

FILED  
Court of Appeals  
Division III  
State of Washington  
9/14/2018 2:16 PM

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

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IN THE MATTER OF THE PETITION OF  
KITTITAS COUNTY FOR A DECLARATORY ORDER

KITTITAS COUNTY,

Respondent,

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD,

Appellant.

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AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION  
OF MUNICIPAL ATTORNEYS

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## INTRODUCTION

The Growth Management Act (“GMA” or “Act”) provides: “State agencies shall comply with . . . local comprehensive plans and development regulations” and that “[a]dopted countywide planning policies shall be adhered to by state agencies.” RCW 36.70A.103, .210(4).

It is clear that these statutes require state agencies to conform their own land development activities to local zoning. *See, e.g., Univ. of Wash. v. City of Seattle*, 188 Wn.2d 823, ¶ 35, 399 P.2d 519 (2017). In this case, the Court should hold that the GMA also requires state agencies to comply with local zoning when they make licensing decisions. This holding is consistent with the statutory scheme of the GMA, which shows an overall intent to include state agencies in the GMA’s “integrating framework” for land use regulations. There is no practical or legal reason why the Liquor and Cannabis Board (“LCB” or “Board”) cannot comply with this GMA mandate. And the LCB’s practice of ignoring local zoning when issuing licenses hurts municipalities and licensees.

## **IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association of Municipal Attorneys is a non-profit corporation that represents attorneys for Washington's cities and towns. WSAMA has an interest in ensuring that state agencies comply with the Growth Management Act in their licensing decisions so that they do not act at cross-purposes with local zoning authorities.

## **STATEMENT OF THE CASE**

The facts are set forth in the parties' briefing. This amicus curiae brief adopts the facts set forth in the brief of Kittitas County.

## **ARGUMENT**

### **A. STANDARD OF REVIEW**

The Court's review in this case is governed by the error of law standard in RCW 34.05.570(3)(d), which the Court applies directly to agency action. *See* RCW 34.05.240(8); *Squaxin Island Tribe v. Wash. State Dept. of Ecology*, 177 Wn. App. 734, 740, 312 P.3d 766 (2013). Under the error of law standard, the Court reviews an agency's legal conclusions *de novo*, giving substantial weight to the agency's interpretation of statutes it administers. *Manke Lumber Co., Inc. v. Cent.*

*Puget Sound Growth Mgmt. Hr'gs Bd.*, 113 Wn. App. 615, 622, 53 P.3d 1011 (2002).

The LCB does not administer the GMA, and its interpretation of RCW 36.70A.103 is therefore not entitled to deference, as the LCB concedes. *See* Appellant's Reply Br. at 1. Furthermore, the LCB may not ignore or override the mandates of the GMA in its administration of the marijuana licensing statutes in Chapter 69.50. *See Cockle v. Dept of Labor & Indus.*, 142 Wn.2d 801, 812, 16 P.3d 583 (2001). To the extent the LCB's interpretation of Chapter 69.50 RCW conflicts with the GMA, its interpretation should receive no deference. *Honeycutt v. State Dep't of Labor & Indus.*, 197 Wash. App. 707, ¶ 23, 716, 389 P.3d 773 (2017) (“[W]e accord no deference to an interpretation that is inconsistent with a statutory mandate.”).

**B. THE LCB'S DECLARATORY ORDER IS AN ERRONEOUS INTERPRETATION OF RCW 36.70A.103.**

The GMA was enacted in 1990 in response to “uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest . . . .” RCW 36.70A.010. The Act was as much about regulatory reform as it was about substantive land use control: it was designed as an “integrating framework for all other land-use related law”

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that would enhance “certainty for development decisions” and “orderly growth and development.” Laws of 1995, ch. 347, § 1.

To this end, the Act clearly envisions a role for both local and state government. Apart from the mandates in RCW 36.70A.103 and .210, the Act entrusted a state agency, the Department of Commerce,<sup>1</sup> with the power to issue guidance and interpretation on the Act. *See* RCW 36.70A.050, .090. It established a process for state agencies to comment on adoption of local ordinances. *See* RCW 36.70A.106. And it authorized the state agencies to appeal local land use decisions to the Growth Management Hearings Board (“GMHB”). RCW 36.70A.280(2), (3).<sup>2</sup>

More to the point, the GMA contains provisions that only make sense if state agencies’ actions—both proprietary and governmental—are subject to the Act. One of the eleven core goals of the GMA is that “[a]pplications for *both state and local* government permits should be processed in a timely and fair manner to ensure predictability.” RCW 36.70A.020(7) (emphasis added). Another core goal is protection of private property rights from regulatory takings, RCW 36.70A.020(6), and

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<sup>1</sup> Initially, the Act entrusted this role to the Department of Community and Economic Development.

<sup>2</sup> *See also, e.g.*, RCW 36.70A.430 (establishing a collaborative process for state and local review of transportation project permits); RCW 36.70A.150 (requiring counties to work with the state to identify areas of shared need for public facilities).

the process governments must use to comply with Goal 6,<sup>3</sup> requires “state agencies and local governments to evaluate proposed *regulatory or administrative actions*” for unconstitutional takings. RCW 36.70A.370(1) (emphasis added). Finally, the GMA grants authority to the Growth Management Hearings Board to hear appeals that argue “[t]hat . . . a state agency, county, or city *planning* under this chapter is not in compliance with the requirements of this chapter . . . .” RCW 36.70A.280. If state agencies were only required to comply with the GMA when they act as permit applicants, the language regarding “applications for . . . state . . . government permits” in RCW 36.70A.020(7); “state . . . regulatory or administrative actions” in RCW 36.70A.370; and “state agenc[ies] . . . planning under [the GMA]” in RCW 36.70A.280 would be superfluous and make no sense.

Finally, applying the GMA to agencies’ permitting decisions conforms to the Department of Commerce’s interpretations of the GMA, *see* WAC 365-197-530(3) and (4), and with recent Supreme Court precedent. In *Whatcom County v. Hirst*, 186 Wn.2d 648, 381 P.3d 1

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<sup>3</sup> The Growth Management Hearings Board has held that Goal 6 does not offer substantive takings protection, but simply requires governments to consider the potential regulatory takings of their actions under RCW 36.70A.370. *See Gutschmidt v. City of Mercer Island*, CPSGMHB No. 92-3-0006, Final Decision and Order (Mar. 16 1993) at 10–12.  
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(2016), the Supreme Court considered whether Whatcom County could rely on the Department of Ecology's water rules when making water availability determinations under the GMA, or whether the GMA required the County to make an independent determination regarding water availability. *Id.* ¶ 64. The County argued that the GMA and the state Water Resources Act created distinct roles for local and state government and that, were the County to evaluate water availability under the GMA, it would intrude on the Department of Ecology's jurisdiction over water permitting. The Court rejected this siloed view of the GMA, holding that the County had an independent duty to protect water availability, regardless of the Department of Ecology's concurrent jurisdiction. *Id.* at ¶ 64. Implicit in this holding is the understanding that other statutes and regulatory regimes cannot diminish an agency's responsibilities under the GMA.

In sum, the statutory framework of the GMA reveals an intent to create a cooperative, integrating framework in which state and local agencies act in concert in their land use regulatory decisions. Furthermore, an agency's concurrent duties under other statutes do not alleviate the agency's responsibilities under the GMA.

**C. THERE ARE NO PRACTICAL OR LEGAL OBSTACLES PREVENTING THE LCB FROM COMPLYING WITH LOCAL ZONING.**

The Board argues that a number of practical or legal obstacles prevent it from considering local zoning when issuing marijuana licenses, but these obstacles are either non-existent or easily surmountable.

**1. The Board has statutory authority to consider local zoning in its licensing decisions.**

The Board argues that it must have a statutory basis to deny a license, that Chapter 69.50 does not authorize the Board to deny a license due to local zoning, and that it therefore cannot consider local zoning in licensure decisions. Appellant’s Reply Br. at 8. But this argument begs the question. If the GMA requires the Board to consider local zoning in marijuana licensing, then the GMA itself is a statutory basis for a license denial. It is immaterial whether Chapter 69.50 *also* allows denials based on zoning.

Moreover, Chapter 69.50 RCW does authorize zoning-based denials. Under RCW 69.50.331(1), the LCB must conduct a “*comprehensive, fair and impartial evaluation*” of applications for marijuana licenses. RCW 69.50.331(1) (emphasis added). In reviewing applications, the LCB may “inquire into all matters in connection with the

construction and operation of the premises.” RCW 69.50.331(1)(b). The Board may “in its discretion, grant or deny the renewal or license applied for,” and “[d]enial may be based on, *without limitation*, the existence of chronic illegal activity documented in objections . . . .” RCW 69.50.331(1)(a) (emphasis added). The Board’s own interpretation of these statutory provisions, expressed in its regulations, is that they grant the Board “broad discretionary authority to approve or deny a marijuana license application . . . .” WAC 314-55-050. These provisions grant sufficient discretion to the Board to deny a permit due to local zoning rules. At the very least, they present no bar to a zoning-based denial mandated under the GMA.

**2. Appeals before the Board could easily accommodate zoning-based denials.**

The Board argues that its staff and administrative law judges are not prepared to handle administrative appeals of license denials based on local zoning. As a threshold matter, this argument cannot, in itself, excuse the Board’s obligation to consider local zoning in its licensing decisions because the Board “is not entitled to disregard statutory provisions merely because it finds them administratively inconvenient.” *See Cockle v. Dept. of Labor & Indus.*, 142 Wn.2d 801, 812, 16 P.3d 583 (2001).

Moreover, the task is not as difficult as the Board makes out. Chapter 69.50 RCW already requires the Board to consider local zoning in registering marijuana cooperatives. RCW 69.50.250. Marijuana cooperatives are also entitled to an administrative appeal of registration denials. *See* WAC 314-55-410(6). The Board is therefore already charged with defending and adjudicating zoning-based denials in marijuana licensing, which it presumably handles in a competent manner.

And, if the Board is truly overwhelmed by the task of defending zoning-based denials, the Board could simply create procedures that allow for more thorough participation by local governments. The Board's rules governing licensing appeals could, for instance, provide for intervention by the local government in zoning-based denials. Or, they could provide for some kind of certified question procedure for more subtle questions of zoning interpretation. Or, more simply, the Board could have a two-track appeal docket, with one docket sent to an adjudicator with a background in zoning appeals.

Ultimately, it is the Board's responsibility to find a way to manage its statutory responsibilities. But the Court should not reject the County's

argument because of perceived impracticalities in administration when those alleged problems are so easily overcome.

**D. IGNORING LOCAL ZONING IN MARIJUANA LICENSING DECISIONS CREATES HARDSHIPS FOR MUNICIPALITIES.**

Finally, the Board's interpretation hurts municipalities because it causes them to unnecessarily expend resources on zoning enforcement and undermines municipalities' credibility and goodwill with the business community.

When Kittitas County filed its declaratory order petition, eleven municipalities—seven counties and four cities—responded in support of the petition. In their responses, municipalities explained that applicants for marijuana licenses generally do not understand that an LCB license does not override local zoning, *see* CP 48, an assertion borne out in applicants' and community members' comments on the LCB petition.<sup>4</sup> They emphasized that inconsistent permitting decisions between the LCB and local governments did not advance the goal of customer service in government administration. *See* CP 200. They explained that the LCB's practice gives licensees false expectations, which in turn undermines both

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<sup>4</sup> *See* CP 46 (comment from anonymous Tier 3 producer on petition arguing that the LCB should continue to be able to trump local zoning); CP 47 (comment from community member on County's petition arguing against state preemption of local laws).  
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the Board's and the County's credibility with local businesses. CP 99–100. And one city explained that it has spent over \$35,000 in legal fees alone while enforcing the local zoning code against marijuana businesses that received licenses that conflict with local zoning. *Id.*

All of these accounts show that the LCB's practice of ignoring local zoning in its licensing decisions is bad for municipalities and for applicants. It causes needless expense to cities and counties, and it creates confusion and distrust on the part of licensees. This practice undermines the predictability and timeliness of state and local permitting for marijuana businesses—a result the GMA was specifically designed to prevent. *See* RCW 36.70A.020(7) (“Applications for *both state and local* government permits should be processed in a timely and fair manner to ensure predictability.” (emphasis added)).

### **CONCLUSION**

The LCB's practice of ignoring local zoning when issuing licenses to marijuana operations violates its duty to comply with and adhere to local zoning set forth in the GMA. *See* RCW 36.70A.103, .210(4). There is no practical or legal reason why the Board cannot comply with this mandate. Given the harm and expense the Board's position causes local

jurisdictions, the Court should reverse the LCB's declaratory order, and hold that the LCB may only issue licenses to marijuana businesses that comply with local development regulations.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of September, 2018.

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**September 14, 2018 - 2:16 PM**

**Transmittal Information**

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

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