No. 45565-0-II

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

THE CITY OF BURLINGTON

v.

THE WASHINGTON STATE LIQUOR CONTROL BOARD, HAKAM SINGH AND JANE DOE SINGH, and HK INTERNATIONAL, LLC.

RESPONSE BRIEF OF RESPONDENTS HAKAM SINGH and HK INTERNATIONAL, LLC.

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I. Counterstatement of the Case

HK International, LLC, operates a convenience store in the City of Burlington under the name, "Skagit Big Mini Mart." Hakam Singh is the owner of HK International.

HK International was the successful bidder in the auction which closed on April 20, 2012, for State Store #152 within the City of Burlington. AR 14. The private landlord of the premises of State Store #152 refused to lease the premises to Hakam Singh, the owner of HK International, LLC. AR 23. Accordingly, Hakam Singh notified the Board on May 7, 2012 that he wished to move the location of the "operating right" about one-half mile from the location of the former state store to the location of his "Skagit Big Mini Mart." AR 23.

1. Singh's History of Being Licensed Without Violations

HK International (owned by Hakam Singh) applied for a spirits retail license at the new location of the store, where it had held licenses to sell beer and wine since 2003. AR 23. As part of the consideration of the application for a spirits retail license, the Board examined the history of the applicant, and the history of the location, with regard to liquor and tobacco sales. The most recent violation for a sale of alcohol to a person under age 21 occurred more than four years prior to the decision to grant

the application for the spirits retail license. AR 43-48. Despite close attention from the Board's enforcement staff, there had been no more recent violations. The record further showed that the Liquor Control Board had conducted recent "compliance checks" at the location and the licensee refused to sell liquor to the underage operative used by the Board. AR 48.

2. The City Provided No Facts to Support its Vague Assertions of Public Safety Concerns

The Board notified the City of HK International's request for a spirits retail license at the new location by "Notice of Liquor License Application" dated May 14, 2012. AR 36. The Notice of Liquor License Application states at the bottom under paragraph 4, "If you disapprove, per RCW 66.24.010(8) you MUST attach a letter to the Board detailing the reason(s) for the objection and a statement of all facts on which your objection is based" (emphasis in original). AR 36. The City objected to the location and submitted a three-page letter dated May 31, 2012. AR 37-39.

The City focused its letter-objection on the issue of the legality of the request, not on any public safety concerns it may have harbored regarding the location. Only on the final page of the letter did the City briefly address such concerns. In spite of the Board's Notice that the City

"MUST attach a letter to the Board detailing the reason(s) for the objection and a statement of all facts on which your objection is based," the City chose to include only vague and unsubstantiated allegations with no supporting documentation:

> Moreover, we also observe that the proposed location is the site of numerous activities requiring law enforcement involvement. The Burlington Police Department has logged many calls to the proposed license location, reflecting the high level of crime that occurs at the licensee's business.
>
> Finally, we believe a liquor store is incompatible with the land use in the area, and particularly incompatible with the Burlington High School, which is situated just beyond 500 feet from the entrance to the proposed location. High-school age children frequent this area on their way to or from school, and many purchase soft drinks, candy, ice cream, and other products typically available at a convenience store. Adding liquor to the products sold at this location will necessarily bring children into frequent close contact with those individuals who commit the crimes that plague the Skagit big Mini-Mart. The City of Burlington thus objects to the proposed location. AR 39.

The Board also solicited input from Board employee Roxanne Johnson, who referenced an anonymous Investigative Aid who "says he knows kids who buy alcohol there all the time." AR 41. Ms. Johnson also stated on one afternoon she saw "a stream of kids from the high school go into the store," though Ms. Johnson admits she "didn't see any come out with beer." *Id.*

In short, Ms. Johnson's email contained only triple-hearsay in the first paragraph, and no personal observations in her second paragraph.

3. The Decision of the Board Shows the Licensing Director Carefully Considered the City's Objections

The Board's Licensing Director reviewed the report of the Licensing Division staff (AR 34-35) who investigated the application and the materials submitted with the application. The Licensing Director provided the City of Burlington (hereafter "The City") with a "Statement of Intent to Approve Liquor License Over the Objection of the City of Burlington" dated August 31, 2012. AR 29-31.

The Statement of Intent took into account the issues raised by the City relating to public safety, but found, "In examining the record, there have been no liquor violations at the existing grocery store licensed premise for the past four years and several compliance checks conducted by the Liquor Control Board resulted in no sale. The City did not demonstrate any conduct that constitutes chronic illegal activity as defined by RCW 66.24.010(12) at this premise. The City of Burlington's objection does not conclusively link the licensee and areas under the licensee's control to the information cited in the city's objection." AR 30, paragraphs 3.2, 3.3 and 3.5.

The handwritten decision of the Board Director states in pertinent part, "City's request for an adjudicative hearing is denied as they did not demonstrate conduct related to public safety per WAC 314-07-121(4)." AR 35.

The Board subsequently issued its "Final Order of the Board" approving HK International's license application. AR 49-51. The Final Order offered the City the ability to request reconsideration of the Final Order: "Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested." AR 50.

4. The City Did Not Seek Reconsideration or Seek to Supplement the Record Before the Board or the Superior Court

The City chose to not file a petition for reconsideration or to submit additional documentation in an attempt to "conclusively link the licensee and areas under the licensee's control to the information cited in the city's objection," or to "demonstrate conduct related to public safety per WAC 314-07-121(4)." AR 35.

Instead, the City appealed the Board's decision to the Thurston County Superior Court, electing to rely on the administrative record as their basis for standing on appeal.

Here it should be noted that the City is granted standing at the administrative level by statute. RCW 66.24.010(8). The same is not true, however, on appeal of the administrative decision.

On September 11, 2012, the City filed its Petition for Review with the Thurston County Superior Court, and thereafter filed its Opening Brief on March 5, 2013. CP 5 and 22.

5. The City was Aware of Its Obligation to Establish Standing in its Opening Brief but Relied Solely on Administrative Record.

The City was aware of its legal obligation to establish standing for the appeal, and addressed the issue extensively in its Opening Brief to the Superior Court. CP 22, pp. 13-15. The City, however, did not submit any additional evidence in support of its standing argument, but chose to rely on the administrative record filed by the Board. The City did not seek to supplement the administrative records filed with the court.

The *Board's Response Brief*, dated March 22, 2013, included a lengthy section challenging the City's standing to appeal the Board's grant of the license. CP 24, pp. 15-19.

6. The City Did Not Seek to Supplement the Record to Show Standing with its Reply Brief.

In its Reply Brief, dated April 4, 2013, the City argued that it did have standing to bring the action, but once again chose to not introduce

any additional evidence but to rely solely on the administrative record on file with the court. CP 26, pp. 12-13.

7. The City Did Not Seek to Supplement the Record Until Two Weeks After Oral Argument Before the Superior Court.

Hearing on the City's appeal was held July 19, 2013 before the Honorable Christine Schaller. After hearing argument from the parties, Judge Schaller directed counsel for the City to restrict its arguments to standing, advising that if she did not find the City had standing, she was not going to reach the other issues. 7/19/13 Hearing, RP 37. Judge Schaller then gave all parties the opportunity to provide additional "briefing" of no more than five pages on the issue of standing, provided a deadline for the submission of such briefing, and reserved her final ruling until after such submissions were made. It is important Judge Schaller be quoted in her entirety rather than cherry picking only certain phrases which may give an incorrect impression:

> All right. Thank you. Even if I wanted to, I could not rule because it is noon. I think that by my questions and perhaps from my comments in general the way I see this case is probably clear and the issue that the Court is having difficulty with is standing. I would not be ruling today because I want to further look at this issue based upon some of the arguments made in court today that has made me look at this differently than I was approaching it prior to the hearing today, which is why we have argument.

> I am going to allow, if any party wants to, to supplement the record on the issue of standing five pages per entity that is before the Court. You are not required to, but I want to give the parties an opportunity to do that. If you are going to supplement the record on the issue of standing **on the briefing**, that would need to be done by a week from today, which would be July 26th. I will issue a ruling by the close of business on July 31st. 7/19/13 Hearing, RP 40-41. (Emphasis added.) (The deadline for submitting additional briefing was subsequently changed to August 2nd at the request of counsel for the City of Burlington. *Id.*)

The City states it misunderstood Judge Schaller's invitation to supply additional "materials" on the issue of standing as an open door to file evidentiary declarations in support of the City's standing. This was clearly not Judge Schaller's intent, as manifested by the fact she specifically referred to "the issue of standing on the briefing." Making Judge Schaller's intent even more clear: (1) the supplemental briefing was limited to five pages; (2) she made the same invitation to the Board and to HK International; and, (3) no mention was made of supplementation by means of additional evidence or affidavits.

The City at no point requested clarification from Judge Schaler, but instead seized upon its misunderstanding to file 9-pages of declarations from three persons on August 2, 2013, *two weeks* after the July 19, 2013 hearing on the appeal. CP 32-37. The City submitted no additional briefing to the court on August 2, 2013.

8. The Superior Court Struck the City's Late-Filed Declarations as Untimely.

On August 5, 2013, Respondents filed objections to the City's filing of extra-record declarations and moved to strike them as too late, as improper, and as an attempt to supplement the record without leave of court (citing RCW 34.05.562 and RCW 34.05.558 for when a court may receive evidence in a case to be decided on the administrative record). CP 39-40.

The City filed a Response on Petitioner's Motion to Strike (CP 41) and Respondents filed Reply Briefs. CP 43-44.

A hearing on the Motion to Strike the City's late-filed declarations was held on August 23, 2013, at which time Judge Schaller made it clear that she had not earlier extended an invitation to the City to submit late declarations in support of standing, but only to supply additional briefing and argument on the record already made by the City prior to the July 19, 2013 hearing at which the matter was argued before her:

> At the conclusion of the hearing on July 19th, I told the parties that, initially, I had been prepared to rule from the bench but that, based upon arguments to the court, I wanted to further consider the issue of standing, and I invited each of the three parties to provide supplemental briefing, up to five pages each, on that issue.
>
> And insomuch as the Court may have caused any confusion, I apologize for that, but it was never the intent of the Court that there

be supplemental declarations submitted at that point. 8-23-13 Hearing, RP 3.

Judge Schaller therefore granted the motions to strike the late declarations in the following carefully considered and balanced language:

> [A]s I've looked at this case and the issue of standing being challenged from the very beginning, it was a question in my mind, well, how can the City of Burlington prove standing if they can't supplement the record, because they're not trying to prove standing for a Court's review when they are submitting their information to the Liquor Control Board.
>
> And I think I better now understand really how that process is supposed to happen, and I'm going to grant the motion to strike. And that is because, even before I read the case that certainly isn't binding on the court, it's consistent with what I'd already decided I was going to rule, and that's the *Sierra Club vs. EPA* case [I.e., *Sierra Club v. Environmental Protection Agency*, 292 F.3d 895, 900 (D.C. Cir. 2002)] that was cited by Mr. Volluz in his supplemental briefing. That's consistent with what I ultimately concluded. And that is, initially, the City knew that standing is a requirement of the Administrative Law Review process when the Court is going to review an agency's decision. Maybe that's because it's addressed in their opening brief.
>
> Clearly, the City believed that they had sufficient evidence at that time to support the issue of standing and that, if they didn't, they would have filed additional declarations to supplement the record on the issue of standing as it relates to the matter before the Court. And if the respondents had objected, had the City done that, I would have denied any objections, and I would have considered that information.
>
> But in this case, it went even further than that, because the response filed in this matter clearly argued first and foremost, I think, that the Court shouldn't get to the merits of the case because there is no standing, and there was quite a bit of information. And I believe Mr. Volluz said he drafted that portion of the brief. There was a big section on standing in the State's brief. And so the City

was well on notice at that point that the respondents believed that the Court did not have jurisdiction to hear this matter because the petitioners had no standing.

And contrary to the ruling in the *Sierra Club* case cited by Mr. Volluz, had the City at that point in their reply filed additional declarations with their reply brief, I would have considered those on the issue of standing above any objection, which I'm sure there would have been from the respondents, because, at that point, at least, it would be completely clear to the City that the issue of standing was a large issue that the Court was going to face.

And based upon all of that, I find it is too late for the City of Burlington to now supplement the record. And when I asked for supplementation, I was not inviting them to supplement factually the record; although, I believe they could have done that prior to our argument on July 19th. 8-23-13 Hearing RP 3-6.

9. Superior Court Ruled the City Did Not Establish Standing

Judge Schaller then announced that she would take the opportunity of the parties being present at the hearing on the Motion to Strike to announce orally her ruling on the appeal itself. Judge Schaller proceeded to carefully consider the evidence properly submitted and ruled that the City had not established standing to bring the action in Thurston County Superior Court and dismissed the City's appeal:

Standing, though, is the threshold question. And I can't make any rulings on the merits unless I find that there is standing. And I think it was well argued and well put that it is important to note that, just because someone is entitled to receive notice and object to something that an agency might do, that in and of itself does not then confer standing to bring an action for judicial review.

Under RCW 34.05.530, a person who is aggrieved or adversely affected by an agency action to have standing, there has to be three elements met: One, the agency action has prejudiced or is likely to prejudice that person; two, that the person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and three, a judgment in favor of that person would substantially eliminate or redress the prejudice to the person caused or likely to be caused by the agency action.

Burlington has argued that the agency action has prejudiced it or is likely to prejudice it. The City is entrusted with ensuring public safety, and part of that includes preventing minors from obtaining alcohol. They're also entrusted with fighting crime. The record contains very little information on standing in this issue. The record contains information that the convenience store location is in an area where there have been numerous activities requiring law enforcement to respond, that there have been calls to the police department in this area, and an argument that this reflects a high area of crime. Additionally, there's evidence in the record that this minimart is just outside 500 feet of a high school.

Of the three criteria, clearly, number two is met, and that is that the City is among those whose opinion was required to be considered by the Board, and that did happen in this matter.

The other two factors, which are factors one and three, are referred to sometimes as an "injury in fact" test. And it must be proven that the City has a real interest in or injury, and that the relief requested will redress the harm suffered as a result of the agency action. If it's a threatened injury and not a real injury—which is this case, it's a threatened injury—the City must demonstrate immediate, concrete and specific injury. And I do not recognize, I don't think standing is a really high burden to meet. But in this case, it simply has not been met, because there was no immediate, concrete or specific injury really that was argued or put into the record by the City, and the few statements that were made were really conjectural and hypothetical.

> And based upon that, I find the petitioner does not have standing, and, therefore, the petition must be dismissed. 8-23-13 Hearing, RP 15-17.

The City then appealed Judge Schaller's decision to the Court of Appeals.

II. Argument

Issue No. 1—*The reviewing court did not abuse its discretion in dismissing the City's appeal for lack of standing.*

The issue of the correct standard of review on appeal of Judge Schaller's decision may be a mixed question. It appears that two standards of review may be in play: (1) That de novo review is the correct standard in reviewing Judge Schaller's decision that the City failed to establish standing; and, (2) That abuse of discretion is the correct standard in reviewing Judge Schaller's decision to strike the City's late-filed declarations, and also to dismiss the City's appeal on that basis. *Sprague v. Sysco Corp.*, 97 Wn.App. 169, 171, 982 P.2d 1202 (1999) (holding that "[d]ecisions regarding application of civil rules are reviewed for abuse of discretion.") In *Stichting Ter Behartiging Van de Balangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schrieber*, the Second Circuit stated that an abuse of discretion standard applies to a "district court's application of the curative procedures set forth in that rule [FRCP 17(a)]" within the context of a motion to dismiss for lack of

standing, which motion is reviewed de novo. 407 F.3d 34, 43 (2nd Cir. 2005). The court noted that three other federal circuits have "uniformly held that abuse of discretion is the proper standard of review" to apply to whether dismissal is proper under the federal counterpart to our CR 17(a). *Id.*

The City claims it had standing to obtain judicial review of the agency action of the Board. But the City failed to establish the elements required by law to demonstrate that it had standing to receive the relief it requests in this action.

The City correctly notes that RCW 34.05.530 conveys standing upon those persons or entities that are "aggrieved or adversely affected" by an agency action. The City also correctly notes that Washington case law stands for the proposition that a person is aggrieved or adversely affected when (1) the agency action has prejudiced or is likely to prejudice that person; (2) that person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and (3) a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action. (See *Brief of Appellant*, 24-25.) The City, however, fails to

establish that it qualifies for standing under the first and third prongs of the above test.

Our Supreme Court has denominated the first and third prongs of the standing test as the "injury-in-fact" test. *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 327, 997 P.2d 360 (2000). In order to satisfy the prejudice requirement of the test, a person must allege facts demonstrating that he or she is "specifically and perceptibly harmed" by the agency decision. *Trepanier v. City of Everett*, 64 Wn.App. 380, 382-83, 824 P.2d 524 (1992). When, as here, the City alleges a *threatened* injury, as opposed to an existing injury, the person must demonstrate an "immediate, concrete, and specific injury to him or herself." *Id.*, 64 Wn.App. at 383, 824 P.2d 524 (1992). "If the injury is merely conjectural or hypothetical, there can be no standing." *Patterson v. Segale*, 171 Wn.App. 251, 254, 289 P.3d 657 (2012).

1. First and Third Prong (Injury-in-Fact Test)

The City fails to demonstrate prejudice under the First and Third Prong, or the "Injury-in-Fact Test." The City claims prejudice on the basis that a liquor enforcement officer had seen "a stream of kids from the high school go into the store," (*Brief of Appellant*, 35) which is unremarkable and not probative considering Respondents Hakam Singh and HK International operate a convenience store at the location. The presence of underage

persons in a store where they are legally permitted to enter (such as any grocery store, or, for that matter, the former state stores) is not a factor disqualifying the location from receiving a spirits retail license.

The liquor board's record of HK International's operation of the premises does not show a history of public safety concerns.--The City fails to reference the detailed "complete violation history" for the location, included in the record at AR 43-48. That history shows the location is subject to frequent premises checks by the liquor enforcement staff, and the enforcement staff has also conducted several "compliance checks" over the years. As recently as August 2, 2012, a little more than a month before the Board issued its order granting the license, the record shows that a compliance check was conducted, and no sale was made to the underage operative. In fact, the violation history for the location shows that, despite frequent premises checks by LCB staff (visits to the location by a liquor enforcement officer) and surveillance of the premises, in addition to attempts to make a "controlled buy" of liquor, the location had not been cited by the Board for a sale of liquor to an underage person since April, 2008.

The City quotes the opinion of the liquor enforcement officer that she "is concerned a spirits license for this premises is an invitation to add to

the serious problem of youth access to alcohol." *Brief of Appellant*, 35. Personal opinions of citizens do not constitute prejudice or likely prejudice to the City, regardless of whether the opinion is of a person who is employed as a liquor officer, and regardless of whether that opinion may be colored by the fact that the same liquor officer is also a parent. The City did not present any evidence to the Board that the City had a problem with youth access to alcohol, whether or not related to this particular location, but relied on the liquor enforcement officer's general statement, which could apply to the entire state, not exclusively within the City.

From this paucity of evidence, the City argues, "the City will be compelled by the WSLCB's decision to dedicate additional law enforcement resources to ensure that a convenience store selling liquor in close proximity to the City's high school does not result in youth obtaining liquor through theft or deception." (*Brief of Appellant*, 35.) There is no basis to believe that the City is likely (much less "be compelled") to dedicate any additional law enforcement resources to this convenience store as a result of the Board's decision to expand HK International's liquor license privileges at this location to include spirits. This is merely an assertion based on no evidence.

This is precisely the type of "conjectural or hypothetical" injury that our courts have found does not confer standing on a party.

The actual facts relating to the sale of liquor from the Singh store prior to the Board's issuance of the license, and which were specifically relied upon by the Board in the issuance of the license to Singh, are quite different. The facts are that the Singh store has been licensed as a grocery store at the same location "since 6/17/03 with no violations within the previous two year period." [1] AR 29. Further, The Board examined the record and found that "there have been no liquor violations at the existing grocery store licensed premise for the past four years and several compliance checks conducted by the Liquor Control Board resulted in no sale." AR 30.

There is no factual basis for the City's assertion that "the City will be compelled by the WSLCB's decision to dedicate additional law enforcement resources to ensure that a convenience store selling liquor in close proximity to the City's high school does not result in youth obtaining liquor through theft or deception."

[1] The previous two year period is referenced because in its rules for imposing penalties for violations of the liquor laws, the Board imposes a higher penalty if the licensee has had a violation of the same nature within the previous two years. If there is a violation and the next violation in the same category, such as sale to a minor, occurs more than 24 months after the earlier violation, the later violation is treated as a first violation. *See* WAC 314-29-015.

The City has provided no reason to expect that such a situation does not pertain to any other liquor store in the City of Burlington; or anywhere else in the country, for that matter. The assertion that the City is prejudiced by the Board's decision is supported by nothing but supposition, is "conjectural and hypothetical," and is contrary to the actual facts which the Board considered below, and which Judge Schaller considered on the City's initial appeal.

2. Third Prong—"Redressability"

Because the City fails to establish prejudice under the first prong, the City necessarily fails to meet the third prong, that a judgment in favor of the City would substantially eliminate or redress the prejudice to the City caused or likely to be caused by the agency action.

In order to meet the redressability requirement of the injury-in-fact test, the City must demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *KS Tacoma Holdings, LLC, v. Shoreline Hearings Bd.*, 166 Wn.App. 117, 129, 272 P.3d 876, *review denied*, 174 Wash.2d 1007, 278 P.3d 1112 (2012). This, the City has failed to do.

3. Second Prong (Zone of Interest)

As to the second prong ("Zone of Interest"), the City is correct that the Legislature "intended the City's interest to be considered by the agency when it took the action that is the subject of judicial review." *Brief of Appellant*, 25. "A party's standing to participate in an administrative proceeding, however, is not necessarily coextensive with standing to challenge an administrative decision in a court." *Patterson v. Segale*, 171 Wn.App. 251, 257, 289 P.3d 657 (2012), citing, e.g., *Med. Waste Associates, Inc. v. Maryland Waste Coalition, Inc.*, 327 Md. 596, 611, 612 A.2d 241, 249 (1992). Rather, it remains the task of the reviewing Court (in this case, Thurston County Superior Court) to determine whether the City had standing to seek judicial review of the Board's decision. *Patterson v. Segale*, 171 Wn.App. 251, 257, 289 P.3d 657 (2012).

Because the City failed to establish that it meets the "Injury-in-Fact" test of the first and third prongs, the City had no standing to challenge this administrative action of the Board before the Thurston County reviewing court. The reviewing court did not abuse its discretion in holding the City did not have standing in the action and in dismissing the City's action.

Issue No. 2—*The reviewing court did not abuse its discretion in striking the City's late-filed declarations.*

The City asserts the reviewing court invited the Parties to "supplement the **record**" to address the issue of standing "which the City understood to mean that it could submit briefing and evidence on this issue as allowed by case law." *Brief of Appellant*, 17. Respondent Liquor Control Board and Respondents Singh and HK International understood the Court to invite the Parties to submit supplemental **briefing** on the issue. See 7/19/13 Hearing, RP 40-41, quoted above.

The City contends that filing declarations two weeks after oral argument by the parties before the reviewing court is appropriate where standing was not at issue in earlier proceedings, and they should be allowed to establish standing anytime "during the briefing phrase." (*Brief of Appellant, 39*). The City cites to *Beck v. United States Dep't of Interior*, 982 F.2d 1332, 1340 (9th Cir. 1992) for the proposition that a court will accept appellant-intervenor's supplemental declarations alleging particularized injury because intervenors were not required to establish standing **until they appealed**." [*Brief of Appellant, 39*, citing *Northwest Envt'l Defense Ctr. V. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997).]

Even assuming this is correct, the City has known that standing to challenge the Board's decision would be an issue since it filed its Opening Brief on **March 5, 2013**, wherein the City devoted pages 13-15 to the issue of standing. CP 22. And yet the City did not file any additional declarations in order to support its argument but was content to rely on the record developed at the administrative level.

Respondents vigorously challenged the City's standing to bring this action in their Response Briefing filed **March 22, 2013** (CP 24, pp. 15-19).

In its Reply Brief filed **April 4, 2013**, the City once again argued that it had standing to bring this action. CP 24, 12-13. Yet the City still chose to not file any additional declarations in order to buttress their claims of standing. This concluded the "briefing phase" of the initial appeal to Thurston County Superior Court.

Argument on the initial appeal was held in due course on July 19, 2013, at which time all parties were present before the reviewing court in Olympia and a vigorous argument on the issue of standing took place.

At the end of the hearing, the Court invited the parties to submit up to five pages of supplemental briefing on the issue of standing. The City sought to take advantage of that invitation by submitting to the Court

additional declarations and evidence on the issue two weeks after oral argument.

This is far beyond the normal "briefing phrase" the City argues such supplementation of the record is permitted. It is also far beyond the requirement argued by the City that they were not required to prove standing "until they appealed." *Brief of Appellant*, 39.[2]

As set forth in *Sierra Club v. Environmental Protection Agency*:

> Henceforth, therefore, a petitioner whose standing is not self evident should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto *at the first appropriate point in the review proceeding.* In some cases that will be in response to a motion to dismiss for want of standing; in cases in which no such motion has been made, *it will be with the petitioner's opening brief—and not, as in this case, in reply to the brief of the respondent agency.* . . . Requiring the petitioner to establish its standing *at the outset of its case* is the most fair and orderly process by which to determine whether the petitioner has standing to invoke the jurisdiction of the court.

Sierra Club v. Environmental Protection Agency, 292 F.3d 895, 900 (D.C. Cir. 2002) (Emphasis added.)

Under the holding in *Sierra Club*, *supra*, the City should have established its standing by submission of "any affidavits or other

[2] It is clear from the 7/19/13 transcript that the superior court did not anticipate any additional opportunity for hearing, argument, or response to the supplemental briefing on standing. Judge Schaller offered the opportunity for additional briefing to be submitted by the parties, then indicated she would make her ruling.

evidence" filed no later than "with the petitioner's opening brief." It should not be done so late as "in reply to the brief of the respondent agency." This is because "[r]equiring the petitioner to establish its standing at the outset of its case is the most fair and orderly process by which to determine whether the petitioner has standing to invoke the jurisdiction of the court." *Sierra Club*, *supra*, at 900.

And yet, in spite of the *Sierra Club* case being brought to the attention of the reviewing court, Judge Schaller stated she would not have held the City to the strict *Sierra Club* requirement of filing "affidavits or other evidence" to establish standing with its opening brief, but would have extended her discretion to allow the City to have filed "affidavits and other evidence" as late as the City's reply brief. 8/23/13 Hearing, RP 5. But because the City waited to file "affidavits or other evidence" until after the briefing schedule was completed, and even after oral argument on appeal had been heard, it was simply "too late" for such filings to be considered timely. *Id.*

The City cites to *Holt v. U.S.*, 46 F.3d 1000, 1003 (10th Cir. 1995) for the proposition that, "The Tenth Circuit has held that a court has wide discretion to allow affidavits or other documents and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Brief*

of Appellant, 38, FN 28. But the contrary is also true that a court has wide discretion to *not* allow affidavits or other documents to resolve disputed jurisdictional facts where, as here, such documents were filed after oral argument was heard on the matter, and when no additional opportunity for response, much less argument, was anticipated.[3]

The City makes the same unavailing argument at *Brief of Appellant*, 39, arguing from a recent case where no abuse of discretion was found where a trial court considered supplemental declarations filed as part of a motion to reconsider a summary judgment decision. *Martini v. Post*, ___Wn.App.___, 313 P.3d 473 (2013). Leaving aside the fact that the City at no time filed a motion to reconsider in this matter, once again discretion to consider supplemental declarations is also discretion to not consider supplemental declarations. There is simply no abuse of discretion either way.

Accordingly, the City's attempt to file "affidavits or other evidence" at so late a date was properly denied by the reviewing court and Judge Schaller did not abuse her discretion in so doing.

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[3] The Board and HK International had only the opportunity to respond to the additional evidence the City submitted on August 2, 2013 because they brought the Motion to Strike. Without said motion, Respondents would have had no opportunity to discuss the additional evidence or argue about its sufficiency or relevance to the Board's decision.

Because the City did not demonstrate standing to appeal the administrative decision of the Board to Thurston County Superior Court, the City's arguments relating to whether WSLCB had authority to allow the relocation are moot. *Brief of Appellant*, 39-47.

Issue No. 3—*Respondent Moves to Strike Arguments Raised by City for the First Time on Appeal.*

In its *Brief of Appellant* filed with this Court, the City seeks to raise for the first time on appeal several arguments, all of which are objected to on the basis that they were not advanced before the initial reviewing court in Thurston County, nor before the Board at the underlying administrative proceeding.

1. The City argues for the first time on appeal that a "park" is a "public institution" under RCW 66.24.010(9)(a) and that no notice was provided to the City under this section. *Brief of Appellant*, 13. This argument was not raised below and should be stricken.
2. "The WSLCB did not consider the differences between the location of the former state store and the new Mini-Mart location adjacent to a high school, a park, and multi-family housing projects." *Brief of Appellant*, 16. The only issues brought before the reviewing court had to do with the high

school. Any additional arguments relating to a park and a multi-family housing project raised for the first time on appeal should be stricken.

3. The City also argues for the first time on appeal it has standing because of its "unique role as a general purpose local government with police powers" *Brief of Appellant*, 27; "the associational standing of a variety of groups to obtain judicial review of administrative decision, including unions and associations" (*Brief of Appellant*, 28-29), that "a failure of an agency to comply with procedural requirements alone establishes sufficient injury to confer standing" (*Brief of Appellant*, 29), that "[r]elief is available if he (sic) agency acted in an 'unconstitutional' or 'arbitrary or capricious' fashion" (*Brief of Appellant*, 30), that "the City is 'substantially prejudiced' if it (sic) denied the ability to have judicial review" of the Board's administrative decision (*Brief of Appellant*, 31); that had the Board granted the City's request for an administrative hearing, "the City would have had the opportunity to present evidence, examine, and cross examine witness (sic), which would have created a sufficient record to

demonstrate" injury-in-fact and therefore standing (*Brief of Appellant*, 31), and that the "denial of a requested hearing coupled with the prejudice to the City from having its ability to obtain judicial review of agency action is a denial of procedural due process" *Brief of Appellant*, 31-36.

The City made none of these arguments in front of the reviewing Thurston County Superior Court, should not be allowed to raise these arguments for the first time on appeal to this Court, and these arguments should be stricken from the Brief of Appellant. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

III. Conclusion

The City failed to establish it had standing to bring its appeal of the Board's administrative level in this matter. Through the entirety of the "briefing phase" on appeal, the City elected to rest on the record developed at the administrative proceeding to establish standing; this in spite of the fact the City knew, or should have known, that it had the duty on appeal to establish its standing to do so. The City failed to supply any supplemental declarations to establish standing on appeal with its Opening Brief in the Thurston County reviewing court, even though the City addressed the issue of standing therein. The City elected to file no supplemental

declarations to establish standing with its Reply Brief before the reviewing court.

Only after the briefing phase was concluded and oral argument completed, did the City seek to file additional declarations two-weeks after oral argument.

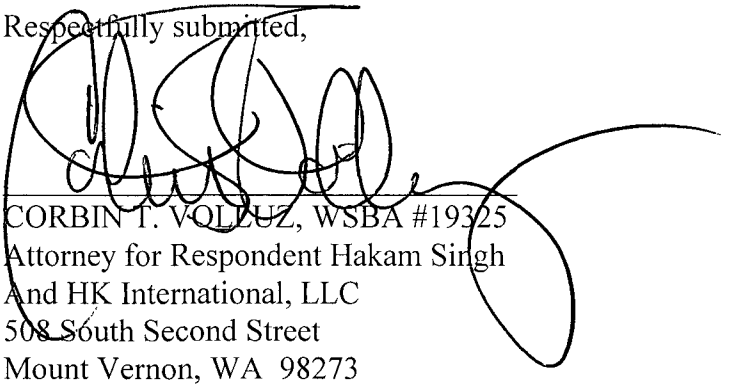
Given these facts, Judge Schaller of the reviewing court did not abuse her discretion in striking the City's late-filed declaration.

Judge Schaller of the reviewing court did not abuse her discretion in finding the City had no standing to bring the action and in dismissing the City's case.

The Court of Appeals should affirm Judge Schaller of the reviewing court in these decisions.

DATED this 24 day of March, 2014.

Respectfully submitted,



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STATE OF WASHINGTON COURT OF APPEALS
DIVISION 2

THE CITY OF BURLINGTON, Appellant, v. WASHINGTON STATE LIQUOR CONTROL BOARD; HAKAM SINGH; and HK INTERNATIONAL, LLC, Respondents.	COA No: 45565-0-II **DECLARATION OF SERVICE**

TO: THE CLERK OF THE COURT

I, Corbin T. Volluz, declare under penalty of perjury under the laws of the state of Washington that I have placed in the United States Mail on the below date with sufficient postage affixed copies of the Response Brief of Respondents Hakam Singh and HK International, LLC:

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STATE OF WASHINGTON

Signed this 24 day of March, 2014 at Mount Vernon, Washington.

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