

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON** July 10, 2018

**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UNPUBLISHED OPINION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<sup>1</sup> (collectively Puget Sound Group)

appeal the trial court’s dismissal of their challenges to the Washington State Liquor and

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<sup>1</sup> 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We hold that (1) the challenge to the emergency rule is moot because the rule has expired and has been replaced by a permanent rule, and (2) the LCB's decision regarding the statewide cap on retail marijuana licenses did not require formal rulemaking procedures and was not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.

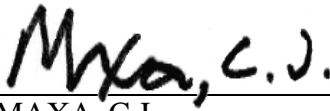
C. ATTORNEY FEES ON APPEAL

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.

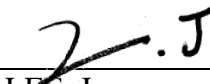
CONCLUSION

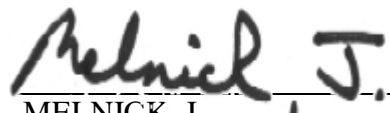
We affirm the trial court's order dismissing Puget Sound Group's claims.

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.

  
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MAXA, C.J.

We concur:

  
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LEE, J.

  
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MELNICK, J.