96390-8

No. 50090-6

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

PUGET SOUND GROUP, LLC, et al.,

PETITIONERS,

V.

WASHINGTON STATE LIQUOR & CANNABIS BOARD et al.,

RESPONDENTS.

PETITION FOR REVIEW BY

THE WASHINGTON SUPREME COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Session Laws

I. INTRODUCTION

This case is about arbitrary and capricious rulemaking and action by the Washington State Liquor and Cannabis Board ("LCB"), taken in contravention of Washington's Administrative Procedure Act [1] ("APA") and Washington's Cannabis Patient Protection Act [2] ("CPPA").

The Court of Appeals declined to address most of case's merits, including a broader challenge to LCB's inability to comply with statutory instructions. The matter was dismissed as moot under the proposition that emergency rules, having expired during the pendency of litigation, are not subject to review. Through its opinion, the Court of Appeals gives imprimatur to actions that show a willful disregard for statutory requirements. In cases where interim rules are the only rules of consequence, harmful administrative actions will continue to evade review unless corrected by this Court.

The Court of Appeals addressed a subset of the challenge, deciding only that a license cap was not rulemaking[3] because it did not alter the standard for the issuance of a license and that it was not arbitrary and

[1] RCW 34.05 *et seq.*
[2] Laws of 2015, Ch. 70.
[3] The license cap was challenged as meeting the definition of a rule under RCW 34.05.010(16) and RCW 34.05.328(5)(c)(iii), RP. 14-16.

capricious for the LCB to rely on questionable data. Petitioners seek review of the Appellate decision and the trial court record.

II. PETITIONER'S IDENTITY

Petitioner Puget Sound Group LLC et al. are the Appellants at the Court of Appeals and the Plaintiffs at the trial court.

III. CITATION TO APPELLATE DECISION TO BE REVIEWED

Petitioner requests the Washington Supreme Court review the Washington State Court of Appeals Division Two opinion in *Puget Sound Group LLC et al. v. Washington State Liquor and Cannabis Board*, No. 50090-6-II (July 10, 2018), herein the "Opinion." A copy of the Opinion is included in the **Appendix** pages 26 through 35. An order denying reconsideration was issued on August 31st, 2018. A copy of the order denying reconsideration is also included in the **Appendix** pages 36-37.

IV. ISSUES PRESENTED FOR REVIEW

Substantial Public Interest in Affirming Judicial Authority to Render Judgments and Issue Remedies in Review of Emergency Rules:

1. Whether an emergency rule challenged in a timely manner remedy is available in situations where the emergency rule later expires? Short Answer: Remedy is not precluded because the rule was later adopted as a permanent rule. When cognizable harms are the result of an

emergency rule, the judiciary is not prevented from entering declaratory judgment and issuing other remedies as justice dictates.

Substantial Interest in Avoiding Future Administrative Misconduct.

1. If an issue is otherwise moot, does the public have an interest in preventing future misconduct by public officials? Short Answer: When a plaintiff brings an APA challenge to arbitrary and capricious rulemaking procedure, a substantial public interest lay in preventing a repeat of that manner of action and issuing guidance to public officials.

2. When an agency acts contrary to its own judgment, is the agency decision invalid? Short Answer: Yes. Administrative action is arbitrary and capricious if it is taken without regard to attendant facts and is unsupported by a process of reason.

Issues Unaddressed by the Court of Appeals are Reviewable and Represent Matters of Substantial Public Interest

1. Does a certified agency record that is absent proof of deliberation constitute arbitrary and capricious rulemaking? Short Answer: Yes. Despite the gravity of their charge to merge a $400M+ annual medical cannabis market into a joint system, the record shows the LCB immediately adopted the rules presented for their consideration, without discussion.

2. Did the LCB follow its statutory mandate to create a merit-based application system? Short Answer: No. The legislature's specific command to create a system that accommodated the needs of Washington's patients and providers was not implemented.

IV. STATEMENT OF THE CASE

On April 24, 2015, Governor Jay Inslee signed the CPPA into law. The law mandated;

> The state liquor and cannabis board must reconsider and increase the maximum number of retail outlets it established … and allow for a new license application period and a greater number of retail outlets to be permitted in order to accommodate the medical needs of qualifying patients and designated providers.[4]

The CPPA ordered consolidation of Washington's legal cannabis markets by transitioning patients and providers operating under MUCA / Former RCW 69.51A into the LCB's I-502 adult-use program. To transition dispensaries from the medical cannabis system into a program overseen by the LCB,[5] the CPPA gives explicit instructions to develop a new license application process; instructing that:

> The state liquor and cannabis board **must develop** a competitive, merit-based application process that includes, at a minimum, the

[4] Laws of 2015, ch. 70, § 8(2)(d)
[5] In association with the Department of Health and Department of Agriculture.

> opportunity for an applicant to demonstrate experience and qualifications in the marijuana industry.[6] (emphasis added)

The CPPA then directs:

> The state liquor and cannabis board shall give preference **between competing applications *in the licensing process*** to applicants that have the following experience and qualifications, in the following order of priority.[7] (emphasis and italics added)

The preference between competing applications in process was established under three legislatively prescribed priorities. The first priority given to those who; applied for a recreational retail license prior to July 1, 2014, owned, operated, or were employed by a collective garden[8] before January 1, 2013, maintained applicable business licenses, and "had a history of paying all applicable state taxes and fees."[9] The second priority for those that meet the criteria for priority one but did not previously apply for a retail license. [10] The third priority category was a catchall for "all other applicants who do not have the experience and qualifications above." [11]

<u>LCB Rulemaking to Implement the CPPA.</u>

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[6] Laws of 2015, ch. 70, § 6(1)(a) -Former RCW 69.50.331(1)(a)
[7] *Id.*
[8] A.k.a. "Dispensary"
[9] Laws of 2015, ch. 70, § 6(1)(a)(i)
[10] Laws of 2015, ch. 70, § 6(1)(a)(ii)
[11] Laws of 2015, ch. 70, § 6(1)(a)(iii)

On September 23, 2015, the LCB issued emergency rules purporting to implement the CPPA. The rules lacked the merit-based process ordered by the Legislature. Instead, the following was adopted:

> *The WSLCB will use a priority system to determine the order that marijuana retailers are licensed. Within priority categories, applications will not be ranked and will be processed in order of submission.* AR at 9

On October 9, 2015, the LCB announced that a new retail application period would begin on October 12, 2015. [12] CP 514, Ex A.

Retail applications were opened to all, without regard for applicants currently serving patients or the number of patients served.[13]

License Cap Adoption Outside Rulemaking

On November 19th, 2015, BOTEC Analysis released a report entitled, Estimating the Size of the Medical Cannabis Market in Washington State.[14] CP 279. On November 25th, 2015, the LCB informed BOTEC that the agency had serious concerns with the methodology and accuracy of the report. The LCB stated that the report could not be used for the purposes of increasing the total number of retail stores. CP 516, Ex B. In response, BOTEC released a second report on December 15th, 2015.

[12] Neither the October 9th notice, nor the rules adopted on September 23rd, specified a limit on the number of retail licenses that would be made available.
[13] *Id.*
[14] Mark A.R. Kleiman et al., Estimating the Size of the Medical Cannabis Market in Washington State. November 19, 2015

CP 520, Ex C. The final report was cited by the LCB as the basis for setting the number of new retail stores.[15] On December 16th, 2015, the LCB adopted a new statewide retail store cap with allotments for cities and counties.

Trial Court Proceedings.

Faced with the statutorily-imposed transition deadline,[16] Puget Sound Group LLC et al. brought suit (RCW 34.05.514) in Thurston County Superior Court on January 29th, 2016; seeking declaratory judgments (RCW 34.05.570(2)), injunctive relief, an order to compel agency action required by state law (RCW 34.05.570(4)(b)), and other relief as may be necessary and appropriate, plus damages and costs. Injunctive relief was denied, and the complaint was put on a civil calendar.

The license application window closed on March 31st, 2016.[17]Permanent rules were filed May 18th, 2016, effective June 18th, 2016.[18]

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[15] CP 555, Ex D., BOARD TO INCREASE NUMBER OF RETAIL MARIJUANA STORES FOLLOWING ANALYSIS OF MARKETPLACE | WASHINGTON STATE LIQUOR AND CANNABIS BOARD, https://lcb.wa.gov/pressreleases/lcb-to-increase-number-of-retail-mj-stores

[16] Laws of 2015, ch. 70, § 6 (Repealing RCW 69.501A, effective July 1, 2016)

[17] 500906 PSG et al. v. WSLCB Supplemental Brief, Pg. 12-13. Appendix A. WSLCB Listserv – "Board to Close Marijuana Retail License Application Window March 31."

[18] 500906 Appellants Reply Brief, Pg. 13 Fn. 14. See also, Wash. State Reg. 16-11-110, CR-103P "Final 2015 Legislation Implementation Rules." http://lawfilesext.leg.wa.gov/law/wsr/2016/11/16-11-110.htm

Briefs were filed, CP 267-325, 460-477, 326-459, 478-482 and the Petitioners' challenges in the amended complaint CP 117-150, were heard in an ALR hearing on November 18th, 2016. RP. at 6, 20, and 38. The remainder of the Petitioners' claims were dismissed. RP. at 48. The Final Order was entered February 10th, 2017. CP 483-485. The Court of Appeals, Division II dismissed the case on July 10th, 2018.

V. ARGUMENT

1. Standards of Review.

> Mootness, like other questions of justiciability, is a question of law reviewed de novo. [19]
>
> The standard of review of decisions involving statutory interpretation are conducted de novo.[20]

Validity of agency rules are reviewed in consideration of; constitutionality, *ultra vires*, compliance with statutory rulemaking procedures or are arbitrary and capricious.[21] Matters involving agency action (or inaction), not reviewable under RCW 34.05.570(2) or (3) are reviewed in consideration of constitutionality, *ultra vires*, or whether the

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[19] *Washington State Communication Access Project v. Regal Cinemas, Inc.*, 173 Wn.App. 174, 293 P.3d 413, (Div. 1 2013) (citing *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wash.2d 22, 29, 891 P.2d 29 (1995))
[20] *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012)
[21] RCW 34.05.570(2)(c)

agency action was arbitrary and capricious.[22]

2.a. The case is not moot because the emergency rules were the only rules of consequence.

> An issue is moot if the matter is "purely academic."[23] However, an issue is not moot if a court can provide any effective relief. *Id*. at 733.[24]

Puget Sound Group LLC et al. were harmed as a result of the LCB's implementation of the CPPA. The case represents a justiciable controversy. Petitioners were denied the opportunity to obtain licenses during the effective period of the emergency rules.[25] The harms had already been suffered and the license application window was closed prior to adoption of the permanent rules.[26] LCB errors were set and fates were determined before the permanent rules took effect. In regard to the amendment to the governing statute, the law specifically stated that it was not retroactive. [27]

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[22] Or whether the action was taken by an unauthorized person. RCW 34.05.570(4)(c)
[23] *State v. Turner*, 98 Wash.2d 731 (1983) Quoting *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wash.2d 70, 73, 442 P.2d 967 (1968).
[24] *City of Sequim v. Malkasian*, 157 Wn.2d 251, 258-259, 138 P.3d 943, (2006)
[25] This is the same period in which other groups, not contemplated by the legislature, were made eligible to obtain state licenses.
[26] See *Supra* Pgs. 10-11 Fn. 14 and Fn. 15. The license application window was closed on March 31st, 2016. The Decision states, incorrectly, that emergency rules expired in January 2016. Opinion at 5. Emergency licensing rules expired on June 18th, 2016.
[27] Laws of 2017 ch. 317, Sec. 25. "This act applies prospectively only and not retroactively. It applies only to causes of action that arise (if change is substantive) or that are commenced (if change is procedural) on or after the effective date of this

2.b. Case not moot because remedy is available.

The Court of Appeals decision is in conflict with Supreme Court opinions on matters of justiciability. Two cases illustrate the authority of courts to tailor remedies within the context of the facts and the governing statutes. Namely, *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894 (1997) and *Hillis v. State Department of Ecology* 131 Wn.2d 373 (1997)

Washington Coalition involved a class action alleging that DSHS had failed to comply with the requirement under RCW 74.13.031 to develop and implement a plan for providing services to homeless children. The trial court directed DSHS to comply with its statutory obligations. This Court affirmed.

A portion of the dissent in *Washington Coalition* felt that the statute in question did not create an implied right for plaintiffs to seek declaratory and injunctive relief under the uniform declaratory judgements act. More recently, this Court has affirmed that the APA is the exclusive means of judicial review for administrative violations.[28] However, declaratory judgment and the power to order an agency to carry out a

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section." EFFECTIVE DATE: 7/23/2017

[28] *Northwest Ecosystem Alliance v. Washington Forest Practices Bd*., 149 Wn.2d 67, 66 P.3d 614 (2003)

statutory duty are recognized under the APA. Puget Sound Group sought declaratory judgment per RCW 34.05.570(2) and sought an order to comply with statutory instructions, per RCW 34.05.570(4)(b). Remedies under RCW 34.05.574 may issue under any .570 review. Where multiple material issues are presented, remedies are not exclusive of each other.

The *Washington Coalition* dissent also felt that directing DSHS to take specific action to remedy non-compliance with a legislative mandate was contrary to the holding in *Hillis*. What the dissent neglects however, is that the remedy in *Hillis* heavily encroached into the rights of others. *Hillis* does not stand for the proposition that directed action is unavailable.

In *Hillis,* this Court took issue with an order to process plaintiff's water rights application and the impact on other parties seeking the same. Some 5000 applications were currently in cue. While consideration was given as to whether it was arbitrary and capricious for Ecology to process applications in what appeared to be a random order and at an excruciatingly slow pace; it's clear that the nature of the specific relief being sought weighed heavily on this Court. The plaintiffs had their own water needs, but the rights of others in the process would be substantially impacted by that specific relief.

Hillis also involved creation of new permitting criteria outside of rulemaking. The result was invalidation of agency action and remand for rulemaking. On first blush, it appears that the remedy for failure to follow rulemaking procedures was mere rule-invalidation. However, this Court goes on to remand the case for rulemaking on the issue of legislative rules adopted without adherence to APA requirements. It's clear then, that invalidation was the judgment and remand was the broader remedy.

Puget Sound Group challenged the validity of the emergency rule on the basis that LCB failed to properly implement the governing statute (arbitrary and capricious as-applied) and on the basis that the rule was adopted without consideration or deliberation (arbitrary and capricious *per se*). The Court of Appeals believes that the only available remedy is "set-aside." The logic being that a court cannot set aside a rule that has since expired. However, a challenge to the validity of a rule is conducted through a petition for declaratory judgement (RCW 34.05.570(2)(a)) under the standard of review articulated in RCW 34.05.570(2)(c). Of the remedy options described in RCW 34.05.574(1), "set aside" and "declaratory judgement" are distinct. Having confused the remedies while ignoring the remainder of the prayers for relief, the Court of Appeals has impermissibly narrowed the ability for parties to obtain meaningful review.

The APA explicitly states that a court may remand a matter and issue an interlocutory order to preserve the rights of the parties. Puget Sound Group asks that declaratory judgments issue and order the agency to comply with its statutory commands. Petitioners bore the burden of the action to enforce their rights and an interlocutory order is available to provide relief specific to the Petitioners. An Interlocutory order is authorized by the APA and allows the Court to both tailor relief and avoid implicating parties that have already been processed by the LCB's rules. [29]

3. Mootness Exception: Question presented is of substantial or continuing public interest.

> We have quite consistently held that the fact that an issue is moot does not divest this court of jurisdiction to decide it. We will retain an appeal and decide issues, even though moot, if they present matters of substantial public interest, particularly where final determination of the issue is essential in guiding the conduct of public officials.
> *DeFunis v. Odegaard*, 84 Wn.2d 628, (1974)

Considerations - whether: (1) the issue presented is of a public or private nature, (2) it is desirable to provide guidance to public officers, and (3) the issue is likely to recur.

> Appeals in other jurisdictions have been retained, even though moot, inasmuch as matters of 'public interest' were involved,

[29] Additionally, the LCB has made no compelling argument that relief limited to the Petitioners would have an adverse impact on third parties.

> particularly when it was important that a particular statute be correctly construed or when the final determination of a particular question was essential in guiding the conduct of public officials. [30]

The distinction between public issues sufficient to trigger a mootness exception and those that are too modest in scale is a question of impact. Cases that involve a small subset of the population that do not concern bodies with statewide jurisdiction or do not involve substantial public dollars are considered lacking in public interest.

> The instant issue, although of notable academic interest, does not meet this test. Petitioners admit that Lynden is the only city in Washington state to prohibit ballroom dancing where liquor by the drink is sold. Although the issue is undoubtedly of great interest to its residents, it is not of sufficient importance to the public at large to warrant our review under these circumstances. [31]

Despite what appears to be a bright line between significant public interests and those of too private a nature, even *Harvest House* was a split decision.

> The term "moot" is generally applied to cases where the determination does not rest on existing facts or rights, cases in which no judgment rendered could be carried into effect, or cases in which no actual controversy exists.[32]

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[30] *National Elec. Contractors Ass'n v. Seattle School Dist. No. 1*, 66 Wn.2d 14, 400 P.2d 778, (1965)
[31] *Harvest House Restaurant, Inc. v. City of Lynden*, 102 Wn.2d 369, 685 P.2d 600, (1984)
[32] *Harvest House Restaurant, Inc. v. City of Lynden*, 102 Wn.2d 369, 685 P.2d 600, (1984) (Williams, C.J., dissenting).

Puget Sound Group challenges the arbitrary interpretation of the CPPA and arbitrary method by which rules were promulgated. Petitioners also challenge the arbitrary and capricious approach taken by the LCB that amended an existing rule and rule adoption[33] without adherence to APA rulemaking procedures. The perfunctory approaches taken by the LCB show a pattern of unlawful action likely to reoccur.

> A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203.[34] The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness. Ibid.
>
> *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 170 (2000)

The Court of Appeals was in error to narrow the consideration of misconduct to a misinterpreted statute. The Opinion only considered whether a ruling would clarify the agency's statutory authority with regard to license applications and failed to consider whether a ruling would prevent the kind of arbitrary and capricious procedures that Petitioners allege. [35] *Of course* it's unlikely that the Legislature would re-task the LCB

[33] Retail license cap adoption on December 16th, 2015.
[34] "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "[t]he defendant . . . free to return to his old ways." Concentrated Phosphate at 203.
[35] Decision at 6.

to consolidate market systems.[36] That doesn't mean that the LCB did what the CPPA instructed or did so in the manner required by the APA.

While preventing procedural misconduct is significant in its own right, the seemingly private nature of the licenses sought turns out to have a significant public impact. Washington's excise tax on cannabis sales is 37 percent. [37] The State received $315 million dollars in tax revenue in 2017.[38] Divided evenly amongst each retailer[39], each store is responsible for generating $826,000 per store, per year. If Petitioners were made eligible for only one license,[40] they collectively stand to generate $10,748,000 in taxes annually.[41] [42]

4. Decision in Conflict with Published Opinion of the Court of Appeals

The cause was held moot because of the expiration of the emergency rule.

"Because the challenged emergency rule has expired, we cannot

[36] Especially since MUCA, former RCW 69.51A expired on July 1, 2016.
[37] RCW 69.50.535. Plus local sales tax.
[38] Washington State Treasurer (Citing WSLCB 2017 Annual Report Pg. 16.) https://tre.wa.gov/portfolio-item/washington-state-marijuana-revenues-and-health/
[39] 381 retailers with reported revenue per 502data.com. https://502data.com/retailers
[40] Though, some Petitioners applied for more than one license.
[41] On an unweighted basis. The top 100 retailers are responsible for $500,601,000 in state tax revenue, to date. https://502data.com/retailers
[42] The matter of public benefit further increases when one considers the impact of licensing Petitioners, given their substantial experience in medical cannabis.

> provide Puget Sound Group any effective relief. Even if we invalidated the emergency rule, retail marijuana license applications still would be governed by the permanent rule currently in place.[43] And that holding would not affect the validity of the permanent rule. See *Mauzy v. Gibbs*, 44 Wn. App. 625, 634-35, 723 P.2d 458 (1986)." Opinion at 5-6

In 1986, the Court of Appeals stated

> "[T]here is no evidence that [the plaintiff] suffered any prejudice as the result of an attempt by DSHS to require her participation, or, indeed, that DSHS ever followed up on its referral of her. There is no showing that [other plaintiff] was ever affected by the emergency amendment." *Mauzy* at 629.

Mauzy applies if Puget Sound Group attempted to invalidate the permanent rule on the theory that an unlawfully adopted emergency rule taints the permanent rule. Here, no such claim was presented. The *Mauzy* Court considered whether any of the harms were suffered during the effective period of DSHS's emergency rule. The proximity of the harms was among the considerations that The Court of Appeals ignored in making its mootness finding. The *Mauzy* Court actually employed a mootness exception to address the case on the merits and remanded with an order to invalidate the emergency rules. Because the *Mauzy* plaintiffs sought to invalidate the permanent rules by attaching its fate to those of

[43] The proposition that license applications were governed by the permanent rule is in error. See argument on the effective period of the emergency rule, pg. 20, *supra.*

the improper emergency rules, the Court upheld the entry of summary judgement for DSHS as to the validity of the permanent rules.

LCB's permanent rules also reflect a misinterpretation of the CPPA, but their flippant approach to the statutory mandate must not be viewed in isolation of when harms occurred. The license application window created to implement the CPPA was open only during the emergency rule period. [44]

5. Decision in conflict with opinion of the Supreme Court establishing the test for arbitrary and capricious.

The Court of Appeals concluded that the LCB properly deliberated prior to adopting the retail license cap. Proper deliberation depends on whether an agency gave due consideration to the attendant facts and circumstances prior to making its decision.

The seminal case on the arbitrary and capricious standard is *Rios v. Labor and Industries.*[45] *Rios* was about LnI's willful disregard of facts that supported adoption of a pesticide-exposure testing program. In the present case, the LCB called into question the consultant's methodology and metrics, and without any proof of further consideration or deliberation.

[44] Thus, a challenge to the inconsequential permanent rules would be purely academic.
[45] *Rios v. Dep't of Labor & Indus.*, 145 Wash.2d 483 (2002)

The Court of Appeals confuses what the LCB was supposed to be considering and muddles the circumstances informing that consideration. In its Opinion, The Court of Appeals states,

> "the appropriate examination of the agency's deliberation is throughout its decision-making process..." Opinion at 9.

The "entirety of the decision-making process" must evaluate what the LCB knew about BOTEC's methodology and whether the final report could be relied upon.

> "The discussion of methodology between the LCB and BOTEC suggests the LCB took steps to consider the uncertainty of the analysis as part of the attendant facts and circumstances before reaching a decision." Opinion at 9.

The alluded discussions spoke only to the sufficiency of effort, not sufficiency of methodology. LCB staff discussions of BOTEC's effort is the basis upon which the Opinion finds adequacy of the Board's consideration, inferring a satisfaction with results that are undocumented in the record.

> "[T]he LCB's initial concerns do not indicate that the agency was ultimately unconvinced by BOTEC's analysis. The LCB discussed their concerns with BOTEC and BOTEC provided its rationale." Opinion at 9.

It is important to reflect on what those initial concerns were. The LCB did not merely question the metrics and methods; they said in no

uncertain terms that the first report could not be relied upon.

> "[W]e cannot use this report to estimate the need for additional stores." Bob Schroeter, LCB [46]

The Court of Appeals was not provided a record that proved the systemic issues identified by the LCB had been corrected. LCB response to the first report called into question BOTEC's entire approach.

The fact that the Board modified the license cap and pointed to BOTEC's analysis isn't proof that they were convinced, its proof that they acted contrary to their own knowledge. That's *Rios* at its core.

VIII. CONCLUSION

Just as the unlawful actions of LCB cannot be viewed in isolation of the CPPA's broader mandate, the available APA remedies should not be considered in isolation. The nature of the relief should be appropriately fashioned to make the Petitioners whole. The challenge was not brought merely for the benefit of future parties subjected to arbitrary and capricious administrative decision-making, but to see that the CPPA is properly executed.

The Opinion of the Court of Appeals should be reversed. The decision of the trial court should also be reversed, with declaratory

[46] CP 516. Ex B.

judgement against the LCB for arbitrary and capricious rulemaking and remand to the agency with an interlocutory order specifying that petitioners must be made eligible to receive a number of retail licenses proportional to the number of licenses in which they originally applied. [47]

Respectfully submitted, this First day of October, Two Thousand Eighteen.

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[47] Subject to the general requirements for license applicants under RCW 69.50.331

Filed
Washington State
Court of Appeals
Division Two

July 10, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PUGET SOUND GROUP LLC, a Washington limited liability company, POST ONE LLC, a Washington limited liability company, CLONER'S MARKET INC., a Washington corporation, KF INDUSTRIES LLC, a Washington limited liability company, CANNABIS CARE COLLECTIVE LLC is a Washington limited liability company, SGSG, a Washington nonprofit corporation, THE JOINT LLC, a Washington limited liability company, STARBUDS COLLECTIVE a division of THE JOINT LLC, a Washington limited liability company and EMERALD COAST COLLECTIVE, a Washington limited liability company and RAINIER EXPRESS, LLC, a Washington limited liability company, NW PAIN MANAGEMENT LLC, a Washington limited liability company, and ALTERCARE LLC, a Washington limited liability company, Appellants, v. WASHINGTON STATE LIQUOR and CANNABIS BOARD, an agency of the State of Washington, RICK GARZA, Director of Washington State Liquor and Cannabis Board, (in his official capacity), and JOHN AND JANE DOES 1-8, Respondents.	No. 50090-6-II UNPUBLISHED OPINION

MAXA, C.J. – Certain medical marijuana retailers[1] (collectively Puget Sound Group) appeal the trial court's dismissal of their challenges to the Washington State Liquor and

[1] The plaintiffs in this action are Puget Sound Group LLC, Post One LLC, Cloner's Market Inc., KF Industries LLC, Cannabis Care Collective LLC, SGSG, The Joint LLC, Starbuds Collective, a division of the Joint LLC, Emerald Coast Collective, Rainier Express LLC, NW Pain Management LLC, and Altercare LLC.

Cannabis Board's (LCB) adoption of an emergency rule and imposition of a new cap on retail marijuana licenses to implement provisions of the Cannabis Patient Protection Act (CPPA).

We hold that (1) the challenge to the emergency rule is moot because the rule has expired and has been replaced by a permanent rule, and (2) the LCB's decision regarding the statewide cap on retail marijuana licenses did not require formal rulemaking procedures and was not arbitrary and capricious. Accordingly, we affirm the trial court's order dismissing Puget Sound Group's claims.

FACTS

Enactment of CPPA

In 2015 the legislature passed the CPPA, a comprehensive act designed to use the regulations already in place for the sale of recreational marijuana to regulate medical marijuana. LAWS OF 2015, ch. 70 § 2. The CPPA consolidated retail and medical marijuana regulation under the LCB.

The CPPA directed the LCB to develop a competitive, merit-based application process for retail marijuana licenses that included consideration of applicants' experience and qualifications in the marijuana industry. Former RCW 69.50.331(1)(a) (2015). The CPPA also directed the LCB to increase the maximum number of retail marijuana outlets the LCB previously had established, to open a new license application period, and to issue permits for a greater number of retail outlets. Former RCW 69.50.345(2)(d) (2015).

LCB's Response to CPPA

In July 2015, the LCB began exploring new rules and revisions to existing rules to implement the 2015 legislative changes. The LCB determined that emergency rules were

necessary because permanent rules would not be effective until 2016 and the LCB anticipated opening the application period for new retail marijuana licenses on October 12, 2015.

The LCB held a public meeting on September 23, 2015 to discuss the adoption of emergency rules. At the meeting, the LCB adopted emergency rules in WSR 15-19-165, which amended the LCB's existing regulations for licensing retail marijuana outlets. One of the amendments established a three-tiered priority system based on applicants' previous involvement in the marijuana industry to determine the order in which new marijuana retail applicants would be licensed.

The emergency rules also removed the existing cap on the maximum number of retail marijuana licenses and stated that the maximum number of licenses would be determined at a later date. The LCB hired a consulting firm, BOTEC Analysis, to provide information on the size of the medical marijuana market in Washington.

BOTEC submitted a draft report in November. The LCB raised concerns about the report's methodology and its usefulness in estimating the need for additional retail outlets with medical marijuana endorsements. In discussions with LCB staff, BOTEC provided explanations for the adequacy of its methodology. These discussions satisfied the LCB staff's concerns.

BOTEC issued its final report on December 15. The LCB used the report in developing a methodology to determine the number of additional retail licenses to grant in each county. The LCB decided to increase the maximum number of retail outlets by 75 percent in each county and by 100 percent in the 10 counties with the highest medical marijuana sales, unless the county has a moratorium on marijuana sales. The LCB also decided to issue more licenses than BOTEC had suggested would be necessary to meet the medical market demand in order to ensure patients throughout the state had easy access to retail outlets with medical endorsements.

The LCB announced on December 16 that it had decided to cap the maximum number of retail marijuana outlets at 556, which would allow for 222 additional licenses.

Challenge to LCB Actions

Puget Sound Group filed a complaint challenging the validity of the emergency rule establishing a priority system for retail marijuana license applicants and the LCB's decision regarding the maximum number of retail marijuana licenses. Puget Sound Group claimed that the LCB's emergency rule was inconsistent with the statutory intent of the CPPA because it did not rank the applications by submission date or allow applicants to demonstrate their experience and qualifications, that the LCB had failed to engage in required rulemaking in setting the maximum number of retail marijuana licenses, and that the determination of the maximum number of retail licenses was based on unreliable calculations.

The LCB filed a summary judgment motion. The trial court held a supplemental hearing on two issues: Puget Sound Group's challenges to the emergency rule and to the LCB's process in determining the maximum number of retail marijuana licenses. The trial court ruled that the LCB's emergency rule was consistent with its statutory authority and that the LCB did not act arbitrarily or capriciously in deciding the maximum number of retail marijuana licenses. Accordingly, the trial court dismissed Puget Sound Group's claims and upheld the LCB's actions.

Puget Sound Group appeals the trial court's order dismissing its challenge to the emergency rule establishing a priority system for retail marijuana license applicants and the LCB's decision regarding the maximum number of retail marijuana licenses.

ANALYSIS

A. MOOTNESS OF CHALLENGE TO EMERGENCY RULE

Puget Sound Group argues that the LCB's emergency rule regarding the priority of retail marijuana license applicants was invalid because (1) the rule did not incorporate the legislature's directive in former RCW 69.50.331(1)(a) to develop a competitive, merit based application process that gave applicants an opportunity to demonstrate their experience and qualifications in the marijuana industry, and (2) the rule was arbitrary and capricious because the LCB adopted it without proper deliberation or consideration of alternatives. We hold that this challenge is moot because the emergency rule has expired and has been replaced by a permanent rule.

A case is moot if we cannot provide the relief sought or can no longer provide effective relief. *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 510, 309 P.3d 636 (2013). As a general rule, we do not consider cases that are moot or present only abstract questions. *4518 S. 256th, LLC v. Karen L. Gibbon, PS*, 195 Wn. App. 423, 433, 382 P.3d 1 (2016), *review denied*, 187 Wn.2d 1003 (2017).

Emergency rules cannot remain in effect for longer than 120 days unless an agency has filed notice of its intent to adopt a permanent rule. RCW 34.05.350(2). Here, the emergency rule that Puget Sound Group challenges expired in January 2016. The LCB has since issued a permanent rule, WSR 16-11-110, the relevant section of which is codified as WAC 314-55-020. Puget Sound Group does not challenge the permanent rule in this case.

Because the challenged emergency rule has expired, we cannot provide Puget Sound Group any effective relief. Even if we invalidated the emergency rule, retail marijuana license applications still would be governed by the permanent rule currently in place. And that holding

would not affect the validity of the permanent rule. *See Mauzy v. Gibbs*, 44 Wn. App. 625, 634-35, 723 P.2d 458 (1986).

Puget Sound Group argues that we could grant relief if the emergency rule is invalid by ordering the LCB to process the plaintiffs' license applications and grant them retail marijuana licenses. But under RCW 34.05.574(1), the only relief for a challenge to an agency action applicable here is setting aside that action. Under RCW 34.05.574(3), we can order "damages, compensation, or ancillary relief," but "only to the extent expressly authorized by another provision of law." No such provision of the law applies here.

We may choose to consider an emergency rule despite its mootness in order to address issues of continuing and substantial public interest. *See Sudar v. Fish & Wildlife Comm'n*, 187 Wn. App. 22, 35, 347 P.3d 1090 (2015). In deciding if we should rule on a moot issue, we consider (1) whether the question presented is public or private in nature, (2) the desirability of an authoritative determination for future guidance, and (3) the likelihood of future recurrence of the question. *Randy Reynolds & Assocs. v. Harmon*, 1 Wn. App. 2d 239, 244, 404 P.3d 602 (2017), *review granted*, 190 Wn.2d 1019 (2018).

Here, the public concern exception does not favor judicial review of the emergency rule. Although the permanent rule is substantially the same as the challenged emergency rule, the legislature has since amended the statute under which the LCB promulgated the emergency rule. SSB 5131 (2017) (amending RCW 69.50.331). Therefore, a ruling would not clarify the agency's statutory authority with regard to evaluating license applications.

Accordingly, we decline to consider as moot Puget Sound Group's challenge to the emergency rule establishing a priority system for retail marijuana license applicants.

B. DECISION ESTABLISHING MAXIMUM NUMBER OF RETAIL LICENSES

Puget Sound Group argues that the LCB's December 2016 decision to issue only 222 additional retail marijuana licenses (1) constituted rulemaking done without following formal rulemaking procedures, and (2) was arbitrary and capricious because the LCB disregarded its own evidence and failed to deliberate in reaching the final number. We disagree.

1. Decision as Rulemaking

Under the Administrative Procedures Act (APA), chapter 34.05 RCW, an agency is required to go through a specific process in promulgating a new rule. *Providence Physician Servs. v. Dep't of Health*, 196 Wn. App. 709, 725, 384 P.3d 658 (2016). RCW 34.05.570(2) provides for the judicial review of agency rules. One basis for the court to declare a rule invalid is if the rule was adopted without compliance with statutory rulemaking procedures. RCW 34.05.570(2)(c).

However, rulemaking procedures apply only if an agency action meets the APA definition of a rule. *Budget Rent A Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 895, 31 P.3d 1174 (2001). RCW 34.05.010(16) defines "rule" as an agency "order, directive, or regulation of general applicability" that falls within one of five categories. One category is when violation of an agency order "subjects a person to a penalty or administrative sanction." RCW 34.05.010(16)(a). Another category is when an agency order "establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession." RCW 34.05.010(16)(d). The definition of rule explicitly excludes "statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public." RCW 34.05.010(16)(i).

Here, increasing the LCB cap on the number of retail marijuana licenses to issue in each jurisdiction does not meet the definition of a rule. The LCB's decision did not subject any applicant or person to a penalty or sanction. And it did not alter any qualification or standard for the issuance of a license. Instead, the LCB's decision increased the number of retail marijuana licenses that could be issued.

Puget Sound Group argues that the cap established a new qualification for receiving a license – that applicants be located in a jurisdiction where the number of licenses issued had not exceeded the cap. However, the caps for each jurisdiction limit the agency's ability to issue additional licenses, not an applicant's qualifications for receiving a license.

Therefore, we hold that the LCB did not engage in rulemaking by setting a maximum number of additional retail marijuana licenses for each jurisdiction.

2. Arbitrary and Capricious Process

RCW 34.05.570(4) governs judicial review of other agency actions other than rules or agency orders in adjudicative proceedings. We can grant relief from an agency action only if it is unconstitutional, outside the agency's statutory authority, arbitrary and capricious, or exercised by an unauthorized person. RCW 34.05.570(4)(c); *Squaxin Island Tribe v. Dep't of Ecology*, 177 Wn. App. 734, 740, 312 P.3d 766 (2013). An action is arbitrary and capricious if it is willful and unreasoning and taken without consideration of the attending facts or circumstances. *Squaxin*, 177 Wn. App. at 742.

We review an agency's decision to determine if the agency reached the decision " 'through a process of reason, *not whether the result was itself reasonable in the judgment of the court*.' " *Id.* (quoting *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961

(2002)). The party challenging the agency action bears the burden of demonstrating that the action was invalid. *Squaxin*, 177 Wn. App. at 740.

Puget Sound Group argues that the LCB's decision was arbitrary and capricious because the LCB accepted BOTEC's information and methodology in the final report after raising concerns about that same methodology in the draft report. But the LCB's process reflects consideration of BOTEC's analysis as well as additional information and policy concerns.

The LCB expressed concerns about the limitations of the information BOTEC provided in its first draft. However, the LCB's initial concerns do not indicate that the agency was ultimately unconvinced by BOTEC's analysis. The LCB discussed their concerns with BOTEC and BOTEC provided its rationale. The discussion of methodology between the LCB and BOTEC suggests that the LCB took steps to consider the uncertainty of the analysis as part of the attendant facts and circumstances before reaching a decision. The agency incorporated both the information it received and its policy judgment into its ultimate decision. As a result, nothing about the agency's *process* of reaching the maximum number of retail licenses was arbitrary or capricious.

Puget Sound Group also argues that the LCB failed to deliberate before accepting BOTEC's final report because the report was published on December 15 and the LCB announced the cap on December 16. However, the appropriate examination of the agency's deliberation is throughout its entire decision-making process, not the small window of time between receiving a finalized report and reaching a decision. The fact that the LCB staff commented on BOTEC's draft report and engaged with BOTEC to address those concerns indicates ongoing deliberation.

Therefore, we hold that Puget Sound Group has not met its burden of showing the LCB's December 2016 decision to issue only 222 additional retail marijuana licenses was arbitrary and capricious.

C. ATTORNEY FEES ON APPEAL

Puget Sound Group requests attorney fees on appeal under RCW 4.84.350(1), which allows the award of attorney fees to a qualified party who prevails on judicial review of an agency action unless the court finds the agency action was substantially justified or an award would be unjust. Puget Sound Group is not entitled to attorney fees under RCW 4.84.350(1) because it does not prevail on its claims.

CONCLUSION

We affirm the trial court's order dismissing Puget Sound Group's claims.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, C.J.

MAXA, C.J.

We concur:

J. J

LEE, J.

Melnick J.

MELNICK, J.

Filed
Washington State
Court of Appeals
Division Two

August 31, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PUGET SOUND GROUP LLC, a Washington limited liability company, POST ONE LLC, a Washington limited liability company, CLONER'S MARKET INC., a Washington corporation, KF INDUSTRIES LLC, a Washington limited liability company, CANNABIS CARE COLLECTIVE LLC is a Washington limited liability company, SGSG, a Washington nonprofit corporation, THE JOINT LLC, a Washington limited liability company, STARBUDS COLLECTIVE a division of THE JOINT LLC, a Washington limited liability company and EMERALD COAST COLLECTIVE, a Washington limited liability company and RAINIER EXPRESS, LLC, a Washington limited liability company, NW PAIN MANAGEMENT LLC, a Washington limited liability company, and ALTERCARE LLC, a Washington limited liability company,

Appellants,

v.

WASHINGTON STATE LIQUOR and CANNABIS BOARD, an agency of the State of Washington, RICK GARZA, Director of Washington State Liquor and Cannabis Board, (in his official capacity), and JOHN AND JANE DOES 1-8,

Respondents.

No. 50090-6-II

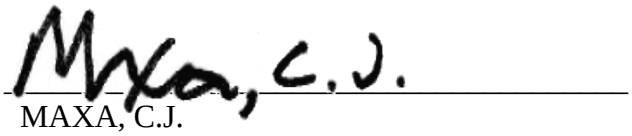
ORDER DENYING MOTIONS FOR RECONSIDERATION AND TO SUPPLEMENT THE RECORD

Appellants move for reconsideration of the court's July 10, 2018 opinion and to supplement the record. Upon consideration, the court denies both motions. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Melnick

FOR THE COURT:



MAXA, C.J.

Laws of 2015, ch. 70 § 6 (former RCW 69.50.331(a))

Sec. 6. RCW 69.50.331 and 2013 c 3 s 6 are each amended to read as follows:
(1) For the purpose of considering any application for a license to produce, process, or sell marijuana, or for the renewal of a license to produce, process, or sell marijuana, the state liquor ((control)) and cannabis board must conduct a comprehensive, fair, and impartial evaluation of the applications timely received.

(a) The state liquor and cannabis board must develop a competitive, merit-based application process that includes, at a minimum, the opportunity for an applicant to demonstrate experience and qualifications in the marijuana industry. The state liquor and cannabis board shall give preference between competing applications in the licensing process to applicants that have the following experience and qualifications, in the following order of priority:

(i) First priority is given to applicants who:
(A) Applied to the state liquor and cannabis board for a marijuana retailer license prior to July 1, 2014;
(B) Operated or were employed by a collective garden before January 1, 2013;
(C) Have maintained a state business license and a municipal business license, as applicable in the relevant jurisdiction; and
(D) Have had a history of paying all applicable state taxes and fees;

(ii) Second priority shall be given to applicants who:
(A) Operated or were employed by a collective garden before January 1, 2013;
(B) Have maintained a state business license and a municipal business license, as applicable in the relevant jurisdiction; and
(C) Have had a history of paying all applicable state taxes and fees; and

(iii) Third priority shall be given to all other applicants who do not have the experience and qualifications identified in (a)(i) and (ii) of this subsection.

RCW 69.50.331 (current)

Application for license.

(1) For the purpose of considering any application for a license to produce, process, research, transport, or deliver marijuana, useable marijuana, marijuana concentrates, or marijuana-infused products subject to the regulations established under RCW 69.50.385, or sell marijuana, or for the renewal of a license to produce, process, research, transport, or deliver marijuana, useable marijuana, marijuana concentrates, or marijuana-infused products subject to the regulations established under RCW 69.50.385, or sell marijuana, the state liquor and cannabis board must conduct a comprehensive, fair, and impartial evaluation of the applications timely received.

(a) The state liquor and cannabis board may cause an inspection of the premises to be made, and may inquire into all matters in connection with the construction and operation of the premises. For the purpose of reviewing any application for a license and for considering the denial, suspension, revocation, or renewal or denial thereof, of any license, the state liquor and cannabis board may consider any prior criminal conduct of the applicant including an administrative violation history record with the state liquor and cannabis board and a criminal history record information check. The state liquor and cannabis board may submit the criminal history record information check to the Washington state patrol and to the identification division of the federal bureau of investigation in order that these agencies may search their records for prior arrests and convictions of the individual or individuals who filled out the forms. The state liquor and cannabis board must require fingerprinting of any applicant whose criminal history record information check is submitted to the federal bureau of investigation. The provisions of RCW 9.95.240 and of chapter 9.96A RCW do not apply to these cases. Subject to the provisions of this section, the state liquor and cannabis board may, in its discretion, grant or deny the renewal or license applied for. Denial may be based on, without limitation, the existence of chronic illegal activity documented in objections submitted pursuant to subsections (7)(c) and (10) of this section. Authority to approve an uncontested or unopposed license may be granted by the state liquor and cannabis board to any staff member the board designates in writing. Conditions for granting this authority must be adopted by rule.

(b) No license of any kind may be issued to:

(i) A person under the age of twenty-one years;

(ii) A person doing business as a sole proprietor who has not lawfully resided in the state for at least six months prior to applying to receive a license;
(iii) A partnership, employee cooperative, association, nonprofit corporation, or corporation unless formed under the laws of this state, and unless all of the members thereof are qualified to obtain a license as provided in this section; or
(iv) A person whose place of business is conducted by a manager or agent, unless the manager or agent possesses the same qualifications required of the licensee.
(2)(a) The state liquor and cannabis board may, in its discretion, subject to the provisions of RCW 69.50.334, suspend or cancel any license; and all protections of the licensee from criminal or civil sanctions under state law for producing, processing, researching, or selling marijuana, marijuana concentrates, useable marijuana, or marijuana-infused products thereunder must be suspended or terminated, as the case may be.
(b) The state liquor and cannabis board must immediately suspend the license of a person who has been certified pursuant to RCW 74.20A.320 by the department of social and health services as a person who is not in compliance with a support order. If the person has continued to meet all other requirements for reinstatement during the suspension, reissuance of the license is automatic upon the state liquor and cannabis board's receipt of a release issued by the department of social and health services stating that the licensee is in compliance with the order.
(c) The state liquor and cannabis board may request the appointment of administrative law judges under chapter 34.12 RCW who shall have power to administer oaths, issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and testimony, examine witnesses, and to receive testimony in any inquiry, investigation, hearing, or proceeding in any part of the state, under rules and regulations the state liquor and cannabis board may adopt.
(d) Witnesses must be allowed fees and mileage each way to and from any inquiry, investigation, hearing, or proceeding at the rate authorized by RCW 34.05.446. Fees need not be paid in advance of appearance of witnesses to testify or to produce books, records, or other legal evidence.
(e) In case of disobedience of any person to comply with the order of the state liquor and cannabis board or a subpoena issued by the state liquor and cannabis board, or any of its members, or administrative law judges, or on the refusal of a witness to testify to any matter regarding which he or she may be lawfully interrogated, the judge of the superior court of the county in which the person resides, on application of any member of the board or administrative law judge, compels obedience by contempt proceedings, as

in the case of disobedience of the requirements of a subpoena issued from said court or a refusal to testify therein.
(3) Upon receipt of notice of the suspension or cancellation of a license, the licensee must forthwith deliver up the license to the state liquor and cannabis board. Where the license has been suspended only, the state liquor and cannabis board must return the license to the licensee at the expiration or termination of the period of suspension. The state liquor and cannabis board must notify all other licensees in the county where the subject licensee has its premises of the suspension or cancellation of the license; and no other licensee or employee of another licensee may allow or cause any marijuana, marijuana concentrates, useable marijuana, or marijuana-infused products to be delivered to or for any person at the premises of the subject licensee.
(4) Every license issued under this chapter is subject to all conditions and restrictions imposed by this chapter or by rules adopted by the state liquor and cannabis board to implement and enforce this chapter. All conditions and restrictions imposed by the state liquor and cannabis board in the issuance of an individual license must be listed on the face of the individual license along with the trade name, address, and expiration date.
(5) Every licensee must post and keep posted its license, or licenses, in a conspicuous place on the premises.
(6) No licensee may employ any person under the age of twenty-one years.
(7)(a) Before the state liquor and cannabis board issues a new or renewed license to an applicant it must give notice of the application to the chief executive officer of the incorporated city or town, if the application is for a license within an incorporated city or town, or to the county legislative authority, if the application is for a license outside the boundaries of incorporated cities or towns, or to the tribal government if the application is for a license within Indian country, or to the port authority if the application for a license is located on property owned by a port authority.
(b) The incorporated city or town through the official or employee selected by it, the county legislative authority or the official or employee selected by it, the tribal government, or port authority has the right to file with the state liquor and cannabis board within twenty days after the date of transmittal of the notice for applications, or at least thirty days prior to the expiration date for renewals, written objections against the applicant or against the premises for which the new or renewed license is asked. The state liquor and cannabis board may extend the time period for submitting written objections upon request from the authority notified by the state liquor and cannabis board.
(c) The written objections must include a statement of all facts upon which the objections are based, and in case written objections are filed, the city or

town or county legislative authority may request, and the state liquor and cannabis board may in its discretion hold, a hearing subject to the applicable provisions of Title 34 RCW. If the state liquor and cannabis board makes an initial decision to deny a license or renewal based on the written objections of an incorporated city or town or county legislative authority, the applicant may request a hearing subject to the applicable provisions of Title 34 RCW. If a hearing is held at the request of the applicant, state liquor and cannabis board representatives must present and defend the state liquor and cannabis board's initial decision to deny a license or renewal.

(d) Upon the granting of a license under this title the state liquor and cannabis board must send written notification to the chief executive officer of the incorporated city or town in which the license is granted, or to the county legislative authority if the license is granted outside the boundaries of incorporated cities or towns.

(8)(a) Except as provided in (b) through (d) of this subsection, the state liquor and cannabis board may not issue a license for any premises within one thousand feet of the perimeter of the grounds of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older.

(b) A city, county, or town may permit the licensing of premises within one thousand feet but not less than one hundred feet of the facilities described in (a) of this subsection, except elementary schools, secondary schools, and playgrounds, by enacting an ordinance authorizing such distance reduction, provided that such distance reduction will not negatively impact the jurisdiction's civil regulatory enforcement, criminal law enforcement interests, public safety, or public health.

(c) A city, county, or town may permit the licensing of research premises allowed under RCW 69.50.372 within one thousand feet but not less than one hundred feet of the facilities described in (a) of this subsection by enacting an ordinance authorizing such distance reduction, provided that the ordinance will not negatively impact the jurisdiction's civil regulatory enforcement, criminal law enforcement, public safety, or public health.

(d) The state liquor and cannabis board may license premises located in compliance with the distance requirements set in an ordinance adopted under (b) or (c) of this subsection. Before issuing or renewing a research license for premises within one thousand feet but not less than one hundred feet of an elementary school, secondary school, or playground in compliance with an ordinance passed pursuant to (c) of this subsection, the board must ensure that the facility:

(i) Meets a security standard exceeding that which applies to marijuana producer, processor, or retailer licensees;
(ii) Is inaccessible to the public and no part of the operation of the facility is in view of the general public; and
(iii) Bears no advertising or signage indicating that it is a marijuana research facility.
(e) The state liquor and cannabis board may not issue a license for any premises within Indian country, as defined in 18 U.S.C. Sec. 1151, including any fee patent lands within the exterior boundaries of a reservation, without the consent of the federally recognized tribe associated with the reservation or Indian country.
(9) A city, town, or county may adopt an ordinance prohibiting a marijuana producer or marijuana processor from operating or locating a business within areas zoned primarily for residential use or rural use with a minimum lot size of five acres or smaller.
(10) In determining whether to grant or deny a license or renewal of any license, the state liquor and cannabis board must give substantial weight to objections from an incorporated city or town or county legislative authority based upon chronic illegal activity associated with the applicant's operations of the premises proposed to be licensed or the applicant's operation of any other licensed premises, or the conduct of the applicant's patrons inside or outside the licensed premises. "Chronic illegal activity" means (a) a pervasive pattern of activity that threatens the public health, safety, and welfare of the city, town, or county including, but not limited to, open container violations, assaults, disturbances, disorderly conduct, or other criminal law violations, or as documented in crime statistics, police reports, emergency medical response data, calls for service, field data, or similar records of a law enforcement agency for the city, town, county, or any other municipal corporation or any state agency; or (b) an unreasonably high number of citations for violations of RCW 46.61.502 associated with the applicant's or licensee's operation of any licensed premises as indicated by the reported statements given to law enforcement upon arrest.

[2017 c 317 § 2; 2015 2nd sp.s. c 4 § 301; 2015 c 70 § 6; 2013 c 3 § 6 (Initiative Measure No. 502, approved November 6, 2012).]

NOTES:

Findings—Application—2017 c 317: See notes following RCW 69.50.325.

RCW 69.50.325

NOTES:

Application—2017 c 317: "This act applies prospectively only and not retroactively. It applies only to causes of action that arise (if change is substantive) or that are commenced (if change is procedural) on or after July 23, 2017." [2017 c 317 § 25.]
Effective date—2017 c 316 §§ 2 and 3: "Sections 2 and 3 of this act take effect July 1, 2018." [2017 c 316 § 4.]
Effective date—2016 c 170: "This act takes effect July 1, 2016." [2016 c 170 § 3.]
Short title—Findings—Intent—References to Washington state liquor control board—Draft legislation—2015 c 70: See notes following RCW 66.08.012.
Intent—2013 c 3 (Initiative Measure No. 502): See note following RCW 69.50.101.

Laws of 2015, ch. 70 § 8

Sec. 8. RCW 69.50.345 and 2013 c 3 s 10 are each amended to read as follows:
The state liquor ((control)) and cannabis board, subject to the provisions of this chapter ((3, Laws of 2013)), must adopt rules ((by December 1, 2013,)) that establish the procedures and criteria necessary to implement the following:

(d) The number of retail outlets holding medical marijuana endorsements necessary to meet the medical needs of qualifying patients. The state liquor and cannabis board must reconsider and increase the maximum number of retail outlets it established before the effective date of this section and allow for a new license application period and a greater number of retail outlets to be permitted in order to accommodate the medical needs of qualifying patients and designated providers. After January 1, 2017, any reconsideration of the maximum number of retail outlets needed to meet the medical needs of qualifying patients must consider information contained in the medical marijuana authorization database established in section 21 of this act;

RCW 69.50.345

The state liquor and cannabis board, subject to the provisions of this chapter, must adopt rules that establish the procedures and criteria necessary to implement the following:

(d) The number of retail outlets holding medical marijuana endorsements necessary to meet the medical needs of qualifying patients. The state liquor and cannabis board must reconsider and increase the maximum number of retail outlets it established before July 24, 2015, and allow for a new license application period and a greater number of retail outlets to be permitted in order to accommodate the medical needs of qualifying patients and designated providers. After January 1, 2017, any reconsideration of the maximum number of retail outlets needed to meet the medical needs of qualifying patients must consider information contained in the medical marijuana authorization database established in RCW 69.51A.230;

CERTIFICATE OF SERVICE

I certify that on this date, I sent for delivery a true and correct copy of the document to which is affixed by the method indicated below and addressed to the following:

Penny L. Allen - Senior Attorney Office of the Attorney General, WA PO Box 40100 Olympia, WA 98504-0100 f. 360.664.9006 pennya@atg.wa.gov	[ ] U.S. MAIL [ ] PROCESS LEGAL SERVER [x] EMAIL [ ] HAND DELIVERED [ ] EXPRESS DELIVERY [ ] FACSIMILE
Kim Cleveland Court of Appeals Division II Case Manager 950 Broadway Suite 300 Tacoma, WA 98402-4454 coa2filings@courts.wa.gov	[ ] U.S. MAIL [ ] PROCESS LEGAL SERVER [X] E-MAIL [ ] HAND DELIVERED [ ] EXPRESS DELIVERY [ ] FACSIMILE

DATED: October 1, 2018 SIGNED By:

S./*Ryan R. Agnew*
Ryan R. Agnew, WSBA #43668

The Law Office of Ryan R. Agnew, PS
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THE LAW OFFICE OF RYAN R. AGNEW PS

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Transmittal Information

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Appellate Court Case Number:	50090-6
Appellate Court Case Title:	Puget Sound Group, LLC, et al., Appellants v. WA State Liquor & Cannabis Bd, et al., Respondents
Superior Court Case Number:	16-2-00477-3

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