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Division III
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No. 35874-7
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

IN THE MATTER OF:
THE PETITION OF KITTITAS COUNTY FOR A
DECLARATORY ORDER WSLCB NO. 01-2017

WASHINGTON STATE LIQUOR AND CANNABIS BOARD,

Appellant,

vs.

KITTITAS COUNTY,

Respondent.

RESPONDENT KITTITAS COUNTY'S PETITION FOR REVIEW

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Identity of Petitioner

COMES NOW the Respondent, Kittitas County, by and through its attorney of record, Neil A. Caulkins, and submits its Petition for Review in the above-captioned action.

Citation to Court of Appeals Decision

Kittitas County is challenging the decision of Division III of the Court of Appeals in this matter in which it determined that the Growth Management Act (GMA) does not require the Washington State Liquor and Cannabis Board (LCB) to comply with local development regulations when reviewing/issuing applications for cannabis licenses. The decision was filed on April 11, 2019 and is attached hereto in the Appendix as Exhibit "A." (Hereinafter referred to as "Decision.")

Issues Presented for Review

This case asks whether RCW 36.70A.103, which states that "State agencies shall comply with …local development regulations" and WAC 365-196-530, which requires state agencies to consider local regulation when engaged in "permit function," requires the LCB to comply with local development regulation when issuing marijuana permits? This case asks whether the LCB's practice of ignoring local zoning when making marijuana permit decisions, thereby creating code enforcement problems for local government by issuing licenses that violate local zoning

regulations, is cognizable as being in compliance with RCW 36.70A.103's directive that "State agencies shall comply with ...local development regulations"?

Statement of the Case

RCW 36.70A.103 provides in its entirety as follows:

> 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.

WAC 365-196-530 provides in its entirety as follows:

> (1) RCW 36.70A.103 requires that state agencies comply with the local comprehensive plans and development regulations, and subsequent amendments, adopted pursuant to the act. An exception to this requirement exists for the state's authority to site and operate a special commitment center and a secure community transition facility to house persons conditionally released to a less restrictive alternative on McNeil Island under RCW 36.70A.200.
> (2) 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.

> (3) Under RCW 36.70A.210(4), state agencies must follow adopted county-wide planning policies. Consistent with other statutory mandates, state programs should be administered in a manner which does not interfere with implementation of the county framework for interjurisdictional consistency, or the exercise by any local government of its responsibilities and authorities under the act.
> (4) Overall, the broad sweep of policy contained in the act implies a requirement that all programs at the state level accommodate the outcomes of the growth management process wherever possible. The exercise of statutory powers, whether in permit functions, grant funding, property acquisition or otherwise, routinely involves such agencies in discretionary decision making. The discretion they exercise should take into account legislatively mandated local growth management programs. State agencies that approve plans of special purpose districts that are required to be consistent with local comprehensive plans should provide guidance or technical assistance to those entities to explain the need to coordinate their planning with the local government comprehensive plans within which they provide service.
> (5) After local adoption of comprehensive plans and development regulations under the act, state agencies should review their existing programs in light of the local plans and regulations. Within relevant legal constraints, this review should lead to redirecting the state's actions in the interests of consistency with the growth management effort.

Kittitas County sought a declaratory determination from the LCB, pursuant to Ch. 34.05 RCW, as to whether these GMA provisions required the LCB to only issue marijuana licenses in conformance with local zoning regulations. Decision at 3. The LCB decided it did not. Id. The County appealed to the Superior court which reversed the LCB's

administrative decision. Id. The LCB then appealed to the Court of Appeals which reversed the Superior Court. Id at 10.

Argument

The Court of Appeals Decision is in Conflict with the Supreme Court's decision in *Woods v. Kittitas County* and its progeny.

In *Woods v. Kittitas County*, the Supreme Court stated that "the GMA is not to be liberally construed. The court's role is to interpret the statute as enacted by the legislature...; we will not rewrite the GMA." 162 Wn2d 597, 614, 174 P.3d 25 (2007)[1] By deciding that the LCB does not need to comply with local development regulations when issuing marijuana licenses, it both liberally construed and rewrote the GMA.

State agencies are required to comply with local zoning. RCW 36.70A.103 states in pertinent part that "State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter . . ." The clear statutory language is the mandatory "shall comply." RCW 36.70A.103 obliges state agencies, such as the LCB, to comply with local "development regulations."

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[1] *see also Feil v. EWGMHB,* 172 Wn2d. 367, 259 P.3d 227 (2011); *Quadrant Corp. v. Hearings Board,* 154 Wn2d 224, 110 P.3d 1132 (2005); *Spokane County v. EWGMHB,* 173 Wn.App. 310, 293 P.3d 1248 (2013);*Irondale Cmty. Action Neighbors v. WWGMHB,* 163 Wn.App. 513, 262 P.3d 81 (2011).

By holding that the state only needs to comply with local development regulations when it is in the position of project applicant (with certain enumerated exceptions), the Court of Appeals has liberally construed the GMA. RCW 36.70A.103 says that the state "shall comply" with local development regulations with certain specific exceptions. The Court of Appeals holding reads this statute as saying the state, with certain specific exceptions, only needs to comply with local development regulations when it is a project applicant. This is a liberal construction of the GMA that is contrary to the controlling Supreme Court precedent on GMA interpretation. This is a liberal construction that is radically different than what the statute actually says. This is a liberal construction that drastically expands the exemptions to the statute beyond what the legislature provided.

By holding that the state only needs to comply with local development regulations when it is a project applicant, the Court of Appeals has rewritten the GMA. The Court of Appeals' holding rewrites RCW 36.70A.103 to say that, because the exemptions all seem to be instances where the state is the project applicant, this statute only applies to the state when it is a project applicant, with certain enumerated exceptions. This is simply not what the statute says and constitutes a rewriting of the statute in contravention of the Supreme Court precedent.

This rewrite vastly expands the exemption regarding state compliance beyond that which was specified by the legislature. The opinion of the Court of Appeals means that the only time this statute applies to the state is when the state is a project applicant, which is utterly incorrect.

WAC 365-196-530 explains more of what state agency compliance with RCW 36.70A.103 looks like. Subsection (2) explains that the state must comply with local development regulations when it is a development applicant.[2] This subsection does not say that is the only time the state must comply. Actually, the rule continues by listing several other examples of state compliance. Subsection (3) stresses that state programs should be administered in a manner that does not interfere with local government GMA responsibilities. Subsection (4) speaks in terms of a "requirement" that state government action accommodate the GMA regulation of local government. It goes on to state that state permit issuance should consider legislatively mandated local GMA regulation. This is a vastly different meaning from the claim that the County is trying to force the LCB to enforce these regulations. Honoring local zoning regulations when notice is provided during the comment process is not at all the same, and is certainly not onerous. Please notice that the only place

[2] Please note that, while subsection (2) does say that the state must comply with local development regulations when it is a project applicant, it does not say it only needs to comply in that instance. Subsection (3), (4), and (5) would be rendered nullities otherwise.

in this section of the rule where discretion is mentioned is here, and that discretion refers to state permit issuance – whether to issue the permit or not. That discretion does not refer to consideration of local regulations. The consideration of local regulation is not discretionary, but is rather referred to as "a requirement." WAC 365-196-530 describes state compliance as a "requirement" and the goal is state action being consistent with the GMA effort.

Finally, subsection (5) directs state agencies to review their programs in light of changes to local regulation so as to be acting consistently therewith. In short, WAC 365-196-530 requires state agencies to comply with local regulation when the agency is a project applicant; states that state programs should be managed so as not to be a cross-purpose with local government GMA responsibilities; that the issuance of state permits requires consideration of local development regulation; and that the state should revise its programs to maintain consistency with local regulation as that local regulation changes.

The Court of Appeals held that the LCB is only required to comply with development regulations when it is a project applicant. This is inconsistent with the meaning of the statute and contrary to the wording of the WAC. The WAC states that these activities, permit function being amongst them, involve the state in discretionary decision making. A

permit applicant is never involved in discretionary decision making, but a permit granting agency always is. It is contrary to the plain meaning of the WAC to state that the reference to "permit function" is merely a reference to the state acting as a project applicant, and not the state acting as a permitting authority, when a permit applicant is never involved in the discretionary decision making contemplated by the statute and the permitting authority always is. The Court of Appeals' decision largely ignores subsections (3), (4), and (5) from the WAC.

RCW 36.70A.103 simply does not say what the Court of Appeals has held it says. The statute is not limited to the state as project applicant with specific exemptions. The statute commands ("shall comply") state compliance except for enumerated exemptions not applicable here. In all other instances, the state is to comply. To hold otherwise, as the Court of Appeals has, constitutes liberally construing the statute and an out-and-out rewrite of it which is in conflict with the precedent of the Supreme Court.

The Court of Appeals Decision is in Conflict with the Supreme Court's Holding in *Southwick, Inc. v. Washington.*

On September 13, 2018, the Washington Supreme Court issued its decision in *Southwick, Inc. v Washington*, 191 Wn.2d 689, 426 P.3d 693 (2018). The point of the case is 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.

In this case we have the statutory mandate, the legislative enactment of RCW 36.70A.103, which says in pertinent part that "State agencies shall comply with the local...development regulations." Here we have a state agency, the LCB, arguing, and the Court of Appeals holding, that its interpretation of the law does not require compliance with local development regulations. In so holding, the Court of Appeals has misread the exemptions allowed by the legislature. To achieve that result, the Court of Appeals ignored the provisions (3), (4), and (5) from WAC 365-196-530. The agency rule or interpretation cannot avoid a requirement placed by the legislature.

To support its holding that conflicts with the Supreme Court precedent in *Southwick*, the Court of Appeals relied upon a misunderstanding of a more recent legislative enactment. Decision at 8-9. The Legislature has created a forfeiture provision that is applicable, only, to marijuana retail licenses. The provisions for marijuana retail licenses are found at RCW 69.50.325(3) with the provisions for the new forfeiture provision beginning at sub (c). A true and correct copy of RCW 69.50.325(3) is attached hereto in the Appendix as Exhibit "B."

The forfeiture provision is only available for retail licenses (not production or processor licenses) and is not relevant to license issuance. What the provision does is allow LCB to forfeit retail licenses if those licensees have not gotten up and running within a certain time. It also creates an exception that a license cannot be forfeited if that licensee's failure to become operational was caused by local zoning. The plain language of the statute is that the forfeiture provision is inapplicable if the "licensee's" inability to become operational was due to "the adoption" of some regulation locally. The plain language of the statute is that the subject already was a "licensee" when the local government caused "the adoption" of the regulation that prevented the licensee from getting into operation. Said another way, this statute is relevant only to instances where a local government, subsequent to the LCB issuance of a license (causing the entity to be a "licensee" rather than merely an "applicant"), adopts a regulation that frustrates the purpose of that licensee. This makes sense given that RCW 36.70A.103 and WAC 365-196-530 require state agencies to act in accord with local zoning when engaging in permit issuance. Hence, a license that is at variance with existing local development regulations should not have been issued in the first place under existing law. This new provision protects licensees from license forfeiture if local government <u>subsequently</u> regulated in a manner that

frustrates the licensee's business plan. This in no way indicates that the LCB is to ignore local zoning when engaged in license issuance. Yet the Court of Appeals decision misread this statute to give support to its holding that the LCB was not required to issue licenses in conformity with local development regulations as required by the GMA in RCW 36.70A.103. Decision at 8-9.

This Case Involves an Issue of Substantial Public Interest that Should be Determined by the Supreme Court.

The statewide interest in this case is exemplified by the number and breadth of municipalities that commented on the matter when it was still in its administrative stage before the LCB, as acknowledged by the Court of Appeals. Decision at 3. The statewide interest is also exemplified by the submission of an amicus brief by the Washington Association of Municipal Attorneys.

In the GMA there is the recognition that "state and local government have invested considerable resources in an act that should serve as the integrating framework for other land use related laws..." WAC 365-196-010(1)(j). One part of that integrating framework is the requirement that "applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability." RCW 36.70A.020(7). Another part of that integrating framework

designed to ensure predictability is the coordination for "common goals" to benefit "the health, safety, and high quality of life" for the people of this state. RCW 36.70A.010. A part of this integrating framework of predictability and common goals is RCW 36.70A.103, which says "State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter . . . ." A part of this integrating framework of predictability and common goals is WAC 365-196-530, which provides that the state shall meet local siting and building requirements when it is a project applicant; that the state will not administer its programs in a manner that interferes with local government responsibilities; that state programs are required to take into account local GMA regulations – specifically calling out state permit issuance functions; and that state programs are to be reviewed and altered as local regulations evolve to achieve "consistency." The decision of the Court of Appeals is inconsistent with and frustrates all of these purposes.

The LCB was established under Ch. 66.08 RCW, where it states that "all provisions [of that title] shall be liberally construed for the accomplishment of . . . the protection of the welfare, health, peace, morals, and safety of the people of the state." RCW 66.08.010. The authority of the LCB is to be liberally construed to enable it to have "full power to do

each and every act necessary to the conduct of its regulatory functions." RCW 66.08.050(8). This integrating framework to promote predictability and common goals includes RCW 69.50.331, which provides that the LCB is to undertake a "comprehensive" review of an application and that the LCB has discretion to deny a license based on, "without limitation," county objections. Those objections are not limited in scope and they are to be liberally construed to give the LCB "full power" to do everything necessary to its regulatory function. This integrating framework includes WAC 314-55-165, which specifically provides for county objections that show a detrimental impact to the "safety, health, or welfare of the community." The Court of Appeals decision renders this objection process superfluous. This integrating framework includes WAC 314-55-050(17), which specifically states that a basis for denial is an LCB determination that "the issuance of the license will not be in the best interest of the welfare, health, or safety of the people of the state." Again, these provisions specifically related to the LCB are to be liberally construed to give it full power to accomplish its regulatory functions. This integrating framework includes case law stating that "the purpose of traditional zoning is to protect the public health, safety, and welfare." *Save Our Rural Environement v. Snohomish County,* 99 Wn.2d 363, 369, 662 P.2d 816 (1983). The Court of Appeals failed to honor these purposes.

Conclusion

This case meets the requirements for acceptance of review under RAP 13.4(b). The decision of the Court of Appeals must be overturned. The order of the Superior Court should be affirmed.

SUBMITTED this 10th day of May, 2019.

Neil A. Caulkins, WSBA #31759
Deputy Prosecuting Attorney

EXHIBIT "A"

FILED
APRIL 11, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Petition of: KITTITAS COUNTY for a Declaratory Order. KITTITAS COUNTY, Respondent, v. WASHINGTON STATE LIQUOR AND CANNABIS BOARD, Appellant.	)	No. 35874-7-III PUBLISHED OPINION

PENNELL, A.C.J. — This case asks whether Washington's Growth Management Act (GMA), chapter 36.70A RCW, requires the Washington State Liquor and Cannabis Board (the Board) to defer to local zoning laws when making licensing decisions. Our answer is no. Neither the GMA nor the State's marijuana licensing laws require the

Board to issue licenses in conformity with local zoning laws. While the Board may consider zoning restrictions in making licensing decisions, doing so is not required under current law.

BACKGROUND

Washington voters legalized the sale and use of recreational marijuana in 2012. INITIATIVE 502, LAWS OF 2013, ch. 3. The new law created a legal marketplace for marijuana and delegated licensing, regulatory, and oversight powers to the Board. RCW 69.50.325, .331. Under the law, marijuana producers, processors, and retailers must operate under Board-approved licenses. RCW 69.50.325. Board licenses are site-specific, meaning they are valid only if used at the location approved by the Board in a license application. *Id.*

In December 2015, Kittitas County (the County) notified the Board of its objection to a license application for a marijuana producer/processor operation. The objection was based solely on the location of the operation.[1] Marijuana production and processing is permitted in the county only "in certain land use zoning designations" and "under strict conditions." Clerk's Papers (CP) at 31; *see also* Report of Proceedings (RP) (Dec. 22, 2017) at 6-7.

[1] While the County's objection is referenced in subsequent correspondence, Clerk's Papers at 29-30, the actual objection is not part of the record on appeal.

The Board granted the license over the County's objection. In correspondence to the County, the Board indicated that it could not base its denial of an application on local zoning laws.

In February 2017, the County petitioned the Board under RCW 34.05.240 for a declaratory order. The County argued the site-specific nature of marijuana licenses means that licensing decisions are subject to local zoning regulations.

In May 2017, the Board rendered a decision on the County's petition after issuing a notice of proceedings and receiving input from numerous cities and counties. Although the County's position garnered significant support from various municipalities and county governments, the Board determined that neither the marijuana licensing statute nor the GMA required its adherence to "all local zoning laws and land use ordinances prior to granting a license." *Id.* at 235.

The County successfully appealed the Board's decision to the Kittitas County Superior Court. In reversing the Board's decision, the superior court ordered the Board to "only approve those licenses which are in compliance with local zoning." *Id.* at 330; *see also* RP (Dec. 22, 2017) at 38.

The Board brings this appeal seeking reversal of the superior court's order.

ANALYSIS

The Board's appeal comes to us via the Administrative Procedure Act, chapter 34.05 RCW. In this context, we review the Board's decision, not that of the superior court. *Goldsmith v. Dep't of Social & Health Servs.*, 169 Wn. App. 573, 583-84, 280 P.3d 1173 (2012). Because the Board's decision here turns on statutory interpretation, our review is de novo. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). We begin with the statute's plain language, and end our analysis there if the text is unambiguous. *Id.* at 192. In addition, if a statute has been interpreted by state agencies with relevant administrative expertise, we will give that agency's legal interpretation substantial weight. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

Marijuana licenses and the GMA

According to the County, the GMA requires the Board to deny marijuana licenses to marijuana producers, processors, and retailers whose site locations are in areas with local zoning restrictions. This argument is based on RCW 36.70A.103, which states:

> **State agencies required to comply with comprehensive plans.**
> 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.[2] 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.

The County reasons that, because the Board is a state agency, this statute requires it to adhere to local zoning restrictions when issuing site-specific marijuana licenses.

The Board counters that RCW 36.70A.103 applies only to actions taken by a state agency acting in its proprietary capacity as the developer or operator of a public facility site. Because licensing decisions—even if site specific—do not involve a state agency acting in its proprietary capacity, it argues this statute is inapplicable.

The plain language of RCW 36.70A.103 favors the Board's approach. As worded, the statute is concerned with governmental agencies involved in *siting* public facilities. According to the statute, when a governmental agency is involved in siting a public facility, it must follow generally applicable zoning rules, except in certain limited circumstances.[3] While RCW 36.70A.103 requires governmental actors to abide by the same zoning rules as regular citizens, nothing in the statute suggests state agencies must

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[2] RCW 36.70A.103 was amended in 2001 to include exceptions from local zoning ordinances for construction of sex offender transition facilities and facilities on McNeil Island. LAWS OF 2001, 2d Spec. Sess., ch. 12, § 203.

[3] State agencies are not held to the same standards as private parties with respect to siting designated correctional facilities, as set forth in RCW 71.09.250(1) through (3), RCW 71.09.342, and RCW 72.09.333.

be concerned with local zoning restrictions when engaged in purely governmental functions, such as determining the appropriateness of a state license.

Regulations promulgated by the Department of Commerce support the view that RCW 36.70A.103 is directed at governmental agencies involved in siting public facilities.[4] Specifically, WAC 365-196-530(2) states:

> 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.

(Emphasis added). Outside of the siting and development context, the regulations recognize the GMA imposes no strict obligations on state agencies. Instead, the GMA merely "implies" that governmental agencies "should take into account" growth management programs when engaged in "discretionary decision making." WAC 365-196-530(4).

The Board's decision to issue a marijuana license is not a siting activity. Although the licenses are location-specific, they do not confer final authority to actually open a marijuana site. The Board's regulations specify a license holder must comply

[4] The Department of Commerce is tasked with a limited amount of state-wide GMA rule making. *See* RCW 36.70A.030(6), .050, .190.

with local laws—including zoning requirements—before going into business. WAC 314-55-020(15).

Because a marijuana license does not authorize the siting of a marijuana business, the Board cannot fail to "comply" with RCW 36.70A.103 merely by conferring marijuana licenses without regard to zoning restrictions. Zoning laws remain in full force regardless of whether a license is issued. The Board's decision to license a business in a zoning-restricted area may mean the license will have little utility.[5] But nothing in the limited nature of the Board's license changes local development plans or undermines the GMA's policy of coordinated development.

License requirements under the marijuana laws

The County claims that even if the GMA is inapplicable to the Board's licensing decisions, the state's marijuana laws themselves require the Board to adhere to local zoning rules in issuing licenses. The County points to RCW 69.50.331(7), which requires the Board to notify local governments of marijuana license applications and renewals, and to allow an opportunity for input. In addition, RCW 69.50.331(10) specifies that in making a licensing decision, the Board "must give substantial weight to objections from" local governmental authorities based on concerns regarding "chronic illegal activity."

[5] This, of course, depends on whether the license holder can obtain a variance.

The County's reliance on the marijuana licensing statute is misplaced. That statute requires only communication with local governments; it does not require compliance with local zoning laws. If the legislature intended to require the Board to adhere to local zoning laws, it would have done so directly. *See* RCW 69.50.331(8)(e). The marijuana licensing statute sets forth numerous circumstances requiring license denial. RCW 69.50.331(1)(b), (2)(b), (8). Noncompliance with local zoning standards is not one of them.

Instead of tethering the Board's licensing decisions to local zoning standards, the legislature has explicitly recognized that the Board's licensing decisions are independent of local zoning restrictions. In 2017, the legislature amended the marijuana laws to address the plight of marijuana licensees who have been unable to open their businesses due to zoning restrictions. LAWS OF 2017, ch. 317, § 1. Normally, a licensee's failure to begin operations within 24 months of licensure will result in license forfeiture. RCW 69.50.325(3)(c)(ii)(B). But under the 2017 amendment, a licensee who is unable to open a business due to zoning restrictions is protected from the forfeiture rule. RCW 69.50.325(3)(c)(v). 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. Instead, the legislature's

action indicates an understanding that a licensing decision is separate and apart from zoning compliance.[6]

While nothing in the marijuana licensing statute requires the Board to issue licenses in conformance with local zoning restrictions, there is also no prohibition on doing so. Outside a limited set of prohibitive circumstances, RCW 69.50.331(1)(b), (2)(b), and (8), the legislature granted the Board discretionary authority over licensing decisions. RCW 69.50.331(1)(a), (2)(a). In its implementing regulations, the Board has recognized it has "broad discretionary authority to approve or deny a marijuana license." WAC 314-55-050. The Board's regulations set forth a list of nonexclusive factors relevant to marijuana licensing decisions. *Id.* In fact, the final regulatory factor is a broadly worded catchall, providing that the Board may deny a license if it determines "issuance of the license will not be in the best interest of the welfare, health, or safety of the people of the state." WAC 314-55-050(17).

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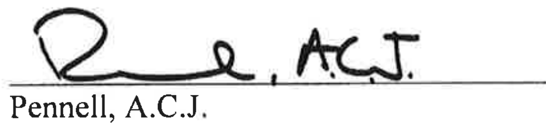
[6] The County argues the 2017 amendments favor its claim that the Board is illegally ignoring zoning restrictions in issuing marijuana licenses. According to the County, the legislature amended the marijuana statute out of recognition of the Board's ongoing illegal conduct and in order to grant reprieves to marijuana licensees who receive illegal licenses. We find this analysis unconvincing. If the legislature had thought the Board was illegally ignoring zoning restrictions when conferring licenses, it would have taken direct responsive action. Illegal activity by a governmental agency would be a serious problem. If the legislature had believed the Board was acting illegally, it would have condemned the Board's actions and added zoning restrictions to the list of prohibitions on marijuana licenses under RCW 69.50.331.

It is not for this court to say whether, or to what extent, the Board should consider zoning restrictions in making its discretionary licensing decisions. The Board must treat each license application individually and consider a host of different circumstances in determining whether to grant a license. WAC 314-55-020, -050. Zoning restrictions are just one potential consideration. While there appears to 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. It is not a matter to be resolved by the judiciary.

CONCLUSION

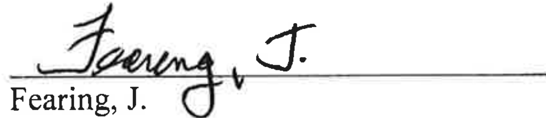
We reverse the superior court and affirm the Board's determination that it is not required to deny marijuana license applications based on local zoning restrictions.



Pennell, A.C.J.

WE CONCUR:

Siddoway, J.



Fearing, J.

EXHIBIT "B"

(3)(a) There shall be a marijuana retailer's license to sell marijuana concentrates, useable marijuana, and marijuana-infused products at retail in retail outlets, regulated by the state liquor and cannabis board and subject to annual renewal. The possession, delivery, distribution, and sale of marijuana concentrates, useable marijuana, and marijuana-infused products in accordance with the provisions of this chapter and the rules adopted to implement and enforce it, by a validly licensed marijuana retailer, shall not be a criminal or civil offense under Washington state law. Every marijuana retailer's license shall be issued in the name of the applicant, shall specify the location of the retail outlet the licensee intends to operate, which must be within the state of Washington, and the holder thereof shall not allow any other person to use the license. The application fee for a marijuana retailer's license shall be two hundred fifty dollars. The annual fee for issuance and renewal of a marijuana retailer's license shall be one thousand three hundred eighty-one dollars. A separate license shall be required for each location at which a marijuana retailer intends to sell marijuana concentrates, useable marijuana, and marijuana-infused products.

(b) An individual retail licensee and all other persons or entities with a financial or other ownership interest in the business operating under the license are limited, in the aggregate, to holding a collective total of not more than five retail marijuana licenses.

(c)(i) A marijuana retailer's license is subject to forfeiture in accordance with rules adopted by the state liquor and cannabis board pursuant to this section.

(ii) The state liquor and cannabis board shall adopt rules to establish a license forfeiture process for a licensed marijuana retailer that is not fully operational and open to the public within a specified period from the date of license issuance, as established by the state liquor and cannabis board, subject to the following restrictions:

(A) No marijuana retailer's license may be subject to forfeiture within the first nine months of license issuance; and

(B) The state liquor and cannabis board must require license forfeiture on or before twenty-four calendar months of license issuance if a marijuana retailer is not fully operational and open to the public, unless the board determines that circumstances out of the licensee's control are preventing the licensee from becoming fully operational and that, in the board's discretion, the circumstances warrant extending the forfeiture period beyond twenty-four calendar months.

(iii) The state liquor and cannabis board has discretion in adopting rules under this subsection (3)(c).

(iv) This subsection (3)(c) applies to marijuana retailer's licenses issued before and after July 23, 2017. However, no license of a marijuana retailer that otherwise meets the conditions for license forfeiture established pursuant to this subsection (3)(c) may be subject to forfeiture within the first nine calendar months of July 23, 2017.

(v) The state liquor and cannabis board may not require license forfeiture if the licensee has been incapable of opening a fully operational retail marijuana business due to actions by the city, town, or county with jurisdiction over the licensee that include any of the following:

(A) The adoption of a ban or moratorium that prohibits the opening of a retail marijuana business; or

(B) The adoption of an ordinance or regulation related to zoning, business licensing, land use, or other regulatory measure that has the effect of preventing a licensee from receiving an occupancy permit from the jurisdiction or which otherwise prevents a licensed marijuana retailer from becoming operational.

DECLARATION OF SERVICE

On the day set forth below, I sent via electronic mail and deposited in the U.S. Mail a true and accurate copy of:

- Petition for Review

to the following parties:

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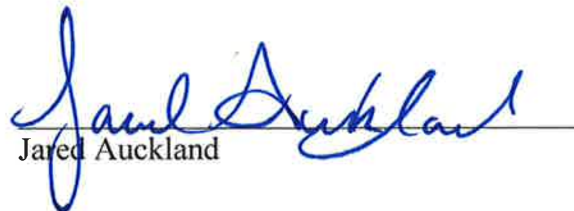
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 10th day of May, 2019, at Ellensburg, Washington.



Jared Auckland

KITTITAS COUNTY PROSECUTOR'S OFFICE

May 10, 2019 - 4:24 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35874-7
Appellate Court Case Title:	In re the Matter of: Petition of Kittitas County for Declaratory Order
Superior Court Case Number:	17-2-00216-2

The following documents have been uploaded:

- 358747_Petition_for_Review_Plus_20190510162319D3399324_6836.pdf
  This File Contains:
  Affidavit/Declaration - Service
  Petition for Review
  The Original File Name was 05-10-2019 Respondent Kittitas Countys Petition for Review.pdf

A copy of the uploaded files will be sent to:

- BruceT1@atg.wa.gov
- LALOlyEF@ATG.WA.GOV
- angela.bugni@co.kittitas.wa.us
- jared.auckland@co.kittitas.wa.us
- maryt@atg.wa.gov
- milt@spokanelitigation.com

Comments:

Kittitas County's Petition for Review with attached Declaration of Service

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Sender Name: Angela Bugni - Email: angela.bugni@co.kittitas.wa.us
Filing on Behalf of: Neil Alan Caulkins - Email: neil.caulkins@co.kittitas.wa.us (Alternate Email:)

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