NO. 45565-0-II

IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

CITY OF BURLINGTON, a Washington Municipal Corporation,

Appellant,

vs.

WASHINGTON STATE LIQUOR CONTROL BOARD; a Washington Agency; HAKIM SINGH AND JANE DOE SINGH, and the marital community composed thereof; and HK INTERNATIONAL, LLC, a Washington Limited Liability Company,

Respondents.

BRIEF OF AMICI CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS & WASHINGTON STATE ASSOCIATION OF COUNTIES

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I. INTRODUCTION

When the voters approved Initiative 1183 that privatized liquor sales in Washington, they did so with the recognition that "[l]icense issuances and renewals are subject to RCW 66.24.010 and the regulations promulgated thereunder, *including without limitation rights of cities, towns, county legislative authorities*, the public, churches, schools, and public institutions *to object to or prevent issuance of local liquor licenses*." LAWS OF 2012, ch. 2, § 103(3)(b), *codified at* RCW 66.24.360(3)(b) (emphasis added); *see also id.* § 105(5), *codified at* RCW 66.24.055(5). The trial court below reduced the voters' recognition of local government "rights" to a hollow promise because it rendered a statutory obligation of the Washington State Liquor Control Board (LCB) to "give … due consideration to the location of the business to be conducted under such license with respect to the proximity of churches, schools, and public institutions," RCW 66.24.010(9)(a), and "give substantial weight to objections from an incorporated city or town or county legislative authority based upon chronic illegal activity," RCW 66.24.010(12), to unenforceable suggestions. That is not what the voters intended, and that is not what the legislature intended. To properly give effect to legislative intent, this Court should adopt the arguments of the City of Burlington, recognize its standing under the Administrative

Procedure Act (APA), ch. 34.05 RCW, and allow the municipality its day in court.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association of Municipal Attorneys (WSAMA) is a non-profit organization of municipal attorneys in Washington. Washington has 281 cities and towns, ranging from Seattle at over half a million citizens to Krupp, with a population of about 60. WSAMA members represent municipalities throughout the state, as both in-house counsel and as private, outside legal counsel.

The Washington State Association of Counties (WSAC) is a non-profit association whose membership includes elected county commissioners, council members and executives from all of Washington's 39 counties. It provides a variety of services to its member counties including advocacy training and workshops, a worker's compensation retrospective rating pool, and a forum in which to network and share best practices. Voting within WSAC is limited to county commissioners, council members and county executives; however WSAC also serves as an umbrella organization for affiliate organizations representing county road engineers, local public health officials, county administrators, emergency

managers, county human service administrators, clerks of county boards, and others.

Both WSAMA and WSAC have an interest in ensuring that its members retain the standing to challenge erroneous and unlawful decisions of the LCB within their respective jurisdictions. This brief will focus solely on whether a local government, which here is the City of Burlington, has standing under RCW 34.05.530 to seek judicial review in such cases.[1]

III. STATEMENT OF THE CASE

As discussed below, the critical issue in this case is one of law, namely statutory interpretation. As such, WSAMA/WSAC incorporate by reference the factual discussion presented by the parties, thus negating any need to repeat them here.

IV. ISSUE PRESENTED

Whether a local government that is statutorily entitled under RCW 66.24.010 to notice, the right to object to a proposed issuance or renewal of a liquor license, and to have its objections given substantial weight, has standing under the Administrative Procedure Act to seek relief from the

[1] WSAMA and WSAC agree fully with Burlington's other arguments, but do not repeat them here in the interest of brevity.

courts when its objections are ignored, disregarded, and/or overruled by the Liquor Control Board.

V. ARGUMENT

The critical question presented is whether the City of Burlington has standing under RCW 34.05.530 to seek judicial review of the LCB's refusal to properly consider its objections. LCB argues extensively in its briefing that Burlington's attempt to raise its objections insufficiently met the test to establish its standing under the APA. This argument should be rejected, as it unreasonably conflates the relative merits of a local government's arguments with whether the local government can present those arguments in the first place. When chapter 66.24 RCW is read in conjunction with chapter 34.05 RCW, it follows that when a local government timely raises objections to the issuance or renewal of a liquor license, it has the right to seek judicial review when the LCB fails to properly consider those objections. The importance of this case cannot be discounted, for the exact same statutory structure is in place for marijuana under Initiative 502. Under that landmark initiative, individuals may now grow, process, and sell marijuana for adult recreational usage, provided that the person obtains a license from the LCB. RCW 69.50.331. Critically, a local government's ability to object and the LCB's obligation

to recognize such an objection to the issuance of marijuana licenses is identical to LCB's duties to Burlington in the case here involving a liquor license. Because the LCB's obligations to properly consider a local government's objections under I-502 are identical to those under I-1183, affirming the trial court here will absolve the LCB of any meaningful checks or balances in both the liquor and marijuana context. It would send a message that local governments are powerless to protect its citizens when the LCB ignores its own procedures and grants liquor or marijuana licenses in a manner not contemplated by the voters. The judgment of the superior court must be reversed.

A. A local government's entitlement to have its objections given due consideration and substantial weight under RCW 66.24.010 would be meaningless absent a procedure to obtain judicial review.

Whether a court is reviewing an initiative enacted by the people or statute enacted by the legislature, the principles governing the task remain the same. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762, 27 P.3d 608 (2000). "[T]he court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure." *Id.*; *see also Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) ("The court's fundamental objective is to ascertain and carry out the Legislature's intent. . . ."). This purpose is accomplished by examining

the language of not only the statute, but all the legislature (or voters) have said on that issue. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Importantly, statutes should be read so that no provision is rendered meaningless. *Id.* at 823.

No one disputes, and rightfully so, LCB's duty to give notice to all affected local governments of an application for a liquor license issuance or renewal:

> Unless (b)[2] of this subsection applies, before the board issues a new or renewal license to an applicant it *must give notice of such application* to the chief executive officer of the incorporated city or town, if the application is for a license within an incorporated city or town, or to the county legislative authority, if the application is for a license outside the boundaries of incorporated cities or towns.

RCW 66.24.010(8)(a) (emphasis added). The affected local government then has a time certain within which it must raise any objections it has to the issuance of a license. RCW 66.24.010(8)(c). That period is either "twenty days after the date of transmittal of such notice for applications, or at least thirty days prior to the expiration date for renewals." *Id.* If the local government's objections are "*based upon* chronic illegal activity associated with the applicant's operations of the premises proposed to be

[2] RCW 66.24.010(8)(b) applies when an applicant seeks a liquor license for an event to be held "during a county, district, or area fair as defined by RCW 15.76.120" and the fairgrounds are located on county property but still within a municipality's jurisdiction. Although that circumstance is not present in Burlington's case, the legislature has directed the LCB in those cases to give primary notice to the county, but also a duplicate to the municipality. RCW 66.24.010(8)(b).

licensed or the applicant's operation of any other licensed premises," the LCB is required to give those objections "substantial weight." RCW 66.24.010(12) (emphasis added). And:

> Before the board issues any license to any applicant, it *shall give* (i) *due consideration* to the location of the business to be conducted under such license with respect to the proximity of churches, schools, and *public institutions* and (ii) written notice, with receipt verification, of the application to *public institutions* identified by the board as appropriate to receive such notice, churches, and schools within five hundred feet of the premises to be licensed.

RCW 66.24.010(9)(a). The term "public institution" is statutorily defined to mean "institutions of higher education, *parks*, community centers, libraries, and transit centers." *Id.* (emphasis added). When the legislature (or voters) has supplied a statutory definition, neither the courts nor any state agency may rewrite it or supplant that meaning with their own interpretation. *State v. Evans*, 164 Wn. App. 629, 634, ¶ 8, 265 P.3d 179 (2011). Thus, when an applicant's proposed business has close "proximity" to any "park[], community center[], librar[y], [or] transit center[]," the LCB is not free to ignore those concerns, but rather *must* give them "due consideration." RCW 66.24.010(9)(a). The requirement to give local governments not only notice and the ability to object, but also substantial deference and due consideration when they do object is in line with "one of the chief objects of local government," namely "the preservation of public health and public safety." *Shepard v. City of*

Seattle, 59 Wash. 363, 375, 109 P. 1067 (1910). To be sure, the trial court here found that this local government has always been "entrusted with ensuring public safety, including the prevention of minors obtaining alcohol, and fighting crime." CP 224 (FF 11). No party has challenged this finding, so it is therefore a verity on appeal. *State v. Link*, 136 Wn. App. 685, 695-96, ¶ 30, 150 P.3d 610 (2007).

When the LCB finally decides on whether to issue a license, it is beyond dispute that the applicant can seek judicial review if its request is denied. RCW 66.24.010(8)(d). But if the LCB disregards its statutory obligations as it did here and grants a license application in total deviation from what the statute mandates, neither the applicant nor the LCB will seek judicial review. Consequently, the trial court's view on the municipality's standing is upheld, there would exist no check on the LCB's ability to completely disregard the voters' and legislature's directives. It would be an absurd result—namely denying anyone and everyone the ability to challenge the LCB's failure to follow the law by issuing licenses contrary to statute and legislative intent. "Constructions that yield unlikely, absurd, or strained consequences must be avoided." *City of Seattle v. Fuller*, 177 Wn.2d 263, 270, ¶ 9, 300 P.3d 340 (2013). The absurd result posited by LCB can be avoided here, namely by

recognizing local government's ability to seek judicial review under the APA so long as they preserve that objection before the LCB.

B. Standing under the Administrative Procedure Act is not a demanding test, and that test is met here.

For one to have standing under the APA, three elements must be present:

> (1) The agency action has prejudiced or is likely to prejudice that person;
>
> (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
>
> (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action

RCW 34.05.530. These elements stem from federal case law, *Seattle Bldg. & Const. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 793, 920 P.2d 581 (1996), and the legislature has directed the courts to interpret the APA consistent with federal law, RCW 34.05.001.

The courts have labeled subsections (1) and (3) of RCW 34.05.530 as the "injury-in-fact" prongs and subsection (2) and the "zone of interest" prong. *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 327, 997 P.2d 360 (2000). Regardless of how these elements are labeled, if a person—whether that be "any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, … includ[ing] another agency," RCW

34.05.010(14) (defining "person" under the APA)—can establish all three elements under RCW 34.05.530, a right to judicial review exists.

No one can reasonably dispute that a local government's "asserted interests are among those that the [LCB] was required to consider when it engaged in the … action challenged." RCW 34.05.530(2). Statutorily, the LCB is required to give "substantial weight" to objections raised by a local government if those objections are "based upon chronic illegal activity." RCW 66.24.010(12). And if the local government operates a nearby park, community center, or transit center, the LCB must give "due consideration" to any objections timely raised. RCW 66.24.010(9)(a). Consequently, RCW 34.05.530(2) is easily satisfied.

The LCB seems to suggest, though, that Burlington failed to sufficiently prove that "chronic illegal activity" plagued the mini-mart in question, and therefore the obligation to consider the City's objections never materialized. *See* Br. of Respondent WSLCB at 9, 17-19. It must be remembered that the "zone of interests" prong "is not meant to be especially demanding." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987). LCB's argument is misguided because, statutorily, its obligation to give "substantial weight" to Burlington's objections arises when those objections are "*based upon* chronic illegal activity," not whether Burlington affirmatively proves

(especially without the LCB permitting a full evidentiary hearing) "chronic illegal activity." The clear statutory obligation to give notice to local government, give "due consideration" to its objections when the proposed site is near a public park, and give "substantial weight" to objections "based upon chronic illegal activity" is more than enough to meet RCW 34.05.530(2). As a result, so long as the LCB's wholesale disregard of a local government's objections "has prejudiced or is likely to prejudice" a local government, and a favorable judicial decision "would substantially eliminate or redress the prejudice to" the local government, there is standing to go to court. RCW 34.05.530(1), (3).

On that point of law, the Supreme Court's decision from two years ago is instructive, if not dispositive. *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 278 P.3d 632 (2012) (*WASAVP*). *WASAVP* considered a group's argument that it had standing to challenge the constitutionality of I-1183 because "its goals of preventing substance abuse could reasonably be impacted by I–1183's restructuring of Washington's regulation of liquor." *WASAVP*, 174 Wn.2d at 653, ¶ 25. The Court held that in light of the reasonable impact the initiative would have on the organization's goals to curb substance abuse, the organization satisfied the "injury in fact" prong to establish standing to bring a declaratory judgment action. *Id.* at 653, ¶¶ 23-25.

The same can be said of local governments here, all of which have the goal of protecting public health and welfare, a goal that is furthered by preventing alcohol abuse by minors. *Accord* CP 224 (FF 11). By issuing a license in complete disregard of the local government's objections (which it has a statutory right to raise) that are based on "its goals of preventing substance abuse [which] could reasonably be impacted by [the issuance of the license," *WASAVP*, 174 Wn.2d at 653, ¶ 25, the local government has been prejudiced, RCW 34.05.530(1). And a favorable judgment in court would correct that prejudice. RCW 34.05.530(3). The APA requires nothing more to open the courthouse doors.

This conclusion is bolstered by reviewing federal case law, as those decisions are highly persuasive, if not dispositive, on issues of standing. RCW 34.05.001; *Seattle Bldg. & Const. Trades*, 129 Wn.2d at 793-94. For example, the United States Court of Appeals for the District of Columbia found that a county had standing to challenge an agency's order granting an application to surrender its license to operate a hydroelectric dam and powerhouse. *Jackson County v. FERC*, 589 F.3d 1284, 1288 (D.C. Cir. 2009). The court reasoned that the county met the "injury in fact" requirement for Article III standing because "the threatened physical destruction of property within [the county's] borders [would] substantially alter Jackson County's geography by converting a

dammed lake into a free flowing river and eliminate a possible power source." *Id.* (second alteration in original). Thus, if an agency's licensing decision threatens the safety and peace of a local government's ability to protect its citizens, the decision "prejudice[s]" the local government. RCW 34.05.530(1). There can be little doubt that alcohol—and in particular its proximity to minors—is a paramount concern of local government. Indeed, that fact is a conclusively established verity that cannot be disputed. CP 224 (FF 11).

Burlington's position also finds support in Colorado. *Bd. of County Comm'rs v. Dep't of Pub. Health & Env't*, 218 P.3d 336, 341 (Colo. 2009). Similar to what occurred here, a state agency there issued a license to a facility to accept and dispose of low-level radioactive materials. *Id.* at 339. Under state law, though, the applicant was required to first obtain a Certificate of Designation, but the state agency violated state law and issued the license anyway. *Id.* at 339-40. The affected county then sued for declaratory relief, but its case was dismissed for lack of standing, a dismissal that was initially affirmed by an intermediate appellate court. *Id.* at 340. The Colorado Supreme Court reversed, holding that the county satisfied the requirement of establishing an "injury in fact" because the agency denied the county the ability to issue or not issue the preliminary certificate. *Id.* at 341. In short, the court held that

because the state agency issued a license contrary to state law, the affected county had standing to seek judicial review under the state's Administrative Procedure Act. *Id.*

These decisions weigh heavily in favor of holding that Burlington has standing to seek judicial review here. The LCB is not correct when it argues that a local government lacks standing to challenge an agency's licensing decision, particularly when it does so in disregard of a local government's objections that the LCB is required to consider and give substantial weight, or at a minimum, due consideration. The local government agency must be allowed its day in court to have the independent judiciary review such a decision.

C. Depriving the City of Burlington of standing here would equally deprive all local governments from illegal or wrongful actions by the LCB in matters of marijuana growth, processing, and selling, an absurd result that cannot be sustained.

In 2012 the voters also passed Initiative 502, a landmark piece of legislation that embarked Washington into unchartered waters by decriminalizing marijuana. *See* LAWS OF 2013, ch. 3. As is the case with liquor privatization, the LCB was charged with the responsibility to evaluate and license applicants who desired to grow, process, or sell marijuana. RCW 69.50.331. Most notably, the LCB's obligations to give notice to local governments and "substantial weight" to the objections of

that local government are identical to whether the license is for marijuana or liquor. *Compare* RCW 69.50.331(7)(c), (9) *with* RCW 66.24.010(8), (12). And like Title 66 RCW, the language governing the applicability of the APA is identical in Initiative 502. *Compare* RCW 69.50.331(7)(c) *with* RCW 66.24.010(8)(d). "When the same words are used in different parts of the same statute, it is presumed that the Legislature intended that the words have the same meaning." *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 313, 884 P.2d 920 (1994). Thus, upholding the trial court's rejection of Burlington's standing under chapter 66.24 RCW would be tantamount to rejecting a local government's ability to protect its citizens from the LCB's wrongful issuance of a marijuana license. That is not what the voters or the legislature intended, meaning that is not how the court should interpret the statute. *Fuller*, 177 Wn.2d at 270, ¶ 9.

VI. CONCLUSION

For all of the foregoing reasons and for the reasons stated by the City of Burlington, WSAMA and WSAC respectfully request that this Court reverse the decision of the superior court and recognize Burlington's standing to seek judicial review under the APA.

RESPECTFULLY SUBMITTED this 16th day of July, 2014.

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[3] Pursuant to General Rule 30(d)(2)(E)(ii), Mr. Lloyd represents that he has the express authority from Mr. Weiss to electronically sign this brief on his behalf.

CERTIFICATE OF SERVICE

I certify that on the date referenced below, I mailed (via first class mail, postage prepaid) a copy of the foregoing document to each and every attorney of record herein, as identified below:

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