No. 73646-9-I

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON
DIVISION I

GREENSUN GROUP LLC,

Appellant,

v.

CITY OF BELLEVUE,

Respondent.

BRIEF OF RESPONDENT CITY OF BELLEVUE

Matthew J. Segal, WSBA # 29797
Jessica A. Skelton, WSBA # 36748
Jamie L. Lisagor, WSBA # 39946
PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, Washington 98101
Telephone: 206-245-1700

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I. INTRODUCTION

The City of Bellevue ("City") has broad authority through its zoning power to regulate the location of marijuana retail outlets within the City. Based on this authority, the City included a provision in its interim zoning restrictions stating that no marijuana retailer may locate within 1,000 feet of another marijuana retailer ("1,000 Foot Separation"). In order to determine which marijuana retailer was established first for the purposes of enforcing the 1,000 Foot Separation, the City advised marijuana retail applicants, in advance, that it would follow a neutral criterion – the issuance of the Washington State Liquor and Cannabis Board's ("LCB's") license approval to the marijuana retailer – to make this determination ("First in Time Determination"). After the LCB issued license approvals, the City applied the 1,000 Foot Separation and First in Time Determination to Plaintiff Greensun Group LLC's ("Greensun's") proposal to use property located in Bellevue for a marijuana retail use ("Premises"). As the superior court correctly held, the City properly determined that it could not issue a business license to Greensun because it was not first in time and doing so would violate the 1,000 Foot Separation.

Now, rather than appealing the dismissal of the constitutional claims it alleged before the superior court, Greensun resorts to assertions that the City acted arbitrarily and capriciously by denying Greensun a

business license, which assertions are not a proper claim for relief in this case. Regardless, the superior court correctly rejected those assertions and determined that the City followed proper procedures in applying the 1,000 Foot Separation and First in Time Determination to Greensun. This Court should affirm the superior court's decision.

Alternatively, this Court should reach the threshold issue not decided by the superior court and hold that Greensun's collateral attack on the City's zoning restriction is time-barred under the Land Use Petition Act, chapter 36.70C RCW ("LUPA"). Regardless of the grounds used to affirm the superior court, this Court also should award the City its reasonable attorney fees on appeal.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

The City assigns no errors.

B. Issues Pertaining to Assignments of Error.

1. Whether the superior court properly dismissed Greensun's alleged claims for violations of the Due Process Clause and the Privileges and Immunities Clause of the Washington Constitution and for declaratory and injunctive relief because those claims fail as a matter of law.

2. Whether Greensun's claims are time-barred under LUPA's 21-day limitations period because Greensun waited months before filing

an action challenging the City's final land use decision interpreting and enforcing the 1,000 Foot Separation.

3. Whether the superior court properly dismissed Greensun's assertions that the City engaged in arbitrary and capricious conduct where those assertions were not stated as a proper claim in the case and fail on their merits in any event.

4. Whether Greensun is entitled to an award of partial summary judgment on a claim not alleged in its Complaint and when it did not move for partial summary judgment before the superior court.

5. Whether the City is entitled to an award of its reasonable attorney fees pursuant to RCW 4.84.370.

III. STATEMENT OF THE CASE

Washington Initiative Measure No. 502 ("I-502"), passed by voters in November of 2012, established a licensing program for three categories of marijuana businesses (production, processing, and retail sales) to be administered by the LCB in conjunction with the local jurisdiction where the proposed business would be located. RCW 69.50.325. Following the enactment of I-502, the Washington Attorney General opined that Washington municipalities may ban marijuana retailers outright from operating in their jurisdictions. AGO 2014 No. 2 at 8. With respect to regulation short of an outright ban, the Attorney General opined that "the

Washington Constitution provides broad authority for local jurisdictions to regulate within their boundaries and impose land use and business licensing requirements." *Id.* at 9.

After voters passed I-502, the City adopted Ordinance No. 6133 B-1 in October of 2013, which provided for temporary interim zoning controls for marijuana producers, processors, and retailers in the City. CP 323-28. In March of 2014, in Ordinance No. 6156, the City extended those interim controls and added the 1,000 Foot Separation,[1] which provides that no marijuana retailer shall be located within 1,000 feet of another marijuana retailer. CP 112, 127-30. The LCB allocated four licenses for marijuana retail outlets to operate in the City and established a lottery system to determine the four applicants whose applications could be finalized. CP 113. In May of 2014, the LCB released the results of its lottery for licenses in the City. *Id.* Applicant Par 4 Investments LLC ("Par 4") was one of the four lottery winners, but Greensun was not. *Id.*

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[1] Separation requirements like the 1,000 Foot Separation are an appropriate tool to prevent clustering or concentration of certain business in any one area in order to prevent blight, downgrading, or other ill effects in the surrounding neighborhoods. *See, e.g.*, *World Wide Video of Wash., Inc. v. City of Spokane*, 125 Wn. App. 289, 296-97, 300-313, 103 P.2d 1265 (2005) (upholding city ordinance that prohibited location of adult establishments within 750 feet of another such establishment); *City of Seattle v. Davis*, 174 Wn. App. 240, 251, 306 P.3d 961 (2012) (buffer zone used between adult cabarets to "combat the undesirable secondary effects"); *Walnut Props., Inc. v. City Council*, 100 Cal. App. 3d 1018, 1023, 161 Cal. Rptr. 411 (1980) (upholding city ordinance that prohibited adult entertainment business within 1,000 feet of any other adult entertainment business).

After the LCB released its lottery results, the City sent a notice to all applicants, including Greensun, about the City's interim zoning controls and specifically notifying them that the City would apply the 1,000 Foot Separation to retail marijuana locations. CP 113, 153. Greensun did not respond to this letter. *Id.* In late May, Greensun applied for a City business license, and in early June, the City sent a letter notifying Greensun that it could only approve a business license for the four LCB lottery winners. CP 114. Two days later, the City received notice that Greensun had moved up to the Number 4 position in the LCB lottery. CP 115, 159-60. On June 9, the City received a Notice of Marijuana Application for Greensun, which identified its planned location as the Premises at 10600 Main Street in Bellevue. CP 115. On June 4, the City previously had approved a retail location for lottery winner Par 4 that was within 1,000 feet of the Premises.[2] CP 114. Accordingly, in its June 25 conditional approval of the Premises as Greensun's planned location, the City included the notice that it had adopted the 1,000 Foot Separation and that "[a]lthough the City approves the location for the use, <u>such use may be prohibited at the proposed location based on the order the State issues the retail licenses</u>." CP 115, 162 (emphasis added). Similarly, on

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[2] The City approved Par 4's planned location with the caveat that it reserved the right "to enforce violations of city ordinances and codes as exist now or as hereafter amended." CP 114, 155.

June 24, the City sent a letter to all lottery participants notifying them that "the City shall consider the entity that is licensed first by the LCB to be the 'first-in-time' applicant" and that the "issuance date for the letter serving as your 30-day marijuana license will determine which entity is" licensed first. CP 115-16, 165-66. Again, Greensun did not respond. *Id.*

On July 2, 2014, High Society, Inc., one of the original four lottery winners, whose application the LCB later terminated, sought and obtained a temporary restraining order ("TRO") barring the LCB from issuing retail licenses to anyone but the four original LCB lottery winners. CP 116. Following issuance of the TRO, the City confirmed with the LCB that it likely would be issuing Par 4 the first retail license, because Par 4 was one of the original lottery winners. CP 116, 168. Greensun, on the other hand, was not an original lottery winner. *Id.*; CP 113. On Monday, July 7 at 9:17 am, Par 4 received a conditional approval letter dated July 3, and the LCB notified City officials that Par 4 was the "first of the Marijuana Retailers approved for Bellevue." CP 116-17, 171-73, 175-76. The LCB sent a broadcast e-mail stating that it had issued its first 24 retail licenses and published a list that included Par 4, but not Greensun. CP 117, 178-80. The LCB sent a revised conditional approval letter to Par 4 at 1:08 pm on July 7. CP 191, 230-34. Early that same afternoon, the LCB reported that the TRO obtained by High Society, Inc. had been lifted. CP 117.

After the City notified Greensun that Par 4's LCB conditional approval letter was issued first, Greensun claimed that Par 4's letter was issued in error and notified the City that it received its conditional approval letter at 3:04 pm on July 7. CP 117, 182-88, 191, 219-28. As a result, the City sought additional information from the LCB, Par 4, and Greensun regarding when the LCB issued the conditional approval letters. CP 190-92, 195-234, 241. On July 29, the City sent Greensun a letter summarizing its finding that Par 4 was, in fact, first in time because both its original and revised conditional approval letters were issued prior to Greensun's letter and because internal LCB records indicated that Par 4's license was issued on July 6, 2014. CP 191-92, 236-41. Greensun filed the above-captioned lawsuit more than four months later, on November 3, 2014, alleging claims for violations of the Due Process Clause, Privileges and Immunities Clause, and for declaratory and injunctive relief. CP 1-11. Greensun filed a Motion for Preliminary Injunction on December 4, 2014, which the superior court denied following a December 12, 2014, hearing. CP 248-49.

On February 13, 2015, the City moved for summary judgment on the grounds that Greensun's claims were time-barred by LUPA and failed on their merits. CP 263-85. Following an extension of time for Greensun to conduct discovery, full and complete briefing on summary judgment,

and a hearing, the King County Superior Court granted the City partial summary judgment on the issues that Greensun had withdrawn or waived on summary judgment. CP 780-82. Specifically, the superior court dismissed Greensun's due process claim in full and dismissed the facial challenge portion of its privileges and immunities claim. CP 781. The superior court also granted declaratory relief in response to the City's counterclaim and declared that "the City has the authority to regulate the location and density of marijuana retail outlets within its boundaries, including through the adoption and enforcement of the 1,000 Foot Separation. The City also has the authority to develop and apply processes for enforcing the 1,000 Foot Separation, including through use of a First in Time Determination." *Id.* The superior court also ordered supplemental briefing on Greensun's "request for cross-relief" on the remaining as-applied challenge portion of Greensun's privileges and immunities claim. CP 782.

Following supplemental briefing, the superior court granted the City's summary judgment motion in full and dismissed Greensun's claims. CP 774-76. The superior court acknowledged Greensun's assertions that the City "acted arbitrarily and capriciously in denying their business license" and specifically held as follows:

> Assuming this claim is not barred by LUPA, Plaintiff has the burden of proof. Plaintiff did not have a vested right in operating the marijuana store as they were awaiting a state license. The evidence shows that the city first considered one method to determine first in time under its zoning ordinance and then ultimately chose another method. The method appears to be neutral on its face. There is no evidence that the second method was chosen for the purpose of harming Plaintiff or of benefiting a rival business. All parties were notified of the process to be used.
>
> Plaintiff challenges the lack of a formal process in establishing the method to determine first in time. There does not appear to be a requirement under Bellevue City Code for the Director to promulgate formal rules. The code is permissive. The Director may promulgate rules. The director also has the authority to coordinate with the business license process under the code.
>
> There is no substantive issue of fact as to the application of the method to Plaintiff.
>
> Therefore, the Court concludes that the Plaintiff has not met their burden of proof in showing arbitrary and capricious conduct by Defendant.

CP 776. As a result, the superior court declared "that the City properly enforced the 1,000 Foot Separation and properly applied the First in Time Determination as to Greensun." CP 777. Greensun moved for reconsideration and the superior court called for a response from the City. *See* CP 712-23, 746-58. After complete briefing on reconsideration, the superior court denied Greensun's motion for reconsideration. CP 764-65.

Greensun then filed a notice of appeal and amended notice of appeal. CP 766-71, 772-82.

IV. ARGUMENT

A. Standard of Review.

Greensun seeks review of the superior court's orders dismissing its claims against the City and granting the City's counterclaim for declaratory relief. CP 772-82. On summary judgment, Greensun expressly withdrew its facial challenge to the 1,000 Foot Separation and waived its procedural due process claim, leaving only the as-applied portion of its privileges and immunities claim and the related declaratory and injunctive relief claims to be resolved by the superior court. CP 329-52; CP 492; CP 780-82. Accordingly, this Court's review of the claims dismissed by the superior court must be limited to the claims not withdrawn or waived by Greensun.[3] *See, e.g., Sneed v. Barna,* 80 Wn. App. 843, 847, 912 P.2d 1035 (1996) (summary judgment argument not pleaded or argued to the trial court cannot be raised for the first time on appeal). Accordingly, given the arguments raised below, only the appeal of the dismissal of the as-applied portion of Greensun's privileges and

[3] Moreover, Greensun does not specifically assign error to the dismissal of its due process claim. *See* Appellant's Br. at 3 (assigning error only to "granting the City's Motion for Summary Judgment" generally and stating issues relating to general "violat[ions] of Greensun's rights under the State Constitution" and "arbitrary and capricious" conduct).

immunities claim, and the related declaratory and injunctive relief claims, is before this Court.

Review of whether the 1,000 Foot Separation as applied to Greensun violates the Privileges and Immunities Clause is highly deferential. "A legislative enactment is presumed constitutional and the party challenging it bears the burden of proving it unconstitutional beyond a reasonable doubt." *Tekoa Const., Inc. v. City of Seattle*, 56 Wn. App. 28, 34, 781 P.2d 1324 (1989) (quoting *State v. Brayman*, 110 Wn.2d 183, 193, 751 P.2d 294 (1988)). Thus, under an "as applied" challenge, Greensun must prove beyond a reasonable doubt that the 1,000 Foot Separation is unconstitutional as applied to it. *See Sch. Districts' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 607-08, 244 P.3d 1 (2010). A determination that an enactment is "unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated." *City of Redmond v. Moore,* 151 Wn.2d 664, 669, 91 P.3d 875 (2004).

Additionally, where an issue may be resolved on statutory grounds, courts "avoid deciding the issue on constitutional grounds." *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000). Accordingly, as discussed in Section IV(C), *infra*, this Court should determine that Greensun's claims are statutorily barred by LUPA.

B. The Superior Court Properly Dismissed Greensun's Claims.

On summary judgment, Greensun failed to demonstrate that it could establish all of the required elements of either of its two constitutional claims or its claims for declaratory and injunctive relief. In fact, Greensun conceded before the superior both that the 1,000 Foot Separation is a valid zoning restriction and that the City has "the authority to develop and apply processes for enforcing the 1,000 Foot Separation, including through the use of a First in Time Determination." CP 329, 610, 781. As discussed, *supra*, Greensun also withdrew its claim under the Due Process Clause and its facial challenge under the Privileges and Immunities Clause. CP 329-52; CP 492; CP 780-82. As a result, the superior court correctly determined that the City was entitled to summary judgment on all of Greensun's claims and should be affirmed.

1. The superior court properly dismissed Greensun's privileges and immunities claim.

The superior court correctly determined that Greensun failed to establish the required elements of its as-applied challenge under the Privileges and Immunities Clause.[4] In order to state a claim for a violation of the Privileges and Immunities Clause, Greensun must satisfy a two-part test. First, courts consider "whether a challenged law grants a 'privilege'

[4] Similar to its due process claim, Greensun's privileges and immunities claim included allegations relating to both facial and as-applied challenges to the City's actions. *See* CP 9. Greensun later expressly withdrew its facial challenge. CP 329.

or 'immunity' for purposes of [the] state constitution." *Schroeder v. Weighall*, 179 Wn.2d 566, 573, 316 P.3d 482 (2014) (internal citations omitted). If the answer is yes, then courts "ask whether there is a 'reasonable ground' for granting that privilege or immunity." *Id.* The Privileges and Immunities Clause is implicated only when it impacts "'such a fundamental right of a citizen that it may be said to come within the prohibition of the constitution, or to have been had in mind by the framers of that organic law.'" *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 814, 83 P.3d 419 (2004) (quoting *Bussell v. Gill,* 58 Wash. 468, 476-77, 108 P. 1080 (1910) (internal quotation omitted)). Moreover, "a 'privilege' normally relates to an exemption from a regulatory law that has the effect of benefiting certain businesses at the expense of others." *Am. Legion Post #149 v. Wash. State Dep't of Health,* 164 Wn.2d 570, 607, 192 P.3d 306 (2008).

Although the right to carry on business has been determined to be a fundamental right of state citizenship in some circumstances, the Washington Supreme Court has "rejected the notion that the privileges and immunities clause is violated anytime the legislature treats similarly situated businesses differently." *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 781, 317 P.3d 1009 (2014). The Washington Supreme Court also has "rejected attempts to assert the right to carry on business when a

narrower, nonfundamental right is truly at issue." *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 360, 340 P.3d 849 (2015) ("*Ass'n of Wash. Spirits*"). In *Ass'n of Wash. Spirits*, the Washington Supreme Court recently held that "[t]he ability to sell and distribute spirits does not implicate a 'privilege' under article I, section 12" based on "the distinction between privileges and rights granted only at the discretion of the legislature when considering claims of disparate treatment of businesses." *Id.* at 362 (citing *Randles v. Wash. State Liquor Control Bd.*, 33 Wn.2d 688, 694, 206 P.2d 1209 (1949) ("the distinction between a lawful business which a citizen has the right to engage in and one in which he may engage only as a matter of grace of the state" must be considered)). Accordingly, the *Ass'n of Wash. Spirits* Court held that there is no constitutional privilege involved in the sale of liquor and thus no violation of the Privileges and Immunities Clause. *Id.* at 362-63.

Ass'n of Wash. Spirits controls the outcome of Greensun's privileges and immunities claim. The right to sell marijuana in a retail store, like the right to sell liquor, is a right granted only at the discretion of the state; it is not a fundamental right of state citizenship. *See* RCW 69.50.354 ("Retail sale of marijuana ... by a validly licensed marijuana retailer or retail outlet employee, shall not be a criminal or civil offense under Washington state law."). In fact, as the Washington Attorney

General has opined, municipalities may ban outright the sale of retail marijuana within their borders. AGO 2014 No. 2 at 8. Greensun fails in its attempt to distinguish *Ass'n of Wash. Spirits*, *see* Appellant's Br. at 26-27, which is directly on point and concludes that a right to conduct business is not fundamental when it is granted at the discretion of the legislature.

Additionally, Greensun cannot establish that some marijuana retailers are "exempt" from regulation, benefitting certain retailers at the expense of others. *See Am. Legion Post #149,* 164 Wn.2d at 607. The City applied the 1,000 Foot Separation equally to all marijuana retail applicants in the City. *See* CP 153 (notifying all marijuana retail applicants that the City would be applying the 1,000 Foot Separation). Although Greensun complains the City has "absolutely prevented Greensun from engaging in its business" while issuing business licenses to "thousands of other businesses within the City," Appellant's Br. at 27, the City has not prohibited Greensun from carrying on a business at the Premises, so long as it complies with the applicable land use regulations. Thus, Greensun cannot establish a privilege or immunity sufficient to state its claim.

Even if a privilege were implicated (which is not the case), Greensun cannot satisfy the second, "reasonable ground" portion of the

test for a privileges and immunities claim. The reasonable ground test also comprises two prongs: "first, whether the law applies equally to 'all persons within a designated class,' and second, whether there is a 'reasonable ground for distinguishing between those who fall within the class and those who do not.'" *Ockletree*, 179 Wn.2d at 783 (internal citation omitted). Here, the 1,000 Foot Separation applies equally to all marijuana retail applicants in the City. *See* CP 505 at 83:11-16 (Greensun does not dispute that the same criteria were applied to Par 4). By enforcing the 1,000 Foot Separation through the First in Time Determination, the City did not distinguish between classes of businesses, as is required for a violation of the Privileges and Immunities Clause. *See, e.g., Ralph v. City of Wenatchee*, 34 Wn.2d 638, 644, 209 P.2d 270 (1949) (invalidating ordinance that protected local photographers from competition by "itinerant" photographers). Even if the City did distinguish between classes of businesses, however, it did so only on the basis of when the applicant had received an LCB license to sell retail marijuana for the purpose of enforcing the 1,000 Foot Separation. Thus, not only did the City's regulation apply equally to all applicants, but there was a reasonable ground for any distinction made between applicants.

Greensun cannot establish the elements of its privileges and immunities claim, so it falls back on a general assertion that the City

engaged in "arbitrary and capricious conduct." *See generally* Appellant's Br. at 14-46.[5] But Greensun never pleaded an independent arbitrary and capricious claim. As discussed in Section IV(C), *infra*, mere claims that a public entity's action was "arbitrary and capricious" must be asserted in a LUPA petition. Accordingly, Greensun's privileges and immunities claim fails as a matter of law, and the superior court properly dismissed that claim.

2. The superior court properly dismissed Greensun's due process claim.

Greensun either withdrew[6] or waived all portions of its due process claim on summary judgment. The City sought dismissal of both the procedural and substantive components of Greensun's due process claim on the grounds that Greensun could not establish the required elements of those claims. CP 278-81, 492 (arguing that Greensun could not establish that it was deprived of notice and an opportunity to be heard, had not established the importance of the interest at stake, and did not identify additional procedural safeguards that should have been employed). At the time the City moved for summary judgment based on Greensun's inability to prove the elements of its due process claim, Greensun was obligated to

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[5] Notably, neither of Greensun's two constitutional claims for relief – its privileges and immunities claim or its due process claim – is discussed anywhere in Greensun's Opening Brief.

[6] Greensun does not and cannot dispute that it expressly withdrew the facial challenge portion of its due process claim. *See* CP 329.

provide evidence and authority sufficient to prevent dismissal of that claim. *See Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). But Greensun's Opposition did not offer *any* argument in opposition to the dismissal of its due process claim. *See* CP 329-52. When due process issues were raised at the hearing on the City's Motion, the Court indicated that it believed that Greensun had waived that issue. *See* Verbatim Report of Proceedings ("VRP") (April 17, 2005) at 8:25-9:6; *see also id.* at 33:6-16 (by Greensun counsel: "The test is not one of procedural due process.").

Even if Greensun did not waive its procedural due process claim, however, the superior court properly dismissed that claim because Greensun could not prove it as a matter of law. "Procedural due process '[a]t its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context.'" *State v. Derenoff,* 182 Wn. App. 458, 466, 332 P.3d 1001 (2014) (quoting *In re Det. of Stout,* 159 Wn.2d 357, 370, 150 P.3d 86 (2007)). In order to recognize a claim for a violation of procedural due process, courts balance three factors:

> (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural

> safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures.

Id. (quoting *Stout,* 159 Wn.2d at 370 (internal citation omitted)).

Greensun failed to establish that it was deprived of the opportunity to be meaningfully heard. To the contrary, the City notified Greensun directly, in writing and on multiple occasions, that it would be applying the 1,000 Foot Separation to Greensun's intended use of the Premises and specifically advised Greensun of the process that would be used to make the First in Time Determination. CP 113, 115-16, 153, 162-66 (May 2, June 24, and June 25 notices). Greensun did not object. *See id.* Moreover, after the City made the initial determination that Par 4 was first in time, it undertook an extensive investigation of all available evidence and made several requests to Greensun to submit evidence to support the conclusion that it was first in time, before the City made its final decision. CP 191-92, 195-241.

Likewise, Greensun cannot establish a violation of procedural due process under the applicable balancing factors. The affected private interest[7] – the operation of a retail marijuana outlet – is a use that the

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[7] Greensun also was not deprived of any vested right to a business license or to operate a marijuana retail outlet that is not subject to the 1,000 Foot Separation. When the City enacted the 1,000 Foot Separation, Greensun had not submitted a complete business license application to the City, nor had the LCB issued Greensun a marijuana retail license. *See* CP 114; *cf. Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 213-14, 334 P.3d 1143 (2014) (failure to file a completed application for a

Washington Attorney General already has opined may be banned outright. AGO 2014 No. 2 at 8. Nor has Greensun identified any additional procedural safeguards that were warranted under the circumstances, but which the City failed to employ. To the contrary, Greensun primarily argues that the City should have employed a different process for making the First in Time Determination, namely that it should have issued a license to Greensun because it could have opened sooner than Par 4. *See* Appellant's Br. at 28. But Greensun fails to articulate how the City could have made such a subjective determination with sufficient procedural safeguards. Moreover, using a criterion such as which applicant was closer to opening its retail store would have directly contradicted the City's position, conveyed in writing to all applicants, that work undertaken by an applicant prior to obtaining an LCB license was at the risk and expense of the applicant. *See, e.g.,* CP 115-16, 165-66 ("Any work undertaken by a potential retail marijuana operator in furtherance of obtaining a state license or improvements related to the proposed location is undertaken solely at the risk and expense of the potential operator.").

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building permit bars vesting of rights to zoning or other land use control ordinances). Greensun was also well aware that the City's interim zoning regulations were temporary and, thus, likely to change. *See World Wide Video of Wash., Inc.*, 125 Wn. App. at 308 ("[R]ights are vested only if they are more than a mere expectation that an existing law will continue."). Thus, Greensun cannot establish that the City's application of the 1,000 Foot Separation to the Premises interfered with any vested rights.

The City selected the issuance of the LCB license as the basis for the First in Time Determination because it is the necessary condition under state law for a marijuana retailer to operate legally. *See, e.g.,* RCW 69.50.354; CP 157 (stating that the City could only approve business licenses for retailers licensed by the LCB). The superior court correctly held that the process used for the First in Time Determination was "neutral on its face" and that Greensun was "notified" of the process. CP 776. Accordingly, the superior court's dismissal of the procedural due process claim should be affirmed.

3. The superior court properly dismissed Greensun's claims for declaratory and injunctive relief.

Greensun's claims for declaratory and injunctive relief depend entirely on the presumption that the 1,000 Foot Separation was applied unconstitutionally to Greensun. *See* CP 9-10. Accordingly, the superior court properly dismissed Greensun's declaratory and injunctive relief claims upon dismissal of its constitutional claims. *See* CP 777.

Moreover, Greensun did not and could not establish any independent basis for declaratory or injunctive relief. The City properly declined to issue Greensun a business license because the license application failed to comply with the City's zoning requirements. *See* CP 191-92, 236-39. Prior to issuing a business license for a location in

Bellevue, the City must determine whether the proposed use conforms to the City land use code ("LUC"), including whether the use is allowed in the underlying land use district. CP 114. Because Greensun's application was properly denied, the superior court lacked the authority to compel the City to issue a business license. *See Kelly v. County of Chelan*, 157 Wn. App. 417, 425, 237 P.3d 346 (2010) (issuance of conditional use permit is not obligatory unless the project complies with applicable zoning and building ordinances). Thus, Greensun failed to establish any entitlement to a declaration that it should receive a business license or injunctive relief compelling the issuance of that license, and thus, the superior court properly dismissed its declaratory and injunctive relief claims.

C. Greensun's Claims Against the City Also Are Barred by Laws Restricting Challenges to Land Use Decisions.

On summary judgment, the City also moved for dismissal of Greensun's claims on the grounds they were time-barred by LUPA. CP 268-74. In rejecting Greensun's claims on their merits, the superior court "assum[ed]" without deciding that Greensun's claims were not barred by LUPA. CP 776. This Court may affirm the superior court's summary judgment order on any grounds supported by the record. *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011).

As discussed below, LUPA bars Greensun's due process, privileges and immunities, and declaratory and injunctive relief claims. LUPA also bars any stand-alone assertions that the City engaged in arbitrary and capricious conduct in applying the 1,000 Foot Separation to Greensun and in denying Greensun a business license, even though those assertions were not proper claims for relief before the superior court.

1. Greensun's claims are time-barred under LUPA.

LUPA provides "the exclusive means of judicial review of land use decisions," RCW 36.70C.030(1), which are broadly defined to include final determinations on "[a]n interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating...use of real property," and on "[t]he enforcement by a local jurisdiction of ordinances regulating...the use of real property." RCW 36.70C.020(2)(b), (c).[8] LUPA establishes a uniform

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[8] RCW 36.70C.020(2) provides:

> "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

21-day deadline for appealing a land use decision. RCW 36.70C.040(3). This bright-line rule "prevent[s] parties from delaying judicial review at the conclusion of the local administrative process." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406, 120 P.3d 56 (2005); *see also* RCW 36.70C.010 (LUPA's stated purpose is "consistent, predictable, and timely judicial review"). Land use decisions become unreviewable if not appealed to a superior court within LUPA's specified timeline. RCW 36.70C.040(2). "[E]ven illegal decisions must be challenged in a timely, appropriate manner." *Habitat Watch*, 155 Wn.2d at 407.

LUPA specifically applies to the City's land use decision challenged by Greensun in this case. *See, e.g.*, *Brotherton v. Jefferson County*, 160 Wn. App. 699, 704, 249 P.3d 666 (2011) (LUPA covers denial of land owner's request for a waiver of land use regulations); *Asche v. Bloomquist*, 132 Wn. App. 784, 791, 133 P.3d 475 (2006), *as amended* (Apr. 4, 2006) (LUPA applies to an "interpretation of the County zoning ordinance as applied to this piece of property"). The timeline relating to the City's land use decision is as follows:

> improvement, development, modification, maintenance, or <u>use of real property</u>; and
>
> (c) <u>The enforcement by a local jurisdiction of ordinances regulating</u> the improvement, development, modification, maintenance, or <u>use of real property</u>. 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.

Id. (emphasis added).

- **May 2, 2014.** The City determined that Ordinance No. 6156, which "contains a requirement that no marijuana retailer shall be located within 1,000 feet of any another marijuana retailer[,]...is applicable to retail marijuana locations." CP 153 (notice sent to all potential businesses seeking to operate retail marijuana outlets within the City, including Greensun and Par 4).

- **June 24, 2014.** The City decided how it would apply the 1,000 Foot Separation to retail marijuana locations in the City, *i.e.*, the First In Time Determination. CP 165-66 (notice sent to all potential businesses seeking to operate retail marijuana outlets within the City, including Greensun and Par 4).

- **June 25, 2014.** The City conditionally approved the location specified by Greensun for use as a marijuana retail outlet with the caveat that City code required "recreational marijuana retail outlets be separated from each other by a minimum distance of 1,000 feet" and that the proposed "use may be prohibited at the proposed location based on the order the State issues the retail licenses." CP 162-63.

- **July 29, 2014.** After requesting and reviewing submissions by Greensun and Par 4 and the LCB's response to the City's public records request, the City determined that Par 4 received its license from the LCB before Greensun and, thus, the 1,000 Foot Separation prohibited Greensun from operating a retail marijuana outlet at the Premises. CP 236-37 (notice sent to Greensun and Par 4).

Even taking these facts in the light most favorable to Greensun, the City's land use decision applying the 1,000 Foot Separation to the Premises using the First in Time Determination was final no later than July 29, 2014. As a result, Greensun was obligated to file a LUPA petition no later than August 19, 2014.

Importantly, Greensun <u>never</u> sought relief from the 1,000 Foot Separation or the First in Time Determination until it filed this untimely declaratory action against the City on November 3, 2014, more than three months after the City's final decision on this issue. CP 113, 191-92. In fact, even though all of Greensun's arguments in this case, including its constitutional claims, "arise directly from" the City's land use decision and Greensun seeks reversal of that decision, Greensun has never sought review under LUPA. *See Brotherton*, 160 Wn. App. at 704 (rejecting property owners' argument that LUPA did not apply to constitutional challenge to land use regulation, where the relief sought by property owners was reversal of the County's final land use decision) (citing *Holder v. City of Vancouver*, 136 Wn. App. 104, 107-08, 147 P.3d 641 (2006)).

Moreover, because of its protracted delay, Greensun has now effectively precluded meaningful judicial review for all of the impacted parties, including Greensun, Par 4, and the City. *See* CP 6 (Par 4 opened on October 7, 2014, about a month before Greensun filed this suit); RCW 36.70C.050 (providing for the disclosure and joinder of any person who "may be needed for just adjudication of the petition"). Instead of joining Par 4 in a timely LUPA petition to resolve the parties' respective rights,

Greensun waited until Par 4 opened and established its business, and then brought this untimely judicial challenge to the City's land use decision.

In Washington, statutes of limitation governing land use challenges (such as LUPA's 21 day provision) reflect a consistent policy to require review of decisions affecting use of land expeditiously "so that legal uncertainties can be promptly resolved and land development not be unnecessarily delayed by litigation-based delay." *Bellewood No. 1, LLC v. LOMA*, 124 Wn. App. 45, 49, 97 P.3d 747 (2004). The Washington Supreme Court recently reaffirmed this policy and explained that even when the "result may seem harsh and unfair, ... '[l]eaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner.'" *Durland v. San Juan. County*, 182 Wn.2d 55, 59-60, 340 P.3d 191 (2014) (holding that in order to prevent untimely collateral attacks on land use decisions, the LUPA time limit runs against even those without actual or constructive notice) (quoting *Chelan County v. Nykreim*, 146 Wn.2d 904, 933, 52 P.3d 1 (2002)).

The same policies apply with equal force here. Greensun chose to wait to bring this action until months after the City adopted, interpreted, and applied its zoning regulations to Greensun's proposed use of the

Premises. Thus, this Court should affirm the superior court's dismissal of Greensun's claims because they are time-barred under LUPA.

2. Greensun fails in its attempt to avoid application of LUPA.

Of the three categories of "land use decisions" subject to review only through LUPA (RCW 36.70C.020(2)(a), (b), and (c)), Greensun erroneously focuses on "applications" under (2)(a). *See* Appellant's Br. at 46-47. The City's decision applying and enforcing the 1,000 Foot Separation to Greensun's and Par 4's proposed sites, however, qualifies as an "interpretative or declaratory" decision under (2)(b), as well as an "enforcement" decision under (2)(c), neither of which contain an exception for business license applications. RCW 36.70C.020(2)(b) and(2)(c); *see also Asche*, 132 Wn. App. at 791 (.020(2)(a) and (2)(b) are each independently sufficient to determine that LUPA applies).[9] Greensun also incorrectly argues that the City "was denying a business license (not some other land use permit)," Appellant's Br. at 47, but the record is clear that the City properly made its land use decision prior to denying Greensun's business license, *see, e.g.,* CP 540-48 at 44:25-45:24, 47:3-50:17, 51:13-23, 60:24-61:16; CP 526-29 at 63:6-64:12, 67:24-68:8.

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[9] Greensun does not assert any of the exceptions to exclusive judicial review applicable to all three categories of LUPA decisions, which are set forth in RCW 36.70C.030(1). Regardless, none of those exceptions applies.

The City's July 29, 2014, decision falls squarely within RCW 36.70C.020(2)(b), as "an interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating...use of real property[.]" In fact, Greensun does not dispute that it took no action to challenge this "interpretation" of the 1,000 Foot Separation as applied to the Premises. CP 517 at 109:1-10. Instead – without citing any authority – Greensun asserts that (2)(b) is limited to decisions resulting from the formal interpretation process in the LUC. *See* Appellant's Br. at 48. Greensun's narrow read of the term "interpretative" in (2)(b) conflicts with LUPA's plain language, which broadly includes "interpretative or declaratory decision[s]" without any limitation on the procedure or context of the decision.[10] *See, e.g., Asche*, 132 Wn. App. at 791, 801 (challenge to county's interpretation of zoning code as applied to piece of property, which interpretation was made in connection with license application, "is precisely the kind of challenge" covered under (2)(b)); *see also Brotherton*, 160 Wn. App. at 704 ("LUPA broadly defines 'land use decision[.]'").

Moreover, LUPA specifically applies even where the plaintiff alleges defects in the decision making process. *Habitat Watch*, 155 Wn.2d

[10] Greensun's narrow reading of LUPA also conflicts with the ordinary meaning of interpretative. *See, e.g.*, Merriam-Webster Online (2015) ("interpretive" means "serving to explain"), *available at* http://www.merriam-webster.com/thesaurus/interpretive.

at 407 ("[E]ven illegal decisions must be challenged in a timely, appropriate manner"); *see also* RCW 36.70C.130(1)(a), (e). To that end, Greensun's claim that the City failed to follow the formal written interpretation procedure is also subject to LUPA.

Likewise, the term "enforcement" in (2)(c) is not limited to the City's prosecution of civil violations and misdemeanors, as Greensun suggests. *See* Appellant's Br. at 49; *Brotherton*, 160 Wn. App. at 704 (denial of land owner's request for a waiver of land use regulations is enforcement decision within (1)(c)).

LUPA applies to Greensun's challenge to the City's interpretation and enforcement of its zoning restriction to the Premises. Accordingly, LUPA bars Greensun's untimely challenge to the City's land use decision.

D. The Superior Court Correctly Rejected Greensun's Assertions that the City Engaged in Arbitrary and Capricious Conduct.

There is no stand-alone claim in this case that Greensun is entitled to relief because the City engaged in arbitrary and capricious conduct. Greensun has alleged two constitutional claims in this case, for violations of the Due Process Clause and the Privileges and Immunities Clause. CP 7-9. As discussed in Section IV(B), *supra*, the superior court properly dismissed this case because Greensun cannot establish the elements of those claims. In an attempt to avoid dismissal of its case, however,

Greensun now resorts to assertions of arbitrary and capricious conduct, untethered to any specified constitutional claim. This Court need not and should not review the City's zoning policies absent proof beyond a reasonable doubt that the zoning enactment violates the Washington Constitution. *See Tekoa Const., Inc.*, 56 Wn. App. at 34.

Moreover, as also discussed in Section IV(C), *supra*, Greensun was required to bring any claim that the City failed to follow proper procedures or engaged in arbitrary and capricious conduct under LUPA. *See* RCW 36.70C.130(1)(a), (e). Although the superior court did not decide the threshold LUPA issue, however, it correctly determined that Greensun's assertions that the City engaged in arbitrary and capricious conduct also fail on their merits.

Greensun also incorrectly asserts that the City bears the burden to establish that its conduct was not arbitrary and capricious, relying on a 1957, pre-LUPA case. *See* Appellant's Br. at 32 (citing *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wn.2d 378, 383, 312 P.2d 195 (1957)). Since then, however, the Washington Supreme Court has confirmed that "[t]he burden is upon the [plaintiff] to establish its allegations concerning the allegedly arbitrary and capricious acts" of a city's enforcement of zoning codes. *State ex rel. Standard Mining & Dev. Corp. v. City of Auburn*, 82 Wn.2d 321, 332, 510

P.2d 647 (1973). Moreover, in 1995, the Legislature codified in LUPA that the burden of proof is on the party seeking relief from a land use decision. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004) (citing RCW 36.70C.130(1)).

1. The City properly followed its codes and procedures in interpreting and applying the 1,000 Foot Separation to Greensun's proposed use of the Premises.

Greensun argues that City staff in the Development Services Department ("DSD") followed improper procedures when making the First In Time Determination. Greensun makes this argument even though it conceded before the superior both that the 1,000 Foot Separation is a valid zoning restriction and that the City has "<u>the authority to develop and apply processes for enforcing the 1,000 Foot Separation, including through the use of a First in Time Determination.</u>" CP 329 and 610 (quoting proposed order submitted by Greensun (emphasis added)).

In selecting the process for making the First in Time Determination, the City followed the plain language of the City's zoning ordinances, including the definition of "marijuana retailer." City Ordinance No. 6156 provides that "[n]o <u>marijuana retailer</u> shall be <u>located</u> within 1,000 feet of another <u>marijuana retailer</u>." CP 129 (emphasis added). City Ordinance No. 6133 B-1 defines "marijuana retailer" as "a person licensed by the state [LCB] to sell useable marijuana and

marijuana-infused products in a retail outlet." CP 553. Accordingly, Greensun and Par 4 became "marijuana retailers" and were subject to the provisions of the 1,000 Foot Separation at the time they were licensed by the LCB to sell marijuana. *See* CP 630-32 at 56:19-57:4, 69:11-19. Thus, at the time Greensun received its marijuana retailer license from the LCB, it was in violation of the 1,000 Foot Separation, because another marijuana retailer (Par 4) already had been licensed by the LCB at a location within 1,000 feet of Greensun's Premises. *See* CP 549 at 76:7-13 (explaining that Par 4 was first "no matter which way you slice it").

Significantly, Greensun's theory that the 1,000 Foot Separation did not apply unless and until a marijuana retailer was "operating" conflicts with the plain language of the City's ordinance. *See* Appellant's Br. at 20. City Ordinance No. 6156 restricts where a marijuana retailer "shall be located," not where a marijuana retailer "operates" or "opens for business."[11] *See* CP 129. Because the LCB licensing process requires the approval of a specific location for a marijuana retail outlet, the location of a marijuana retailer is determined at the time of LCB license issuance. *See* CP 155, 162-63 (LCB Notices of Marijuana License Application identifying location address); *see also* CP 553 ("retail outlet" defined as "a

[11] Likewise, Greensun's assertion that the City decided, through the First in Time Determination, when a marijuana retailer had a "vested right to operate" also is without basis. *See* Appellant's Br. at 18. Rather, the City determined when a marijuana retailer had "located" based on City code and state law.

location licensed by the state [LCB] for the retail sale of useable marijuana and marijuana-infused products" (emphasis added)). Thus, the City's process for making the First in Time Determination was consistent with both City code and state law.

Moreover, contrary to Greensun's contentions, the City was not required to engage in formal rule making or to issue a formal written interpretation when making the First in Time Determination. *See* Appellant's Br. at 21-24. As the officer charged with the administration and enforcement of the LUC (Bellevue City Code ("BCC") 3.44.020; LUC 20.40.430), the DSD Director (or his designee) has authority to "fill in gaps" in effectuating the land use regulatory scheme. *See Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975) (administrative agency has authority to "fill in the gaps" to effectuate legislative scheme); *Northshore Investors, LLC v. City of Tacoma*, 174 Wn. App. 678, 697 n.5, 301 P.3d 1049 (2013) (deferring to Clerk's consistently applied interpretation of city ordinance that Clerk was charged with enforcing, even though the interpretation was not memorialized as a final rule), *disapproved of on other grounds by Durland.*, 182 Wn.2d at 79; *see also Tuerk v. State, Dep't of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994) ("When a power is granted to an agency, everything lawful and necessary to the effectual execution of

the power is also granted by implication of law." (internal quotation omitted)).

Further, the LUC provides that the Director's authority also is vested in authorized representatives. LUC 20.50.016 (defining "Director" as "[t]he Director of the Development Services Department for the City of Bellevue, the Director's authorized representative, or any representative authorized by the City Manager, unless otherwise specified"). Here, the Director and his authorized representatives properly interpreted and enforced the 1,000 Foot Separation as to Greensun's proposed use, including through the First in Time Determination. *See* CP 637-39. Contrary to Greensun's suggestion that it is unclear whether these decisions were made by authorized representatives, *see* Appellant's Br. at 12, the DSD Director confirmed that the Legal Planner and City Attorney's Office acted under his authorization. *See id.*

There is no requirement that the Director (or his designee) promulgate formal rules or issue formal written interpretations in carrying out these duties. *See* LUC 20.40.100 ("The Director may adopt rules for the implementation of this title[.]" (emphasis added)); LUC 20.35.030.A.8 ("[T]he Director may issue interpretations of the Land Use Code as needed." (emphasis added)); BCC 1.04.010.F ("'May' is permissive."); *see also State v. Straka*, 116 Wn.2d 859, 867, 810 P.2d 888 (1991)

(agency's approval of generally applicable procedures for implementing statutory directive need not occur through formal administrative rule making).[12] Nor does the LUC require formal rulemaking each and every time the DSD determines how to implement City zoning ordinances. *See* LUC 20.40.100; LUC 20.35.030.A.8. Thus, as the superior court correctly determined, the City's "code is permissive. The Director may promulgate rules." CP 776 (emphasis added).

Here, consistent with the City's ordinance and state law, the DSD Director decided that the City would use the issuance of an LCB license to make the First in Time Determination. CP 638. Through the Director's authorized representatives, the City sent a letter to all participants in the LCB marijuana retail lottery explaining how the City would implement the 1,000 Foot Separation through the First in Time Determination. CP 638, 645-46. In selecting this process, the City was not "granting a substantive privilege to the applicant" as suggested by Greensun. *See* Appellant's Br. at 20. As the superior court determined, the City's method is "neutral on its face"; "[t]here is no evidence that [it] was chosen for the purpose of harming Plaintiff or of benefiting a rival business"; and "[a]ll parties were notified of the process to be used." CP 776.

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[12] In *Straka*, the Court determined that neither the substantive statute nor the Administrative Procedure Act, chapter 34.05 RCW, required the state agency to engage in formal rulemaking. 116 Wn.2d at 867. Similarly, here, formal rulemaking is not required by the 1,000 Foot Separation, the BCC, or the LUC.

In fact, the Washington Supreme Court rejected a similar attempt to impose broad obligations on a municipality to promulgate formal rules in *Earle M. Jorgensen Co. v. City of Seattle*, 99 Wn.2d 861, 874, 665 P.2d 1328 (1983). There, the Court explained that the judiciary must "place commonsense limits" on municipal rulemaking requirements, even though the applicable municipal code (unlike Bellevue's) contained a mandatory rulemaking procedure and a "broad and nonexhaustive" definition of the term "rule." *Id.* This principle applies with even greater force here, where the City code specifically grants discretion to the DSD Director (or his designee) to determine when a formal rule is appropriate. Greensun's conclusory comparisons to rulemaking authority of other City officers do not alter the permissive nature of this grant under the City code. *See* Appellant's Br. at 22.

Moreover, Greensun improperly relies on the mandatory rulemaking requirements of chapter 34.05 RCW, the Washington Administrative Procedure Act ("APA") and its federal equivalent, to support its incorrect interpretation of the permissive provisions in the City code. *See* Appellant's Br. at 16-17 (citing *Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 399, 932 P.2d 139 (1997) (interpreting scope of APA); *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994) (same)). But even Greensun concedes that

the APA and these federal statutes do not apply to the City. *See id.*; *see also Plumbers & Steamfitters Union Local 598 v. Wash. Public Power Supply Sys.*, 44 Wn. App. 906, 910-11, 724 P.2d 1030 (1986) (rejecting argument that municipal corporation was required to promulgate formal rule).

Likewise, Greensun's assertion that the City's "constantly changing rules during the application process violate[s] Greensun's rights" is without merit. Appellant's Br. at 38-42. As discussed in Section IV(B)(2), *supra*, Greensun has failed to establish the elements of a procedural due process violation. The First In Time Determination was not an "anonymous" or "uncertain" process, as Greensun contends. Appellant's Br. at 42-43. To the contrary, there is no dispute that Greensun was advised, in advance, as to the process for making the First in Time Determination and that Greensun did not object to that process until months after it had been completed. CP 115-16, 165-66. *HC&D Moving & Storage Co. v. United States*, 298 F. Supp. 746, 751 (D. Haw. 1969), *enforcement denied*, 317 F. Supp. 881 (D. Haw. 1970), in which the court held an agency cannot "adopt different standards for similar situations," is inapposite because, here, the City applied the same criteria to Greensun and Par 4.

Contrary to Greensun's assertions, the City did not adopt a new "rule" by applying the First in Time Determination, but rather properly enforced the provisions of the 1,000 Foot Separation in City ordinances as it is authorized to do. Greensun has failed to identify any basis to reverse the superior court's dismissal of its assertions that the City failed to follow proper procedures.

2. The City did not act arbitrarily or capriciously in denying Greensun a building permit or business license.

Greensun also makes vague assertions that the City "acted arbitrarily and capriciously and violated Greensun's rights under the Washington Constitution" by failing to issue a building permit or business license to Greensun. *See generally* Appellant's Br. at 25-42. As discussed, *supra*, these assertions have no basis in the constitutional claims at issue in this case and do not provide a basis to reverse the superior court.

First, Greensun asserts that the City has violated Greensun's fundamental right to do business. As discussed in IV(B)(1), *supra*, the Washington Supreme Court has determined that there is no fundamental right to conduct business that is permitted only at the discretion of the legislature. *See Ass'n of Wash. Spirits*, 182 Wn.2d at 362.

Additionally, Greensun argues that the City applied "extra-legal standards" to the issuance of a business license and had a non-discretionary duty to issue the license. Appellant's Br. at 27-38, 42-32. As discussed in Section IV(C), *supra*, such challenges must be brought under LUPA. In support of its assertions, Greensun relies on a 1950s pre-LUPA case which concerns vested rights for the issuance of a building permit. *See* Appellant's Br. at 30-31 (citing *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 495, 275 P.2d 899 (1954)). This authority is inapplicable, not only because Greensun has no vested rights, but because *Ogden* utilizes a framework that has long been superseded by state statute and Washington case law. *See, e.g.*, *Potala Village Kirkland, LLC*, 183 Wn. App. at 198-202.

Nor does *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 674-79, 86 P.3d 1169 (2004) support Greensun's claims, because Greensun does not claim either a vested right to operate its retail marijuana business or that the City failed to process a building permit application necessary to obtain state licensing. *See* Appellant's Br. at 33. In contrast to *WCHS*, the City's requirement for a state license is valid because the City's zoning ordinance defines "marijuana retailer" as "a person licensed by the state [LCB]." CP 553 (Ord. 6133 B-1).

Moreover, as a basic matter, DSD has the authority to coordinate its interpretation and enforcement of the 1,000 Foot Separation with the business license application process. The City's business permitting process is "accomplished under the direction of the director" of the Finance Department. BCC 4.03.160.[13] Because a business license is invalid if the particular business use is not permitted at the designated location, the DSD Director (or more typically his or her designee) determines whether a proposed use is allowed before the Finance Department finally approves a business license application. *See* BCC 4.03.230.A.3 (providing for revocation of business license where "[t]he licensee has failed to comply with any provisions of the Bellevue City Code."); CP 637; *see also* CP 526-29 at 63:6-64:12, 67:24-68:8; CP 540-41 at 44:25-45:24; CP 546-48 at 51:13-23, 60:24-61:16. The BCC specifically authorizes "coordination of cross-departmental permit review" by DSD. BCC 3.44.010.B. Business license applicants are advised of this coordinated process. CP 634-35 ("If registering a business physically located in Bellevue, your Bellevue license will be subject to zoning approved by the city's Development Services Department."). While DSD

[13] The Finance Department administers the business license application process pursuant to an agreement between the City and Washington State. CP 526-27 at 63:6-64:12. Where the application identifies a physical location in Bellevue, the application is also routed to DSD. CP 526-29 at 63:6-64:12, 67:24-68:8; CP 540-41 at 44:25-45:24; CP 546-48 at 51:13-23, 60:24-61:16.

could wait to revoke or suspend a business license until after it has issued, *see* BCC 4.03.230.A.3, the coordinated process adopted by DSD and authorized by the BCC is a more customer-oriented approach and avoids unnecessary burdens and potential liability for the City and the public.

At its core, Greensun's challenge to the City's process for interpreting and enforcing the 1,000 Foot Separation is an immaterial objection to the sequencing of that process. *See* Appellant's Br. at 36-38. Although (contrary to its procedures) the City could have issued Greensun a business license prior to licensing by the LCB, the City would have revoked that license once the LCB issued licenses to Par 4 and Greensun, because the location of Greensun's marijuana retail outlet violated the 1,000 Foot Separation requirements in City code. *See* CP 129, 553. Thus, no matter the order in which the City considered Greensun's business license application, the outcome would have been the same because the location of Greensun's business violated the LUC.[14]

In sum, the City properly administered the 1,000 Foot Separation in accordance with the plain language of City ordinances and the other applicable provisions of the LUC, the BCC, and state law by notifying Greensun and the other potential marijuana retailers how the 1,000 Foot

[14] This also reinforces the conclusion that the City's enforcement of the 1,000 Foot Separation through the First in Time Determination was a land use decision subject to LUPA, not a business license decision. *See* Section IV(C), *supra*.

Separation would be enforced and consistently applying that interpretation in making the First In Time Determination. *See* CP 638-39. Regardless, LUPA provides the exclusive remedy for claims like Greensun's that a land use officer "engaged in unlawful procedure or failed to follow a prescribed process" or that a "land use decision is outside the authority or jurisdiction of the body or officer making the decision[.]" RCW 36.70C.130(1)(a), (e). For all of these reasons, Greensun's procedural assertions fail and the superior court should be affirmed.

3. The City made a proper First in Time Determination.

Greensun also fails to establish that the superior court erred in determining that the City made a proper First in Time Determination as between Greensun and Par 4. *See* Appellant's Br. at 43-46. Greensun attempts to mischaracterize the record to obscure evidence[15] that "no matter which way you slice it," Par 4 was first. CP 549 at 76:7-13; *see also* CP 559-60 (LCB e-mail stating Par 4 was first). Par 4 undeniably received a temporary license dated July 3, 2014, which license was valid and never withdrawn. CP 563-65; CP 578 at 28:6-20. Although the LCB later issued two "corrected" licenses to Par 4 dated July 7, each of those licenses was issued prior to Greensun's license. CP 578 at 28:6-20; CP 22; CP 507-12 at 86:20-91:10.

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[15] Many of Greensun's factual assertions either do not cite to, or are mischaracterizations of, the record. *See, e.g.,* Appellant's Br. at 43-45.

Contrary to Greensun's claim that the LCB testified that the licenses were issued in a single "batch," Appellant's Br. at 45, the LCB witness subsequently clarified in her Civil Rule 30(b)(6) deposition that the licenses were in fact issued at different times, CP 579-82 at 29:17-30:4, 37:14-38:19. Moreover, there was a clear reason for the delay in Greensun's license: a temporary restraining order prevented its issuance. CP 506 at 85:15-25; CP 586-90. Although the time of issuance may or may not have made a difference for LCB's purposes (because LCB uses the date for purposes of license renewal), the LCB confirmed that Par 4's license was issued first and Greensun's own attorney agreed with that determination. CP 579-82 at 29:17-30:4, 37:14-38:19; CP 560, 584.

Greensun also does not and cannot dispute that the City determined which applicant was first based on the timing of issuance of the LCB conditional approval letter or that the City advised all applicants in advance that was the criterion that would be used. *See* CP 115-16, 165-66.[16] Greensun does not dispute that the City had no knowledge of who would be first in time when it issued this interpretation, nor can it point to any evidence that the City somehow conspired with the LCB or Par 4. CP

[16] Prior to the June 24 letter explaining that LCB license issuance would be used for the First in Time Determination, City Planner Reilly Pittman provided the answer that a complete building permit would be used. *See* CP 592. The City ultimately decided that using building permits as the criterion would be unworkable, because even a party not participating in the LCB lottery could submit a building permit application and prevent successful LCB lottery applicants from securing a location. CP 524-25 at 12:3-13:9.

520-21 at 123:19-124:17. In fact, the only reason that Greensun could articulate in its Civil Rule 30(b)(6) deposition as to why the First in Time Determination was arbitrary and capricious is that Greensun believed it would have been first in time if a different standard had been applied. CP 518-19 at 118:3-119:5.[17]

Greensun has never presented substantial evidence that it was licensed by the LCB at the same time as Par 4, let alone evidence sufficient to demonstrate that the City acted arbitrarily and capriciously in determining that Par 4 was first in time. *See* Appellant's Br. at 43-45 (citing testimony by the LCB that licenses were issued in "batches" and an interim letter from the City informing Greensun and Par 4 that the ongoing investigation had resulted in "conflicting information" and requesting additional submissions from the parties). This Court should, therefore, affirm the superior court's determination that the City properly applied the First in Time Determination as to Greensun.

E. Greensun Is Not Entitled to Partial Summary Judgment.

Greensun improperly asks this Court "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[.]" Appellant's Br. at 50. Greensun

[17] Even if building permits were used, Greensun would not have been first. *See* CP 592-93.

did not, however, file a cross-motion for partial summary judgment before the superior court on this or any other issue. Rather, in one sentence in the conclusion of its Opposition to the City's Motion for Summary Judgment, Greensun argued that "[w]here the court rules in favor of the non-moving party on a central legal issue in the case, it may enter summary judgment on the legal issue in its favor," citing *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 841 P.2d 752 (1992) and 4 Wash. Prac. Rule 56 at 413. CP 352. This vague and conclusory request for cross-relief falls far short of entitling Greensun to partial summary judgment in this case.

In *Impecoven*, the Washington Supreme Court directed that summary judgment be entered in favor of the Department of Revenue, the nonmoving party, because the Supreme Court had reversed the trial court's determination on summary judgment of the only issue in the case: whether the plaintiffs were entitled to a B&O tax refund. 120 Wn.2d at 365. Here, the City moved for summary judgment on the grounds that Greensun's claims were time-barred by LUPA and that Greensun cannot establish its two claimed constitutional violations as a matter of law. CP 263-88. The City's LUPA argument provides an independent basis for the dismissal of Greensun's claims, *see* RCW 36.70C.040, and thus, cannot provide a basis for cross-relief. As a result, Greensun's only basis for seeking cross-relief in this case is to argue that it has established one or

both of its constitutional claims as a matter of law. Greensun's counsel confirmed that this was the basis of its request for cross-relief at the summary judgment hearing. *See* VRP (April 17, 2015) at 44:9-12 (by Greensun's counsel: "Your Honor, we had asked that the legal issues that are raised ... that the same legal issues would apply if the Court finds that there was a constitutional violation."); *see also id.* at 45:3-4 (by the Court: "It's the same issue; just the adverse of [the City's.]").

As discussed, *supra*, Greensun has failed to establish that the superior court erred in dismissing its constitutional claims, let alone that it is entitled to relief on those claims. Accordingly, Greensun is not entitled to an award of partial summary judgment by this Court. To the extent this Court determines that the superior court committed any error warranting reversal, it should simply remand for further proceedings without an award of relief to Greensun.

F. The City Is Entitled to Its Attorney Fees on Appeal.

Under RCW 4.84.370, this Court also should award the City its attorney fees on appeal. The Washington Supreme Court has recognized that a public entity will receive an award of attorney fees if its land use decision is upheld on the merits before the trial court and the Court of Appeals. *Durland*, 182 Wn.2d at 78. Fees are appropriate even if the matter affirmed is not brought pursuant to LUPA because RCW 4.84.370

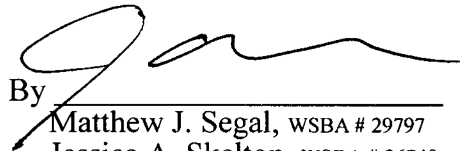
"extends not only to the actions expressly listed but also to other, 'similar land use approval[s] or decision[s].'" *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 701-02, 169 P.3d 14 (2007) (quoting RCW 4.84.370(1)). Accordingly, if this Court affirms the superior court's decision on any ground, the City is entitled to an award of its reasonable attorney fees on appeal.

V. CONCLUSION

The superior court properly dismissed Greensun's claims on summary judgment because they fail as a matter of law. The superior court also correctly rejected Greensun's attempt to fall back on the unsupported assertion that the City engaged in arbitrary and capricious conduct. This Court should affirm the superior court on these grounds, or alternatively, hold that Greensun's claims are time-barred under LUPA. Finally, regardless of the basis used to affirm the superior court, this Court should award the City its reasonable attorney fees on appeal.

RESPECTFULLY SUBMITTED this 21st day of October, 2015.

PACIFICA LAW GROUP LLP



By ______________________
Matthew J. Segal, WSBA # 29797
Jessica A. Skelton, WSBA # 36748
Jamie L. Lisagor, WSBA # 39946

Attorneys for Respondent City of Bellevue

PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. That on the 21st day of October, 2015 I caused to be served a true copy of the foregoing document upon:

Kenneth H. Davidson Bryan W. Krislock Davidson & Kilpatric, PLLC 520 Kirkland Way, Suite 400 P.O. Box 817 Kirkland, WA 98083-0817 ken@kirklandlaw.com bryan@kirklandlaw.com *Attorneys for Appellant*	☐ via facsimile ☐ via overnight courier ☒ via first-class U.S. mail ☒ via email ☐ via electronic court filing ☐ via hand delivery
Jeffrey M. Eustis Aramburu & Eustis, LLP 720 Third Avenue, Suite 2000 Seattle, WA 98104 Eustis@aramburu-eustis.com *Attorney for Appellant*	☐ via facsimile ☐ via overnight courier ☒ via first-class U.S. mail ☒ via email ☐ via electronic court filing ☐ via hand delivery

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DATED this 21st day of October, 2015.

Sydney Henderson