Case No. 73646-9-1

In the Court of Appeals of the State of Washington, Division One

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GREENSUN GROUP LLC,

Appellant

vs.

CITY OF BELLEVUE,

Respondent

APPELLANT GREENSUN'S REPLY BRIEF

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a. Chad Barnes's letter of July 29 was not a land use decision reviewable under LUPA.

In its response brief, the City does not dispute Greensun's assertion that the City's action on Greensun's application for a business license is not a land use decision appealable under LUPA pursuant to RCW 36.70C.020(2)(a), but rather the City argues its actions were an "interpretative or declaratory decision" and an "enforcement" action subject to LUPA under subsections (b) and (c) of RCW 36.70C.020(2). The City's argument fails to account for all the elements of the definition of a "land use decision" under RCW 36.70C.020 and cites cases which are distinguishable. Regarding interpretative and declaratory decisions which are appealable under LUPA, the full scope of the definition is as follows:

> (2) "Land use decision" means a *final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination*, including those with authority to hear appeals, on:
> ....
> (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property...
>
> RCW 36.70C.020(2)(b) (Emphasis added).

In this case, the letter of Assistant City Attorney, Chad Barnes, dated July 29 announcing the denial of Greensun's business license is not

a final determination by the City's "officer with the highest level of authority to make the determination" on "an interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances regulating...use of real property." Under Bellevue's municipal code the "body or officer with the highest level of authority" to make such an interpretative or declaratory decision is the Director of the Development Services Department (DSD) or the hearing examiner in the event of an appeal. Moreover, the Director of DSD is authorized to make a final determination on an interpretation of a zoning ordinance and its application to a specific property only after following the procedure for doing so as set forth in B.C.C. 20.30K. B.C.C. 20.30K.130 contains the following explicit mandate: "The Director shall interpret the provisions at the Land Use Code in conformance with this Part 20.30K." In this case, no application was made by Greensun or anyone else to invoke the process for issuance of an interpretative decision, nor did the Director of DSD author or sign an interpretative decision in accordance with B.C.C. 20.30K.

The definition of an interpretative decision under RCW 36.70C.020(2)(b) must be construed in light of RCW 36.70B.110(11) which was adopted at the same time as LUPA. RCW 36.70B.110(11) expressly required Bellevue and every other local government planning

under the Growth Management Act to "adopt procedures for administrative interpretations of its development regulations." Thus, it is logical to conclude that the reference in RCW 36.70C.020(2) to "a final determination by the local jurisdiction's body or officer with the highest level of authority to make the determination" with respect to an interpretative decision is reference to a decision made in accordance with the procedures for administrative interpretations of development regulations, adopted pursuant to RCW 36.70B.110(11).

There are sound public policy reasons for the framework the Legislature adopted in RCW 36.70B and RCW 36.70C which limits judicial review under LUPA to those final determination made by the jurisdiction's highest body or officer in accordance with the jurisdiction's adopted procedures for issuing administrative interpretations of the application of zoning codes to specific properties. First, this framework assures a full vetting of the issues before engaging judicial resources and the expense of litigation. Under Bellevue's adopted procedure for issuing interpretations of its zoning code, a period of public notice and public comment is held before the Director issues an interpretive decision. The Director's decision is then published. B.C.C. 20.35.200-235. The applicant and any person who has submitted a comment is entitled to appeal the Director's decision to a hearing examiner. If an appeal is filed,

the hearing examiner conducts an open record hearing at which parties may present testimony. Within 10 working days of the close of the record, the hearing examiner issues a decision which is subject to review to Superior Court. B.C.C. 25.35.250. In short, only cases not resolved after this process with public notice and comment and a trial-type hearing will be brought before the courts. The reference in RCW 30.70C.20(2)(b) to a "final determination" should be construed to mean the final determination entered at the conclusion of the local jurisdiction's administrative process adopted pursuant to RCW 36.70B.110(11).

Second, if the Legislature had not limited jurisdiction under LUPA to those final interpretative decisions issued by the local jurisdiction's highest body or officer after following adopted administrative procedures, the courts would be inundated with zoning interpretation cases. If every letter or e-mail of a municipal planner containing an interpretation of a zoning code unsatisfactory to a property owner or an interested party were subject to LUPA, that owner or interested party would feel compelled to file suit under LUPA or face being barred from challenging the interpretation after 21 days. The Legislature wisely structured LUPA so that the writings and e-mails of mid-level municipal staff on zoning interpretations would not invoke superior court jurisdiction for review. Only the "final determination" by the local jurisdiction's "body or officer

with the highest level of authority to make the determination" is subject to review under LUPA. Barnes's letter does not rise to that level and, therefore, was not a land use decision reviewable pursuant to LUPA.

Barnes's letter also does not qualify as an enforcement action under subsection (c) of RCW 36.70C.020(2). Again, to qualify as an enforcement action under subsection (c) it must be based upon a determination by the City's "officer with the highest level of authority to make the determination". Under the City's code, Director of DSD is responsible for the administration and enforcement of zoning code. B.C.C.20.40.100. The Director has authority to issue a stop work order. B.C.C. 20.40.470. Alternatively, the Director may issue a notice of civil violation under B.C.C. 1.18.040 which leads to civil penalties and is subject to review by a hearing examiner. Bellevue's code is clear that it is the Director of DSD, not an assistant city attorney or any other staff member, who has authority to commence the civil enforcement remedies under the City's code. In this case, the Director of DSD did not issue a stop work order or notice of civil violation of Greensun.

In support of its contention that Barnes's letter of July 29, was an enforcement action under LUPA, the City cites *Brotherton v. Jefferson County*, 160 Wn. App. 699, 249 P.3d 666 (2011). In *Brotherton*, Jefferson County informed the Brothertons that the holding tank on their property

violated state and local sewage system regulations and ordered them to correct the violation. In holding that the Brotherton's action was time barred under LUPA, the court found that the denial of their waiver request was the county's final determination on an enforcement action. Unlike *Brotherton*, this case does not involve a notice from the City that Greensun was violating any state or local ordinance concerning its property nor an order from the City directing it to correct any violation. There is no statement in Barnes's letter of July 29 asserting that Greensun's property was in violation of any city code. There is simply no basis for characterizing Barnes's letter as an enforcement action.

b. Closer examination of the City's "coordinated process" argument exposes the nature of this action and the violations of due process.

In its brief the City argues that Greensun's business license could have been issued and later revoked and that, therefore, its so-called "coordinated process" with DSD's involvement in denying its issuance is more "customer-oriented". *Bellevue's Response* at 41-42. A closer examination of this proposition reveals (1) the true nature of the City's action and (2) the scope of its violations of Greensun's constitutional rights. The City acknowledges in its brief that it received Greensun's application for a business license in late May and on June 3, it sent Greensun a letter saying it would only issue business licenses to the four

marijuana retailer applicants selected for further consideration by the Liquor Control Board ("LCB"). The City further acknowledges that two days later it was advised by the LCB that Greensun had been advanced to one of those four applicants. What then would have been the posture and outcome of this case if the City had issued a business license to Greensun immediately after receipt of LCB's notification?

Contrary to the suggestion in the City's brief, the City could not have immediately revoked the business license. The City points out that the Director of Finance is authorized to suspend or revoke the business license of any licensee who "has failed to comply with any provisions of the Bellevue City Code." B.C.C. 4.03.230.A.3. However, in June of 2014, Greensun was not out of compliance with any City code. Indeed, it was not yet operating a business and simply awaiting final approval of its marijuana retailer license by the LCB.

Moreover, if Greensun had opened its retail marijuana store in July after LCB issued its license, the City could not have revoked its business license at that time, because its operation was not in violation of any City Code. At that time the only relevant Code provision was the prohibition against one marijuana retailer locating within 1,000 feet of another marijuana retailer. In July, Greensun was the only marijuana retailer. Therefore, it was not in violation of any City Code provision.

DSD staff might have argued that Greensun's retail marijuana store was in violation of the First-In-Time Rule announced in the letter of Catherine Drews dated June 24. The question then would be how would action contrary to a letter from DSD staff constitute a violation of City Code supporting revocation of a business license. Arguably, violation of a rule adopted by the Director of DSD pursuant to B.C.C. 20.40 would constitute a violation of City Code. However, as argued in Greensun's Opening Brief, the First-In-Time rule was not a rule duly adopted under the rule-making procedures of the Code.

Assuming that DSD staff nevertheless wished to press for revocation of Greensun' business license, what would have been the process for doing so? First, DSD staff would have had to convince the Director of Finance to issue a notice of intention to suspend or revoke Greensun's business license, since the Director of Finance is the official authorized to revoke or suspend business licenses under B.C.C. 4.03.230. If the Director elected to exercise such authority, he or she would have sent Greensun a notice of the intended revocation and the grounds therefore. Greensun would have had the right to challenge the suspension or revocation in a hearing before a hearing examiner pursuant to B.C.C. 4.03.230B. The hearing examiner's decision would be subject to review in King County Superior Court pursuant to B.C.C. 4.03.230D. The

suspension or revocation of the business license would be stayed while the case was under appeal before the hearing examiner and the Superior Court.

Thus, if the City had issued a business license to Greensun in June and then sought to revoke the business license after Greensun opened its retail marijuana store in July, the action before Superior Court would have been an action for review of revocation of a business license by the Director of the Department of Finance. Such review of the Finance Director's actions clearly would not have been "a land use decision" within the definitions in LUPA. Indeed, in adopting the procedures for revocation of a business license, the City Council apparently understood that revocation of a business license did not invoke jurisdiction under LUPA, since it expressly provided for a 30 day period for filing an appeal of the hearing examiner's decision in King County Superior Court, rather than the 21 day appeal period required under LUPA.

It is also instructive to compare the due process protections for revocation of a business license under B.C.C. 4.03.230 and the treatment Greensun received from DSD staff and the assistant City Attorney in the denial of its business license. In the license revocation procedure under B.C.C. 4.03.230, Greensun would have had the opportunity to have an independent hearing examiner consider whether the First-In-Time Rule

adopted by mid-level planning staff was a properly adopted rule or an overreaching attempt by administrative staff to legislate new policy. If the hearing examiner upheld the legality of the First-In-Time Rule, Greensun would have had the opportunity to present evidence to show that the *date of issuance* of the LCB licensing letters—the express criteria set out in Drews' June 24 letter—was the same date for both Greensun's and Par 4's letters. Greensun would also have had the opportunity to present evidence that the LCB had not ranked the order of issuing licenses on July 7 and could not say whether Greensun's license was issued before Par 4's or vice versa.

By comparison, Greensun had no right to or an opportunity for a hearing before an independent hearing examiner following Catherine Drews's pronouncement on July 7 that Greensun would not get a business license because she had determined that Par 4 was "first-in-time." Greensun's counsel was later invited to submit information to Assistant City Attorney, Chad Barnes, but Barnes was not a hearing examiner and made no attempt to conduct an independent trial-type hearing. Rather, he had ex parte communications with Par 4's counsel, conducted his own research of the LCB website and conferred with DSD staff behind closed doors to reach the conclusions announced in his July 29 letter and to cause the Finance Department to withhold issuing a tax registration (a.k.a.

business license) to Greensun and to issue one to Par 4. In short, Greensun was afforded no due process in the denial of its business license.

Looking at the Bellevue City Code in a favorable light, one would conclude that tax registrations (business licenses) are available for any who apply. Like a federal tax identification number, a tax registration under the Bellevue tax code is a number to be used for reporting sales and occupational taxes on business activity. There are no criteria for denying issuance of a business license. However, there are criteria and procedures for suspending and revoking a license. Thus, the City's tax code makes issuance of a business license open to all and effectively automatic, but establishes a procedure with due process protections for suspension or revocation of a business license. The due process protections in the suspension and revocation procedures are important, because the loss of a business license is equivalent to the loss of the right to conduct business in Bellevue. The City Code imposes civil and criminal penalties on anyone doing business in Bellevue without a business license. Thus, the suspension or revocation of a business license is carefully prescribed in the City Code with due process protections.

Unfortunately, the DSD staff subverted the due process protections by inserting itself into the issuance of the business licenses for marijuana retailers. As described above, if DSD staff had allowed Greensun's

business license to be issued in due course shortly after Greensun's application was received, its later efforts to revoke the license would have been subject to the due process protections in the City Code. Instead, DSD staff used closed door processes to cause the Director of Finance to withhold Greensun's business license. In so doing, DSD staff deprived Greensun of its due process rights under the State Constitution.

c. The City improperly argues that Greensun has no right to conduct business in the City of Bellevue.

Bellevue does not dispute Greensun's assertion that Washington Courts have consistently held that the right to carry on a business is a fundamental right in the State of Washington, but suggests that this fundamental right is diminished by Bellevue's ability to implement a blanket, uniform ban of the sale of marijuana within the City Limits. Greensun has not argued that Bellevue lacks the ability to ban certain types of businesses within the City Limits. What is at issue is whether or not the City's administrative action to deny Greensun a business license, which is otherwise permitted under the Bellevue City Code and the Revised Code of Washington, is in violation of Greensun's rights under the Washington State Constitution.

In support of its position that Greensun is not entitled to protections under the Washington State Constitution, the City relies on

Ass'n of Washington Spirits & Wine Distributors v. Washington State Liquor Control Bd., 182 Wn.2d 342, 340 P.3d 849 (2015). The issue the Supreme Court was addressing in that case, however, is fundamentally different. *Ass'n of Washington Spirits* dealt with a regulation that differentiated between liquor wholesalers and those who could sell and distribute spirits under a more limited license. The regulation assigned responsibility for the payment of a certain fee to one category of distributors and not the others. The basis of the suit was whether distinguishing between these two classes of business—both of whom were allowed to conduct their business subject to the state licensing—violated their fundamental rights. The Court held that since there was no showing that the regulation prevented any party from engaging in business, the case did not involve a constitutional issue. The Court did not hold, as Bellevue intimates, that the right of LCB licensees to conduct business is less than the right of any other business owner. Rather, it held that the issue in litigation did not involve a fundamental right but rather classifications for payment of a tax.

Here, however, the dispute is not over a type of business classification, but rather the absolute denial of Greensun's ability to engage in a business on its leasehold, which both the Bellevue City Code

and Washington State Law permit. Bellevue's reading of *Ass'n of Washington Spirits* is erroneous.

d. Greensun properly litigated and demonstrated that the City engaged in arbitrary and capricious conduct.

The City argues that Greensun does not have an independent claim against the City for its arbitrary and capricious conduct. But a review of the record indicates that this issue was fully considered by the Trial Court. *See* CP 346-347 (discussion of HC&D Moving & Storage Seal and standards for arbitrary and capricious administrative conduct); CP 492-493; CP 755. The City further acknowledges that the Trial Court considered Greensun's allegation that Greensun acted arbitrarily and capriciously and was provided an opportunity to specifically brief that issue. *Bellevue's Response at 8-9; VRP (April 17, 2015)* at 45-46. Bellevue has failed to allege that it was either surprised by the claim or make a showing that the factual basis for the claim is different than Greensun's initial claims. The issue was properly raised and considered at the trial court level and Bellevue was invited to brief it and asked how much time it needed to respond. Furthermore, even if the issue was only first raised in Greensun's Motion for Reconsideration, such new legal issues may considered by the Court of Appeals. *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 158, 293 P.3d 407, 410 (2013) (new

legal theories may be raised in a motion for reconsideration of summary judgment).

The City fails to contest that the Courts have a fundamental power to review an agency's action for arbitration and capricious action, nor does it address the argument that an arbitrary and capricious action is a violation of a fundamental right under the Washington Constitution and not tethered to a particular clause within the Constitution. *Pierce Cty. Sheriff v. Civil Serv. Comm'n of Pierce Cty.*, 98 Wn.2d 690, 694, 658 P.2d 648, 651 (1983). The Court has continued to review administrative decisions under its inherent authority. The Court's jurisdiction to review such actions are found in *Washington Const. Article 4 § 6*. Rather, the City relies on its LUPA argument by stating that if Greensun had an arbitrary and capricious claim, it needed to be brought under LUPA. However, since this action is based on the City's denial of a business license, discussed *supra*, LUPA is inapplicable. LUPA only preempts actions to the extent that LUPA applies to the case.

The sole reference in the City's briefing to the merits of Greensun's arguments on the fundamental right is a conclusory statement that Greensun does not meet the "proof beyond a reasonable doubt" standard articulated in *Tekoa. Tekoa Const., Inc. v. City of Seattle*, 56 Wn. App. 28, 34, 781 P.2d 1324, 1328 (1989). That standard, however, applies

to the Court's review of a legislative enactment, not conduct by the City in enforcing such legislation. It is designed to be applied under circumstances where the underlying challenge is to the constitutionality of the ordinance. Here, Greensun is challenging the arbitrary and capricious acts of the City, the City's failure to follow its own City Code, and its discrimination of Greensun, not the rational basis for a 1,000 foot separation requirement in Ordinance No. 6156 as adopted by the City Council.

Greensun did concede that the City Council had the authority adopt a 1000 foot separation requirement in a City ordinance. However, Greensun did not withdraw its challenge to the Bellevue's actions in enforcing the 1000 foot separation and specifically alleged violation of Greensun's constitutional rights under the State Constitution. CP310. At issue, is the development and implementation by DSD staff of the First-In-Time Rule, which is found nowhere in the City's Code.

e. The City fails to explain why *WCHS v. Lynwood* should not be controlling.

In its brief, the City attempts to distinguish *WCHS v. City of Lynnwood*, 120 Wn. App.668, 86 P.3d 1169 (2004) by saying that (1) Greensun does not claim a vested right to operate a retail marijuana store or a failure to process a building permit necessary to obtain state licensing

and (2) the City's zoning code definition of a marijuana retailer makes a state license a prerequisite for a business license. However, these are differences without distinctions. It is true that Greensun, unlike WCHS, was able to complete improvements to its store necessary to pass LCB's inspection for a marijuana retailer license. The building permit it applied for (but has yet to receive) was intended to retroactively address permit requirements for work done in the past. However, like the plaintiff in *WCHS*, Greensun was denied its fundamental right to conduct business by administrative staff who imposed new and arbitrary conditions on issuance of a business license. In *WCHS*, the City of Lynnwood argued that a DSHS/DASA certification was a prerequisite to a business license, because without it WCHS would be an unauthorized business in violation of RCW 35A.82.020. In this case, Bellevue makes the same argument: Greensun is not a lawful business until it is licensed by the LCB. The Court's answer to Lynnwood was that (1) nothing in its tax code made any state certification a prerequisite and (2) the issuance of a business license in anticipation of future activity under state license to be issued would not constitute a violation of state law. In this case, there is nothing in Bellevue's tax code which makes state licensure in any field a prerequisite for issuance of a business license and a violations of the City's zoning ordinance or state law would not occur upon the issuance of a business

license, but rather upon the conduct of a retail marijuana business without an LCB license. In *WCHS*, the court found that city staff had improperly imposed new conditions on issuance of a business license and ordered Lynnwood to issue the license. In its decision the Court cites *Ogden v. City of Bellevue*, 45 Wn.2d 492 (1954) for the constitutional proposition that administrative staff may not legislate new policy in carrying out ministerial duties. In this case, administrative staff have usurped the role of the legislative branch by creating the First-In-Time Rule and barriers to Greensun's receipt of a business license. Its conduct is the same as the improper conduct of the Lynnwood staff in withholding a business license and the Court's outcome should be the same.

f. The Washington State Liquor Control Board issued the licenses in Batch and assigned no order to any license issued on July 7, 2014.

Bellevue continues to mischaracterize the LCB's position with respect to the order of the issuance of the license. In support of that position, it continues to state that Par 4 was licensed on July 3, since the licensing letter dated July 3 was never withdrawn by the LCB. In fact, the City was told the opposite by the LCB: the letter dated July 3 was issued in error on the morning of July 7, that it was corrected by letters issued later on July 7 and that the actual licenses were issued on July 7, 2014. In

addition, the City acknowledged that the LCB had no mechanism to track who was licensed first. CP 740.

The facts are clear, the LCB issued an early draft of the license on July 3, 2014 from a customer service manager at the LCB. The delivery was in fact as follows:

- July 7, 2014 at 9:17 a.m. – Par 4 first receives an email from Elizabeth Lehman, an LCB Customer Service with the attached "July 3, 2014" letter. CP 468-469.
- July 7, 2014 at 1:08 p.m – Par 4 receives an email apologizing for the earlier mistakes and stating that the final version, dated July 7, 2015. CP 480-481
- July 7, 2014 at 3:04 p.m. Greensun receives its letter, in final correct form. CP 476-477.

Nowhere in the record is there any evidence that Par 4, LLC received a license on July 3, 2014—yet the City continues to assert that Par 4 was licensed first because of this clerical error on the first letter e-mailed to Par 4 on the morning of July 7.

When the designated representative of the LCB was asked whether or not the timing of the emails to licensees had any legal effect, indicated a ranking, or order of licensing, the representative answered it did not. CP 372-374. Furthermore, when asked about the licensing "approval" date of July 6, 2014 on a website which Bellevue relies on, the LCB representative stated that the website was not maintained by the LCB's licensing system, was connected to a different department, and that no

licenses were issued on July 6, 2014, a Sunday. CP 376-377. The current business licensing system shows that Par 4, LLC was first issued on July 7, 2014, as is Greensun. CP 92. Notably, nowhere in Bellevue's First-in-Time rule does it reference an approval date, which it now uses.

The City staff has acted with a blatant disregard to the factual circumstances and continues to change the rules. In Ms. Drews's June 24 letter, the City announces a rule that the date of the LCB licensing letters is issued will determine which marijuana retailer was licensed first. When the date of the final licensing letters from LCB to Greensun and Par 4 was the same, staff abandoned its own rule. It then attempted to reach back into the internal processes of the LCB and determine who was licensed first. Its new criteria became the time of receipt of an e-mail from LCB's customer service clerk transmitting a copy of the licensing letter. The staff adopted and used this criteria, even though LCB advised Barnes that it had no ranking of the order of issuance of licenses on July 7 or means of determining who was licensed first. Thus, the new criteria had no factual basis for making a determination of who was licensed first by LCB. Its criteria may only reflect the superior speed of Par 4's e-mail service over Greensun's or the arbitrary order in which a clerk at LCB sent out courtesy e-mails to applicants on July 7 to provide them with a copy of their licensing letter. The staff's use of the time of receipt printed on these

e-mails to determine that a business license should be denied to Greensun, who was ready to open for business, and to grant one to Par 4, who was not ready to open, was completely arbitrary and unsupported by any authority granted staff in the City Code.

g. Respondent's "fill in the gap" argument mischaracterizes the Supreme Court's ruling in *Hama Hama*.

In its brief, the City argues that administrative staff has authority to "fill in the gaps" in the administration of ordinances adopted by City Council and cite *Hama Hama Co. v. Shoreline Hearings Board*, 85 Wn.2d 441, 448, 538 P.2d 157 (1975), for that proposition. Respondent's Brief at 34. However, in *Hama Hama*, the court was dealing with construing an ambiguity in a statute and noted judicial deference to an administrative agency's filling in the gaps in statutory construction, *as long as the agency does not purport to 'amend' the statute. Id at 448.* The judicial deference discussed in *Hama Hama* is not applicable to the case for two reasons. First, Ordinance 6156 is not ambiguous and statutory construction is not at issue. Second, the rules that the City staff have adopted represent a substantial amendment to Ordinance No. 6156 which would authorize staff to withhold the issuance of business licenses and building permits, exercise discretion to determine in advance which of two retail marijuana stores should be permitted to open, and convey a substantial right on an individual without

any opportunity for appeal or review. The City's argument ignores the fact that the City's code authorizes the director of DSD to adopt rules for the administration of the zoning code, *provided* the director first holds a hearing on the proposed rules and has published the proposed rules at least 14 days before the hearing. B.C.C. 20.40.100. None of the rules announced by staff to justify withholding issuance of Greensun's business license and building permit were adopted pursuant to the required rule-making procedures in the City code.

h. Greensun never conceded that City Staff had the authority to develop the first-in-time rule.

In Bellevue's Response at 32, the City argues that Greensun had conceded that the City Staff had the authority to develop the first-in-time determination. As the record indicates at CP 329, Greensun's concession was to the City Council's original adoption of Ordinance No. 6156 and Greensun specifically retained its challenge to the staff's implementation and enforcement of that ordinance. At no point in this case, did Greensun ever submit to the Court a proposed order, or approve Bellevue's proposed order, which included language that the staff properly developed and implemented a first-in-time rule. The Court's Order including that determination was presented solely by Bellevue's counsel. CP 706-707.

i. Greensun properly moved for and is entitled to partial summary judgment.

Bellevue argues that Greensun is not entitled to partial summary judgment since Greensun did not properly file and move for partial summary judgment and attempts to distinguish *Impecoven v. Dep't of Revenue,* 120 Wn.2d 357, 841 P.2d 752 (1992). *Bellevue's response* at 45. The City moved to dismiss the case based upon the application of LUPA and the violation of Greensun's constitutional rights. The trial court acknowledged, as Bellevue states in its brief, that the same legal issues would apply if the Trial Court found a constitutional violation. *VRP (April 17, 2015)* at 44:9-12 and *id.* at 45:9-12. Greensun would be entitled to Summary Judgment in its favor on those issues. After the motion was presented, Bellevue even requested and was provided the opportunity to submit supplemental briefing on those issues. *Id.* at 45-46. The same facts are relevant to both claims the positions are just adverse.

j. The City is not entitled to attorney fees under RCW 4.84.370 for this challenge to its denial of a business license.

This action involves a challenge to the City's decision to deny Greensun a business license which prevented it from opening its retail marijuana store. That decision was formally announced in the letter from Assistant City Attorney Chad Barnes to Greensun dated July 29, 2015 in which he stated, "The City will not grant Greensun Group/Greenside a

business license to operate a retail marijuana outlet at 10600 Main Street, ..." 6156. CP 409.

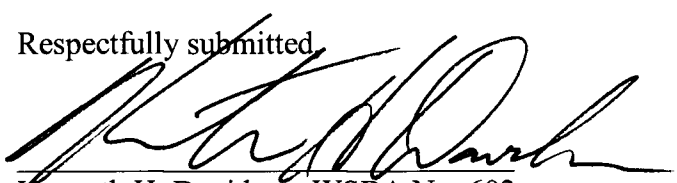
There is no reference in his letter to a denial of a "development permit" within the meaning of RCW 4.84.370. RCW 4.84.370 allows an award of attorney fees on appeal of a city's decision "to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision."

In its brief, the City tacitly acknowledges its actions did not involve any of the land use actions expressly listed in RCW 4.84.370, but suggests that its actions qualify as a "similar land use approval[s] or decisions[s]," citing *Biggers v. City of Bainbridge*, 162 Wn.2d 683, 701-07, 169 P3d 14 (2007). However, *Biggers* is distinguishable. In *Biggers*, the Bainbridge City Council's adopted rolling moratoriums on private property development in shoreline areas. The moratoriums suspended the processing of applications for development permits for shoreline properties for more than three years. The landowners challenged the moratoriums and prevailed before the trial court and on appeal. In awarding them attorney fees, the Court found the City's moratoriums were a "similar land use approval[s] under RCW 4.84.370 because they banned permit applications for each site along the shoreline. *Id at 702.* In

Biggers, the city's moratorium functioned to deny the landowners development permits. In this case, Barnes's letter functioned to deny Greensun a business license from the Department of Finance which Greensun needed to report its sales taxes and operate in the City of Bellevue. Greensun faced civil and criminal sanctions if it operated its business without a tax registration (business license) from Bellevue's Department of Finance. The City's denial of a tax registration for Greensun's business is categorically different from the moratoriums on development permits in *Biggers* and is not a "similar land use approval" under RCW 4.84.370.

DATED NOVEMBER 19TH, 2015, AT KIRKLAND, WASHINGTON.

Respectfully submitted,



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