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Court of Appeals No. 84927-1 I

SUPREME COURT OF THE STATE OF WASHINGTON

HEADWORKS HAND CRAFTED ALES, INC. dba

HEADWORKS BREWING, a Washington Corporation,

Appellant

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD,

Respondent

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Appellant Headworks Hand Crafted Ales Inc., dba Headworks Brewing, a Washington Corporation ("Headworks") asks the Court to accept review of the unpublished Court of Appeals decision terminating review designated in Part II.

II. CITATION TO COURT OF APPEALS' DECISION

Headworks requests review of *Headworks Hand Crafted Ales, Inc., dba Headworks Brewing v. Washington State Liquor and Cannabis Board,* No. 84927-1-I, Court of Appeals Division I.

On January 2, 2024, the Court of Appeals issued an order affirming the Liquor Cannabis Board's ("LCB") final order affirming violations issued by the LCB against Headworks for failing to comply with Secretary of Health's "Mask Mandate" order related to the Covid-19 pandemic. ("Headworks Decision")

A copy of the Headworks Decision is in the Appendix at pages A-1 through A-16. Neither party filed a motion to publish.

III. ISSUES PRESENTED FOR REVIEW

1. Does the Liquor Cannabis Board Have Statutory Authority to Enforce an Order Issued by the Secretary of Health

2. Was the Liquor Cannabis Board's enforcement of the Mask Mandate without a proper rulemaking under the Administrative Procedure Act unlawful for not providing proper notice of the enforcement provisions to its licensees?

IV. STATEMENT OF THE CASE

On February 29, 2020, Governor Inslee issued Proclamation 20.05 ("Proclamation"), which declared a State of Emergency for all counties in the State due to the coronavirus outbreak. The proclamation was were amended several times during the Pandemic. CP at 473[1] The Governor's amended Proclamations led to a complete shut-down of all non-essential

[1] See also, https://www.governor.wa.gov/office-governor/official-actions/proclamations.

businesses with a gradual reopening of those businesses under certain limitations. *Id.* One of those limitations, based on Secretary of Health Order No 20-3.6 et seq., was that restaurants and bars would be allowed to stay open so long as individuals maintained social distancing, wore facemasks upon entering the facility only to be removed when sitting down, and that employees of such establishments wear facemasks. *Id.*; CP at 330-334. This requirement has come to be known as, and is referred to hereinafter as, the "Mask Mandate". CP at 330-334. The Mask Mandate issued by the Secretary of Health Order No. 20-3.5 et seq., specifies that certain individuals are exempt from wearing the mask. *Id.* While the Secretary of Health issued the order regarding the Mask Mandate, the legislature never proposed any legislation that would make the Mask Mandate into a law. CP at 472.

Petitioner Headworks is a hand-crafted brewery that offers its beer for sale and for customers to drink at its tasting room in Enumclaw, WA. It has been issued a license by the

Washington State Liquor Cannabis Board (LCB). CP at 470. Shortly after the Secretary of Health's Order 20-3.5 was executed, the LCB began informing its licensees that it would issue and enforce violations to licensees who failed to enforce the Mask Mandate. CP at 472.

LCB never formally adopted the Mask Mandate as a rule under the Administrative Procedure Act ("APA"). It held that any failure for a person to follow the Mask Mandate was a "threat to public safety" pursuant to WAC 314.11.015. CP at 472; CP at 518-520.

The LCB issued Headworks an Administrative Violation Notice ("AVN") on November 29, 2021, as a result of an alleged violation of the Mask Mandate. CP 320-321. The AVN indicated that the violation was a "COVID-19 related complaint", that the applicable enforcement authority was WAC 314.11.015, and that the penalty was a 5-day suspension or $500 fine. CP at 320.

Headworks appealed LCB's AVN, filed a motion for summary judgment and argued that the Mask Mandate was inappropriately enforced because the Governor's Proclamations 20.05 and the Secretary of Health's orders are not laws, passed by the Washington State legislature and therefore not binding on Headworks and its employees. CP at 644.

Headworks further contended that the LCB acted unlawfully inasmuch as the LCB did not adhere to the Administrative Procedure Act rulemaking process, including allowing for public comment, before enforcing the Mask Mandate pursuant to WAC 314-11-015(3)(c). CP at 644.

The Office of Administrative Hearings (OAH) upheld the AVN and upon a petition for review, the Board affirmed. CP 670-675. Headworks appealed to the Court of Appeals, Div. I, which affirmed the Board's decision in an Opinion dated January 2, 2024.

V. ARGUMENT

A. The Court of Appeals' Order Conflicts with Other Washington Supreme Court Opinions Acknowledging the Limitations of Agency Power and is a Matter of Substantial Public Interest Because it Renders the LCB's Police Powers Limitless

LCB's enforcement of an order issued by a separate agency extends beyond the statutory authority prescribed it by the legislature to regulate "the sale of liquor kept by holder of licenses which entitle the holder to purchase and keep liquor for sale." RCW 66.08.030(6). A-17. The LCB issued its violation to enforce the mask mandate pursuant to WAC 314-11-015(3)(c), which provides that licensees and employees may not "[e]ngage in or allow behavior that provokes conduct which presents a threat to public safety." WAC 314-11-015(3)(c). A-19.

The LCB's powers and duties are confined to the regulation, sale, consumption and distribution of alcohol and cannabis. It does not extend broadly to responses to pandemics,

especially when that duty is specifically prescribed to the Board of Health.

The LCB's proposed enforcement of the mask mandate as a "threat to public safety", is outside its scope of powers because that specific enforcement does not originate within the powers provided to it by the legislature under RCW Title 66. Rather it is derived from the Secretary of Health's order. In the case of Headworks, the LCB has literally become an enforcement arm of the Secretary of Health. The Court of Appeals failed to appreciate this crucial point, which is fond nowhere in the statutory scheme for either agency.

The LCB's enforcement of a separate agency's order, and the Court of Appeals' affirmation, contradicts the Supreme Court's opinions describing the scope of agency authority. This Court has repeatedly held that administrative agencies are creatures of the legislature, "without inherent or common-law powers and, as such, may exercise only those powers conferred

by statute, either expressly or by necessary implication." *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cnty.*, 135 Wash.2d 542, 558, 958 P.2d 962 (1998) (citing *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wash.2d 776, 780, 854 P.2d 611 (1993); *Human Rights Comm'n v. Cheney Sch. Dist.* 30, 97 Wash.2d 118, 125, 641 P.2d 163 (1982))." The power of an administrative tribunal to fashion a remedy is strictly limited by statute." Skagit Surveyors, 135 Wash.2d at 558, 958 P.2d 962. The authority claimed by LCB to operate as an arm of the Health Department is not expressly provided in statute. No "necessary implication" has been offered to justify what LCB has done to Headworks in this matter. Thus, the decision of the Court of Appeals directly conflicts with this Court's prior holdings on the subject.

Such an expansive interpretation of the LCB's powers is a matter of substantial public interest because it renders the LCB's police power limitless.

1. The Legislature Did Not Authorize the LCB to Enforce an Order by the Secretary of Health.

The powers of the LCB are prescribed in RCW 66.08.050 (A-21) and the scope of its regulations are set forth in RCW 66.08.030. A-19.

There are eight subsections of RCW 66.08.050 that enumerate the requirements of the LCB. None of those subsections reference a duty or an opportunity for the LCB to enforce the orders of a separate agency, let alone those of the Secretary of Health. While issues of public health are addressed in Subsection (6), those powers extend to the LCB' s requirement to:

> (6) Accept and deposit into the general fund-local account and disburse, subject to appropriation, federal grants or other funds or donations from any source **for the purpose of improving public awareness of the health risks** associated with alcohol and cannabis consumption by youth and the abuse of alcohol and cannabis by adults in Washington state….

RCW 66.08.050(6). A-21

RCW 66.08.030 sets forth 21 additional powers of the LCB under the Scope of Regulations. Of the 21 powers extended

to the LCB, nothing references any authority to enforce an order by the Secretary of Health or any other executive branch agency. It does, however, reference issues of public health under Subsection (19) which provides the power to conduct "…from time to time, **in the interest of the public health** and general welfare, scientific studies and research relating to alcoholic beverages and the use and effect thereof." RCW 66.08.030(19). A-17

The Court of Appeals, however, relied on Subsection (12), which states that the LCB's power to make regulations extends to: "Prescribing the conditions, accommodations, and qualifications requisite for the obtaining of licenses to sell beer, wines, and spirits, and regulating the sale of beer, wines, and spirits thereunder." 66.08.030(12). A-17. The Court of Appeals then expanded the limits of that provision to state that, "There can be no question but that the [LCB], in the interests of public health, safety, and morals, possesse[s] the constitutional and statutory power to control and regulate the dispensation of

alcoholic beverages." *Jow Sin Quan v. Wash. State Liquor Control Bd.,* 69 Wn. 373, 379, 418 P.2d 424 (1966). That case is inapposite.

The Court of Appeals failed to recognize: (1) that *Jow Sin Quan* was not an issue regarding LCB's enforcement of a "threat to public safety"; and (2) that the LCB was enforcing a law pursuant to rules that the LCB had propertly adopted. There, the LCB enforced a licensee's violation of RCW 9.76.010, which made it a misdemeanor to sell alcoholic beverages on Sunday. *Jow Sin Quan* at 374, 425. The LCB's authority to enforce that particular RCW was specifically reflected in its Rules under WAC 314-16-050.[2] Those rules

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[2] "No retail licensee shall sell, deliver, offer for sale, serve or allow to be consumed upon the licensed premises any liquor, nor permit the removal of any liquor from the licensed premises in any manner whatsoever,…between the hours of twelve o'clock midnight on Saturday and six o'clock a.m. on the following Monday, …" WAC 314-16-050 (REPEALED).

mirror the intent of the RCW of which the licensee in *Jow Sin Quan* was in violation.

Here, the Court of Appeals' "connection" between RCW 66.08.030(12) and the ability to enforce a rule by the Secretary of Health as being a "threat to public safety" is fractured because there is no direct link between the Secretary of Health's order and the rule to enforce "threats to public safety" --an undefined term within the Title. Throughout this case, LCB has assumed without proof that the Mask Mandate mitigated or prevented "threats to public safety."

Nevertheless, the Court of Appeals justifies its connection between RCW 66.08.030 (12) and enforcement of the Secretary's mask mandate as a threat to public safety by referencing RCW 66.08.010 which provides, "This entire title shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals and safety of the people of the state, and all its provisions shall be liberally

construed for the accomplishment of that purpose." RCW 66.08.010. A-24

Under the LCB's application, "public safety" has a broad meaning and interpretation vast enough to allow the LCB to enforce anything that it deems to be a threat. "Because common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense." See ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXT 418 (2012); *accord; Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). To know which meaning the Legislature intended in WAC 314.11.015—public safety—the court must rely on the statute's context, including the surrounding words, the statute's structure and history and common usage at the time." *See Food Mktg. Inst. V. Argus Leader Media,* 139 S. Ct. 2356, 2364 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a

careful examination of the ordinary meaning and structure of the law itself.”).

As set forth in detail above, the LCB’s power to address issues of public health (but not “public safety”) are enumerated in its powers and scope of regulations. It is those sections within the title that are to be “liberally construed” because those are the specific powers granted the LCB by the legislature—powers within the “Title” to be “liberally construed”.

Here, taking into account the context in which the given words appear, the Court of Appeals’ interpretation of the Title is not a *liberal* construction, it is a *new* construction, fashioning a remedy under its own powers to enforce the Secretary of Health’s Order where none currently exists. Skagit Surveyors, 135 Wash.2d at 558, 958 P.2d 962 (1998).

2. The Board of Health Has the Power and Enforcement Authority to Respond to Issues of the Pandemic.

The authority to create regulations for the prevention and control of infectious diseases rests with the State Board of

Health, created specifically in the Constitution, Article XX, § 1. A-25. The legislature gave the Board of Health, and not any other state official or agency, the authority to create regulations for "the prevention and control of infections… diseases." RCW 43.20.050(2)(f). A-26. Rules from the Board of Health are enforced by local boards of health. RCW 70.05.070. A-30. Regulations are set forth in WAC 246 and the response to communicable diseases is set forth specifically in WAC 246.100. See WAC 246.100.006. A-31. Nowhere in the cited RCW or WAC is there a reference to the LCB and nowhere is there any indication that the LCB falls under any jurisdiction of the Board of Health or its Secretary.

In 2006, the legislature specifically took the time to enact legislation for responses to pandemics, when it passed the "Pandemic Influenza Preparedness" Bill, codified now at RCW 70.26. See RCW 70.26.010 A-32. RCW 70.26.020 sets forth the legislature's intents and findings. A-33.

The legislature clearly anticipated a pandemic and delegated that authority specifically to public health jurisdictions statewide. *Id.* Even while acknowledging requirements for flexibility, nowhere in RCW 70.26 is the LCB mentioned and nowhere in the law does the legislature permit the Governor, Board of Health or local health departments to delegate any authority regarding the response to pandemics to the LCB.

Enforcement authority is set forth in RCW 43.70.200: "Upon the request of a local health officer, the secretary of health is hereby authorized and empowered to take legal action to enforce the public health laws and rules and regulations of the state board of health or local rules and regulations within the jurisdiction served by the local health department…." RCW 43.70.200. A-34. The Secretary of Health may also "bring an action to enjoin a violation or the threatened violation of any of the provisions of the public health laws of this state or any rules or regulation made by the state board of health or the department of health pursuant to said laws, or may bring any legal

proceeding authorized by law…." RCW 43.70.190. A-35. Civil fines of the Department of Health are set forth in RCW 43.70.095. A-36.

Thus, the Secretary of Health has ample opportunity and authority to enforce any rule or law under its power should such enforcement be deemed necessary.[3] Consequently LCB's proposal that it has the authority to enforce the Secretary's Order is both unnecessary and legally meaningless.

Whenever possible, statutes are to be read together to achieve a "'harmonious total statutory scheme … which maintains the integrity of the respective statutes.'" *Dep't of Revenue v. Fed. Deposit Ins. Corp.,* 190 Wn. App. 150, 157-58, 359 P.3d 913 (2015) (quoting *Employco Pers. Servs., Inc. v. City of Seattle,* 117 Wn.2d 606, 614, 817 P.2d 1373 (1991)). An interpretation that reads language in isolation is too limited and

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[3] Headworks continues to note that the Secretary of Health's ability to enforce its own Order also remains questionable inasmuch as it is not a "law, rule or regulation."

fails to apply this rule. *Jongeward v. BNSF Ry. Co.,* 174 Wn.2d 586, 595, 278 P.3d 157 (2012); *see Davis v. Mich. Dep't of Treasury,* 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). The construction of two statutes shall be made with the assumption that the legislature does not intend to create an inconsistency. *State v. Bash,* 130 Wn.2d 594, 602, 925 P.2d 978 (1996).

LCB's application is analogous to that of the Department of Ecology ("Ecology") in *Rettkowski* when Ecology sought to issue orders addressing senior water rights while such adjudications were vested with the Superior Courts of the State of Washington. *Rettkowski v. Dept. of Ecology*¸122 Wn. 2d 219, 227, 858 P.2d 232, 237 (1993). There, Ecology argued that the power to issue such orders and adjudicate those matters was derived from an inherent authority to protect senior water rights and issue regulatory orders whenever it appeared to Ecology

that a person is or about to violate any provision of the Water Code. *Id* at 227. Noting the "broad enabling statutes" to be silent as to how Ecology is to determine water rights in a regulatory action, and that such silence was even more telling when compared to the elaborate general adjudication process for determining water rights entrusted to superior courts, the Court found that "nowhere in Ecology's enabling statutes was [Ecology] vested with similar authority to conduct general adjudications or even regulatory adjudications of water." *Id.* at 237. The Court therefore held that the absence of a specific grant to an agency to determine certain issues, coupled with an explicit grant to another branch of government to determine those exact matters, makes the agency's determination ultra vires. *Id.* The same applies here, yet the Court of Appeals failed to recognize that.

Moreover, in publishing its opinion, the appeals court created a new power for the LCB, but establishing laws is no its province.

That is exactly the case here. LCB sought to enforce an order issued by Secretary of Health, who has specific power to respond to pandemics and issue rules for the enforcement thereof.

The LCB's enforcement of the Secretary of Health's Mask Mandate also serves as an unlawful delegation of power from a separate agency.

> It is a general principle of law, expressed in the maxim "delegatus non potest delegare," that a delegated power may not be further delegated by the person to whom such power is delegated….Merely ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature….

In re Puget Sound Pilots Asso. 63 Wn.2d 142, 146, 385 p.2d 711, 713 (1963). That is, again, clearly the case here where the LCB is choosing to enforce an order by another agency to which certain powers—specifically powers regarding response to pandemics—is vested.

To be sure, the Secretary of Health could have had its rules enforced by a separate agency had it gone through the proper rulemaking. RCW 43.20.05(5) provides that opportunity:

> All local boards of health, health authorities and officials, **officers of state institutions,** police officers, sheriffs, constables, and all other officers and **employees of the state**, or any county, city, or township thereof, **shall enforce all rules adopted by the state board of health**.

RCW 43.20.050(5) (Emphasis added). A-26

Such a process was not undertaken by the Secretary or Board of Health and the consequent delegation of authority to the LCB (or more accurately the assumption of such authority by the LCB) from the Secretary of Health is unlawful.

Issues of Agency Power have been addressed at length at the Federal level by the US Supreme Court: "Agencies have only those powers given to them by [the legislative authority], and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *West*

Virginia v. EPA, 597 U.S. __, at p. 24, 142 S.Ct. 2587, 2609 (2022) (citation omitted).

At issue in *West Virginia v. EPA* was whether the EPA had the authority to enact rules addressing carbon dioxide pollution for existing power plants by requiring power plants to reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources. In *West Virginia*, the U.S. Supreme Court reviewed the body of law forming the major questions doctrine which addresses a "particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia,* 597 U.S. at 69-74 (Food and Drug Administration claim for authority over drugs and devices does not include power to regulate and ban tobacco products; Centers for Disease Control and Prevention claim for authority to prevent the spread of disease does not include power to institute nationwide eviction moratorium; Environmental Protection Administration claim for authority to

construe the term "air pollutant" does not include power to regulate hotels and office buildings; Occupational Safety and Health Administration's claim for authority over occupational hazards does not include power to mandate COVID-19 vaccines). The Supreme Court in *West Virginia* was clear in its holding: an agency "**must point to 'clear [legislative] authorization' for the power it claims.**" *West Virginia*, 597 U.S. at 24 (emphasis added).

B. The LCB Failed to Implement and Enforce the Mask Mandate Pursuant to the APA and its Own Rules

The LCB failed to acknowledge that because it had no specific authority to enforce the wearing of face masks pursuant to the Governor's proclamation (a situation not contemplated by its existing rules), that it must enact its rules of enforcement pursuant to the Administrative Procedure Act ("APA").

The LCB must follow the processes and procedures pursuant to Washington's APA, codified at RCW 34.05. See RCW 66.08.030. A-17.

In response to Headworks' argument on this issue, the Court of Appeals criticized Headworks' argument: "Providing no relevant authority or analysis in support of its assertion, Headworks also contends that the LCB was required to promulgate a new regulation in order to enforce an existing regulation (WAC 314-11-015(3)) and that the enforcement of the existing regulation without a new regulation violates due process." Opinion at 13 fn 9.

The Court of Appeals confuses Headworks' argument. Headworks argued that the enforcement of the Mask Mandate did not and does not fall within LCB's statutory authority and therefore no rule exists to enforce the Mask Mandate. However, Headworks asserted that if the Court should find that statutory authority exists to enforce such a mandate, the LCB should have, at the very least, followed the APA to adopt a rule specifically putting its licensees on notice of the processes and reasoning it would take to enforce the Mask Mandate and fine its licensees.

Indeed, in situations of emergency, as the LCB claims here, the LCB has specific authority to take emergency action under RCW 34.05.350:

> (1) If an agency for good cause finds:
>
> (a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest;
>
> * * *
>
> the agency may dispense with those requirements and adopt, amend, or repeal the rule on an emergency basis. The agency's finding and a concise statement of the reasons for its finding shall be incorporated in the order for adoption of the emergency rule or amendment filed with the office of the code reviser under RCW 34.05.380 and with the rules review committee.

RCW 34.05.350. A-37.

LCB downplays the importance of the APA and the process that an administrative agency must follow in providing notice to the public about the rules it intends to enact and enforce—even if directed to do so by the executive (governor) of the executive branch.

The U.S. Dist. Ct. of the Middle District of Florida ruled on a similar issue regarding the federal mask mandate. See *Health Freedom Defense Fund, Inc., Ana Carolina Daza and Sarah Pope. v. Joseph R. Biden, Jr., et al.,* US Dist. Ct. Middle Dist. FL, Case No. 8:21-cv-1693-KKM-AEP (April 18, 2022), currently on appeal. In that case, the Court found that the federal mask mandate on federal transportation systems enforced by the CDC, and ordered by the President of the United States, was unlawful and was vacated because the CDC failed to provide notice of its rulemaking, despite the CDC's argument that its authority to enforce the mandate existed under current rules. *Id.* In that case, the Court discussed the APA process and notice requirements and its importance. *Id.* at 1166-1167. In its conclusion, the Court explained "It is indisputable that the public has a strong interest in combating the spread of [COVID-19]…In pursuit of that end, the CDC issued the Mask Mandate. But the Mandate exceeded the CDC's statutory authority, improperly invoked the good cause exception to

notice and comment rulemaking, and failed to adequately explain its decisions. Because **<u>'our system does not permit agencies to act unlawfully even in pursuit of desirable ends,'</u>** the Court declares unlawful and vacates the Mask Mandate." *Id.* at 1178 (internal citations omitted; emphasis added). So too should be the result here with respect to the LCB's enactment and enforcement of this Mask Mandate.

Here, the implementation of the Mask Mandate, albeit pursued with good intentions, did not and does not fall within LCB's statutory authority as prescribed by the legislature. The LCB's interpretation to squeeze the Mask Mandate into existing WAC rules is not within the context of its authority. As the LCB failed to recognize its limitations, it then failed to even attempt to properly enact the mandate as a rule, even under an expedited process that is and was available to it under the APA.

The LCB's failure should not be the burden of the Licensee who could not even get specific guidance from LCB's

enforcement officers on what would be acceptable exemptions under the Mask Mandate (CP at 473; 488-489), and when the LCB even failed to cite the most current rule that it believed governed the enforcement of the Mask Mandate. CP at 536 and 542-575 .

VI. CONCLUSION

It is true that the Covid-19 pandemic presented significant challenges to everyone in this country and the State of Washington. The Governor, in carrying out his duties, and in declaring a State of Emergency set forth expectations of citizens to follow in an effort to mitigate the effects of the Pandemic. Efforts to curb the effects of the Pandemic are laudable. However, as laudable as those efforts may be, enforcement of any provision issued still must follow the law. The Governor's proclamation required the wearing of masks. If the Governor's Proclamation was interpreted by the State's agencies to enforce the Mask Mandate, then those agencies would need to do so under the authority granted to them by the

legislature. Because the LCB does not have the power to enforce orders of a separate agency and because it does not have authority to enforce issues that are unrelated to the sale or consumption of alcohol and cannabis without a specific rule, its enforcement of the Mask Mandate is ultra vires and unlawful.

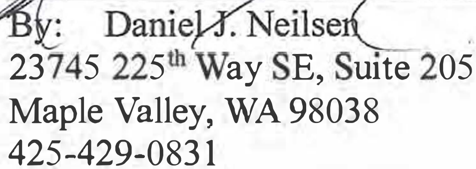
The Court of Appeals' affirmation of the LCB's enforcement of the Mask Mandate against Headworks contradicts other Washington Supreme Court opinions regarding agency powers and limits and such an expansive interpretation of the LCB's powers is a matter of substantial public interest because it renders the LCB's police power limitless.

For the reasons stated herein, the Petition for Review should be Granted and Headworks should be permitted to argue this issue before the Supreme Court of Washington.

Respectfully Submitted this 31st day of January 2024.

Per RAP 18.17, I hereby certify the number of words contained in this Petition for Review are as follows: 4,795.

LAW OFFICE OF DANIEL J. NEILSEN, PLLC



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PROOF OF SERVICE

I certify that I filed and served this PETITION FOR REVIEW with the Clerk of the Court using its electronic filing system and had it served on the following parties, according to the Court's protocols for electronic filing and service:

Jason Miller, Asst. Attorney General
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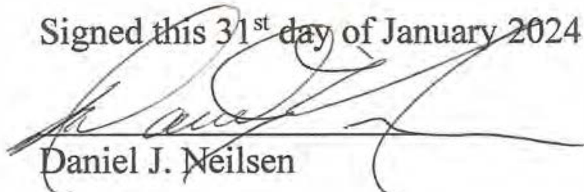
Signed this 31st day of January 2024



Daniel J. Neilsen

APPENDIX

FILED
1/2/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HEADWORKS HAND CRAFTED ALES, INC., dba HEADWORKS BREWING,

Appellant,

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD,

Respondent.

No. 84927-1-I

DIVISION ONE

PUBLISHED OPINION

HAZELRIGG, A.C.J. — After multiple warnings, the Washington State Liquor and Cannabis Board (LCB) issued an administrative violation notice (AVN) to Headworks Hand Crafted Ales Inc. dba Headworks Brewing due to its failure to comply with the pandemic-related mask mandate issued by the state Department of Health in 2020. Headworks seeks judicial review of the final order that affirmed the violation and argues that the LCB did not have statutory authority to issue the AVN, and, alternatively, the LCB's action violated constitutional due process. Because the LCB has statutory authority to issue the AVN under Title 66 RCW and the failure to comply with the statewide mask mandate posed a "threat to public safety" under WAC 314-11-015(3)(c), we affirm the final order.

FACTS

On February 29, 2020, due to the outbreak of the novel coronavirus infection disease (COVID-19), Governor Jay Inslee issued Proclamation 20-05, which declared a state of emergency for all counties in Washington.[1] The governor exercised his emergency powers under RCW 43.06.220 and issued several subsequent proclamations amending the original including Proclamations 20-25 through 20-25.20 which prohibited certain activities unless specific conditions were met. On June 24, 2020, the secretary of health issued Order 20-03, directing everyone in Washington to wear a face covering in “any indoor or outdoor public setting.”[2] Although the secretary amended the order on May 15, 2021 to exempt fully vaccinated people,[3] the order was subsequently amended on August 19, 2021 to reinstitute the face covering mandate regardless of vaccination status “when in a place where any person from outside their household is present.”[4] On September 13, 2021, the governor amended Proclamations 20-25 through 20-25.16 to incorporate the secretary of health’s face covering order and all subsequent amendments thereto.[5] Proclamations 20-05 through 20-25 as well as

[1] Proclamation of Governor Jay Inslee, No. 20-05 (Wash. Feb. 29, 2020), governor.wa.gov/sites/default/files/proclamations/20-05%20Coronavirus%20%28final%29.pdf [https://perma.cc/TAF6-QNGB].

[2] Wash. Sec’y of Health, Ord. No. 20-03 (Wash. June 24, 2020), mrsc.org/getmedia/d6167fa2-f2a3-427f-936b-f630098d859f/Secretary_of_Health_Order_20-03_Statewide_Face_Coverings.pdf [https://perma.cc/DUV4-92K3].

[3] Wash. Sec’y of Health, Ord. No. 20-03.2 (Wash. May 15, 2021), mrsc.org/getmedia/6649c06a-bfe6-48a7-829a-d499d2d99238/SHO_20-03-2_Statewide_Face_Coverings.pdf.

[4] Wash. Sec’y of Health, Ord. No. 20-03.4 (Wash. Aug. 19, 2021), mrsc.org/getmedia/485b7566-e399-4602-9f83-47cfb37140c8/Secretary_of_Health_Order_20-03-4_Statewide_Face_Coverings.pdf

[5] Proclamation of Governor Jay Inslee, No. 20-25.17 (Wash. Sept. 13, 2021), governor.wa.gov/sites/default/files/proclamations/proc_20-25.17.pdf.

Order 20-03 and its subsequent amendments, are collectively referred to herein as the “mask mandate.”

Headworks is a brewery located in Enumclaw, Washington that is open to the public and offers alcoholic beverages to its customers. Headworks applied for and was issued a license to sell alcohol by the LCB. On September 8, 2021, the LCB received a public complaint that Headworks employees and customers were not adhering to the mask mandate. Three days later, LCB enforcement officers conducted a check of the premises and observed the bartender not wearing a mask. During a follow-up visit the next week, LCB Enforcement Officer Richard Steinbach observed three Headworks employees working in the brewery without masks. After Steinbach informed Headworks manager, Gino Santamaria, of the public complaint and masking requirements, Santamaria stated that Headworks would neither refuse service to unmasked patrons nor require employees to wear masks. On September 20 and October 5, 2021, the LCB received additional public complaints concerning Headworks’ failure to comply with the mask mandate.

On October 8, 2021, Steinbach returned to the brewery and observed three Headworks employees working without masks. At the time, there were approximately 15-25 patrons at the establishment. Steinbach contacted two of the employees, explained that they were required to wear masks, and informed them that Headworks would receive a written warning for noncompliance with the mask mandate. On October 13, the written warning was issued and, in it, the LCB directed Headworks to comply with the mask mandate and advised that further noncompliance would result in a violation of WAC 314-11-015. The written

warning also included a copy of the secretary of health's Order 20-03.6,[6] along with a document providing guidance on the COVID-19 facial covering requirements for employers and businesses.

That November, the LCB received three more public complaints about Headworks' continued failure to follow the mask mandate. In response, Steinbach called Santamaria, notified him of the complaints, and said that he would conduct a check of the premises in the following week to determine whether Headworks was in compliance with the masking requirements. During the phone call, Santamaria asked what would qualify as a legitimate exemption from the mask mandate and Steinbach stated that Headworks "would need to determine that on their own and it would need to be a case-by-case basis with each employee." Steinbach also "offered one suggestion of having those employees who want a medical exemption from wearing a mask to provide a doctor's note as a way for them as the employer to give credibility to that process." Santamaria responded that it would be a violation of the employees' rights to require a doctor's note in order to validate a mask exemption. According to Steinbach, his "take-away from that conversation was that Headworks Brewing did not believe in the legality of the mask mandate and thus was not enforcing the mask wearing by their employees."

On November 23, Steinbach returned to the brewery and observed three employees, including Santamaria, working without face coverings. Steinbach met with Santamaria who continued to question the legality of the mask mandate and

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[6] Wash. Sec'y of Health, Ord. No. 20-03.6 (Wash. Sept. 24, 2021), mrsc.org/getmedia/5862c24f-a144-4f14-9045-043b9bf9c0dd/Secretary_of_Health_Order_20-03-6_Statewide_Face_Coverings.pdf.

told Steinbach that Headworks employees were not required to wear masks because the mandate was not a law. After Steinbach's inspection, the LCB issued Headworks an AVN on December 2, 2021. The AVN referenced WAC 314-11-015, established that the violation was for a COVID-19 related complaint, and imposed a penalty of a five-day license suspension or $500 fine in lieu of suspension.

Headworks appealed the AVN and requested an administrative hearing. Accordingly, the LCB requested assignment of an administrative law judge (ALJ) and issued "LCB Complaint No. L-27,636" which was based on the original AVN. The complaint provided that, on November 23, 2021, Headworks "failed to adopt or enforce minimal safety precautions to prevent the spread of the COVID-19 virus as required by the Governor's Proclamations 20-05 & 20-25, *et seq.*, and associated orders of the Secretary of Health." The complaint alleged that Headworks' noncompliance "presented a threat to public safety, in violation of WAC 314-11-015(3)" and provided the penalty pursuant to WAC 314-29-020. Headworks "did not contest the material facts of the November 23, 2021 incident." Both parties filed motions for summary judgment. The ALJ issued an initial order that granted LCB's motion for summary judgment and affirmed complaint L-27,636.

Headworks then filed a petition for review of the initial order with the LCB. On review, the LCB affirmed the initial order and adopted the findings of fact and conclusions of law contained therein as the final order of the board. Headworks sought reconsideration of the final order, but the LCB denied the petition for reconsideration.

Headworks timely appealed.

ANALYSIS

I. Procedural Posture and RAP 10.3

Headworks seeks review of the final order of the board entered after an adjudicative proceeding, but does not assign error to the substance of the final order or any findings of fact or conclusions of law therein. Rather, in its opening brief, Headworks asserts that assignments of error are "not strictly necessary" and cites to RCW 34.05.570(2), writing "this is a challenge to the validity of agency rules brought under Washington's Administrative Procedure Act [(APA)]." This framing suggests that Headworks may have misinterpreted the interplay between the Rules of Appellate Procedure and the two options for review governed by RCW 34.05.570(2), either pursuant to a petition for declaratory judgment challenging the validity of the rule or "in the context of any other review proceeding under this section." Headworks did not file a petition for declaratory judgment "challenging the validity of a rule" as described in RCW 34.05.570(2)(a) and (b)(i), which may have rendered explicit assignments of error repetitive since the entire purpose of such an action is plain.[7] However, because Headworks opted to pursue its

[7] At oral argument before this court, Headworks asserted that it did not petition for a declaratory judgment regarding WAC 314-11-015 because it did not know what provision the LCB was relying on to enforce the mask mandate until the AVN was issued. Wash. Ct. of Appeals oral argument, *Headworks Handcrafted Ales v. Liquor & Cannabis Bd.*, No. 84927-1-I (Sept. 8, 2023), at 7 min., 10 sec., *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023091159/?eventID=2023091159.

This proffered reason is refuted by the record. Approximately six weeks before the LCB issued the AVN, the agency issued Headworks a written warning that explicitly provided WAC 314-11-015 as the basis for the violation. Under RCW 34.05.570(2), the validity of an agency rule may be reviewed "when it appears that the rule, or *its threatened application*, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner." RCW 34.05.570(2)(b)(i) (emphasis added). Thus, once Headworks received the written warning,

challenge through "any other review proceeding" under the APA, here, review of the AVN, express identification of the purported errors of the board were required under the RAPs.

Contrary to Headworks' contention, "[e]rror assigned to administrative orders must comply with RAP 10.3." *Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 676, 887 P.2d 411 (1994). The appellant's brief is required to provide a "separate concise statement of each error" alleged and this court "will only review a claimed error which is included in an assignment of error." RAP 10.3(a)(4), 10.3(g). *See also* RAP 10.3(h) (Appellants challenging an administrative order must "set forth a separate concise statement of each error which the party contends was made by the agency."). Because Headworks' opening brief contains no assignments of error, it fails to comply with RAP 10.3. Only after the LCB had argued in its response that Headworks' noncompliance with RAP 10.3 is a basis for this panel to deny the relief sought did Headworks begrudgingly assign error as follows: "The Board improperly found that the enforcement of the Mask Mandate . . . was within [the LCB's] power to enforce as a 'Threat to Public Safety' under WAC 314-11-015(3)." As a general rule, we "will not review an issue raised and argued for the first time in a reply brief." *Bergerson v. Zurbano*, 6 Wn. App. 2d 912, 926, 432 P.3d 850 (2018). However, because this is an issue capable of repetition and, more critically, the LCB was able to understand the nature of Headworks' challenge sufficiently to respond to each of

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it could have sought a declaratory judgment and challenged the LCB's threatened application of WAC 314-11-015, but made a different strategic choice.

the issues raised in its opening brief, we exercise our discretion and reach the merits, notwithstanding these procedural defects. *See* RAP 1.2(a).

II. Final Order of the LCB

A. Standard of Review Under the APA

Judicial review of administrative actions is governed by our APA, chapter 34.05 RCW. *Providence Health & Servs.-Wash v. Dep't of Health*, 194 Wn. App. 849, 856, 378 P.3d 249 (2016); RCW 34.05.570. On review, we "sit in the same position as the superior court" and apply the APA "to the record before the agency." *Id.* The "agency decision is presumed to be correct" and the party challenging it bears the burden of demonstrating its invalidity. *Id.*; RCW 34.05.570(1)(a). We review the final order of the LCB, not the initial order issued by the ALJ. *See Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015). Pursuant to RCW 34.05.570(3), Headworks may only obtain relief if we determine that the LCB's final order was unconstitutional, arbitrary or capricious, extended outside the statutory authority of the agency, resulted from an erroneous interpretation of the law, or is not supported by substantial evidence.[8] *See DaVita, Inc. v. Dep't of Health*, 137 Wn. App. 174, 181, 151 P.3d 1095 (2007).

"'The error of law standard permits this court to substitute its interpretation of the law for that of the agency, but we accord substantial deference to the agency's interpretation, particularly in regard to the law involving the agency's special knowledge and expertise.'" *Univ. of Wash. Med. Ctr. v. Dep't of Health*,

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[8] Factual findings are reviewed for substantial evidence, i.e., evidence "sufficient to persuade a fair-minded person of the declared premise." *Providence Health & Servs.*, 194 Wn. App. at 856.

164 Wn.2d 95, 102, 187 P.3d 243 (2008) (quoting *Providence Hosp. of Everett v. Dep't of Soc. & Health Servs.*, 112 Wn.2d 353, 355-56, 770 P.2d 1040 (1989)). Challenged findings will be overturned if they are "clearly erroneous" but "unchallenged findings of fact become verities on appeal." *Providence Health & Servs.*, 194 Wn. App. at 856-57; *Davis v. Dep't of Lab. & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

For an agency decision to be deemed arbitrary or capricious, this court must conclude that "'the decision is the result of willful and unreasoning disregard of the facts and circumstances.'" *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 102 (quoting *Providence Hosp.*, 112 Wn.2d at 356). However, an agency action "taken after giving a party ample opportunity to be heard, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary or capricious." *Yow v. Dep't of Health Unlicensed Prac. Program*, 147 Wn. App. 807, 830, 199 P.3d 417 (2008).

When an agency's decision is based on summary judgment, "we overlay the APA and summary judgment standards of review." *Waste Mgmt. of Wash., Inc. v. Wash. Utils. & Transp. Comm'n*, 24 Wn. App. 2d 338, 344, 519 P.3d 963 (2022), *review denied*, 1 Wn.3d 1003 (2023). We review the facts in the administrative record de novo and legal conclusions under the error of law standard. *Wash. State Dairy Fed'n v. Dep't of Ecology*, 18 Wn. App. 2d 259, 307, 490 P.3d 290 (2021). "Summary judgment is appropriate if the undisputed material facts entitle the moving party to judgment as a matter of law." *Id.* A material fact

is one that "might affect the outcome of the suit." *Sehmel v. Shah*, 23 Wn. App. 2d 182, 191, 514 P.3d 1238 (2022).

B. Authority To Enforce Mask Mandate

Headworks argues that neither the governor nor the LCB had authority to enforce the mask mandate. According to Headworks, the power to create regulations for the prevention and control of infectious diseases belongs solely with the state Department of Health and those rules are only to be enforced by local departments of health. We disagree on each point.

1. Governor's Emergency Powers

In Washington, our governor "possesses broad discretionary authority to issue emergency proclamations restricting 'activities the governor reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace' during declared emergencies." *In re Recall of Inslee*, 199 Wn.2d 416, 426, 508 P.3d 635 (2022) (quoting RCW 43.06.220(1)(h)). During the COVID-19 pandemic, our governor "exercised his discretion under these emergency powers dozens of times since [initially] proclaiming a state of emergency." *Colvin v. Inslee*, 195 Wn.2d 879, 896, 467 P.3d 953 (2020). As our Supreme Court has explained, the governor's "emergency powers are broad and include the authority to prohibit 'any number of persons . . . from assembling,' RCW 43.06.220(1)(b), [and] 'to waive or suspend' 'any statute, order, rule, or regulation that would in any way prevent, hinder, or delay necessary action in coping with the emergency,' RCW 43.06.220(2)(g)." *Id.* at 895.

The governor's emergency authority has been "repeatedly and recently upheld by the Washington Supreme Court." *Sehmel*, 23 Wn. App. 2d at 197. Division Two of this court recently addressed challenges to the mask mandate and followed our Supreme Court's decisions to hold that the "governor was authorized to issue an emergency proclamation." *Id.* (first citing *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 474, 647 P.2d 481 (1982), *overruled in part on other grounds by Chong Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019) and then *Colvin*, 195 Wn.2d at 895.). Specifically, this court explained that "the legislature properly delegated the authority to address an emergency to the secretary [of health], the governor's Emergency Proclamation was not in excess of his authority, and the power delegated to the local health officer [was] not improper." *Sehmel*, 23 Wn. App. 2d at 199. These cases directly contradict Headworks' assertion that the governor's emergency powers do not extend to issues stemming from a pandemic. Accordingly, Headworks' argument on that basis fails.

2. Statutory Authority of the LCB

Headworks' main contention that the LCB did not have authority to issue the AVN is also unavailing. A "fundamental rule of administrative law" is that "an agency may only do that which it is authorized to do by the Legislature." *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 226, 858 P.2d 232 (1993). By statute, the LCB has authority to regulate "the sale of liquor kept by holders of licenses which entitle the holder to purchase and keep liquor for sale." RCW 66.08.030(6). Additionally, the LCB may prescribe "the conditions,

accommodations, and qualifications requisite for the obtaining of licenses" to sell alcoholic beverages and has authority to regulate the sale of those beverages. RCW 66.08.030(12). As emphasized by our Supreme Court, "There can be no question but that the [LCB], in the interests of public health, safety, and morals, possesse[s] the constitutional and statutory power to control and regulate the dispensation of alcoholic beverages." *Jow Sin Quan v. Wash. State Liquor Control Bd.*, 69 Wn.2d 373, 379, 418 P.2d 424 (1966).

The LCB relied on WAC 314-11-015 to issue the AVN to Headworks. Pursuant to this regulation, "[l]icensees have the responsibility to control their conduct and the conduct of employees and patrons on the premises at all times." WAC 314-11-015(3). Further, it provides that licensees and employees may not "[e]ngage in or allow behavior that provokes conduct which presents a threat to public safety." WAC 314-11-015(3)(c). WAC 314-29-020 sets out "Group 1 violations against public safety." Group 1 violations are the most serious issued by the LCB because the conduct they address "present[s] a direct threat to public safety." WAC 314-29-020(1). The first Group 1 violation results in a "[five] day suspension or $500 monetary option." WAC 314-29-020(2). Because this was Headworks' first violation, the plain language of the code establishes that it was subject to the penalty of a five-day suspension of its LCB license or a $500 monetary penalty in lieu of license suspension.

Headworks argues that the LCB does not have authority under WAC 314-11-015(3)(c) to enforce violations of the secretary of health's mask mandate as a

"threat to public safety."[9] Therefore, Headworks asserts, the AVN at issue was "outside the statutory authority or jurisdiction of the [LCB]" under RCW 34.05.570(3)(b). This contention is without merit. In an unpublished opinion, this court recently addressed a challenge to the LCB's authority to issue an AVN for noncompliance with the mask mandate and we plainly stated that

> the LCB's enforcement of WAC 314-11-015(3)(c) is clearly within the authority granted to the LCB by the legislature because '[t]his entire title [66 RCW - Alcoholic Beverage Control] shall be deemed an exercise in the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose.'

Racoon Hill, LLC, v. Liquor & Cannabis Bd., No. 84622-1-I, slip. op. at 11 (Wash. Ct. App. Aug. 28, 2023) (alterations in original) (quoting RCW 66.08.010) (unpublished), https://www.courts.wa.gov/opinions/pdf/846221.pdf.[10]

According to Headworks, the LCB's interpretation of "threat to public safety" is overly broad.[11] We disagree. As Headworks correctly concedes, the state

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[9] Providing no relevant authority or analysis in support of its assertion, Headworks also contends that the LCB was required to promulgate a new regulation in order to enforce an existing regulation (WAC 314-11-015(3)) and that the enforcement of the existing regulation without a new regulation violates due process. "Parties raising constitutional issues must present considered arguments to this court." *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Moreover, "lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

While Headworks broadly cites to the due process clauses of the federal and state constitutions, it makes no effort to apply a constitutional test to its broad claims, much less the specific facts of the case before us. Because Headworks has failed to provide the proper legal framework to facilitate appellate review, we decline to consider its "due process" claim.

[10] Though unpublished opinions have no precedential value, we may consider them where necessary for a reasoned decision. GR 14.1(c). Here, we adopt the reasoning set out in *Racoon Hill*.

[11] Headworks also argues that the LCB's interpretation of "threat to public safety" causes confusion among its licensees and the LCB itself. Although there was an inaccurate citation to an outdated WAC provision on the header of the AVN issued to Headworks, the complaint that was later issued when Headworks sought an administrative hearing correctly identified the applicable WAC provisions. Further, during their various interactions with Headworks before finally citing it

secretary of health has statutory authority to "[t]ake such measures as the secretary deems necessary in order to promote the public health." RCW 43.70.130(10). Here, the secretary recognized COVID-19 as "an emergency threatening the safety of the public health" and issued an order that required face coverings for the purpose of controlling and preventing its spread. The secretary expressly defined COVID-19 as a threat to public safety and required masking to address that threat. Accordingly, consistent with the secretary's determination, the LCB's recognition that refusing to wear face masks during the pandemic at a public establishment on licensed premises constituted a threat to public safety under WAC 314-11-015(3)(c) was not an overly broad interpretation of the regulation. Moreover, it is indisputable that threats to public safety come in all shapes and sizes; the phrasing of the delegation of authority from our state legislature to the LCB is inherently broad and flexible so as to encapsulate and address unforeseeable events, such as those which unfolded as a result of the COVID-19 pandemic.

Headworks next insists that if failure to comply with the mask mandate on the licensed premises constitutes a "threat to public safety," then "the LCB can simply say any potential safety issue is within its jurisdiction," which "would be arbitrary and capricious." As a preliminary matter, this is a misapplication of the arbitrary or capricious standard under the APA. Arbitrary or capricious means a

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for noncompliance, LCB enforcement officers had provided verbal guidance and supplemental documents for employers on compliance with the mask mandate.

The record shows not only that Headworks ignored the repeated warnings and guidance from the LCB, but also that staff directly told the LCB enforcement officer prior to the issuance of the AVN that the mask mandate was not lawful and they would not comply. Accordingly, we are not persuaded by Headworks' "confusion" argument.

decision or action which is "the result of willful and unreasoning disregard of the facts and circumstances." *Providence Hosp.*, 112 Wn.2d at 356. Headworks offers no authority for prospective application of the arbitrary or capricious standard to hypothetical future facts.

The record before us establishes that the LCB received a total of seven public complaints regarding the customers and employees of Headworks failing to comply with the mask mandate in the midst of a global pandemic. Before issuing the AVN, LCB enforcement visited Headworks, spoke with employees and the manager, and issued a written warning that included guidance on the mask mandate for employers. Headworks still failed to comply. Though Headworks disagrees with the LCB's final order, an agency action "taken after giving a party ample opportunity to be heard, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary or capricious." *Yow*, 147 Wn. App. at 830. Because Headworks was given the opportunity to be heard and the LCB considered and rejected its arguments, Headworks has failed to demonstrate that the final order was arbitrary or capricious.

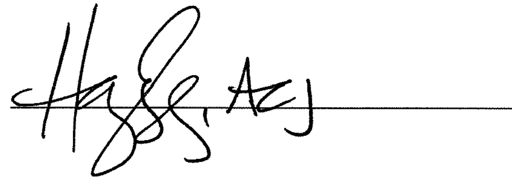
As no material facts are in dispute and Headworks fails to demonstrate any basis for relief, we affirm.

III. Attorney Fees

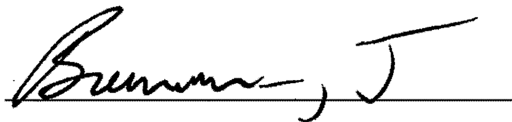
Headworks requests attorney fees and costs on appeal pursuant to RCW 4.84.350. This court shall "award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees,

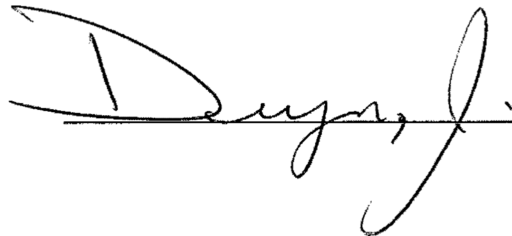
unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350(1). As Headworks does not prevail, we decline to award attorney fees and costs.

Affirmed.



WE CONCUR:





RCW 66.08.030 Regulations—Scope. The power of the board to make regulations under chapter 34.05 RCW extends to:

(1) Prescribing the duties of the employees of the board, and regulating their conduct in the discharge of their duties;

(2) Prescribing an official seal and official labels and stamps and determining the manner in which they must be attached to every package of liquor sold or sealed under this title, including the prescribing of different official seals or different official labels for different classes of liquor;

(3) Prescribing forms to be used for purposes of this title or the regulations, and the terms and conditions to be contained in permits and licenses issued under this title, and the qualifications for receiving a permit or license issued under this title, including a criminal history record information check. The board may submit the criminal history record information check to the Washington state patrol and to the identification division of the federal bureau of investigation in order that these agencies may search their records for prior arrests and convictions of the individual or individuals who filled out the forms. The board must require fingerprinting of any applicant whose criminal history record information check is submitted to the federal bureau of investigation;

(4) Prescribing the fees payable in respect of permits and licenses issued under this title for which no fees are prescribed in this title, and prescribing the fees for anything done or permitted to be done under the regulations;

(5) Prescribing the kinds and quantities of liquor which may be kept on hand by the holder of a special permit for the purposes named in the permit, regulating the manner in which the same is kept and disposed of, and providing for the inspection of the same at any time at the instance of the board;

(6) Regulating the sale of liquor kept by the holders of licenses which entitle the holder to purchase and keep liquor for sale;

(7) Prescribing the records of purchases or sales of liquor kept by the holders of licenses, and the reports to be made thereon to the board, and providing for inspection of the records so kept;

(8) Prescribing the kinds and quantities of liquor for which a prescription may be given, and the number of prescriptions which may be given to the same patient within a stated period;

(9) Prescribing the manner of giving and serving notices required by this title or the regulations, where not otherwise provided for in this title;

(10) Regulating premises in which liquor is kept for export from the state, or from which liquor is exported, prescribing the books and records to be kept therein and the reports to be made thereon to the board, and providing for the inspection of the premises and the books, records and the liquor so kept;

(11) Prescribing the conditions and qualifications requisite for the obtaining of club licenses and the books and records to be kept and the returns to be made by clubs, prescribing the manner of licensing clubs in any municipality or other locality, and providing for the inspection of clubs;

(12) Prescribing the conditions, accommodations, and qualifications requisite for the obtaining of licenses to sell beer, wines, and spirits, and regulating the sale of beer, wines, and spirits thereunder;

(13) Specifying and regulating the time and periods when, and the manner, methods and means by which manufacturers must deliver liquor within the state; and the time and periods when, and the manner, methods and means by which liquor may lawfully be conveyed or carried within the state;

(14) Providing for the making of returns by brewers of their sales of beer shipped within the state, or from the state, showing the gross amount of such sales and providing for the inspection of brewers' books and records, and for the checking of the accuracy of any such returns;

(15) Providing for the making of returns by the wholesalers of beer whose breweries are located beyond the boundaries of the state;

(16) Providing for the making of returns by any other liquor manufacturers, showing the gross amount of liquor produced or purchased, the amount sold within and exported from the state, and to whom so sold or exported, and providing for the inspection of the premises of any such liquor manufacturers, their books and records, and for the checking of any such return;

(17) Providing for the giving of fidelity bonds by any or all of the employees of the board. However, the premiums therefor must be paid by the board;

(18) Providing for the shipment of liquor to any person holding a permit and residing in any unit which has, by election pursuant to this title, prohibited the sale of liquor therein;

(19) Prescribing methods of manufacture, conditions of sanitation, standards of ingredients, quality and identity of alcoholic beverages manufactured, sold, bottled, or handled by licensees and the board; and conducting from time to time, in the interest of the public health and general welfare, scientific studies and research relating to alcoholic beverages and the use and effect thereof;

(20) Seizing, confiscating and destroying all alcoholic beverages manufactured, sold or offered for sale within this state which do not conform in all respects to the standards prescribed by this title or the regulations of the board. However, nothing herein contained may be construed as authorizing the *liquor board to prescribe, alter, limit or in any way change the present law as to the quantity or percentage of alcohol used in the manufacturing of wine or other alcoholic beverages;

(21) Monitoring and regulating the practices of license holders as necessary in order to prevent the theft and illegal trafficking of liquor pursuant to RCW 66.28.350. [2014 c 63 § 2; 2012 c 2 § 204 (Initiative Measure No. 1183, approved November 8, 2011); 2002 c 119 § 2; 1977 ex.s. c 115 § 1; 1971 c 62 § 1; 1943 c 102 § 1; 1933 ex.s. c 62 § 79; RRS § 7306-79. Formerly RCW 66.08.030 and 66.08.040.]

***Reviser's note:** The "state liquor control board" was renamed the "state liquor and cannabis board" by 2015 c 70 § 3.

Finding—Application—Rules—Effective date—Contingent effective date—2012 c 2 (Initiative Measure No. 1183): See notes following RCW 66.24.620.

WAC 314-11-015 What are my responsibilities as a liquor licensee? (1)(a) Liquor licensees are responsible for the operation of their licensed premises in compliance with the liquor laws and rules of the board (Title 66 RCW and Title 314 WAC). Any violations committed or permitted by employees will be treated by the board as violations committed or permitted by the licensee.

(b) The penalties for violations of liquor laws or rules are in: WAC 314-29-015 through 314-29-035, as now or hereafter amended, for licensees; and WAC 314-17-105 and 314-17-110, as now or hereafter amended, for employees who hold mandatory alcohol server training permits. These rules also outline aggravating and mitigating circumstances that may affect what penalty is applied if a licensee or employee violates a liquor law or rule.

(2) Licensees and their employees also have the responsibility to conduct the licensed premises in compliance with the following laws, as they now exist or may later be amended:

• Titles 9 and 9A RCW, the criminal code laws;

• Title 69 RCW, which outlines the laws regarding controlled substances; and

• Chapters 70.155, 82.24 RCW, and RCW 26.28.080 which outline laws regarding tobacco.

(3) Licensees have the responsibility to control their conduct and the conduct of employees and patrons on the premises at all times. Except as otherwise provided by law, licensees or employees may not:

(a) Be disorderly or apparently intoxicated on the licensed premises;

(b) Allow any disorderly person to remain on the licensed premises;

(c) Engage in or allow behavior that provokes conduct which presents a threat to public safety;

(d) Consume liquor of any kind while working on the licensed premises; except that:

(i) Entertainers per WAC 314-02-010 may drink while performing under the following conditions:

(A) Alcohol service must be monitored by MAST servers;

(B) Drinks must be served in unlabeled containers;

(C) Entertainers may not advertise any alcohol brands or products;

(D) Entertainers may not promote drink specials; and

(E) If any member of the entertainment group is under 21 years of age, alcohol may not be consumed by any member of the group while performing.

(ii) Licensed beer manufacturers and their employees may sample beer of their own manufacture for manufacturing, evaluating or pricing product in areas where the public is not served, so long as the licensee or employee does not become apparently intoxicated;

(iii) Licensed wine manufacturers and their employees may:

(A) Sample wine for manufacturing, evaluating, or pricing product, so long as the licensee or employee does not become apparently intoxicated; and the licensee or employee who is sampling for these purposes is not also engaged in serving alcohol to the public; and

(B) Sample wine of their own manufacture for quality control or consumer education purposes, so long as the licensee or employee does not become apparently intoxicated.

(e) Engage in, or allow others to engage in, conduct on the licensed premises which is prohibited by any portion of Titles 9, 9A, or 69 RCW;

(f) Engage in the consumption of any type of cannabis, useable cannabis, or cannabis-infused products in a liquor licensed business, including outdoor service areas or any part of the property owned or controlled by the licensee;

(g) Allow any person to consume any type of cannabis, useable cannabis, or cannabis-infused products in a liquor licensed business, including outdoor service areas or any part of the property owned or controlled by the licensee;

(h) Allow any person consuming, or who has consumed on any part of the licensed premises, any type of cannabis, useable cannabis, or cannabis-infused products to remain on any part of the licensed premises; or

(i) Sell or serve liquor by means of drive-through service from pickup or pass-through windows.

(4) Licensees have the responsibility to control the interaction between the licensee or employee and their patrons. At a minimum, licensees or employees may not:

(a) Solicit any patron to purchase any beverage for the licensee or employee, or allow a person to remain on the premises for such purpose;

(b) Spend time or dance with, or permit any person to spend time or dance with, any patron for direct or indirect compensation by a patron.

See WAC 314-11-050 for further guidelines on prohibited conduct.

[Statutory Authority: RCW 69.50.342 and 2022 c 16 § 168. WSR 22-14-111, § 314-11-015, filed 7/6/22, effective 8/6/22. Statutory Authority: RCW 66.08.030 and 66.24.360. WSR 19-03-061, § 314-11-015, filed 1/10/19, effective 8/1/19. Statutory Authority: RCW 66.08.030. WSR 14-02-002, § 314-11-015, filed 12/18/13, effective 1/18/14; WSR 11-22-035, § 314-11-015, filed 10/26/11, effective 11/26/11. Statutory Authority: RCW 66.08.030 and 66.28.320. WSR 10-01-090, § 314-11-015, filed 12/16/09, effective 1/16/10. Statutory Authority: RCW 66.08.030, 66.12.160, 66.44.010, 66.44.200, 66.44.240, 66.44.270, 66.24.291 [66.44.291], 66.44.310. WSR 04-15-162, § 314-11-015, filed 7/21/04, effective 8/21/04. Statutory Authority: RCW 66.08.030, 66.28.100, 66.28.040, 66.28.090, 66.44.010, 66.44.070, 66.44.200, 66.44.270, 66.44.291, 66.44.292, 66.44.310, 66.44.316, 66.44.318, 66.44.340, and 66.44.350. WSR 02-11-054, § 314-11-015, filed 5/9/02, effective 6/9/02. Statutory Authority: RCW 66.08.030, 66.28.100, 66.28.040, 66.28.090, 66.44.010, 66.44.070, 66.44.200, 66.44.270, 66.44.291, 66.44.292, 66.44.310, 66.44.316, 66.44.318, 66.44.340, 66.44.350, and chapter 66.44 RCW. WSR 01-06-014, § 314-11-015, filed 2/26/01, effective 3/29/01.]

RCW 66.08.050 Powers of board in general. The board, subject to the provisions of this title and the rules, must:

(1) Determine the nature, form and capacity of all packages to be used for containing liquor kept for sale under this title;

(2) Execute or cause to be executed, all contracts, papers, and documents in the name of the board, under such regulations as the board may fix;

(3) Pay all customs, duties, excises, charges and obligations whatsoever relating to the business of the board;

(4) Require bonds from all employees in the discretion of the board, and to determine the amount of fidelity bond of each such employee;

(5) Perform services for the state lottery commission to such extent, and for such compensation, as may be mutually agreed upon between the board and the commission;

(6) Accept and deposit into the general fund-local account and disburse, subject to appropriation, federal grants or other funds or donations from any source for the purpose of improving public awareness of the health risks associated with alcohol and cannabis consumption by youth and the abuse of alcohol and cannabis by adults in Washington state. The board's alcohol awareness program must cooperate with federal and state agencies, interested organizations, and individuals to effect an active public beverage alcohol awareness program. For the purposes of this subsection, "cannabis" has the meaning provided in RCW 69.50.101;

(7) Monitor and regulate the practices of licensees as necessary in order to prevent the theft and illegal trafficking of liquor pursuant to RCW 66.28.350;

(8) Perform all other matters and things, whether similar to the foregoing or not, to carry out the provisions of this title, and has full power to do each and every act necessary to the conduct of its regulatory functions, including all supplies procurement, preparation and approval of forms, and every other undertaking necessary to perform its regulatory functions whatsoever, subject only to audit by the state auditor. However, the board has no authority to regulate the content of spoken language on licensed premises where wine and other liquors are served and where there is not a clear and present danger of disorderly conduct being provoked by such language or to restrict advertising of lawful prices. [2022 c 16 § 46; 2015 2nd sp.s. c 4 § 601; 2014 c 63 § 3; 2012 c 2 § 107 (Initiative Measure No. 1183, approved November 8, 2011); (2011 1st sp.s. c 45 § 7 repealed by 2012 c 2 § 216 (Initiative Measure No. 1183)); (2011 c 186 § 2 expired December 1, 2012); 2005 c 151 § 3; 1997 c 228 § 1; 1993 c 25 § 1; 1986 c 214 § 2; 1983 c 160 § 1; 1975 1st ex.s. c 173 § 1; 1969 ex.s. c 178 § 1; 1963 c 239 § 3; 1935 c 174 § 10; 1933 ex.s. c 62 § 69; RRS § 7306-69.]

Intent—Finding—2022 c 16: See note following RCW 69.50.101.

Findings—Intent—Effective dates—2015 2nd sp.s. c 4: See notes following RCW 69.50.334.

Finding—Application—Rules—Effective date—Contingent effective date—2012 c 2 (Initiative Measure No. 1183): See notes following RCW 66.24.620.

Spirit sampling—Liquor store pilot project—2011 c 186: "(1) The liquor control board shall establish a pilot project to allow spirits sampling in state liquor stores as defined in *RCW 66.16.010 and contract stores as defined in RCW 66.04.010(11) for the purpose of promoting the sponsor's products. For purposes of this section, "sponsors" means: A domestic distiller licensed under RCW 66.24.140 or an accredited representative of a distiller, manufacturer, importer, or distributor of spirituous liquor licensed under RCW 66.24.310.

(a) The pilot project shall consist of thirty locations with at least six samplings to be conducted at each location between September 1, 2011, and September 1, 2012. However, no state liquor store or contract store may hold more than one spirits sampling per week during the project period.

(b) The pilot project locations shall be determined by the board. Before the board determines which state liquor stores or contract stores will be eligible to participate in the sampling pilot, it shall give:

(i) Due consideration to the location of the state liquor store or contract store with respect to the proximity of places of worship, schools, and public institutions;

(ii) Due consideration to motor vehicle accident data in the proximity of the state liquor store or contract store; and

(iii) Written notice by certified mail of the proposed spirits sampling to places of worship, schools, and public institutions within five hundred feet of the liquor store proposed to offer spirits sampling.

(c) Sampling must be conducted under the following conditions:

(i) Sampling may take place only in an area of a state liquor store or contract store in which access to persons under twenty-one years of age is prohibited;

(ii) Samples may be provided free of charge;

(iii) Only persons twenty-one years of age or over may sample spirits;

(iv) Each sample must be one-quarter ounce or less, with no more than one ounce of samples provided per person per day;

(v) Only sponsors may serve samples;

(vi) Any person involved in the serving of such samples must have completed a mandatory alcohol server training program;

(vii) No person who is apparently intoxicated may sample spirits;

(viii) The product provided for sampling must be available for sale at the state liquor store or contract store where the sampling occurs at the time of the sampling; and

(ix) Customers must remain on the state liquor store or contract store premise while consuming samples.

(d) The liquor control board may prohibit sampling at a pilot project location that is within the boundaries of an alcohol impact area recognized by resolution of the board if the board finds that the sampling activities at the location are having an adverse effect on the reduction of chronic public inebriation in the area.

(e) All other criteria needed to establish and monitor the pilot project shall be determined by the board.

(f) The board shall report on the pilot project to the appropriate committees of the legislature by December 1, 2012. The board's report shall include the results of a survey of liquor store managers and contract liquor store managers.

(2) The liquor control board may adopt rules to implement this section." [2011 c 186 § 1.]

***Reviser's note:** RCW 66.16.010 was repealed by 2012 c 2 § 215 (Initiative Measure No. 1183).

Expiration date—2011 c 186: "This act expires December 1, 2012." [2011 c 186 § 5.]

Severability—1975 1st ex.s. c 173: "If any phrase, clause, subsection, or section of this 1975 amendatory act shall be declared unconstitutional or invalid by any court of competent jurisdiction, it shall be conclusively presumed that the legislature would have enacted this 1975 amendatory act without the phrase, clause, subsection, or section so held unconstitutional or invalid and the remainder of the act shall not be affected as a result of said part being held unconstitutional or invalid." [1975 1st ex.s. c 173 § 13.]

Effective date—1975 1st ex.s. c 173: "This 1975 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1975." [1975 1st ex.s. c 173 § 14.]

Severability—1963 c 239: See note following RCW 66.08.026.

Minors, access to tobacco, role of liquor and cannabis board: Chapter 70.155 RCW.

RCW 66.08.010 Title liberally construed. This entire title shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose. [1933 ex.s. c 62 § 2; RRS § 7306-2.]

ARTICLE XX PUBLIC HEALTH AND VITAL STATISTICS

Article XX Section 1 SECTION 1

BOARD OF HEALTH AND BUREAU OF VITAL STATISTICS. There shall be established by law a state board of health and a bureau of vital statistics in connection therewith, with such powers as the legislature may direct

RCW 43.20.050 Powers and duties of state board of health—Rule making—Delegation of authority—Enforcement of rules. (1) The state board of health shall provide a forum for the development of public health policy in Washington state. It is authorized to recommend to the secretary means for obtaining appropriate citizen and professional involvement in all public health policy formulation and other matters related to the powers and duties of the department. It is further empowered to hold hearings and explore ways to improve the health status of the citizenry.

In fulfilling its responsibilities under this subsection, the state board may create ad hoc committees or other such committees of limited duration as necessary.

(2) In order to protect public health, the state board of health shall:

(a) Adopt rules for group A public water systems, as defined in RCW 70A.125.010, necessary to assure safe and reliable public drinking water and to protect the public health. Such rules shall establish requirements regarding:

(i) The design and construction of public water system facilities, including proper sizing of pipes and storage for the number and type of customers;

(ii) Drinking water quality standards, monitoring requirements, and laboratory certification requirements;

(iii) Public water system management and reporting requirements;

(iv) Public water system planning and emergency response requirements;

(v) Public water system operation and maintenance requirements;

(vi) Water quality, reliability, and management of existing but inadequate public water systems; and

(vii) Quality standards for the source or supply, or both source and supply, of water for bottled water plants;

(b) Adopt rules as necessary for group B public water systems, as defined in RCW 70A.125.010. The rules shall, at a minimum, establish requirements regarding the initial design and construction of a public water system. The state board of health rules may waive some or all requirements for group B public water systems with fewer than five connections;

(c) Adopt rules and standards for prevention, control, and abatement of health hazards and nuisances related to the disposal of human and animal excreta and animal remains;

(d) Adopt rules controlling public health related to environmental conditions including but not limited to heating, lighting, ventilation, sanitary facilities, and cleanliness in public facilities including but not limited to food service establishments, schools, recreational facilities, and transient accommodations;

(e) Adopt rules for the imposition and use of isolation and quarantine;

(f) Adopt rules for the prevention and control of infectious and noninfectious diseases, including food and vector borne illness, and rules governing the receipt and conveyance of remains of deceased persons, and such other sanitary matters as may best be controlled by universal rule; and

(g) Adopt rules for accessing existing databases for the purposes of performing health related research.

(3) The state board shall adopt rules for the design, construction, installation, operation, and maintenance of those

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on-site sewage systems with design flows of less than three thousand five hundred gallons per day.

(4) The state board may delegate any of its rule-adopting authority to the secretary and rescind such delegated authority.

(5) All local boards of health, health authorities and officials, officers of state institutions, police officers, sheriffs, constables, and all other officers and employees of the state, or any county, city, or township thereof, shall enforce all rules adopted by the state board of health. In the event of failure or refusal on the part of any member of such boards or any other official or person mentioned in this section to so act, he or she shall be subject to a fine of not less than fifty dollars, upon first conviction, and not less than one hundred dollars upon second conviction.

(6) The state board may advise the secretary on health policy issues pertaining to the department of health and the state. [2021 c 65 § 37; 2011 c 27 § 1; 2009 c 495 § 1; 2007 c 343 § 11; 1993 c 492 § 489; 1992 c 34 § 4. Prior: 1989 1st ex.s. c 9 § 210; 1989 c 207 § 1; 1985 c 213 § 1; 1979 c 141 § 49; 1967 ex.s. c 102 § 9; 1965 c 8 § 43.20.050; prior: (i) 1901 c 116 § 1; 1891 c 98 § 2; RRS § 6001. (ii) 1921 c 7 § 58; RRS § 10816.]

Explanatory statement—2021 c 65: See note following RCW 53.54.030.

Effective date—2009 c 495: "Except for section 9 of this act, this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 14, 2009]." [2009 c 495 § 17.]

Findings—1993 c 492: "The legislature finds that our health and financial security are jeopardized by our ever increasing demand for health care and by current health insurance and health system practices. Current health system practices encourage public demand for unneeded, ineffective, and sometimes dangerous health treatments. These practices often result in unaffordable cost increases that far exceed ordinary inflation for essential care. Current total health care expenditure rates should be sufficient to provide access to essential health care interventions to all within a reformed, efficient system.

The legislature finds that too many of our state's residents are without health insurance, that each year many individuals and families are forced into poverty because of serious illness, and that many must leave gainful employment to be eligible for publicly funded medical services. Additionally, thousands of citizens are at risk of losing adequate health insurance, have had insurance canceled recently, or cannot afford to renew existing coverage.

The legislature finds that businesses find it difficult to pay for health insurance and remain competitive in a global economy, and that individuals, the poor, and small businesses bear an inequitable health insurance burden.

The legislature finds that persons of color have significantly higher rates of mortality and poor health outcomes, and substantially lower numbers and percentages of persons covered by health insurance than the general population. It is intended that chapter 492, Laws of

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1993 make provisions to address the special health care needs of these racial and ethnic populations in order to improve their health status.

The legislature finds that uncontrolled demand and expenditures for health care are eroding the ability of families, businesses, communities, and governments to invest in other enterprises that promote health, maintain independence, and ensure continued economic welfare. Housing, nutrition, education, and the environment are all diminished as we invest ever increasing shares of wealth in health care treatments.

The legislature finds that while immediate steps must be taken, a long-term plan of reform is also needed." [1993 c 492 § 101.]

Intent—1993 c 492: "(1) The legislature intends that state government policy stabilize health services costs, assure access to essential services for all residents, actively address the health care needs of persons of color, improve the public's health, and reduce unwarranted health services costs to preserve the viability of nonhealth care businesses.

(2) The legislature intends that:

(a) Total health services costs be stabilized and kept within rates of increase similar to the rates of personal income growth within a publicly regulated, private marketplace that preserves personal choice;

(b) State residents be enrolled in the certified health plan of their choice that meets state standards regarding affordability, accessibility, cost-effectiveness, and clinical efficaciousness;

(c) State residents be able to choose health services from the full range of health care providers, as defined in RCW 43.72.010(12), in a manner consistent with good health services management, quality assurance, and cost effectiveness;

(d) Individuals and businesses have the option to purchase any health services they may choose in addition to those included in the uniform benefits package or supplemental benefits;

(e) All state residents, businesses, employees, and government participate in payment for health services, with total costs to individuals on a sliding scale based on income to encourage efficient and appropriate utilization of services;

(f) These goals be accomplished within a reformed system using private service providers and facilities in a way that allows consumers to choose among competing plans operating within budget limits and other regulations that promote the public good; and

(g) A policy of coordinating the delivery, purchase, and provision of health services among the federal, state, local, and tribal governments be encouraged and accomplished by chapter 492, Laws of 1993.

(3) Accordingly, the legislature intends that chapter 492, Laws of 1993 provide both early implementation measures and a process for overall reform of the health services system." [1993 c 492 § 102.]

Short title—Savings—Reservation of legislative power—Effective dates—1993 c 492: See RCW 43.72.910 through 43.72.915.

Severability—1992 c 34: See note following RCW 69.07.170.

Effective date—Severability—1989 1st ex.s. c 9: See RCW 43.70.910 and 43.70.920.

Savings—1985 c 213: "This act shall not be construed as affecting any existing right acquired or liability or obligation incurred under the sections amended or repealed in this act or under any rule, regulation, or order adopted under those sections, nor as affecting any proceeding instituted under those sections." [1985 c 213 § 31.]

Effective date—1985 c 213: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect June 30, 1985." [1985 c 213 § 33.]

Severability—1967 ex.s. c 102: See note following RCW 43.70.130.

Rules and regulations—Visual and auditory screening of pupils: RCW 28A.210.020.

RCW 70.05.070 Local health officer—Powers and duties. The local health officer, acting under the direction of the local board of health or under direction of the administrative officer appointed under RCW 70.05.040 or 70.05.035, if any, shall:

(1) Enforce the public health statutes of the state, rules of the state board of health and the secretary of health, and all local health rules, regulations and ordinances within his or her jurisdiction including imposition of penalties authorized under RCW 70A.125.030 and 70A.105.120, the confidentiality provisions in RCW 70.02.220 and rules adopted to implement those provisions, and filing of actions authorized by RCW 43.70.190;

(2) Take such action as is necessary to maintain health and sanitation supervision over the territory within his or her jurisdiction;

(3) Control and prevent the spread of any dangerous, contagious or infectious diseases that may occur within his or her jurisdiction;

(4) Inform the public as to the causes, nature, and prevention of disease and disability and the preservation, promotion and improvement of health within his or her jurisdiction;

(5) Prevent, control or abate nuisances which are detrimental to the public health;

(6) Attend all conferences called by the secretary of health or his or her authorized representative;

(7) Collect such fees as are established by the state board of health or the local board of health for the issuance or renewal of licenses or permits or such other fees as may be authorized by law or by the rules of the state board of health;

(8) Inspect, as necessary, expansion or modification of existing public water systems, and the construction of new public water systems, to assure that the expansion, modification, or construction conforms to system design and plans;

(9) Take such measures as he or she deems necessary in order to promote the public health, to participate in the establishment of health educational or training activities, and to authorize the attendance of employees of the local health department or individuals engaged in community health programs related to or part of the programs of the local health department. [2020 c 20 § 1066; 2013 c 200 § 26; 2007 c 343 § 10; 1999 c 391 § 5; 1993 c 492 § 239; 1991 c 3 § 309; 1990 c 133 § 10; 1984 c 25 § 7; 1979 c 141 § 80; 1967 ex.s. c 51 § 12.]

Effective date—2013 c 200: See note following RCW 70.02.010.

Findings—Purpose—1999 c 391: See note following RCW 70.05.180.

Findings—Intent—1993 c 492: See notes following RCW 43.20.050.

Short title—Savings—Reservation of legislative power—Effective dates—1993 c 492: See RCW 43.72.910 through 43.72.915.

Findings—Severability—1990 c 133: See notes following RCW 36.94.140.

WAC 246-100-006 Purpose. The following rules and regulations are adopted under the authority of chapter 43.20 RCW to protect the health and well-being of the public by controlling communicable and certain other diseases.

[Statutory Authority: RCW 43.20.050. WSR 91-02-051 (Order 124B), recodified as § 246-100-006, filed 12/27/90, effective 1/31/91; WSR 87-11-047 (Order 302), § 248-100-006, filed 5/19/87.]

RCW 70.26.010 Findings—Intent. The legislature finds that:

(1) Pandemic influenza is a global outbreak of disease that occurs when a new virus appears in the human population, causes serious illness, and then spreads easily from person to person.

(2) Historically, pandemic influenza has occurred on average every thirty years. Most recently, the Asian flu in 1957-58 and the Hong Kong flu in 1968-69 killed seventy thousand and thirty-four thousand, respectively, in the United States.

(3) Another influenza pandemic could emerge with little warning, affecting a large number of people. Estimates are that another pandemic influenza would cause more than two hundred thousand deaths in our country, with as many as five thousand in Washington. Our state could also expect ten thousand to twenty-four thousand people needing hospital stays, and as many as a million people requiring outpatient visits. During a severe pandemic these numbers could be much higher. The economic losses could also be substantial.

(4) The current Avian or bird flu that is spreading around the world has the potential to start a pandemic. There is yet no proven vaccine, and antiviral medication supplies are limited and of unknown effectiveness against a human version of the virus, leaving traditional public health measures as the only means to slow the spread of the disease. Given the global nature of a pandemic, as much as possible, the state must be able to respond assuming only limited outside resources and assistance will be available.

(5) An effective response to pandemic influenza in Washington must focus at the local level and will depend on preestablished partnerships and collaborative planning on a range of best case and worst case scenarios. It will require flexibility and real-time decision making, guided by accurate information. It will also depend on a well-informed public that understands the dangers of pandemic influenza and the steps necessary to prevent the spread of the disease.

(6) Avian flu is but one example of an infectious disease that, were an outbreak to occur, could pose a significant statewide health hazard. As such, preparation for pandemic flu will also enhance the capacity of local public health jurisdictions to respond to other emergencies.

It is therefore the intent of the legislature that adequate pandemic flu preparedness and response plans be developed and implemented by local public health jurisdictions statewide in order to limit the number of illnesses and deaths, preserve the continuity of essential government and other community services, and minimize social disruption and economic loss in the event of an influenza pandemic. [2006 c 63 § 1.]

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RCW 70.26.020 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Department" means the department of health.

(2) "Local health jurisdiction" means a local health department as established under chapter 70.05 RCW, a combined city-county health department as established under chapter 70.08 RCW, or a health district established under chapter 70.05 or 70.46 RCW.

(3) "Secretary" means the secretary of the department of health.
[2006 c 63 § 2.]

RCW 43.70.200 Enforcement of health laws and state or local rules and regulations upon request of local health officer. Upon the request of a local health officer, the secretary of health is hereby authorized and empowered to take legal action to enforce the public health laws and rules and regulations of the state board of health or local rules and regulations within the jurisdiction served by the local health department, and may institute any civil legal proceeding authorized by the laws of the state of Washington, including a proceeding under Title 7 RCW. [1990 c 133 § 5; 1989 1st ex.s. c 9 § 259; 1979 c 141 § 56; 1967 ex.s. c 102 § 6. Formerly RCW 43.20A.655 and 43.20.180.]

Findings—Severability—1990 c 133: See notes following RCW 36.94.140.

Severability—1967 ex.s. c 102: See note following RCW 43.70.130.

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RCW 43.70.190 Violations—Injunctions and legal proceedings authorized. The secretary of health or local health officer may bring an action to enjoin a violation or the threatened violation of any of the provisions of the public health laws of this state or any rules or regulation made by the state board of health or the department of health pursuant to said laws, or may bring any legal proceeding authorized by law, including but not limited to the special proceedings authorized in Title 7 RCW, in the superior court in the county in which such violation occurs or is about to occur, or in the superior court of Thurston county. Upon the filing of any action, the court may, upon a showing of an immediate and serious danger to residents constituting an emergency, issue a temporary injunctive order ex parte. [1990 c 133 § 3; 1989 1st ex.s. c 9 § 258; 1979 c 141 § 55; 1967 ex.s. c 102 § 5. Formerly RCW 43.20A.650 and 43.20.170.]

Findings—Severability—1990 c 133: See notes following RCW 36.94.140.

Severability—1967 ex.s. c 102: See note following RCW 43.70.130.

A -000035

RCW 43.70.095 Civil fines. This section governs the assessment of a civil fine against a person by the department. This section does not govern actions taken under chapter 18.130 RCW.

(1) The department shall give written notice to the person against whom it assesses a civil fine. The notice shall state the reasons for the adverse action. The notice shall be personally served in the manner of service of a summons in a civil action or shall be given in an other [another] manner that shows proof of receipt.

(2) Except as otherwise provided in subsection (4) of this section, the civil fine is due and payable twenty-eight days after receipt. The department may make the date the fine is due later than twenty-eight days after receipt. When the department does so, it shall state the effective date in the written notice given the person against whom it assesses the fine.

(3) The person against whom the department assesses a civil fine has the right to an adjudicative proceeding. The proceeding is governed by the Administrative Procedure Act, chapter 34.05 RCW. The application must be in writing, state the basis for contesting the fine, include a copy of the adverse notice, be served on and received by the department within twenty-eight days of the person's receiving the notice of civil fine, and be served in a manner which shows proof of receipt.

(4) If the person files a timely and sufficient appeal, the department shall not implement the action until the final order has been served. The presiding or reviewing officer may permit the department to implement part or all of the action while the proceedings are pending if the appellant causes an unreasonable delay in the proceedings or for other good cause. [1991 c 3 § 378.]

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RCW 34.05.350 Emergency rules and amendments. (1) If an agency for good cause finds:

(a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest;

(b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule; or

(c) In order to implement the requirements or reductions in appropriations enacted in any budget for fiscal year 2009, 2010, 2011, 2012, 2013, or in an omnibus transportation appropriations act for the 2021-2023 biennium related to setting toll rates or ferry fares, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency,

the agency may dispense with those requirements and adopt, amend, or repeal the rule on an emergency basis. The agency's finding and a concise statement of the reasons for its finding shall be incorporated in the order for adoption of the emergency rule or amendment filed with the office of the code reviser under RCW 34.05.380 and with the rules review committee.

(2) An emergency rule adopted under this section takes effect upon filing with the code reviser, unless a later date is specified in the order of adoption, and may not remain in effect for longer than one hundred twenty days after filing. Identical or substantially similar emergency rules may not be adopted in sequence unless conditions have changed or the agency has filed notice of its intent to adopt the rule as a permanent rule, and is actively undertaking the appropriate procedures to adopt the rule as a permanent rule. This section does not relieve any agency from compliance with any law requiring that its permanent rules be approved by designated persons or bodies before they become effective.

(3) Within seven days after the rule is adopted, any person may petition the governor requesting the immediate repeal of a rule adopted on an emergency basis by any department listed in RCW 43.17.010. Within seven days after submission of the petition, the governor shall either deny the petition in writing, stating his or her reasons for the denial, or order the immediate repeal of the rule. In ruling on the petition, the governor shall consider only whether the conditions in subsection (1) of this section were met such that adoption of the rule on an emergency basis was necessary. If the governor orders the repeal of the emergency rule, any sanction imposed based on that rule is void. This subsection shall not be construed to prohibit adoption of any rule as a permanent rule. [2021 c 333 § 717; 2011 1st sp.s. c 2 § 1; 2009 c 559 § 1; 1994 c 249 § 3; 1989 c 175 § 10; 1988 c 288 § 309; 1981 c 324 § 4; 1977 ex.s. c 240 § 8; 1959 c 234 § 3. Formerly RCW 34.04.030.]

Effective date--2021 c 333: See note following RCW 43.19.642.

Effective date--2011 1st sp.s. c 2: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions,

and takes effect immediately [May 31, 2011]." [2011 1st sp.s. c 2 § 2.]

Effective date—2009 c 559: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 19, 2009]." [2009 c 559 § 2.]

Severability—Application—1994 c 249: See notes following RCW 34.05.310.

Effective date—1989 c 175: See note following RCW 34.05.010.

Legislative affirmation—Severability—1981 c 324: See notes following RCW 34.05.010.

Effective date—1977 ex.s. c 240: See RCW 34.08.905.

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LAW OFFICE OF DANIEL J. NEILSEN, PLLC

January 31, 2024 - 11:47 AM

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