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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 342026

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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BOTANY UNLIMITED DESIGN AND SUPPLY, LLC,

Appellant,

v.

STATE OF WASHINGTON, LIQUOR AND CANNABIS BOARD,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The Administrative Procedure Act (APA) requires that a petition for judicial review of an agency order be served on the agency within 30 days after service of the final order. RCW 34.05.542(2). Appellant Botany Unlimited Design and Supply (Botany) sought judicial review of a final order of the Liquor and Cannabis Board (Board), but failed to serve the Board with its Petition for Judicial Review (Petition) within 30 days as required by the APA. Botany has yet to serve the Board with the Petition for Judicial Review. Franklin County Superior Court dismissed Botany's Petition for failing to timely invoke the appellate jurisdiction of the court under the APA.

Botany concedes that it failed to serve the Petition for Judicial Review on the Board. Despite that concession, however, Botany asserts that the superior court erred by not accepting its argument that the timely filed Emergency Motion for Stay functions as a Petition for Judicial Review to show that the Petition was properly served in compliance with statute. This convoluted argument is meritless.

First, Botany concedes that it failed to serve the Petition of Judicial Review on the Board, as required by RCW 34.05.542(2); there is no factual dispute that Botany failed to comply with that statute's service requirements. Second, Botany's Emergency Motion for Stay was different

in both form and substance from the filed Petition for Judicial Review, and thus cannot serve as a legal substitute or equivalent of a Petition for Judicial Review so as to excuse Botany's failure to serve the Petition on the Board.<sup>1</sup> Third, because Washington courts have consistently held that noncompliance with the APA's service requirement on the agency requires dismissal of a petition for judicial review, the Superior Court's order was correct as a matter of law and should be affirmed.

## **II. STATEMENT OF THE ISSUES**

1. Did the Superior Court correctly dismiss Botany's Petition for Judicial Review when it was not served on the Board?

2. Does a timely filed Emergency Motion for Stay function as the legal equivalent of a Petition for Judicial Review for the purpose of complying with statutory service requirements?

## **III. COUNTERSTATEMENT OF THE CASE**

On December 2014, Botany applied for renewal of a license for Marijuana Producer Tier 2/Processor with the Licensing and Regulation Division of the Liquor and Cannabis Board (Licensing). CP 120-121. As part of the renewal process Botany's principal, Mark Gomez (Gomez), submitted his finger prints. *Id.* The Licensing staff ran a federal criminal

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<sup>1</sup> Botany's Emergency Motion for Stay was not served on the Board in accordance with RCW 34.05.542(2).

background check using those prints. *Id.* Gomez received a score of twelve for a federal felony conviction in 2007. *Id.* On July 17, 2015, based on Gomez' accumulation of twelve points in criminal history, Licensing denied renewal of Botany's marijuana license. *Id.*

Botany filed an administrative appeal arguing that the Board had mitigated Mark Gomez's felony conviction during the initial application, but then changed its position during the renewal process. However, the administrative record showed that at the time of the initial application, the Board had not yet received an originating agency identifier to run federal background checks. CP 121-123. The federal felony conviction could not be verified, and the Licensing staff did not consider the conviction when determining whether to grant the original license in August, 2014. CP 120-123.

**A. Administrative Proceedings**

On August 7, 2015, after a Brief Adjudicative Proceeding, Administrative Law Judge Terry A. Schuh issued Findings of Fact, Conclusions of Law and Initial Order (Initial Order), affirming Licensing's decision to deny Botany's renewal of a marijuana license. CP 119-125. The Initial Order stated as follows with respect to Botany's right to seek administrative review:

#### RIGHTS OF REVIEW

If you are dissatisfied with the order in the brief adjudicative proceeding, you may appeal to the Board...This appeal process is called an administrative review. A copy of the request for administrative review must be mailed to all other parties, and their representatives at the time the request is filed...Address for filing a request for administrative review with the Board:

Washington State Liquor Control Board  
Attention: Kevin McCarroll  
3000 Pacific Avenue SE  
PO Box 43076  
Olympia, Washington 98504-3076

On August 18, 2015, the Board, *sua sponte*, issued an order to conduct an administrative review of the initial order. CP 126.

On August 28, 2015, Botany filed its Request for Administrative Review with the Board to the address specified in the Initial Order. CP 141, 147.

On September 15, 2015, the Board issued a Final Order. CP 147. The Board adopted the Initial Order as the Final Order and found that Botany's license renewal for Marijuana Producer Tier 2/Processor shall not be renewed. CP 147-148. The Final Order stated the following with respect to Botany's right of review:

#### RIGHTS OF REVIEW

Reconsideration. 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. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Washington State



Liquor and Cannabis Board, Attn: Kevin McCarroll, 3000 Pacific Avenue Southeast, PO Box 43076, Olympia, WA 98504-3076, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board's office. RCW 34.05.010(6). A copy shall also be sent to Mary M. Tennyson, Senior Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110...

Judicial Review: Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. CP 148-149.

**B. Judicial Review In Superior Court**

On September 22, 2015, Assistant Attorney General Jong Lee (AAG Lee) of the Office of the Attorney General received, via email, a copy of the Petition. At the time it was thought to be a courtesy copy. CP 231, 301.

On September 23, 2015, Botany filed its Petition in Franklin County Superior Court. CP 48. Also on September 23, 2015, Botany also filed an Emergency Motion for Stay. CP 38-46. Botany served a copy of the motion via mail to AAG Lee but a copy was not served on the Board. CP 231, 287.

On September 25, 2015, AAG Lee filed his notice of appearance and the Board's opposition to the motion for stay. CP 214.

On September 28, 2015, Judge Bruce A. Spanner denied the motion for stay. CP 217-218.

On November 13, 2015, AAG Lee contacted Kevin McCarroll, Adjudicative Proceedings Coordinator (Adjudicative Coordinator) regarding status of the certification of agency records to be used in the Judicial Review. At that time AAG Lee first learned that Botany had failed to properly serve the Washington State Liquor and Cannabis Board with its Petition. CP 230-234.

On December 21, 2015, the Board moved to dismiss Botany's Petition. CP 220-225. The Board specifically argued that Botany's failure to timely serve the agency with the Petition required dismissal. *Id.*

On February 1, 2016, oral argument was held. CP 301. During oral argument the issue of whether e-mail was proper service under the APA was discussed. Botany contended that existing legal authority allowed service of the Petition by e-mail, and that the APA's definition of service should not be applied. *Id.* Botany's counsel requested additional time to brief that issue, and the court granted additional time to brief the issue of e-mail service. *Id.* Botany filed its supplemental response on March 1, 2016, but the response did not contain any legal authority whether e-mail service is proper under the APA or other authority. Botany argued for the first time in its supplemental response that the

Emergency Motion for Stay met the requirement for a timely filed Petition for Judicial Review. CP 302.

On March 16, 2016, the Superior Court granted the Board's motion to dismiss with prejudice. CP 301-302. Botany timely filed a notice of appeal. CP 303-304.

#### IV. ARGUMENT

##### A. Standard Of Review

In Washington, the APA provides the exclusive method for obtaining judicial review of an agency's final order. RCW 34.05.510; *see also Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 954, 235 P.3d 849 (2010), *review denied*, 170 Wn.2d 1023 (2011). Judicial review proceedings are statutory in nature, not falling under the superior court's general or original jurisdiction. *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). As such, the superior court acts in a limited appellate capacity when reviewing an administrative decision. *City of Seattle v. Pub. Employment Relations Comm'n (PERC)*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991). A party must comply with the APA's filing and service requirements to invoke the superior court's appellate jurisdiction. *Skagit Surveyors*, 135 Wn.2d at 555; *Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 850, 232 P.3d 558 (2010). Failure to comply requires

dismissal. *Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 271 P.3d 268 (2012) (failure to file petition within 30 days of final agency action required dismissal); *Sprint Spectrum*, 156 Wn. App. at 953 (failure to comply with APA's terms for service of a copy of the petition on Board required dismissal). As the Washington Supreme Court made clear in *Skagit Surveyors*:

Substantial compliance with the service requirements of the APA is not sufficient to invoke the appellate, or subject matter, jurisdiction of the superior court.

Lack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it.

*Skagit Surveyors*, 135 Wn.2d at 556. The Supreme Court went on to find that:

The issue raised in relation to the motion to dismiss the petition of Surveyors is identical to the issue raised in *Union Bay* [*Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 902 P.2d 1247 (1995)]. That is, does the superior court acquire jurisdiction to make rulings in an appeal under the APA if service is made on an attorney of record in lieu of service on a party. *Union Bay* strictly construed and applied the APA and dismissed the petition for review because Union Bay Preservation Coalition had served the attorneys rather than the parties in the case; thus Union Bay did not perfect jurisdiction in the superior court. *Union Bay*, 127 Wn.2d 614, 902 P.2d 1247.

Similarly, Surveyors did not properly invoke the jurisdiction of the superior court in this case. The motion to dismiss the petition of Surveyors is granted.

*Skagit Surveyors*, 135 Wn.2d at 556-57. *Accord, Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 621, 902 P.2d 1247 (1995) (dismissal when petitioner served attorneys of record, not the actual parties as the APA required); *PERC*, 116 Wn.2d at 928 (dismissal when petitioner served parties three days after APA deadline); *Bock v. State*, 91 Wn.2d 94, 100, 586 P.2d 1173 (1978) (dismissal when petitioner failed to serve Board of Pilotage Commissioners until 53 days after service under former version of APA); *Cheek v. Employment Sec. Dep't of State of Wash.*, 107 Wn. App. 79, 85, 25 P.3d 481 (2001) (dismissal when petitioner failed to serve the agency until four days after APA deadline); *Banner Realty, Inc. v. Dep't of Revenue*, 48 Wn. App. 274, 278, 738 P.2d 279 (1987) (dismissal when taxpayer failed to serve the Board within 30 days under former version of APA).

RCW 34.05.542 sets the time limits and service requirements for a petition for judicial review under the APA. Specifically, the statute requires the petition to be filed with the superior court and served on the agency issuing the decision, the office of the attorney general, and all parties of record within thirty days after service of an agency's final order. RCW 34.05.542(2). While the office of the attorney general and the parties of record may be served by mail, service on the agency must be by

delivery to the principal office of the agency. RCW 34.05.542(4).<sup>2</sup> The APA states that only failure to timely serve the office of the attorney general will not result in dismissal of the petition. RCW 34.05.542(5).<sup>3</sup>

**B. The Superior Court Properly Dismissed Botany's Petition For Failing To Comply With The APA's Requirements For Obtaining Judicial Review**

To perfect the superior court's appellate jurisdiction to review the Board's order under the APA, Botany was required to deliver a copy of its petition for judicial review to the Board within 30 days of the final order. RCW 34.05.542(2), (4). Botany failed to do so.

This case is controlled by *Skagit Surveyors*. As in that case Botany did not properly invoke the jurisdiction of the superior court because it merely attempted to serve the Board's attorney - who was not even the attorney of record at the time of that purported service - rather than the Board. Thus, Botany failed to perfect jurisdiction in the superior court as to its Petition for Judicial Review. *See Skagit Surveyors*, 135 Wn.2d at 556-57, and *Union Bay*, 127 Wn.2d at 617-20. Because a lack of

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<sup>2</sup> RCW 34.05.542(4):

Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

<sup>3</sup> RCW 34.05.542(5): "Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition."

jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it, Botany's Petition for Judicial Review was properly dismissed by the superior court.

Moreover, Botany concedes that it did not serve its Petition on the Board: "Botany, however, failed to properly serve the Petition on the attorney general or the LCB." As a result, the Petition, filed but not served, cannot on its own establish jurisdiction for review at the superior court level. *See* Appellant's Brief at 4 and 12.

**C. The Motion For Emergency Stay Was Different In Both Form And Substance From The Petition For Review That Was Filed In The Superior Court**

Despite Botany's concession that its failure to serve the Petition itself does not establish superior court jurisdiction, Botany claims that the superior court should not have dismissed the Petition. It argues that its Emergency Motion for Stay (Motion) was properly and timely served upon the attorney of record and filed with the superior court, and "functions as a Petition for Review" because the Motion completely met the requirements of RCW 34.05.546(1) through (8). *See* Appellant's Brief at 13. Botany argues that its Motion "plainly — if inartfully — filed and served timely documents to obtain the superior court's jurisdiction." *Id.* This convoluted argument is utterly meritless.

Botany filed its Petition for Judicial Review in the Franklin County Superior Court on September 23, 2015. CP 48. Botany also filed a separate Emergency Motion for Stay on September 23, 2015. The Motion was different in both form and substance from the Petition, as it served a legally different purpose than the Petition. For example, the relief requested in the Motion, a temporary stay, and the reasons for seeking a stay, are substantively different than the relief sought in the Petition, which sought to overturn the Board's Final Order. Simply put, a Emergency Motion for Stay is not the same document, legally or otherwise, as a Petition for Judicial Review. A properly filed motion cannot serve as the legal equivalent to a petition for judicial review, or "function" as such a petition, as Botany suggests.

In addition, the statutory bases for the different types of relief differ. *See* RCW 34.05.570 and RCW 34.05.550. For example, the APA explicitly requires that a petition for judicial review be filed and served. RCW 34.05.542(2). That statute requires that a single document—a petition for judicial review—be provided to the court and to the agency. It would be legally incorrect to allow an appellant to file one document with the court while mailing a different document to the agency.

Here, the Motion that was mailed to AAG Lee was different in both form and substance from the Petition for Judicial Review that was



filed with the court. The statute's requirement that the Petition must be served on the agency is unequivocal. It does not permit Botany to vitiate that strict service requirement by substituting its Motion as a "stand-in" for its unserved Petition.

Botany also notes that no case has allowed a missed deadline or failed service to "substantially comply" with the APA's jurisdictional requirements. *See* Appellant's Brief at 4 and 12. Despite this second concession, however, Botany nevertheless argues that this absolute bar does not extend to the *contents of* an otherwise timely and properly served pleading. Rather, it argues that the requirement for the contents of an appeal from the administrative body are set forth in RCW 34.05.546(2), and that statute, unlike the timing and service rules, does not require strict compliance: "We decline to hold that strict compliance with RCW 34.05.546 is a jurisdictional requirement," citing *Skagit Surveyors*, 135 Wn.2d at 556. *See* Appellant's Brief at 11. This argument is devoid of merit.

The issue is not whether the contents of Botany's Petition comported with the requirements of RCW 34.05.546, but rather, whether Botany failed to properly serve its Petition on the Board as required by RCW 34.05.542(2). Botany attempts to circumvent the strict requirements of RCW 34.05.542(2) by arguing that the contents of its Petition for

Judicial Review substantially complied with RCW 34.05.546. Because it is undisputed that Botany did not serve the Board with its Petition, the superior court lacked jurisdiction, and properly dismissed the Petition on that basis. The contents of Botany's Petition, and whether those contents complied with RCW 34.05.546, is irrelevant to the issue whether it complied with the requirement that its Petition be served on the Board.

Although strict compliance as to the contents of a Petition for Judicial Review is not required, strict compliance under RCW 34.05.542(2) *is* required for proper filing and service of the Petition: "A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order." There is no dispute that Botany failed to comply with that requirement. Because it did not comply, the superior court did not possess jurisdiction to adjudicate the matter, and lacking jurisdiction to hear the case, correctly dismissed the Petition.

Further, although the Board responded to Botany's Motion, that response did not excuse Botany from complying with the APA's service requirements. The burden of compliance with the procedural requirements for proper service is Botany's, and mandatory compliance with those requirements is required to properly invoke the appellate jurisdiction of

the superior court. Because of the shortness of time and the emergency nature of Botany's motion, neither the Attorney General's Office nor the Board knew Botany had failed to comply with the procedural requirements of the APA by failing to properly serve the agency. Even after the Motion was denied, Botany had until October 15, 2015 to properly serve the agency with a petition for judicial review, but failed to do so.

**D. Service Upon AAG Lee Did Not Meet The APA Requirement That The Petition Be Served On The Agency**

The superior court did not determine whether or not AAG Lee was the attorney of record for the Board for the purpose of judicial review because it had determined that service to AAG Lee was ineffective. CP 302. Likewise, it is not necessary for this Court to reach this issue to adjudicate this appeal. Should this Court consider this issue, however, it does not change the outcome here. AAG Lee was not the attorney of record for the Board, rendering service upon him insufficient to meet the APA service requirement.

This Court, in *Cheek v. Employment Sec. Dep't of State of Wash.*, 107 Wn. App. 79, 25 P.3d 481 (2001), held that serving the Attorney General does not constitute timely service upon the agency for purposes of meeting the statutory procedural requirements of the APA to invoke the superior court's appellate jurisdiction. In *Cheek*, this Court held that an

unemployment compensation claimant failed to timely serve a petition for review on the Employment Security Department, although the claimant timely served the petition on the Attorney General. Thus, the claimant could not invoke the appellate jurisdiction of the superior court, where the Attorney General was not yet attorney of record for the Department at the time the petition was served. *See Cheek*, 107 Wn. App. at 83-85.

*Cheek* is controlling here. As in *Cheek*, the Board did not file a formal notice of appearance through the Office of the Attorney General until September 25, 2015. The Attorney General's Office was not yet authorized to accept service for the Board on September 22, 2015, the date on which Botany emailed to AAG Lee. CP 231.

The Appellant relies on the holding in *Ricketts v. Washington State Bd. of Accountancy*, 111 Wn. App. 113, 43 P.3d 548 (2002), a Division I Court of Appeals decision, for the proposition that mail service on AAG Lee constituted service on the Board. However, the Court in *Ricketts* did not provide clarification as to who constitutes the attorney of record in a given matter. Instead, the Court merely found that mail service on an agency's attorney of record was sufficient. *Ricketts*, 111 Wn. App. at 117-118. In this case, AAG Lee appeared on behalf of the Licensing Division of the Board, before the Office of Administrative Hearings for the Brief Adjudicative Proceeding and before the Board for the Administrative

Review. CP 107.<sup>4</sup> Until he entered his notice of appearance on September 25, 2015, AAG Lee did not yet represent the Board.

In the administrative proceeding, the Board and the Office of Administrative Hearings were the quasi-adjudicating bodies, the tribunal, analogous to a court. It would be incorrect to say AAG Lee was the attorney of record for the Board when his only appearance was on behalf of the Licensing Division, a party in the administrative proceeding, before the Board. In both the Initial Order and the Final Order, it is clear that the Board is the tribunal, before which the Licensing Division appears. The requirement that the agency issuing the Final Order be served for judicial review is analogous to RAP 5.1(a) and (b) that requires that a notice of appeal be filed with the trial court. “Service on the agency rendering the final decision in question is a prerequisite to and triggers transmittal of the administrative record to the court...Without such service, there is no record before the superior court and thus, no basis for review.” See *Banner Realty, Inc. v. Dep’t of Revenue*, 48 Wn. App. 274, 278, 738 P.2d 279 (1987). It would be incorrect to argue that an Assistant Attorney General who represented a party before a tribunal is the attorney of record for that same tribunal for the purposes of judicial review of that tribunal’s

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<sup>4</sup> The Licensing Division and the Board were provided separate legal counsel in the administrative proceeding below. Assistant Attorney General Mary Tennyson represented the Board in this matter. CP 148.

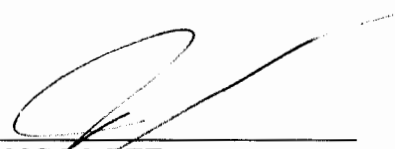
Final Order. See *Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 235 P.3d 849 (2010). (Even though the Appellant in *Sprint* served its petition for judicial review on the Department of Revenue and the Attorney General's Office, it had not served a copy on the agency that issued the final order, the Board of Tax Appeals. Dismissal was upheld.) Botany cites AAG Lee's participation in the administrative proceedings to support its argument that he is the attorney of record for the Board. It is, however, only the Final Order of the Agency that is subject to judicial review. Within that document, the only attorney referenced from the Office of the Attorney General is Mary Tennyson. CP 148. Thus, while Ms. Tennyson may have been the Attorney of Record for the Board below, it is clear AAG Lee was not. Thus, service of the Petition upon AAG Lee does not overcome Botany's failure to invoke the superior court's appellate jurisdiction.

**V. CONCLUSION**

For the above stated reasons, the Department respectfully requests that this Court affirm the superior court's order dismissing Botany's petition for judicial review.

RESPECTFULLY SUBMITTED this 24 day of August, 2016.

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