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

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ALL NATURAL HERBS, LLC

Appellant,

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD,

Respondent.

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**WASHINGTON STATE LIQUOR AND CANNABIS BOARD'S  
RESPONSE BRIEF**

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## I. INTRODUCTION

Having failed to establish that its marijuana retail license application qualified for Priority 1 status under a now-defunct system, All Natural Herbs, LLC, asks this Court to order the Washington State Liquor and Cannabis Board (Board) to grant it such status through a series of unsupported allegations of procedural errors. The Court should reject this attempt, as it is based on a number of flawed and incomplete assertions and legal theories. Contrary to All Natural Herbs' contentions, the Board timely commenced an adjudicative proceeding after receiving All Natural Herbs' formal application and based its priority decision on substantial and legally appropriate evidence. All Natural Herbs has failed in its burden of establishing constitutional impairments and fails to ask for an available remedy.

The Administrative Procedure Act (APA) authorizes agencies to provide a form for appellants to use in requesting an adjudicative proceeding. The use of a standardized form provides a clear, predictable, and methodical process for determining the date of the request in order to accurately calculate the 90-day deadline for commencing an adjudicative proceeding. All Natural Herbs contends that informal email communications constituted its application for an adjudicative proceeding. However, All Natural Herbs formally requested an adjudicative proceeding by filing the Board's standardized Request For Hearing form. Immediately after receiving the form, the Board timely commenced an adjudicative proceeding by providing All Natural Herbs with written notice that its

request had been timely received, accepted, assigned a case number, and forwarded to the Washington Attorney General's Office (AGO) or, in the alternative, when the administrative law judge (ALJ) timely scheduled a prehearing conference.

After a hearing on the merits, the ALJ held that the Board had correctly assigned All Natural Herbs' license application to Priority 3 because the applicant could not establish that any member had worked for a qualifying collective garden that had paid its taxes. On review, the Board affirmed the initial order, and its decision should be affirmed. In this appeal, All Natural Herbs has failed to cite evidence supporting its constitutional claims, and those arguments should be rejected.

## **II. RESTATEMENT OF THE ISSUES FOR REVIEW**

1. Whether the Board timely commenced an adjudicative proceeding by providing written notice to All Natural Herbs that the appeal process had begun within two days of receiving All Natural Herbs' Request For Hearing form.
2. Whether the remedy for failing to timely commence an adjudicative proceeding is an automatic grant of the appellant's requested relief.
3. Whether All Natural Herbs had a protected property right in its license application or in a Priority 1 determination.
4. Whether the Board's order directing Licensing to consider the additional documentation that All Natural Herbs had presented during the first adjudication was proper.

5. Whether All Natural Herbs established constitutional equal protection claims when it failed to establish any racial motivation by the Board and when its principal owner stated during his testimony that “I’m not claiming that race played a role” in licensing decisions.

6. Whether substantial evidence supports the Board’s decision that All Natural Herbs had been correctly determined to be a Priority 3 applicant.

7. Whether granting a license to All Natural Herbs is an available remedy when it has failed to establish that it could qualify for a license and when there are no more licenses available.

### **III. RESTATEMENT OF THE CASE**

#### **A. Priority System For Retail Marijuana Licensing**

In 2015, Washington sought to merge the medical marijuana market into the existing retail marijuana industry by enacting ESSB 5052, which created 222 additional retail marijuana licenses. *Top Cat Ent., LLC, v. City of Arlington*, 11 Wn. App. 2d 754, 756, 455 P.3d 225 (2020). Within each jurisdiction in the state, the Board allocated a specific number of additional retail marijuana licenses, which were known as ESSB 5052 licenses. Under former RCW 69.50.331(1)(a) (2015), the Board was required to assign a Priority 1, Priority 2, or Priority 3 status to applications for these additional licenses, using specific criteria outlined in the statute. Former RCW 69.50.331(1) (2015); *see also* former WAC 314-55-020(3) (2015).

Priority 1 was assigned to those applicants who had applied for a marijuana retail license prior to July 1, 2014, who had operated or were

employed by a collective garden before January 1, 2013, who had maintained a state and a municipal business license, and who had a history of paying all applicable state taxes and fees. Former RCW 69.50.331(1)(a)(i) (2015). A Priority 2 designation required an applicant to establish the same criteria, with the exception of having applied for a marijuana license in 2014. Former RCW 69.50.331(1)(a)(ii) (2015). A Priority 3 designation was assigned to applicants who did not qualify for Priority 1 or Priority 2. Former RCW 69.50.331(1)(a)(iii) (2015).

Priority 1 applications were processed first, Priority 2 applications were to be processed next, and Priority 3 applications were to be processed last. *Top Cat*, 11 Wn. App. 2d at 756. However, because there were more Priority 1 applicants for each jurisdiction than licenses available, the Board was only able to process and grant licenses for Priority 1 applications. *Id.* Agency Record (AR) 242. Priority 1 applicants who applied early, submitted documents promptly, and moved through the application process quickly were more likely than other Priority 1 applicants to receive a license. *Top Cat*, 11 Wn. App. 2d at 756.

The Board accepted ESSB 5052 license applications from October 12, 2015 until March 31, 2016, and received more than 2500 applications for the 222 available licenses. AR 421; 1788. After each application was submitted, the Board's Licensing and Regulation Division (Licensing) prioritized the applicant by requesting a completed priority verification form and all documentation necessary to support the claimed priority. AR 304, 338-42. After the applicant had submitted its priority

verification form and supporting documents, Licensing would review the documentation. If the information was not sufficient or there was documentation missing, Licensing informed the applicant of its priority designation based on what had been submitted to date and gave a fourteen-day deadline to submit additional documents. AR 713-15. If an applicant timely submitted additional documentation, Licensing would review those documents as well as any information it had obtained from other state agencies and make a final priority determination. AR 721-22, 744. Licensing assigned each applicant the highest priority for which it was eligible, which resulted in 388 Priority 1 applicants, all vying for one of the 222 available ESSB 5052 licenses. AR 276, 421. The licensing process moved so quickly that the Board had already issued all of the available licenses in 29 of Washington's 123 jurisdictions even before the ESSB 5052 application period was closed on March 31, 2016. AR 1788; 1037-42.

**B. All Natural Herbs' Application and Priority Assignment**

On March 27, 2016, four days before the end of the five-month application window, All Natural Herbs applied for a retail marijuana license. On April 7, 2016, All Natural Herbs submitted its Marijuana Priority Verification Form and supporting documentation. AR 786, 910, 1270-84. All Natural Herbs claimed to be a Priority 1 applicant based on its

principal owner's employment at The Healing Center of Tacoma,<sup>1</sup> which All Natural Herbs alleged was a qualifying collective garden. AR 188, 1270-84. All Natural Herbs produced a 2011 W-2 from The Healing Center of Tacoma to substantiate that its principal owner had been employed by The Healing Center of Tacoma prior to January 1, 2013. AR 245; 1280, 1683. The Board requested that All Natural Herbs provide additional information about The Healing Center of Tacoma. AR 1798-99. During its internal investigation, the Board discovered documentation from the Washington Secretary of State revealing that the owner of The Healing Center of Tacoma had repeatedly reported having no location, no product, no business, and no intention of conducting business prior to the statutory cutoff date of January 1, 2013. AR 1418-24. From this documentation alone, Licensing determined that The Healing Center of Tacoma could not qualify as a collective garden for priority purposes. Former RCW 69.50.331(1) (2015) and former WAC 314-55-020(3) (2015). Concluding that no further investigation was necessary, Licensing classified All Natural Herbs as a Priority 3 applicant. AR 1296.

On April 21, 2016, Licensing notified All Natural Herbs of its Priority 3 status. AR 910, 1296, 1302. On April 27, 2016, All Natural Herbs emailed a five-page letter requesting that Licensing change its status to a

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<sup>1</sup> All Natural Herbs continues to argue that Natural 7, LLC, could have satisfied its collective garden requirement. However, each applicant was required to specify just one collective garden for priority purposes, and All Natural Herbs designated The Healing Center of Tacoma. AR 406-07; 421. In any event, Natural 7 could not qualify as a collective garden because it had not received a business license prior to the statutory cutoff date of January 1, 2013. AR 408; 1472; 1712; 1715; 1723; 1765.

Priority 1, or in the alternative, provide a detailed explanation for its priority decision. AR 1737; 1740-44. The letter concluded with a records request for “any and all documentation supporting the Board’s determination that we should be given a Priority 1 [sic].” AR 1740-44. Because All Natural Herbs had not been assigned to Priority 1, the Board’s public records staff member asked for clarification. AR 1737.

On May 4, 2016, All Natural Herbs responded by email, making no mention of an appeal but, instead, simply acknowledging its typographical error and requesting the documents the LCB had relied on to *deny* a Priority 1 status. AR 913-14; 1735-36. The Board accepted All Natural Herbs’ clarification, acknowledged the request for public records and the desire for an appeal, and asked for additional identifying information. AR 913; 1735. That same day, All Natural Herbs sent another email, stating that its April 27, 2016 letter was “not necessarily intended to be an appeal” but was, instead, a request that Licensing explain its reasoning for the Priority 3 determination. AR 912; 1734. All Natural Herbs’ final email on May 4, 2016, also stated that it was now requesting “an administrative hearing/adjudication” and a written statement beforehand “detailing the reason(s)” it had been assigned to Priority 3 rather than Priority 1. AR 912; 1734. Having been notified of the Applicant’s desire for an appeal, the Board responded on May 24, 2016, by sending All Natural Herbs a written explanation of its priority assignment, entitled Statement of Intent for Priority Determination, along with the agency’s standard Request For Hearing form. AR 918, 961.

## **C. Procedural History**

### **1. First Adjudicative Proceeding**

After the Board issued its Statement of Intent for Priority Determination on May 24, 2016, All Natural Herbs returned the Request for Hearing form on June 15, 2016. AR 961-62. Two days later, the Board sent a letter informing the applicant that its request had been received, had been assigned LCB Case No. M-26,119, and was being forwarded to the Office of the Attorney General (AGO) for further action. AR 961, 964. On August 31, 2016, the AGO sent the matter to the Office of Administrative Hearings (OAH) for assignment to an ALJ. AR 1785.

On September 9, 2016, OAH sent the parties a Notice of Prehearing Conference in LCB Case No. M-26,119, which scheduled a prehearing conference for October 25, 2016. AR 790-792. At the prehearing conference, the parties agreed that the sole issue to be decided by the ALJ was “[w]hether the Office of Administrative Hearings and / or Liquor and Cannabis Board has jurisdiction over this matter.” AR 794-95. Soon afterward, All Natural Herbs filed a motion for summary judgment, arguing that the Board had lost subject matter jurisdiction to oppose the appeal by failing to commence “a hearing” within 90 days of receiving its request for a hearing, as directed by RCW 34.05.419(1). AR 820-46. The Board filed a response, and All Natural Herbs filed a reply. AR 945-55; 980-95.

The ALJ issued an initial order granting summary judgment in LCB Case No. M-26,119 on the ground that the Board had lost subject matter jurisdiction to oppose All Natural Herbs’ appeal by failing to timely

commence an adjudicative proceeding. AR 996-1006. However, instead of awarding All Natural Herbs its requested relief of a Priority 1 and a license, the ALJ remanded the matter to the Licensing Division with directions to allow All Natural Herbs to provide additional documentation supporting its claim and to reassess its priority based on the additional information provided. AR 1005-06. Licensing sought Board review. AR 1143.

On March 22, 2017, the Board issued a final order reversing summary judgment in LCB Case No. M-26,119. AR 1341-51. The Board concluded that Licensing had timely commenced an adjudicative proceeding and rejected the Initial Order's subject matter jurisdiction analysis. The Board directed Licensing to reconsider All Natural Herbs' priority in light of any additional documentation the Applicant had submitted during the summary judgment proceeding, issue a new statement of intent, and offer All Natural Herbs another opportunity to appeal its new priority determination.

## **2. Second Adjudicative Proceeding**

Following the Board's directive, Licensing reviewed All Natural Herbs' additional documentation and reevaluated the Applicant's priority in light of all the available documents. After doing so, Licensing again concluded that All Natural Herbs could only qualify as a Priority 3 applicant. AR 1389. Licensing issued a second Statement of Intent for Priority Determination, and All Natural Herbs again submitted the standard Request For Hearing form. Licensing commenced a new adjudicative proceeding, which was assigned LCB Case No. M-26,505.

After a three-day evidentiary hearing, the ALJ issued an initial order in LCB Case No. M-26,119, holding that Licensing had correctly assigned Priority 3 to All Natural Herbs' license application. AR 2576. All Natural Herbs sought Board review, and in a final order dated July 24, 2018, the Board affirmed the Priority 3 assignment. AR 2670. All Natural Herbs filed a petition for judicial review in superior court, which denied the petition. Clerk's Papers 1-38; 751-52. This appeal followed.

### **III. STANDARD OF REVIEW**

The APA governs this Court's review of the Board's actions. RCW 34.05.510; *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). Review is confined to the agency record. RCW 34.05.558. The Court reviews the Board's final decision rather than the decision of the superior court. *Kadlec Reg'l Med. Ctr. v. Department of Health*, 177 Wn. App. 171, 177, 310 P.3d 876 (2013).

Under the APA, the Petitioner bears the burden of demonstrating the invalidity of the agency action. RCW 34.05.570(1)(a). On issues of fact, this Court may grant relief only if the agency's findings are "not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). The substantial evidence test is "highly deferential." *ARCO Prods. Co. v. Washington Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The test is not whether the evidence is sufficient to persuade the reviewing court of the truth or correctness of the order but whether any fair-minded person could have

ruled as the agency did after considering all of the evidence. *Callegod v. Washington State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997). Evidence may be “substantial” even if it conflicts with other evidence in the record. *Id.* at 676. In determining whether substantial evidence exists, the court must take the “record in the light most favorable to the party who prevailed [before the fact-finding tribunal],” which is the Board in this case. *Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

Courts apply de novo review to issues of law. *Franklin Cty. Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982). Jurisdictional questions are issues of law and are therefore reviewed de novo. *Hutmacher v. State Bd. of Nursing*, 81 Wn. App. 768, 771, 915 P.2d 1178 (1996). Courts will grant substantial weight to an agency’s interpretation of a statute that the agency administers. *Public Util. Dist. 1 of Pend Oreille Cty v. State, Dep’t of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002); *King Cty. v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). This is especially true when the agency has expertise in the subject area. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593–95, 90 P.3d 659 (2004); *Inland Empire Distrib. Sys., Inc. v. Utils. & Transp. Comm’n*, 112 Wn.2d 278, 282, 770 P.2d 624 (1989).

The Washington Supreme Court has defined arbitrary or capricious agency action as action that “is willful and unreasoning and taken without

regard to the attending facts or circumstances.” *Washington Independent Tel. Ass’n v. Washington Utilities & Transp. Comm’n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003) (citations omitted). “Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 47, 959 P.2d 1091 (1998). Neither the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious. *Rios v. Washington Dep’t of Labor & Industries*, 145 Wn.2d 483, 504, 39 P.3d 961 (2002). In considering constitutional arguments, the Court presumes the challenged statutes and rules are constitutional, and the petitioner has a heavy burden of proving invalidity beyond a reasonable doubt. *City of Bellevue v. State*, 92 Wn.2d 717, 719-20, 600 P.2d 1268 (1979).

#### **IV. LEGAL ARGUMENTS**

The Board engaged in a methodical, evidence-based licensing process that relied on documentation to evaluate each license application against the priority criteria in former RCW 69.50.331(1) (2015) and former WAC 314-55-020(3) (2015). The Board properly applied the statutory requirements to the evidence in All Natural Herbs’ application and correctly determined that it qualified as a Priority 3 applicant. In challenging this priority determination, All Natural Herbs’ arguments fall into three broad categories: 1) arguments challenging the timeliness of the commencement

of the first adjudicative proceeding; 2) arguments asserting an equal protection violation based on race; and 3) arguments challenging the outcome of the second adjudicative proceeding, which affirmed All Natural Herbs' Priority 3 designation. None of All Natural Herbs' arguments warrants relief.

**A. The Board Timely Commenced An Adjudicative Proceeding**

RCW 34.05.419(1) directs agencies to commence an adjudicative proceeding within 90 days of receiving an application for an adjudicative proceeding. Here, All Natural Herbs argues that email correspondence on May 4, 2016 constituted its formal application for an adjudicative proceeding. This argument, however, ignores RCW 34.05.413(3), which allows agencies to require the use of a form for filing an application for an adjudicative proceeding. It also ignores the fact that All Natural Herbs did not submit the required Request For Hearing form until June 15, 2016, and further ignores the fact that All Natural Herbs was equivocal in the May 4, 2016 communications it now claims served as an application for an adjudicative proceeding.

Based on its contention that the request for a hearing was submitted on May 4, 2016, All Natural Herbs argues that the Board failed to commence an adjudicative proceeding within 90 days. This is incorrect. Under the APA, an “adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, **or other stage of an adjudicative proceeding will be conducted.**” RCW 34.05.413(5) (emphasis added). In this case, the record reflects that

the Board notified All Natural Herbs in writing on June 17, 2016, that the agency had received its formal application for an adjudicative proceeding, had opened the case and assigned a case number, and had forwarded the matter to the AGO for further action. This written notice satisfied the definition of commencement in RCW 34.05.413(5), and it was sent just two days after receiving the applicant's Request For Hearing form on June 15, 2016. Even if informal communications can serve as an application for an adjudicative proceeding, the Board's June 17, 2016 notice was sent just 44 days after receiving All Natural Herbs' May 4, 2016 email. Either way, the Board commenced an adjudicative proceeding within 90 days of All Natural Herbs' request for a hearing.

**1. All Natural Herbs filed its Request For Hearing on June 15, 2016**

The APA authorizes agencies to commence an adjudicative proceeding "at any time" with respect to a matter within the agency's jurisdiction. RCW 34.05.413(1). In commencing an adjudicative proceeding, the APA permits agencies to "provide forms" to be used in filing an "application for an adjudicative proceeding." RCW 34.05.413(3). Here, the Board provided just such a form when it issued its Statement of Intent for Priority Determination on May 24, 2016. AR 1771-73. The form, which was entitled "Request For Hearing," instructed that "[t]o request an administrative hearing, you must complete this form and return it to the Washington State Liquor and Cannabis Board" within 20 days.

AR 1396-97. All Natural Herbs returned the completed form on June 15, 2016, thus starting the 90-day time period in RCW 34.05.419(1).

All Natural Herbs, however, argues that informal email communications on May 4, 2016, constituted All Natural Herbs' official application for an adjudicative proceeding. Opening Brief (Opening Br.) 8. However, RCW 34.05.413(3) specifically authorizes agencies to designate a particular form for appellants to use in requesting an adjudicative proceeding. As the Board pointed out in its Final Order in LCB Case No. M-26,119, "requiring that the Applicant submit a hearing request on a form in response to the formal notice of Board action ensures that cases will not be lost or misplaced in the process because an individual may indicate that a hearing will be held, without the authority to make that commitment." AR 1346. This conclusion is entirely consistent with the agency's authority under RCW 34.05.413(3). To treat an informal communication as a formal "application for an adjudicative proceeding" for purposes of RCW 34.05.419 would create, as it did here, uncertainty and disagreement about the date of a hearing request. The use of a standardized form eliminates such uncertainty. The Board did not err in relying on the standardized form to conclude that June 15, 2016, was the date of All Natural Herbs' request for an adjudicative proceeding.

All Natural Herbs argues, however, that the agency "expressly accepted" its May 4, 2019 email as an application for an adjudicative proceeding. Opening Br. 8. It did not. The entirety of the email communications shows that such a conclusion is misplaced. On

April 26, 2016, All Natural Herbs sent an ambiguous, five-page letter complaining about its Priority 3 designation and questioning Licensing for failing to provide a detailed, written explanation as to how and why the agency had reached its decision. AR 1740-44. The five-page letter concluded with a request for “all documentation supporting the Board’s determination that we should be given Priority 1.” AR 1744. The Board’s public records team responded that it had no documentation of a Priority 1 assignment for All Natural Herbs. AR 1736-37.

On May 4, 2016, All Natural Herbs acknowledged its “scrivener’s error” and clarified that it had been requesting records supporting the Priority 3 assignment, which “will be used for an appeal.” AR 1735-36. Jeanne McShane, Deputy Director of Licensing and Regulation, responded that Licensing would consider the request to be “a public records request and a request for appeal.” AR 1735. Informal requests such as this routinely triggered Licensing to issue a Statement of Intent and a Request For Hearing form in order to allow the requesting party to make a formal appeal, and Ms. McShane’s response provided All Natural Herbs with assurance that the necessary documents would be issued. *See* AR 1346.

In a subsequent email on May 4, 2016, All Natural Herbs told Ms. McShane that the five-page letter “*was not necessarily intended to be an appeal.*” AR 912; 1734 (emphasis added). Thus, Ms. McShane’s prior email could not have served to accept the five-page letter as an official “application for an adjudicative proceeding” under RCW 34.05.419 when All Natural Herbs expressly stated that it had not intended the letter to be

an appeal and when the request was not filed on the standard form designated for such appeals.

The final email communication occurred late in the evening on May 4, 2016, at 6:46 p.m. In it, All Natural Herbs stated its desire for “an administrative hearing/adjudication on the issue of the denial of Priority 1 status” and specifically requested that the Board provide “a written statement, *beforehand*, detailing the reason(s) we have been given Priority 3 status and NOT Priority 1 status.” AR 1734 (emphasis added). Consistent with its normal procedures, the Board provided just such a “written statement” by issuing a Statement of Intent on May 24, 2016. AR 1771-73. Included with the Statement of Intent was the agency’s formal Request For Hearing form, which All Natural Herbs does not dispute was returned to the agency on June 15, 2016. Because the record contains substantial evidence to support the Board’s factual finding that June 15, 2016 was the date on which All Natural Herbs submitted its application for an adjudicative proceeding, All Natural Herbs failed to meet its burden of showing that this finding of fact lacked substantial evidence.

**2. The Board commenced an adjudicative proceeding two days after receiving All Natural Herbs’ Request For Hearing Form**

All Natural Herbs’ argument that an adjudicative proceeding only commences when a hearing is scheduled is unsupported by any citation to relevant authority and should be rejected. Under RCW 34.05.419(1), the agency must, with few exceptions, commence the adjudicative process, not the hearing, within 90 days of receiving an application for an adjudicative

proceeding. Under RCW 34.05.413(3), agencies are permitted to use a standardized form for requesting an adjudicative proceeding. The adjudicative proceeding commences “when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted.” *See also Hutmacher v. State, Bd. of Nursing*, 81 Wn. App. 768, 771-72, 915 P.2d 1178 (1996) (noting that “an adjudicative proceeding is not limited to the formal hearing itself, but also contemplates other stages of proceedings affecting the rights of an individual under the administrative scheme”).

Two days after receiving All Natural Herbs’ standardized Request For Hearing form on June 15, 2016, the Board commenced an adjudicative proceeding by sending All Natural Herbs a letter providing notice that its request had been received, that a LCB case number had been assigned, and that the matter was being forwarded to the AGO. All Natural Herbs argues that the letter’s wording did not provide the requisite notice. Opening Br. 26. The APA itself, however, lacks any requirement that specific language be used in the notice. Instead, RCW 34.05.413(5) merely requires that a party be notified that a stage in the process “will be conducted,” and the Board’s June 17, 2016 letter did exactly that.

All Natural Herbs further argues that the act of forwarding the case to the AGO was not a “stage in the adjudicative proceeding” that could satisfy the meaning of commencement in RCW 34.05.413(5). Opening Br. 25. However, the LCB’s standard procedure in administrative

cases includes referral to the AGO as an essential step, as it is the AGO that sends the case to OAH to request assignment to an ALJ. AR 1785. Moreover, as the Board pointed out in its March 22, 2017 final order in LCB Case No. M-26,119, the notification letter did far more than merely notify All Natural Herbs that the case had been forwarded to the AGO. AR 1341-52. The letter also informed All Natural Herbs that its hearing request had been received, accepted, and assigned a case number. AR 1349. In addition, the letter indicated that the matter was being copied to the attorney who represents the Board in adjudicative proceedings. AR 1349. The mere fact that LCB assigned a case number to the appeal demonstrates that an adjudicative proceeding had commenced, just as the assignment of a docket number by the clerk of a court demonstrates that a case has been opened and an action commenced. The agency's June 17, 2016 letter provided All Natural Herbs with notice that the adjudicative process had begun, thus satisfying the definition of commencement in RCW 34.05.413(5).

Furthermore, OAH sent the parties a Notice of Prehearing Conference on September 9, 2016, which was only 86 days after the Board had received All Natural Herbs' Request For Hearing on June 15, 2016. Pursuant to RCW 34.05.413(5), it is undisputed that providing notice of a prehearing conference commences an adjudicative proceeding. OAH sent such notice within 90 days of the Board's receipt of All Natural Herbs' Request For Hearing form. Under all of these circumstances, the Board's

final order was correct in concluding that an adjudicative proceeding had timely commenced.

**B. The 90-Day Rule In RCW 34.05.419(1) Does Not Implicate Subject Matter Jurisdiction**

The Court need not address jurisdiction where the Board timely commenced All Natural Herbs' adjudicative proceeding within the 90-day period specified in RCW 34.05.419(1). However, even if the Board had failed to commence an adjudicative proceeding within 90 days, such a failure would not mean the agency forfeits its position in the appeal. Instead, the 90-day provision in RCW 34.05.419(1) is directory rather than mandatory. *See Niichel v. Lancaster*, 97 Wn.2d 620, 623-24, 647 P.2d 1021 (1982).

In *Niichel*, our Supreme Court explained the difference between directory and mandatory provisions: “A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer.” *Niichel*, 97 Wn.2d at 623 (quoting 1A C. Sands, *Statutory Construction* §25.03, at 298-99 (4th ed. 1972)). In general, “where the time, or manner of performing the action directed by the statute is not essential to the purpose of the statute, provisions in regard to time or method are generally interpreted as directory only.” *Id.* (quoting 1A C. Sands §25.04). When a statute simply guides the conduct of business or provides for an orderly procedure, it will be

construed as directory only. *Id.* Although such provisions should not be disregarded, “the seriousness of noncompliance is not considered so great that liability automatically attaches for failure to comply.” *Id.* at 623-24 (quoting 1A C. Sands §25.03).

Here, RCW 34.05.419(1) did not limit LCB’s power to proceed with an adjudicative proceeding, but rather served as “a guide for the conduct of business and for orderly procedure.” *See Niichel*, 97 Wn.2d at 623-24 (quoting 1A C. Sands §25.03). As such, the statute is directory rather than mandatory, and a failure to timely comply, even if one had occurred, would not deprive the Board of subject matter jurisdiction. Further, All Natural Herbs had an available remedy if the Board had in fact not timely commenced an adjudicative proceeding. If that had actually occurred, All Natural Herbs could have filed a writ of mandamus. Chap. 7.16 RCW; *Eugser v. City of Spokane*, 118 Wn. App 383, 404, 76 P.3d 741 (2003). *See also Hasan v. E. Wash. Univ.*, 24 Wn. App. 829, 835, 604 P.2d 191 (1979) (“Mandamus is available to a plaintiff in those situations where a public official refuses to act.”). It did not do so.

The ALJ’s January 4, 2017 Initial Order granted All Natural Herbs’ motion for summary judgment based on several errors. AR 996. The order erred in holding that Licensing had no authority to require the use of a standardized request-for-hearing form, that informal communications can serve as an application for an adjudicative proceeding, and that Licensing’s June 17, 2016 notification letter failed to commence the adjudicative

proceeding under the standards in RCW 34.05.413(5). The order also incorrectly concluded that an agency's failure to timely commence an adjudicative proceeding deprives the agency of subject matter jurisdiction over the appeal. AR 1005. Under light of these errors, the Board was correct to overturn the initial order in the first adjudicative proceeding and reverse the grant of summary judgment.

**C. All Natural Herbs Failed to Establish a Due Process Violation**

All Natural Herbs argues that the Board's alleged failure to commence "a full adversarial hearing" within 90 days violated its due process rights. Opening Br. 39. There are several reasons for rejecting this argument. First, procedural due process simply requires notice and an opportunity to be heard. *Rivett v. City of Tacoma*, 123 Wn.2d 573, 583, 870 P.2d 299 (1994). Second, as demonstrated above, the Board properly commenced an adjudicative proceeding under the definition in RCW 34.05.413(5), and it did so within 90 days, which is all that RCW 34.05.419(1) requires.

To establish a due process violation, All Natural Herbs must show the deprivation of a constitutionally protected property right. *See Manna Funding, LLC v. Kittitas Cty.*, 173 Wn. App. 879, 894-95, 295 P.3d 1197 (2013). All Natural Herbs has failed to identify an entitlement to any constitutionally protected property right. First, there is no property interest in the priority designations in former RCW 69.50.331(1) (2015). Second, All Natural Herbs had no property interest in its license

application. See *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 743, 406 P.3d 1199 (2017) (license applicants “do not have a property interest in the issuance of a marijuana license”). Even if All Natural Herbs had actually been granted a marijuana license, it would still have had no property right in the license. See *id.*; see also *Jow Sin Quan v. Washington Liquor Control Bd.*, 69 Wn.2d 373, 382, 418 P.2d 424 (1966) (license to sell intoxicants “does not become a vested property right upon the issuance thereof”); see also *Grandpa Bud, LLC v. Chelan Cty. Wash.*, No. 2:19-CV-51-RMP, 2020 WL 2736984, at \*4 (E.D. Wash. May 26, 2020) (“Despite state legalization, there is no federal constitutional right to cultivate cannabis.”).

Even if a Priority 1 designation were somehow construed to be a property interest, there was no deprivation where All Natural Herbs never received – and was never entitled to – a final Priority 1 designation. Thus, All Natural Herbs is mistaken that it has a legitimate property right to the benefit of a Priority 1 designation. Opening Br. 37. For such a claim to be a protected property right, there must be little doubt that the claimed benefit is actually owed. *Crescent Convalescent Center v. DSHS*, 87 Wn. App. 353, 358, 942 P.2d 981 (1997). There is no such showing here.

Moreover, if the benefit being claimed is based on criteria in a statute, it must be sufficiently restrictive that a decision-maker’s discretion is so limited that there is but one outcome. *Id.* Here, the Board was required to strictly apply the statutory criteria to tangible documentation, thus leaving little or no room for discretion. Under these circumstances,

All Natural Herbs' claim to qualify for Priority 1 does not rise to the level of a protected property interest.

Nor has All Natural Herbs shown any deviation from the Board's normal procedures in assigning Priority 3 to its license application or the commencement of an adjudicative proceeding. All Natural Herbs received proper notice and more than one opportunity for its claims to be heard. *See Rivett*, 123 Wn.2d at 583. However, even if there had been some deviation, that fact alone would not establish a due process violation. *See Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 641-42, 127 P.3d 713 (2005) ("The fact that [the decision-making entity] may have deviated from its procedures, or acted arbitrarily, is not a prima facie deprivation of constitutional due process."). For all of these reasons, All Natural Herbs has failed to establish a violation of its constitutional right to due process.

**D. The Board's Final Order In The First Proceeding was Lawful and Appropriate**

Next, All Natural Herbs now claims that the Board improperly directed Licensing to reconsider All Natural Herbs' priority in light of any new documentation submitted during the first adjudication in LCB Case No. M-26,119. Opening Br. 15; 41-42. Although the ALJ ordered this same remedy in the initial order in the first proceeding, this decision went unchallenged by All Natural Herbs. AR 1005-06. On this basis alone, the Court should reject this argument.

All Natural Herbs' argument that the Board's order was an after-the-fact justification improperly relies on *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1760, 91 L. Ed 1995 (1947) (*Chenery II*). In *SEC v. Chenery Corp.*, 318 U.S. 80, 85, 63 S. Ct. 454, 87 L. Ed 626 (1943), (*Chenery I*), the SEC concluded that the purchase of preferred stock by the Federal Water Service Corporation's directors, officers, and controlling stockholders would violate their fiduciary duties. The United States Supreme Court reversed, holding that the Court could only consider the agency's articulated rationale, which had been based on an incorrect interpretation of judicial precedent. *Id.* at 87-88. After remand, the SEC again found the purchases prohibited but based its decision on different grounds. *Chenery II* at 200-01. The Supreme Court affirmed the SEC's revised decision, reiterating its conclusion that courts must review agency action on the grounds cited by the agency. *Id.* at 201, 209.

All Natural Herbs interprets this line of cases as supporting its position that the Board was prohibited from adding additional reasons for the Priority 3 decision in the reissued Statement of Intent. But *Chenery II* held just the opposite by concluding that, after a remand, an agency can reach the same conclusion based on different grounds. If anything, the decision in *Chenery II* supports the action that was taken here. The Court should reject this argument.

**E. All Natural Herbs Failed To Present Evidence Of A Constitutional Equal Protection Violation**

All Natural Herbs alleges that the Board violated the state and federal equal protection clauses by assigning Priority 3 to its application and denying it a license based on race discrimination against its principal owner, Mr. Il Yi. Opening Br. 46. This claim is meritless.

All Natural Herbs bears the burden of establishing an equal protection violation. *See Davis v. Washington Dep't of Licensing*, 137 Wn.2d 957, 972, 977 P.2d 554 (1999) (burden is on the party claiming discrimination). In analyzing an equal protection claim, the Court must first determine whether there is any evidence of race-based decision-making or discriminatory intent. *State v. Johnson*, 194 Wn. App. 304, 308, 374 P.3d 1206 (2016). Without evidence of discriminatory intent, even rational basis review may not be necessary. *Id.* If there is evidence of discriminatory intent, the appropriate level of scrutiny depends on the nature of the classification or the rights involved. *Id.* If the classification is based on race or affects a fundamental right, strict scrutiny applies. *Nielsen v. Wash. State Bar Ass'n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978).

During the evidentiary hearing, All Natural Herbs conceded that race did not play a role in the agency's licensing decision. All Natural Herbs' principal owner, Mr. Yi, testified that "I'm not claiming that race played a role" in licensing. AR 657. Despite that clear concession, All Natural Herbs argues inconsistently that there must have been race discrimination because it believed that the Board issued licenses to "four

Caucasian applicants” while All Natural Herbs was litigating its appeals. Opening Br. 46-47. In addition to its internal inconsistency, there are several other problems with this argument.

First, All Natural Herbs presented no evidence that the Lacey jurisdiction was allocated a total of four ESSB 5052 licenses. In fact, All Natural Herbs’ own documentation shows that Lacey was allocated just two ESSB 5052 licenses. AR 1041.

Second, although All Natural Herbs claims that all of the marijuana store owners in Lacey had “zero experience” in the marijuana industry, it produced no evidence to support this claim. Opening Br. 46; AR 646. Nor has All Natural Herbs presented evidence to show that all retail marijuana license holders in Lacey are Caucasian. Mr. Yi testified that, at some unspecified time, he had visited all of the retail stores in the immediate vicinity of his chosen Lacey location and had “discovered” that all of the owners were Caucasian. AR 646. However, Mr. Yi admitted more than once that he was unable to tell a person’s racial makeup just by looking and just “assumed” that race corresponds to a person’s appearance. AR 656; 674. All Natural Herbs’ argument is thus premised only on unsupported assumptions and speculation that Board personnel took race into account in determining that the application qualified for Priority 3. The evidence showed otherwise. Accordingly, All Natural Herbs has failed to satisfy its burden of proof.

This line of argument was also contradicted by testimony from Licensing’s Compliance and Policy Manager, Nicola Reid, who explained

that Licensing neither knew nor considered a license applicant's race at any time during the licensing process. AR 724-26. Ms. Reid stated that "the only thing we looked at" in making licensing decisions was documentation and that the decisions were made only "based on prioritization qualifications." AR 725. Ms. Reid also pointed out evidence of the agency's diversity by naming several individuals, including LCB employees, former employees, and her own daughter, who share the same race as All Natural Herbs' principal owner. AR 724-26. In light of all of this evidence, she testified that she could "guarantee" that "[r]ace was not a factor" in processing applications. AR 724-26.

Despite the lack of evidence of race-based decision-making, All Natural Herbs continues to assert that Mr. Yi, who is "clearly a Korean-American" "has not received like treatment to any other I-502 [sic] applicant."<sup>2</sup> Opening Br. 46. In light of the evidence, this claim is merely an assertion that is unsubstantiated by any actual evidence. Instead, the person who allegedly suffered the discrimination denied the claim, while a Licensing manager testified that applicants' race, *which was neither known nor considered during the licensing process*, played no role in the agency's decisions. This argument is without merit and should be rejected.

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<sup>2</sup> This appears to be a typographical error, as All Natural Herbs' application in this case was for an ESSB 5052 license, not an I-502 license.

**F. Substantial Evidence Supports All Natural Herbs' Priority 3 Designation**

After resolving the jurisdictional issue in the first proceeding, the Board commenced a second adjudicative proceeding to address the merits of Licensing's Priority 3 assignment to All Natural Herbs' application. During a three-day evidentiary hearing in that proceeding, LCB Case No. M-26,505, the evidence showed that All Natural Herbs' principal owner, Mr. Yi, could not meet the criterion of prior employment at a collective garden because his employer, The Healing Center of Tacoma, did not qualify as a collective garden for priority purposes. Former WAC 314-55-020(3)(a)(i) (2015) and (ii) (2015). To establish that an entity qualified as a collective garden for priority purposes, the entity had to satisfy the definition of collective gardens in former RCW 69.51A.085 (2015), meet all of the date requirements in former RCW 69.50.331(1) (2015) and former WAC 314-55-020(3) (2015), and have paid all its taxes and fees. The Healing Center of Tacoma did not meet any of these criteria.

**1. The Healing Center of Tacoma was not operating as a collective garden**

In order to qualify as a collective garden, an entity was barred from delivering marijuana to anyone other than one of its own ten patients. Former RCW 69.51A.085 (2011). The evidence showed that The Healing Center of Tacoma could not meet this qualification.

At the evidentiary hearing, the owner of a separate business, The Healing Center of Olympia, testified that he had purchased and received several pounds of marijuana per month from The Healing Center

of Tacoma, which he then offered for sale to his own patients. AR 213, 226. This testimony was confirmed by testimony from the owner of The Healing Center of Tacoma. AR 509-10. By selling and delivering marijuana to another business, The Healing Center of Tacoma could not meet the definition of a collective garden in former RCW 69.51A.085(1)(e) (2011) (to qualify as a collective garden, no useable marijuana can be delivered to anyone other than one of its own ten patients). In addition, The Healing Center of Tacoma itself reported to the Secretary of State repeatedly that the company had not been in business, had no location, and had no product during the requisite statutory time period. AR 1418, 1421-22, 1424.

Together, this evidence disqualified The Healing Center of Tacoma as a collective garden for a Priority 1 or Priority 2 designation. Accordingly, there was substantial evidence that All Natural Herbs could only qualify as a Priority 3 applicant.

**2. The Healing Center of Tacoma did not have the required history of paying its taxes**

To qualify for Priority 1 or 2, both the applicant and the underlying collective garden were required to have a history of having paid all applicable state taxes and fees. Former RCW 69.50.331(1)(a)(i) (2015) and (ii) (2015). The record contains ample evidence that The Healing Center of Tacoma was not up-to-date on its taxes.

Although Mr. Yi testified that he had earned wages working for The Healing Center of Tacoma during the requisite time period, two

employees of the Washington Department of Labor and Industries (L&I) testified that The Healing Center of Tacoma had never opened an L&I account or paid any employment taxes. AR 434, 436, 454-57. The owner of The Healing Center of Tacoma also signed a declaration admitting that he had not paid the company's taxes, and he confirmed this fact in his testimony. AR 1407-09. This testimony and declaration provided substantial evidence of tax delinquency, which disqualified The Healing Center of Tacoma from serving as a qualifying collective garden for a Priority 1 or Priority 2 assignment. Under these circumstances, the record contains substantial evidence to support All Natural Herbs' Priority 3 designation.

**G. The Initial Order and Final Order Were Both Valid and Lawful**

At the conclusion of the evidentiary hearing in LCB Case No. M-26,505, the ALJ issued an initial order dated May 31, 2018. That order held that The Healing Center of Tacoma did not qualify as a collective garden for priority purposes and that Licensing had correctly determined All Natural Herbs to be a Priority 3 applicant. AR 2577-85. All Natural Herbs sought review, and in a final order issued on July 24, 2018, the Board affirmed the initial order. AR 2670. The initial order and the final order both considered the evidence, which was substantial, and reached the same conclusion. Both conclusions were consistent with the applicable legal standards and were amply supported by the evidence. There was no error.

Nonetheless, All Natural Herbs urges this Court to simply declare both orders in LCB Case No. M-26,119 void on the ground that the orders violated All Natural Herbs' "statutory, due process, First Amendment, and equal protection rights." Opening Br. 48. In advancing this argument, All Natural Herbs provides no reasoned explanation or analysis but merely states in conclusory fashion that because the final order in the first adjudicative proceeding was void, "[a]ll subsequent administrative orders are void as well." Opening Br. 48.

All Natural Herbs has provided the Court with no argument or citation to relevant authority to support this contention. Without such support, the Court should ignore this claim. In an appeal, "an appellant's brief must include arguments supporting the issues presented for review and citations to legal authority." *Collins v. Clark Cty. Fire Dist. No. 5*, 155 Wn. App. 48, 96, 231 P.3d 1211 (2010) (quoting *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004)). Arguments that are not developed or that lack authority need not be considered. *Id.* All Natural Herbs' claim that the orders are void is just such an unsupported assertion that need not be considered. *See State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988) (consistent with its "policy not to consider matters neither timely nor sufficiently argued by the parties," Supreme Court will decline to consider unsupported assertions).

#### **H. This Court Cannot Grant a Retail License to All Natural Herbs**

All Natural Herbs asks this Court to remedy the Board's alleged errors by assigning Priority 1 to its license application and requiring that it

be issued a retail marijuana license at any qualifying location it chooses. Opening Br. 50. For several reasons, this Court cannot grant this relief.

First, even if this Court were to decide that the Board had failed to timely commence an adjudicative proceeding, the grant of a license would not be an appropriate remedy. For one thing, All Natural Herbs did not complete the application process and, therefore, has not shown that it is eligible for a retail marijuana license. Without verification that the Applicant would meet the minimum qualifications for a license, the grant of a license would be improper.

Second, marijuana license applicants were required to apply for a license in one particular jurisdiction. *Top Cat*, 11 Wn. App. 2d at 756. Any applicant who wished to change locations was required to withdraw its application and reapply in the new jurisdiction. AR 407, 421, 614, 745-46. Under ESSB 5052, the Board allotted a fixed number of licenses per jurisdiction, and once that number was reached, the licensing process closed, and no additional licenses were available in that jurisdiction. All Natural Herbs applied for a license in Lacey, which was allotted two additional ESSB 5052 licenses. AR 1041. Now that the ESSB 5052 licensing process is complete, the Board is no longer accepting applications or issuing ESSB 5052 licenses. There is no license available in Lacey.

Third, the Legislature has already repealed the priority system in former RCW 69.50.331(1) (2015), and the Board has withdrawn all remaining license applications. AR 642. Because there is no longer a licensing process underway or a priority system in existence that would

make a priority assignment relevant, granting All Natural Herbs' request to be designated a Priority 1 applicant would provide no relief.

Fourth, All Natural Herbs has failed to establish that it would have received a license even if it had been designated a Priority 1. All Natural Herbs filed its application at the very end of the application window for ESSB 5052 licenses, which lasted for five months and closed on March 31, 2016. During that time, 2500 applications were submitted for the 222 available ESSB 5052 licenses. AR 421; 1788. Applicants who applied early in the five-month period and worked quickly and diligently to submit the necessary documentation were much more likely to obtain one of the few licenses available. AR 927; *Top Cat*, 11 Wn. App. 2d at 756. Because of the limit on the number of licenses allocated for each jurisdiction, many Priority 1 applicants were unable to obtain one of the few licenses available. As late as April 7, 2016, just one week after the end of the five-month application period, All Natural Herbs was still in the earliest stages of the licensing process. AR 884-85. Thus, even if All Natural Herbs had qualified as a Priority 1 applicant, the lateness of its application would have given All Natural Herbs little or no realistic chance of securing one of the two ESSB 5052 licenses allotted to Lacey. AR 1041.

Even if relief is deemed appropriate, the Court should decline to grant All Natural Herbs a retail marijuana license when there is no evidence that there is a license available and no evidence that All Natural Herbs meets the minimum qualifications for a marijuana retail license. If the Court determines that All Natural Herbs should have been a Priority 1 or Priority 2

applicant, the Court should, at most, order the Board to reopen All Natural Herbs' application and continue the application process.

## V. CONCLUSION

The Board engaged in a methodical, evidence-based process in determining that All Natural Herbs' retail marijuana license application qualified as a Priority 3 application. All available documentation was carefully and systematically considered in accordance with the criteria in former RCW 69.50.331(1) (2015) and former WAC 314-55-020(3) (2015). All Natural Herbs has raised numerous arguments and claims but has failed to carry its burden of demonstrating the invalidity of the agency's actions. Nor has All Natural Herbs provided a legitimate legal basis for any of its constitutional claims. Under these circumstances, the Court should affirm the Board's final order and decline to provide relief.

RESPECTFULLY SUBMITTED this 9 day of June, 2020.

ROBERT W. FERGUSON  
Attorney General

*/s/ Rose Weston*

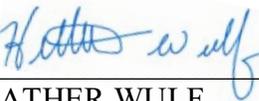
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I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, a true and correct copy of the Washington State Liquor and Cannabis Board's Response Brief, upon the following:

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