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

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

KITTITAS COUNTY,

Respondent,

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD,

Appellant.

APPELLANT'S REPLY BRIEF

ROBERT W. FERGUSON
Attorney General

BRUCE L. TURCOTT, WSBA No. 15435
Senior Counsel

MARY M. TENNYSON, WSBA No. 11197
Senior Assistant Attorney General

1125 Washington St. SE
PO Box 40110
Olympia, WA 98501-0110
360-586-2738; 360-753-0225
OID No. 91029

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I. ARGUMENT IN REPLY

A. Standard of Review

The Washington State Liquor and Cannabis Board (Board) agrees that it is Kittitas County's burden to demonstrate the invalidity of the Board's declaratory order. The Board's order concluded that the Growth Management Act, chapter 36.70A RCW (GMA), does not require the Board to apply local zoning in granting business licenses to third parties under chapter 69.50 RCW. RCW 34.05.570(1). However, the Board disagrees with the county's assertion that the error of law standard of review does not apply. *See* Resp't's Br. 13. Because this case involves questions of statutory interpretation, specifically whether "the agency has erroneously interpreted or applied the law" under RCW 34.05.570(3)(d), it is the only appropriate standard of review for this appeal under RCW 34.05.570(3).¹ And while the Board may not be entitled to deference in its interpretation of the GMA, the Court should afford "substantial weight" to its interpretation of chapter 69.50 RCW and the implementing rules, as they are within the Board's expertise. *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 743, 406 P.3d 1199 (2017) (citing *Verizon Northwest*,

¹ As explained in the Board's Opening Brief, under RCW 34.05.240(8), a declaratory order "has the same status as any other order entered in an agency adjudicative proceeding." Therefor the Court reviews the Board's declaratory order under RCW 34.05.570(3). Appellant's Opening Br. (Am.) at 6.

Inc. v. Washington Emp't Sec. Dep't, 164 Wn. 2d 909, 915, 194 P.3d 255 (2008)).

Judicial review of facts is limited to the agency record. RCW 34.05.558. The County argues it was specifically harmed by expending resources “shutting down” business licensed by the Board. Resp’t’s Br. at 14, 19. But there is no evidence in the record of any licensees that opened businesses despite the County’s ban. The County states the superior court found that as fact, but the court did not make any such finding. *See* CP at 327–30. The Court should decline to consider this argument.²

Finally, although it is the Board’s declaratory order that is on review in this appeal, not the superior court’s order, the County recites contents of the superior court’s oral ruling and order. Respondent’s Br. at 11; *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993) (appellate court sits in same position as superior court in reviewing the administrative action).

² The County filed a motion for contempt after this appeal was filed, alleging the Board continued to issue licenses contrary to local zoning and local objections. Resp’t’s Br. at 11–12. This is incorrect. The Board’s response in opposition noted there were objections to renewals by four local authorities, none of which are in Kittitas County or Division III of the Court of Appeals. No renewals were issued in three of the four cases, and in the fourth case, the local authority objection was not timely. CP at 435.

The Board filed a motion in this Court to stay the superior court’s order, which this Court granted, and the County withdrew its contempt motion. Yet in its brief, the County argues that the Board, by not arguing in the opening brief that the orders under review are not applicable statewide, was “essentially stipulating to the contempt.” Resp’t’s Br. at 12, n.2. The Board has done no such thing. The County having withdrawn its contempt motion, this appeal presents no issue on that point for the Court to address.

B. The GMA Does Not Require State Agency Licensing Decisions to Comply with Local Zoning

The Board agrees with the County that the plain meaning rule applies in this case, but the County urges the Court to misapply that rule. The County argues that the meaning of RCW 36.70A.103 is plain on its face, and the inquiry can stop there. Resp't's Br. at 20, 29–30. But in discerning the plain meaning of a statute, the Court must look at “all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). While RCW 36.70A.103 requires state agencies to comply with local comprehensive plans and development regulations, the GMA contains no specific language requiring state agency *licensing* decisions to be compliant with local zoning. Rather, when looking at the statute as a whole, it is clear the requirement to comply with the GMA applies to actions taken in state agencies' proprietary capacity. *See* Appellant's Opening Br. at 9–10. The County does not cite any examples or precedent to support interpreting the GMA as applying to state agencies when acting in its governmental capacity, such as when it makes licensing decisions.

Moreover, the plain meaning of words is “not gleaned from those words alone but from all the terms and provisions of the act . . . and

consequences that would result from construing the particular statute one way or another.” *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007). If the Court construed the GMA in the way that the County urges, the Liquor and Cannabis Board—a governmental body with no expertise in the area of land use and growth management, and with no authority to enforce local zoning laws—would be in the position of interpreting, applying, and enforcing local zoning laws in rendering its licensing decisions. The County provides no examples of any other contexts in which the state must consider any local laws in evaluations of business license applications – and therefore provides no precedent for the GMA, enacted 28 years ago, having ever been applied to state business licenses in this way. Given the language of the GMA, that is a consequence the legislature did not intend.

C. The Department of Commerce Rule Does Not Require State Agency Licensing Decisions to Comply with Local Zoning

Contrary to the County’s argument, the Department of Commerce rule does not impose any requirement on the Board to comply with the GMA when it engages in licensing decisions. WAC 365-196-530. Rather, the rule makes clear that the Department interprets RCW 36.70A.103 as requiring state agencies to comply with the GMA when they are proposing to develop state facilities:

The department construes RCW 36.70A.103 to require each state agency to meet local siting and building requirements *when it occupies the position of an applicant proposing development*, except where specific legislation explicitly dictates otherwise. This means that *development of state facilities* is subject to local approval procedures and substantive provisions, including zoning, density, setbacks, bulk and height restrictions.

WAC 365-196-530(2) (emphasis added).

The County's reliance on *University of Washington v. City of Seattle*, 188 Wn.2d 823, 399 P.2d 519 (2017) is misplaced. There, the question was whether the statute that gave the university Regents "full control of the university and its property" was subject to limitation by the GMA. *Univ. of Washington*, 188 Wn.2d at 829. Seeking to demolish a landmark property *on its campus*, the University argued that the City of Seattle's landmark preservation ordinance "cannot apply to any UW property as a matter of law." *Id.* at 827 (emphasis added). Thus, the UW case was about property the University owned, not a permit or license it sought to grant to someone else. *University of Washington* does not support the County.

Importantly, the Department of Commerce (Commerce) rule provides no authority or requirements, and is interpretive only. The Commerce rule does not, and cannot, grant authority to the Board regarding marijuana licensing that it does not already have under chapter 69.50 RCW. "The [Department of Commerce's] purpose is to provide assistance in

interpreting the act, not to add provisions and meanings beyond those intended by the legislature.” WAC 365-196-020(3). And its guidance relating to permit (and other) functions is aspirational—it interprets the statute as requiring state agencies to accommodate the GMA “whenever possible.” WAC 365-196-530(4). There is no language in the rule *requiring* state agency decisions in *licensing* matters to comply with local zoning.

The County argues the DOC rule requires state agencies to consider local regulation when engaged in “permit functions,” and that this includes the Board. Resp’t’s Br. at 2. The rule states:

The exercise of statutory powers, whether in *permit functions*, grant funding, property acquisition or otherwise, routinely involves such agencies in discretionary decision making. The discretion they exercise *should take into account* legislatively mandated local growth management programs. State agencies that approve plans of special purpose districts that are required to be consistent with local comprehensive plans should provide guidance or technical assistance to those entities to explain the need to coordinate their planning with the local government comprehensive plans within which they provide service.

WAC 365-196-530(4) (emphasis added). Thus there is no specific *requirement* in the rule that state agencies account for local growth management programs in exercising its permit functions; when exercising this function, the rule merely states that agencies “*should take into account*” local zoning laws.

Moreover, the County's argument reads too much into the rule's reference to "permit functions." "Permit" is not defined in the Commerce rule nor in the GMA. It is defined in other statutes, however, as a governmental approval required by law before a *property owner* may improve, sell, transfer, or put *real property* to use, such as building permits or grading permits. *See Manna Funding, LLC v. Kittitas Cty.*, 173 Wn. App. 879, 889, 295 P.3d 1197 (2013) (discussing RCW 64.40.010(2) and RCW 36.70C.020(2)). A marijuana license is not a "permit," because it does not grant any authority to alter, sell, transfer, or use real property. The County does not address the Board's specific, distinguishing examples of where the GMA *does* apply to property developers, such as in the *University of Washington* case cited above, and specified types of permit functions exercised by state agencies, such as sand and gravel permits, substantial shoreline development permits, and large on-site sewage system permits. *See* Appellant's Opening Br. (Am.) at 15, n.4. A license to operate a business under RCW 69.50 and the Board's rules is far different from permits to alter the topography of the land under shoreline development "permits" or similar permits for building structures, which clearly are included within the GMA.

The County did cite an exception that proves the Board's point, however. *See* Resp't's Br. at 7. RCW 69.51A.250 specifically prohibits the

Board from registering marijuana cooperatives if they do not comply with local zoning. This specific statutory requirement would not be necessary if the legislature had intended the GMA to *always* require the Board to comply with local zoning when exercising its licensing functions. *See McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004) (“The legislature is presumed not to include unnecessary language when it enacts legislation.”).

D. The Marijuana Licensing Statute Does Not Allow the Board to Deny Licenses Based on Local Law

It is axiomatic under constitutional due process that the Board must have a statutory basis to deny a license. RCW 69.50.331; WAC 314-55-050. But the Board does not have authority or discretion to deny a license based on zoning under the statutes governing marijuana.

The County retained its police power over marijuana businesses because I-502 legalizing marijuana did not preempt it, and the GMA did not delegate part of that police power to state agencies. *See Emerald Enterprises, LLC v. Clark Cty.*, 2 Wn. App. 2d 794, 818, 413 P.3d 92, review denied, 190 Wn.2d 1030, 421 P.3d 445 (2018) (state marijuana laws do not preempt local zoning ordinances that prohibit marijuana businesses). The legislature has not provided a requirement or mechanism for the Board to condition issuance of marijuana business licenses on local zoning. The

County's arguments would be better addressed to the legislature, which has the power to change processes for state licensing.

In contrast, the legislature has specifically required certain types of state licensing programs to comply with local zoning, such as vehicle dealer licenses and driver training school licenses. *See* discussion in Appellant's Opening Br. (Am.) at 17–18. Where the legislature has created requirements for specific state licensing programs to comply with local zoning, but it has not done so for marijuana licensing, it must be presumed that the omission was intentional. *Ellensburg Cement Prod., Inc. v. Kittitas Cty.*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014).

The local authority notice under RCW 69.50.331(7) gives local authorities the right to receive notice of licensing and renewal applications, file objections, and request hearings, but it does not provide the Board an independent ground to deny licenses. The Board must base license denials on specific grounds under WAC 314-55-020. In filing objections, local authorities may advise the Board of “chronic illegal activity” or information that the applicant may not meet licensing qualifications under Board rules. “Chronic illegal activity” is defined in RCW 69.50.331(10) with particular reference to violent criminal acts and crime statistics.

A marijuana license issued by the Board is not a license to ignore local law or open a business without complying with local requirements.

The Board expressly warns licensees of this by rule:

The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements.

WAC 314-55-020(15). In sum, it is the responsibility of licensees to comply with local ordinances, and it is the responsibility of local authorities to enforce them.³

E. Local Jurisdictions Are Better Suited to Interpret and Apply Local Zoning Ordinances

If the Board denied a license based on a local zoning ordinance, and the applicant requested a hearing, the Board may be required to defend the *interpretation and application* of the ordinance to the applicant's location to support the denial. *See* RCW 69.50.334; WAC 314-55-070. Administrative law judges conduct hearings for the Board and issue initial orders, and the Board reviews them and issues final agency orders. *See* RCW 34.05.425; RCW 34.05.464.

³ In an exception, the Board does require pre-approval by the local fire marshal of extraction equipment used by marijuana processors. WAC 314-55-104(7); discussed in Appellant's Opening Br. (Am.) at 11.

The interpretation and application of zoning ordinances is not an area in which the Board, nor the administrative law judges who conduct Board hearings, possess expertise. As discussed in Section B above, that is a result the legislature did not intend. Local jurisdictions have land use hearing processes and expertise for that purpose, in the event an applicant disputes the application of a zoning ordinance to its site.

F. Recent Statutory Changes Support the Board's Position

As cited in Appellant's Opening Brief (Amended) at 21–23, a recent statutory amendment prohibits the Board from forfeiting retail licenses for failure to become operational because of local zoning. RCW 69.50.325(3)(c)(v). The County argues that this statute supports its position. It does not. Rather, it supports the Board's interpretation that in exercising its marijuana licensing functions, the Board may is not required to interpret, apply, and enforce local zoning laws. The County's theory of this lawsuit—that the GMA requires the Board to deny licenses that do not comply with local zoning—is at odds with this statutory direction that the Board cannot forfeit a license if a licensee is not operating due to local zoning. *See McGinnis*, 152 Wn.2d at 645 (statutes should not be construed so as to render any statute superfluous); *see also Emerald Enterprises*, 2 Wn. App. 2d at 811 (using the enactment of subsequent legislation to construe prior statutory language).

II. CONCLUSION

The Court should reject the County's attempt to require the state to interpret and apply local zoning laws to the licensing of third-party businesses where the legislature has not provided for it. Local authorities should use established processes to interpret and apply their zoning ordinances. The Board respectfully asks this Court to reverse the superior court and affirm the Board's Declaratory Order.

RESPECTFULLY SUBMITTED this 29th day of August, 2018.

ROBERT W. FERGUSON
Attorney General



BRUCE L. TURCOTT, WSBA No. 15435
Senior Counsel

MARY M. TENNYSON, WSBA No. 11197
Senior Assistant Attorney General
Attorneys for Washington State

Liquor and Cannabis Board
OID #91029
BruceT1@atg.wa.gov; MaryT@atg.wa.gov

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I, Dianne S. Erwin, certify that I sent a copy of this document, **Appellant's Reply Brief**, to be served on all parties or their counsel of record on the date below as follows:

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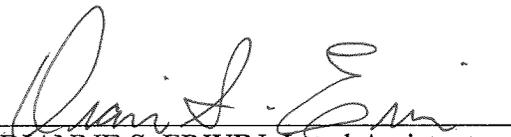
Neil A Caulkins
Kittitas County
205 West 5th Ave., Ste. 213
Ellensburg, WA 98926-2887

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DIANNE S. ERWIN, Legal Assistant

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

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