No. 93606-4

SUPREME COURT OF THE STATE OF WASHINGTON

No. 733646-9-I 73346-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON 736469

GREENSUN GROUP LLC,

Respondent,

v.

CITY OF BELLEVUE,

Petitioner.

CITY OF BELLEVUE'S PETITION FOR REVIEW

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I. INTRODUCTION & IDENTITY OF PETITIONER

In its opinion in this case ("Opinion"), the Court of Appeals reversed the trial court and summarily invalidated the City of Bellevue's ("City's") process for interpreting and enforcing its zoning ordinance requiring that marijuana retailers in the City be separated by 1,000 feet ("1,000 Foot Separation"). Although it is undisputed that the 1,000 Foot Separation is valid and enforceable, the Opinion abrogated the City's facially neutral means for determining which marijuana retailer was first in time for purposes of applying the 1,000 Foot Separation ("First in Time Determination"). The Opinion did not hold that the First in Time Determination violated Respondent Greensun Group LLC's ("Greensun's") constitutional rights or interfered with any rights vested in Greensun (nor did the trial court find any such violation). Instead, the Opinion invalidated the First in Time Determination solely because the City failed to engage in formal rulemaking, even though City code provides that rulemaking is permissive, not mandatory. In so doing, the Opinion takes the unprecedented step of second guessing a city's interpretation and enforcement of its own valid zoning restriction.

This Court should grant review of the Opinion on three alternative grounds. First, the Opinion conflicts with this Court's precedent because it adopts an unduly broad definition of the term "rule" and imposes

rulemaking requirements on the City inconsistent with the City code. The Opinion also conflicts with precedent governing when a court may invalidate local implementation of a marijuana zoning ordinance. Further, the Opinion conflicts with precedent establishing the broad reach of the Land Use Petition Act, chapter 36.70C RCW ("LUPA"), which rendered Greensun's challenge untimely at the outset.

Second, the Opinion raises important constitutional issues, because it deprives municipalities of the authority to implement and enforce valid local ordinances regulating marijuana without finding a violation of any constitutional or vested right. Third, the Opinion raises an issue of substantial public importance because it opens all local regulation of marijuana up to second guessing by courts. For these reasons, the City respectfully requests that the Court accept review in this matter, reverse the Court of Appeals' Opinion, and reinstate the decision of the trial court.

II. COURT OF APPEALS DECISION

The Court of Appeals' Opinion reverses the trial court's grant of summary judgment to the City and remands for further proceedings consistent with the Opinion. The Court of Appeals specifically invalidated the City's process for determining which marijuana retail applicant was first in time for purposes of the 1,000 Foot Separation because the City did not engage in formal rulemaking.

The Court of Appeals issued its Opinion on June 13, 2016, 194 Wn. App. 1029 (2016).[1] Appendix A. The Court of Appeals denied a timely motion for reconsideration on August 10, 2016. Appendix B.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the Court of Appeals erred by determining, in conflict with this Court's precedent and the Constitution, that the City's First in Time Determination was a rule that required formal rulemaking.

B. Whether the Court of Appeals erred by invalidating, in conflict with precedent and the Constitution, the City's interpretation and enforcement of its valid zoning restriction regarding the location of marijuana retail stores in the City.

C. Whether the Court of Appeals erred by determining, in conflict with precedent, that the City's First in Time Determination was not a land use decision subject to the limitations period under LUPA.

IV. STATEMENT OF THE CASE

A. The City Adopts the 1,000 Foot Separation.

Washington Initiative Measure No. 502 ("I-502"), passed by voters in November of 2012, established a licensing program for marijuana businesses, including marijuana retail stores, to be administered by the Washington Liquor Control Board, now the Liquor and Cannabis Board

[1] Although the Opinion is unpublished, it can now be cited as persuasive authority pursuant to General Rule 14.1.

("LCB"). *See, e.g.,* RCW 69.50.325. Following the enactment of I-502, the Washington Attorney General opined that cities may, under article XI, section 11 of the Constitution, ban marijuana retailers outright from operating in their jurisdictions. AGO 2014 No. 2 at 8-9. Where cities seek to regulate short of an outright ban, "the ... Constitution provides broad authority for local jurisdictions to regulate within their boundaries and impose land use and business licensing requirements." *Id.* at 9.

After voters passed I-502, the City initially considered an outright ban but ultimately struck a compromise by adopting Ordinance No. 6133 B-1 in October of 2013, which provided for temporary interim zoning controls for marijuana businesses in the City. CP 551-56. In March 2014, in Ordinance No. 6156, the City extended the interim controls and added the 1,000 Foot Separation between marijuana retailers. CP 112, 127-30.[2]

B. The City Notifies Marijuana Retail Applicants in the City About Its Process for Enforcing the 1,000 Foot Separation.

After passage of I-502, the LCB allocated four licenses for marijuana retail outlets to operate in the City and established a lottery system to determine the four applicants whose applications could be finalized. CP 113. In May 2014, the LCB determined that applicant Par 4 Investments LLC ("Par 4") was one of the four lottery winners, but

[2] The City subsequently adopted an additional restriction that only one marijuana retailer may operate in each of six defined subareas of the City, *see* Ordinance No. 6286, but that additional restriction is not at issue in this appeal.

Greensun was not. *Id.* After the LCB released its lottery results, the City sent a notice to all applicants, including Greensun, about the City's interim zoning controls and specifically notifying them that the City would apply the 1,000 Foot Separation to retail marijuana locations. *Id.*; CP 153. Greensun did not respond to this letter. CP 113.

Around the time of this notice, the City received inquiries from applicants regarding the process that would be used to determine which retailer was first for purposes of enforcing the 1,000 Foot Separation. *See, e.g.,* CP 592. A City Planner initially responded to several of these inquiries by stating that the timing of a completed building permit application would be used. *See id.*; CP 524. As the City further evaluated this issue, however, it determined that the time of issuance of an LCB license, not a completed building permit application, was the proper basis to make this determination. CP 524, 630-32.

In early June 2014, the City received notice that Greensun had moved up to the Number 4 position in the LCB lottery. CP 115, 159-60. On June 9, the City received a Notice of Marijuana Application for Greensun, which identified its planned location as the Premises at 10600 Main Street in Bellevue. CP 115. On June 4, the City previously had approved a retail location for lottery winner Par 4 that was within 1,000

feet of the Premises.[3] CP 114. Accordingly, in its June 25 conditional approval of the Premises as Greensun's planned location, the City included the notice that it had adopted the 1,000 Foot Separation and that "[a]lthough the City approves the location for the use, such use may be prohibited at the proposed location based on the order the State issues the retail licenses." CP 115, 162 (emphasis added). Similarly, on June 24, the City sent a letter to all lottery participants notifying them that "the City shall consider the entity that is licensed first by the LCB to be the 'first-in-time' applicant" and that the "issuance date for the letter serving as your 30-day marijuana license will determine which entity is" licensed first. CP 115-16, 165-66. Again, Greensun did not respond. *Id.*

The City decided to use the timing of issuance of the LCB license for the First in Time Determination because it is consistent with the language of the 1,000 Foot Separation, which applies to a "marijuana retailer." CP 129 ("[n]o *marijuana retailer* shall be located within 1,000 feet of another *marijuana retailer*." (emphasis added)). City Ordinance No. 6133 B-1 defines "marijuana retailer" as "a person licensed by the state [LCB] to sell useable marijuana and marijuana-infused products in a retail outlet." CP 553. The City also determined that using a completed building permit application was not a fair basis to make that determination

[3] The City approved Par 4's planned location with the caveat that it reserved the right "to enforce violations of city ordinances and codes as exist now or as hereafter amended." CP 114, 155.

because it required applicants who might not receive an LCB license to invest resources in a location. CP 388, 524-25, 630-32. Greensun did not object to the City's decision to use the LCB license or to the fact that the City did not engage in rulemaking to determine that was the proper basis for the First in Time Determination until after it was determined that Greensun was not licensed first. CP 116, 262.

C. The City Correctly Determines Greensun Was Not First.

In early July 2014, the LCB confirmed that it likely would be issuing Par 4 the first retail license, because Par 4 was one of the original lottery winners. CP 116, 168. On Monday, July 7 at 9:17 am, Par 4 received the letter serving as its 30-day marijuana license ("conditional approval letter") dated July 3, and the LCB notified City officials that Par 4 was the "first of the Marijuana Retailers approved for Bellevue." CP 116-17, 171-73, 175-76. The LCB sent a revised conditional approval letter to Par 4 at 1:08 pm on July 7. CP 191, 230-34.

After the City notified Greensun that Par 4's LCB license was issued first, Greensun claimed that Par 4's license was issued in error and notified the City that it received its conditional approval letter at 3:04 pm on July 7. CP 117, 182-88, 191, 219-28. The City sought information from the LCB, Par 4, and Greensun regarding when the conditional approval letters were issued. CP 190-92, 195-234, 241. On July 29, the

City sent Greensun a letter summarizing its finding that Par 4 was, in fact, first in time because both its original and revised conditional approval letters were issued prior to Greensun's letter. CP 191-92, 236-41.[4]

D. Greensun Sues the City for Alleged Constitutional Violations.

More than four months after the City determined Greensun was not first in time, Greensun sued the City, alleging claims for violations of the Due Process Clause, Privileges and Immunities Clause, and for declaratory and injunctive relief. CP 1-11. Greensun filed a Motion for Preliminary Injunction, which the trial court denied following a December 2014 hearing. CP 248-49. In February 2015, the City moved for summary judgment on the grounds that Greensun's claims were time-barred by LUPA and failed on their merits. CP 263-85. The trial court initially granted the City partial summary judgment on the issues that Greensun abandoned on summary judgment, specifically Greensun's due process claim and the facial challenge portion of its privileges and immunities claim, and ordered supplemental briefing on Greensun's "request for cross-relief" on the remaining as-applied challenge portion of Greensun's privileges and immunities claim. CP 780-82.

[4] Importantly, Greensun did not argue before the trial court or on appeal that the building permit application should have been used to decide which retailer was first. This is because even if the building permit application were used, Greensun would not have been first. CP 592-93. The only alternative basis that Greensun ever identified for making the First in Time Determination was that Greensun believes it would have been able to open its store first, which was too speculative a basis for the City to use to enforce the 1,000 Foot Separation. *See, e.g.*, CP 518-19, 388, 524-25.

Following supplemental briefing, the trial court granted the City's summary judgment motion in full and dismissed Greensun's claims. CP 774-76. The trial court acknowledged Greensun's assertions that the City "acted arbitrarily and capriciously in denying their business license" and specifically ruled as follows:

> Assuming this claim is not barred by LUPA, Plaintiff has the burden of proof. Plaintiff did not have a vested right in operating the marijuana store as they were awaiting a state license. The evidence shows that the city first considered one method to determine first in time under its zoning ordinance and then ultimately chose another method. The method appears to be neutral on its face. There is no evidence that the second method was chosen for the purpose of harming Plaintiff or of benefiting a rival business. All parties were notified of the process to be used.
>
> Plaintiff challenges the lack of a formal process in establishing the method to determine first in time. There does not appear to be a requirement under Bellevue City Code for the Director to promulgate formal rules. The code is permissive. The Director may promulgate rules.

CP 776. Thus, the Court held that Greensun had not established that the City's conduct was arbitrary and capricious. *Id.* Greensun moved for reconsideration, which the trial court denied. *See* CP 764-65. Greensun then filed a notice of appeal and amended notice of appeal. CP 766-82.

The Court of Appeals' reversed the trial court's decision, and invalidated the City's process for making the First in Time Determination because the City failed to engage in formal rulemaking. Opinion at 16.

The Court of Appeals further determined that the City's First in Time Determination was a business license decision and not a land use decision subject to LUPA's 21-day statute of limitations. *Id.* at 10. The Court of Appeals remanded "for further proceedings consistent with" the Opinion. *Id.* at 18. The City filed a timely motion for reconsideration, which the Court of Appeals denied on August 10, 2016. Appendix B.

V. ARGUMENT

A. The Opinion Conflicts with Precedent.

1. The Opinion Conflicts with this Court's Precedent Regarding Rulemaking Requirements.

The Opinion incorrectly holds that the City's First in Time Determination for purposes of applying the 1,000 Foot Separation was a "rule" that required the City to engage in rulemaking.[5] This holding conflicts with this Court's precedent imposing commonsense limits on what constitutes a "rule" and precedent recognizing the authority of municipalities to construe and effectuate their own ordinances.

In conflict with this Court's precedent, the Opinion adopts such a broad definition of "rule" that nearly every administrative process could be determined to be a "rule." The Opinion begins by observing that the

[5] The Opinion incorrectly states that "[n]either the City's summary judgment brief or brief on appeal address [sic] this issue." Opinion at 11, n.9. On summary judgment, the City specifically argued that it had the legal authority to establish a process for determining which retailer was first in time. CP 280-81. The City also addressed the need for rulemaking in its supplemental brief requested by the trial court, CP 610-14, and in its Brief of Respondent, Respondent's Br. at 34-39.

term "rule" is undefined in the Bellevue City Code ("BCC"). Opinion at 13. Despite acknowledging that under the BCC legal terms shall be construed according to their peculiar meaning, the Opinion proceeds to place great weight on dictionary definitions of "rule" in a largely non-legal context. *See id.* The Opinion relies on these definitions to conclude that the First in Time Determination is a rule because it "is a guide, regulation, or principle that governs the City's procedure for siting marijuana retail stores now and in the future." Opinion at 13-14. The Opinion's characterization of the First in Time Determination is inaccurate. The City's valid 1,000 Foot Separation is the guide, principle, and regulation that governs the siting of marijuana retail stores in the City. The First in Time Determination interprets and effectuates that zoning ordinance.

Moreover, the Opinion's holding that the First in Time Determination required rulemaking cannot be reconciled with this Court's decision in *Earl M. Jorgensen Co. v. City of Seattle*, 99 Wn.2d 861, 665 P.2d 1328 (1983). In *Jorgensen*, this Court considered whether the City of Seattle's adoption of an electrical rate increase was a rule that required rulemaking. *Id.* at 863, 874. The *Jorgensen* Court determined that Seattle's rate-making likely fell within the very broad definition of "rule" within the Seattle Municipal Code, "[b]ut then so does most everything the Council does in its legislative capacity." *Id.* at 874. Accordingly, despite

Seattle's broad statutory definition of "rule," the Court held that there must be "commonsense limits" on what constitutes a rule and determined that Seattle did not intend its rate increase to be a rule. *Id.*

The Opinion attempts to distinguish *Jorgensen* on the basis that that Seattle's code includes a definition of "rule," whereas the City of Bellevue's code does not. Opinion at 14-15. But *Jorgensen* held that even where the definition of "rule" is "broad and nonexhaustive," it must be subject to commonsense limits. 99 Wn.2d at 874 ("It is simply because the definition of 'rule' is so sweeping that we must place commonsense limits on it."). The Opinion provides no basis to distinguish between using a broad dictionary definition of "rule" and a broad statutory definition of "rule" for purposes of applying *Jorgensen.*

Under *Jorgensen*, it is error to simply evaluate whether a municipal decision falls within the very broad definition of "rule," without considering the implications of that decision and without considering whether the City intended its decision "to be an 'order, directive or regulation' constituting a rule under the code." *Id.* at 874.[6] In this case, the Opinion fails to consider whether the City intended its interpretation of

[6] The Opinion states that it is "consistent with the intent of the Bellevue City Code and our duty to construe the provisions of the code 'with a view to effect their objects and to promote justice.'" Opinion at 15 (quoting BCC 1.04.040(A). To the contrary, the Opinion's conclusion is inconsistent with the permissive rulemaking provision in City Land Use Code ("LUC") 20.40.100 ("The Director may adopt rules for the implementation of this title[.]"). Nor does the Opinion promotes justice when Greensun had advance notice of the First in Time Determination but did not object. CP 262.

its zoning ordinance as a whole, including the definition of "marijuana retailer," to be an order, directive or regulation. By simply holding that the City's decision falls within the broad category of "a general norm mandating or guiding conduct or action in a given type of situation," Opinion at 14, the Opinion transforms essentially any City decision based on an ordinance into a "rule" requiring rulemaking, in conflict with this Court's prior recognition of commonsense limits on such requirements.

The Opinion's holding that the City failed to engage in mandatory rulemaking also directly conflicts with other precedent from this Court holding that a municipality may construe and effectuate its own statutes without engaging in formal rulemaking. For example, in *Hama Hama Co. v. Shorelines Hr'gs Bd.*, 85 Wn.2d 441, 536 P.2d 157 (1975), this Court held "that considerable judicial deference should be accorded to the special expertise of administrative agencies" when construing a statutory scheme and that "we have heretofore recognized that it is an appropriate function for administrative agencies to 'fill in the gaps' where necessary to the effectuation of a general statutory scheme." *Id.* at 448.

The Opinion mistakenly attempts to distinguish *Hama Hama* on the basis that it applies only when a statute is ambiguous. *See* Opinion at 16. To the contrary, *Hama Hama* recognizes both the authority of agencies to construe an ambiguous statutory scheme and to fill in gaps in a

scheme. 85 Wn.2d at 448. Thus, whether the City's statutory scheme is ambiguous is beside the point. It cannot reasonably be disputed that in order to apply the City's valid 1,000 Foot Separation, under the circumstances where there were not yet any marijuana retailers located in the City, the City needed to determine which marijuana retailer first located in the City. This Court repeatedly has held that a municipality may interpret its zoning ordinances without adopting a formal rule, so long as it adopts the interpretation in advance. *See, e.g., Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007) (while a city must show it adopted an interpretation of its ordinance as a "matter of agency policy . . . the construction does not have to be memorialized as a formal rule" (internal citation omitted)); *Ellensburg Cement Prod., Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 753, 317 P.3d 1037 (2014) (applying same rule under LUPA).

Here, the City properly effectuated and construed its statutory scheme by advising all applicants in advance that the basis for making the First in Time Determination would be when an applicant received its LCB license and became a "marijuana retailer" subject to the 1,000 Foot Separation. *See* CP 630-32, 115-16. The Opinion's holding that the City was required to adopt a formal rule conflicts with this Court's precedent,

fails to give deference to the City's intent and interpretation of its own ordinance, and fails to do justice.

2. The Opinion Conflicts with Precedent Regarding When a Court May Invalidate a City's Enforcement of a Zoning Ordinance.

The Opinion also conflicts with precedent regarding when a court may invalidate a city's implementation of a marijuana zoning ordinance. Notably, the Opinion does not reverse the trial court's dismissal of Greensun's constitutional claims, its determination that no vested rights were involved, or its determination that the City's actions were not arbitrary and capricious. *See* Opinion at 17, n.13. Rather, the Opinion takes the unprecedented step of invalidating the City's enforcement of its zoning ordinance without any determination that the City violated Greensun's rights or any other general law.

The Opinion cites *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997), as authority for its invalidation of the First in Time Determination. Opinion at 17 (quoting *Hillis*, 131 Wn.2d at 400 ("Ecology's decisions, made without rule making, must be invalidated.")). But *Hillis* invalidated a rule adopted without rulemaking under the Administrative Procedure Act, ch. 34.05 RCW ("APA"). 131 Wn.2d at 400; *see also* RCW 34.05.570(2)(c). As even the Opinion recognizes, however, the APA and its rulemaking requirements do not apply to cities. Opinion at 14 ("The APA does not apply to municipalities."); *see also*

Plumbers & Steamfitters Union Local 598 v. Wash. Pub. Power Supply Sys., 44 Wn. App. 906, 911, 724 P.2d 1030 (1986).

Additionally, the APA rulemaking requirements are based in due process concepts of ensuring notice. *See, e.g.*, *Hillis*, 131 Wn.2d at 399. Greensun alleged, but could not establish, a due process claim and a privileges and immunities claim. *See In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007) (requirements for due process claim); *Ass'n of Wash. Spirits & Wine Distributors v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 359-60, 340 P.3d 849 (2015) (requirements for privileges and immunities claim). The Opinion relieves Greensun of the burden to prove these claims, in conflict with this Court's precedent.

Moreover, this Court and the Court of Appeals repeatedly have held that cities and other municipal corporations need not engage in formal rulemaking to ensure sufficient notice. *See, e.g., Gary Merlino Const. Co. v. City of Seattle*, 108 Wn 2d 597, 602, 741 P.2d 34, 37 (1987) (where bid documents provided notice of conduct that would violate ordinance, city did not need to promulgate formal rules); *Plumbers & Steamfitters Union*, 44 Wn. App. at 910-11 (rejecting argument that municipal corporation was required to engage in formal rulemaking to adopt rules employees allegedly violated in part because a municipal corporation has "the power to 'make and enforce within its limits all such

local police, sanitary and other regulations as are not in conflict with general laws'" (quoting Const. art. XI, § 11)). This Court also has affirmed the broad authority of cities to adopt and enforce marijuana zoning restrictions under article XI, section 11. *See Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 225-26, 351 P.3d 151 (2015).

The City notified Greensun in advance that it would enforce its marijuana zoning ordinance with the First in Time Determination. CP 165-66. By failing to object, Greensun waived any argument that it did not have an opportunity to be heard. CP 116, 262. By invalidating the City's enforcement of its valid zoning restriction without any determination that the City violated Greensun's rights or other general laws, the Court of Appeals has undermined the City's authority to regulate marijuana businesses. Accordingly, the Opinion's invalidation of the City's First in Time Determination, based on APA authority and untethered to any constitutional violation or other violation of general laws, conflicts with precedent.

3. The Opinion Conflicts with LUPA Precedent.

The Opinion also conflicts with precedent confirming that Greensun's claims were time-barred by LUPA. The Opinion determined that Greensun's challenge to the First in Time Determination was not subject to LUPA's 21-day statute of limitations because it was a business

license decision not subject to LUPA. Opinion at 9-10. Even if the City did make a decision on Greensun's business license application, however, it also made "an interpretive or declaratory decision regarding the application to a specific property of zoning or other ordinance or rules" under RCW 36.70C.020(2)(b) and the decision was "[t]he enforcement by a local jurisdiction of ordinance regulating the improvement, development, modification, maintenance, or use of real property" under RCW 36.70C.020(2)(c). Accordingly, the Opinion conflicts with published Court of Appeals precedent that each subsection of RCW 36.70C.020(2) is independently sufficient for LUPA to apply. *Asche v. Bloomquist,* 132 Wn. App. 784, 791, 133 P.3d 475 (2006), *as amended* (Apr. 4, 2006).

The only reason identified in the Opinion why the First in Time Determination was not an interpretative or enforcement decision subject to LUPA is that the decision was not made by the City Development Services Department Director.[7] Opinion at 10. This holding conflicts with precedent confirming that LUPA applies to decisions even where a city or its officials fail to follow a prescribed process. *See, e.g., Habitat Watch* v. *Skagit Cnty.,* 155 Wn.2d 397, 406, 120 P.3d 56 (2005); RCW 36.70C.130(1)(a), (e).

[7] The Opinion fails to address that the LUC defines "Director" as "[t]he Director of the Development Services Department for the City of Bellevue, the Director's authorized representative, or any representative authorized by the City Manager, unless otherwise specified." LUC 20.50.016. The First in Time Determination was made by the Director's authorized representative. CP 637-39.

By both rejecting the applicability of the LUPA statute of limitations and invalidating the City's land use decision, the Opinion allows a collateral attack on that decision to continue nearly two years after it was made and without a clear method of interpreting and enforcing the 1,000 Foot Separation in a manner that does not violate the City's zoning ordinance. Thus, the Opinion conflicts with the long-standing recognition of the need for certainty regarding land use decisions. *Durland v. San Juan Cnty.*, 182 Wn.2d 55, 59-60, 340 P.3d 191 (2014) ("[l]eaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner." (quoting *Chelan Cnty. v. Nykreim,* 146 Wn.2d 904, 933, 52 P.3d 1 (2002)).

B. The Opinion Raises Significant Constitutional Questions.

This matter also presents significant questions of law under the Constitution. Specifically, as discussed above, the Opinion raises the question of whether, absent proof of a constitutional violation, a court may invalidate a municipality's interpretation and enforcement of its own valid zoning ordinance. Additionally, as discussed above, the Opinion raises the question of whether, in light of the City's broad authority under article

XI, section 11 of the Constitution, a court may second guess the City's enforcement of its zoning ordinance.

C. The Opinion Involves an Issue of Substantial Public Interest that Should Be Determined by this Court.

Finally, as discussed above, the Opinion raises an issue of substantial public interest necessitating review by this Court because it imposes significant additional rulemaking requirements on municipalities, which are not subject to the APA. Likewise, the scope of the City's authority to enforce zoning restrictions on marijuana businesses also is an issue of substantial public interest because it affects the public's health, safety and welfare. *See, e.g.,* CP 112-13, 192-93.

VI. CONCLUSION

The Court of Appeals improperly interfered in the City's enforcement of its valid zoning ordinance, in direct conflict with precedent and the Constitution. The Court should accept review and restore the proper deference to municipalities to interpret and enforce their own zoning ordinances, particularly in the context of marijuana retail sales.

RESPECTFULLY SUBMITTED this 9th day of September, 2016.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF BELLEVUE, Respondent, v. GREENSUN GROUP, LLC, Appellant.	)	NO. 73646-9-I DIVISION ONE UNPUBLISHED OPINION FILED: June 13, 2016

LAU, J. — This case involves a lawsuit between Greensun Group LLC and the city of Bellevue (the City) over Greensun's attempt to open a recreational marijuana store in downtown Bellevue after voters passed Initiative 502. Greensun appeals the summary judgment order dismissing its claims against the City. Because the denial of a business license is not a land use decision subject to the Land Use Petition Act's (LUPA) statute of limitations and the City failed to adopt its first in time rule according to mandatory rule making procedures, we reverse the trial court's order granting the City's summary judgment and remand for further proceedings consistent with this opinion.

FACTS[1]

Marijuana Statute

In 2012, Washington voters passed Washington Initiative Measure No. 502 ("I-502"). This initiative decriminalized marijuana possession for limited amounts and created a system for the licensed production, distribution, and sale of recreational marijuana. All recreational marijuana distributors must be "validly licensed" and maintain compliance with "rules adopted by the state liquor and cannabis board." RCW 69.50.360. An applicant for each license type is required to disclose the location for the proposed business.

I-502 directed the Washington Liquor Control Board (LCB) to create rules governing commercial marijuana. LCB set the number of permissible retail marijuana licenses in King County at 61. It allocated four licenses to the city of Bellevue. See Bellevue Ordinance No. 6156.

In October 2013, Bellevue adopted Ordinance No. 6133 B-1, an emergency interim zoning provision. This ordinance imposed temporary restrictions on marijuana producers, processors, and retailers to "mitigate the negative impacts arising from operation of recreational marijuana uses." Clerk's Papers (CP) at 80.

In April 2014, the City extended the emergency ordinance for six months under Ordinance No. 6156. The ordinance also imposed a location restriction: "[n]o marijuana retailer shall be located within 1,000 feet of any other marijuana retailer." CP at 82.

[1] The parties are familiar with the facts. We address them only briefly.

Greensun Group LLC

In late 2012, Greensun's two member-managers, Seth Simpson and David Ahl, leased retail space in downtown Bellevue in anticipation of I-502's voter approval. Greensun modified the building for use as a medical marijuana store until it obtained a recreational retail license.

The City later required Greensun to obtain a building permit for these upgrades. In January 2013, Simpson submitted a permit application.

In April 2014, the LCB announced a lottery system to award the four marijuana retail licenses among potential applicants. It also explained that after lottery winners were selected, "[t]he initial retail licenses will issued [sic] in batches (10-20) in the most populous areas." CP at 95.

On May 2, LCB announced Par 4 as one of the lottery winners. Par 4's application showed its planned retail store was within 1,000 feet of Greensun's retail space.

The City denied Greensun's marijuana retail business license because it was not a lottery winner.

On May 7, City Associate Planner Reilly Pittman, notified retailers, including Par 4 and Greensun, that marijuana retailers can "lock down" a location for purposes of the 1,000 foot rule by submitting a completed building permit application. CP at 403. Pittman told Greensun its building permit application did not satisfy the "lock down" rule because Greensun was not a lottery winner. CP at 356-57.

On June 5, Greensun was named a lottery winner when an original winner was disqualified.

On June 11, Pittman notified Par 4 its location was "locked down." CP at 416.

For reasons not clear in our record, the City abandoned the building permit "lock down" rule. Development Services Department (DSD) legal planner Catherine Drews announced a new "first in time" rule to resolve conflicts among stores located within 1,000 feet of each other. Drews' June 24 letter also informed applicants that LCB's conditional approval letters would serve as a 30-day marijuana license and its issuance date determines which entity is first in time.

> In the event two or more retail marijuana applicants seek licensing from the LCB and are located within 1000 feet of another potential retail applicant, the City shall consider the entity that is licensed first by the LCB to be the "first-in-time" applicant. Based on information obtained from the LCB, if LCB approves your application, you will receive an electronic billing statement requesting payment of the $1,000 licensing fee. Once the LCB receives this fee, the City understands that LCB will send you a conditional approval letter that serves as your 30-day marijuana license until you receive your business license with the marijuana endorsement from the Washington State Department of Revenue Business Licensing Service. The issuance date for the letter serving as your 30-day marijuana license will determine which entity is first-in-time in terms of how the City applies the 1000 foot separation requirement for retail outlets.[2]

CP at 115-16 (emphasis added).

On July 7, LCB issued marijuana licenses via e-mailed letters all dated July 7 to the four lottery winners including Par 4 and Greensun.[3] As soon as Greensun received its license, Simpson applied for a business license. The City refused to issue the

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[2] Drews apparently did not know that LCB issued the licenses "in batches" even though this information was available at the time to the public.

[3] Par 4 received three different versions of the LCB license on July 7. The first license was incorrectly dated July 3. The final version of the license sent to Par 4 on July 7 corrected this mistake and indicated an issuance date of July 7. Par 4 agrees July 3 is an erroneous date because it received the e-mailed letter on July 7.

license and claimed Par 4 was first in time. Greensun disagreed, pointing to the same July 7 date on the license issued to it and Par 4.

Assistant City Attorney Chad Barnes contacted LCB Assistant Attorney General Kim O'Neal. She said no means existed to determine which license was issued first in time under the LCB's system. Barnes explained the problem to Par 4 and Greensun in a letter.

> The LCB issued a letter to [Par 4][4] on July 3, 2014, which appears to grant [Par 4] a retail license; however, Greensun claims that the letter was issued in error. We have spoken with Assistant Attorney General Kim O'Neal who has informed us that the LCB currently takes the position that the July 3, 2014 letter received by [Par 4] was not the actual marijuana retail license despite the language contained in the letter. O'Neal stated that the actual licenses were issued following the July 7, 2014 online notice to both your clients. We asked Ms. O'Neal if the LCB had any way to determine which entity was actually first issued a marijuana license, and she indicated that their system was not set up for such a query.

CP at 195-96 (emphasis added).

Barnes continued to investigate. He found a state licensing website that showed Par 4's license was approved on July 6 and Greensun's was approved on July 7.

On July 29, the City denied Greensun's business license. Barnes explained, "the entity that is licensed first by the [LCB] will be considered 'first-in-time' at a particular location." He further explained LCB's July 3, 2014 letter "approving an entity's license and serving as the temporary operating permit"[5] was the "determinative factor" for establishing which entity was first in time. CP at 236. Barnes said that Par 4 was first in

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[4] Although the parties used trade names in their application materials, we refer to the parties as "Greensun" and "Par 4" for clarity.

[5] The LCB marijuana license letter also served as the entities' temporary operating permit. For clarity, we refer to the LCB letter as "license," in this opinion.

time because it received a marijuana license and LCB never revoked the July 3 letter granting Par 4 the license.

> The City's decision is based on the fact that on July 3, 2014, the LCB sent [Par 4] a letter indicating it was approving [Par 4]'s marijuana retailer license and directed that the letter be posted as [Par 4]'s temporary operating permit.[6] The LCB subsequently sent [Par 4] a revised temporary operating permit on July 7, 2014 at 1:08 pm.
>
> In contrast, the LCB did not inform [Greensun] that its retail marijuana license had been approved until a similar letter was issued at 3:04 pm on July 7, 2014. Consequently, [Par 4] was approved at its proposed location before [Greensun]. Although [Greensun] has asserted the July 3, 2014, letter sent to [Par 4] was done so in error by the LCB, the City is not aware of any actions taken by the LCB to revoke the July 3, 2014 letter. Regardless, the revised temporary operating permit letter sent to [Par 4] on July 7, 2014, precedes the letter sent to [Greensun].

CP at 236. Barnes also explained, "LCB's records indicated [Par 4]'s license was approved on July 6, 2014. [Greensun] was not approved until July 7, 2014." CP at 237. July 6 falls on a Sunday. Attached to his letter were internet printouts from a website entitled "Statewide Recently Approved Licenses." CP at 238.

Rebecca Smith, LCB Director of Licensing and Regulations for liquor and marijuana, explained the LCB's licensing process in her deposition. Smith testified that Par 4's initial license dated July 3 was "an error" because "we didn't issue any licenses before [July 7]." CP at 578, 581. She said that no licenses were actually issued on July 6, a Sunday. She further testified that the website Barnes relied on for the July 6

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[6] Even after learning from O'Neal that actual licenses were all issued on July 7, Barnes' letter incorrectly states that the LCB sent Par 4 the license on July 3, 2014. Par 4 received the e-mail from LCB representative Elizabeth Lehman on July 7, 2014.

approval date was not an official LCB website. "I believe this belongs to Licensing Resources. It's not the Liquor Control Board."[7] CP at 377.

On November 3, 2014, Greensun sued the City, alleging due process violations, arbitrary and capricious action, and requested declaratory and injunctive relief on enforcement of the 1,000 foot ordinance.

The City moved for summary judgment, arguing Greensun's claims failed on their merits and were time-barred under LUPA.

Greensun voluntarily withdrew its facial challenge to the City's 1,000 foot ordinance and cross-moved for summary judgement.

On May 20, 2015, the trial court granted summary judgment for the City and dismissed Greensun's lawsuit. It denied Greensun's motion for reconsideration.

Greensun appeals.

ANALYSIS

Greensun argues the City (1) failed to follow mandatory rule making procedures, (2) violated its fundamental right to conduct business under Article I, § 12 of the Washington Constitution, and (3) applied the first in time rule in an arbitrary and capricious manner.

Standard of Review

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. When reviewing an

[7] Smith's sworn testimony arguably undermines Barnes' reliance on dates he used to determine first in time as between Par 4 and Greensun for the purposes of the 1,000 foot rule. We note that Barnes' reliance on questionable dates and times differs from the first in time rule announced by Drews in her June 24 letter. There, Drews used the licenses' "issuance date" as the first in time rule.

order for summary judgment, an appellate court engages in the same inquiry as the trial court. James v. County of Kitsap, 154 Wn.2d 574, 580, 115 P.3d 286 (2005). We review questions of law de novo. James, 154 Wn.2d at 580.

LUPA Statute of Limitations[8]

The City argues that Greensun's claim is barred by LUPA's 21-day statute of limitations. RCW 36.70C.040(3). The parties agree we review this as a question of law.

LUPA's purpose is to effectuate "uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review" of land use decisions. RCW 36.70C.010. LUPA sets out a "21-day deadline for appealing the final decisions of local land use authorities and is intended to prevent parties from delaying judicial review at the conclusion of the local administrative process." Habitat Watch v. Skagit County, 155 Wn.2d 397, 406, 120 P.3d 56 (2005). Where it applies, LUPA provides the "exclusive means of judicial review" of a land use decision. RCW 36.70C.030. The parties dispute whether the City's decision to deny Greensun's business license is a land use decision subject to LUPA's statute of limitations.

Whether a given action constitutes a "land use decision" subject to LUPA's 21-day statute of limitations is governed by statute:

> (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:
>
> (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed,

[8] We note the trial court did not expressly rule on the LUPA time bar question. We assume the trial court rejected the time bar claim when it granted the City's summary judgment. Since both sides briefed it, we address it.

> modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses.
>
> (b) An interpretive 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; and
>
> (c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.020(2) (emphasis added).

The City argues that Chad Barnes' July 29 letter denying Greensun's business license is either an "interpretive" or "enforcement" decision under section (2)(b) or (2)(c), above. It claims "the record is clear that the City properly made its land use decision prior to denying Greensun's business license." Br. of Resp't at 28.

We look to the statute's plain language in order to fulfill our obligation to give effect to legislative intent. Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). When faced with an unambiguous statute, we derive the legislature's intent from the plain language alone. Waste Management of Seattle, Inc. v. Utilities and Transp. Comm'n, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994).

Section (2)(a)'s plain language quoted above expressly excludes business license applications from the land use decision definition. Barnes' July 29 letter to Greensun states that "[t]he City will not grant [Greensun] a business license to operate a retail marijuana outlet at 10600 Main Street based on the separation requirement in Ordinance 6156." CP at 237 (emphasis added). The record shows the City's denial

decision was based on Greensun's business license application. The City's brief does not address section (2)(a)'s business license application exception.

But even if we assume the City's decision is either an "interpretive" or "enforcement" decision, land use decisions are defined as a "final determination by a jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals. . ." RCW 36.70C.020(2). Under the Bellevue City Code (BCC), the official with the highest level of authority to make a land use decision is the DSD Director. LUC 20.40.100. Barnes is a Bellevue Assistant City Attorney, and his July 29 letter was written in anticipation of litigation. Indeed, this letter closes with the City's threat to "take legal actions . . . including seeking a restraining order" if Greensun persisted in trying to operate a retail marijuana outlet. Barnes is not the director or an official vested "with authority to hear appeals." RCW 36.70C.020(2)(c). The City's brief fails to address this dispositive question.

The City relies on Asche v. Bloomquist, 132 Wn. App. 784, 791, 801, 133 P.3d 475 (2006), and Brotherton v. Jefferson County, 160 Wn. App. 699, 249 P.3d 666 (2011), to argue LUPA bars Greensun's claims. These cases are unpersuasive. Unlike here, neither case involved the business license application exception.

Judicial review under LUPA is expressly limited to final "land use decisions" as defined by the statute. Because business license applications are explicitly excluded from the definition of "land use decisions," LUPA's statute of limitations does not apply to bar Greensun's claims.

Failure to Follow Rule Making Procedure

The core issue here is whether the City's first in time method is a "rule" and thus subject to rule making procedures under LUC 20.40.100.[9] Greensun argues the first in time rule is invalid because it was never adopted under the city code's rule making procedures. We agree.

Statutory construction is a question of law we review de novo. Belleau Woods II, LLC v. City of Bellingham, 150 Wn. App. 228, 240, 208 P.3d 5 (2009). "The court's fundamental objective is to ascertain and carry out the intent of the legislative body." Belleau Woods II, LLC, 150 Wn. App. at 240. "If the language of the statute is plain, that ends the court's role." Belleau Woods II, LLC, 150 Wn. App. at 240.

The BCC codifies several common law rules of statutory construction. For instance, the code applies the ordinary meaning to words and terms unless technical words or phrases are used.

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning.

BCC 1.04.040(B). Undefined terms "shall be construed according to the context and approved usage of the language." BCC 1.04.040(D). And "[t]he provisions of the ordinances of the city, and all proceedings under them, are to be construed with a view to effect their objects and to promote justice." BCC 1.04.040(A).

[9] Neither the City's summary judgment brief or brief on appeal address this issue.

Responsibility for administration of the Bellevue City Land Use Code (LUC) rests with the director. The LUC governs the director's rule making discretion, and prescribes certain formal rule making procedures:

> The Director shall be responsible for the administration of this title. The Director may adopt rules for the implementation of this title; provided, the Director shall first hold a public hearing. The Director shall publish notice of intent to adopt any rule, and the date, time and place of the public hearing thereon in a newspaper of general circulation in the City at least 14 days prior to the hearing date. Any person may submit written comment to the Director in response to such notice, and any person may speak at the public hearing. Following the public hearing, the Director shall adopt, adopt with modifications, or reject the proposed rule.

LUC 20.40.100 (emphasis added).

The trial court ruled this provision grants discretion to the director to adopt rules without formal rule making:

> Plaintiff challenges the lack of a formal process in establishing the method to determine first in time. There does not appear to be a requirement under Bellevue City Code for the Director to promulgate formal rules. The code is permissive. The Director may promulgate rules. The director also has the authority to coordinate with the business license process under the code.

CP at 710 (emphasis added).

Greensun acknowledges the director is not required to adopt rules under LUC 20.40.100's plain language. But Greensun argues this provision requires the director to follow certain rule making procedures whenever it adopts a rule. Greensun contends the City's first in time method is a formal rule that triggers the code's rule making procedures. Thus, we first consider whether the first in time method is a "rule." If so, we must then consider whether rule making is required under BCC 20.40.100.

Nowhere in the BCC is the term "rule" defined. The City could have defined the term "rule" to narrow the actions within its scope. For example, under the Seattle Municipal Code (SMC):

> "Rule" means any agency order, directive, or regulation of future effect, including amendment or repeal of a prior rule, which applies generally and which, if violated, subjects a person to a penalty or administrative sanction, including, but not limited to, an order, directive, or regulation which affects:
> 1. Any procedure, practice or requirement relating to agency hearings;
> 2. Any qualification or standards for the issuance, suspension or revocation of licenses;
> 3. Any mandatory standards for any product or material which must be met before distribution or sale; or
> 4. Any qualification or requirement relating to the enjoyment or benefit or privileges conferred by law.
>
> Such term does not include statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, declaratory rulings issued pursuant to Section 3.02.080, or rules relating to the use of public ways and property when substance of such rules is indicated to the public by means of signs or signals.

SMC 3.02.020(E).

Since "rule" is undefined, we turn to BCC 1.04.040. Undefined terms "shall be construed and understood according to the common and approved usage of the language," except that "technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning." BCC 1.04.040(B).

Whether we use the common or technical meaning, the first in time method is a "rule" for purposes of rule making under the code. The standard dictionary defines "rule" as "a prescribed, suggested, or self-imposed guide for conduct or action: a regulation or principle" or "a regulation or bylaw governing procedure in a public or private body (as a legislature or club) or controlling the conduct of its members." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1986 (2002).

A legal dictionary defines the term as "an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation." BLACK'S LAW DICTIONARY 1529 (10th ed. 2014).

The City's first in time rule satisfies both the common and technical definition of the term "rule." It is a guide, regulation, or principle that governs the City's procedure for siting marijuana retail stores now and in the future.[10]

Greensun cites the state and federal APA statutes as persuasive authority. We are not persuaded. The APA does not apply to municipalities. And unlike here, the APA expressly defines the term "rule."

The City argues for common sense limits on the broad definition of "rule," citing Earl M. Jorgensen Co. v. City of Seattle, 99 Wn.2d 861, 665 P.2d 1328 (1983). The Supreme Court, there, considered whether rate making by the Seattle City Council was a "rule" as defined by the city's municipal code. The court explained, "[w]e might easily include the setting of electrical rates within the Council's rule making capacity since those rates have 'future effect.' But then so does most everything the Council does in its legislative capacity." Earl M. Jorgensen Co., 99 Wn.2d at 874. Because the definition of "rule" was so "sweeping," the court concluded the application of "commonsense limits" was appropriate. Earl M. Jorgensen Co., 99 Wn.2d at 874. Jorgensen is not persuasive. As discussed above, BCC 1.04.040(B) controls where, as

[10] The record shows that Drews "sent a letter to all participants in the LCB lottery advising the participants to familiarize themselves with the separation requirements in the City's ordinances and stating that '[i]n the event two or more retail marijuana applicants seek licensing from the LCB and are located within 1000 feet of another potential retail applicant, the City shall consider the entity that is licensed first by the LCB to be the "first-in-time" applicant.'" CP at 115 (emphasis added).

here, a term is not defined. Unlike here, the SMC provides an express definition for the term "rule" as quoted above. Our conclusion is consistent with the intent of the Bellevue City Code and our duty to construe the provisions of the code "with a view to effect their objects and to promote justice." BCC 1.04.040(A).[11]

We next address whether formal rule making was required. LUC 20.40.100 states that the director "may adopt" rules. Under the City code definition, "'[m]ay' is permissive." BCC 1.04.010(F). The code plainly authorizes but does not require the director to adopt formal rules.

But where the director elects to adopt a rule, the code is equally clear the director "shall" follow LUC 20.40.100's rule making procedures. Under LUC 20.40.100, the director "may adopt rules . . . provided, the Director shall first hold a public hearing," and "shall publish notice of intent to adopt any rule . . ." LUC 20.40.100 (emphasis added). "Shall" is mandatory. BCC 1.04.010(H).

The trial court ignored the proviso language that limits the director's rule adoption discretion. "Provisos operate as limitations upon or exceptions to the general terms of

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[11] The City's failure to notice the LCB's public announcement that "initial retail licenses will issued [sic] in batches (10-20) in most populous areas" (included Par 4 and Greensun) triggered a series of ad hoc City decisions intended to implement its unworkable first in time rule. As Drews later described it, "we did not issue a written policy about [the "lock down" rule.] We didn't publish it. We had to make decisions on the fly and—Well, that's probably not a good way to say it." CP at 630. The City's assistant attorney acknowledged licenses were issued in batches and LCB's system was not set up to "determine which entity was actually first in time." CP at 195. Even the ultimate first in time winner, Par 4, complained to the City about its "illogical first in time rule":

> The City's pursuit and reliance on the State's actual license 'issuance order' is illogical and a waste of time for all parties involved where those records likely do not exist.

CP at 198.

the statute to which they are appended and as such, generally should be strictly construed with any doubt to be resolved in favor of the general provisions, rather than the exceptions." Washington State Legislature v. Lowry, 131 Wn.2d 309, 327, 931 P.2d 885 (1997). Properly read in context, the rule adoption language permits the director to decide whether or not to "adopt rules for the implementation" of the land use code. But the proviso language limits this discretion by requiring formal rule making procedures to adopt a rule.

The director's failure to adopt the first in time rule under the City's rule making procedures renders the first in time rule and related decisions invalid.

The City relies on Hama Hama Co. v. Shorelines Hr'gs Bd., 85 Wn.2d 441, 448, 536 P.2d 157 (1975), to argue the first in time rule was a valid attempt to "fill in the gaps" of the 1,000 foot ordinance. In some cases, an agency charged with the enforcement of an ambiguous statute is authorized to "fill in the gaps" to implement a general statutory scheme, provided the "agency does not purport to 'amend' the statute."[12] Hama Hama, 85 Wn.2d at 448; Northshore Investors, LLC v. City of Tacoma, 174 Wn. App. 678, 697 n.5, 301 P.3d 1049 (2013) (deferring to clerk's consistently applied interpretation of city ordinance the clerk was charged with enforcing). This "gap filling" principle applies only where a statute is ambiguous. Hama Hama, 85 Wn.2d at 448. Ordinance 6156 states that "[n]o marijuana retailer shall be located within 1,000

[12] The City cites Hama Hama for the proposition that it has authority to "fill in the gaps." Br. of Respondent at 34. The City omits that this principle only applies where the statute is ambiguous. Hama Hama, 85 Wn.2d at 448. Furthermore, an "agency does not have the power to promulgate or change legislative enactments but it may fill in the gaps in legislation where necessary to effectuate a general statutory scheme." In re Dependency of D.F.-M., 157 Wn. App. 179, 193 n.45, 236 P.3d 961 (2010).

feet of any other marijuana retailer." CP at 82. Ambiguity occurs where language is susceptible to two or more reasonable interpretations. Cerillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). The 1000 foot ordinance contains no ambiguity and the City points to none.

Under the unique circumstances here, LUC 20.40.100's rule making procedures apply to the City's first in time rule. Because the City's first in time decisions were made without rule making, the rule and these decisions must be invalidated.[13] Hillis v. State, Dep't of Ecology, 131 Wn.2d 373, 400, 932 P.2d 139 (1997) ("Ecology's decisions, made without rule making, must be invalidated.").

Attorney Fees

The City requests attorney fees. Under RCW 4.84.370, the Washington Supreme Court has held that a public entity is entitled to fees if its land use decision is upheld on the merits at the trial court and on appeal. Durland v. San Juan County, 182 Wn.2d 55, 78, 340 P.3d 191 (2014). Because the City has not prevailed, we decline its request for fees and costs.

[13] Given our disposition in this opinion, we decline to address the more troubling claim by Greensun that the questionable first in time decision here constitutes arbitrary and capricious action by the City. Bridle Trails Community Club v. City of Bellevue, 45 Wn. App. 248, 724 P.2d 1110 (1986) (addressing freestanding arbitrary and capricious claim raised against the city).

CONCLUSION

For the reasons discussed above, the City's first in time rule and related decisions must be invalidated. We reverse the trial court's order granting the City's summary judgment and remand for further proceedings consistent with this opinion.[14]

Ann, J.

WE CONCUR:

Spearman, J.

Cox, J.

[14] Given our resolution here, we need not address Greensun's remaining contentions.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF BELLEVUE, Respondent, v. GREENSUN GROUP, LLC, Appellant.	)	NO. 73646-9-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Respondent City of Bellevue has filed a motion for reconsideration of the court's opinion filed on June 13, 2016. Appellant Greensun Group, LLC filed an answer. The panel has determined that the motion should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

Dated this 10th day of August 2016.

FOR THE PANEL:

Jan, J. p.t.

SUPREME COURT OF THE STATE OF WASHINGTON

No. _____

GREENSUN GROUP LLC, Respondent, v. CITY OF BELLEVUE, Petitioner.	Court of Appeals Division I No. 73646-9-I PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. On the 9th day of September, 2016, I caused to be served a true copy of City of Bellevue's Petition for Review upon the parties listed below:

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DATED this 9th day of September, 2016.

Sydney Henderson