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

IN THE MATTER OF:
THE PETITION OF KITTITAS COUNTY FOR A
DECLARATORY ORDER WSLCB NO. 01-2017

WASHINGTON STATE LIQUOR AND CANNABIS BOARD,

Appellant,

vs.

KITTITAS COUNTY,

Respondent.

RESPONDENT KITTITAS COUNTY'S BRIEF

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Introduction

COMES NOW the Appellant, Kittitas County, by and through its attorney of record, Neil A. Caulkins, and submits its brief on appeal.

Kittitas County is challenging Washington State Liquor and Cannabis Board (LCB) Order No. 01-2017 in which the Board determined it does not need to consider local development regulations when reviewing applications for cannabis licenses.

This is a case that asks whether the Washington Legislature created an “integrating framework” of regulations that requires state and local governments to regulate in a congruous fashion to achieve the goals of the Growth Management Act (GMA), or whether the Liquor and Cannabis Board (LCB) is supposed to operate at cross-purposes with local governments’ state-mandated regulations that are designed to benefit the health, safety, and welfare of Washington residents.

More specifically, this case asks whether RCW 36.70A.103 , which states that “State agencies shall comply with ...local development regulations” and WAC 365-196-530, which requires state agencies to consider local regulation when engaged in “permit function” requires the LCB to comply with local development regulation when issuing marijuana permits. This case asks whether the LCB’s practice of ignoring local zoning when making marijuana permit decisions, thereby creating code

enforcement problems for local government by issuing licenses that violate local zoning regulations, is cognizable as being in compliance with RCW 36.70A.103's statement that "State agencies shall comply with ...local development regulations."

Assignments of Error

1. The LCB erroneously interpreted and applied the law when it determined that it did not need to consider local development regulations in its license review process as required by RCW 36.70A.103 and its implementing rule WAC 365-196-530.
2. The order is inconsistent with the statute and agency rule (RCW 36.70A.103 and WAC 365-196-530) which require consideration of local development regulation as a part of state permit issuance.
3. The LCB erroneously interpreted and applied the law when it confused "compliance" with "enforcement."
4. The LCB erroneously interpreted and applied the law when it held that it would need to handle challenges to the validity of local ordinances, what the nature of its review was upon appeal of a permit denial, and that it is not otherwise called upon to make factual determinations.
5. The LCB order, by ignoring the requirement of state agencies to comply with local development regulations, as found in RCW

36.70A.103 and WAC 365-196-530, is outside the LCB's statutory authority and is arbitrary and capricious.

Statement of the Case

The Growth Management Act (GMA) was passed in 1990 because the legislature recognized that “uncoordinated” growth and “a lack of common goals . . . pose a threat” to the health, safety and quality of life of Washington residents. RCW 36.70A.010. One of the specific planning goals of the GMA is that “Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.” RCW 36.70A.020(7). This legislative objective of fostering coordination, common goals, and predictability acknowledged “a recognition that the [GMA] is a fundamental building block of regulatory reform. The state and local government have invested considerable resources in an act that should serve as the integrating framework for other land use related laws.” WAC 365-196-010(1)(j). In short, part of the purpose of the GMA was to foster coordination, common goals, and predictability between state and local government, and this coordination was to serve as an “integrating framework for other land use related laws.”

To that end, the Legislature passed RCW 36.70A.103. It provides, with exceptions not applicable here, that “State agencies shall comply with

the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter . . .”

Similarly, the Department of Commerce provided clarification as to the implications and requirements of the GMA upon state action required by RCW 36.70A.103 in WAC 365-196-530. WAC 365-196-530 provides in pertinent part that:

(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 . . . (3) Consistent with other statutory mandates, state programs should be administered in a manner which does not interfere with . . . the exercise by any local government of its responsibilities and authorities under the act. (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 function, 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 . . . (5) After local adoption of comprehensive plans and development regulations under the act, the state agencies should review their existing programs in light of the local plans and regulations. Within relevant legal constraints, this review should lead to redirecting the state’s actions in the interests of consistency with the growth management effort.

Years later, Washington provided a legal framework for marijuana production, processing, and retail, and tasked the LCB with its supervision and administration. The regulations for these tasks accommodate the

framework of coordination envisioned and required by the GMA. RCW 69.50.331 requires LCB to engage in a “comprehensive” review of an application and grants it “discretion” to deny a license based on, “without limitation,” objections from a county pursuant to subsections (7) and (10). Neither subsections (7) nor (10) in any way limit the subject matter or scope of county objections. Subsection (10) provides that the LCB is to give “substantial weight” to an objection of chronic illegal activity, but it does not limit the county to only making an objection of chronic illegal activity. Similarly, WACs 314-55-160 and 314-55-165 provide no limitation upon the subject matter for local objection to, respectively, license issuance or renewal. WAC 314-55-165 actually gives a broad description of potential local objection when it states “the objection must state specific reasons and facts that show issuance of the marijuana license at the proposed location . . . will detrimentally impact the safety, health, or welfare of the community.” Given that protection of community safety, health, and welfare are important concerns, objections¹ based on zoning are legally appropriate and the LCB’s consideration of them is legally required.

Throughout its regulations, the LCB is required to consider or apply rules enacted by other governmental entities. WAC 314-55-050(8)

¹ See, generally, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363 (1983).

authorizes the LCB to deny a marijuana license if another “state or local jurisdiction” has suspended or cancelled its marijuana license.

WAC 314-55-050(11) provides that the LCB may grant a license within the 1,000-foot buffer if a local ordinance has permitted such reduction.

RCW 69.51A.250 prohibits the LCB from registering cooperatives if they do not comply with local zoning. WAC 314-55-097 requires the applicant to comply with local laws and regulations in solid and liquid waste storage and disposal. WAC 314-55-104 requires that closed loop systems for extraction be approved for use by the local fire code official. For disposal of marijuana solid waste, LCB requires approval from the local jurisdictional health department. WAC 314-55-097. These last four provisions are mandatory; the LCB does not have any discretion.

The two sets of statutes involved in this matter are to be interpreted in very different ways. “The GMA was spawned by controversy, not consensus, and, as a result, it is not to be liberally construed.” *Thurston County v. WWGMAHB*, 164 Wn.2d 329, 342, 190 P.3d 38 (2008). Hence, when we see RCW 36.70A.103 state that, with certain exceptions not applicable here, “State agencies shall comply with the local comprehensive plans and development regulations . . .” the court must strictly construe “State agencies shall comply” and the court cannot liberally construe the exceptions to include things not mentioned.

The regulations of the LCB are quite different. The LCB is created, and given its powers and charge, in Ch. 66.08 RCW. RCW 66.08.010 states “This entire title shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all provisions shall be liberally construed for the accomplishment of that purpose.” Case law has held that the LCB’s statutory scheme should “be read as a means for local governments to protect the health and safety of their constituents.” *City of Burlington v. WSLCB*, 187 Wn.App. 853, 864, 351 P.3d 875 (2015). In RCW 66.08.050(8) the legislature provides essentially a “necessary and proper clause” for the LCB where it is given the authority to “perform all other matters and things . . . and has full power to do each and every act necessary to the conduct of its regulatory functions.” Hence, the regulations specific to the LCB are to be (in stark contrast to the GMA) “liberally construed for the accomplishment of that purpose,” that purpose (for the LCB) is “to do each and every act necessary to the conduct of its regulatory functions,” and the legislature and courts have declared the LCB’s regulatory scheme is a means for “local government to protect the health and safety of its constituents.”

With those two contrasting statutory understandings in mind, one can correctly understand WAC 365-196-530(4)’s first sentence. This is a

piece of the GMA, so is to be strictly construed. It, strictly, says that considering local regulation is a requirement if at all possible. While the LCB does not explain or argue this, the next question would be, under LCB regulation, is consideration of local zoning “possible”? The LCB’s regulations and charge are to be liberally construed to do “each and every act necessary to aid local government to protect the health and safety of its constituents.” This charge, rather than showing it not “possible” as LCB seems to argue, but rather underlines LCB’s responsibility to consider local zoning. The strict reading of the GMA requires it “whenever possible” and the liberal reading of LCB’s regulations provide no prohibition, only encouragement.

Despite the requirements for coordination and consistency in state law, the LCB has pursued a policy of ignoring local zoning and ignoring objections based upon local zoning. CR 28, 30, 31,32-33, 49, 50-51, 52-97, 99, 100-130, 132, 133. This has resulted in the issuance of site-specific licenses to sites where the activity could not legally occur, thus causing code enforcement actions for local governments. *Id.* The legislative objectives of fostering coordination, common goals, and predictability (RCW 36.70A.010; 36.70A.020(7)) were sabotaged. The fact that “the state and local government have invested considerable resources in an act that should serve as the integrating framework for other

land use related laws” (WAC 365-196-010(1)(j)) was squandered.

Despite the fact that RCW 36.70A.103 requires that “State agencies shall comply with the local comprehensive plans and development regulations,” LCB has decided not to. There is no discernable basis for this decision to violate the law.

Kittitas County filed a petition for declaratory order challenging the errors outlined in the previous paragraph pursuant to Ch. 34.05 RCW. LCB issued a Notice of Proceedings that was distributed state-wide. CR 37-38. The vast majority of comments received were from municipalities that echoed the experience and legal argument presented by Kittitas County.

The Order made no finding of irregularity or deficiency under Ch. 34.05 RCW. *Id.* The Order determined that RCW 36.70A.103 did not require the LCB to consider local zoning. Kittitas County filed and mailed a timely appeal on June 16, 2017 pursuant to RCW 34.05.510. After briefing and oral argument, the Superior Court ruled in the County’s favor, overturning the declaratory order of the LCB. The Court’s order contained a synthesis of the requirements of the GMA and those governing the LCB showing how they regulate in congruity.

The LCB’s declaratory order was only concerned with the LCB’s compliance with laws of state-wide applicability (the GMA and

regulations specific to the LCB) and so that declaratory order concerned LCB's activities generally and so had state-wide applicability. The Superior Court, in its exercise of its appellate jurisdiction, issued a decision with the same state-wide applicability of the order being appealed to it.

The Superior Court Judge ruled from the bench that the LCB declaratory order was an erroneous interpretation and application of the law, inconsistent with agency rule, was outside the LCB's statutory authority, and was arbitrary and capricious. CR 335. The County brought a motion to amend the written final order to reflect the Judge's oral pronouncements that the LCB was acting beyond its statutory authority and had acted in a manner that was arbitrary and capricious. The Judge, though declining to amend the written order, stated that his oral ruling was equally a part of the court's decision and would be looked to as such by the Court of Appeals. So while the court declined to amend the written order, it reiterated that the oral pronouncements were equally a part of the decision.

The LCB filed a petition for review with the Court of Appeals, but initially sought no stay. The LCB continued to issue licenses that were contrary to local zoning regulations and contrary to local objections thereto in violation of the Superior Court's order. Kittitas County brought

a motion for contempt. The LCB then sought, and was granted, a stay by the Court of Appeals.²

Standard of Review

RCW 34.05.570(1) provides that “the burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” Hence, it is the county’s burden. The statute also provides that the court shall make a separate ruling on each material issue upon which its decision is based and the court must find that the county has been substantially prejudiced by the appealed agency action.

RCW 34.05.570(3) provides that the court shall grant relief from an agency order only if it determines that “the agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; the agency has erroneously interpreted or applied the law; the order is inconsistent with a rule of the agency; or the order is arbitrary or capricious.”³

RCW 34.05.574 describes the type of relief the court may provide. “The court may . . . order an agency to take action required by law, order an agency to exercise discretion required by law . . . In reviewing matters within agency discretion, the court shall limit its function to assuring that

² In its briefing before this court, nowhere does the LCB argue that the orders at issue here did not have state-wide applicability, thereby essentially stipulating to the contempt.

³ There are other grounds listed, but they are not relevant to this matter.

the agency has exercised its discretion in accordance with the law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay . . . If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public, pending further proceedings or agency action.”

“Statutory interpretation is a question of law we review de novo...If the statute’s meaning is plain on its face, we give effect to that plain meaning.” *Haines-Marchel v. WSLCB*, 1 Wn.App. 2d 712, 745, 406 P.3d 1199, (2017). Here, the meaning of RCW 36.70A.103 (“State agencies shall comply with ...local development regulations”) is plain on its face and the court is to give effect to that plain meaning, rather than engage in an inquiry into legislative intent.

This matter is not reviewed under the “error of law” standard. The error of law standard “accords substantial weight to an agency’s interpretation of a statute within its expertise and an agency’s interpretation of rules that the agency promulgated.” 1 Wn.App. 2d at 745. The GMA (neither RCW 36.70A.103 or WAC 365-196-530) is

neither a body of law within the expertise of the LCB nor a rule promulgated by the LCB. Hence, no deference is due to the LCB's interpretations.

Kittitas County has been specifically harmed by the LCB practices at issues herein because it has had to needlessly expend code enforcement resources shutting down operations licensed by the state in violation of local zoning. The Superior Court found this in its determination of the county's standing. LCB has assigned no error to that (finding 2.17 from the Superior Court Order).

Argument

“Integrating Framework”

State agencies are required to comply with local zoning. RCW 36.70A.103 states in pertinent part that “State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter . . .” The clear statutory language is the mandatory “shall comply.” RCW 36.70A.103 obliges state agencies, such as the LCB, to comply with local “development regulations.”

WAC 365-196-530 explains more of what state agency compliance with RCW 36.70A.103 looks like. Subsection (2) explains that the state must comply with local development regulations when it is a development

applicant. This subsection does not say that is the only time the state must comply. Actually, the rule continues by listing several other examples of state compliance. Subsection (3) stresses that state programs should be administered in a manner that does not interfere with local government GMA responsibilities. Subsection (4) speaks in terms of a “requirement” that state government action accommodate the GMA regulation of local government. It goes on to state that state permit issuance should consider legislatively mandated local GMA regulation. Please notice that the only place in this section of the rule where discretion is mentioned is here, and that discretion refers to state permit issuance – whether to issue the permit or not. That discretion does not refer to consideration of local regulations. The consideration of local regulation is not discretionary, but is rather referred to as “a requirement.” WAC 365-196-530 describes state compliance as a “requirement” and the goal is state action being consistent with the GMA effort.⁴ The LCB argues in its brief that the reference to “permit function” found here is merely a reference to when the state agency is a permit applicant. This is contrary to the wording of the WAC. The WAC states that these activities, permit function being amongst them,

⁴ LCB is not meeting this requirement and the result is inconsistency with the GMA effort. Even if this requirement were considered an exercise of discretion, RCW 34.05.574 gives authority to order the exercise of that discretion. It would be warranted because the legislatively stated goal of a consistent growth management effort is being thwarted by the LCB. The RCW says they “should” to achieve consistency and coordination, but their refusal is causing discord and chaos. The LCB should be ordered to exercise that discretion.

involve the state in discretionary decision making. A permit applicant is never involved in discretionary decision making, but a permit granting agency always is. It is contrary to the plain meaning of the WAC to state that the reference to “permit function” is merely a reference to the state acting as a project applicant, and not the state acting as a permitting authority, when a permit applicant is never involved in the discretionary decision making contemplated by the statute and the permitting authority always is. Finally, subsection (5) directs state agencies to review their programs in light of changes to local regulation so as to be acting consistently therewith. In short, WAC 365-196-530 requires state agencies to comply with local regulation when the agency is a project applicant; states that state programs should be managed so as not to be a cross-purpose with local government GMA responsibilities; that the issuance of state permits requires consideration of local development regulation; and that the state should revise its programs to maintain consistency with local regulation as that local regulation changes.

“The state and local government have invested considerable resources in an act that should serve as the *integrating framework* for other land use related laws.” WAC 365-196-010(1)(j). This “integrating framework” includes the requirement in RCW 36.70A.103 that state agencies comply with local development regulations. The “integrating

framework” includes the “requirement” in WAC 365-196-530 that local development regulations be considered during state permit issuance. The “integrating framework” includes RCW 69.50.331 that requires LCB to engage in a “comprehensive” review of an application and grants “discretion” to deny a license based on, “without limitation,” county objections pursuant to subsections (7) and (10). The “integrating framework” includes those subsections which place no limit upon the scope of possible objections. The “integrating framework” includes WAC sections 314-55-160 and 314-55-165 which also provide no limit upon the scope of municipal objection. The “integrating framework” includes WAC 314-55-165 which specifically invites local objections based upon “safety, health, or welfare of the community” (the very language of zoning). In spite of these components of the mandates of an “integrating framework”, all of which clearly apply to the LCB, the LCB not only ignores them, but goes out of its way to violate them.

This requirement that state agencies must comply with local zoning regulations was evident in the recent Washington Supreme Court case *University of Washington v. City of Seattle*, 188 Wn.2d 823, 399 P.2d 519 (2017). Though this case is significantly different in its context and facts than the matter before the court, it warrants attention because the same legal principle applies. The case involved whether or not the

University of Washington (UW) had to comply with a portion of the Seattle Municipal Code regarding historic landmark preservation. One of the issues was whether RCW 36.70A.103 mandated UW's compliance with the Seattle code given that the regents of the institution, pursuant to RCW 28B.20.130(1) and its predecessors, were given "full control" over UW property "except as otherwise provided by law." The court decided that RCW 36.70A.103 was applicable to a state agency like the UW, that it was "otherwise provided by law," and the UW needed to comply with local code. The significance of this case for the current matter is that the LCB has no statute granting them plenary control with exception as otherwise provided by law. Rather, it has a statutory scheme that focuses upon coordination, common goals, and cooperation. When the UW was held to need to comply with local code, how much more should the LCB be required to comply with local code?

Dis-integration

Despite the fact that RCW 36.70A.103 requires that "State agencies shall comply with the local comprehensive plans and development regulations," LCB has decided not to. Despite the fact that WAC 365-196-530(3) mandates that state programs be administered in a way that does not interfere with local governments GMA responsibilities, the LCB has consistently issued licenses in violation of local GMA-

mandated regulation, causing those entities to expend resources on code enforcement matters that boil down to telling holders of site-specific state-issued licenses that they really cannot do what the state has licensed them to do. This wastes the time of both the local government and the licensee, and creates unnecessary conflict and the impression of intransigence.

Despite the “requirement” that all state programs accommodate GMA regulation (WAC 365-196-530(4)), the LCB has taken the position that it does not have to. Despite the fact that statutory permit issuance involves discretion that “should take into account legislatively mandated local grown management programs,” (WAC 365-196-530(4)) the LCB believes it does not need to consider local zoning when issuing marijuana licenses. Despite the requirement that state programs re-evaluate themselves in light of changed local zoning to foster consistency with the GMA (WAC 365-196-530(5)), the LCB believes it does not need to pay attention to local zoning at all and that to do so would be overly burdensome upon it. Despite the fact that there is no limitation on the subject matter for local objections to license applications (apart from showing a negative impact on health, safety, and welfare – something a zoning objection is per se), the LCB has taken the position that the only objection it will consider is “chronic illegal activity” and that objections

based on zoning are to be ignored. Not only is this not supported in any legal authority, but it is directly contrary to the controlling legal authority.

At page 2 of its order, the LCB held that RCW 36.70A .103 does not require determination of compliance with local zoning because the local jurisdiction has the ability to determine and enforce that. This misses the point – the fact that the jurisdiction still has police power does not relate to the interpretation of the statute that says the state shall comply. The local jurisdiction’s abiding police powers do not dispatch the LCB’s statutory obligation to comply with the GMA as required by RCW 36.70A.103. The clear language of the statute creates a requirement that LCB’s license issuance accord with local zoning.

On page 2 of the order, LCB states that the LCB cannot deny a license based on local zoning, because the LCB does not have jurisdiction over local zoning. The latter point is of course true, but of no consequence at all. Jurisdiction is not the issue. LCB has a mandate to (1) comply with local development regulations pursuant to RCW 36.70A.103 and WAC 365-196-530 and (2) consider local objections based upon health, safety, and welfare by municipalities, which could well be zoning-based, in its license review process. The fact that the LCB does not administer these local regulations is irrelevant. They have a statutory duty to act in accord with them and to consider objections based upon them.

At page 2 of the Order it states that a zoning-based objection is not grounds for denial under WAC 314-55-050. But that WAC provides that a reason for denial is a substantial local objection under RCW 69.90.331(7) and (10) – neither of which limit the scope of those objections. Non-compliance with mandatory local regulations required by law to be created and imposed by definition creates a “substantial local objection”. Also, a license can be denied if the LCB finds denial in the interest of the welfare, health, or safety of the people of the state. Zoning is the chief manifestation of health, safety, and welfare regulation, and objections based thereon are, hence, specifically cognizable by the LCB.⁵

On page 2 of the order, LCB states that “The Board does not maintain a comprehensive list of the local ordinances, or the nature and scope of the prohibitions or conditions that they contain.” This violates WAC 365-196-530(5). The responsibility is upon the municipality to determine and report zoning consistency in the response it will already be making to the application.

At page 4, the LCB asserts it cannot find authority for denying a license based on local zoning objections. But WAC 365-196-530 says exactly that. Why would there be a WAC requiring consideration of local development regulations for consistency during the review of applications

⁵ See, generally, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363 (1983).

for state permits, if discovered inconsistencies could not serve as a basis for denial? They state there is no case law for that proposition, but none is needed when there are both an RCW (36.70A.103) and a WAC (365-196-530) that say as much.

LCB admits it's a site-specific determination. The regulations require certain site-specific evaluations; some are driven by local regulation. The list of things LCB is to consider and/or use as basis for rejection is "including but not limited to." The GMA (RCW 36.70A.103 and WAC 365-196-530) impose other requirements. Those requirements are among those "included" by the statutes. By granting a license to do X at Y location without checking if X is allowed by Y location by local code, the LCB is undermining the predictability in state permit issuance required by RCW 36.70A.020(7).

The only way not considering local zoning could make sense is if the license was not site-specific – if it merely was a license to a certain group of individuals to do something so long as that something accorded with other (local) regulations. However, this license, as admitted by the LCB in the order being appealed, is site-specific. This is a license that requires inquiry into local zoning. Some such requirements are specifically called out in LCB's own regulations and others that govern the state in general also sweep in the LCB.

The LCB misrepresents the decision of the Superior Court where it states, at page 5 of its brief, that the decision stated that the LCB “has the power to deny licenses on agency discretion alone rather than specific statutory grounds. The Superior Court held, rather, that the LCB regulations were not limited to those specifically regulating the LCB, but included other regulations that governed the State generally, the GMA being one of them, and that the GMA specifically requires compliance with local zoning in matters of State permit issuance. So the Superior Court specifically showed the statutory authority for the LCB to deny licenses based on local zoning objections to be in RCW 36.70A.103 and WAC 365-196-530. The LCB’s order is an erroneous interpretation of the law, it is contrary to agency rule, outside the LCB’s statutory authority, and arbitrary and capricious. The Superior Court correctly determined this. The Superior Court’s order clearly and correctly synthesizes the laws. The LCB’s order must be reversed and the Superior Court’s order must be affirmed.

Confuses “Comply” and “Enforce”

The LCB misinterpreted both the law and the English language. The LCB substituted the word “enforce” for “comply” and then went on to explain it does not have a role in enforcing local code and to consider such code in license review would be enforcing local code. RCW 36.70A.103

uses the verb “comply,” not “enforce.” Comply and enforce have two very different meanings. Webster’s Dictionary defines “comply” as “act in accordance with someone’s rules, commands, wishes.” The one who complies is the actor – compliance has to do with one’s own actions. Webster’s Dictionary defines “enforce” as “compel to behave a certain way.” “Compel” is, in turn, defined as “force somebody to do something.” Hence, “enforce” has to do with the action of another – making someone else comply. The person who is enforcing is not the one complying – one person is made to comply by the enforcement activity of another. RCW 36.70A.103 says state agencies “shall comply” with local development regulation. That means that its own activity must accord with that local regulation. The agency action at issue here is LCB’s permit issuance. That is LCB’s action, and the statute mandates that such action comport with local zoning. RCW 36.70A.103 mandates state “compliance” with local zoning. It has nothing to do with “enforcement” of local zoning. LCB’s explanation of why it does not need to comply with local zoning by considering it in its permit review process because that would constitute “enforcement” is intellectually dishonest.

Validity of Ordinance Not Subject to Challenge

LCB states that consideration of local regulations within the licensing review process would involve the LCB in defending those local

regulations. This is contrary to the law in Washington. One cannot, since at least 1954, challenge a land use regulation during project permit review. State ex rel. Ogden v. Bellevue, 45 Wn.2d 492, 495, 275 P.2d 899 (1954); WAC 365-197-010. Local regulations are deemed valid upon adoption (RCW 36.70A.320) and one cannot challenge local ordinances except to the Growth Management Hearings Board (RCW 36.70A.280). The LCB does not have jurisdiction over such a challenge and so would not need to, even be able to, entertain such a challenge. The issue of validity of local regulations is an unchallengeable verity in any proceeding before the LCB. To say that the LCB cannot consider local zoning in its license review process because it would involve the LCB in a challenge to the validity of those local regulations is not a legally valid argument in this state.

LCB Already Makes Factual Determinations

“The Board is not in a position to evaluate the validity of the ordinance, or its applicability to the application in question.” Order at page 3. The first is contrary to state law and outside the LCB’s jurisdiction as explained in the paragraph above; the second is false because LCB does so already. The fire Marshal has to approve closed loop processing facilities. The health department has to approve solid waste plans. So if the municipality says “no” in the application and the applicant says “oh

yes I did” then the LCB already has to decide which is correct as part of its decision to issue or renew a license. That is no different than the municipality saying that a proposal does not comport with local zoning and the applicant saying that it does. How does LCB deal with situations currently when a municipality objects due to chronic criminal activity and the applicant asserts that it is not chronic? They have to make that type of determination already, and they can do so-it is part and parcel of any responsibility to issue licenses.

Confuses Standard of Appellate Review

LCB claims that a denial based on a local zoning objection that is subsequently appealed would place LCB in the position of “defending and interpreting the local ordinance.” Order pg. 3. The legal framework for such an appeal is in the Administrative Procedures Act (APA)(Ch. 34.05 RCW). RCW 34.05.461(4) states that “Findings of fact shall be based exclusively on the evidence in the adjudicative record.” That, in turn is subject to review under 34.05.570(3)(e), which says an agency decision can only be overturned for lack of substantial evidence in the record. Hence, the question on appeal of a license denial is not “is black acre in zone 1 where X use is prohibited?” but rather “is there substantial evidence in the record showing black acre to be in zone 1 where X use is prohibited?” So, if the LCB had a statement from a

municipality showing how the proposed application violates local zoning, that would constitute substantial evidence to support a decision, and the inquiry is both ended and completely defensible. As to the validity of a local ordinance, validity is defined (RCW 36.70A.320(1) and (2)) as compliance with the GMA, the GMA provides local regulation is valid upon adoption (RCW 36.70A.320(1)) and can only be found invalid by the GMA Hearings Board (RCW 36.70A.280(1)). Indeed, a site-specific application cannot contain or bring a challenge as to the validity of the local regulation (compliance with the GMA). Woods v. Kittitas County, 162 Wn.2d 597, 614, 123 P.3d 883 (2005). The LCB would have no authority or jurisdiction to take up such a challenge. Additionally, since at least 1954, it has been contrary to Washington law to challenge the validity of local regulation during project permit review. State ex rel. Ogden v. Bellevue, 45 Wn.2d 492, 495, 275 P.2d 899 (1954); WAC 365-197-010.

Conducting such an adjudication with the concern that the LCB must “comply” with the GMA is in no sense the LCB enforcing the GMA upon others. Its focus is upon its own action, license issuance, and the need for its own actions to comply. Said another way, how can issuance of site specific licenses that ignore local zoning be considered coordinated

and consistent compliance with the GMA in permit issuance by the issuing state agency as mandated by law?

Ignorance of Laws

LCB admits that a marijuana license is a site-specific permit.

Order pg. 4. The LCB then goes on to display a level of ignorance of its own regulations that undermines any authority they may wish to display.

“However, the Board’s review of the location does not encompass local concerns such as whether the plumbing, sewer requirements, power services, or fire codes are met, as those matters are within the purview and authority of the local jurisdiction.” Order pg.4. However,

WAC 314-55-097 requires the applicant to comply with local laws and regulations in solid and liquid waste storage and disposal.

WAC 314-55-104 requires that closed loop systems for extraction be approved for use by the local fire code official. For solid marijuana waste disposal, LCB requires approval from the local jurisdictional health department. WAC 314-55-097. At page 3 of the order LCB states that RCW 36.70A.103 clearly governs those things listed as exceptions to what the statute governs and does not regulate anything else. This is backwards of what the statute actually says and contrary to WAC 365-196-530 (it does not apply to the exceptions [which the LCB is not one of] and does apply to everything else). The LCB never explains why the GMA doesn’t

apply to them. Nor do they explain why they are only governed by LCB regulations, not those that regulate the state generally.

LCB's Brief Repeats Erroneous Arguments

The LCB's brief reiterates the flawed arguments found in the LCB Order, which have already been refuted above. At page 7 of its brief, the LCB continues its confusion between the words "enforce" and "comply"- the latter being what is required of LCB under the GMA, and the former not being relevant to this matter. On that page the LCB repeats its mischaracterization of WAC 265-196-530 as only applying to the State when it occupies the position of a project applicant, something the plain meaning of the WAC does not say. On page 8 it states that the GMA is implemented through local regulation without mentioning the responsibility of the State to comply as required in RCW 36.70A.103 and WAC 365-196-530, said coordination being one of the features of the GMA. RCW 36.70A.020(7); WAC 365-196-010(1)(j).

On page 9, the LCB tries to discuss Legislative intent, which is legally inappropriate when the statute's meaning is plain on its face. "The state shall comply with ...local development regulations" is plain on its face and so no inquiry into Legislative intent is warranted.

Also on page 9 of its brief, the LCB reiterates its flawed argument that the GMA only applies to it when it is a permit applicant. The plain

meaning of RCW 36.70A.103 and WAC 365-196-530 refute that, and are clearly not limited to that circumstance. Again, as explained above, when the WAC is talking about “permit function” as an example of discretionary decision making, how can that possibly be referring to when the state is a permit applicant instead of a permit issuing authority? Discretionary decision making, in the context of “permit function” is only applicable to the permitting authority, not the applicant-the applicant makes no decision.

On pages 10, 11, and 14 of its brief, the LCB points out the exceptions to the compliance requirement in RCW 36.70A.103 (none of which include the LCB), and then strangely concludes that, because it does not mention marijuana facilities, that they too are exempt. No, the GMA is to be strictly construed, and so the LCB cannot be deemed to be a part of an exemption that they are not specifically mentioned in. Additionally WAC 365-196-530 specifically calls out “permit function” which involves third parties by definition, and requires coordination between state and local government for consistency. The LCB’s misrepresentation of WAC 365-196-530 is particularly apparent at page 15 where it neglects to even mention that the WAC has a subsection (5) that requires coordination between the state and local governments. LCB misses the point, at page 15, when it characterizes the GMA language as

aspirational and that it could not form the basis for a denial of a license. What possibly does consideration of local zoning mean if that consideration could not possibly ground a denial? The LCB's interpretation is that it just means, look at local zoning, smile, and then drive on. That cannot be what the legislature had in mind in trying to coordinate state and local permitting. The LCB never answers the basic question-if you grant licenses that violate state-mandated local regulations (the GMA and the local regulations spawned therefrom), in what sense are you acting in accord with a statute that says "State agencies shall comply with local...development regulations"?

At page 12 of its brief, the LCB argues that the county's position would place a burden upon it to know and interpret local zoning. This is false. As the County argued below, the LCB already receives objections from local governments on a form the LCB send to them. On that form, there could be a place (a blank line, a yes/no check box, etc.) where the local government could state whether or not the proposed application comports with its zoning. Hence the burden is upon local governments to voice these objections. If none is voiced, the LCB would be justified in deeming the project not objectionable to the local government. Again, there is no burden whatsoever being placed upon the LCB, it would remain the local governments' responsibility to voice the objection.

At page 19 of its brief, the LCB argues that it can only consider local objections of chronic illegal activity, even though the subject matter of local objections is not limited to chronic illegal activity and that RCW 69.50.331(7)(c) does specifically state that the LCB can deny a license based on local objection. The County never argued that RCW 69.50.331's reference to public health, safety, and welfare in defining "chronic illegal activity" was the only place that was mentioned nor limited to such a definition. The County, rather, pointed out that WAC 314-55-050 provides that a ground for denial, apart from chronic illegal activity, is merely when "(17) the WSLCB determines the issuance of the license will not be in the best interest of the welfare health, or safety of the people of the state."

At page 20 of its brief, the LCB repeats its flawed argument that it would need to defend that validity of local ordinances, despite, as argued above, the fact that ordinances are deemed valid upon adoption under the GMA and only to be found invalid by the GMA Hearing Board, not the LCB. Additionally, it is well-settled in Washington the local ordinances cannot be challenged during permit review. Additionally, as argued above, in a review hearing of a denial, the agency merely needs to show substantial evidence, and a local objection based on zoning would constitute such evidence to ground a denial.

The final section of the LCB's brief (pages 24-28) admits that there is a problem, but asserts that, since the local government still has police power to enforce its regulations, it can clean up that mess itself. The problem with that argument is, as shown above, the GMA speaks in terms of coordination, consistency, integrating framework, and predictability. The statutory framework (which was elegantly synthesized by the Superior Court in its Order) contemplates governments working together to meet the challenges that growth and development place upon society. It is anathema to that sense to coordination and common purpose for the LCB to assert, as it does in this matter, that it can and will work at cross-purposes with local governments and the fact that this causes problems is of no concern to it because local governments can expend their code enforcement resources and clean up the problem. The LCB's position is incongruous with the legal framework the Legislature has crafted. The LCB's order is an erroneous interpretation of the law, it is contrary to agency rule, outside the LCB's statutory authority, and arbitrary and capricious. The Superior Court correctly determined this. The Superior Court's order clearly and correctly synthesizes the laws. The LCB's order must be reversed and the Superior Court's order must be affirmed.

New Regulations Support County's Position

The Legislature has created a forfeiture provision that is applicable, only, to marijuana retail licenses. The provisions for marijuana retail licenses are found at RCW 69.50.325(3) with the provisions for the new forfeiture provision beginning at sub (c).

(3)(a) There shall be a marijuana retailer's license to sell marijuana concentrates, useable marijuana, and marijuana-infused products at retail in retail outlets, regulated by the state liquor and cannabis board and subject to annual renewal. The possession, delivery, distribution, and sale of marijuana concentrates, useable marijuana, and marijuana-infused products in accordance with the provisions of this chapter and the rules adopted to implement and enforce it, by a validly licensed marijuana retailer, shall not be a criminal or civil offense under Washington state law. Every marijuana retailer's license shall be issued in the name of the applicant, shall specify the location of the retail outlet the licensee intends to operate, which must be within the state of Washington, and the holder thereof shall not allow any other person to use the license. The application fee for a marijuana retailer's license shall be two hundred fifty dollars. The annual fee for issuance and renewal of a marijuana retailer's license shall be one thousand three hundred eighty-one dollars. A separate license shall be required for each location at which a marijuana retailer intends to sell marijuana concentrates, useable marijuana, and marijuana-infused products.

(b) An individual retail licensee and all other persons or entities with a financial or other ownership interest in the business operating under the license are limited, in the aggregate, to holding a collective total of not more than five retail marijuana licenses.

(c)(i) A marijuana retailer's license is subject to forfeiture in accordance with rules adopted by the state liquor and cannabis board pursuant to this section.

(ii) The state liquor and cannabis board shall adopt rules to establish a license forfeiture process for a licensed marijuana retailer that is not fully operational and open to

the public within a specified period from the date of license issuance, as established by the state liquor and cannabis board, subject to the following restrictions:

(A) No marijuana retailer's license may be subject to forfeiture within the first nine months of license issuance; and

(B) The state liquor and cannabis board must require license forfeiture on or before twenty-four calendar months of license issuance if a marijuana retailer is not fully operational and open to the public, unless the board determines that circumstances out of the licensee's control are preventing the licensee from becoming fully operational and that, in the board's discretion, the circumstances warrant extending the forfeiture period beyond twenty-four calendar months.

(iii) The state liquor and cannabis board has discretion in adopting rules under this subsection (3)(c).

(iv) This subsection (3)(c) applies to marijuana retailer's licenses issued before and after July 23, 2017. However, no license of a marijuana retailer that otherwise meets the conditions for license forfeiture established pursuant to this subsection (3)(c) may be subject to forfeiture within the first nine calendar months of July 23, 2017.

(v) 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.

The forfeiture provision is only available for retail licenses (not production or processor licenses) and is not relevant to either license issuance or renewal.

Basically, what the provision does is allow LCB to forfeit retail license if those licensees have not gotten up and running within a certain time. It also creates an exception that a license cannot be forfeited if that failure to become operational was caused by local zoning. Given that RCW 36.70A.103 and WAC 365-196-530 require state agencies to act in accord with local zoning when engaging in permit issuance, the exception is basically saying that if the reason for the retail licensee not being operational is was caused by LCB's violation of the GMA, in not acting in accord with local zoning, the license will not be forfeited because that was LCB's fault, not the fault of the licensee. This regulation supports the county's position that the LCB is to license operations in accord with local zoning and here we see a specific instance where the Legislature carves out an exception to protect licensees from the LCB's GMA violations. This provision protects licensees from harms caused by the LCB's GMA violations. This does nt support LCB's position at all. This in no way indicates that the LCB is to ignore local zoning, but merely stands for the proposition that those already harmed by that ignorance will not further be harmed by having their incorrectly issued license forfeited.

This provision, which is cognizant of local zoning, is inapplicable to license issuance or renewal, only to the new forfeiture provision. The GMA already prohibits LCB from issuing licenses in derogation of local zoning (and from reissuing the same). Hence, there is no need for the Legislature to address issuance or renewal because it is already prohibited. The fact that this does not apply to license issuance or renewal (as one can see by contrasting the wording in sub (a) with that in sub (c)) supports the county's position.

The provision that licenses issued in tribal lands (RCW 69.50.331) must have tribal approval also supports the county's position. RCW 36.70A.103 (which, in conjunction with WAC 365-196-530, requires the state to only grant licenses that are in accord with local zoning) is only applicable to entities that plan under the GMA. Indian tribes are governed by federal law and so are not subject to, nor plan under, the GMA. Hence, having a provision requiring tribal approval, or that licenses be issued in accord with tribal regulations, merely provides the same safeguard on Indian lands as had been required elsewhere via the GMA.

Conclusion

In the GMA there is the recognition that "state and local government have invested considerable resources in an act that should

serve as the integrating framework for other land use related laws...”

WAC 365-196-010(1)(j). A part of that integrating framework is the requirement that “applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.”

RCW 36.70A.020(7). A part of that integrating framework designed to ensure predictability is the coordination for “common goals” to benefit “the health, safety, and high quality of life” for the people of this state.

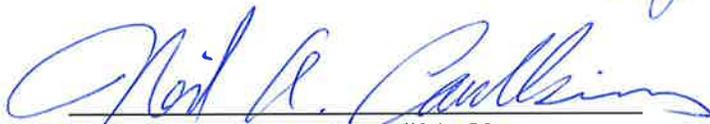
RCW 36.70A.010. A part of this integrating framework of predictability and common goals is RCW 36.70A.103, which says “State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter” A part of this integrating framework of predictability and common goals is

WAC 365-196-530, which provides that the state shall meet local siting and building requirements when it is a project applicant; that the state will not administer its programs in a manner that interferes with local government responsibilities; that state programs are required to take into account local GMA regulations – specifically calling out state permit issuance functions; and that state programs are to be reviewed and altered as local regulations evolve to achieve “consistency.” The LCB was established under Ch. 66.08 RCW, where it states that “all provisions [of that title] shall be liberally construed for the accomplishment of . . . the

protection of the welfare, health, peace, morals, and safety of the people of the state.” RCW 66.08.010. The authority of the LCB is to be liberally construed to enable it to have “full power to do each and every act necessary to the conduct of its regulatory functions.” RCW 66.08.050(8). This integrating framework to promote predictability and common goals includes RCW 69.50.331, which provides that the LCB is to take a “comprehensive” review of an application and that the LCB has discretion to deny a license based on, “without limitation,” county objections. Those objections are not limited in scope and they are to be liberally construed to give the LCB “full power” to do everything necessary to its regulatory function. This integrating framework includes WAC 314-55-165, which specifically provides for county objections that show a detrimental impact to the “safety, health, or welfare of the community.” This integrating framework includes WAC 314-55-050(17), which specifically states that a basis for denial is an LCB determination that “the issuance of the license will not be in the best interest of the welfare, health, or safety of the people of the state.” Again, these provisions specifically related to the LCB are to be liberally construed to give it full power to accomplish its regulatory functions. This integrating framework includes case law stating that “the purpose of traditional zoning is to protect the public health, safety, and welfare.” (99 Wn.2d at 369).

WSLCB Order No. 01-2017 must be reversed because it is an erroneous interpretation and application of the law, it is inconsistent with applicable statutes and agency rules, it is outside the LCB's statutory authority, and is arbitrary and capricious. The order of the Superior Court should be affirmed.

SUBMITTED this 1st day of August, 2018.



Neil A. Caulkins, WSBA #31759
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

On the day set forth below, I deposited in the U.S. Mail a true and accurate copy of:

- Respondent Kittitas County's Brief

to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 1st day of August, 2018, at Ellensburg, Washington.


Rebecca Schoos

KITTITAS COUNTY PROSECUTOR'S OFFICE

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