NO. 97191-9

SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE PETITION OF:
KITTITAS COUNTY FOR A DECLARATORY ORDER.

KITTITAS COUNTY,

Petitioner,

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD,

Respondent.

ANSWER TO KITTITAS COUNTY'S PETITION FOR REVIEW

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I. INTRODUCTION

Neither Washington's Growth Management Act (GMA), chapter 36.70A RCW, nor the State's marijuana licensing laws require the Washington State Liquor and Cannabis Board (the Board) to issue marijuana business licenses in compliance with local zoning laws. The GMA binds state agencies only when they act in their siting or development—not regulatory or licensing—capacity. And there is nothing in the marijuana licensing laws that requires the Board to consider an applicant's compliance with local zoning or deny a license on that basis. The Court of Appeals correctly read these unambiguous statutes and rejected Kittitas County's arguments to the contrary. *Kittitas County v. Liquor and Cannabis Board*, No. 35874-7-III, Slip Op. (April 11, 2019).

To obtain further review of this straightforward decision, the County attempts to manufacture a conflict with two cases, one of which held that the GMA must not be liberally construed, and the other of which held that a state licensee's business rules do not supersede statutory mandates. *Woods v. Kittitas County,* 162 Wn.2d 597, 174 P.3d 25 (2007); *Southwick, Inc. v. Dep't of Licensing,* 191 Wn.2d 689, 426 P.3d 693 (2018). But the Board's and Court's interpretation of the GMA—specifically RCW 36.70A.103—*is* strict, because it does not read additional requirements into the statute, as

the County proposes. And this case involves no rules that are inconsistent with statutes. The County does not demonstrate a conflict.

The Court of Appeals correctly interpreted the plain language of the GMA and marijuana licensing laws. Its decision presents no issues requiring a determination by this Court. Further review is unwarranted under RAP 13.4(b)(1) or (4).

II. COUNTERSTATEMENT OF THE ISSUE

Does the GMA require the Liquor and Cannabis Board to defer to local zoning laws when making marijuana licensing decisions?

III. COUNTERSTATEMENT OF THE CASE

Initiative 502 (I-502) legalized the sale and possession of marijuana. Laws of 2013, ch. 3. It also required the Board to issue licenses to businesses to produce, process, and sell marijuana. RCW 69.50.325. Licenses are granted for specific business locations. *Id.*

Kittitas County petitioned the Board for a Declaratory Order, under RCW 34.05.240 of the Administrative Procedure Act, holding that the GMA—specifically RCW 36.70A.103—required the Board's marijuana licensing decisions to comply with local zoning. CP 21–33. The Board issued an order rejecting the County's interpretation. CP 231–40. The Board explained that it interpreted RCW 36.70A.103 to govern the siting of

locations owned, operated, or occupied by state agencies, and not a state agency's business licensing decisions. CP 233.

The County sought judicial review in superior court. The superior court reversed the Board's Declaratory Order, and the Board appealed. CP 327. In a published decision, the Court of Appeals affirmed the Board's order and held that neither the GMA nor the State's marijuana licensing laws require the Board to issue licenses in conformity with local zoning laws. Slip Op. 1-2.

IV. REASONS WHY THIS COURT SHOULD DENY REVIEW

This case involves a straightforward interpretation of RCW 36.70A.103. The Court of Appeals correctly held that the statute does not require state agencies to comply with local zoning requirements when issuing business licenses to private applicants. Because that holding does not conflict with any of this Court's decisions or involve an issue of substantial public interest that should be determined by this Court, the Court should deny review. RAP 13.4(b)(1), (4).

A. The Court of Appeals Correctly Concluded That Neither the GMA Nor the Marijuana Laws Require the Board To Comply with Local Zoning Regulations When Issuing Business Licenses

1. Nothing in the GMA requires the Board to comply with local zoning when issuing business licenses

The Court of Appeals relied on the plain meaning, and the only

logical reading, of the GMA in its ruling. The GMA was enacted in 1990 in response to the problems associated with an increase in population, particularly in the Puget Sound area. Laws of 1990, 1st Ex. Sess., ch. 17. It requires counties and cities to establish comprehensive land use plans and develop regulations consistent with the GMA. RCW 36.70A.040.

At issue here, RCW 36.70A.103 requires state agencies to comply with the local comprehensive plans and development regulations that cities and counties adopt pursuant to the GMA. But the text of the statute makes clear that state agency compliance is required only when the state is siting public facilities, not when it is licensing business entities at specific locations:

> State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except as otherwise provided in RCW 71.09.250(1) through (3), 71.09.342, and 72.09.333.
>
> The provisions of chapter 12, Laws of 2001 2nd sp. sess. do not affect the state's authority to site any other essential public facility under RCW 36.70A.200 in conformance with local comprehensive plans and development regulations adopted pursuant to chapter 36.70A RCW.

RCW 36.70A.103. The Court of Appeals properly read this statute as requiring governmental agencies to "follow generally applicable zoning rules" "when a governmental agency is involved in siting a public facility." Slip Op. 5. But "nothing in the statue suggests state agencies must be

concerned with local zoning restrictions when engaged in purely governmental functions, such as determining the appropriateness of a state license." *Id.* at 5-6.

Bolstering this interpretation, the statute exempts the siting of specific state facilities from compliance with local development regulations. It references RCW 71.09.250(1)–(3), which authorizes the construction of a secure community transition facility and special commitment center on McNeil Island; RCW 71.09.342, which authorizes siting and construction of transition facilities by the Department of Social and Health Services; and RCW 72.09.333, which authorizes the Department of Corrections to operate a correctional facility on McNeil Island. These are all state owned and operated public facilities, indicating that the state-compliance requirement applies only to the siting of state owned and operated public facilities.

Further, RCW 36.70A.103 provides that the GMA does not affect the state's authority to site "*any other* essential public facility," which includes facilities such as airports, state education and transportation facilities, and solid waste handling facilities. RCW 36.70A.103 (emphasis added); RCW 36.70A.200(1). In short, RCW 36.70A.103 refers only to the siting of public facilities. It makes no reference to the licensing of private

entities or of any need to comply with the GMA in the issuance of business or professional licenses.

A Department of Commerce rule supports this reading of the statute.[1] Under WAC 365-196-530, the Department has made clear that it interprets RCW 36.70A.103 as requiring state agencies to comply with the GMA when they are proposing to develop state facilities:

> The department construes RCW 36.70A.103 to require each state agency to meet local siting and building requirements *when it occupies the position of an applicant proposing development*, except where specific legislation explicitly dictates otherwise. This means that *development of state facilities* is subject to local approval procedures and substantive provisions, including zoning, density, setbacks, bulk and height restrictions.

WAC 365-196-530(2) (emphasis added). The rule explicitly recognizes that state agencies must comply with the GMA only when the state agency is a project applicant. WAC 365-196-530(2). Even when a state agency is exercising its discretionary "permit functions," "the GMA merely 'implies' that governmental agencies 'should take into account' growth management programs when engaged in 'discretionary decision making.'" Slip Op. 6 (quoting WAC 365-196-530(4)).

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[1] The Department of Commerce is charged with adopting rules that contain guidelines for classification of lands and to establish a program of technical and financial assistance to local governments. RCW 36.70A.050 and 36.70A.190. Under its GMA rules, "The department's purpose is to provide assistance in interpreting the act, *not to add provisions and meanings beyond those intended by the legislature.*" WAC 365-196-020(3) (emphasis added).

The statute's plain language supports the result below, even independent of the Department of Commerce rule. The Court of Appeals' discussion of this rule served merely to confirm the result that was already plain under the language of RCW 36.70A.103 itself. *See Tesoro Ref. & Mktg Co. v. Dep't of Revenue*, 173 Wn.2d 551, 556, 269 P.3d 1013 (2012) ("Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency.").

The Court of Appeals correctly concluded that RCW 36.70A.103 does not apply to the Board's licensing decisions.

2. Nothing in the marijuana laws, Chapter 69.50 RCW, requires the Board to comply with local zoning when issuing business licenses

The specific marijuana statutes themselves also do not require the Board to consider or comply with the GMA when evaluating marijuana business license applications.

RCW 69.50.331 establishes detailed criteria that an applicant for a marijuana license must meet, as well as areas the Board may examine, such as the criminal history of individuals associated with the proposed business or evidence of chronic illegal activity as set out in subsections (7) and (10). Compliance with local zoning laws is not among them. The statute also

enumerates specific circumstances requiring the Board to deny a license.[2] RCW 69.50.331(1)(b), (2)(b), (8). As the Court of Appeals noted, "[n]oncompliance with local zoning standards is not one of them." Slip Op. 8. The Board's rule, WAC 314-55-050, also lists specific reasons the Board may deny licenses or renewals of licenses. Again, local zoning is not listed.

Additionally, RCW 69.50.331(7) requires the Board to notify local governments of marijuana license applications and renewals and allow them an opportunity to provide input. RCW 69.50.331(10) directs the Board to give "substantial weight" to local governments' objections based on "chronic illegal activity" associated with the proposed licensed premises or the applicant's operation of any other licensed premises. Although RCW 69.50.331(10) does not limit the kind of input the local jurisdiction can provide, all that RCW 69.50.331(10) requires is for the Board to *consider* local government input. It does not require the Board to defer to that input. And, while the Board may grant a hearing to a local government on its objection, a

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[2] In contrast, statutes for other state licensing programs explicitly require compliance with local zoning to obtain a license. For example, in order for a vehicle dealer to receive a license, its physical location must comply with local zoning. RCW 46.70.023(7) ("A [dealers] temporary subagency shall meet all local zoning and building codes for the type of merchandising being conducted."); RCW 46.70.023(8) ("A wholesale vehicle dealer . . . shall meet local zoning and land use ordinances."); RCW 46.70.023(9) ("A retail vehicle dealer shall . . . maintain office and display facilities in a commercially zoned location or in a location complying with all applicable building and land use ordinances . . . ."). A driver training school also must be in a properly-zoned location before receiving a license. RCW 46.82.360(6) ("The established place of business of a driver training school shall be located in a district that is zoned for business or commercial purposes or zoned for conditional use permits for schools, trade schools, or colleges.").

hearing is held only at the Board's discretion. RCW 69.50.331(7)(c) ("the state liquor and cannabis board may in its discretion hold, a hearing subject to the applicable provisions of Title 34 RCW"). There is no statutory *right* to a hearing on a local jurisdiction's objection. This demonstrates that the Legislature did not intend for the local government's point of view to control. If the Board were *required* apply local zoning regulations, then a local government's objection would control the licensing decision. But the statutory provisions merely require "communication with local governments." Slip Op. 8.

The County effectively concedes that there is nothing in the plain language of chapter 69.50 RCW requiring the Board to defer to local zoning laws when it asks the Court to "liberally construe" the Board's authority to deny a license based on a county's objections. Pet. for Review 13-14. This argument demonstrates that chapter 69.50 RCW does not explicitly require the Board to deny a license based on a county's objections.

A recent legislative enactment supports the Board's and Court of Appeals' interpretation. In 2017, the Legislature amended RCW 69.50.325, which authorizes marijuana business licenses and sets out the processes and criteria for issuance. Laws of 2017, ch. 317. That act amended RCW 69.50.325 to subject a marijuana license to forfeiture for failure to begin operations within 24 months, but the legislature protected from forfeiture a

licensee who is unable to open due to zoning restrictions. RCW 69.50.325(3)(c)(v). As the Court of Appeals observed, "By adopting protections for licensees who cannot begin operations because of zoning restrictions, the legislature recognized that the Board's licensing decisions are not dependent on zoning regulations." Slip Op. 8.[3]

The Court of Appeals correctly understood that the Board makes licensing decisions "separate and apart from zoning compliance." Slip Op. 9. Further review is unwarranted.

B. The Court Of Appeals' Decision Does Not Conflict with *Woods v. Kittitas County* or *Southwick, Inc. v. Department of Licensing*

1. The Court of Appeals' decision is consistent with *Woods*

The County argues that the Court of Appeals' interpretation of RCW 36.70A.103 amounted to a liberal construction of the GMA and thus conflicts with the mandate of *Woods v. Kittitas County,* 162 Wn.2d 597, 174 P.3d 25 (2007), that the GMA is not to be liberally construed. Pet. for Review 5-6. On the contrary, the Court of Appeals interpreted the GMA according to its plain meaning, which "is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v.*

[3] The County argues, for the first time in its Petition, that the statute prohibits forfeiture of a license only where a local jurisdiction adopts a conflicting zoning regulation *after* the license was issued. Pet. for Review 11. The statute does not contain such a limitation.

Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The Court strictly interpreted the statute's plain meaning.

In *Woods*, this Court considered whether the superior court has subject matter jurisdiction to decide whether a site-specific rezone complies with the GMA. *Woods*, 162 Wn.2d at 608-14. The Court concluded it does not, because "there is no explicit requirement that [a] project permit be consistent with the GMA." *Id.* at 613. The Court acknowledged the potential problem this could create: "If a project permit is consistent with a development regulation" that was not challenged within the required 60 days of publication, "both the permit and the regulation" could potentially be inconsistent with the GMA. *Id.* at 614. Even so, the Court declined to liberally construe the GMA and held that because "the GMA does not provide for it, . . . a site-specific rezone cannot be challenged for compliance with the GMA." *Id.*

The Court of Appeals' decision is entirely consistent with *Woods*. Here too, there is no explicit requirement in the GMA that state-issued business licenses be consistent with the GMA. *See id.* at 613. This *could* result in the Board issuing a marijuana license for a location that does not comply with the local jurisdiction's comprehensive plan or development regulations. However, because the GMA does not provide for it, the Court

of Appeals properly held that the Board is not required to issue licenses in compliance with local zoning restrictions. *See id.* at 614.

2. The Court Of Appeals' decision does not conflict with *Southwick, Inc.*

Next, the County misreads *Southwick, Inc. v. Department of Licensing,* 191 Wn.2d 689, 426 P.3d 693 (2018). Pet. for Review 9-10. While it is true that an agency cannot adopt a rule that conflicts with a statutory mandate,[4] that is not what happened in *Southwick*, and that is not what happened here.

In *Southwick*, a cemetery licensee with statutory authority to adopt rules related to its operations argued that one of its internal rules gave it the "authority of law" to move human remains in a manner contrary to statutory requirements. *Southwick, Inc.*, 191 Wn.2d at 697. This Court made the unremarkable holding that the cemetery could not adopt a rule that conferred on it the "authority of law" to act contrary to a statutory mandate. *Id.* at 691, 697-98.

The County relies on *Southwick*'s principle that a rule cannot contravene a statute merely to repeat its argument that the Board's and Court of Appeals' interpretation of RCW 36.70A.103 and WAC 365-196-

[4] The County states that *Southwick* stands for the proposition "that an agency may not proffer a legal interpretation that conflicts with a statutory mandate nor may it promulgate a rule that amends or changes a legislative enactment." Pet. for Review 9-10.

530 are wrong. Pet. for Review 10-11. But a disagreement about what the GMA requires does not establish a conflict with *Southwick*'s statement that rules may not supersede statutes. The County's reliance on the case is inapt.

C. This Case Does Not Present an Issue of Substantial Public Interest Requiring Supreme Court Review

Finally, the County contends that this case presents an issue of substantial public interest that should be determined by this Court. Pet. for Review 12-14; RAP 13.4(b)(4). It is wrong.

The County is correct that many cities and counties provided input on the County's petition for a declaratory order. Pet. for Review 12; Slip Op. 3. But just because an issue has garnered interest does not mean that this Court must decide it. Here, the analysis of the controlling statutes—RCW 36.70A.103 and RCW 69.50.331—is uncomplicated, and the Court of Appeals correctly resolved the case in a published opinion. There is sufficient appellate resolution of the County's concerns, and the Court of Appeals' straightforward explanation of the plain meaning of the statutes does not require further analysis.

Local jurisdictions bear the responsibility for interpreting and enforcing their own land use ordinances, regardless of the Board's licensing decisions. While there may be "broad support for imposing zoning restrictions on the Board's licensing authority, this is a matter that must be

taken up by the legislative or rule-making process." Slip Op. 10. But neither the Legislature nor the Board has imposed such restrictions. The County's displeasure with that fact "is not a matter to be resolved by the judiciary." *Id.* The Court should deny review.

V. CONCLUSION

This Court should deny the petition for review. The Court of Appeals' analysis is consistent with both state statutes and case law. The County has failed to establish that the correctly decided Court of Appeals' ruling on the plain meaning of the statutes warrants this Court's review.

RESPECTFULLY SUBMITTED this 10th day of June 2019.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of June 2019, at Olympia, Washington.

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