

NO. 48807-8-II

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

WASHINGTON RESTAURANT ASSOCIATION, a Washington non-profit organization; NORTHWEST GROCERY ASSOCIATION, a non-profit organization; and COSTCO WHOLESALE CORPORATION, a Washington corporation,

Appellants,

v.

WASHINGTON STATE LIQUOR CONTROL BOARD, a state agency; CHRIS MARR, SHARON FOSTER, and RUTHANN KUROSE, in their official capacities as members of the Washington State Liquor Control Board,

Respondents,

and

ASSOCIATION OF WASHINGTON SPIRITS & WINE
DISTRIBUTORS,

Intervenor-Respondent.

**RESPONSE BRIEF OF WASHINGTON STATE LIQUOR
CONTROL BOARD**

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I. INTRODUCTION

Since 1934, the State has delegated authority to implement and enforce the State's liquor laws to the Washington State Liquor Control Board (Board).¹ The Board issues licenses to sell liquor, enforces statutes and regulations governing the exercise of licensing rights, and, until May 31, 2012, distributed liquor sold at retail from stores operated by the Board and staffed by employees of the Board, or from stores operated by persons who contracted to sell the state-owned liquor in exchange for a commission. *See* Ch. 66.08 RCW (2010).

In November 2011, Washington voters passed Initiative 1183, which "privatized" the importation, distribution, and retail sale of spirits. The Initiative created new spirits distributor licenses, spirits retail licenses, and modified or created privileges that other types of liquor licensees can hold or exercise with regard to spirituous liquor. The law imposed license fees to be collected by the Board. Among those fees is a fee imposed on spirits distributors based on sales. The "license issuance fee" for spirits distributors is set at the rate of 10 percent of sales in the first 27 months of

¹ In 2015, the Legislature changed the Board's name to the Washington State Liquor and Cannabis Board. Laws of 2015, ch. 70, § 3 (2SSB 5052).

licensure, dropping to five percent in each year thereafter.
RCW 66.24.055(3)(a).²

Appellants Washington Restaurant Association, the Northwest Grocery Association, and Costco Wholesale Corporation—the parties who drafted and promoted the Initiative—challenge the Board’s rules that impose a fee on the sales of those who do not specifically hold distributor licenses but who enjoy limited distribution rights under other licenses or certificates. But the Initiative did not eliminate the Board’s historically broad regulatory and rulemaking authority, including the Board’s authority to prescribe and collect certain license fees consistent with the Board’s duty to collect and disburse funds for the regulation of liquor and for public safety purposes. RCW 66.08.010, .030(4), .170 through .210. The Court should uphold the fees.

Additionally, the “sell and deliver” rules are consistent with the Board’s authority to regulate the sale of liquor kept by licensees entitled to purchase it, RCW 66.08.030(6); to specify the “manner, method and means by which liquor may lawfully be conveyed or carried within the state,” RCW 66.08.030(13); and are “necessary to perform [the Board’s] regulatory functions” to preserve the distributor tier, RCW 66.08.050(8).

² The Initiative set the fee at 10 percent for the first two years of licensure. Laws of 2012, ch. 2, § 105(3)(a)(i). The legislature later amended it to the first 27 months of licensure. Laws of 2013 2nd Sp. Sess., ch. 12, § 1.

And the alleged procedural defects do not render the rules invalid. The Court should affirm.

II. COUNTERSTATEMENT OF THE ISSUES

1. Where the statute imposes a fee on sales by licensed spirits distributors, and the Board imposed the same fee on spirits distribution sales made by licensed distillers exercising their limited distribution authority, was the Board imposition of that fee a proper exercise of its statutory authority?

2. Do the sell and deliver rules validly further the Board's historically expansive—and undiminished—authority to regulate the sale of liquor within the state, RCW 66.08.030(6), and specify the “manner, methods and means by which liquor may lawfully be conveyed or carried within the state,” RCW 66.08.030(13)?

3. Did the Board substantially comply with the rulemaking requirements?

III. STATEMENT OF THE CASE

A. The 1933 Liquor Control Act Created a Distinct Regulatory Scheme for the Sale of Liquor

In 1933, Washington State adopted the Washington State Liquor Control Act to regulate intoxicating liquors. Laws of 1933, Ex. Sess., ch. 62; Title 66 RCW. The Act created the Washington State Liquor Control

Board to regulate the distribution and sale of liquor. *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 647, 278 P.3d 632 (2012).

The state became the exclusive distributor and retailer for off-premises consumption of spirits.³ *Id.* (citing former RCW 66.16.010 (2010)); *see also* former RCW 66.08.050 (2010). All retailers selling liquor on premises (e.g., restaurants and bars) had to purchase spirits from a designated state liquor store. *Id.* at 648. The Board purchased spirits from suppliers and distributed them to state liquor stores from a single distribution center. *See* former RCW 66.08.030, .050 (2010), and former RCW 66.16.010-080 (2010). Sales, taxes, and markups contributed funds to the state treasury.

For the distribution and sale of beer and wine, the legislature enacted a three-tier system, providing different regulations and licensing requirements for manufacturers, distributors, and retailers. *Wash. Ass'n for Substance Abuse*, 174 Wn.2d at 647 (citing former RCW 66.28.280 (2009)). The distributor tier was designed to “prevent manufacturers from exerting undue influence upon retailers and to provide an efficient means of tax collection.” *Id.*

³ “Spirits” is defined to include almost all distilled alcoholic beverages and some fortified wines. RCW 66.04.010(41).

The Liquor Act also created the Liquor Revolving fund, which consists “of all license fees, permit fees, penalties, forfeitures, and all other moneys, income, or revenue received by the Board.” RCW 66.08.170. From the fund, monies are disbursed to fund alcoholism treatment, juvenile alcohol and drug abuse prevention programs, wine and grape research, RCW 66.08.180, as well as general funding for state and local governments. RCW 66.08.190.

B. I-1183 “Privatized” the Sale of Spirits but Did Not Diminish the Board’s Role as Regulator or Licensor

Initiative 1183, passed by the voters in 2011, “privatized” the importation, distribution, and retail sale of spirits. It proposed to “[g]et the state government out of the commercial business of distributing, selling, and promoting the sale of liquor, allowing the State to focus on the more appropriate government role of enforcing liquor laws and protecting the public health and safety concerning all alcoholic beverages.” Laws of 2012, ch. 2, § 101(2)(b). Another purpose of the Initiative was to “provide increased funding for state and local government services, while continuing to strictly regulate the distribution and sale of liquor.” Laws of 2012, ch. 2, § 101(2)(a) (emphasis added). By statute, those state and local government services relate primarily to various aspects of liquor

regulation, substance abuse, and local services in counties and cities in which alcohol is sold. *See* RCW 66.08.180 through .210.

The Initiative created spirits distributor and retail licensees, and it imposed license fees based on sales to support liquor regulation and funding for local services. Laws of 2012, ch. 2, §§ 103, 105 (*codified as* RCW 66.24.630, .055). Although the Board no longer has authority to buy, distribute, or sell liquor, it continues to collect license fees from all types of liquor licensees. Laws of 2012, ch. 2, § 102(2) (*codified as* RCW 66.24.620(2)). So while the passage of I-1183 ended the state's direct involvement in the sale and distribution of liquor, it maintained the Board's role as a strict regulator of the distribution and sale of liquor and did not diminish its authority to impose fees on those activities. *See* RCW 66.08.010, 66.08.030(3)–(20). The Initiative also did not change the Act's provision for distributions from the Liquor Revolving Fund to counties, cities, towns, and border areas to fund local services including public safety programs. Laws of 2012, ch. 2, § 101(2)(k); *Wash. Ass'n for Substance Abuse*, 174 Wn.3d at 649. In fact, I-1183 was intended to provide *increased* funding for state and local government services, including local public safety programs. Laws of 2012, ch. 2, § 101(2)(a), (k).

C. The Initiative Created Distributor Licenses for New, Private Spirits Distributors, and Requires Them to Pay a Monthly Fee Based on Sales

To replace the state as the sole distributor of spirits, I-1183 created a “spirits distributor license” and imposed a license issuance fee based on sales to replace lost revenues that support liquor regulation and local services. Laws of 2012, ch. 2, § 105 (*codified as* RCW 66.24.055); *Ass’n of Wash Spirits and Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 347-48, 340 P.3d 849 (2015). This license is the “broadest grant of authority under the Initiative, authorizing the licensee to purchase spirits from manufacturers, distillers, or other suppliers and resell the spirits to a variety of establishments.” *Ass’n of Wash. Spirits and Wine Distribs.*, 182 Wn.2d at 347. Distributor licensees also may export spirits from the state. RCW 66.24.055(1).

The distributor license fee is a monthly fee, calculated as 10 percent of the total revenue from the licensee’s sales of spirits for each of the first 27 months of licensure, dropping to 5 percent thereafter. RCW 66.24.055(3)(a). The Initiative specifically required that those fees amount to \$150 million in the first year of private distribution sales. Laws of 2012, ch. 2, §105(3) (*codified as* RCW 66.24.055(3)(c)).

D. I-1183 Authorized Licensed Distillers and Certificate of Approval Holders to Sell Their Products Directly to Retailers

I-1183 also permitted in-state distillers and importers to exercise limited authority to distribute their own products without requiring the sale to go through a licensed spirits distributor. *Id.* at 347-48. Licensed in-state distillers may sell their own product directly to retailers, and out-of-state spirits distillers and importers may obtain one of three “certificates of approval” that authorize them to import their products into Washington and sell them directly to retailers. Laws of 2012, ch. 2, § 206 (*codified as* RCW 66.24.640).⁴ A licensed distiller has authority to sell only its own products, which it may sell to licensed spirits distributors or, by paying the additional fee prescribed in WAC 314-28-070(3), directly to licensed spirits retailers. Similarly, certificate of approval holders may sell only their own products, and they may sell them only to spirits distributors or importers licensed in Washington, unless they pay prescribed fees to receive a separate additional endorsement allowing sale directly to licensed spirits retailers. WAC 314-23-030.

E. The Rulemaking Process

After filing emergency rules in December 2011 in response to the passage of I-1183, the Board undertook a comprehensive rulemaking

⁴ Like the Appellants’ brief, this brief refers to distillers and certificate of approval holders collectively as “distillers” for ease of reference and because they are treated similarly as to the fees at issue in this case.

process to implement I-1183, ultimately adopting two sets of rules in 2012. The Board filed a Preproposal Statement of Inquiry on December 11, 2011 (Wash. St. Reg. 11-24-098) and filed notices of the proposed permanent rules on March 14 and April 18, 2012 (Wash. St. Reg. 12-07-040, 12-09-088). CP 121-22, 471-72. The Board solicited and received hundreds of written comments and held public hearings on the proposed rules on May 24, June 27, and July 25, 2012 (CP 122-23).⁵

Among the rules the Board adopted were rules imposing a fee on sales made by distillers when exercising their limited distribution authority; the fee was 10 percent for the first two years of sales, and 5 percent thereafter. WAC 314-28-070(3) (distillers); WAC 314-23-030(3)(b) (certificate of approval holders). This fee matched the fee imposed on licensed distributors in I-1183, section 105(3)(a) (Laws of 2012, ch. 2, §105(3)(a)). The Board also adopted rules requiring distributors to sell and deliver product only from their licensed premises. WAC 314-23-020 (spirits distributors); WAC 314-24-180(2) (wine distributors).

⁵ The record does not support the Appellants' characterization that the Board "staunchly opposed, and continues to resist" the Initiative. Br. of Appellants at 1. Rather, the record demonstrates the Board's efforts to interpret and implement a complicated initiative while continuing to fulfill its regulatory duties.

F. Procedural History

Shortly after the rules were adopted, the Appellants—the Washington Restaurant Association, Northwest Grocery Association, and Costco Wholesale Corporation, who were instrumental in drafting and promoting the Initiative—filed a petition for review and declaratory judgment in this case, challenging several of the rules individually and all of the rules on procedural bases. CP 1-16. They complained that the Board had picked sides by passing rules that favored the distributors. CP 75, 77, 112.

At the same time, the Association of Washington Distributors of Wine and Beer—the Intervenor-Respondent here—filed a separate petition for judicial review, challenging the Board’s rules implementing the requirement that the first year of distributor license fees amount to \$150 million. *Ass’n of Wash Spirits*, 182 Wn.2d at 349. The Association argued that the Board should have imposed that one-time fee obligation on distillers who self distribute, just as it had imposed a 10 percent monthly fee on the distribution sales of distillers. *Id.* at 353-54. The Washington Supreme Court disagreed. *Id.* at 357-58. The Court specifically “decline[d] to address the subsection (3)(a) percentage fee” which is at issue in this case *Id.* at 355.

After briefing and oral argument in this case, the Thurston County Superior Court upheld all but one of the individual rules the Appellants challenged as valid exercises of the Board's rulemaking authority and not inconsistent with the Initiative.⁶ CP 778-91. The court further held that the Board failed to substantially comply with rulemaking procedures because it did not file a Small Business Economic Impact Statement (SBEIS) for the two sets of rules. CP 781-81, 790. However, the court stayed the invalidation of all the rules so that the Board could complete the SBEIS. CP 782, 790.

Following the ruling, the Board conducted an SBEIS; it was filed with the Office of the Code Reviser on March 1, 2014. Wash. St. Reg. 14-05-103, <http://lawfilesexternal.wa.gov/law/wsr/2014/05/14-05-103.htm>. The Appellants did not argue to the superior court that the SBEIS was untimely or insufficient, or that the Board failed to adequately reconsider the rules in light of the SBEIS. In fact, they entered an agreed order with the Board stipulating that the portion of the order invalidating all of the rules could be vacated. CP 859. In this appeal, they have abandoned their argument that all the rules must be invalidated because of any alleged

⁶ The court invalidated the portions of WAC 314-02-103(2) and WAC 314-02-106(1)(c) that imposed "per day" limitations on sales between retailers. CP 784, 789. The Board does not appeal that ruling.

procedural deficiencies. Br. of Appellants at 16. They continue to challenge the 10 percent fee rules and the delivery location rules only.

IV. STANDARD OF REVIEW

The Court reviews the validity of agency rules under RCW 34.05.570(2)(c). Under that provision, a rule may be invalidated only if it 1) violates constitutional provisions; 2) exceeds the agency's statutory authority; 3) was adopted without complying with statutory rule-making procedures; or 4) is arbitrary and capricious in that it could not have been the product of a rational decision maker. *Ass'n of Wash. Spirits*, 182 Wn.2d at 350. Appellants do not allege any constitutional violation, so that basis for invalidation is not discussed further.

A rule is presumed valid and should be upheld if it is reasonably consistent with the statute it implements. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). A rule is valid if it is promulgated pursuant to properly delegated authority. *State v. Brown*, 142 Wn.2d 57, 62, 11 P.3d 818 (2000). The burden is on the Appellants to present compelling reasons why the rule conflicts with the intent and purpose of the statute it implements. RCW 34.05.570(1)(a); *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986). Questions of statutory interpretation are reviewed de novo. *Ass'n of Wash. Spirits*, 182 Wn.2d at 350. "The court discerns legislative intent from the

plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions . . . and the statutory scheme as a whole.” *Id.* (citing *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)).

A rule is arbitrary and capricious only if is “willful, unreasoning, and taken without regard to the attending facts or circumstances.” *Ass’n of Wash. Spirits*, 182 Wn.2d at 358. “[W]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Id.* (quoting *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002)). The arbitrary and capricious standard is very narrow and highly deferential, and the party asserting it carries a “heavy burden.” *King Cnty. Public Hosp. Dist. No. 2 v. Dep’t of Health*, 167 Wn. App. 740, 749, 275 P.3d 1141 (2012).

V. ARGUMENT

The Board imposed an additional fee on licensed distillers and certificate of approval holders who wish to exercise their limited ability to distribute their own products. The fee the Board imposed was identical to that imposed by the Initiative on licensed distributors. The Board’s imposition of that additional fee was reasonable, consistent with the

statute read as a whole, and a valid exercise of its historically broad regulatory authority over liquor and its specific authority to impose fees. RCW 66.08.030(4). The Court should uphold the rules imposing the fee as a lawful exercise of the Board's authority.

The Court should also uphold the sell and deliver rules. They also were adopted in the reasonable exercise of the Board's statutory authority to regulate liquor sales, and they serve to preserve the distributor tier in Washington, which is an important part of the regulatory system.

The alleged procedural defects in the rulemaking process do not undermine the rules' validity.

The Court should affirm the superior court's order upholding the challenged rules.

A. The 10 Percent Fee Rule is Valid

Because of the public safety implications associated with liquor consumption, the Board historically has had broad regulatory authority over the sale and distribution of liquor. *See* RCW 66.08.010; *Jow Sin Quan v. Liquor Control Bd.*, 69 Wn.2d 373, 382, 418 P.2d 424 (1966); *see also Wash. Ass'n for Substance Abuse*, 174 Wn.2d at 657. While the passage of I-1183 ended the state's direct involvement in the sale and distribution of liquor, it did not eliminate the state's authority to regulate it or its authority to impose fees on those activities. *See* RCW 66.08.010,

66.08.030(3)–(20). In fact, the Initiative requires the state government to “continu[e] to strictly regulate the distribution and sale of liquor.” Laws of 2012, ch. 2, § 101(2)(a).

The Board also is specifically authorized to impose license fees “for which no fees are prescribed in [Title 66], and prescribing the fees for anything done or permitted to be done under the regulations.” RCW 66.08.030(4). The Initiative did not amend or repeal this authority. Given these broad and specific powers, the Board reasonably acted within its authority to impose an additional fee on licensees who act as distributors but who are not required to obtain a specific distributor license. The Board reasonably determined that the 10 percent fee (dropping to 5 percent in the third year) that the Initiative imposed on licensed distributors should also be imposed on those distillers who self-distribute. This determination is supported by the Initiative’s requirement that they comply with the “applicable laws and rules relating to distributors.” RCW 66.24.640; *see also* RCW 66.28.330(4). Additionally, the different purposes of the ongoing fee on sales under RCW 66.24.055(3)(a) and the distributors’ one-time, \$150 million obligation under RCW 66.24.055(3)(c) support extending the former fee to distillers who self-distribute but not the latter.

1. I-1183 created new spirits licenses, giving some manufacturers and importers the authority to distribute spirits without having to obtain a spirits distributor license

Before the passage and implementation of I-1183, only the State of Washington could distribute and sell packaged spirits within the state. The Initiative ended the state's exclusive right to distribution and retail sales, allowing private persons to become licensed as spirits distributors in Washington.

The Initiative established a spirits distributor license, allowing a person holding the license to be a general distributor and exporter of spirits, able to buy and sell spirits purchased from a wide range of manufacturers, distillers, and suppliers anywhere in the world. RCW 66.24.055(1); *Ass'n of Wash. Spirits*, 182 Wn.2d at 347. A person holding a spirits distributor license is broadly authorized to purchase spirits from

manufacturers, distillers, or suppliers including, without limitation, licensed Washington distilleries, licensed spirits importers, other Washington spirits distributors, or suppliers of foreign spirits located outside of the United States,

and to sell those spirits to

spirits retailers including, without limitation, spirits retail licensees, special occasion license holders, interstate common carrier license holders, restaurant spirits retailer license holders, spirits, beer, and wine private club license holders, hotel license holders, sports entertainment facility

license holders, and spirits, beer, and wine nightclub
license holders, and to other spirits distributors;

or to export those spirits from the state. RCW 66.24.055(1).

In exchange for the privilege of holding a spirits distributor license, each licensee must pay a license issuance fee that is comprised of two parts: (1) a monthly fee, calculated as 10 percent of the total revenue from the licensee's sales of spirits for that month, for each of the first 27 months of licensure, dropping to five percent for the 28th month and thereafter; and (2) an additional one-time prorated payment to bring the total amount of license issuance fees paid in the first year to \$150 million. RCW 66.24.055(3)(a), and (c). In what the Appellants term the "parallel litigation" over the \$150 million rules, the Appellants here (who intervened to defend the challenged rules there) characterized this first-year, \$150 million requirement as the "purchase price" or a "one-time business opportunity transfer payment" for the new distribution business. Br. of Intervenor-Resp'ts at 2, 22, *Ass'n of Wash. Spirits*, 182 Wn.2d 342 (2015) (No. 90561-4), <http://www.courts.wa.gov/content/Briefs/A08/90561-4%20-%20COA%20-%20Intervenor%20Resp%20Brief.pdf>. Distributor licensees also must pay an annual license renewal fee of \$1,320. RCW 66.24.055(4).

Other licensees also may obtain the right to distribute spirits, but their distribution authority is much more limited. For example, a person who produces spirits under a distiller's license under RCW 66.24.140 may "act as a . . . distributor to retailers . . . of spirits of its own production." RCW 66.24.640. The fee for a distiller's license is \$2,000 per year, with fee reductions for certain small distillers of spirits. RCW 66.24.140. The statute is silent as to any additional fee for a licensed distiller acting as a distributor of its own product, even though it imposes no upper limit on the quantity of product that a licensed distiller may distribute.

Similarly, a manufacturer, importer, or bottler of spirits may obtain a "certificate of approval" authorizing it to import those spirits into the state and distribute them to persons who are licensed by the Board or otherwise legally authorized to sell spirits in Washington. RCW 66.24.640; RCW 66.28.035(2). The statute did not set a fee for the certificates and directed the Board to "provide by rule for the issuance of certificates of approval." RCW 66.24.640.

2. The Board properly exercised both its broad regulatory authority and its specific fee-setting authority to impose an additional fee on distillers and certificate of approval holders who act as distributors

The Board historically has broad, general authority. It is directed to "[p]erform all other matters and things, whether similar to the foregoing or

not, to carry out the provisions of this title, and has full power to do each and every act necessary to the conduct of its regulatory functions . . . subject only to audit by the state auditor.” Former RCW 66.08.050(8). Indeed, the entirety of Title 66 RCW is “deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose.” RCW 66.08.010. The Washington Supreme Court has consistently acknowledged and affirmed the broad grant of powers to the Board. *See, e.g., Hi-Starr*, 106 Wn.2d at 458; *Anderson, Leech & Morse, Inc. v. Liquor Control Bd.*, 89 Wn.2d 688, 694–95, 575 P.2d 221 (1978); *State ex rel. Thornbury v. Gregory*, 191 Wash. 70, 74–79, 70 P.2d 788 (1937). Contrary to the Appellants’ insistence, this authority was not altered or removed by I-1183. Br. of Appellants at 33-34. In fact, I-1183 mandated that the Board “continu[e] to strictly regulate the distribution and sale of liquor.” Laws of 2012, ch. 2, § 101(2)(a).

The Court also has specifically recognized the power of administrative agencies to adopt rules “to fill in the interstices of statutes.” *Hi-Starr*, 106 Wn.2d at 462–63; *Wash. Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003) (agencies generally have power to promulgate rules to “fill in the gaps” in legislation if such

rules are necessary to effectuate a general statutory scheme). This general administrative agency authority was not repealed by I-1183. Although the Initiative may have rescinded the language that authorized the Board to “make such regulations not inconsistent with the spirit of this title . . . [which] shall have the same force and effect as if incorporated in this title,” Laws of 2012, ch. 2, § 204, it did not eliminate the Board’s specifically enumerated rulemaking authority in RCW 66.08.030, which includes a considerable range of liquor-related subjects, many of which are very broad.

Among the 21 broad topics for which the Board is authorized to adopt rules are:

- “Regulating the sale of liquor kept by the holders of licenses which entitle the holder to purchase and keep liquor for sale,” RCW 66.08.030(6);
- “Regulating premises in which liquor is kept for export from the state, or from which liquor is exported, prescribing the books and records to be kept,” RCW 66.08.030(10);
- “Prescribing the conditions, accommodations, and qualifications requisite for the obtaining of licenses to sell beer, wines, and spirits, and regulating the sale of beer, wines, and spirits thereunder,” RCW 66.08.030(12); and

- “Prescribing the methods of manufacture, conditions of sanitation, standards of ingredients, quality and identity of alcoholic beverages manufactured, sold, bottled, or handled by licensees and the board; and conducting . . . scientific studies and research relating to alcoholic beverages,”
RCW 66.08.030(19).

Thus, although the Initiative eliminated some language in the rulemaking statute alluding to the Board’s general rulemaking authority, it did not diminish the broad range of topics delegated to the Board for “strict” regulation. The Appellants erroneously state that “if the People had intended to grant the Board generalized powers in addition to specific enumerated ones, it would have done so explicitly.” Br. of Appellants at 34. The People did not have to grant the Board generalized powers it already had been granted. The Board retains its broad rulemaking authority.

In addition to the Board’s broad authority to regulate the distribution and sale of liquor, RCW 66.08.050(6), the Board is specifically authorized to prescribe fees for “permits and licenses issued under this title for which no fees are prescribed in the title, and prescribing the fees for anything done or permitted to be done under the regulations.” RCW 66.08.030(4). This authority predates and survived the Initiative, and it authorizes the Board to establish fees for anything done pursuant to

Title 66 or any of the related rules. Accordingly, although I-1183 did not specifically impose fees on licensed distillers who choose to distribute their product directly to licensed liquor retailers, or on persons obtaining a certificate of approval to import spirits into Washington to distribute them to licensed liquor retailers, the Board has ample authority to prescribe such fees. These broad and specific powers authorized the Board to impose an additional fee on distillers and certificate of approval holders who exercise limited distribution rights. And it is within the Board's discretion, and consistent with the Initiative, to calculate these fees using the same formula as provided for persons holding spirits distributor licenses—i.e., as a percentage of gross distribution sales of the product distributed to licensed liquor retailers. WAC 314-28-070(3); WAC 314-23-030(3).

The Appellants are mistaken when they argue that the Board relied solely on RCW 66.24.055—which created provisions for spirits distributor licenses—as authority for prescribing fees on licensed distillers and persons holding certificates of approval who choose to distribute their own products. In adopting both WAC 314-28-070 and 314-23-030, the Board cited as authority five statutes, including RCW 66.08.030 (providing for the Board's broad rulemaking and fee-setting authority).⁷ Accordingly, it

⁷ Both rules cited RCW 66.08.030, 66.24.055, 66.24.160, 66.24.630, and 66.24.640 as authority. Copies of the rules are attached as an Appendix. *See also* Wash.

is not necessary to parse the language in RCW 66.24.055(3) to find the necessary authority for these rules. Persons holding a distillers license or certificate of approval are not licensed under RCW 66.24.055, and their license fees—including the extra fee prescribed for undertaking the limited distribution of their products to licensed spirits retailers—do not necessarily depend on the language of RCW 66.24.055(3)(a).

3. Imposing on distillers an ongoing distribution fee, but not the one-time distribution business purchase price, is not arbitrary and capricious because it is consistent with the fees' differing purposes

The Board's decision to impose an ongoing distribution fee on the sales of distillers who exercise their limited distribution authority, but to not impose on them the initial, \$150 million dollar purchase price for the new distribution business was not arbitrary and capricious because the purposes of the fees differ, as does the nature of the distributor and distiller businesses themselves.

The purpose of the one-time, \$150 million fee differs from the purpose of the ongoing fee on sales. Prior to I-1182, the State was the sole distributor of spirits. *Ass'n of Wash. Spirits*, 182 Wn.2d at 347. The parties agree that the first-year, \$150 million fee requirement was the initial purchase price to buy the spirits distribution business from the State. In the

St. Reg. 12-12-065, at 79-85 (available at <http://apps.leg.wa.gov/documents/laws/wsr/2012/12/12-12PERM.pdf>).

“parallel litigation,” the Appellants here characterized the \$150 million requirement as the “purchase price” or a “one-time business opportunity transfer payment” for the new distribution business. Br. of Intervenor-Resp’ts at 2, 22, *Ass’n of Wash. Spirits*, 182 Wn.2d 342 (2015) (No. 90561-4), <http://www.courts.wa.gov/content/Briefs/A08/90561-4%20-%20COA%20-%20Intervenor%20Resp%20Brief.pdf>. And the distributor association—Intervenor here and appellant there—referred to the fee as the “initial value” on the distribution business. Opening Br. of Appellant at 1, *Ass’n of Wash. Spirits*, 182 Wn.2d 342 (2015) (No. 90561-4), <http://www.courts.wa.gov/content/Briefs/A08/90561-4%20-%20COA%20-%20App%20Brief.pdf>.

In contrast, a monthly fee based on sales is an ongoing obligation to generate revenue to support the regulation of liquor and related local services; it is not a one-time purchase price for new business. This purpose was explicitly contemplated in I-1183. Among the Initiative’s purposes was to “provide increased funding for state and local government services” and “dedicate a portion of the new revenues raised from liquor license fees to increase funding for local public safety programs, including police, fire, and emergency services in communities throughout the state.”

Laws of 2012, ch. 2, § 101(a), (k).⁸ Thus, even if, as the Appellants suggest, the Board's rulemaking authority was reduced to public safety purposes only, passing rules to generate revenue that supports liquor regulation and local public safety programs is consistent with that purportedly narrow authority. Imposing the fees is "tethered" to the Board's duty to fund public safety programs. *See* Br. of Appellants at 32-34.

The nature of the distribution and distiller businesses themselves also differs. The distributor licensees are entirely new businesses formed after the passage of I-1183. As previously discussed, the new distributor licensees are granted nearly unlimited distribution authority. They can purchase spirits from an entire range of sellers, including international sellers, can sell to the entire range of spirits purchasers, and can export. RCW 66.24.055(1). In other words, these new distributor licensees are in the business of distributing liquor. Distillers, on the other hand, are in the business of making spirits, and they existed as spirits-producing businesses before I-1183. They can distribute only what they produce to a

⁸ The sponsors of the Initiative sought to highlight this aspect of I-1183 in their "arguments for" I-1183 in the voter's pamphlet, stating it would generate "hundreds of millions of dollars in new revenues for state and local services like education, health care and public safety." The "arguments for" I-1183 were prepared by, among others, the president of the Washington Restaurant Association and the Washington State chair of the Northwest Grocery Association. 2011 VOTERS' GUIDE (text available at <https://weiapplets.sos.wa.gov/MyVoteOLVR/onlinevotersguide/Measures?language=en&electionId=42&countyCode=xx&ismyVote=False&electionTitle=2011%20General%20Election%20#ososTop>).

limited number of purchasers, and they cannot export. WAC 314-23-030(1), (2)(a), (3). And, prior to I-1183, the distillers were authorized to sell directly to the Board and, in limited quantities, directly to the public. Former RCW 66.28.060 (2008); former RCW 66.24.145 (2008). So they retained their authority to self-distribute; the Initiative merely changed to whom they can sell and put them in competition with newly-licensed distributors.

It thus makes sense that the \$150 million initial purchase price for the new distribution business and rights would not extend to the existing distillers who only gained limited distribution authority to sell directly to retailers. The new distributor licensees, in contrast, had to buy their way into the market. But where the activities authorized by different licenses overlap, it is appropriate and reasonable that those activities be subject to the same or similar applicable regulatory requirements, such as reporting requirements and requirements relating to fair dealing and undue influence. *See, e.g.*, RCW 66.28.290, .315. When distillers self-distribute and sell directly to retailers, they are now competing with the newly licensed distributors. It therefore also made sense for the Board to impose a fee on distillers who exercise that limited distribution authority to ensure a fee was collected on every distribution sale, and to ensure the distillers do not have an unfair competitive advantage over the licensed distributors.

Under these circumstances, the Board acted within its authority under RCW 66.08.030(4) to impose the same percentage fee on distillers who self-distribute as the Initiative imposed on the licensed distributors.

4. The Court may consider the Board's arguments

The Appellants complain that the rationale the Board offers in support of the validity of the 10 percent fee rules is different than the one offered by the Board during the rulemaking process and in the superior court. Br. of Appellants at 11, 25-26. They improperly urge the Court to reject any defense of the rule that was not previously articulated. However, a “party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” RAP 2.5(a); *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (“an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.”). As the Board’s argument is purely legal, relying only on statutory authority that predated the Initiative and not on material outside of the record, the Court may consider it.

Moreover, RCW 34.05.570(1)(b) does not support the Appellant’s claim that the validity of a challenged rule can be based only on the reasons relied on by the agency in the course of rulemaking. Br. of Appellants at 24. That statute provides that the “validity of agency action

shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.” RCW 34.05.570(1)(b). It says only that the agency action must have been valid at the time it was taken. It says nothing about assessing the reasoning of the agency. The Court’s role is to determine the authority of the agency to have acted, not to look for flaws in the agency’s reasoning. Because the Board’s independent fee-setting authority predated the Initiative and authorized the rules at the time they were adopted, it is a valid source of authority; the adopted rules fall within that authority and are valid under RCW 34.05.570(1)(b).

Appellant’s reliance on *Somer v. Woodhouse*, 28 Wn. App. 262, 623 P.2d 1164 (1981), is unavailing. Br. of Appellants at 25. There, the Department of Licensing was in “technical violation” of the statute requiring it to issue a concise explanatory statement of the principal reasons for and against a rule’s adoption, because it did not issue one at all. *Somer*, 28 Wn. App. at 272. The court explained that the purpose of the concise statement is to assure that the agency actually considered the arguments made and to facilitate judicial review. *Id.* In trying to determine the consequences that should flow from an agency’s failure to provide the required statement, the court looked to federal law and found that the absence of the statement *could* render a rule invalid. *Id.* (citing *Tabor v.*

Joint Bd. for Enrollment of Actuaries, 566 F.2d 705, 710 (D.C. Cir. 1977)). However, regulations with no such statements also have been upheld. *Id.* (citing *Hoving Corp. v. Federal Trade Comm’n*, 290 F.2d 803, 807 (2nd Cir. 1961)). The court ultimately found that the record and briefing provided an adequate basis for judicial review and upheld the challenged regulation, even without the required concise explanatory statement. *Id.* at 273. Thus, the language quoted by the Appellants, that “agency action cannot be sustained on post hoc rationalizations,” was dictum, because the court did not use that reason as a basis to declare the rule invalid—in fact, it upheld the rule. *See* Br. of Appellants at 25.

The more apt case is *Department of Social and Health Services v. Nix*, where Nix argued that the agency should be bound to apply one of its rules as interpreted in its concise explanatory statement made during the rulemaking process. 162 Wn. App. 902, 914-15, 256 P.3d 1259 (2011). The court disagreed, because such statements “do not carry the same weight as the rules themselves.” *Id.* at 914. Just as an agency “is not precluded from changing its interpretation of its own rule,” *id.*, the Board should not be precluded from changing its interpretation of the authority for passing certain rules, where the exercise of that authority was valid. Because the Board’s broad rulemaking authority and specific fee-setting authority authorized the Board to impose a 10 percent fee on sales made

by distillers and certificate of approval holders, the Court should uphold the rules.

5. The Board reasonably imposed a fee on the distribution sales of distillers in light of the statutory requirement that other licensees acting as distributors must comply with the laws applicable to distributors

Agencies may fill in gaps in a statutory framework necessary to effectuate a general statutory scheme. *ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 112, Wn.2d 314, 322, 771 P.2d 335 (1989). Here, the Initiative required that an “industry member operating as a distributor . . . must comply with the applicable laws and rules relating to distributors.” RCW 66.24.640. It also provided that a distiller who self-distributes “must, to the extent consistent with the purposes of chapter 2, laws of 2012, comply with all provisions of and regulations under this title applicable to wholesale distributors selling spirits to retailers.” RCW 66.28.330(4). The requirement that distillers acting as distributors comply with the laws applicable to distributors demonstrates an intent to treat similar activities authorized by different licensees consistently and fairly. Given this purpose, and the purpose of the 10 percent distributor fee, the Board properly harmonized the “applicable laws” and distributor fee provisions and reasonably determined that distillers also should pay a

fee when they self-distribute. The 10 percent fee rules were thus a valid exercise of the Board's fee setting authority under RCW 66.08.030(4).

The Appellants point out that the Board did not extend the one-time, \$150 million fee obligation to the distillers as an "applicable law." Br. of Appellants at 19, 37. But the "all applicable laws" provision cannot mean that distillers who self-distribute must comply with literally *all* laws applicable to distributors. See *Ass'n of Wash. Spirits*, 182 Wn.2d at 357. For example, it would be inconsistent with the Initiative for the Board to require distillers to acquire a full spirits distributor license in order to distribute only their own product where the statute authorizes them to self-distribute under their own licenses; but it is not inconsistent with the Initiative's licensing scheme to impose the same volume-based fee on all distribution activities. Accordingly, the Board must have some discretion to determine what laws are "applicable" and necessary to extend to distillers when they self-distribute in light of the statutory scheme as a whole. And, given the purpose of the ongoing distributor fee obligation (to support liquor regulation and related local services) as compared to the \$150 million fee (buy into the distribution business formerly operated exclusively by the State), and given the previously discussed differences between the new distributor licensee and the pre-existing distillers, the

Board reasonably determine that the ongoing 10 percent fee obligation was an “applicable law” that distillers must comply with. CP 255-56.

This also is consistent with the overall statutory scheme. *See Ass’n of Wash. Spirits*, 182 Wn.2d at 350 (court discerns intent from plain language, text of the provision, context of the statute, related provisions, and statutory scheme as a whole). RCW 66.24.055(3)(b) provides that the monthly distributor fee “is calculated only on sales of items which the licensee was the first spirits distributor in the state to have received.” RCW 66.24.055(3)(d) imposes the (3)(a) distributor license fee on retailers selling for resale if no other distributor license fee has yet been paid. And RCW 66.24.055(3)(e) provides that spirits inventory may not be subject to more than one distribution fee. These provisions demonstrate an intent that a fee be imposed on all spirits sold in the state. Imposing the fee on distillers who act as distributors—where no distributor fee would otherwise be paid—effectuates that intent.

6. The Washington Supreme Court’s decision in the parallel litigation does not control this case

The Appellants erroneously suggest that the outcome of this case is controlled by the Washington Supreme Court’s reasoning in the prior litigation—that the specific language in RCW 66.24.055(3)(c), imposing the \$150 million dollar obligation on “persons holding spirits distributor

licenses” trumps the more general provision in RCW 66.24.640 and RCW 66.28.330(4) requiring distillers to comply with applicable laws relating to distributors. *Ass’n of Wash. Spirits*, 182 Wn.2d at 356-58.

First, the Supreme Court specifically “decline[d] to address the subsection (3)(a) percentage fee.” *Id.* at 355. Second, and more importantly, the Court’s decision merely held that the “fees assessed pursuant to RCW 66.24.055(3)(c) . . . are specific fee provisions that relate only to ‘persons holding spirits distributor licenses.’” *Id.* at 356. Thus, they were not superseded by the general statutory provisions of RCW 66.24.640 and RCW 66.28.330(4). The Court, therefore, rejected the distributor association’s argument that RCW 66.24.055(3)(c) was an “applicable law” with which distillers must comply.

But here, the Board does not argue that the Board’s authority to impose a fee on the distribution sales of distillers comes from RCW 66.24.055(3)(a). Rather, that authority comes from the Board’s historically broad regulatory authority over liquor and its specific authority to prescribe license fees under Title 66. RCW 66.08.030(4); *see* Section V.A.2, *supra*. But the requirement that those licensees comply with the laws applicable to distributors under RCW 66.24.640 and RCW 66.28.330(4) demonstrates a statutory directive to treat similar authorized activities by different licensees consistently and fairly. The

Board thus exercised its fee-setting authority consistent with the statutory scheme.

While the Board offered this reasoning to the Supreme Court in the previous litigation, the Court did not evaluate the merits of the argument or reach the validity of the 10 percent fee rules. *Ass'n of Wash. Spirits*, 182 Wn.2d at 354 n.4. Just because the Washington Supreme Court agreed that the imposition of the \$150 million obligation on only the holders of distributor licenses was consistent with the statute it implemented does not mean the Board was prohibited from exercising its independent fee setting authority to impose a fee on distillers' distribution sales. They are separate matters. *Ass'n of Wash. Spirits*, 182 Wn.2d at 355. The decision does not control the outcome here.

B. The Delivery Location Rules Preserve the Distributor Tier

Prior to I-1183, the Legislature enacted a "three-tier" system for the distribution and sale of beer and wine. *Wash. Ass'n for Substance Abuse*, 174 Wn.2d at 647; former 66.28.280 (2009). Manufacturers, distributors, and retailers comprised the three tiers. *Id.* "The distributor tier was included to prevent manufacturers from exerting undue influence upon retailers and to provide an efficient means of tax collection." *Wash. Ass'n for Substance Abuse*, 174 Wn.2d at 647. For spirits, the state was the sole distributor and seller. *Id.* at 648 (citing former RCW 66.16.010

(2005); WASH. STATE LIQUOR CONTROL BD. FY 2010 ANNUAL REP., at 9-10, <http://www.liq.wa.gov/publications/2010-annual-report-final-web.pdf>.

The Initiative did not abolish Washington's three-tier system for beer and wine. Laws of 2012, ch. 2 §124, codified as RCW 66.28.280. I-1183 extended the three-tier system to spirits by ending the State's exclusive right to sell and distribute spirits and creating private distribution and sale rights and respective licenses. Laws of 2012, ch. 2 § 101(2)(d); *Ass'n of Wash. Spirits*, 182 Wn.2d at 347.

The challenged "sell and deliver" rules require licensed distributors to sell and deliver spirits and wine from the distributors' licensed premise. WAC 314-23-020(2) (spirits); WAC 314-24-180(2) (wine). This preserves the distributor tier by preventing a retailer from, for example, ordering several thousand cases of wine from a winery in California and using a distributor to collect the wine in California and deliver it directly to the retailer's warehouse. In this scenario, the distributor is not acting as a distributor but merely as a freight hauler. Accordingly, the sell and deliver rules maintain the role of distributors and prevent the distributor tier from becoming a sham.

The rules also serve the goal of "promoting the efficient collection of taxes," RCW 66.28.280, which I-1183 left intact. Laws of 2012, ch. 2, § 124. If imported liquor bypasses in-state distribution facilities, the Board

cannot properly track to confirm the quantities imported or ensure the collection of taxes.

These rules were a valid exercise of the Board's broad regulatory authority, which again, the Initiative did not diminish. RCW 66.08.030(6) authorizes the Board to make rules "[r]egulating the sale of liquor kept by the holders of licenses which entitle the holder to purchase and keep liquor for sale." This is an extremely broad grant of authority to "regulat[e] the sale of liquor." Additionally, RCW 66.08.030(13) authorizes the Board to make rules "[s]pecifying and regulating . . . the manner, methods and means by which manufacturers must deliver liquor within the state; and the . . . manner, methods and means by which liquor may lawfully be conveyed or carried within the state." And RCW 66.08.050 requires the Board to "[p]erform all other matters and things, whether similar to the foregoing or not, to carry out the provisions of this title, and has full power to do each and every act necessary to the conduct of its regulatory functions, including . . . every other undertaking necessary to perform its regulatory functions whatsoever." None of these expansive powers was changed by the Initiative. *See* Laws of 2012, ch. 2 § 204. The sell and deliver rules regulate the sale of liquor kept by licensees entitled to purchase it, RCW 66.08.030(6); specify the "manner, method and means by which liquor may lawfully be conveyed or carried within the state,"

RCW 66.08.030(13); and are “necessary to perform [the Board’s] regulatory functions” to preserve the distributor tier, RCW 66.08.050(8). They are valid exercises of the Board’s authority, and the Court should uphold them.

C. The Individual Rules Should Not Be Invalidated on Procedural Grounds

1. The Appellants have abandoned their challenge to the rules based on the SBEIS and, in any event, the argument is moot

Although the Appellants continue to complain that the Board did not prepare an SBEIS, they no longer substantively challenge the rules on that basis or argue the Board failed to substantially comply with the rulemaking procedures in the Administrative Procedure Act (APA). Below, the Appellants argued generally that *all* of the rules should be invalidated because the Board had not conducted an SBEIS. CP at 103-106. The argument was purely procedural. They did not extend this argument to each individual rule they challenged and did not offer any particularized argument as to how the decision not to conduct an SBEIS was legally or factually problematic for the two rules they have brought forward on appeal. *See* CP 66-114. Their effort to do so now, in this Court, should be rejected because they did not do so below. RAP 2.5(a).

More importantly, after the Board completed the SBEIS, the Appellants did not return to the superior court to challenge its sufficiency, argue for a new rulemaking, or argue that the Board inadequately reconsidered the rules in light of the SBEIS. Rather, they entered an agreed order with the Board stipulating that the portion of the order invalidating all of the rules could be vacated. CP 859. Any argument that the rules are invalid for this procedural deficiency has been abandoned. And, because the Board has now completed the SBEIS, and the superior court vacated its order invalidating the rules, the argument is moot.

However, even if the argument had been properly raised and preserved, any error was harmless because the Board, upon completing an SBEIS following the superior court's ruling, found there was no adverse impact on small businesses that would necessitate a change in any of the rules. Wash. St. Reg. 14-05-103, <http://lawfilesexternal.wa.gov/law/wsr/2014/05/14-05-103.htm>. And, as the superior court noted, all that is required of an agency is substantial compliance with rulemaking procedures. CP 781; RCW 34.05.375; *Anderson, Leech & Morse, Inc. v. Liquor Control Bd.*, 89 Wn.2d 688, 693, 575 P.2d 221 (1978). Because the Board has now substantially complied with the procedural requirement to complete an SBEIS, the Court should affirm the challenged rules.

2. The Board substantially complied with the requirement to prepare a concise explanatory statement

Further, the superior court properly declined to invalidate the delivery location rules for lack of a precise explanation for these specific rules during the rulemaking process. As already discussed, in *Somer v. Woodhouse*, the court upheld a rule when the agency had not issued a concise explanatory statement, because the court was still able to engage in judicial review and determine the rule's validity. *Somer*, 28 Wn. App. at 273. Because the court here can review the relevant statutes and determine that the delivery location rules are authorized by law, the lack of a prior explanation does not render the rules invalid or arbitrary and capricious. *Id.*

The Board adopted numerous rules during the rulemaking process to implement I-1183. It filed notice of the proposed sell-and deliver rules, as required by RCW 34.05.325(1). Wash. St. Reg. 12-09-088. It provided opportunity to submit written and oral comments, as required by RCW 34.05.325(2). In the concise explanatory statements, the Board explained generally that the reasons for adopting the numerous rules was to implement the Initiative. CP 445. The Board received 18 comments at the public hearing and 294 written comments. CP 445. It summarized all the comments received during the rulemaking process and responded to them

by subject matter, as required by RCW 34.05.325(6)(a)(iii). CP 445-53. The Board did not receive any comments regarding the proposed sell-and-deliver rules. *Id.* Therefore, it did not specifically address those rules in the concise statement. Thus, the Board substantially complied with the APA's requirements for the concise explanatory statement, RCW 34.05.325, as the superior court correctly held. CP 781.

The *Puget Sound Harvesters Association* case does not support the Appellant's argument that rules must be invalidated because of an inadequate explanation during rulemaking. Br. of Appellants at 40 (citing *Puget Sound Harvesters Ass'n v. Dep't of Fish and Wildlife*, 157 Wn. App. 935, 951, 239 P.3d 1140, 1148 (2010)). There, the court found that the rules allocating fishing time between purse seine and gillnet fishers were not rational because there had been no consideration of the impact the rules would have on the allocation of fish harvest between the two groups. *Puget Sound Harvesters Ass'n*, 157 Wn. App. at 950. The agency asserted it could not accurately predict the catch outcomes, but the court's review of the data in the concise explanatory statement led it to conclude that fishing opportunity is generally proportional to harvest opportunity. *Id.* at 949. Therefore, the agency's analysis had been faulty, and without the proper calculus, the agency's allocation was arbitrary. *Id.* at 948-950.

It was a fact-specific case, and the court did not announce a broad rule that a regulation must be invalidated when there is no explanation.

The reliance on *Low-Income Housing Institute v. City of Lakewood*, 119 Wn. App. 110, 77 P.3d 653 (2003), is similarly misplaced. That case involved a challenge to a final agency order approving the City of Lakewood's comprehensive plan and whether it satisfied the affordable housing demands under a methodology required by the county. *Low-Income Housing Institute*, 119 Wn. App. at 112-13. It was not a rule challenge. The court found the city's order approving the plan never identified the city's current housing needs or how the plan would affect the future availability of affordable housing. *Id.* at 118. Therefore, the court remanded the order to the agency for more thorough findings and articulation for the basis for the ruling because the "agency ha[d] not decided all issues requiring resolution by the agency." RCW 34.05.570(3)(f); *Low-Income Housing Institute*, 119 Wn. App. at 119. The court's ruling was limited to the APA standards for reviewing agency orders in adjudicative proceedings under RCW 34.05.570(3). It does not apply to rulemaking challenges.

The Appellant's procedural arguments do not undermine the rules' validity or the Board's authority to have promulgated them. The Court should uphold the challenged rules.

VI. CONCLUSION

For the foregoing reasons, the Board respectfully asks the Court to affirm the superior court's order upholding the challenged rules.

RESPECTFULLY SUBMITTED this 22nd day of August, 2016.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Leah Harris". The signature is written in a cursive, flowing style.

LEAH HARRIS,
WSBA # 40815
Assistant Attorney General
Attorneys for Respondent

Appendix

WAC 314-28-070

What are the monthly reporting and payment requirements for a distillery and craft distillery license?

(1) A distiller or craft distiller must submit monthly reports and payments to the board.

The required monthly reports must be:

(a) On a form furnished by the board;

(b) Filed every month, including months with no activity or payment due;

(c) Submitted, with payment due, to the board on or before the twentieth day of each month, for the previous month. (For example, a report listing transactions for the month of January is due by February 20th.) When the twentieth day of the month falls on a Saturday, Sunday, or a legal holiday, the filing must be postmarked by the U.S. postal service no later than the next postal business day; and

(d) Filed separately for each liquor license held.

(2) For reporting purposes, production is the distillation of spirits from mash, wort, wash or any other distilling material. After the production process is completed, a production gauge shall be made to establish the quantity and proof of the spirits produced. The designation as to the kind of spirits shall also be made at the time of the production gauge. A record of the production gauge shall be maintained by the distiller. The completion of the production process is when the product is packaged for distribution. Production quantities are reportable within thirty days of the completion of the production process.

(3) On sales on or after March 1, 2012, a distillery or craft distillery must pay ten percent of their gross spirits revenue to the board on sales to a licensee allowed to sell spirits for on- or off-premises consumption during the first two years of licensure and five percent of their gross spirits revenues to the board in year three and thereafter.

(a) On sales after June 1, 2012, a distillery or craft distillery must pay seventeen percent of their gross spirits revenue to the board on sales to customers for off-premises consumption.

(b) Payments must be submitted, with monthly reports, to the board on or before the twentieth day of each month, for the previous month. (For example, payment for a report listing transactions for the month of January is due by February 20th.) When the twentieth day of the month falls on a Saturday, Sunday, or a legal holiday, payment must be postmarked by the U.S. postal service no later than the next postal business day.

[Statutory Authority: RCW 66.08.030, 66.24.055, 66.24.160, 66.24.630, and 66.24.640. WSR 12-12-065, § 314-28-070, filed 6/5/12, effective 7/6/12. Statutory Authority: RCW 66.24.145 and 66.08.030. WSR 10-19-066, § 314-28-070, filed 9/15/10, effective 10/16/10; WSR 09-02-011, § 314-28-070, filed 12/29/08, effective 1/29/09.]

WAC 314-23-030**What does a spirits certificate of approval license allow?**

(1) A spirits certificate of approval licensee may not commence sales until March 1, 2012. A spirits certificate of approval license may be issued to spirits manufacturers located outside of the state of Washington but within the United States.

(2) There are three separate spirits certificate of approval licenses as follows:

(a) A holder of a spirits certificate of approval may act as a distributor of spirits they are entitled to import into the state by selling directly to spirits distributors or spirits importers licensed in Washington state. The fee for a certificate of approval is two hundred dollars per year.

(b) A holder of an authorized representative out-of-state spirits importer or brand owner for spirits produced in the United States but outside of Washington state may obtain a spirits authorized representative domestic certificate of approval license which entitles the holder to import spirits into the state by selling directly to spirits distributors, or spirits importers licensed in Washington state. The fee for an authorized representative certificate of approval for spirits is two hundred dollars per year.

(c) A holder of an authorized representative out-of-state spirits importer or brand owner for spirits produced outside of the United States obtains a spirits authorized representative foreign certificate of approval which entitles the holder to import spirits into the state by selling directly to spirits distributors, or spirits importers licensed in Washington state. The fee for an authorized representative certificate of approval for foreign spirits is two hundred dollars per year.

(3) A spirits certificate of approval holder, a spirits authorized representative domestic certificate of approval holder, and/or a spirits authorized representative foreign certificate of approval holder must obtain an endorsement to the certificate of approval that allows the shipment of spirits the holder is entitled to import into the state directly to licensed liquor retailers. The fee for this endorsement is one hundred dollars per year and is in addition to the fee for the certificate of approval license. The holder of a certificate of approval license that sells directly to licensed liquor retailers must:

(a) Report to the board monthly, on forms provided by the board, the amount of all sales of spirits to licensed retailers.

(b) Pay to the board a fee of ten percent of the total revenue from all sales of spirits to retail licensees made during the month for which the fee is due for the first two years of licensure.

(c) Pay to the board five percent of the total revenue from all sales of spirits to retail licensees made during the month for which the fee is due for the third year of licensure and every year thereafter.

[Statutory Authority: RCW 66.24.640, 66.08.030. WSR 13-07-009, § 314-23-030, filed 3/7/13, effective 4/7/13. Statutory Authority: RCW 66.08.030, 66.24.055, 66.24.160, 66.24.630, and 66.24.640. WSR 12-12-065, § 314-23-030, filed 6/5/12, effective 7/6/12.]

PROOF OF SERVICE

I, Roxanne Immel, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 22nd day of August 2016, I caused to be served by email a true and correct copy of **Response Brief of Washington State**

Liquor Control Board:

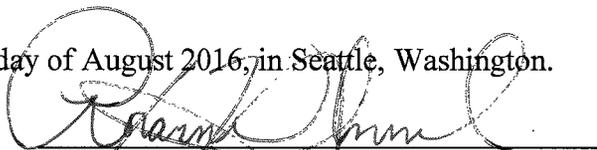
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 22nd day of August 2016, in Seattle, Washington.



Roxanne Immel, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

August 22, 2016 - 4:08 PM

Transmittal Letter

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