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NO. 35874-7

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

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

KITTITAS COUNTY,

Respondent,

v.

WASHINGTON STATE LIQUOR AND CANNIBAS BOARD,

Appellant.

**APPELLANT'S ANSWER TO AMICUS CURIAE BRIEF OF
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS**

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I. ARGUMENT IN REPLY

A. Standard of review

Amicus Washington State Association of Municipal Attorneys (WSAMA) argues that Appellant Washington State Liquor and Cannabis Board (Board) is not entitled to deference because it does not administer the Growth Management Act, chapter 36.70A RCW (GMA). *See* Amicus Br. at 3. That misses the point.

The Board administers chapter 69.50 RCW, which controls qualifications for issuance of marijuana business licenses. The Board is entitled to have “substantial weight” afforded to its interpretation of chapter 69.50 RCW and implementing rules, as they are undeniably 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, Inc. v. Washington Emp’t Sec. Dep’t*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008)).

No state agency administers the GMA. *See* Appellant’s Opening Br. at 13.

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B. The GMA Does Not Require the Board to Apply Local Zoning to its Licensing Decisions

WSAMA argues that the Board erroneously interprets RCW 36.70A.103. *See* Amicus Br. at 3–6. WSAMA is not only incorrect on the merits; it does not address the Board’s arguments.

WSAMA argues that the GMA is an “integrating framework” that envisions a role for both local and state government. *See* Amicus Br. at 3–4. However, that phrase appears in the GMA only in an uncodified legislative finding; the full sentence reads, “The state and local governments have invested considerable resources in an act that should serve as the integrating framework for all other land-use related laws.” Laws of 1995, Chap. 347, § 1 (emphasis added). Chapter 69.50 RCW, the marijuana licensing laws administered by the Board, are neither land-use nor land-use-related laws. WSAMA’s and Kittitas County’s attempt to extend this legislative finding to state licensing law is unsupported by the two reported cases that have mentioned it, both of which involved the application of land-use related laws.¹

WSAMA then argues that the GMA contains provisions that “only make sense” if state proprietary and governmental actions (i.e., licensing)

¹ The two reported cases mentioning the phrase “integrating framework” are *Town of Woodway v. Snohomish Cty.*, 180 Wn.2d 165, 322 P.3d 1219 (2014) and *Overhulse Neighborhood Ass’n v. Thurston Cty.*, 85 Wn. App. 1041 (1997).

are both subject to the GMA. *See* Amicus Br. at 4. But WSAMA's examples of such provisions are neither definitive nor convincing.

First, WSAMA points to a GMA requirement that state and local government permits should be processed in a timely manner. *Id.* This argument only refers us back to the distinction between state permits and state licensing, which the Board addressed in its briefing. *See* Appellant's Br. at 15, n.4; Appellant's Reply Br. at 7. WSAMA does not address the Board's argument that only a Department of Commerce rule, WAC 365-196-530(4), includes a reference to permits. The GMA contains no mention of them, and the rule refers to types of state permits that alter the typography of land, such as sand and gravel permits, substantial shoreline development permits, and large on-site sewage system permits. Appellant's Reply Br. at 7. The rule does not apply to business licensing.

Second, WSAMA offers a GMA provision to protect private property rights that requires state agencies to "evaluate regulatory or administration actions for regulatory takings." Amicus Br. at 4-5 (quoting RCW 36.70A.020(7)). This has no bearing on the issues in this case or the Board's licensing actions whatsoever.

Third, WSAMA argues the GMA provides a forum to hear appeals that argue a "state agency, county, or city *planning* under [the GMA] is not in compliance with [the GMA]." Amicus Br. at 5 (quoting RCW

36.70A.280) (emphasis in original). This provision also has no bearing on this case because the Board is not engaged in a planning exercise.

Finally, WSAMA argues that applying the GMA to state permitting conforms to the Department of Commerce interpretive rule, WAC 365-196-530. Amicus Br. at 5. As argued above, the Board is not involved in permitting of the type referred to in the DOC interpretative rule. *See* Appellant's Br. at 15 n.4; Appellant's Reply Br. at 7.

WSAMA relies on *Whatcom County v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016). The *Hirst* case involved a county attempting to defer to a state agency, rather than carrying out its role as a local government to plan under the GMA to ensure an adequate water supply before granting a building permit or subdivision application. The Supreme Court held that the county was obligated to exercise its own governmental authority. The holding in the *Hirst* case does not advance WSAMA's argument. In fact, it buttresses the Board's interpretation of the GMA as defended in this appeal, because what the county wanted in *Hirst* was the same as what Kittitas County and WSAMA are asking the Board to do in this case: It is a local jurisdiction's job to enforce its local zoning laws, but Kittitas County is asking the Board in its licensing decisions to do the county's job.

WSAMA's argument misapplies the law to the issues in this case. Compliance with the GMA is an issue for purposes of this case only in terms

of whether it applies to the Board granting third-party licenses, versus the state developing real property as a landowner or undertaking other governmental functions. Any other involvement of state government under the GMA is not relevant to the facts and issues in this case.

C. The Board Would Need Statutory Authority to Deny Licenses Based on Zoning, and It is Not Suited to Make Zoning Decisions

1. The Board Does Not Have Statutory Authority to Deny Licenses Based on Zoning

WSAMA argues that, even if there is no basis under the Board's enabling statute, chapter 69.50 RCW, to consider local zoning in licensing decisions, the Board has such authority under another statute, the GMA. That argument takes us back to the proper interpretation of the GMA. But more significantly for this line of reasoning, WSAMA ignores the fact that the marijuana statutes and rules do not provide any basis for denial or discipline of licenses based on "other law." *See* chapters 69.50 RCW and 314-55 WAC. The specific amendments to chapter 69.50 RCW legalizing marijuana business licensing were enacted in 2012, long after the general statements at issue in the GMA enacted in 1990.

WSAMA also argues that the Board's authority to deny a license based on zoning on the basis of "chronic illegal activity" under RCW 69.50.331(1)(a) means it is authorized to enforce zoning laws in its licensing

decisions. “Chronic illegal activity” does not include zoning issues. It is defined as:

(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.

RCW 69.50.331(10). The Board briefed the meaning of this statute and how it is involved in the licensing process in its opening brief. *See* Appellant’s Opening Br. at 18–19.

2. The Board and OAH Administrative Law Judges Are Not Suited to Apply Zoning Ordinances

WSAMA criticizes the Board for pointing out that local jurisdictions are better suited to interpret and apply local zoning ordinances than Board staff and administrative law judges from the Office of Administrative Hearings (OAH). *See* Amicus Br. at 8–10; Appellant’s Reply Br. at 10–11.

Pragmatism is not the only basis of the Board’s argument; it is primarily a legal argument. The GMA does not incorporate state third-party licensing as WSAMA urges. If the legislature made the policy choice to

assign zoning compliance decisions to the Board, the Board would execute its policy decision. The potential pitfalls, difficulties, and consequences of the Board having to determine the applicability of local zoning questions in Board licensing hearings perhaps illustrates why the legislature has not made that policy choice.

WSAMA argues that the Board is already required to consider local zoning and defend denials in the case of marijuana cooperatives. But the cooperative statute actually supports the Board's position that specific statutory authorization is required to deny a license based on zoning. Cooperatives are required to apply for registration with the Board, but they may not be located "[w]here prohibited by a city, town, or county zoning provision." RCW 69.51A.250(3)(c). If the legislature had intended to require zoning compliance for licensing marijuana businesses, it would have included a similar prohibition in the licensing process. *See Ellensburg Cement Products, Inc. v. Kittitas Cty.*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014) ("Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*—specific inclusions exclude implication.")

WSAMA makes a number of suggestions to supposedly ameliorate the difficulty of adjudicating local zoning in a licensing administrative hearing, but none is truly ameliorative. It suggests a rule to provide for intervention by local governments. But an agency rule cannot compel local governments to participate in administrative hearings as parties.

It suggests creation of a certified question procedure for questions of zoning interpretation. But that is a matter for OAH, which is an independent agency. OAH does not have such a rule, and arguably, it is not within the Board's rulemaking authority. Also, where would the certified question be sent? The Board is not aware of precedent for an administrative law judge to certify a question to superior court. The Administrative Procedure Act, chapter 34.05 RCW, does not contain any provisions to certify a question to the superior court.

Finally, WSAMA rather blithely suggests sending appeals to an administrative law judge with a zoning background – which, to the Board's information and belief, OAH does not have, because it does not do zoning appeals. However, as stated above, the legal arguments and not the impracticalities of having the Board adjudicate zoning issues, are the reason this Court should affirm the Board's Declaratory Order. The Board has put applicants and licensees on notice, since the original I-502 rules were adopted, that "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) (emphasis added).

D. Zoning Determination is the Proper Role of Local Government

Finally, WSAMA argues that not applying local zoning to licensing decisions is a hardship for local governments. This is a policy argument and not determinative of the legal question before the Court. This argument cuts both ways, because the County and WSAMA essentially ask the Board to expend resources to enforce city and county zoning laws. This would be a hardship for the Board. It would require the Board to construe and enforce policy choices that the Legislature has chosen to vest in local government. *Whatcom Cty v. Hirst*, 186 Wn.2d at 648.

The “practical solutions” WSAMA advocates would commit Board resources to application processing and adjudicative proceedings. Board staff would be required to interpret and apply zoning ordinances to applicants’ locations and defend their decisions in adjudicative proceedings. *See* RCW 69.50.334; WAC 314-55-070. Administrative law judges, who conduct hearings and issue initial orders, and Board members, who issue final agency orders, do not possess expertise in the interpretation and application of zoning ordinances.

As discussed above, it is indisputable that local jurisdictions are better suited to interpret and apply their zoning ordinances than the Board and OAH. The Board informs licensees of their obligation to comply with local ordinances, including zoning, building and fire codes, and business licensing requirements. WAC 314-55-020(15). Both the Board and local governments have separate roles to play in regulation of the marijuana industry, as with any business activity. It is within the power of the legislature to decide whether it would be practicable for the Board to adjudicate the application of local zoning to marijuana licensing applications.

II. CONCLUSION

Nothing in the GMA requires the Board to apply local zoning to third-party licensing decisions. The Board would need statutory authority to do so, and there is no such authority in the marijuana licensing laws. Zoning enforcement, like the enforcement of other local ordinances, is the responsibility of local governments.

The Court should reject the attempt to shift the responsibility to enforce local zoning to the Board and affirm the Board's Declaratory Order.

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RESPECTFULLY SUBMITTED this 19th day of October, 2018.

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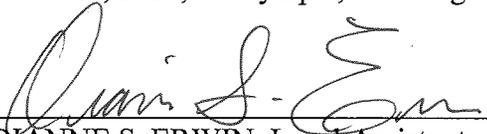
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