NO. 96390-8

SUPREME COURT OF THE STATE OF WASHINGTON

Puget Sound Group, LLC, et al.,

Petitioners,

v.

Washington State Liquor & Cannabis Board, et al.,

Respondents.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

I. INTRODUCTION

In 2015, the Legislature adopted the Cannabis Patient Protection Act (CPPA) to combine the medical and recreational cannabis markets. The CPPA directed the Washington State Liquor and Cannabis Board (Board) to increase the number of retail cannabis licenses and to prioritize applicants for those new licenses in accordance with legislatively mandated criteria.

In response, the Board adopted the legislatively mandated competitive, merit-based system for awarding the new retail marijuana licenses required by former RCW 69.50.331 in a rule that mirrored the statute's language. The Board's rule regarding the Priority system was first adopted as an emergency rule and then as a permanent rule. The Board also increased the number of available retail marijuana licenses based on due consideration of scientific research as to the size of the medical market, as well as policy concerns.

Puget Sound Group[1] challenged the Board's emergency rule adopting the CPPA's Priority criteria, and the Board's methodology used to determine the increase in the number of retail medical marijuana licenses,

[1] There were seven plaintiffs below: Puget Sound Group, The Cloner's Market, KF Industries, Cannabis Care Collective LLC, SGSG and The Joint LLC. They will collectively be referred to as Puget Sound Group.

as well as their ultimate decision regarding the number of new retail marijuana licenses.

In an unpublished decision, the Court of Appeals, Division II correctly held that Puget Sound Group's challenge was moot because there was no relief to be granted with regard to the emergency rule that had been supplanted by an unchallenged permanent rule. Nor did the challenge to the emergency rule meet the exceptions to mootness because the challenge did not present an issue of substantial and continuing public concern. The court also determined that the Board's increase in the number of retail licenses was not subject to rulemaking as it did not meet the definition of a rule, and that the Board was not arbitrary and capricious in its decision.

Puget Sound Group asks this Court to review the ruling that their challenge to the emergency rule adopting the Priority system was moot and did not meet any exception to mootness justifying review. *See* Petition for Review (Petition) at 19-20. The Petition does not demonstrate that this case presents an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). Nor can it, because law requiring a competitive, merit-based Priority system that Puget Sound Group challenged has since been removed from RCW 69.50.331. There is no need to clarify the Board's statutory authority or its interpretation of the now defunct Priority system.

Puget Sound Group also alleges that the unpublished Court of Appeals' decision conflicts with *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 949 P.2d 1291 (1997), *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997), *Mauzy v. Gibbs*, 44 Wn. App. 625, 723 P.2d 458 (1986), and *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 39 P.2d 361 (2002). Petition at 14-16, 20-24. None of these cases conflict with the Court of Appeals' decision and, therefore, provide no reason for this Court to accept review.

Because Puget Sound Group's Petition for Review does not meet any of the criteria in RAP 13.4(b), review should be denied.

II. RESTATEMENT OF THE ISSUES FOR REVIEW

Puget Sound Group's Petition for Review does not present any issue warranting review under RAP 13.4(b). However, if this Court were to accept this case, the issues presented would be:

1. Whether Puget Sound Group's challenge to the Board's emergency adoption of WAC 314-55-020 was moot when there was no effective relief to be granted, and the challenge falls outside any of the exceptions for hearing moot cases because the challenge does not present issues of substantial and continuing public concerns?
2. Whether the Board was required to engage in rulemaking to exercise its statutory mandate to increase the number of retail marijuana

licenses when the increased number of licenses did not subject any applicant to a penalty or sanction and did not alter any qualification or standard for the issuance of the license?

3. Whether the Board's process to determine the increase in the number of retail licenses was arbitrary and capricious when it fully considered the information before it, including the BOTEC report which scientifically determined the size of the medical market, as well as policy concerns?

III. RESTATEMENT OF THE CASE

A. Adoption of the Cannabis Patient Protection Act

In 1998, Washington voters approved Initiative 692, which permitted the use of marijuana for medical purposes by qualifying patients. However, prior to 2015, neither Initiative 692 nor the Legislature provided any state agency with clear regulatory oversight of medical marijuana providers. Likewise, there were no statutory licensing or production standards for medical marijuana. CP[2] 449-53.

In 2012, Washington voters approved Initiative 502 and established a regulatory system for the production, processing and distribution of limited amounts of marijuana for recreational use by adults.

[2] Clerks Papers will be referred to as CP, Verbatim Report of Proceedings will be referred to as VRP and Administrative Record will be referred to as AR.

The then-named Liquor Control Board was tasked with licensing and regulating these marijuana producers, processors, and retailers, and successfully did so. CP 449-53. The Board used a lottery system to award 334 retail licenses under Initiative 502.

In 2015, the Legislature passed the CPPA, which consolidated recreational and medical retail markets and used regulations already in place for the production, processing and sale of recreational marijuana to regulate commercial medical markets. Laws of 2015, ch. 70, § 2. The CPPA directed the Board to increase the maximum number of retail marijuana licenses, which had been previously established for the recreational market. RCW 69.50.345(2)(d). It also granted the Board discretion in determining the actual size of the increase, describing the factors the Board was to consider and requiring consultation with the Office of Financial Management. *Id.* The CPPA also directed the Board to use a competitive, merit-based application process that included consideration of an applicant's experience and qualifications in the marijuana industry. Former RCW 69.50.331(1)(a)[3]. The CPPA listed the factors related to an applicant's experience and qualifications the Board should consider and how to prioritize competing applicants.

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[3] Effective July 23, 2017, the Legislature removed the competitive, merit-based application process it created as the Board was no longer accepting applications for retail licenses. *See* RCW 69.50.331; Final Bill Report ESSB 5131.

B. The Board's Implementation of the CPPA

1. The Board's adoption of a competitive, merit-based selection system

In July 2015, the Board began the rulemaking process to implement the CPPA. *See* Wash. St. Reg. 15-15-092, AR 20. The Board determined that emergency rules would be necessary because the Board anticipated opening the application process for new retail licenses on October 12, 2015 and permanent rules could not be adopted by that date. AR 21, 22.

Staff drafted the proposed emergency rules taking into consideration the requirements of the CPPA. CP 39. The proposed emergency rule for distributing additional retail licenses mirrored the Priority system set forth in the CPPA. *See* former RCW 69.50.331 and Wash. St. Reg. 15-19-165. The Board adopted these emergency rules at a public meeting held on September 23, 2015. AR 3. The emergency rules became effective on that same day. AR 26. The Board also approved the filing of the CR-102 for the permanent rules. AR 21-22. As an emergency rule, it expired 120 days after adoption. RCW 34.05.350(2). The emergency rule challenged by the Petitioners expired on January 22, 2016, prior to the adoption of the permanent rules. The Board, however, adopted the identical emergency rules twice more; once on January 6, 2016, and again on April 6, 2016. Wash. St. Reg. 16-03-001; 16-08-123. It also continued to work on its

permanent rules, and adopted them on May 18, 2016, with an effective date of June 18, 2016. Wash. St. Reg. 16-11-110.

2. The Board's decision to increase the number of retail marijuana stores

The Board hired BOTEC Analysis to assist them in determining the size in dollars of the medical marijuana market. CP 681. BOTEC was the same consultant the Board used to assist it when determining the number of retail licenses necessary to implement the recreational market under Initiative 502. CP 38.

BOTEC provided a first draft of the report to Board staff in November 2015. After reviewing the draft report, Board staff raised concerns about the report's methodology and its usefulness in estimating the need for additional retail outlets. CP 38-39, 509-11, 682. In discussions with Board staff, BOTEC provided explanations as to the adequacy of their methodology, and when the final report was received on December 15, 2015, Board staff were satisfied with the final report. CP 39.

Board staff then used the BOTEC report, along with information from the Office of Financial Management and information regarding the Board's ability to manage an increased number of retail stores, and developed a methodology to determine the number of new retail licenses needed. CP 39, 49. The staff presented their recommendation on the

number of new retail licenses including methodology for distribution of the new retail licenses at the Board's December 16, 2015 meeting. CP 41-49. The Board adopted staff's recommendation and increased the license cap by 222 new retail licenses (to a total of 556 retail licenses).

C. Procedural History

Puget Sound Group filed a complaint challenging the validity of the emergency rule establishing a Priority system, alleging that the Board failed to develop a system that allowed applicants to demonstrate their experience and qualifications before applicants were prioritized, and that this violated the CPPA. CP 117-50. Puget Sound Group also challenged the Board's decision regarding the number of additional licenses available, alleging that the Board had failed to engage in required rulemaking and had erred by relying on the BOTEC report. *Id.*

The superior court ruled that the Board's emergency rule was consistent with its statutory authority and that the Board had not acted arbitrarily or capriciously in deciding the maximum number of retail marijuana licenses. VRP 49-51 (Nov. 18, 2016); CP 484.

The Court of Appeals affirmed. *Puget Sound Group, LLC, et al., v. Washington State Liquor & Cannabis Board, et al.*, No. 50090-6-II (July 10, 2018) (unpublished) (hereinafter Opinion). It held that Puget Sound Group's challenge to the emergency rule was moot because the court

could not provide relief and the issue did not present an issue of public concern. Opinion at 5-6. The Court of Appeals also held that the decision to increase the number of retail licenses was not a "rule" as defined under the APA, and that the Board did not engage in an arbitrary or capricious process in determining that increased number. Opinion at 7-10.

IV. REASONS FOR DENYING REVIEW

Puget Sound Group fails to establish a basis for review. Whether a challenge to an emergency rule is moot does not constitute an issue of substantial public importance and the Court of Appeals decision is not in conflict with case law. The ruling below involves a straightforward application of settled legal principles and case law. Because the Petition fails to satisfy any of the four factors in RAP 13.4(b), review should be denied.

A. The Ruling that Petitioners' Challenge to the Expired Emergency Rule Is Moot Is Not a Question of Substantial or Continuing Public Interest

Puget Sound Group challenged the Board's emergency rule with two arguments. They claimed implementing the legislatively mandated Priority system was arbitrary and capricious because it failed to incorporate all requirements of former RCW 69.50.331, and they claimed the Board adopted the emergency rule without consideration or deliberation as to alternative interpretations of former RCW 69.50.331. Petition at 19.

The Court of Appeals determined that their challenge was moot because it could grant no meaningful relief. The emergency rule had expired and had been replaced by a permanent rule that the Puget Sound Group had not challenged. Opinion at 6. The Court of Appeals also determined that the issue did not present a sufficient continuing and substantial public interest to warrant review of a moot issue. *Id.*

Puget Sound Group asks this Court to review if the Court of Appeals correctly determined the appeal was moot. They claim the Court of Appeals ruling conflicts with *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 949 P.2d 1291 (1997) and *Hillis v. State Dep't of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997), an argument premised on a theory that the Court of Appeals could have granted relief by declaring the rules invalid and remanding the matter to the Board to comply with the law. Petition at 13-17. As shown below, this has no merit.

Puget Sound Group also argues that their challenge to the emergency rule presented an issue of substantial and continuing public interest such that the Court of Appeals should have decided the issue even though it was moot. Again, this is incorrect and, in any event, the Court of Appeals ruling on that point does not conflict with the holding in *Mauzy v. Gibbs*, 44. Wn. App. 625, 634-35, 723 P.2d 458 (1986), as claimed by Puget Sound Group.

1. Puget Sound Group's challenge to the expired emergency rule is moot because no relief is available

It is well-established that a court will not generally decide a case if the case is moot, and that a case is moot if a court can no longer provide effective relief to the parties. *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (citing *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983)). Puget Sound Group agrees. Petition at 13.

Puget Sound Group argues, however, that relief could still be granted because the Court could declare the emergency rule invalid and remand the matter to the Board to follow the law. Petition at 14-17. This though, begs the question of what the Board could do on remand, and how a remand alone could provide any relief to Puget Sound Group. If this matter was remanded, the Board would do nothing – there is no need to re-adopt an emergency rule when there is no emergency. RCW 34.05.350. There is already a permanent rule, which Puget Sound Group failed to challenge and is outside the scope of this appeal, which would not be affected and would remain in place. *Mauzy*, 44 Wn. App. at 634-35 (Holding that a regularly adopted permanent rule was not invalidated by an invalid promulgation of identical emergency rule).

Nor would Puget Sound Group's status change. Its applications for licenses would be reviewed under the permanent rule. There is no

suggestion how they would have any different result on those licenses under the permanent rules. Thus, the Court of Appeals properly held no relief could be afforded to Petitioners if this Court declared that the emergency rule was invalid and remanded the matter back to the Board.

Puget Sound Group also argues that the Court could and should order some interlocutory relief in the form of retail licenses while the Board re-adopts its emergency rule. Petition at 17. Puget Sound Group provides no legal analysis authorizing this Court to do this, nor is the Board aware of any basis for licensing Puget Sound Group outside the rules and statutes.

2. Puget Sound Group's challenge to the expired emergency rule does not present a substantial or continuing public interest

Puget Sound Group next argues that even if their case is moot, this Court should review the Court of Appeals' holding that it did not present a substantial and continuing public interest that warranted review. Petition at 17-20. They do not show that the case meets that standard, much less that the Court of Appeals ruling should be reviewed on that basis.

This case would not create new law. It is already well established that if an issue is moot, a court may still review the issue if it involves matters of continuing and substantial public interest. *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). For example, issues that may otherwise escape review because of their short nature are not

insulated from judicial review. *Sudar v. Dep't of Fish & Wildlife*, 187 Wn. App. 22, 35, 347 P.3d 1090 (2015) (Emergency fishing season rules "are not necessarily insulated from judicial review on the basis that the justiciable controversy is mooted by expiration of the rule.").

Whether an issue involves continuing and substantial public interest depends on three factors: 1) whether the issue is of a public or private nature, 2) whether an authoritative determination is desirable to provide future guidance to officers, and 3) whether the issue is likely to reoccur. *Sorenson*, 80 Wn.2d at 558; *Hart v. DSHS*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). Puget Sound Group's challenge to the expired emergency rule does not meet these criteria.

First, review would not clarify statutory meaning. Although the challenge involved interpretation of a statute, the Legislature has since removed the statutory language requiring a competitive, merit-based selection as well as the required Priority criteria. Courts have not typically used the public interest exception in cases, like here, that are limited to the facts of the case or which involve statutes or regulations that have been amended. *Hart*, 111 Wn.2d at 459.

Second, given these changes to RCW 69.50.331, the challenges based on former RCW 69.50.331 are unlikely to reoccur. RCW 69.50.331

now requires that the Board "conduct a comprehensive, fair and impartial evaluation of the applications timely received." RCW 69.50.331. If the Board were required to reopen an application window for marijuana retail licenses, the prior system, which was removed, would not be the basis to evaluate future applications. Thus, the statutory construction issues here are unique to the former statute and the expired emergency rule. A ruling on that point would not provide useful guidance to the Board.

Nor would further review regarding the alleged procedural defects be of assistance to officers. There is already a robust body of case law on rulemaking requirements. *See Mauzy*, 44 Wn. App. 625; *Hillis*, 131 Wn.2d 894; *Sudar*, 187 Wn. App. 22; *State v. MacKenzie*, 114 Wn. App. 687, 60 P.3d 607 (2002). This Court need not add to that case law.

Puget Sound Group, however, argues that the Court should go beyond adoption of the emergency rule and address their vague claims of governmental misconduct. Petition at 19-20. Puget Sound Group not only claims misconduct in adopting the emergency rules, it claims that these actions establish a pattern of unlawful action, likely to reoccur. This argument makes no sense because the premises are devoid of logic or substance. Puget Sound Group then also alleges that the Board has the heavy burden of persuading the Court that the challenged conduct cannot

be reasonably expected to reoccur, relying on *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 174, 120 S. Ct. 693, 145 L. Ed. 610 (2000). Petition at 19-20. But *Friends of the Earth* is not applicable. That case involves the situation where a defendant voluntary ceases alleged unlawful behavior and thereby moots a case. Only then does a court impose an additional burden of persuading a court that challenged conduct cannot be reasonably expected to reoccur. *Friends of the Earth*, 528 U.S. at 174.

Finally, Puget Sound Group argues that their issue has significant public impact because additional tax revenues would be raised if each Petitioner received a license. Petition at 20. This speculative argument fails for the simple reason that if the emergency rule were reviewed and invalidated, there is no showing that any Petitioner would be licensed. And even if another location were licensed, that is hardly proof that taxes would be paid, given that there is a finite number of customers.

In short, Puget Sound Group has failed to establish that their moot challenge to the adoption of expired emergency rules merits review, or that the Court of Appeals ruling on that point warrants this Court's review.

3. The Court of Appeals' decision does not conflict with *Coalition*, *Hillis*, or *Mauzy*

Puget Sound Group argues that the Court of Appeals decision conflicts with *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894 (1997) and *Hillis v. State Department of Ecology*,

131 Wn.2d 373 (1997). Neither case conflicts with the unpublished Court of Appeals decision.

In *Coalition*, an association of agencies and organizations that provided services to homeless families sought a declaratory judgment that DSHS had an enforceable duty under RCW 74.13.031(1) to develop a plan for providing benefits to homeless children. The Court found that the requirements of RCW 74.13.031(1) were clear and mandatory, and that DSHS had failed to comply with their statutory duty. *Coal.*, 133 Wn.2d at 894. Unlike the case here, DSHS could provide relief by developing plans to assist with housing needs on remand. But here, the Board cannot provide any relief to Puget Sound Group upon remand. The fact that the Court ordered a remand in another case with vastly different facts does not establish a conflict.

In *Hillis*, Larry and Varalene Hillis filed for a permit from the Department of Ecology to withdraw water for a residential development they had planned to build. *Hillis*, 131 Wn.2d at 377. Because Ecology was unable to process the Hillis' water permit in a timely manner, they sought a writ of mandamus. The trial court issued the writ ordering Ecology to immediately investigate all of Hillis' pending permit applications and approve or deny them. This Court determined that procedures and priorities set by Ecology were new requirements or qualifications for water rights that

should have been adopted through rulemaking. The Court noted that proper remedy was invalidation of Ecology's decision regarding the process and priorities. *Id.* at 400. This Court then remanded the matter to Ecology to engage in rule-making procedures prior to its continued use of its priorities to make decisions and comply with the Court's order. Again, *Hillis* is readily distinguishable from the decision here as no similar relief is available in this case.

Puget Sound Group also argues that the Court of Appeals decision conflicts with *Mauzy*, 44 Wn. App. 625. Petition at 20-22. Puget Sound Group is mistaken. In *Mauzy*, the petitioners, unlike the Petitioners here, challenged both the emergency rule and the permanent rule. *Id.* at 626. *Mauzy*, like the Court of Appeals here, recognized that review of the emergency rules was moot as the rules had been superseded by the permanent rules. *Id.* at 629. But *Mauzy* reviewed the emergency rules under the substantial and continuing public interest exception to mootness finding the issue regarding the standard for adopting an emergency rules was one of first impression, and was an issue that was likely to reoccur. *Id.* at 629-30. However, even when the court held the emergency rule was invalid, it did not remand the matter to DSHS to readopt the emergency rule. *Id.* at 630, 632. *Mauzy* also declined to hold the permanent rule invalid simply because the emergency rule was invalid. *Id.* at 634.

In contrast, the Court of Appeals did not find that Puget Sound Group's challenge to the emergency rule presented an issue of continuing and substantial public interest. Instead, the court found that a ruling regarding the agency's statutory authority which had been subsequently changed would not provide guidance with regard to evaluating license applications and would be unlikely to reoccur. Opinion at 6. Nothing in the decision below conflicts with *Mauzy.*

B. The Board Did Not Act Arbitrarily and Capriciously in Determining the Increased Number of Retail Licenses and the Court of Appeals' Decision on This Issue Does Not Conflict with Other Case Law

Puget Sound Group also argues that the Board acted arbitrarily and capriciously in adopting the retail license cap and asserts that the Court of Appeals conclusion conflicts with this Court's decision in *Rios v. Departmentt of Labor & Indus*tries, 145 Wn.2d 483, 39 P.3d 961 (2002). Petition at 22. Both arguments lack merit.

In *Rios*, the Department of Labor and Industries decided not to engage in rulemaking, despite the fact that its team of technical experts had deemed that pesticide monitoring, the subject of the rulemaking petition, was both necessary and doable. *Rios*, 145 Wn.2d at 507-08. Thus, *Rios* concluded the Department of Labor and Industries acted arbitrarily and capriciously by failing to consider its own technical experts' opinions. *Id.*

In contrast, the Board here did not disregard initial concerns raised regarding the BOTEC analysis. Rather than disregarding those concerns, as in *Rios*, the Board staff raised and discussed their concerns with the initial BOTEC report. CP 38-39, 509-11, 676, 682. As a result of these discussions and the changes made in the final report, Board staff were ultimately satisfied with the report and were able to rely upon it, and with other information to help them determine the number of additional licenses which were necessary. CP 39. The Board's process in determining the cap on retail licenses was reasonable, and fully considered the relevant attending facts and circumstances. Its use of the BOTEC report was not arbitrary and capricious and is distinguishable from *Rios*.

V. CONCLUSION

The Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 30th day of November, 2018.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on November 30, 2018, I served a true and correct copy of the *Answer to Petition for Review* by e-mail and by placing same in the U.S. mail via state Consolidated Mail Service to:

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DATED this 30th day of November, 2018, at Olympia, Washington.

KELLI LEWIS,
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AGO/GCE

November 30, 2018 - 8:21 AM

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