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

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

KITTTAS COUNTY,

Respondent,

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD,

Appellant.

**APPELLANT'S OPENING BRIEF
(AMENDED)**

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I. INTRODUCTION

Kittitas County (County) asks this Court to require the Washington State Liquor and Cannabis Board (Board) to apply local zoning ordinances as part of the qualifications for issuing a marijuana business license. The Board, however, must issue licenses if applicants qualify under RCW 69.50.331 and WAC 314-55-020, while it is the County that is charged with applying and enforcing zoning. Complying with the Superior Court order would entwine the Board in local land use regulation in an unprecedented way. The Growth Management Act, chapter 36.70A RCW (GMA), does not require the Board to determine whether an applicant for a marijuana license complies with local zoning ordinances prior to granting a license, and the Board lacks the authority in statute and rule to do so. The County does have authority, however, to enforce its own zoning ordinances. Because the superior court erred in requiring the Board to apply and enforce local zoning laws in its marijuana licensing decisions, the Court should reverse the superior court's order and affirm the Board's Declaratory Order.

II. ASSIGNMENTS OF ERROR

The Board assigns no error to the Board's Declaratory Order. However, because the Kittitas County Superior Court erred in reversing the

Board's order, and the Board appeals that decision, the Board assigns error to the following aspects of the superior court's order.¹

The superior court erred, at 2.6–2.8 and 2.17, in finding that the GMA governs state and Board licensing functions.

The superior court erred, at 2.9–2.15, in finding that the Board must deny licenses based on local government objections and that doing so is within the Board's discretionary authority.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Board properly conclude that the GMA, specifically RCW 36.70A.103, does not require the Board to ensure that applicants comply with local zoning prior to issuing licenses to marijuana businesses?

2. Did the Board properly conclude that it must base licensing denials on specified grounds under RCW 69.50.331 and WAC 314-55-020, which do not include local zoning?

IV. STATEMENT OF FACTS

A. Background on Marijuana Licensing

In 2012, the people of the state passed Initiative 502 (I-502), which legalized possession of limited amounts of marijuana and marijuana-

¹ This is a judicial review under the Administrative Procedure Act, chapter 34.05 RCW, where the Court of Appeals sits in the same position as the superior court and reviews the Board's order. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). "[A]ssignment of error to the superior court findings and conclusions is not necessary in review of an administrative action." *Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994). Accordingly, the Respondent, Kittitas County, must assign error to the Board's findings and conclusions it challenges. *See* RAP 10.3(h).

infused products for persons 21 and older and required the Board to issue licenses to produce, process, and sell marijuana and marijuana-infused products. Laws of 2013, ch. 3. I-502 modeled the regulatory structure for marijuana licenses after the regulatory structure for liquor licenses.²

I-502 did not limit the number of licenses to grow and process marijuana, but it did require the Board to determine the maximum number of retail outlets, allocate the stores to counties by population, and take into consideration the provision of adequate access to licensed sources of marijuana to discourage purchases from the illegal market. RCW 69.50.345(2). The Board set the maximum number of retail stores at 334, which were then allocated to counties and cities by population. *See* WAC 314-55-081(1) and (2).

In 2015, the Legislature required the Board to increase the maximum number of retail outlets to accommodate the needs of medical marijuana patients, due to the impending closure of medical marijuana collective gardens that was mandated by the Legislature in the same enactment. Laws of 2015, ch. 70, § 8, *codified as* RCW 69.50.345(2)(d). The Board subsequently authorized an additional 222 stores, but no new

² The Board was created in 1933 to regulate the sale, distribution, and consumption of liquor (beer, wine, and spirits) within the State of Washington following the repeal of Prohibition. Laws of 1933, 1st Ex. Sess., ch. 62. Initiative 1183 created private spirits distributor licenses and retail licenses, which the Board issues and regulates. *See generally* Title 66 RCW.

stores were allocated to jurisdictions with bans on retail sales. *See* WAC 314-55-081.

Included in the statutory structure for liquor and marijuana licensing is a requirement that the Board provide notice to local jurisdictions of an application for a license within the jurisdiction. Local jurisdictions then have the opportunity to file objections with the Board. The notice process and the nature of objections that local jurisdictions may file are similar under the liquor licensing laws that the Board has long administered. *Compare* RCW 66.24.010(8) and (12) *with* RCW 69.50.331(7) and (10) (the Board must give substantial weight to “chronic illegal activity” under both statutes). Thus, the Board has substantial experience in evaluating objections from local jurisdictions to license applications within their jurisdictions.

B. Procedural History

The County petitioned the Board to issue a Declaratory Order, under RCW 34.05.240 of the Administrative Procedure Act, holding that the Board may issue licenses for marijuana businesses only when those businesses comply with local zoning. The County asserted that by issuing licenses without regard to local zoning, the Board would be in violation of the GMA, specifically RCW 36.70A.103. CP at 21–33.

The Board issued Declaratory Order 01-2017 on May 23, 2017, declining to interpret its authority and RCW 36.70A.103 in the manner sought by the County. CP at 231–40. The Board explained that it interpreted RCW 36.70A.103 to govern the siting of locations owned, operated, or occupied by state agencies, and not the location of businesses licensed by a state agency. CP at 233. The County petitioned for judicial review under the APA, disputing the Board’s interpretation of its authority, and asked the superior court to overturn the Board’s Declaratory Order. CP at 1–14.

The superior court reversed the Board’s Declaratory Order, holding the GMA and a Department of Commerce rule control the Board’s licensing decisions and, in addition, that the Board has the power to deny licenses based on agency discretion alone rather than specific statutory grounds. CP at 327–30. The superior court ordered the Board “to consider a license applicant’s compliance with local zoning during LCB review of an application for a marijuana license *or renewal*” and “only approve those licenses which are in compliance with local zoning.” CP at 330 (emphasis added).

The Board appealed to this Court. Commissioner Wasson entered a Commissioner’s Ruling granting a stay of the superior court’s order on April 19, 2018. The Board respectfully requests that this Court reverse the superior court order and affirm the Board’s Declaratory Order, finding that

the Board is not required to issue marijuana business licenses only when the businesses comply with local zoning.

V. ARGUMENT

A. Standard of Review.

The APA establishes the exclusive means of judicial review of agency action. RCW 34.05.510. The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1).

This Court sits in the same position as the superior court and applies the standards of the APA directly to the agency's administrative record. *Squaxin Island Tribe v. Washington State Dep't of Ecology*, 177 Wn. App. 734, 740, 312 P.3d 766 (2013), citing *Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003).

Additionally, "the court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

Under RCW 34.05.240(8), "A declaratory order has the same status as any other order entered in an agency adjudicative proceeding." Accordingly, the Court reviews the Board's Declaratory Order under RCW 34.05.570(3), which provides that the Court may grant relief only if it finds, among other things: the order is outside the statutory authority or jurisdiction of the agency; the agency has erroneously interpreted or applied

the law; or the order is arbitrary and capricious. RCW 34.05.570(3)(b), (d), (i).

This Court should review the Board's Declaratory Order under RCW 34.05.570(3)(d), the error of law standard. This standard accords *substantial weight* to an agency's interpretation of a statute within its expertise. *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 743, 406 P.3d 1199 (2017), *citing Verizon Northwest, Inc. v. Washington Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

B. The GMA Does Not Require the Board To Enforce Local Zoning When Issuing Licenses to Marijuana Businesses

The Board properly concluded that the GMA does not require state agencies to interpret and enforce local zoning codes when considering applications for marijuana licenses. A Department of Commerce interpretive rule confirms that what the GMA requires of state agencies is compliance with local zoning in the siting of state facilities. Licensees are third parties who have an independent obligation to comply with local ordinances.

1. Background on the GMA

The GMA was enacted in 1990 in response to the problems associated with an increase in population, particularly in the Puget Sound

area. Laws of 1990, 1st Ex. Sess., ch. 17. These problems included increased traffic congestion, school overcrowding, urban sprawl, and loss of rural lands. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit*, 135 Wn.2d 542, 546-47, 958 P.2d 962 (1998).

The Legislature made findings upon enactment of the GMA:

The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.

RCW 36.70A.010.

The GMA is implemented through local governments, not the state. *See Erickson & Assoc. v. McLerran*, 123 Wn.2d 864, 876, 872 P.2d 1090 (1994). It requires counties and cities to establish comprehensive land use plans within strict deadlines and develop regulations consistent with the GMA to ensure local government enforcement. RCW 36.70A.040.

2. The plain meaning of RCW 36.70A.103 demonstrates that it does not govern State licensing decisions.

On matters of statutory interpretation, the Court's fundamental objective is to ascertain the Legislature's intent. *Darkenwald v. State Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015). To determine whether a statute conveys a plain meaning, "that meaning is discerned from 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).

The Court further stated:

The meaning of words in a statute is not gleaned from those words alone but from all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.

Burns v. City of Seattle, 161 Wn.2d 129, 146, 164 P.3d 475 (2007)

(internal quotation marks omitted).

The Board relied on the plain meaning, and the only logical reading, of the GMA in issuing its Declaratory Order. RCW 36.70A.103 provides that state agencies shall comply with the GMA, then explains what compliance with the GMA means by listing certain types of state *building projects* that are exempt from compliance. That is, the State must comply when acting in its proprietary capacity, but the GMA does not address the State’s actions taken in a governmental capacity. *See Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003) (distinguishing between a city’s proprietary and governmental capacities). Listing only building projects illustrates that the state’s compliance with the GMA does not extend to its business licensing decisions.

RCW 36.70A.103 provides in full:

State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except as otherwise provided in RCW 71.09.250(1) through (3), 71.09.342, and 72.09.333.

The provisions of chapter 12, Laws of 2001 2nd sp. sess. do not affect the state's authority to site any other essential public facility under RCW 36.70A.200 in conformance with local comprehensive plans and development regulations adopted pursuant to chapter 36.70A RCW.

The statute exempts the siting of specified state facilities from compliance with local development regulations. It references RCW 71.09.250(1)–(3), authorizing the construction of a secure community transition facility and special commitment center on McNeil Island; RCW 71.09.342, authorizing siting and construction of transition facilities by the Department of Social and Health Services; and RCW 72.09.333, authorizing the Department of Corrections to operate a correctional facility on McNeil Island.

RCW 36.70A.103 also states that the GMA does not affect the state's authority to site "essential public facilities," which include airports, state education facilities and state or regional transportation facilities, regional transit authority facilities, state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities. *See* RCW 36.70A.200(1).

The Board would be subject to RCW 36.70A.103, and would comply with local zoning, if it were developing property or locating a facility—for example, the former state-run liquor stores. An example of application of a local land use-related ordinance to the state’s *development activities* is illustrated in *Univ. of Washington v. City of Seattle*, 188 Wn.2d 823, 399 P.2d 519 (2017). The Court held that the University was required to comply with a landmarks preservation ordinance, a local development regulation adopted under the GMA, when it proposed to demolish a campus building.

In contrast to its explicit treatment of state development projects, the GMA does not address the state’s issuance of licenses to private parties, or the licensing and siting of marijuana businesses. It does not state anywhere that a state agency must evaluate and accommodate local zoning in the issuance of business or professional licenses. The Board is not charged with ensuring a business has all locally-required permits prior to issuing a license, with one exception imposed by its own rules: equipment used by marijuana processors for creating marijuana extracts must be approved by the local fire code official and meet local fire, safety, and building code requirements.³

³ WAC 314-55-104(7) provides:

Professional closed loop systems, other equipment used, the extraction operation, and facilities must be approved for their use by the local fire

The question before this Court concerns whether the Board is required to comply with RCW 36.70A.103 when granting a marijuana license to a private business. Approving a license application under the marijuana licensing statutes and rules is a far different question than determining whether an applicant is compliant with local zoning and land use classifications. The latter would place this responsibility on Board staff, who are not trained or skilled in interpreting zoning ordinances.

The Board is not aware of any case law where a court has required a state agency to deny a license application because the activity would not be permitted by a local ordinance. To read RCW 36.70A.103 as requiring state agencies to “comply” with local zoning regulations in licensing private entities would be to read the statute as requiring state agencies to enforce local zoning regulations.

The Board’s rules properly inform licensees that they have an obligation to comply with local ordinances, but such compliance is not a precondition for the issuance of licenses by the Board. WAC 314-55-

code official and meet any required fire, safety, and building code requirements specified in:

- (a) Title 296 WAC;
- (b) Chapters 51-51 and 51-54A WAC;
- (c) National Fire Protection Association (NFPA) standards;
- (d) International Building Code (IBC);
- (e) International Fire Code (IFC); and
- (f) Other applicable standards including following all applicable fire, safety, and building codes in processing and the handling and storage of the solvent or gas.

020(15) states, “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.” The Board also provides notices to local governments of applications, facilitating their ability to interact with applicants regarding enforcement of local ordinances. RCW 69.50.331; WAC 314-55-020(1).

3. WAC 365-196-530 reinforces that RCW 36.70A.103 requires state agencies to comply with local development regulations only when siting State facilities.

The state Department of Commerce is not a regulator under the GMA—that is a local government function. Instead, the Department of Commerce is charged with adopting rules that contain guidelines for classification of lands and to establish a program of technical and financial assistance to local governments. RCW 36.70A.050 and 36.70A.190. Its rules lay out how it construes the GMA.

The Department of Commerce rules do not, and cannot, grant authority to the Board that it does not already have in statute. Under its GMA rules, “The department'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) (emphasis added).

The Board properly concluded that a Department of Commerce rule adopted under the GMA, WAC 365-196-530, requires state agencies to comply with local siting and building requirements only when the state itself is a project applicant. It does not require state agencies to comply with local zoning codes by denying licenses to third parties, who have an independent obligation to comply with local ordinances.

The rule, WAC 365-196-530(1) first contains a general statement:

RCW 36.70A.103 requires that state agencies comply with the local comprehensive plans and development regulations, and subsequent amendments, adopted pursuant to the act. An exception to this requirement exists for the state's authority to site and operate a special commitment center and a secure community transition facility to house persons conditionally released to a less restrictive alternative on McNeil Island under RCW 36.70A.200.

That this rule and the GMA, RCW 36.70A.103, target state agencies' proprietary uses of property—such as land use, siting buildings, and other development activities—is then made explicit in WAC 365-196-530(2):

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.

(emphasis added)

Thus, the rule explicitly recognizes that state agencies must comply with the GMA only when the state agency is a project applicant. WAC 365-196-530(2).

The only mention in the rule of anything close to licensing actions is a reference to “permit functions” in WAC 365-196-530(4):

Overall, the broad sweep of policy contained in the act implies a requirement that all programs at the state level accommodate the outcomes of the growth management process *wherever possible*. The exercise of statutory powers, whether in *permit functions*,⁴ 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.

(emphasis added)

This rule contains *aspirational* statements that programs at the state level, when exercising discretion granted them by their *own* statutory authority, should accommodate the outcomes of the growth management process “wherever possible.” The rule is not, and cannot be, a grant of authority to the Board to deny business licenses based on local zoning. The

⁴ For examples of permit functions, see sand and gravel permits and substantial development shoreline permits issued by the Department of Ecology under chapters 90.48 and 90.58 RCW, respectively, and large on-site sewage system permits issued by the Department of Health under chapter 70.118B RCW.

rule cannot add requirements not otherwise found in the GMA. *Haines-Marchel*, 1 Wn. App. 2d at 728; RCW 34.05.570(2)(c) (court shall declare a rule invalid if rule exceeds statutory authority of the agency).

The Board can only exercise the discretion granted to it in the licensing statutes under chapter 69.50 RCW. The Board's processes accommodate the exhortations of the department rule, in advising licensees of their obligation to comply with local ordinances, WAC 314-55-020(11), and in notifying local governments of applications enabling them to interact with licensees, RCW 69.50.331(7).

Nothing in either the Department of Commerce rule or the GMA *requires* state agency decisions in *licensing* matters to be compliant with local zoning. This Court should conclude that the GMA and Department of Commerce rule do not compel the Board to deny licenses to third parties based on local zoning.

C. The Board Must Base License Denials on Specified Grounds Under RCW 69.50.331 and WAC 314-55-020, Which Do Not Include Local Zoning

State agencies, including the Board, may only take actions that are authorized by statute. *State ex rel. Public Util. Dist. No. 1 of Okanogan Cty. v. Dep't of Pub. Serv.*, 21 Wn.2d 201, 208-09, 150 P.2d 709 (1944). The Board must accordingly base its licensing decisions on whether an applicant

has met the statutory and rule requirements to obtain the license. RCW 69.50.331; WAC 314-55-050.

RCW 69.50.331 lists detailed criteria that an applicant for a marijuana license must meet, as well as areas the Board may examine, such as the criminal history of individuals associated with the proposed business or evidence of chronic illegal activity as set out in subsections (7) and (10).

WAC 314-55-050 lists specific reasons the Board may deny licenses or renewals of licenses. Denial of licenses by the Board must be based on grounds specified in the rule. Local zoning is not included in the statute or rule. An applicant denied a license is entitled to a hearing under the APA, at which the Board must defend its denial based on specific disqualifying criteria in the statute and rule. RCW 69.50.334; WAC 314-55-070.

In contrast, statutes for other state licensing programs explicitly require compliance with local zoning to obtain a license. Two examples are vehicle dealer licenses and driver training school licenses, both issued by the Department of Licensing. The physical facilities for those businesses must be compliant with local zoning for the state to grant those types of

business licenses.⁵ But there is no requirement in the marijuana licensing statute for that type of state business license to comply with local zoning.

A local government is entitled to notice and an opportunity to submit input on marijuana applications within its jurisdiction. RCW 69.50.331(7) requires the Board to notify the local government of new marijuana applications and renewals and allow an opportunity for input to the Board. The statutes do not, however, require the Board to deny a license if a local government objects based upon local zoning.

Local governments may advise the Board of chronic illegal activity or information that the applicant may not meet licensing qualifications under Board rules, including “[w]here the city, county, tribal government, or port authority has submitted a substantiated objection per the requirements in RCW 69.50.331 (7) and (10).” WAC 314-55-050(9).

A “substantiated objection” is defined in RCW 69.50.331(10):

In determining whether to grant or deny a license or renewal of any license, the state liquor and cannabis board must give substantial weight to objections from an incorporated city or town or county legislative authority based upon chronic illegal activity associated with the applicant's operations of the premises proposed to be

⁵ See RCW 46.70.023(7) (“A [dealers] temporary subagency shall meet all local zoning and building codes for the type of merchandising being conducted.”); RCW 46.70.023(8) (“A wholesale vehicle dealer . . . shall meet local zoning and land use ordinances.”); RCW 46.70.023(9) (“A retail vehicle dealer shall . . . maintain office and display facilities in a commercially zoned location or in a location complying with all applicable building and land use ordinances”); and RCW 46.82.360(6) (“The established place of business of a driver training school shall be located in a district that is zoned for business or commercial purposes or zoned for conditional use permits for schools, trade schools, or colleges.”).

licensed or the applicant's operation of any other licensed premises, or the conduct of the applicant's patrons inside or outside the licensed premises. "Chronic illegal activity" means (a) a pervasive pattern of activity that threatens the public health, safety, and welfare of the city, town, or county including, but not limited to, *open container violations, assaults, disturbances, disorderly conduct, or other criminal law violations, or as documented in crime statistics, police reports, emergency medical response data, calls for service, field data, or similar records of a law enforcement agency* for the city, town, county, or any other municipal corporation or any state agency; or (b) an unreasonably high number of citations for *violations of RCW 46.61.502 [driving under the influence]* associated with the applicant's or licensee's operation of any licensed premises as indicated by the reported statements given to law enforcement upon arrest.

(emphasis added)

The Board must give "substantial weight" to objections based on "chronic illegal activity," but the statute does not reference compliance with zoning as something the Board must consider. Chronic illegal activity that "threatens the public health, safety, and welfare" is established by demonstrating that a pervasive pattern of activity threatens the public health, safety, and welfare and may be shown through violent criminal acts and crime statistics, not whether the applicant or licensee is compliant with local zoning. RCW 69.50.331(10) does not limit the kind of input the local jurisdiction can provide, but it focuses the Board's inquiry on objections based on substantiated chronic illegal activity, and it does not provide any support for an argument that objections based upon local zoning are a basis upon which the Board could, or must, deny a license application.

All that RCW 69.50.331(10) requires is for the Board to consider local government input. The Board may grant a hearing to a local government on its objection at the Board's discretion under RCW 69.50.331(7)(c) ("the state liquor and cannabis board may in its discretion hold, a hearing subject to the applicable provisions of Title 34 RCW"). There is no statutory right to a hearing on a local jurisdiction objection. That the Legislature chose not to require the Board to grant an objecting local government a hearing demonstrates that the Legislature did not intend the local government's point of view to control.

If the Board denied an initial application or a renewal of a marijuana license on the basis of an objection that the location did not comply with local zoning, the applicant or the licensee would have due process rights to a hearing under RCW 69.50.334. RCW 69.50.331(7)(c) requires "state liquor and cannabis board representatives to present and defend the initial decision to deny a license or renewal." The statute clearly requires the Board's representative to present the case in defense of the decision to deny a license. It does not require a local government, whose objection may have requested the denial, to participate in defense of the Board's decision. The Board would be in the position of defending whether local zoning actually prohibited the use at that location, and it could be in the position of defending the validity of the zoning ordinance itself.

The statutes and rules governing qualification for marijuana business licenses do not authorize the Board to deny licenses based on local zoning. And there is nothing in the local government notice and comment provisions that suggests the Board can or must deny a license based on local government objections based on zoning.

1. Recent legislative enactments support the Board's statutory interpretation.

Recent legislative enactments support the Board's position that it is not authorized to deny licenses based on local zoning. Specifically, Laws of 2017, ch. 317, effective July 23, 2017, made changes to RCW 69.50.325 and RCW 69.50.331. Those statutes, respectively, created marijuana business licenses and set out the processes and criteria for issuance. The legislative changes could have but did not require the Board to deny licenses based on local zoning thereby demonstrating that the Board does not have authority to deny licenses based on local zoning. *See State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (courts may not add language to a clear statute).

a. The Board may not forfeit licenses based on local zoning.

The Legislature amended RCW 69.50.325 to create a process leading to license forfeiture for retail stores that are not fully operational and open to the public within a specified period from the date of license

issuance. Laws of 2017, ch. 317, § 1. RCW 69.50.325(3)(c)(v) reads as follows:

The state liquor and cannabis board *may not require license forfeiture if the licensee has been incapable of opening a fully operational retail marijuana business due to actions by the city, town, or county* with jurisdiction over the licensee that include any of the following:

(A) The adoption of a ban or moratorium that prohibits the opening of a retail marijuana business; or

(B) The *adoption of an ordinance or regulation related to zoning*, business licensing, land use, or other regulatory measure that has the effect of preventing a licensee from receiving an occupancy permit from the jurisdiction or which otherwise prevents a licensed marijuana retailer from becoming operational.

RCW 69.50.325(3)(c)(v) (emphasis added)

The forfeiture process created by RCW 69.50.325 prohibits the Board from forfeiting a license if the licensed business is not fully operational due to the action of a local government, including adoption of a land use or zoning ordinance, that has prevented the business from operating. The clear lesson to draw from this statutory amendment is that the Board cannot affirmatively take away a license if the licensee is not operating due to local zoning.

The superior court's order, currently stayed, would create a particular dilemma for the Board when it considers renewal of a retail license that has already been issued, but the store has not opened, and the local government asserts the location is not in compliance with local zoning.

On one hand, the Board is *prohibited* by RCW 69.50.325 from forfeiting a marijuana retailer's license when local zoning prevented it from opening. On the other hand, if the local government asserts on renewal that the location is noncompliant with local zoning, the superior court's order would *require* the Board to revoke and not renew the license. The Washington Supreme Court has cautioned against construing the law in a manner that would place a government agency into such a "catch-22." *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 642 n. 31, 911 P.2d 1319 (1996), reconsideration denied May 9, 2016 (citing Joseph Heller, *Catch-22*, 58 (1966)).

b. Tribes, but not local governments, must give affirmative consent to licenses.

The Legislature amended RCW 69.50.331 to provide notice to tribal governments of applications for licenses within Indian county and for their affirmative consent before a license may be issued. Laws of 2017, ch. 317, § 2.

A requirement was added to RCW 69.50.331(7)(a) that the Board provide notice to tribal governments of applications for licenses within Indian country. A tribal government is a separate sovereign, so it makes sense that the Legislature would provide for notice to tribes. However, the new language goes further and requires affirmative consent from a tribe for

issuance of a license. RCW 69.50.331(8)(e) prohibits the Board from issuing a license in Indian country, including any fee (i.e., privately-owned) lands within the exterior boundaries of a reservation, without the consent of the federally-recognized tribe associated with the reservation or Indian country.

The Legislature chose to require affirmative consent from tribal governments, while not providing any comparable authority for local governments. This difference in statutory treatment within the same legislative act demonstrates that the Legislature did not intend for the Board to require compliance with local government ordinances, or for it to deny licenses based on local government objections. *See Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (difference in statutory terms signals a legislative intent for a different meaning).

D. The County's Remedy is to Enforce its Zoning Ordinances

In issuing the Declaratory Order, the Board considered not only whether it was authorized to deny licenses based on local zoning, but the fact that local jurisdictions bear the responsibility for interpreting and applying their own land use ordinances and processes, regardless of the Board's licensing decisions.

Before the Board revokes a license, it is required to provide the licensee with a hearing on the revocation. RCW 69.50.334; WAC 314-55-

070. The Board has the burden of proof in defending decisions to deny licenses. *See Oscar's, Inc. v. Washington State Liquor Control Bd.*, 101 Wn. App. 498, 501, 3 P.3d 813 (2000). If a denial is based on a local government's assertion that the location does not comply with local zoning, the Board must be in a position to prove that fact at a hearing. In defending its decision, the Board would be in the position of interpreting and applying local ordinances. It is unknown how many license renewals or initial licensing decisions would involve land use issues. Putting on a case in defense of a local zoning ordinance should not be the Board's role.

In contrast, the County has authority, as part of its normal responsibilities, to enforce its own ordinances and prevent businesses from operating where its ordinances do not permit (assuming those businesses attempt to operate). As the Court of Appeals stated:

In Washington, local governments wield significant regulatory powers. They derive from [Wash. Const.] Article XI, section 11 which states, "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." This provision, known as "home rule," presumes that local governments are autonomous. The scope of a county's police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people.

Emerald Enter., LLC v. Clark County, 2 Wn. App. 2d 794, 803, 413 P.3d 92 (2018), petition for review filed Apr. 12, 2018 (internal citations omitted)

The Attorney General concluded in a formal opinion that local governments have broad authority to regulate within their jurisdictions, and that I-502, including provisions governing the siting of marijuana businesses, did not preempt the power of local governments to impose *additional* regulatory requirements on those businesses. Att’y Gen. Op. 2 (2014).⁶

The opinion reasoned that Board licenses do not override local zoning, and the Board’s rules recognize this:

We have considered and rejected a number of counterarguments in reaching this conclusion. First, one could argue that the statute, in allowing Board approval of licenses at specific locations (RCW 69.50.325(1), (2), (3)), assumes that the Board can approve a license at any location in any jurisdiction. This argument proves far too much, however, for it suggests that a license from the Board could override any local zoning ordinance, even one unrelated to I-502. For example, I-502 plainly would not authorize a licensed marijuana retailer to locate in an area where a local jurisdiction’s zoning allows no retail stores of any kind. The Board’s own rules confirm this: “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(11).

Att’y Gen. Op. 2 (2014), at 8.

⁶ Att’y Gen. Op. 2 (2014) may be accessed at: <http://www.atg.wa.gov/ago-opinions/whether-statewide-initiative-establishing-system-licensing-marijuana-producers>.

The opinion also confirmed the Board has authority to override local government objections to a specific license.⁷

The County clearly has authority to enforce local zoning ordinances against non-conforming uses, including marijuana businesses licensed by the Board. Issuance of a license under chapter 69.50 RCW does not prevent the County from requiring compliance with applicable zoning ordinances.

There are policy reasons that militate against relying on a state agency to interpret a local zoning code. An applicant may ask the local government for an exemption or seek to have the zoning changed. Such local processes may result in a change to the code, granting a variance or non-conforming use,

⁷ Third, one could argue that because local jurisdictions are allowed to object to specific license applications and the Board is allowed to override those objections and grant the license anyway (RCW 69.50.331(7), (9)), local jurisdictions cannot have the power to ban licensees altogether. But such a ban can be harmonized with the objection process; while some jurisdictions might want to ban I-502 licensees altogether, others might want to allow them but still object to specific applicants or locations. Indeed, this is the system established under the state liquor statutes, which I-502 copied in many ways. *Compare* RCW 69.50.331 with RCW 66.24.010 (governing the issuance of marijuana licenses and liquor licenses, respectively, in parallel terms and including provisions for local government input regarding licensure). The state laws governing liquor allow local governments to object to specific applications (RCW 66.24.010), while also expressly authorizing local areas to prohibit the sale of liquor altogether. *See generally* RCW 66.40. That the liquor opt out statute coexists with the liquor licensing notice and comment process undermines any argument that a local marijuana ban irreconcilably conflicts with the marijuana licensing notice and comment opportunity.

Att’y Gen. Op. 2 (2014), at 9.

or other result that affects how zoning applies to the applicant. Therefore, a state agency's denial of a license based on zoning would never be the final word on the matter, where the final authority is with the local government.

If the Board were to deny marijuana licenses based on local ordinances, it would also raise the question whether the Board was acting within its own authority or on delegated authority from the local jurisdiction. In essence, here the County seeks to have the Board interpret and apply ordinances adopted by local government by asking the Board to deny licenses, without statutory authority to do so, on a local government's claim that the license violates a local ordinance. By doing so, the Board risks preempting interpretation of local ordinances, in a situation that could leave local officials without recourse. *See* Att'y Gen. Op. 12 (2003)⁸ at 2 n.1 (noting the Attorney General's "consistent policy and practice" of interpreting local ordinances, in formal opinions, in deference to local authority).

In summary, local governments are in the best position to interpret, apply, and defend zoning ordinances they have developed and adopted. The Board cannot, and should not, make zoning compliance decisions—that is for the local government.

⁸ Att'y Gen. Op. 12 (2003) may be accessed at: <https://www.atg.wa.gov/ago-opinions/applicability-state-and-local-campaign-finance-limitations-prosecuting-attorney-and>.

VI. CONCLUSION

There is no authority for the position that the GMA requires the Board to apply local zoning ordinances to individual license applications. The Board's authority to make determinations on marijuana licenses is derived from chapter 69.50 RCW, and nothing in the law authorizes the Board to deny issuance of a license based on the licensee's compliance with local zoning law.

Enforcing local zoning is the responsibility of local government, and this Court should reject the attempt to shift that authority to the state.

The Board respectfully requests that the Court affirm the Board's Declaratory Order and reverse the order of the superior court.

RESPECTFULLY SUBMITTED this 2nd day of July, 2018.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of July, 2018, at Olympia, Washington.



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