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Division II
State of Washington
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No. 54083-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALL NATURAL HERBS, LLC,

Appellant,

v.

STATE OF WASHINGTON LIQUOR AND CANNIBIS BOARD,

Appellee.

REPLY BRIEF OF APPELLANT

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1. The WSLCB Fails to Respond to All Natural Herbs’ First Amendment Arguments at All and as Such Concedes the Constitutional Violation.

All Natural Herbs argued that the March 21, 2017, Final Order of the Board on summary judgment was an unconstitutional First Amendment prior restraint. The WSLCB provided no response.

“Administrative . . . orders forbidding certain communications . . . in advance . . .” are prior restraints. *In re Marriage of Suggs*, 152 Wn.2d 74, 81, 93 P.3d 161, 164 (2004). “[P]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012).

Here, the Final Order of the Board granted the WSLCB an unconstitutional “do over.” *After denying summary judgment*, it dismissed the appeal, a new statement of intent was ordered, and a new cause issued. It restrained All Natural Herbs from having an immediate hearing on the merits on the original statement of intent. And It prohibited rebuttal evidence to the second statement of intent. This Court need not comb the record, nor authorities, before providing relief on appeal because the WSLCB has conceded the argument by not providing a response. *See West*, 168 Wn. App. at 187.

2. The WSLCB Could Not Commence an Adjudicative Proceeding “at any time”.

The WSLCB argues that that it could “commence an adjudicative proceeding ‘at any time’ . . .” (Br. of Res. at 14). Administrative agencies have no authority outside of statute. *E.g., Seattle v. Dep’t of Ecology*, 37 Wn. App. 819, 823, 683 P.2d 244, 246 (1984). “*Within the scope of its authority*, an agency may commence an adjudicative proceeding at any time with respect to a matter within the agency’s jurisdiction.” RCW 34.05.413(1) (emphasis added). “*When required by law or constitutional right, and upon the timely application of any person, an agency shall commence an adjudicative proceeding.*” RCW 34.05.413(2) (emphasis added). It “shall” do so “within ninety days after receipt of an application. . . .” RCW 34.05.413(1).

Here, the APA provides two adjudicative tracks. First, when an agency commences an adjudicative proceeding itself. *Hutmacher v. State Board of Nursing*, 81 Wn. App 768, 915 P.2d 1178 (1986). Second, like in this case, when an agency receives an appeal. RCW 34.05.413(2). The WSLCB’s commence “at any time” argument fails because it had no authority outside the ninety-day deadline. *In re Forfeiture of Chevrolet Corvette*, 91 Wn. App. 320, 323, 963 P.2d 187, 188 (1997); *Espinoza v. City of Everett*, 87 Wn. App. 857, 865, 943 P.2d 387, 391 (1997); *Tellevik v. 31641 W. Rutherford St.*, 125 Wn.2d 364, 374, 884 P.2d 1319 (1994).

3. The WSLCB’s Expressly Accepted All Natural Herbs Appeal on

May 4, 2016.

In April of 2016, All Natural Herbs applied for a Priority 1 determination and retail cannabis license. (AR at 884-85). The application was denied on April 21, 2016. (AR at 910). An appeal was requested:

[W]e request an administrative hearing/adjudication on the issue of the denial of the Priority 1 status. . . .

(AR at 912). Immediately after, the Deputy Director of Licensing and Regulation at WSLCB accepted All Natural Herbs appeal:

We will consider [your letter] a public records request and a request for appeal. . . . Thank you.

Jeanne McShane
Deputy Director of Licensing and Regulation

(AR at 912-16, 2261-67). On May 24, 2016, the WSLCB acknowledged the April 21, 2016 “Priority Assignment” and May 4, 2016, “Appeal request”¹ (AR at 920). On appeal, the WSLCB argues for the first time that the appeal request “was equivocal” and “ambiguous.” (Br. of Res. at 13-16).

Actual and apparent authority, and estoppel doctrines provide parties may not go back on actions reasonably relied upon. (Br. of App. at 18-19). Here, the WSLCB concedes that All Natural Herbs was officially “assigned . . . its Priority 3 designation. . . .” on April 21, 2016. (Br. of Res.

¹ The Statement of Intent had a typo that the appeal request was “dated 5/12/16” instead of May 4, 2016, when it was in fact acknowledged in writing as received. (AR at 910).

at 15-16). It does not argue against the doctrines of actual and apparent authority or estoppel. Rather, its new “equivocal” and “ambiguous” argument is without merit. Neither party, subjectively or objectively, took the repeal request equivocal or ambiguous, and the WSLCB clearly accepted it on May 4, acknowledging that fact again on May 24, 2016.²

4. The WSLCB’s Argument that, Under RCW 34.05.413(3), All Natural Herbs was Required to Use a Particular Form to Request Its Appeal is Without Merit.

The WSLCB argues that “[R]equiring . . . a[n appeal] form . . . ensures that cases will not be lost or misplaced. . . .” and that “to treat an informal communication as a formal application . . . would create . . . uncertainty and disagreement about the date of a hearing request.” (Br. of Res. at 13-15).

“[U]pon the timely application . . . an agency shall commence an adjudicative proceeding.” RCW 34.05.413(2) “An agency may provide forms for and, *by rule*, may provide procedures for filing an application. . . .” RCW 34.05.413(3) (emphasis added). It “may require *by rule* that an application be in writing . . . in a specified manner. . . .” RCW 34.05.413(3) (emphasis added). No word in a statute is superfluous. *City of Seattle v.*

² The WSLCB would have argued below All Natural Herbs missed its twenty day deadline to request an appeal if had not requested the appeal on May 4, 2020. By not requiring appeal forms, the WSLCB is attempting to preserve the ability to argue such forms are required, or not required, depending on which set of facts best help it in any given case.

State, 136 Wn.2d 693, 701, 965 P.2d 619, 623, (1998); *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 454-55, 210 P.3d 297, 302 (2009).

Here, all “formal” communication occurred by email with the WSLCB during the application process. (*e.g.*, AR at 714) (stating standard operating procedure was to just use email). The WSLCB’s post hoc rationalization is contrary to the applicable plain language because appeal requests are not even required to be in writing. RCW 34.05.413(3). The WSLCB’s argument conspicuously ignores, and attempts to delete from the statute, the words “by rule.” It could have had such a rule but did not and does not. If it had, it would have waived it. Appeals being lost or misplaced are nothing more than possible reasons to create an actual rule in the future.

5. The Did Not Commence an Administrative Adjudication on June 17, 2016.

The WSLCB’s (couple sentence) letter to All Natural Herbs on June 17, 2016, was held by OAH not to commence an adjudicative proceeding. (AR at 1341-54). OAH reasoned that this argument was “not supported by law and grossly misplaced and unsupported by any statute, rule or case law. . . .” (AR at 1341-54). The WSLCB argues otherwise, and that the letter “informed All Natural Herbs that its hearing request had been received, accepted, . . . assigned a case number[,]” and “indicated that the matter was being copied to the attorney who represents the Board. . . .” (Br. of Res. at

1, 8, 14, 18-19).

No language in a statute is superfluous. *City of Seattle*, 136 Wn.2d at 701. Under RCW §§ 34.05.413(2), 419, an agency has two important deadlines. First, to notify the applicant—within 30 days of receipt—that it has received an appeal. RCW 34.05.419(2). Second, “within ninety days after receipt. . . the agency shall. . . [c]ommence an adjudicative proceeding. . . .” RCW 34.05.419(1). “[C]ommence[ment occurs] when the agency or a presiding officer notifies a party that a . . . stage of an adjudicative proceeding will be conducted.” RCW 34.05.413(5).

Here, OAH correctly found the WSLCB’s argument “not supported by law and grossly misplaced and unsupported by any statute, rule or case law. . . .” The letter’s plain language explained its purpose: “This letter is being sent to you to *acknowledge receipt of a request for a hearing.*” (AR at 964) (emphasis added). Moreover, the WSLCB had already assigned an internal case number a month earlier, at least as early as May 24, 2016. (AR at 918). Regardless, assigning an internal case number is for internal bookkeeping. It has nothing to do with commencing an adjudication. Thus, creating it is not similar to filing a case at court and receiving a docket number. Moreover, forwarding documents to an attorney, and letting an opposing party know counsel was retained, is akin to a party preparing for a consultation. It does not “commence” an adjudication; attorney

consultations commonly occur before, during, after, or never in litigation. Last, notifying a party of receipt of an appeal and OAH commencement are two separate deadlines under RCW 34.05.419. The letter could not have done both or a portion of the statute would be rendered superfluous.

6. The WSLCB Directly Contradicts the Board’s Own Conclusion of Law that RCW 34.05.419’s Time Deadlines are Mandatory.

All Natural Herbs argued before OAH and the superior court that RCW 34.05.419’s time deadlines were mandatory. (*e.g.*, AR at 832-39). The WSLCB did not argue otherwise. (AR at 942-55; CP at 709-19). The Final Order of the Board concluded it was mandatory. (AR at 1348). The WSLCB now argues the deadlines are “directory.” (Br. of Res. at 20-21).

“As a general matter, a respondent who has not appealed from the judgment may not urge error on appeal” and “[t]o obtain affirmative relief by way of appeal, respondents must themselves file a notice of appeal and become cross-appellants.” *Pres. Poway v. City of Poway*, 245 Cal. App. 4th 560, 585, 199 Cal. Rptr. 3d 600, 618 (2016); RAP 2.4(a); *State v. Sims*, 171 Wn.2d 436, 449, 256 P.3d 285, 292 (2011). An unambiguous statute requires no interpretation. *Bower v. Reich*, 89 Wn. App. 9, 16, 946 P.2d 1216, 1220 (1997). “The word ‘shall’ in a statute . . . imposes a mandatory requirement unless a contrary legislative intent is apparent.” *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288, 290 (1993);

Singleton v. Frost, 108 Wn.2d 723, 728, 742 P.2d 1224, 1226 (1987); *Espinoza*, 87 Wn. App. at 869; *State v. Alaway*, 64 Wn. App. 796, 799-801, 828 P.2d 591, 594 (1992); *Forfeiture of Chevrolet Corvette*, 91 Wn. App. at 323; *see also State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440, 441 (1979).

Various tests determine whether the word “shall” is mandatory or directory. First, if the language of the statute is “plain” and “unambiguous” the analysis stops there, and the statute’s time-deadline is mandatory. *Erection Co.*, 121 Wn.2d at 518-22. Second, “If the right of anyone depends upon giving the word *shall* an *imperative* construction . . . it receives a mandatory interpretation.” *Singleton*, 108 Wn.2d at 728 (emphasis in original and added). Webster’s Dictionary defines “Imperative” as “not to be avoided or evaded” and “having power to restrain, control, and direct.” *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 14 Sept. 2016 (defining “imperative”); *see also Duskin v. Carlson*, 136 Wn.2d 550, 564, 965 P.2d 611, 617 (1998). Third, “if the provisions affect the public interest, or are intended to protect a private citizen against loss or injury to his property, they are held to be mandatory rather than directory.” *v. Lancaster*, 97 Wn.2d 620, 625, 647 P.2d 1021, 1024 (1982).

Here, first, the WSLCB and Board previously conceded that RCW 34.05.419’s time deadlines are mandatory. The agency did not appeal the

Board's conclusion of law that the time deadlines are mandatory. This Court should reject its "directory" arguments now. Regardless, second, the word "shall" is mandatory because RCW 34.05.419 is unambiguous in its sole purpose of setting time deadlines. *See Erection Co.*, 121 Wn.2d at 518-22. Third, the deadline "affects the public interest" and "is intended to protect private citizen against loss or injury to his property." *See Niichel*, 97 Wn.2d at 625; *Crescent Convalescent Ctr. v. Dep't of Soc. & Health Servs., State of Wash.*, 87 Wn. App. 353, 358, 942 P.2d 981 (1997).

Fourth, the deadline is used in a jurisdictional, or authority depriving, context because "an agency may exercise only those powers granted to it by the legislature." *See Erection Co.*, 121 Wn.2d at 520; *City of Seattle*, 37 Wn. App. at 823; *Munson*, 23 Wn. App. at 524. The statutory scheme does not provide for commencement after ninety days. *See Hutton v. State*, 25 Wn.2d 402, 406, 171 P.2d 248, 250 (1946) (holding "The [government's statutory right/authority] . . . may not be invoked outside of the period during which it is conferred by the statute. . . . *because, outside of the terms of the statute creating the [the government's right/authority], no [government right/authority] exists.*") (emphasis added).

Fifth, what is good for the goose is good for the gander' if a private party is held in default for missing its (reciprocal) time deadline to file an appeal (RCW 34.05.440), reading the statutory scheme as a whole demands

that the WSLCB be held in default too. *See e.g., Espinoza*, 87 Wn. App. at 866. Sixth, the time deadline is based on constitutional due process and cannot be extended. *Forfeiture of Chevrolet Corvette*, 91 Wn. App. at 323; *Espinoza*, 87 Wn. App. at 865.

Seventh, the statutory time deadline is “essential to the purpose of the statute,” “does not “simply guide[] the conduct of business,” and does far more than “provide[] for an orderly procedure.” It prevents agencies from destroying due process rights, businesses, and livelihoods by ignoring an appeal, letting time pass, and driving up litigation costs.

Last *Niichel* provides no support for the WSLCB. Its reasoning buttresses All Natural Herb’s arguments stated above. The word “shall” was not inadvertently “interchange[d]” with the word “may” by the legislature. Any argument otherwise would create an absurd result.

7. All Natural Herbs Never Argued “that an adjudicative proceeding *only* commences when a hearing is scheduled.”

All Natural Herbs has never argued (*see e.g., AR 834, CP 684-96; Br. of App.*) that “an adjudicative proceeding *only* commences when a hearing is scheduled,” otherwise a constitutional violation occurs. (*Br. of Res. at 17, 22*). “An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a . . . stage of an adjudicative proceeding will be conducted.” RCW 34.05.412(5). “Commenc[ing]” a

hearing, defined by statute, within 90 days is required by the due process clause. *Forfeiture of Chevrolet Corvette*, 91 Wn. App. at 323; *Espinoza*, 87 Wn. App. at 865. Here, instead of addressing All Natural Herbs' actual arguments, the WSLCB makes up strawman arguments. Obviously, an adjudicative proceeding had commenced by the time a hearing occurred some 500 plus days after the appeal was accepted. However, *the actual argument made* by All Natural Herbs was that the WSLCB failed, within ninety days, to provide it notification that some "stage of an adjudicative proceeding w[ould] be conducted."

Furthermore, the Board' lacked any authority whatsoever to grant their agency a "do over" regarding All Natural Herbs' appeal. The order prevented an adjudicative hearing from occurring for over 500 days. Such orders cannot be tolerated. *Hart v. Hawtin*, 2019 Wash. App. LEXIS 842, *12-32, 2019 WL 1549103 (unpublished opinion) (holding not following "procedures in any applicable statute" is a denial of "meaningful opportunity to be heard," a due process violation, and has the "potential to undermine the integrity of the legal system.>"). Moreover, this "do over" resulted in the first statement of intent not being adjudicated at all.

8. All Natural Herbs' Due Process Rights were Violated

The WSLCB argues that (1) All Natural Herbs "could have filed a writ of mandamus"; (2) "there is no property interest in the priority

designation in former RCW 69.50.331(1)(2015)”; (3) “All Natural Herbs . . . failed to identify an entitlement to any constitutionally protected interest”; (4) “All Natural Herbs had no property interest in its license application”; (5) All Natural Herbs has not shown “any deviation from the Board's normal procedures in assigning Priority 3 . . . or the commencement of an adjudicative proceeding”; and (6) All Natural Herbs improperly interprets *Chenery Corp.*

8.1 The WSLCB Argues All Natural Herbs “could have filed a writ of mandamus” and Concedes It Violated All Natural Herbs’ Rights.

A writ of mandamus may be issued only in cases “where there is not a plain, speedy and adequate remedy in the ordinary course of law.” *Gonsalves v. Trenary*, 12 Wn. App. 2d 756, 763, 460 P.3d 219, 222 (2020). Here, the WSLCB concedes that its actions were wrongful arguing “All Natural Herbs could have filed a writ of mandamus.” Why, if that is the WSLCB’s position, it has not settled this matter (*see* RCW 34.05.060) is a mystery. Regardless, the WSLCB cannot excuse its unconstitutional actions by arguing All Natural Herbs should have pursued an alternative strategy to remedy the agency’s wrongful behavior. All Natural Herbs pursued the normal course of an appeal for attorney-client privileged reasons.

8.2. All Natural Herbs, Mr. Yi, and Natural 7 Have Protected Property Interests that were Harmed.

“Protected property interests include all benefits to which there is a legitimate claim of entitlement.” *Crescent Convalescent Ctr.*, 87 Wn. App. at 358-59. “Statutes and regulations create protected interests when they contain ‘substantive predicates’ or particularized standards or criteria that guide the discretion of official decision makers and specific directives that mandate a specific outcome if the substantive predicates are present.” *Id.*

Here, former RCW §§ 69.50.331(1), (1)(a), stated that WSLCB “*must* conduct a comprehensive, fair, and impartial evaluation of the applicants timely received” and that it “*must* give preference between competing applications in the licensing process to applicants that have [statutorily defined] experience and qualifications in the following order of priority.” Yet the WSLCB erroneously argues that it did not contain “substantive predicates or particularized standards or criteria that guide the discretion of official decision makers and specific directives that mandate a specific outcome if the substantive predicates are present.” *Crescent Convalescent Ctr.*, 87 Wn. App. at 358-59. Former RCW 69.50.331’s plain language “created” property interests in a Priority 1 determination. The “dimensions” of which “[we]re defined by . . . rules or understandings that stem from an independent source, such as state law” that “establish[ed] and define[d] the contours of th[e] benefit.” *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) (some

internal punctuation omitted); *Nozzi v. Hous. Auth. of City of L.A.*, 806 F.3d 1178, 1191. All Natural Herbs had a “legitimate claim of entitlement” and “more than a unilateral expectation” of Priority 1 determination. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). In turn, since a Priority 1 determination led to a retail license where such licenses were available,³ it was denied expected property interests in the Priority 1 determination and a license.

The WSLCB cites *Haines, Jow Sin Quan*, and *Grandpa Bud, Ltd. Liab. Co.* In *Grandpa Bud*, a federal district court found there could not be federally protected property interest in activity illegal under federal law. *Grandpa Bud, Ltd. Liab. Co. v. Chelan Cty. Wash.*, No. 2:19-CV-51-RMP, 2020 U.S. Dist. LEXIS 91724, at *6 (E.D. Wash. May 26, 2020). The inapplicable case recognized that states can grant rights regarding cannabis.

In *Jow Sin Quan*, the court held that decisions of an agency could be final unless arbitrary and capricious. *Jow Sin Quan v. Wash. State Liquor Control Bd.*, 69 Wn.2d 373, 377, 418 P.2d 424, 427 (1966). In the case at hand, the Board’s decision was beyond arbitrary and capricious—it was in

³ Clearly licenses were available in the jurisdiction when All Natural Herbs applied; four licenses were granted surrounding All Natural Herbs location during its appeal, and today *eight licensed retail cannabis shops exist in the same jurisdiction*: (1) 420 Carpenter at 422 Carpenter Rd, Ste 105, (2) Dank’s Wonder Emporium, LLC at 6906 Martin Way E, (3) Euphoric 360 at 6326 Martin Way E, #103, (4) Lucid at 7294 Martin Way E, (5) THC of Lacey at 6725 Martin Way E, (6) THC of Olympia at 3203 Martin Way E, (7) Green Lady at 3044 Pacific Ave SE, and (8) T Brothers Bud Lodge at 5740 Ruddell Rd SE.

violation of statutory and constitutional mandates.

Finally, *Haines* is easily distinguishable. The license application at issue there was based on entirely different statutory scheme from 2013. That scheme created licenses out of thin air with few predicates or criteria. It did not protect collective garden owners, or employees. The appellant had no prior collective garden experience. The court of appeals held that the appellant's spouse's criminal history disqualified her for a license. In sum, the 2013 statutory scheme did not have "substantive predicates or particularized standards or criteria" and did not "mandate a specific outcome if the substantive predicates [were] present."

On the other hand, the 2015 priority scheme protected collective gardens being shut down. New licenses were not granted randomly by "lottery." To mitigate the harm to people operating collective gardens, the scheme protected their property, livelihoods, and ability to produce and/or provide medicine to themselves and patients. The priority system mandated that the WSLCB "must give preference . . . to applicants that have experience and qualifications. . . ." ⁴ Thus, *Haines* stands on its own facts.

In sum, Mr. Yi had "a reasonable expectation" for a Priority 1 determination and license. He ran the first collective garden licensed in

⁴ (available at <http://leg.wa.gov/CodeReviser/RCWArchive/Documents/2015/7-15SuppBody.pdf>).

Lacey, Washington—ever.⁵ Prior to that, he worked for a qualifying collective garden. The statutory scheme was specifically designed to protect him. There was “little doubt” that he would have been granted a Priority 1 determination and license but for the WSLCB denying his application for a single erroneous reason. (AR at 918). This error of law ended Mr. Yi's livelihood and shutdown his business. To add insult to injury, the WSLCB then violated his constitutional rights. It refused to timely commence his appeal, spending its time granting the priority 1 determination and license he qualified for to others next to his store. It granted a “do over.”

8.3. The Board's “Do Over” was a Due Process Violation.

“It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443, 462 (1983). “If those grounds are inadequate or improper, the court is powerless to affirm the administrative action. . . .” *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577 (1999).

Here, the WLSCB argues that *Chenery Corp.* supports its position that an administrative agency can (1) dismiss a party's appeal of agency

⁵ The WSLCB argues on appeal that Natural 7/Natural Health Collective was not considered in the application process as an underlying collective garden. The problem for the WSLCB is that the deputy director of licensing handling the application considered it to be. (AR at 721).

action after (2) denying the party's summary judgment motion based on procedural due process rights, (3) order a "do over" and new case be started, and (4) deny a party a hearing on the merits of the agency's original decision. *Chenery Corp.* stands for no such proposition.

The WSLCB ignores the procedural posture from which this appeal stems. Unlike either *Chenery*, this appeal stems from an order on summary judgment. Violating any known civil or administrative procedure and violating All Natural Herbs' due process and First Amendment rights regarding the first statement of intent—the Board reversed the order on summary judgment, barred the then scheduled hearing on the merits regarding the first statement of intent, and then ordered a brand new appeal to begin for its agency's benefit. That is not what happened in either *Chenery I* or *II*. *Chenery* is authority directly contrary to such (bias, prejudicial, and unjust) agency action and the Board's unlawful order.

Guidance is needed for the WSLCB as it acted outside its authority granted by the APA. The Board ordered a "do over" because the agency had no chance of prevailing in a hearing on merits based on the first statement of intent. It knew that "a simple but fundamental rule of administrative law" was "that the propriety" of any appeal rested "solely [on] the grounds invoked by the agency." *Chenery Corp.*, 332 U.S. at 196. Since the "propriety" of the first statement of intent issued was erroneous, it gave the

agency an unconstitutional second bite at the apple. This Court should have no tolerance for the Board’s unlawful order as the WSLCB’s argument regarding *Chenery* is frivolous.

9. The WSLCB Erroneously Denied Mr. Yi’s Application, Then Licensed Four Retail Stores Owned by Caucasians with No Prior Experience in Cannabis to Surround His Collective Garden Instead of Commencing an Adjudication.

The WLSCB argues that (1) race played no role in the agency’s decision, (2) “All Natural Herbs presented no evidence that the Lacey Jurisdiction was allocated a total of four . . . licenses,” (3) “All Natural Herbs’ own documentation shows that Lacey was allocated just two . . . licenses,” (4) All Natural Herbs presented no evidence the other store owners were Caucasian, and (5) Mr. Yi conceded that race did not play a role in the agency’s decision. Equal protection is intended to provide equal application of the law. *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789, 793 (2004). Here, not only were four stores allocated and licensed during All Natural Herbs’ appeal,

Jurisdiction	Allotments	Current or pending license	Proposed Additional Allotment	Total Proposed Allotment	Ban or Moratorium
Thurston County					
At Large	6	6	6	12	
Lacey	2	2	2	4	
Olympia	2	2	2	4	
Tumwater	1	1	1	2	

Revised store allocation 12/16/16

(AR 1041), but currently there are no less than eight stores operating in Thurston County.⁶ Additionally—to the degree this Court would consider testimony from a void administrative hearing—Mr. Yi’s testimony that the four owners were “blonde haired” and “blue eyed” is clear evidence of the owner’s Caucasian decent. Last, Mr. Yi did not concede anything. He understood the question cited by the WSLCB had to do with whether Ms. McShane was individually discriminating against him; not whether the WSLCB was with its actions. Regardless, the facts of this case clearly point to racial discrimination and this Court should not sanction this sort of systemic discrimination.

10. This Court Can Provide all of All Natural Herbs’ Requested Relief.

The WSLCB argues that (1) All Natural Herbs did not support its argument that the Board’s orders were void; (2) The Healing Center of Tacoma did not have a history of paying taxes; (3) “By selling and delivering marijuana to another business, The Healing Center could not meet the definition of a collective garden under former RCW 69.51A.085(1)(e)”; and (4) “this Court cannot grant” the relief of ordering the WSLCB to issue a “retail marijuana license at any qualifying location it chooses.”

⁶ See fn. 3, *supra*.

10.1. All Natural Herbs Provided Authority and Citation Demonstrating that the Board’s Final Orders were Void as in Lawfully Never Happened.

The Supreme Court “has not embraced the general proposition that a wrong may be done if it can be undone.” *Olympic Forest Products, Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 430, 511 P.2d 1002 (1973). Orders in violation of due process are void. *Hawtin*, No. 50350-6-II, 2019 Wash. App. LEXIS 842, at *33 n.9. Here, the idea that substantive orders issued after a void order (on due process grounds) are also void is not controversial. *See e.g., Chaussee Corp.*, 82 Wn.2d at 430; *Hawtin*, No. 50350-6-II, 2019 Wash. App. LEXIS 842, at *33 n.9. The phrase “fruit of the poisonous tree” comes to mind. All Natural Herbs cited authority detailing this principle on page 43 of its Brief of Appellant. One recent case cited was *Hawtin*. There, remarkably similar arguments were made as compared to the case at hand.⁷ This Court reversed the trial court and specifically held “any orders [issued subsequently] extending or renewing [the unconstitutional] order [at issue in the appeal] . . . [we]re void.” *Hawtin*, No. 50350-6-II, 2019 Wash. App. LEXIS 842, at *33 n.9

10.2. Agencies May Not Rely on Post Hoc Rationalizations and Employees Cannot be Held Responsible for Employer’s Actions. Regardless, All Natural Herbs Paid, or Would Pay, All Applicable Taxes Due for a Priority 1 Determination and License Just Like All Other Applicants Were Allowed to Do

⁷ Counsel for Mr. Hawtin was the same person as counsel for All Natural Herbs.

During the Application Process.

Administrative agencies may not come with up new reasons, after the fact, justifying their previous actions. *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S. Ct. 454, 459 (1943); *Chenery Corp.*, 332 U.S. at 196. The WSLCB, and all agencies, allowed priority applicants to provide information necessary for the application and to pay all back owed taxes during the application process. (*See e.g.*, AR at 443, 445, 713-23, 740-46).

Here, All Natural Herbs explained to the WSLCB, in April of 2016, how it met all applicable requirements to be issued a Priority 1 determination and license (AR at 2270-73; *see also* 2473-74, 2479-80, as to Natural 7, LLC). The WSLCB never requested tax documents or information, and never considered that a reason for denial, before issuing the first statement of intent. (*See e.g.*, AR at 716-23). The sole (erroneous) reason the WSLCB denied a Priority 1 Determination in the first (*and only relevant*) statement of intent was because The Healing Center of Tacoma did not operate commercially. (AR at 918). Thus, the tax argument is both a red herring and an unlawful “post hoc rationalization” for denying All Natural Herbs its Priority 1 determination and license.⁸

⁸ Even the WSLCB’s own expert conceded that agencies never fault an *employee*—such as Mr. Yi—for his *employer* not paying applicable taxes and always allow back taxes to be paid so businesses can come into good standing, unless there was a “legal order” barring the business from paying those back taxes. (AR at 443, 445). Regardless, Mr. Yi paid those

10.3. The Healing Center of Tacoma was a Collective Garden Under Former RCW 69.51A.085(1)(e).”

A collective garden was simply “sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use,” such as by providing real estate, equipment, supplies, or labor for the collective garden. *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 224, 351 P.3d 151, 153 (2015) (citing former RCW 69.51A.085(2)). A collective garden is “a group of individuals who come together to grow marijuana for the members of the group.” (AR at 2164-65). An access point was a place where the patient could obtain the medicine grown. (AR at 2212-14).

Here, the WSLCB (further) shows its lack of understanding of collective gardens—*something it has never regulated*. It shows inconsistent, changing, and arbitrary legal arguments and positions. First—on its face—the argument that The Healing Center of Tacoma was not a collective garden because it gave cannabis to “another business” (Br. of Res.

taxes. (AR at 2205-06, 2241, 2254, 2297, 2336, 2464-67, 2480). The tax argument is a further red herring because not paying taxes in the past was never a reason to deny a priority determination or license as long as the collective garden paid them during or after submitting a priority application. (*e.g.*, AR at 212). This was because no state agency accepted any taxes from any collective garden (for various reasons) prior to legalization in 2013. (AR at 207-12, 928-29, 934, 938-39). One of the main purposes of former WAC 314-55-020 and RCW 69.50.331 was to resolve the issue of whether prescription cannabis was taxable. (*e.g.*, AR at 928-29, 934, 938-39). By linking a favorable priority determination to the payment of such back taxes, the legislature incentivized collective gardens to voluntarily drop this issue and pay the taxes. (*e.g.*, AR at 212; *see also e.g.* AR at 2213).

at 30) is belayed by the fact that this other “business” the WSLCB speaks of was the Healing Center of Olympia that was issued a Priority 1 determination and license by the WSLCB in 2016. (AR 204-05). In other words, for the WSLCB’s argument to make any sense—it should never have issued a Priority 1 determination or license to The Healing Center of Olympia. But it did. This Court need only understand that the WSLCB will argue anything in one case, and then argue the complete opposite in the next case if it thinks it will justify its arbitrary decision making. (*See also* Transcript from Healing Center of Tacoma Hearing: AR at 2178) (stating “Q[uestion by Applicant’s attorney] . . . *collective gardens could be businesses, but they don’t have to be businesses, is that a fair statement?* A[nswer by Jodi Murphy WSLCB licensing Specialist Supervisor]: *Yes.*”) (emphasis added) and AR at 2164-65) *compared with* AR at 918 (WSLCB denying All Natural Herbs priority determination because it was not a “business” operating commercially). **Guidance is needed.**

Second, the WSLCB misunderstands the definition of a collective garden and the use of “access points.” A collective garden was people sharing resources to grow and provide cannabis as medicine. *Cannabis Action Coal.*, 183 Wn.2d at 224. An “access point” was a place where the patient could obtain the medicine grown. (AR at 2212-14). The WSLCB argues that The Healing Center of Tacoma violated former RCW

69.51A.085(1)(e) by its members supplying cannabis to members of The Healing Center of Olympia. But both collective gardens—as their names indicate—shared the same members. (AR 204-05). Moreover, even if there was a violation (which has never been shown) of RCW 69.51A.085(1)(e) that violation would not redefine The Healing Center of Tacoma as not a collective garden under former RCW 69.51A.085(2). It would, at most, just make the garden possibly subject to prosecution for that violation.⁹ Regardless, this post hoc rationalization is irrelevant because it was not the agency’s reason for denying All Natural Herbs’ Priority 1 determination and license. (AR at 918).

10.4 This Court Can Order the WSLCB to issue a Priority 1 Determination and License.

“A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. . . .” *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916).

Here, the WSLCB is beyond disingenuous arguing it cannot issue a priority determination or license because the “Board has withdrawn all

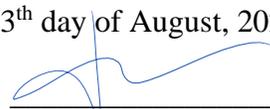
⁹ The Healing Center of Olympia was raided by police and had all charges dropped because *the collective gardens did not violate the law.* (AR 209-18).

remaining license applications,” because the “priority system is [no longer in] existence,” and because All Natural Herbs “did not complete the application process.” First, the WSLCB has provided this type of relief in priority appeals/contested adjudications. Second, there were three parts to the application process; a qualifying location (All Natural Herbs has always had this), Priority 1 status, which demonstrated the collective garden was qualified for a license, and to not have a disqualifying criminal history. All Natural Herbs has met all of these requirements. (*e.g.*, AR 884-908; 2270-73).

Third, there have been a total of at least eight retail stores licensed in Thurston County since this appeal began in 2016 (*See* fn. 3, *supra*), and the WSLCB is beyond disingenuous arguing that it is without power or authority to issue another retail license under the circumstances. Regardless, the WSLCB’s statutory and constitutional violations allow this Court to provide this relief on appeal. *See Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916).

Last, the WSLCB makes no responsive argument against All Natural Herbs being granted attorney fees and costs on appeal.

Respectfully submitted this 13th day of August, 2020,



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Attorney for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on August 13, 2020, I caused to be served:

1. Reply Brief of Appellant

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Signed this 13th day of August, 2020, at Olympia, Washington.



Stacia Smith

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