

No. 50090-6

Court of Appeals
DIVISION II
STATE OF WASHINGTON

PUGET SOUND GROUP, LLC, et al.,

APPELLANTS,

V.

WASHINGTON STATE LIQUOR & CANNABIS BOARD et al.,

RESPONDENTS.

APPELLANTS BRIEF
[AMENDED]

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I. INTRODUCTION

Puget Sound Group et al., ("PSG") submits this opening brief in its appeal from the Final Order of the Thurston County Superior Court ("Trial Court") dismissing the PSG complaint and prayer for relief.

In the order of dismissal, the Trial Court granted substantial deference to the Washington State Liquor and Cannabis Board's ("WSLCB") actions despite the Agency's lack of expertise and despite a glaring absence of due consideration. In upholding the WSLCB's actions, the Trial Court also sanctioned the Agency's use of improper rulemaking procedure. Given the errors of the Trial Court, this Court should reverse the decision.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred in upholding the WSLCB's arbitrary and capricious implementation of The Cannabis Patient Protection Act, Laws of 2015, ch. 70, § 6 (hereinafter, "CPPA").
2. The Trial Court erred in adjudicating that the WSLCB did not engage in rulemaking when the Agency adopted a specific cap on the number of available retail licenses, amending an existing regulatory program that until

that point contained no retail license cap and, in so doing, changed the conditions & qualifications for licensure.

3. The Trial Court erred in upholding the WSLCB's improper rulemaking when the Agency adopted rules setting license caps without public notice & comment and without publication in the Washington State Register.

4a. The Trial Court erred in upholding the WSLCB's arbitrary and capricious action when the Agency relied on third-party methodology it knew to be flawed when it adopted specific caps on marijuana retail licenses.

4b. The Trial Court erred in upholding the WSLCB's arbitrary and capricious action when the Agency adopted the license caps within 24hrs after publication of the final market report, in dereliction of the duty of due consideration.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the WSLCB engage in the minimum amount of deliberation and due consideration required when adopting rules implementing the CPPA?

a. Would a certified agency record that is absent proof of deliberation constitute per se arbitrary and capriciousness?

b. Does emergency rulemaking provide an exception to the deliberation requirement?

2. Did the WSCLB engage in rulemaking when it adopted the retail license cap on December 16th, 2015?

a. RCW 34.05.010(16) provides:

"Rule" means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale. The term includes the amendment or repeal of a prior rule, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, (ii) declaratory rulings issued pursuant to RCW 34.05.240, (iii) traffic restrictions for motor vehicles, bicyclists, and pedestrians established by the secretary of transportation or his or her designee where notice of such restrictions is given by official traffic control devices, (iv) rules of institutions of higher education involving standards of admission, academic advancement, academic credit, graduation and the granting of degrees, employment relationships, or fiscal processes, or (v) the determination and publication of updated nexus thresholds by the department of revenue in accordance with RCW 82.04.067.

b. RCW 34.05.338(5)(c)(iii) provides:

A "significant legislative rule" is a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which

subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.

3. Was due consideration required prior to the WSCLB's adoption of the statewide cap and the corresponding jurisdictional caps and if so, does the record reflect that the Agency engaged in due consideration, supported by a process of reason?

4. Should the decision to adopt specific license caps be upheld if, the decision came within 24 hours of publication of the market research study that the WSLCB relied upon, and which represents the analysis cited as the basis for the Agency's decision?

IV. STATEMENT OF THE CASE

A. Basic Facts

On April 24, 2015, Governor Jay Inslee signed the Cannabis Patient Protection Act, Second Substitute Senate Bill 5052, into law (hereinafter, the "CPPA"). The CPPA mandates;

The state liquor and cannabis board must reconsider and increase the maximum number of retail outlets it established ... and allow for a new license application period and a greater number of retail outlets to be permitted in order to accommodate the medical needs of qualifying patients and designated providers.¹

¹ Laws of 2015, ch. 70, § 8(2)(d)

The legislation's primary function was to facilitate the consolidation of Washington's two legal cannabis markets by transitioning patients and providers operating under the Medical Use of Cannabis Act, MUCA / RCW 69.51A into the Initiative 502 (i502) adult-use / recreational program administered by the WSLCB. The WSLCB, in partnership with the Department of Health (DoH) and Washington State Department of Agriculture (WSDA), were tasked with adopting rules to carry out the consolidation.

To transition participants in the medical cannabis industry into the system overseen by the WSLCB, the CPPA gives explicit instructions regarding the development of a license application process; instructing that:

The state liquor and cannabis board **must develop** a competitive, merit-based application process that includes, at a minimum, the opportunity for an applicant to demonstrate experience and qualifications in the marijuana industry.² (emphasis added)

The CPPA then directs:

The state liquor and cannabis board shall give preference **between competing applications in the licensing process** to applicants that have the **following** experience and qualifications, in the **following** order of priority.³ (emphasis and italics added)

² Laws of 2015, ch. 70, § 6(1)(a) - RCW 69.50.331(1)(a)

³ *Id.*

The preference between competing applications in process is established using three legislatively prescribed priorities.

The first priority is given to those who; applied for a recreational retail license prior to July 1, 2014, owned, operated, or were employed by a collective garden before January 1, 2013, maintained applicable business licenses, and “had a history of paying all applicable state taxes and fees.”⁴

The second priority is for those that meet the criteria for priority one but did not previously apply for a retail license.⁵

The third priority category is a catchall for “all other applicants who do not have the experience and qualifications above.”⁶

B. WSLCB Rulemaking to Implement the CPPA.

On September 23, 2015, the WSLCB issued emergency rules implementing the CPPA. The rules integrated the language of the priority system designed to give preference between competing applications but noticeably did not include the merit-based process affording applicants the opportunity to demonstrate their experience & qualifications in the industry.

Instead, the WSLCB adopted the following rule:

The WSLCB will use a priority system to determine the order that

⁴ Laws of 2015, ch. 70, § 6(1)(a)(i)

⁵ Laws of 2015, ch. 70, § 6(1)(a)(ii)

⁶ Laws of 2015, ch. 70, § 6(1)(a)(iii)

*marijuana retailers are licensed. Within priority categories, applications will not be ranked and will be processed in order of submission.*⁷ AR at 9

On October 9, 2015, the WSLCB announced that a new retail application period would begin on October 12, 2015. CP 514, Ex A.

The marijuana retail application was opened to all those willing to pay the filing fee, without regard for those applicants currently serving patients and without regard to the total number of individuals they had served.⁸ Neither the October 9th notice, nor the rules adopted on September 23rd, contained caps on the number of available retail licenses.

C. License Cap Adoption Outside Rulemaking

On November 19th, 2015, BOTEC Analysis released a report entitled, Estimating the Size of the Medical Cannabis Market in Washington State.⁹ CP 279

The report was commissioned by the WSLCB and served as the basis for setting the number of new retail stores.¹⁰

On November 25th, 2015, the WSLCB informed BOTEC that they

⁷ See also WAC 314-55-020(3)

⁸ *Id.*

⁹ Mark A.R. Kleiman et al., Estimating the Size of the Medical Cannabis Market in Washington State. November 19, 2015

¹⁰ CP 555, Ex D., BOARD TO INCREASE NUMBER OF RETAIL MARIJUANA STORES FOLLOWING ANALYSIS OF MARKETPLACE | WASHINGTON STATE LIQUOR AND CANNABIS BOARD, <https://lcb.wa.gov/pressreleases/lcb-to-increase-number-of-retail-mj-stores>

had concerns with the methodology and accuracy of the report. The WSLCB then stated that the report could not be used for the purposes of increasing the total number of retail stores. CP 516, Ex B.

In response, BOTEC Analysis released a second market research report on December 15th, 2015. CP 520, Ex C.

On December 16th, 2015, the WSLCB adopted a new statewide retail store cap with limited allotments for cities and counties. The WSLCB publicly announced the caps on the day of their adoption. CP 555, Ex D.

D. The Appellants

During the Fall 2015 license application period, Puget Sound Group, et al. were existing purveyors of medical cannabis within their respective jurisdictions, operating in compliance with Washington's Medical Use of Cannabis Act MUCA / RCW 69.51A et. seq.

Each were directly affected by the WSLCB's approach to CPPA implementation. Appellants submitted applications during the first few weeks of the application period and each were harmed by one or more of the WSLCB's actions and rules. Despite applying for licensure early within the application period, not one of the Appellants was given the opportunity to demonstrate their experience and qualifications in the marijuana industry.

E. Trial Court Proceedings.

Faced with the statutorily-imposed transition deadline of July 1, 2016 to shut or acquire licensure from the WSLCB,¹¹ Puget Sound Group et al. brought suit (RCW 34.05.514) in Thurston County Superior Court on January 29th, 2016; seeking declaratory judgment (RCW 34.05.570(2), 34.05.570(4)), injunctive relief, and a writ to compel agency action required by state law (RCW 34.05.574(b)), plus damages and costs. Injunctive relief was denied and the complaint was put on a civil calendar.

On July 15th, 2016, the WSLCB argued its motion for summary judgment, resulting in the bifurcation between facial challenges to WSLCB actions and as-applied challenges to errors in each of Appellant's license application. Briefs were submitted in support CP 161-237 and in opposition CP 243-266 to the WSLCB motion for summary judgment.

In a supplemental brief, Appellants plead both the futility and inadequacy of administrative hearings and the recognized exceptions to the exhaustion of administrative remedies requirement CP 151-160. The Trial Court none the less dismissed each as-applied claim for failure to exhaust administrative remedies.

¹¹ Laws of 2015, ch. 70, § 6 (Repealing RCW 69.501A, effective July 1, 2016)

Briefs were filed, CP 267-325, 460-477, 326-459, 478-482 and the Appellants' challenges in the amended complaint, CP 117-150 were heard in an ALR hearing on November 18th, 2016. RP. at 6, 20, and 38. The remainder of the Appellants' claims were dismissed at that time. RP. at 48. The Final Order of the Trial Court was entered February 10th, 2017 CP 483-485.

V. STANDARD OF REVIEW

A. The standard of review of decisions involving statutory interpretation are conducted de novo. *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012) ("[s]tatutory interpretation is a question of law reviewed de novo" (citing *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003))

The Court gives substantial weight to the agency's interpretation of law only when the subject area falls within the agency's area of expertise.

Campbell v. Board for Volunteer Firefighters, 111 Wn.App. 413, 45 P. 3d 216 (2002), *review denied* 148 Wn.2d 1016, 64 P. 3d 650 (2003).

1. The WSLCB did not deliberate as to the meaning of the statute therefore, general deference should not be upheld.

2. At the time of CPPA implementation, the WSLCB did not

possess expertise in the field of medical cannabis. Thus, deference based on agency expertise cannot be sustained.

3. The CPPA called for a merit-based licensing process, followed by a specific mechanism to arrange applicants that had passed that initial process. Instead, WSLCB adopted the priority mechanism as the merit process, in contravention of legislative instructions.

It is for the Court ultimately to determine the meaning and purpose of these statutes.

Postema v. Pollution Control Hearings Board, 142
Wn.2d 68, 11 P. 3d 726 (2000)

B. Agency rules are reviewed in consideration of constitutionality, *ultra vires*, compliance with statutory rulemaking procedures or are arbitrary and capricious. RCW 34.05.570(2)(c)

C. Matters involving agency action (or inaction) not reviewable under RCW 34.05.570(2) or (3) are reviewed in consideration of constitutionality, *ultra vires*, or whether the agency action was arbitrary and capricious. RCW 34.05.570(4)(c)

VI. ARGUMENT

The WSLCB ignored specific statutory directives in its implementation of the CPPA and acted arbitrarily and capriciously when it

adopted rules without deliberation. The Agency also acted arbitrarily and capriciously when it engaged in rulemaking to adopt license caps without adherence to rulemaking guidelines and did so without deliberation and due consideration of the attendant facts and circumstances.

A. The Certified Agency Record shows that the WSLCB did not engage in a reasoned process during rulemaking, nor did the Agency give “due consideration” to their legislative mandate; violating the statutory prohibition on arbitrary and capricious actions and rules.

i. Rulemaking Timeline¹²

WSLCB Meeting Minutes - September 23rd, 2015 ¹³

1. Call to Order - 10:00 a.m.
2. Approval of Squaxin Island Tribe Contract
3. Action Items:
 - 3A. Adoption of Emergency Rules to Implement 2015 Marijuana Legislation
 - 3B. Approval to file Proposed Rules to Implement 2015

¹² Washington State Liquor and Cannabis Board. Agency Record [Certified March 30, 2016]

¹³ Meeting Minutes. AR at 19

Marijuana Legislation^{14 15}
3C. Approval of Non-Profit Arts Organization Licenses

4. Marijuana Update
5. Announcements
6. Additional Business
7. Motion to Adjourn - 10:58 a.m.

In a meeting that ran less than an hour, the WSLCB summarily approved rules implementing the CPPA without discussion or deliberation. The rulemaking file notes that an issue paper, including rules proposed to implement the CPPA, was presented at the Board meeting on September 23rd.¹⁶ The meeting in question occurred on September 23rd.

There is no record of consideration in the rulemaking file of the CPPA directives, nor deliberation as to whether the priority filters described

¹⁴ Although the Certified Rulemaking Record only contained minutes from the September 23rd, 2015 meeting, and the WSLCB did not supplement the reviewable record, the pertinent language of WAC 314-55-020(3)(A)-(C) related to marijuana retail license applications was unmodified from emergency rule to permanent rule. See, AR at 9 [OTS-7400.1 at 4] and OTS-7401.5 at 6. LCB Recently Adopted Rules, RECENTLY ADOPTED RULES (2016), http://lcb.wa.gov/publications/rules/WSR_16_11_110.pdf.

¹⁵ The only difference between the emergency and permanent versions of WAC 314-55-020(3) is the removal of instructions to process applications in order of submission. See, AR at 9 [OTS-7400.1 at 4] and OTS-7401.4 at 6. LCB Recently Adopted Rules, RECENTLY ADOPTED RULES (2016), http://lcb.wa.gov/publications/rules/WSR_16_11_110.pdf.

¹⁶ AR at 4.

in RCW 69.50.331(1)(a)(i)-(iii) were the same thing as the merit-based process mandated by RCW 69.50.331(1)(a).

Given that Appellants were not provided the opportunity to demonstrate their specific qualifications in the marijuana industry and given the omission of the merit instructions from WSLCB administrative code, one can only conclude that the WSLCB saw the CPPA instructions as superfluous.

The Trial Court was not presented with evidence of deliberation or due consideration upon which judicial deference could operate.¹⁷

WSLCB argued that they complied with rulemaking procedures and statutory instructions. This defense came predominantly in the form of tautological declarations from the WSLCB Rule's Coordinator and Licensing Division Chief; opining without qualification an adherence to rulemaking guidelines and proper implementation of CPPA directives^{18 19}

ii. Adopted Rules in Conflict with Stated Purpose

¹⁷ That is, despite the lack of evidence of deliberation in the rulemaking file, the Trial Court nonetheless concluded that somewhere between the Squaxin Contract and Employee Recognition, the WSLCB properly considered the many imperatives of CPPA implementation such as; the licensing timeline, statutory instructions to adopt a merit-based process, the opportunity to demonstrate experience and qualifications in the industry vs. the itemized qualifications for a priority determination, and, after reading the proposed emergency rules, an evaluation as to whether they would preserve patient access and facilitate market consolidation by the July 1, 2016 cutoff.

¹⁸ CP 168

¹⁹ CP 164

Adoption of an unrestrained retail application system, wherein existing providers of medical cannabis were forced on par with those holding empirically less experience, was contradictory to the WSLCB's stated purpose behind the emergency rules.²⁰

Not only was the WSLCB inundated with retail applications from all comers; their internal review process needlessly duplicated staff time by assigning identical records to different examiners. Applicants for multiple licenses submitted information to establish priority under the WSLCB's distorted version of the CPPA, only to have that information evaluated by different agency staff who reached different conclusions as to eligibility. The claim to consider the needs of patients and expedite licensing to ensure a "smooth transition" fails against the actual approach taken.

²⁰ EMERGENCY RULES - LIQUOR AND CANNABIS BOARD (2015), <http://lawfilesexternal.wa.gov/law/wsr/2015/19/15-19-165.htm>. [Filed September 23, 2015, 11:07 a.m., effective September 23, 2015, 11:07 a.m.]

Purpose: Legislation passed in the 2015 legislative session directs the Washington state liquor and cannabis board to regulate the medical marijuana market. Emergency rules are needed to provide clarity to the marijuana licensees and potential marijuana license applicants regarding the application process and requirements for medical marijuana. **Licenses will need to be issued to ensure that medical marijuana will be available to patients by the date that collective gardens are mandated to be closed, July 1, 2016.**

...
Reasons for th[e] [emergency] Finding: Immediate adoption of these rules is necessary for the preservation of the public health, safety, and welfare. Legislation passed in the 2015 legislative session mandates collective gardens be closed by July 1, 2016. Medical marijuana **patients need a smooth transition** to obtaining (sic) their medication from an alternative source, the legal marijuana market. **Licenses will need to be issued** to ensure that medical marijuana will be available to patients by the date that collective gardens are mandated to be closed, July 1, 2016. (emphasis added)

iii. Emergency Rules and Scope of Judicial Review

Adoption of emergency rules allows an agency to initially disregard some of the standard requirements of RCW 34.05. However, emergency rules expire after 120 days unless adopted as a permanent rule.²¹ The process of converting an emergency rule to a permanent rule requires that an administrative body actively undertake the “appropriate procedures” to adopt a permanent rule, including ratification of the final rules converted from their emergency form.²²

The requirement to adhere to standard APA rulemaking procedures in the transition from emergency rule to permanent rule necessarily means that the general requirements of RCW 34.05 et. seq., must be followed in the adoption of the permanent rule. This also means that the WSLCB cannot avoid the scope of judicial review for arbitrary and capricious behavior merely because they adopted emergency rules and certified a sparse record.

In weighing the scope of judicial review, Appellants highlight the legislative intent behind Washington’s APA:

Laws of 1995, ch. 403 § 1:

It is the intent of the legislature, in the adoption of (the APA) that:

²¹ See RCW 34.05.350(2)

²² *Id.*

(e) Members of the public have adequate opportunity to challenge administrative rules with which they have legitimate concerns through meaningful review of the rule by the executive, the legislature, and the judiciary. While it is the intent of the legislature that upon judicial review of a rule, a court should not substitute its judgment for that of an administrative agency, **the court should determine whether the agency decision making was rigorous and deliberative; whether the agency reached its result through a process of reason; and whether the agency took a hard look at the rule before its adoption;** (Emphasis added)

The rulemaking file is woefully short on any details that would allow adjudication that the licensing system enacted by the WSLCB was the result of a rigorous, deliberative, or reasoned process. Nothing in the record supports the proposition that the WSLCB took a “hard look” (let alone *any* look) before adopting the rules and implementing the flawed licensing scheme that led to the action at the bar.

The certified agency record only contains the cursory minutes from the adoption of the emergency rules, while entirely omitting; all comments received (34.05.370(c)), petitions for amendment (.370(e)), and citations to data and information relied on by the WSLCB (.370(f)).

Also, the WSLCB did not submit the official agency record within 30 days of service of the petition for judicial review. Untimely submission

of the rulemaking file and omission of relevant materials is a violation of the requirement to substantially comply with rulemaking procedures.²³ The certified rulemaking file is the official agency record subject to judicial review under RCW 34.05.370.

iv. Relevant Caselaw and the Rios Standard

Rios v. Dep't of Labor & Indus.,²⁴ encapsulates the APA's command that while a court must refrain from substituting its policy judgment with the judgment of the administrative body, agency action can only be upheld if the decision-making process was rigorous and supported by reason.

“[t]he court must scrutinize the record to determine if the result was reached through a process of reason,” *Id.* at 501

The ‘process of reason’ described in *Rios* is a fact-driven and context-based inquiry. Since *Rios*, Washington courts have further reinforced the factors involved; all in ways that pay homage to the APAs clearly stated intent.²⁵ In addition to procedural requisites, agency decisions must also reflect a process of deliberation, rigor, due diligence, and a

²³ See RCW 34.05.375

²⁴ 145 Wash.2d 483 (2002)

²⁵ *Supra* at 10. Laws of 1995, ch. 403, § 1(e)

consideration of the attendant facts and circumstances.

1. Requisite processes prior to lawful agency action.

Diligence;

“[T]he record shows that Ecology reached its determination...through a reasoned process after considering hundreds of studies in its own literature review, along with the results of two other literature reviews and input from other parties”

Northwest Sportfishing Industry Ass'n v. Dep't of Ecology,
172 Wn.App. 72, 101 (Div. 2 2012)

Consideration of Available Options;

“Before issuing its decision, Ecology held a meeting with representatives from the Tribe and met with Mason County commissioners. Ecology also held a stakeholder and public meeting to discuss the Tribe's petition and concerns and the decision Ecology faced. Ecology devised six options, including closing or withdrawing the basin, limiting new uses, and seeking funding for a study. Ecology's regional director specifically noted that the agency should closely consider how the basin closure request relates to other water resource issues in the state, particularly in Kittitas County.”

[Squaxin] Tribe v. Washington State Dept. of Ecology, 177 Wn.App. 734,743 (Div. 2 2013)

Burden of Deliberation;

"Where there is room for two opinions, an action taken after **due consideration** is not arbitrary and capricious" (emphasis added)

Attorney Gen.'s Office v. Wash. Utils. & Transp. Comm'n, 128 Wn.App. 818, at 824, (2005)

The certified WSLCB rulemaking record does not mention any alternative interpretations of the statutory instructions. It would be incorrect to consider the statutory instructions as an alternative opinion. Presented with clear instructions to develop a specific process in consideration of the needs of patients and providers; the WSLCB should have implemented a merit-based application system as the one and only opinion. There is no alternative to clear and unambiguous language.

v. Statutory Interpretation and Judicial Deference

The language in RCW 69.51.331(1)(a) is clear and unambiguous. The Trial Court ruled that the issues were determined based upon the plain language of the statutes and rules.²⁶ However, WSLCB omission of the CPPA's specific instructions is per se arbitrary and capricious.

²⁶ CP 484

To sustain the intent of the merit-based and competitive process terms used in the CPPA, the decision to omit and disregard the legislature's instructions by the WSLCB cannot be sustained. "[N]o part of a statute should be deemed inoperative or superfluous unless it is the result of obvious mistake or error." *In re Det. of Strand*, 167 Wn.2d 180, 189, (Wash. 2009) (quoting *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 13, 810 P.2d 917, 817 P.2d 1359 (Wash. 1991)). There can be no good faith argument that the CPPA's merit and competitive language was an "obvious mistake." See *id.* The meaning of the CPPA's language is plain and the words "competitive" and "merit-based" are not ambiguous. See *Burns v. City of Seattle*, 161 Wash.2d 129, 140, (2007).²⁷ Accordingly, the WSLCB should have given effect to the ordinary meaning of the statutory language in deference to the legislature and in a manner that reflects the intent of the CPPA. *Id.*

WSLCB may have found justification under the Federal standard of review set forth in *Chevron*.²⁸ To reach the level of judicial deference that

²⁷ The goal of statutory interpretation is to carry out the legislature's intent. *Burns v. City of Seattle*, 161 Wash.2d 129, 140, 164 P.3d 475 (2007). If the meaning of the statute is plain, the court discerns legislative intent from the ordinary meaning of the words. *Id.*

²⁸ *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, under which a reviewing court must first ask whether Congress has directly spoken to the precise question at issue, *id.*, at 842. If so, the court must give effect to Congress' unambiguously expressed intent. If not, the court must defer to the agency's construction of the statute so long as it is permissible.

Chevron affords to reasonable agency interpretations, a court must first decide if the legislature has spoken to the precise question at issue. If it has, the agency's interpretation becomes irrelevant.²⁹

In the present case, the question is whether the legislature specifically created a two-step process, wherein applicants would first be gauged on merit followed by a process by which competing sets of applications would be prioritized by specific priority criteria.

The broader statutory scheme at issue is the consolidation of the existing medical cannabis market in a manner that gives substantial consideration to the needs of patients and provides a mechanism for medical retailers to obtain a license from the WSLCB.

The mechanism for license acquisition is described in two parts. First, the WSLCB was told to create a competitive, merit-based process by which applicants must be given the opportunity to demonstrate their experience and qualifications in the industry. Second, the WSLCB was told to prioritize *competing* applicants, per a set of itemized qualifications.

vi. The Plain Language of the CPPA

²⁹ A note on the applicability of *Chevron*, recall that the case was about the resolution of a discrete term- 'stationary source'. The case was not about the permissibility of omitting an entire paragraph of legislative directives as though they were never codified.

In conjunction with the legislature’s clear instructions to “accommodate the needs of patients, the plain language³⁰ of RCW 69.50.331(a)³¹ eliminates the presumption of ambiguity and gives full effect to the legislature’s unambiguous intent.

“Competitive”

- i. of or relating to a situation in which people or groups are trying to win a contest or be more successful than others.
- ii. having a strong desire to win or be the best at something
- iii. as good as or better than others of the same kind

“Merit”

- i. a good quality or feature that deserves to be praised
- ii. the quality of being good, important, or useful
- iii. character or conduct deserving reward, honor, or esteem

“Demonstrate”

- i. to prove or make clear by reasoning or evidence
- ii. to illustrate and explain especially with many examples

“Opportunity”

- i. an amount of time or a situation in which something can be done
- ii. a favorable juncture of circumstances
- iii. a good chance for advancement or progress

³⁰ Definitions provided by <http://www.merriam-webster.com>

³¹ “The state liquor and cannabis board **must develop a competitive, merit-based application process that includes, at a minimum, the opportunity for an applicant to demonstrate experience and qualifications in the marijuana industry.** The state liquor and cannabis board **must give preference between competing applications** in the licensing process to applicants that have the following experience and qualifications, in the following order of priority:” (emphasis added)

Dictionary definitions inform the legislative mandate, which can accurately be restated as; The WSLCB shall design and develop a process that at the very least, affords each license applicant time to prove their worthiness above other would-be purveyors of medical cannabis.

The WSLCB was told that providing such an opportunity was the minimum requirement.³² The ability to establish merit was the floor of statutory compliance, and because Appellants were denied that opportunity, the WSLCB failed in its most basic duty.

Where there were two or more applicants with ‘the same kind’ of merit, the preference between them would be settled according to priority-

[WSLCB] must give preference between competing applications the licensing process to applicants that have the following experience and qualifications, in the following order of priority:

Comparing “experience and qualifications in the marijuana industry” versus “the following experience and qualifications”³³ -At first glance, one might assume the same meaning and intent, yet their placement and associated terms provide markedly different instructions. “Qualifications in the marijuana industry” precede the priority qualifications and are bound to the instruction that each applicant must be afforded the chance to show how their unique medical marijuana industry experience serving patients and providers is deserving of merit.

³² *Id.*

³³ *Id.*

The statute then states “*the following experience and qualifications in the following order of priority:*”³⁴ In so doing, the statute does not reference the experience and qualifications utilized to gauge merit. Rather, the priority filters are an itemized list of qualifications that rank one applicant the over another within the same merit class. This ranking provides preference between competing applications. Competing applicants were clearly meant to encompass those with similar merit.

The certified administrative record shows zero discussion about legislative ambiguities or legislative intent. What is *does* hold is not enough to support agency discretion. It is not as though the legislature gave open-ended instructions. The CPPA does not tersely read, “consolidate the markets, the Liquor and Cannabis Board can work out the details.”

Unfortunately, Trial Court’s ruling effectively takes such a stance,

Under RCW 34.05.328, the Court believes that the rules that were implemented...are consistent with the statutory authority for issuing those rules. RP. at 49

vii. Expertise

Even if step two of the *Chevron* test is applied and the WSLCB action seeks protection as “reasonable”, the law still asks courts to consider whether special expertise was at play in the decision and thus worthy of

³⁴ *Id.*

deference. Agency expertise is a substantive component of deference and supports the policy behind the general requirement to exhaust available administrative remedies.

The exhaustion rule "is founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges."

Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997)

Appellants have shown that the WSLCBs failed to demonstrate any unique expertise in medical cannabis that would afford them substantial judicial deference.³⁵ In considering the extent to which agency expertise could inform the inquiry, the Trial Court was also implored to scrutinize the rulemaking record and adjudicate whether the WSLCB utilized a process of reason in their deliberations, or agree that the Board did not deliberate at all.

Substantial deference is afforded where the administrative body is considering complex, or heavily fact-based matters that call for agency expertise.³⁶

³⁵ See, CP 154 (The vast majority of medicinal cannabis regulatory authority; including patient registry, medical authorization, consultant certification, and pesticide regulation, are outside the purview of the WSLCB.)

³⁶ See Attorney General's Committee on Administrative Procedure Report:

"[T]he administrative interpretation is to be given weight- not merely as the opinion of some men (sic) or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it. This may be legislation deals with complex matters calling for expert knowledge and judgment." S. Doc. No. 8, 77th Cong., 1 Sess. 90-91(1941)

The Trial Court was asked to examine if the agency action in question involved any special considerations that only the WSLCB should decide. Without a record of deliberation or a demonstration that the agency possessed unique knowledge with regards to medical cannabis, the question of expertise cannot be answered and deference cannot operate.

B. The WSLCB acted arbitrarily and capriciously when setting the statewide cap and jurisdictional limits on the number of available retail license; ignoring attendant facts and circumstances, failing to deliberate, or follow a process of reason in adoption of the license limits.

Timeline of Pertinent Events

BOTEC Market Report v.1	November 19th, 2015 ³⁷
WSLCB objections to Report v.1	November 25th, 2015. ³⁸

The LCB is concerned that without seeing estimates of the number of patients or the amount of cannabis that went “out the door” for dispensaries, we cannot use this report to estimate the need for additional stores.

See also, *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 326, 646 P.2d 113 (1982) (Holding that specialized agency expertise should be accorded substantial weight when undergoing judicial review but that ultimately court must determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law).

³⁷ CP 279-309

³⁸ CP 516, Ex B.

*The LCB is concerned that the number of dispensaries BOTEC has estimated is very much lower than all other estimates we have seen without an adequate reason as to why.*³⁹

Thanksgiving Holiday -	November 26th, 2015.
BOTEC preparation for Report v.2 -	Early December 2015. ⁴⁰
BOTEC Market Report v.2 -	December 15th , 2015. ⁴¹
Rulemaking to cap licenses at 222 -	December 16th , 2015. ⁴²

The final BOTEC report upon which the WSLCBs based their decision did not address the problems that the agency identified in the original report. Among the agency's objections, they declared in no uncertain terms that the report could not be used as the basis for additional stores. The WSLCBs then used the report as the basis for additional stores.⁴³

i. Comparing BOTEC Reports

For the sake of argument, let's presume that the WSLCB had enough time between the publication of the final report and adoption of the specific license cap to; receive, distribute, disseminate, meet, discuss, and make recommendations to the Board,⁴⁴ as to then presume that the Board's vote

³⁹ *Id.*

⁴⁰ CP 529, Ex C.

⁴¹ *Id.*

⁴² CP 557, Ex D.

⁴³ CP 557, Ex D.

⁴⁴ Which they certainly did not. See timeline supra.

on December 16th was the result of a process of reason, deliberation, and due consideration of the relevant facts.

To support that presumption, one must compare the final report with the original version that gave rise to the WSLCB's pointed objections. In comparing the reports to ascertain whether BOTEC corrected their errors, two questions arise from the WSLCB's rejection of BOTEC methodology. The first question is based upon the WSLCB's concern regarding the adequacy of the metrics and the second involves the WSLCB's worry over the quality of the data.

Question #1. Were WSLCB's objections about metrics⁴⁵ addressed in the second report?

Answer: The word "patient" does not occur in the final report. The volume of cannabis moved "out the door" was not also addressed.⁴⁶ Even if dollar figures were the appropriate method to compare market sizes, BOTEC chose not include a number of key inputs. First, they did not include Collective Gardens operating without retail storefronts. BOTEC also wrote-off or otherwise disregarded medical cannabis donated to patients, sales conducted at farmer's markets, and delivery services. They admit to writing off 25% of the medical market. CP 540, Ex C.

⁴⁵ CP 516, Ex B.

⁴⁶ BOTEC admits that using the types of metrics that WSLCB's suggested would yield different results. See CP 552, Ex C.

Question #2. In their attempt to “validate the model” and ensure robustness of results, what was added between the first and second BOTEC reports?⁴⁷

Answer: BOTEC conducted a “ground-truthing” exercise, wherein BOTEC contacted medical stores and made direct inquiries into their sales figures.

“[Our] estimate for the annual cannabis revenues of Washington’s medical cannabis sector rely heavily on the regression model that was built to predict store revenues, based only on that store’s storefront width, operating hours, and location. If that regression model were systematically under- or over-estimating store revenues, then BOTEC’s estimate for the size of the medical cannabis market would similarly err in that direction. **In order to protect against that possibility, BOTEC researchers conducted a “ground-truthing” exercise.**” (emphasis added)

CP 542, Ex C.

BOTEC immediately proceeds to undermine the very ground-truthing exercise that was supposed to validate the original methodology.

“[T]he ground-truthing results should be interpreted with some caution. There is some imprecision at hand.”

CP 543, Ex. C.

In actuality, BOTEC’s ground-truthing exercise reinforced the WSLCB’s concerns.

“The data was analyzed as to record the average predicted and reported revenue for stores who responded, grouped by county group. When these results were weighted according to the number

⁴⁷ CP 543, Ex C.

of verified stores in each county group, **the regression model predicted on average only 64% of reported revenues.**” (emphasis added)

When BOTEC actually asked operators about their monthly revenues,⁴⁸ they realized the original estimates were off by 36%.

In Figure #13 of the final report⁴⁹ BOTEC works to reconcile the discrepancy between their regression model and the figures obtained directly from dispensary owners via the ground-truthing exercise. The reconciled totals are provided for each county group at the bottom of Figure #13.⁵⁰

If the ground truthing data was meant to “validate” the regression model that originally caused the WSLCB’s to have serious concerns as to the accuracy of the data, then the reconciled totals from Figure #13⁵¹ should be found in BOTEC’s final conclusions in Figure #19^{52 53} and Appendix A of the second report.

In fact, none of the monthly revenue numbers from Figure #13 found their way into BOTEC’s conclusion.

⁴⁸ As opposed to the ‘square foot, hours open, estimated price per gram’ method in their regression model.

⁴⁹ CP 544, Ex C.

⁵⁰ *Id.*

⁵¹ *Id.* Figure #13 County Group A - Estimates (Low, Med., High) \$81M, \$140M, \$199M

⁵² CP 552. Ex C., Figure #19 County Group A - Final Estimate: \$183M

⁵³ Figure #19 and Appendix A are BOTEC’s final numbers. See, CP 551, Ex C., and CP 554, Ex C.

BOTEC announced that they would utilize an enhanced methodology to validate their model, then discounted the accuracy of that methodology, and finally, chose not to incorporate the results into their conclusion. In short, there's no substantive difference between the first and second reports. WSLCB's objections still stand. Using the second report is the same as using the original report that was rejected outright.

The final report left the WSLCB with a non-validated regression model and no improvement from the original report which they said in no uncertain terms, "we cannot use this report to estimate the need for additional stores." CP 516, Ex B.

ii. WSLCB Methodology

WSLCBs announced that their methodology behind the new retail allotment would be included in emergency rules published on January 6th, 2016. CP 555, Ex D.⁵⁴

No methodology was included in the January 6th emergency rules.⁵⁵

To date, no methodology has been provided by the WSLCB to support the adoption of the rule creating the statewide and jurisdictional license caps,

⁵⁴ See also, CP 310-323: Notice to Stakeholders - January 6th, 2016 Emergency Rules. EMERGENCY RULES - LIQUOR AND CANNABIS BOARD (2016), <http://lawfilesexxt.leg.wa.gov/law/wsr/2016/02/16-02-128.htm>

⁵⁵ Unless one counts the following statement as 'methodology': "*and to accommodate the needs of qualifying patents and designated providers.*" CP 323 - WSR 16-02-128 / OTS-7400.2 at 13.

other than reliance on BOTEC's market analysis. WSLCB cited the BOTEC report as the basis for their decision. CP 556, Ex D.

Recall that WSLCB objected to BOTEC's initial medical cannabis store count of 333. Between the first report and final report, BOTEC's estimated median medical stores then in operation actually *declined* from 333 to 331; despite the WSLCB's mistrust of BOTEC's guesses at collective garden count.

The WSLCB told BOTEC that 333 was far lower than any number they had previously seen⁵⁶ yet WSLCB mysteriously concludes that 222 new licensed retail access points would be sufficient to consolidate the two markets and accommodate the needs of patients and designated caregivers.

An examination of the December 16th announcement for new retail stores shows that Board intended a "proportionate allocation based on medical sales." For the most populous counties, the Board increased the allotment by 100 percent.^{57 58}

Thus, the new store allotment adopted by the WSLCB is derived solely from the estimated market share⁵⁹ that BOTEC apportioned to medical cannabis patients and designated caregivers.

⁵⁶ See, CP 516, Ex B.

⁵⁷ CP 556, Ex D.

⁵⁸ *Id.*

⁵⁹ Shown as a portion of the total annual market, in dollars.

The Trial Court was reminded that the size of the recreational market was estimated using an annualized “market-snapshot” from October 2015.⁶⁰

For context, the number of state licensed i502 retail stores at the end of October 2015 was 210.⁶¹ See, Weekly Marijuana Report November 03, 2015.⁶²

The Trial Court was also reminded that BOTEC’s “best-estimate” set medical cannabis at 37% of the total market, and recreational at 35%.⁶³

WSLCB appears to have utilized a simplified logic; they assumed that if 210 licensed stores comprised roughly 35% of the total market (as told by BOTEC’s first report), then retail medical cannabis would presumably be accommodated with the addition of 222 new stores.

However, the WSLCBs knew all too well that BOTEC’s numbers were off, their metrics inappropriate⁶⁴, and their methodology woeful. BOTEC did not answer the Board’s concerns in the two-week interim between the first and final reports. Only 24 hrs. passed between the date of the final report and the adoption of the new allotment. WSLCB fully admitted to relying on BOTEC data as the basis for their new allotment and

⁶⁰ See, CP 540, Ex C.

⁶¹ 212 Retail Licenses had been issued as of November 3rd, 2015. CP 325

⁶² *Id.*

⁶³ See, CP 550, Ex C.

⁶⁴ Using estimated store revenue data as opposed to using medicinal product consumed.

did not provide alternative methodology as the basis for the December 16th decision.

The adoption of the license cap in reliance on methodology the WSLCB knew was inadequate is the same sort of willful disregard of the attendant facts and circumstances that overturned the Department of Labor and Industries' action in *Rios* and informs the inquiry of subsequent cases.

In *Roskelley v. Washington State Parks*⁶⁵ this Court evaluated the quality of the process that the Park Commission administered prior to reaching its decision at issue. Deference to the Agency decision rested on a record of consideration and review of the evidence before it.⁶⁶

In the present case, the WSLCB presented no record of reviewing, considering, balancing, or deliberating upon any of the evidence prior to the decision to set the cap a day after the final report was received. What is shown, is a record of objection and suspicion by the Agency toward the consultants tasked with estimating the size of the medical cannabis market. Appellant's declarations and exhibits⁶⁷ reinforce the WSLCB's initial

⁶⁵ 032817 WACA, 48423-4-II

⁶⁶ "The agencies' disregard of their own evidence in *Rios* and *Probst* is not analogous to the Commission's decision here. The Petitioners have not shown that the Commission ignored a potentially unfair result or that it disregarded the evidence before it. Instead, the record shows that the Commission made its decision based on all the evidence and after carefully considering and balancing competing interests." *Id.*

⁶⁷ CP 63-65, CP 238-242, CP 557-558, Ex E., CP 559-564, Ex F.

skepticism and rebut the proposition that the second BOTEC report corrected the failings of the first.

The WSLCB clearly disregarded its own evidence in making its determination setting the statewide cap and the jurisdictional allotments. In addition to the dearth of deliberation that occurred between receipt of the BOTEC report and the Agency's decision, the disregard of the facts is textbook arbitrary and capricious.

C. The WSLCB engaged in rulemaking when setting specific license caps while neglecting to substantially comply with rulemaking requirements under Washington's APA.

When the WSLCB adopted the specific license cap of 222 additional stores after it had already established a licensing program that did not contain a cap, they adopted a legislative rule. *See* RCW 34.05.010(16) and RCW 34.05.328(5)(c)(iii)(C).⁶⁸ The adoption of the license cap constitutes a legislative rule also because it altered the qualifications for the issuance of a license. At the time of application, Appellants applied for retail licenses in open jurisdictions. After the cap was instituted, each jurisdiction in which

⁶⁸ (iii) A "significant legislative rule" is a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, **alters**, or revokes **any qualification or standard for the issuance, suspension, or revocation of a license or permit**; or (C) adopts a new, or **makes significant amendments to, a policy or regulatory program**. (emphasis added)

the Appellants sought a license eventually hit its cap, which substantively changed the standard and qualification for license-issuance. When the retail license system was first opened on October 12th, 2015, the standard for a license was not dependent on locating within an open jurisdiction (since jurisdictions didn't initially have the arbitrarily imposed limit). That standard substantively changed on December 16th, 2015 when the cap and the specific jurisdictional allotments were put in place.

RCW 34.05.328 was referenced to define the criteria for significant legislative rules. Nothing in the pleadings should be construed to mean that the WSLCB is subject to the additional procedural requirements of RCW 34.05.328(1)-(5). Were the Court to hold that the definition of significant legislative rule is limited to the agencies enumerated in RCW 34.05.328, the WSLCB's actions with regards to the license cap and its application against would-be retailers is still a "rule" under RCW 34.05.010(16).

WSLCB may assert that the adoption of the license cap was merely an interpretive rule or policy statement, and therefore it was not subject to notice and comment.

However, RCW 34.05.230(4) requires that policy statements or interpretive rules be published in the Washington State Register. No such publication regarding license caps was submitted to the Code Reviser's Office.

Even if the WSLCB could shield themselves behind an unpublished, non-legislative rule, the license cap would still need to comport with the well-recognized distinction between interpretive rules and administrative rules for which notice and comment are required; namely, that interpretive rules are only advisory⁶⁹ and prospective in nature.

If the adoption of the rule prospectively advised the public about the manner in which the agency proposed to exercise its discretionary power, it would be an interpretive rule. The critical distinction here is that the WSLCB did not give advance notice of the specific cap prior to opening license applications on October 12th, 2015 and the cap applied to all applicants already in process.

WSLCB may also assert that notice and comment may be disregarded where; rules were adopted under emergency RCW 34.05.328(5)(b)(i), merely procedural (5)(c)(i), or already explicit in statute (5)(b)(v). As stated *supra*, neither the license cap, nor the promised methodology was published as an emergency rule. Procedural rules concern filing and submission protocols and not the actual criteria. As for explicit statutory instructions, the Cannabis Patient Protection Act is silent on the

⁶⁹ RCW 34.05.230(1) [I]nterpretive and policy statements are advisory only. (emphasis added)

specific number of stores. Failing to provide notice and comment for the legislative rule renders it invalid and inoperative.

The decision implementing the license cap and jurisdictional allotments represents the adoption of a legislative rule, yet APA-mandated rulemaking procedures were ignored. The license cap is a legislative rule, rendering invalid and inoperable due to the WSLCB's failure to comport with the rulemaking requirements of RCW 34.05.320 and 34.05.345.⁷⁰

i. Altering an existing regulatory program and changing the conditions for the issuance of a license.

Trial Court erred in adjudicating that the adoption of license caps was not rulemaking, stating that the caps did not represent a significant legislative rule under 34.05.328 but ignoring that Appellants had plead that significant legislative rule *as defined by* 34.05.328 and that it nevertheless represented a rule under 34.05.010.

RCW 34.05.328 creates additional obligations for enumerated agencies and those agencies made subject by vote of Joint Legislative Rules Committee. However, 34.05.328 does not say that only those named agencies are capable of adopting significant legislative rules.

⁷⁰ RCW 34.05.345 [W]hen twenty days notice of intended action to adopt, amend, or repeal a rule has not been published in the state register, as required by RCW 34.05.320, the code reviser shall not publish such rule and such rule shall not be effective for any purpose.

Rule and significant legislative rule both involve the modification of a program that necessarily affects the issuance of a permit or license. Significant legislative rule is defined in 34.05.328 but not bound to the agencies enumerated in subsection (5)(a)(i) nor those agencies designated by the Joint Administrative Rules Review Committee. RCW 34.05.328 primarily concerns the increased procedural requirements that accompany the significant rules of specific agencies. See 34.05.328(1) through (4). That does not mean, however, that only those agencies listed in subsection (5) adopt significant legislative rules. The pleadings cite the definition of significant legislative rule contained in 34.05.328(5)(c)(3) but it is not suggested, nor argued, that WSLCB rulemaking is invalid because they did not follow the additional requirements set forth in 34.05.328(1) through (4).

The argument remains that the WSLCB engaged in rulemaking, because it altered the standard for the issuance of a license and made a significant amendment to an existing regulatory program.

The standards and qualifications for the issuance of a license were altered by the December 16, 2015 Agency action because, in addition to the overall cap on available licenses adopted that day, specific jurisdictional caps were put in place where they had not been previously set.

An unlicensed applicant for a given jurisdiction would be disqualified from obtaining a license in that location once the jurisdiction

reached the WSLCB's arbitrary capacity. Each of the Appellants submitted applications within the application window after it opened on October 12th, 2015 but well-before the December 16th adoption of the retail license cap.

The WSLCB made a significant amendment to an existing regulatory program. Appellants submitted license applications to the WSLCB that had announced there was "no rush to apply" during a period in which no local or statewide retail cap existed.

That all changed on December 16th, 2015. Although each applied at the earliest opportunity the applicants began to compete for a very limited number of licenses in a pool increasingly comprised of applicants with demonstrably less merit, experience, and qualification. The largest jurisdictions reached the WSLCBs arbitrary caps months before the license application window closed. For jurisdictions like Seattle, the allotment was at capacity less than a month after the cap was put in place. Appellants were immediately barred from transitioning their medical cannabis operations and serving their existing patient-customer base, without ever being given the ability to demonstrate their experience and qualifications in a merit-based process.

Appellants plead that the WSLCB engaged in rulemaking because of the effect the rule had on the Appellants, meeting the definitions of RCW 34.05.328 and 34.050.010. RP. at 14.

The actions of the WLSCB, in adopting the specific license cap, meet both definitions of rulemaking. Appellants plead that either RCW 34.05.010 or RCW 34.05.328 were applicable and that failure to follow the required rulemaking procedures under RCW 34.05.320 renders the rule void under RCW 34.05.325

The Court should award Puget Sound Group et al its reasonable attorney's fees under the Washington Access to Justice Act

If this Court decrees that the Appellants have prevailed on a significant issue in the case, they ask that the Court award attorney's fees under the Washington Equal Access to Justice Act, codified at RCW 4.84.340-350.

The Washington State Legislature adopted this statute in 1995. In enacting this statute, the Legislature recognized that certain private parties who obtain relief on judicial review of agency action with respect to a significant issue should be entitled to recover their reasonable attorney's fees:

The legislature finds that certain individuals, smaller partnerships, smaller corporations. and other organizations

may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings. The legislature further finds that because of the greater resources and expertise of the state of Washington, individuals, smaller partnerships, smaller corporations, and other organizations are often deterred from seeking review of or defending against state agency actions because of the costs for attorneys, expert witnesses, and other costs. The legislature therefore adopts this equal access to justice act to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.

Laws of 1995 Ch. 403, § 901.

Under this statute, a "qualified party" that obtains relief on a significant issue by judicial review of agency action is entitled to an award of its fees and expenses, including reasonable attorney's fees:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1). Under this statute, a "qualified party" includes a corporation whose net worth did not exceed \$5,000,000 at the time the initial petition for judicial review was filed. RCW 4.84.340(5).

A court awarding attorney's fees under the Equal Access to Justice Act may award fees at a rate of no greater than \$150 per hour unless the

court determines that an increase to the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. RCW 4.84.340(3). The total fee that a court can award is capped at a maximum of \$25,000. RCW 4.84.350(2).

Assuming Puget Sound Group et al. prevails on review, this Court should therefore enter an order awarding Puget Sound Group et al. its attorney's fees. Assuming it prevails on review, Puget Sound Group et al. is entitled to recover both the time it invested in litigating this matter before the Superior Court, and before the Court of Appeals. Therefore, in the event Puget Sound Group et al. prevails, the Court should enter an order determining that Puget Sound Group et al. is entitled to an award of attorney's fees, permit Puget Sound Group et al. to submit an application making the necessary certification as their respective net worths, and directing this Court's Commissioner to determine the fee to be awarded. In the alternative, the Court may direct the Superior Court to address this issue on remand.

VII. CONCLUSION

To uphold the WSLCB's actions at issue in this case is to both condone unlawful WSLCB action and give imprimatur to future APA violations.

The Trial Court's order of dismissal sets a new standard not recognized elsewhere in law; that pro-forma rulemaking and agency action, absent a record of reason and deliberation, is sufficient. In the case of the WSLCB's rule that set license caps, even pro-forma is too generous, since rulemaking procedures were abandoned entirely.

The existing standard is ominous enough. To be sure, most challenges to administrative actions fail because the judiciary is only allowed to examine the administrative process and not the result, however erroneous. The Trial Court's ruling sets an unassailable wall and eviscerates judicial review provisions of the APA.

The harms to the Appellants are worthy of remedy, but beyond their grievances, the decision of the Trial Court, if upheld, could set a dangerous precedent affecting administrative law for years to come. Sanctioning the Trial Court's decision would create a mechanism by which any agency could escape scrutiny of their administrative decisions, merely by certifying derisory records or abandoning public participation altogether.

We ask that the ruling of the Trial Court be reversed and relief granted to the Appellants.

7/14/2017

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16 DATED: October 6th, 2017

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24 Ryan R. Agnew, WSBA #43668

THE LAW OFFICE OF RYAN R. AGNEW PS

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