel to question assessment.

Every person liable for any fee or tax imposed by this chapter shall keep and preserve, for a period of five years after filing a tax return, such records as may be necessary to determine the amount of any fee or tax for which the person may be liable; which records shall include copies of all federal income tax and state tax returns and reports made by the person. All books, records, papers, invoices, vendor lists, inventories, stocks of merchandise, and other data including federal income tax and state tax returns and reports shall be open for examination at any time by the director or its duly authorized agent. Every person's business premises shall be open for inspection or examination by the director or a duly authorized agent.

A. If a person does not keep the necessary books and records within the city, it shall be sufficient if such person (a) produces within the city such books and records as may be required by the director, or (b) bears the cost of examination by the director's agent at the place where such books and records are kept; provided, that the person electing to bear such cost shall pay in advance to the director the estimated amount thereof including round-trip fare, lodging, meals and incidental expenses, subject to adjustment upon completion of the examination.

B. Any person who fails, or refuses a department request, to provide or make available records, or to allow inspection or examination of the business premises, shall be forever barred from questioning in any court action, the correctness of any assessment of taxes made by the city for any period for which such records have not been provided, made available or kept and preserved, or in respect of which inspection or examination of the business premises has been denied. The director is authorized to determine the amount of the tax or fees payable by obtaining facts and information upon which to base the estimate of the tax or fees due. Such fee or tax assessment shall be deemed prima facie correct and shall be the amount of tax owing the city by the taxpayer. The director shall notify the taxpayer by mail the amount of tax so determined, together with any penalty, interest, and fees due; the total of such amounts shall thereupon become immediately due and payable. (Ord.5436 § 1, 2003.)

4.03.070 Accounting methods.

A. A taxpayer may file tax returns in each reporting period with amounts based upon cash receipts only if the taxpayer's books of account are kept on a cash receipts basis. A taxpayer that does not regularly keep books of account on a cash receipts basis must file returns with amounts based on the accrual method.

B. The taxes imposed and the returns required, hereunder, shall be upon a calendar year basis. (Ord. 5436 § 1, 2003.)

4.03.080 Public work contracts – Payment of fee and tax before final payment for work.

The director may, before issuing any final payment to any person performing any public work contract for the city, require such person to pay in full all license fees or taxes due under this title from such person on account of such contract or otherwise, and may require such taxpayer to file with the director a verified list of all subcontractors supplying labor and/or materials to the person in connection with said public work. (Ord. 5436 § 1, 2003.)

4.03.090Underpayment of tax, interest, or penalty – Interest.

If, upon examination of any returns, or from other information obtained by the director, it appears that a tax or penalty less than that properly due has been paid, the director shall assess the additional amount found to be due and shall add thereto interest on the tax only. The director shall notify the person by mail of the additional amount, which shall become due and shall be paid within 30 days from the date of the notice, or within such time as the director may provide in writing.

A. For the purposes of this section, the rate of interest to be charged to the taxpayer for tax periods prior to January 1, 2005, shall be an average of the federal short-term rate as defined in 26 U.S.C. Section 1274(d) plus two percentage

points. The rate shall be computed by taking an arithmetical average to the nearest percentage point of the federal short-term rate, compounded annually, for the months of January, April, July, and October of the year immediately preceding the calendar year as published by the United States Secretary of the Treasury. The rate shall be adjusted on the first day of January of each year for use in computing interest for that calendar year. For tax periods prior to January 1, 2005, interest shall be computed from the last day of the month following the end of the reporting period and will continue to accrue until payment is made.

B. For tax periods after December 31, 2004, the director shall compute interest in accordance with RCW 82.32.050 as it now exists or as it may be amended.

C. If subsection B of this section is held to be invalid, then the provisions of RCW82.32.050 existing as of the effective date of the ordinance codified in this section shall apply. (Ord.5781 § 4, 2007; Ord.5605 § 2, 2005; Ord.5558 § 1, 2004; Ord.5436 § 1, 2003.)

4.03.095 Time in which assessment may be made.

The director shall not assess, or correct an assessment for, additional taxes, penalties, or interest due more than four years after the close of the calendar year in which they were incurred, except that the director may issue an assessment:

A. Against a person who is not currently registered or licensed or has not filed a tax return as required by this chapter for taxes due within the period commencing 10 years prior to the close of the calendar year in which the person was contacted in writing by the director;

B. Against a person that has committed fraud or who misrepresented a material fact; or

C. Against a person that has executed a written waiver of such limitations. (Ord. 5558§ 2, 2004.)

4.03.100Overpayment of tax, penalty, or interest – Credit or refund – Interest rate – Statute of limitations.

A. If, upon receipt of an application for a refund, or during an audit or examination of the taxpayer's records and tax returns, the director determines that the amount of tax, penalty, or interest paid is in excess of that properly due, the excess amount shall be credited to the taxpayer's account or shall be refunded to the taxpayer. Except as provided in subsection B of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

B. The execution of a written waiver shall extend the time for applying for, or making a refund or credit of any taxes paid during, or attributable to, the years covered by the waiver if, prior to the expiration of the waiver period, an application for refund of such taxes is made by the taxpayer or the director discovers that a refund or credit is due.

C. Refunds shall be made by means of vouchers approved by the director and by the issuance of a city check or warrants drawn upon and payable from such funds as the city may provide.

D. Any final judgment for which a recovery is granted by any court of competent jurisdiction for tax, penalties, interest, or costs paid by any person shall be paid in the same manner, as provided in subsection C of this section, upon the filing with the director a certified copy of the order or judgment of the court.

E. The rate of interest on overpayments of taxes for tax periods prior to January 1, 2005, shall be the same as for

underpayments, as set forth in BCC4.03.090(A).

F. 1. For tax periods after December 31, 2004, the director shall compute interest on refunds or credits of amounts paid or other recovery allowed a taxpayer in accordance with RCW 82.32.060 as it now exists or as it may be amended.

2. If subsection (F)(1) of this section is held to be invalid, then the provisions of RCW 82.32.060as existing at the effective date of the ordinance codified in this section shall apply. (Ord. 5781§§ 5, 6, 2007; Ord.5605 § 3, 2005; Ord. 5558 § 3, 2004; Ord. 5436§ 1, 2003.)

4.03.110 Late payment – Disregard of written instructions – Evasion – Penalties.

A. If payment of any tax due on a return to be filed by a taxpayer is not received by the director by the due date, the director shall add a penalty in accordance with RCW 82.32.090(1) as it now exists or as it may be amended.

B. If the director determines that any tax has been substantially underpaid as defined in RCW 82.32.090(2), there shall be added a penalty in accordance with RCW 82.32.090(2) as it now exists or as it may be amended.

C. If a citation or criminal complaint is issued by the city for the collection of taxes, fees, assessments, interest or penalties, there shall be added thereto a penalty in accordance with RCW82.32.090(3) as it now exists or as it may be amended.

D. If the director finds that a person has engaged in any business or performed any act upon which a tax is imposed under this title and that person has not obtained from the director a license as required by BCC4.03.025, the director shall impose a penalty in accordance with RCW82.32.090(4) as it now exists or as it may be amended. No penalty shall be imposed under this subsection D if the person who has engaged in business without a license obtains a license prior to being notified by the director of the need to be licensed.

E. If the director determines that all or any part of a deficiency resulted from the taxpayer's failure to follow specific written tax reporting instructions, there shall be assessed a penalty in accordance with RCW 82.32.090(5) as it now exists or as it may be amended.

F. If the director finds that all or any part of the deficiency resulted from an intent to evade the tax payable, the director shall assess a penalty in accordance with RCW82.32.090(6) as it now exists or as it may be amended.

G. The penalties imposed under subsections A through E of this section can each be imposed on the same tax found to be due. This subsection does not prohibit or restrict the application of other penalties authorized by law.

H. The director shall not impose both the evasion penalty and the penalty for disregarding specific written instructions on the same tax found to be due.

I. For the purposes of this section, "return" means any document a person is required by the city to file to satisfy or establish a tax or fee obligation that is administered or collected by the city, and that has a statutorily defined due date.

J. If incorporation into the city code of future changes to RCW82.32.090 is deemed invalid, then the provisions of RCW82.32.090 referenced in this section existing at the time the ordinance codified in this section is effective shall apply. (Ord. 5781 § 7, 2007; Ord. 5605 § 4, 2005; Ord. 5558 § 4, 2004; Ord. 5436 § 1, 2003.)

4.03.120Cancellation of penalties and interest.

A. The director may cancel any penalties and/or interest imposed under BCC 4.03.110(A) if the taxpayer shows that its failure to timely file or pay the tax was due to reasonable cause and not willful neglect. Willful neglect is presumed

unless the taxpayer shows that it exercised ordinary business care and prudence in making arrangements to file the return and pay the tax but was nevertheless, due to circumstances beyond the taxpayer's control, unable to file or pay by the due date. The director's authority to waive or cancel penalties and/or interest under this subsection shall extend to amounts already paid and also includes any disputes currently pending. "Reasonable cause" may include the following and other similar circumstances:

1. The return was filed on time, but was inadvertently mailed to another agency or there was a delay or loss related to the postal service. The director may also cancel interest in this situation.

2. The delinquency was due to written erroneous information given the taxpayer by the department. The director may also cancel interest in this situation.

3. The delinquency was caused by the death or serious illness of the taxpayer or his/her immediate family, or by the illness or death of his/her tax preparer or a member of the tax preparer's immediate family, prior to the filing date.

4. The delinquency was caused by the unavoidable absence of the taxpayer, prior to the filing date.

5. The delinquency was caused by the destruction, through no fault of the taxpayer, by fire or other casualty of the taxpayer's place of business or business records.

6. The taxpayer, prior to the time of filing the return, made timely application to the department, in writing, for proper forms and these forms were not furnished in sufficient time to permit the completed return to be filed and the tax paid before the delinquent date.

7. The delinquency was the result of an unforeseen and unintentional circumstance, not immediately known to the taxpayer, caused by the malfeasance or misconduct of the taxpayer's employee or accountant.

8. The director has reasonably determined that the taxpayer made a good faith effort to comply with the provisions of this chapter.

9. The taxpayer inadvertently failed to file a tax return because of a good faith belief that the taxpayer qualified for the filing exemption in BCC4.03.040(D).

The director has no authority to cancel any other penalties or to cancel penalties for any other reason except as provided in subsection C of this section.

B. A request for cancellation of penalties and/or interest must be received by the director within 30 days after the date the department mails the notice that the penalties and/or interest are due. The request must be in writing and contain competent proof of all pertinent facts supporting a reasonable cause determination. In all cases the burden of proving the facts rests upon the taxpayer.

C. The director may cancel the penalties in BCC 4.03.110(A) one time if a person:

1. Was not licensed, and filing returns;

2. Was unaware of his/her responsibility to file and pay tax; and

3. Obtained business licenses and filed past due tax returns within 30 days after being notified by the department.

D. The director shall not cancel any interest charged upon amounts due, except under subsections (A)(1) and (2) of this

section. (Ord.5781 § 8, 2007; Ord.5605 § 5, 2005; Ord.5558 § 5, 2004; Ord.5436 § 1, 2003.)

4.03.125 Voluntary registration.

SHARE

In the case of any unregistered taxpayer doing business in the city of Bellevue that voluntarily registers prior to being contacted by the department, the department shall not assess for back taxes or interest for more than four calendar years prior to the year of registration. In addition, the late payment penalty imposed under BCC4.03.110(A) shall not apply. (Ord. 5436 § 1, 2003.)

4.03.130 Taxpayer quitting business – Liability of successor.

SHARE

A. Whenever any taxpayer quits business, sells out, exchanges, or otherwise disposes of his business or his stock of goods, any tax payable hereunder shall become immediately due and payable. Such taxpayer shall, within 10 days thereafter, make a return and pay the tax due.

B. Any person who becomes a successor shall become liable for the full amount of any tax owing. The successor shall withhold from the purchase price a sum sufficient to pay any tax due to the city from the taxpayer until such time as:

1. The taxpayer shall produce a receipt from the city showing payment in full of any tax due or a certificate that no tax is due; or

2. More than six months have passed since the successor notified the director of the acquisition and the director has not issued and notified the successor of an assessment.

C. Payment of the tax by the successor shall, to the extent thereof, be deemed a payment upon the purchase price. If such payment is greater in amount than the purchase price, the amount of the difference shall become a debt due such successor from the taxpayer.

D. Notwithstanding the above, if a successor gives written notice to the director of the acquisition, and the department does not within six months of the date it received the notice issue an assessment against the taxpayer and mail a copy of that assessment to the successor, the successor shall not be liable for the tax. (Ord.5436 § 1, 2003.)

4.03.140 Correction of tax – Administrative appeal.

SHARE

A. Any person having been issued a notice of additional taxes, delinquent taxes, interest, or penalties assessed by the department may, within 30 days after the issuance of such notice or within the period covered by any extension of the due date granted by the department, request a correction of the amount of the assessment and a conference for review of the assessment. Interest and penalties assessed shall continue to accrue during the department's review of a request for a correction, except and to the extent that the department later determines that a tax assessment was too high or the delay in issuing a determination is due to unreasonable delays caused by the department. After the conference, the department will make a final determination regarding the assessment and shall notify the taxpayer of the department's determination within 60 days, unless otherwise notified in writing by the department. Such determination shall be subject to appeal pursuant to subsection B of this section. If no request for correction is filed within the time period provided herein, the assessment covered by such notice shall become final and immediately due and payable.

B. Any person aggrieved by the amount of any fee, tax, interest or penalty determined by the department to be due under the provisions of this chapter or Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; or Chapter 4.14BCC, Gambling Tax Code, may appeal such determination pursuant to the following procedures:

1. Form of Appeal. Any appeal must be in writing and must contain the following:

a. The name and address of the taxpayer;

b. A statement identifying the determination of the department from which the appeal is taken;

c. A statement setting forth the grounds upon which the appeal is taken and identifying specific errors the department is alleged to have made in making the determination; and

d. A statement identifying the requested relief from the determination being appealed.

2. Time and Place to Appeal. Any appeal shall be filed with the office of the hearing examiner with a copy to the director no later than 30 days following the date on which the determination of the department was mailed to the taxpayer. Failure to follow the appeal procedures in this section shall preclude the taxpayer's right to appeal.

3. Appeal Hearing. The hearing examiner shall schedule a hearing date, notify the taxpayer and the director of such hearing date and shall then conduct an appeal hearing in accordance with this chapter and procedures developed by the hearing examiner, at which time the appellant taxpayer and the director shall have the opportunity to be heard and to introduce evidence relevant to the subject of the appeal.

4. Burden of Proof. The appellant taxpayer shall have the burden of proving by a preponderance of the evidence that the determination of the department is erroneous.

5. Hearing Record. The hearing examiner shall make an electronic sound recording of each appeal unless the hearing is conducted solely in writing.

6. Decision of the Hearing Examiner. Following the hearing, the hearing examiner shall enter a decision on the appeal, supported by written findings and conclusions in support thereof. A copy of the findings, conclusions and decision shall be mailed to the appellant taxpayer and to the director. The decision shall state the correct amount of the fee, tax, interest or penalty owing.

7. Interest Accrual or Payment. Interest and/or penalties shall continue to accrue on all unpaid amounts, in accordance with BCC 4.03.090 and4.03.110, notwithstanding the fact that an appeal has been filed. If the hearing examiner determines that the taxpayer is owed a refund, such refund amount shall be paid to the taxpayer in accordance with BCC 4.03.100. (Ord. 5558 § 6, 2004; Ord. 5436§ 1, 2003.)

4.03.150 Judicial review of hearing examiner decision.

The decision of the hearing examiner may be appealed to the superior court of King County by the appellant taxpayer or by the director by filing a proper request for a writ of review with the superior court. A request for a writ of review must be filed within 30 calendar days following the date that the decision of the hearing examiner was mailed to the parties. Review by the superior court shall be on, and shall be limited to, the record on appeal created before the hearing examiner. (Ord. 5436 § 1, 2003.)

4.03.160Administration – Director to make rules.

The administration of this chapter and Chapter4.04 BCC, Admission Tax Code; Chapter 4.09BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; and Chapter 4.14BCC, Gambling Tax Code, shall be accomplished under the direction of the director.

The director may prescribe forms and shall have the power, from time to time, to adopt, publish and enforce rules and

regulations necessary for the administration of this chapter and for the administration of Chapters 4.04, 4.09,4.10, and 4.14 BCC, not inconsistent with these chapters or with law. It shall be unlawful to violate or fail to comply with any such rule or regulation. (Ord. 5436§ 1, 2003.)

4.03.170 Ancillary allocation authority of director.

The director is authorized to enter into agreements with other Washington cities which impose an "eligible gross receipts tax":

A. To conduct an audit or joint audit of a taxpayer by using an auditor employed by the city of Bellevue, another city, or a contract auditor; provided, that such contract auditor's pay is not in any way based upon the amount of tax assessed;

B. To allocate or apportion, in a manner that fairly reflects the gross receipts earned from activities conducted within the respective cities, the gross proceeds of sales, gross receipts, or gross income of the business, or taxes due from any person that is required to pay an eligible gross receipts tax to more than one Washington city; provided, that for tax periods beginning on or after January 1, 2008, such agreement shall be consistent with the allocation or apportionment methods set forth in RCW35.102.130 as it now exists or as it may be amended;

C. To apply the city's tax prospectively where a taxpayer has no office or place of business within the city and has paid tax on all gross income to another Washington city where the taxpayer is located; provided, that the other city maintains an eligible gross receipts tax, and the income was not derived from contracts with the city. (Ord. 5781 § 9, 2007; Ord. 5558 § 7, 2004; Ord. 5436 § 1, 2003.)

4.03.180 Mailing of notices.

Any notice required by this chapter to be mailed to any taxpayer or licensee shall be sent by ordinary mail, addressed to the address of the taxpayer or licensee as shown by the records of the director. Failure of the taxpayer or licensee to receive any such mailed notice shall not release the taxpayer or licensee from any tax, fee, interest, or any penalties thereon, nor shall such failure operate to extend any time limit set by the provisions of this chapter. It is the responsibility of the taxpayer to inform the director in writing about a change in the taxpayer's address. (Ord. 5436 § 1, 2003.)

4.03.190 Tax declared additional.

The license fee and tax levied in Chapters 4.04,4.09, 4.10, and 4.14BCC shall be additional to any license fee or tax imposed or levied under any law or any other ordinance of the city of Bellevue except as herein otherwise expressly provided. (Ord. 5781 § 10, 2007; Ord. 5436 § 1, 2003.)

4.03.200 Public disclosure – Confidentiality – Information sharing.

A. For purposes of this section defined terms shall be as set forth in BCC4.03.020 except as otherwise stated:

1. "Disclose" means to make known to any person in any manner whatever a return or tax information;

2. "Return" shall have the meaning provided in BCC4.03.020;

3. "Tax information" means (a) a taxpayer's identity, (b) the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability deficiencies, overassessments, or tax payments, whether taken from the taxpayer's books and records or any other source, (c) whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, and (d) other data received by, recorded by, prepared by, furnished to, or collected by the city with respect to the

determination of the existence, or possible existence, of liability, or the amount thereof, of a person under the city's tax codes for a tax, penalty, interest, fine, forfeiture, or other imposition, or offense. However, data, material, or documents that do not disclose information related to a specific or identifiable taxpayer do not constitute tax information under this section. Nothing in this chapter requires any person possessing data, material, or documents made confidential and privileged by this section to delete information from such data, material, or documents so as to permit its disclosure;

4. "City agency" means every city office, department, division, bureau, board, commission, or other city agency;

5. "Taxpayer identity" means the taxpayer's name, address, telephone number, registration number, or any combination thereof, or any other information disclosing the identity of the taxpayer.

B. Returns and tax information are confidential and privileged and, except as authorized by this section, neither the director nor any other person may disclose any return or tax information.

C. This section does not prohibit the director from:

1. Disclosing such return or tax information in a civil or criminal judicial proceeding or an administrative proceeding:

a. In respect of any tax imposed under the city's tax codes if the taxpayer or its officer or other person liable under this title is a party in the proceeding; or

b. In which the taxpayer about whom such return or tax information is sought and another city agency are adverse parties in the proceeding;

2. Disclosing, subject to such requirements and conditions as the director prescribes, such return or tax information regarding a taxpayer to such taxpayer or to such person or persons as that taxpayer may designate in a request for, or consent to, such disclosure, or to any other person, at the taxpayer's request, to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, tax information not received from the taxpayer must not be so disclosed if the director determines that such disclosure would compromise any investigation or litigation by any federal, state, or local government agency in connection with the civil or criminal liability of the taxpayer or another person, or that such disclosure would identify a confidential informant, or that such disclosure is contrary to any agreement entered into by the director that provides for the reciprocal exchange of information with other government agencies which agreement requires confidentiality with respect to such information unless such information is required to be disclosed to the taxpayer by the order of any court;

3. Publishing statistics so classified as to prevent the identification of particular returns or reports or items thereof;

4. Disclosing such return or tax information, for official purposes only, to the city manager or city attorney, or to any city agency, or to any member of the city council or their authorized designees dealing with matters of taxation, revenue, trade, commerce, the control of industry or the professions;

5. Permitting the city's records to be audited and examined by the proper city, state or federal officer, his or her agents and employees;

6. Disclosing any such return or tax information to a peace officer as defined in RCW9A.04.110 or county or city prosecuting attorney, for official purposes. The disclosure may be made only in response to a search warrant, subpoena, or other court order, unless the disclosure is for the purpose of criminal tax enforcement. A peace

officer or county or city prosecuting attorney who receives the return or tax information may disclose that return or tax information only for use in the investigation and a related court proceeding, or in the court proceeding for which the return or tax information originally was sought or where otherwise allowed to be disclosed under this section;

7. Disclosing any such return or tax information to the proper officer of the Internal Revenue Service of the United States, the Canadian government or provincial governments of Canada, or to the proper officer of the tax department of any state or city or town or county, for official purposes, but only if the statutes of the United States, Canada or its provincial governments, or of such other state or city or town or county, as the case may be, grants substantially similar privileges to the proper officers of the city;

8. Disclosing any such return or tax information to the United States Department of Justice, including the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Department of Defense, the Immigration and Customs Enforcement and the Customs and Border Protection agencies of the United States Department of Homeland Security, the United States Coast Guard, the Alcohol and Tobacco Tax and Trade Bureau of the United States Department of Treasury, and the United States Department of Transportation, or any authorized representative of these federal agencies or their successors, for official purposes;

9. Disclosing, in a manner that is not associated with other tax information, the taxpayer name, entity type, business address, mailing address, revenue tax registration numbers and the active/closed status of such registrations, state or local business license registration identification and the active/closed status and effective dates of such licenses, reseller permit numbers and the status of such permits, North American Industry Classification System or Standard Industrial Classification Code of a taxpayer, and the dates of opening and closing of business. This subsection may not be construed as giving authority to any person receiving such information to use such information for any commercial purpose;

10. Disclosing such return or tax information that is also maintained by another Washington state or local governmental agency as a public record available for inspection and copying under the provisions of Chapter 42.56RCW or is a document maintained by a court of record and is not otherwise prohibited from disclosure;

11. Disclosing such return or tax information to the United States Department of Agriculture, or successor department or agency, for the limited purpose of investigating food stamp fraud by retailers;

12. Disclosing to a financial institution, escrow company or title company, in connection with specific real property that is the subject of a real estate transaction, current amounts due the city for a filed judgment, or lien against the real property;

13. Disclosing to a person against whom the director has asserted liability as a successor under the city tax codes any return or tax information pertaining to the specific business of the taxpayer to which the person has succeeded;

14. Disclosing real estate excise tax affidavit forms in the possession of the city, including real estate excise tax affidavit forms for transactions exempt or otherwise not subject to tax; or

15. Disclosing such return or tax information to the court or hearing examiner in respect to the director's application for a subpoena if there is probable cause to believe that records in the possession of a third party will aid the director in connection with its official duties under this title or a civil or criminal investigation.

D. 1. The director may disclose return or taxpayer information to a person under investigation or during any court or

administrative proceeding against a person under investigation as provided in this subsection D. The disclosure must be in connection with the director's official duties under this title, or a civil or criminal investigation. The disclosure may occur only when the person under investigation and the person in possession of data, materials, or documents are parties to the return or tax information to be disclosed.

2. Before disclosure of any tax return or tax information under this subsection D, the director must, through written correspondence, inform the taxpayer of the requested disclosure. The correspondence must clearly identify the data, materials, or documents to be disclosed. The director may not disclose any tax return or tax information under this subsection D until the time period allowed in subsection (D)(3) of this section has expired or until the court has ruled on any challenge brought under subsection (D)(3) of this section.

3. The taxpayer has 20 days from the receipt of the written request required under this subsection to petition the superior court of the county in which the petitioner resides (or with any court with jurisdiction over the matter that allows disclosure of information under this subsection D) for injunctive relief consistent with the provisions of applicable state law governing disclosure of taxpayer information.

4. Requesting information under this subsection that may indicate that a taxpayer is under investigation does not constitute a disclosure of tax return or tax information under this section.

E. Service of and compliance with a subpoena issued by the court or any administrative body with authority to issue subpoenas does not constitute a disclosure of return or tax information under this section. Notwithstanding anything else to the contrary in this section, a person served with a subpoena issued by the court or administrative body may disclose the existence or content of the subpoena and the records therein identified to that person's legal counsel.

F. Any person acquiring knowledge of any return or tax information in the course of his or her employment with the city and any person acquiring knowledge of any return or tax information as provided under subsection (C)(3), (4), (5), (6), (7), or (9) of this section who reveals or makes known any such return or tax information to another person not entitled to knowledge of such return or tax information under the provisions of this section or other applicable law may be punished by a civil penalty not exceeding $1,000, and, if the person violating this requirement is an officer or employee of the city, such person may be required to forfeit such office or employment. (Ord. 6092 § 1, 2012; Ord. 5781 § 11, 2007; Ord. 5436 § 1, 2003.)

4.03.210 Tax constitutes debt.

Any license fee or tax due and unpaid under this chapter, and all interest and penalties thereon, shall constitute a debt to the city and may be collected in the same manner as any other debt in like amount, which remedy shall be in addition to all other existing remedies. (Ord.5781 § 12, 2007; Ord.5436 § 1, 2003.)

4.03.220 Unlawful actions – Violation – Penalties.

A. It shall be unlawful for any person liable for fees or taxes under this chapter or Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; or Chapter 4.14BCC, Gambling Tax Code:

1. To violate or fail to comply with any of the provisions of this chapter or Chapters 4.04,4.09, 4.10 or 4.14BCC or any lawful rule or regulation adopted by the director;

2. To make any false statement on any license application or tax return;

3. To aid or abet any person in any attempt to evade payment of a license fee or tax;

4. To fail to appear or testify in response to a subpoena issued pursuant to the rules of procedure of the office of the hearing examiner;

5. To testify falsely in any investigation, audit, or proceeding conducted pursuant to this chapter.

B. Violation of any of the provisions of this chapter is a gross misdemeanor. Any person convicted of a violation of this chapter may be punished by a fine not to exceed $5,000, imprisonment not to exceed one year, or both fine and imprisonment. Penalties or punishments provided in this chapter shall be in addition to all other penalties provided by law.

C. Any person, or officer of a corporation, convicted of continuing to engage in business after the revocation of a license shall be guilty of a gross misdemeanor and may be punished by a fine not to exceed $5,000, or imprisonment not to exceed one year, or both fine and imprisonment. (Ord.5558 § 8, 2004; Ord.5436 § 1, 2003.)

4.03.230 Suspension or revocation of business registration [license].

A. The director, or designee, shall have the power and authority to suspend or revoke any license issued under the provisions of this chapter or Chapter 4.04 BCC, Admission Tax Code; Chapter 4.09 BCC, Business and Occupation Tax Code; Chapter 4.10 BCC, Utility Occupation Tax Code; and Chapter 4.14BCC, Gambling Tax Code, and to such other chapters and sections of the Bellevue City Code in such manner and to such extent as expressly indicated in each such chapter or section. The director, or designee, shall notify such licensee in writing by certified mail of the intended suspension or revocation of his or her license and the grounds therefor. Any license issued under this chapter may be suspended or revoked based on one or more of the following grounds:

1. The license was procured by fraud or false representation of fact.

2. The licensee has failed to comply with any provisions of BCC Title 4.

3. The licensee has failed to comply with any provisions of the Bellevue City Code.

4. The licensee is in default in any payment of any license fee or tax under BCC Title 4.

5. The licensee or employee has been convicted of a crime involving the business.

B. Any licensee may, within 30 days from the date that the suspension or revocation notice was mailed to the licensee, appeal from such suspension or revocation by filing a written notice of appeal ("petition") setting forth the grounds therefor with the hearing examiner. A copy of the petition must be provided by the licensee to the director and the city attorney on or before the date the petition is filed with the hearing examiner. The hearing examiner shall set a date for hearing said appeal and notify the licensee by mail of the time and place of the hearing. After the hearing thereon the hearing examiner shall, after appropriate findings of fact, and conclusions of law, affirm, modify, or overrule the suspension or revocation and reinstate the license, and may impose any terms upon the continuance of the license.

C. No suspension or revocation of a license issued pursuant to the provisions of this subchapter shall take effect until 30 days after the mailing of the notice thereof by the director, and if appeal is taken as herein prescribed the suspension or revocation shall be stayed pending final action by the hearing examiner. All licenses which are suspended or revoked shall be surrendered to the city on the effective date of such suspension or revocation.

D. The decision of the hearing examiner shall be final. The licensee and/or the director may seek review of the decision by the superior court of Washington in and for King County within 30 days from the date of the decision. If review is sought as herein prescribed the suspension or revocation shall be stayed pending final action by the superior court.

E. Upon revocation of any license as provided in this section no portion of the license fee shall be returned to the licensee. (Ord. 5436 § 1, 2003.)

4.03.240 Closing agreement provisions.

The director may enter into an agreement in writing with any person relating to the liability of such person in respect of any tax imposed by any of the chapters within this title and administered by this chapter for any taxable period(s). Upon approval of such agreement, evidenced by execution thereof by the director and the person so agreeing, the agreement shall be final and conclusive as to the tax liability or tax immunity covered thereby, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact:

A. The case shall not be reopened as to the matters agreed upon, or the agreement modified, by the director or the taxpayer; and

B. In any suit, action or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded. (Ord. 5436§ 1, 2003.)

4.03.250 Charge-off of uncollectible taxes.

The director may charge off any tax, penalty, or interest that is owed by a taxpayer, if the director reasonably ascertains that the cost of collecting such amounts would be greater than the total amount that is owed or likely to be collected from the taxpayer. (Ord.5436 § 1, 2003.)

4.03.260Severability.

If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of the chapter or the application of the provision to other persons or circumstances shall not be affected. (Ord. 5436§ 1, 2003.)

4.03.270 Collection of tax.

The city may pursue collection of any fee, tax, interest or penalty due and unpaid to the fullest extent and in any manner authorized by law, including but not limited to the filing of a civil action against the taxpayer for the payment of such debt or the use by the city of a collection agency for such purposes. (Ord. 5436§ 1, 2003.)

4.03.280 City subject to tax.

Repealed by Ord. 5781.(Ord. 5436 § 1, 2003.)

4.03.290 Tax amnesty.

The director, with city council approval, may from time to time declare periods of tax amnesty to the extent that the director determines that such periods of tax amnesty are likely to have the effect of increasing revenues to the city. The director may promulgate rules and procedures to implement the provisions of this section. (Ord.5436 § 1, 2003.)

1380-ORD
04/08/14

CITY OF BELLEVUE, WASHINGTON

ORDINANCE NO. 6156

AN ORDINANCE extending Ordinance No. 6133 B-1, adopting interim official zoning controls regarding the regulation of recreational marijuana producers, processors and retailers for a period of six months, to be in effect while the City drafts, considers, holds hearings and adopts permanent zoning regulations; providing for severability; and establishing an effective date.

WHEREAS, on November 6, 2012, Washington votes approved Initiative 502 (I-502), which in relevant part, legalized the possession of small amounts of marijuana and marijuana-related products for persons age 21 and older, and directed the Washington State Liquor Control Board (LCB) to develop and implement rules to regulate and tax recreational marijuana producers, processors, and retailers by December 31, 2013; and

WHEREAS, the LCB re-filed its proposed rules regulating recreational marijuana uses on September 4, 2013, and accepted the proposed rules on October 16; and

WHEREAS, the LCB rules became effective on November 16, 2013, and the LCB began accepting license applications for recreational marijuana uses on November 18, 2013; and

WHEREAS, the LCB allocated four recreational marijuana retail licenses for the City of Bellevue, and there are no limits on the number of recreational marijuana producer and processor licenses to be issued; and

WHEREAS, the City of Bellevue Land Use Code (LUC) prohibits all recreational marijuana producers, processors, and retailers as uses in the City of Bellevue;

WHEREAS, the City Council deems it to be in the public interest to establish interim regulations advising the public where recreational marijuana producers, processors, and retail uses may be located in the City of Bellevue before the application deadline established by the LCB for state licensing for such uses; and

WHEREAS, on October 21, 2013, in response to the licensing schedule published by the Washington State Liquor Control Board, the City Council adopted Ordinance No. 6133 B-1 implementing an emergency interim zoning ordinance regulating the location of recreational marijuana uses and imposing performance criteria intended to mitigate negative impacts arising from operation of recreational marijuana uses; and

WHEREAS, under the Growth Management Act (GMA), the City was required to hold a public hearing within 60 days of adopting Ordinance No. 6133 B-1, which public hearing was held on December 2, 2013, to receive public comment and extend Ordinance No. 6133 B-1 for a six-month period; and

WHEREAS, Ordinance No. 6133 B-1 will, by its own terms, expire on April 21, 2014, unless the City Council extends the ordinance as allowed by law; and

WHEREAS, on January 13, 2014 the Washington State Legislature convened and is considering several bills related to regulating recreational marijuana and reconciling medical cannabis with the recreational marijuana regulatory structure; and

WHEREAS, on January 14, 2014, the Washington State Attorney General issued its opinion (AGO No. 2014) that I-502 does not preempt counties, cities, and towns from banning recreational marijuana within their jurisdictions and that local ordinances that do not expressly ban state licensed marijuana licensees from operating within the jurisdiction but make such operation impractical are valid if the properly exercise the local jurisdiction's police power; and

WHEREAS, the establishment or licensing of recreational marijuana uses may allow new uses that are incompatible with nearby existing land uses and lead to erosion of community character and harmony; and

WHEREAS, marijuana is still classified as a schedule I controlled substance under federal law and crimes related to marijuana remain subject to prosecution under federal law; and

WHEREAS, On August 29, 2013, the United States Department of Justice, Office of the Attorney General, ("DOJ") released updated guidance regarding marijuana enforcement. The guidance reiterates that DOJ is committed to using its limited investigative and prosecutorial resources to address the most significant threats to public safety related to marijuana crimes in "the most effective, consistent, and rational way." The guidance directs federal prosecutors to review potential marijuana-related charges on a case-by-case basis and weigh all information and evidence, including whether the operation is demonstrably in compliance with a strong and effective state regulatory system and if the conduct at issue implicates one or more of the eight stated federal enforcement priorities. The DOJ appears to not differentiate application of the guidance between medical cannabis and recreational marijuana; and

WHEREAS, the extension of interim regulations of six months in duration for establishment of recreational marijuana producers, processors, and retailers will prevent substantial change until the land areas and the text of development standards applicable to recreational marijuana uses is reviewed, and any needed revisions are made to city codes; and

WHEREAS, the City has a compelling interest in the protection of the health and safety of all its residents, as well as a compelling interest in ensuring that the goals and policies contained within the Comprehensive Plan and other policy/planning documents are fulfilled; and

WHEREAS, RCW 35A.63.220 and RCW 36.70A.390 authorizes cities to adopt interim zoning ordinances provided the City Council holds a public hearing on the interim zoning ordinance within 60 days of the commencement of the ordinance; and

WHEREAS, RCW 35A.63.220 and RCW 36.70A.390 further authorizes Washington cities to extend interim zoning ordinances for additional periods of up to six months following a public hearing and adoption of findings of fact; and

WHEREAS, pursuant to BCC 22.02.050 and WAC 197-11-800(19), the adoption of this ordinance is exempt from environmental review under the State Environmental Policy Act; now, therefore,

THE CITY COUNCIL OF THE CITY OF BELLEVUE, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Extension of Interim Zoning Ordinance. Ordinance No. 6133 B-1 is hereby extended for an additional six-month period, unless repealed, extended or modified by the City Council after subsequent public hearing and the entry of additional findings of fact pursuant to RCW 35A.63.220 and RCW 36.70A.390.

Section 2. Section 1.C of Ordinance 6133 B-1 shall be amended as follows:

C. Limitations on Uses. The following limitations shall apply to all marijuana producers, processors, and retailers, unless stated otherwise:

1. A marijuana producer, retailer, or processor, shall not be located within 1,000 feet of the following uses or any use included in Chapter 314-55 WAC now or as hereafter amended:

    a. Elementary or secondary school;
    b. Playgrounds;
    c. Recreation center or facility;
    d. Child care centers;
    e. Public parks;
    f. Public transit centers;
    g. Libraries;
    h. Any game arcade or
    i. Any medical cannabis collective garden.

2. No marijuana retailer shall be located within 1,000 feet of any other marijuana retailer.

3. No marijuana producer, processor, or retailer shall be allowed in single family and multi-family land use districts (R-1 – R-30).

4. No marijuana retailer is allowed as a subordinate or accessory use in any land use district.

5. Marijuana shall be grown in a structure. Outdoor cultivation is prohibited.

Section 3. Severability. Should any provision of this ordinance or its application to any person or circumstance be held invalid, the remainder of the ordinance or the application of the provision to other persons or circumstances shall not be affected.

Section 4. Findings of Fact. The findings contained in this ordinance are hereby adopted as findings of facts to justify extending Ordinance No. 6133 B-1 imposing the interim zoning ordinance.

Section 5. Effective Date. This ordinance shall take effect and be in force on April 21, 2014.

Passed by the City Council this 17th day of March, 2014 and signed in authentication of its passage this 14th day of April, 2014.

(SEAL)

Claudia Balducci, Mayor

Approved as to form:

Lori M. Riordan, City Attorney

Lacey Hatch, Assistant City Attorney

Attest:

Myrna L. Basich, City Clerk

Published _____