BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: HIGH SOCIETY INC. d/b/a HIGH SOCIETY 10600 MAIN ST BELLEVUE, WA 98004-5922 APPLICANT LICENSE APPLICATION NO. 414499 UBI: 603 354 306 001 0001	LCB NO. M-25,207 OAH NO. 2014-LCB-0068 FINAL ORDER OF THE BOARD

The above-captioned matter coming on regularly before the Board, and it appearing that:

1. The Licensing Division of the Liquor Control Board issued a Statement of Intent to Deny Marijuana License dated June 17, 2014, asserting that the Applicant failed to submit a required signed letter of intent to lease or purchase from property owner or designee.

2. The Applicant timely submitted a request for a hearing.

3. On November 19, 2014, a hearing was held before Administrative Law Judge Terry A. Schuh with the Office of Administrative Hearings.

4. At the hearing, the Applicant was represented by Attorney Ryan Espegard. Assistant Attorney General Kim O'Neal represented the Licensing Division of the Board.

5. On February 23, 2015, Administrative Law Judge Terry A. Schuh issued an Initial Order, affirming the decision to deny the Applicant's license application as expressed in the Statement of Intent to Deny Marijuana License.

6. The Applicant filed a Petition for Review in March 17, 2015.

7. On April 7, 2015, the Board issued an Order Granting Licensing's Motion to Extend the Filing Time for Petition for Review until April 13, 2015.

8. On April 13, 2015, Licensing's Response in Opposition to Petition for Review of Initial Order was filed with OAH instead of LCB in error and filed with LCB on May 5, 2015.

9. The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law and Final Order of the Board, with the following modifications:

> On page 6, in Finding of Fact No. 21, the last sentence, beginning with "Ms. Stephens" is corrected to read "Mr. Stephens..."
>
> On page 10, in Conclusion of Law No. 13, the quoted language of WAC 314-55-081(1) is corrected to read: "Once the number of applications per city and at large have <u>been</u> identified, the eligible applicants will be selected by lottery in the event the number of applications exceeds the allotted amount for the cites and county."
>
> On page 12, Conclusion of Law No. 19 is modified to delete the final six words "and thus itself arbitrary and capricious."
>
> On page 12, Conclusion of Law No. 22 is modified to replace the word "apt" with "appropriate".
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> On page 12, Conclusion of Law No. 21 is modified to delete the final sentence.

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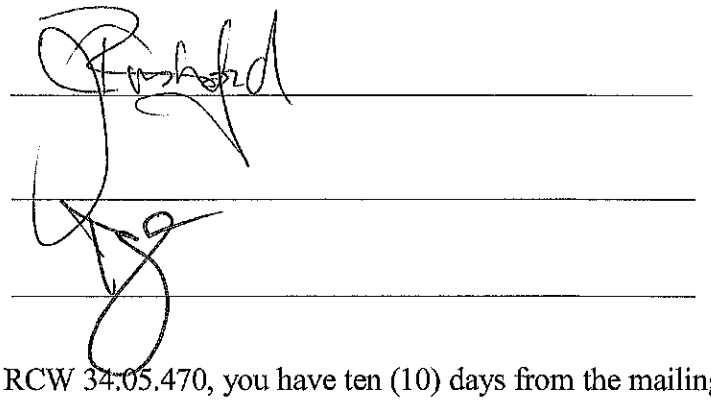
IT IS HEREBY FURTHER ORDERED that marijuana license application number 414499 for High Society Inc. d/b/a High Society is DENIED.

DATED at Olympia, Washington this 19th day of MAY, 2015.

WASHINGTON STATE LIQUOR CONTROL BOARD



Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Washington State Liquor Control Board, Attn: Kevin McCarroll, 3000 Pacific Avenue Southeast, PO Box 43076, Olympia, WA 98504-3076, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board's office. RCW 34.05.010(6). A copy shall also be sent to Mary M. Tennyson, Senior Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Stay of Effectiveness. The filing of a petition for reconsideration does not stay the effectiveness of this Order. The Board has determined not to consider a petition to stay the effectiveness of this Order. Any such request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

Judicial Review. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

Washington State
Liquor Control Board

May 20, 2015

Ryan C. Espegard
Attorney for Applicant
Gordon Thomas Honeywell LLP
600 University St Ste 2100
Seattle, WA 98101-4161

Joshua Stephens
High Society Inc.
d/b/a High Society
625 Picket Ave NE
North Bend, WA 98045-9437

Kim O'Neal, AAG
GCE Division, Office of Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

RE: ***FINAL ORDER OF THE BOARD***
APPLICANT: High Society Inc.
TRADE NAME: High Society
LOCATION: 10600 Main St, Bellevue, WA 98004-5922
LICENSE APPLICATION NO. 414449
LCB HEARING NO. M-25,207
OAH NO. 2014-LCB-0068
UBI: 603 354 306 001 0001

Dear Parties:

Please find the enclosed Final Order of the Board and Declaration of Service by Mail in the above-referenced matter.

If you have any questions, please contact me at (360) 664–1602.

Sincerely,

Kevin McCarroll
Adjudicative Proceedings Coordinator

KM:mg

Enclosures (2)

cc: Becky Smith, Licensing Director, WSLCB
Frank O'Dell, Licensing Supervisor, WLSCB
Mary Henley, Licensing Administrative Assistant, WSLCB

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: HIGH SOCIETY INC. d/b/a HIGH SOCIETY 10600 MAIN ST BELLEVUE, WA 98004-5922 APPLICANT LICENSE APPLICATION NO. 414499 UBI: 603 354 306 001 0001	LCB NO. M-25,207 OAH NO. 2014-LCB-0068 DECLARATION OF SERVICE BY MAIL

I certify that I caused a copy of the FINAL ORDER OF THE BOARD in the above-referenced matter to be served on all parties or their counsel of record by US Mail Postage Prepaid via Consolidated Mail Service for applicants and licensees, by electronic mail for WSLCB offices, and Campus Mail via Consolidated Mail Services for state offices on the date below to:

RYAN C. ESPEGARD ATTORNEY FOR APPLICANT GORDON THOMAS HONEYWELL LLP 600 UNIVERSITY ST. , STE 2100 SEATTLE, WA 98101-4161	OFFICE OF THE ATTORNEY GENERAL MAIL STOP 40100, GCE DIVISION KIM O'NEAL, ASSISTANT ATTORNEY GENERAL
JOSHUA STEPEHENS d/b/a HIGH SOCIETY 625 PICKET AVE NE NORTHBEND, WA 98045-9437	

DATED this 20th day of May, 2015, at Olympia, Washington.

Kevin McCarroll, Adjudicative Proceedings Coordinator

RECEIVED
FEB 27 2015
Liquor Control Board
Board Administration

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
LIQUOR CONTROL BOARD

In the matter of:	Docket No. 2014-LCB-0068 LCB No. M-25,207
Joshua Stephens dba High Society, Inc., Location Address: 10600 Main Street Bellevue, WA 98004, Applicant. License Application No. 414499 UBI No. 603 354 306 001 0001	**INITIAL ORDER**

1. ISSUES PRESENTED

1. Whether the Applicant failed to submit a signed letter of intent to lease or purchase the proposed location from the property owner or designee or any other information or documentation requested by the Liquor Control Board during the evaluation process.

2. If so, whether the Liquor Control Board correctly denied the Applicant's application for that reason.

2. ORDER SUMMARY

1. The letter of intent to lease submitted by the Applicant was not signed by the property owner or designee.

2. Accordingly, the Liquor Control Board correctly denied the Applicant's application for that reason.

3. HEARING

1. Hearing Date: Wednesday, November 19, 2014

2. Administrative Law Judge: Terry A Schuh

3. Licensee/Applicant: Joshua Stephens dba High Society, Inc.

   1. Representative: Ryan C Espegard

   2. Witness: Joshua Stephens

4. Agency: Liquor Control Board

   1. Representative: Kim O'Neal, Sr. Counsel, Office of Atty General

   2. Witnesses: Sean Houlihan, Investigator, LCB
      Alan Rathbun, Lic. & Reg. Director, LCB
      Rebecca Smith, Marijuana Mgr., LCB

5. Exhibits: The administrative law judge admitted exhibits 1 through 6, A through Y, BB, and JJ.

6. Administrative Law Judge T J Martin appeared as an observer.

7. The administrative law judge granted the parties permission to file post-hearing briefs and/or proposed findings of fact and conclusions of law. The record remained open for that purpose until December 24, 2014, at which time the record closed.

4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Jurisdiction

1. The Liquor Control Board ("the Board") issued to the Applicant, Joshua Stephens dba High Society, Inc. ("Mr. Stephens"), and served by mail a Statement of Intent to Deny Marijuana License, dated June 17, 2014. Ex. 1.

2. On July 1, 2014, the Board received from Mr. Stephens a Request for Hearing signed and dated June 27, 2014. Ex. 2

The Board designed a pre-screen and lottery process

3. In late 2013, the Board announced a 30-day window for applicants to file applications for marijuana producer, processor, and retailer licenses. Testimony of Houlihan. The Board expected to receive approximately 2500 applications. Testimony of Smith. Instead, the Board received more than 7,000 applications for marijuana licenses, including more than 2100 for marijuana retailer licenses. Testimony of Rathbun; Testimony of Smith. However, the Board had determined it would issue only 334 marijuana retailer licenses statewide, distributed among the various communities. Testimony of Smith. The Board decided to employ a lottery to place the applicants for marijuana retailer licenses in queue for investigation and, if qualified, a license. Testimony of Rathbun. The lottery by design reduced the number of applicants to be investigated, speeding up the process. Testimony of Smith.

4. As the Board reviewed and processed applications filed by prospective producers and processors, it observed that many applications were seriously deficient, particularly as to the proposed location. Testimony of Smith. Many of those applicants changed proposed locations frequently. Testimony of Smith. As a result, investigation of those applications consumed significant time, prejudicing the Board's ability to grant licenses in a timely manner. Testimony of Smith.

5. The matter of a specific proposed location is particularly relevant because the Board issues licenses to an applicant for a specific location. Testimony of Rathbun.

6. Moreover, applicants who had diligently researched and prepared their applications expressed concern to the Board that they would be forced to compete in a lottery with applicants who were less diligent. Testimony of Rathbun; Testimony of Smith.

7. In response, the Board designed a pre-screen process to disqualify in advance, and deny admission into the lottery, of deficient submissions. Testimony of Rathbun; Testimony of Smith.

8. The applicants were advised in advance of the pre-screen process and, when it was employed, given 30 days to complete the submission, including the requested documentation. Testimony of Smith. The applicants received three notifications regarding the pre-screen process. Testimony of Smith. They were

told what information was needed and they were told that failure to provide that information would cause the Board to withdraw the application and deny the applicant a marijuana retailer license. Testimony of Smith.

9. A key element was the proposed location because so much hinged upon where the applicant intended to operate. Testimony of Rathbun. For example, the proposed location determined what local authority deserved notification so that local authority could object if it desired to do so. Testimony of Rathbun. Also, the proposed location was the basis for applying the 1000-foot proximity rule. Testimony of Rathbun.

10. Thus, the Board required the applicants to identify a specific location and address and to demonstrate that the applicant had a legitimate opportunity to locate a marijuana retail store at that location. Testimony of Rathbun. To that effect, the Board required the applicant to submit either proof that the applicant owned or was in process of purchasing the location property, or had leased it, or had made preliminary arrangements to lease the location property. Testimony of Houlihan; Testimony of Rathbun; Ex. 3, p. 1. The purpose of the latter option was to allow an applicant to participate in the lottery by committing to a location and demonstrating that it was likely to be available to the applicant but without necessarily investing in the property in advance. Testimony of Rathbun. To demonstrate and employ the last option, the applicant was required to submit a document signed by the owner of the location property, stating that the owner intended to lease the location property to the applicant for a marijuana retail store if the applicant was ultimately licensed. Ex. 3, p. 1. This is called a "letter of intent".

11. The Board accepted multiple letters of intent signed by the same property owner for different applicants. Testimony of Houlihan; *see, e.g.*, Ex. K; Testimony of Rathbun. This was because some communities had limited qualifying locations and because relevant property owners wanted an improved chance of selling or leasing to a licensee. Testimony of Rathbun. If more than one such applicant received a "winning" lottery number, the applicant or applicants that did not secure the lease on the property subject of the letters of intent has been allowed to find a new location. Testimony of Houlihan; Testimony of Rathbun; Ex. L.

12. In early January 2014, the Board informed the applicants of the pending pre-screen process, which occurred beginning in late February 2014 and concluded in late March 2014. Testimony of Rathbun; Testimony of Smith.

13. The Board informed the applicants that failure to participate in or satisfy the requirements of the pre-screen process would result in their application being excluded from the lottery. Testimony of Rathbun. The Board did not inform applicants that they could be disqualified post-lottery based on pre-screen deficiencies. Testimony of Smith.

14. The Board allowed, in error, the entry into the lottery of some applicants that should have been disqualified during the pre-screen process. Testimony of Rathbun; Testimony of Smith. When discovered later, these applicants were issued Statements of Intent to Deny Marijuana License. Testimony of Rathbun.

15. Applicants with disqualifying letters of intent were not allowed to change their proposed location. Testimony of Rathbun.

The Applicant submitted a pre-qualification application

16. Prior to submitting a pre-screen application, Mr. Stephens sought an apt location for a marijuana retail store. Testimony of Stephens. He started looking at property after the Board finalized its rules and publicized requirements. Testimony of Stephens.

17. Mr. Stephens discovered a building with several units at 10600 Main Street, Bellevue, WA 98004 ("Main Street property"). Testimony of Stephens; *see* Ex. A. Mr. Stephens spoke with the owner, Ali Biria, in October 2013 and again in March 2014. Testimony of Stephens; *see* Ex. B, p. 2.

18. Mr. Biria told Mr. Stephens that he was open to a marijuana retailer as a tenant, and that he would consider leasing a unit or selling the building. Testimony of Stephens.

19. Mr. Stephens has a cousin, Hans Truesdell, able to and interested in investing in real estate, willing to purchase an apt property and lease it to Mr. Stephens for a marijuana retail store. Testimony of Stephens; Ex. D. Mr. Stephens and Mr. Truesdell discussed the Main Street property. Testimony of Stephens; Ex. D.

20. Neither Mr. Stephens nor Mr. Truesdell made any attempt to begin negotiations with the owner of the Main Street property because Mr. Stephens knew that another applicant for a marijuana retail license was intending to locate across the street and Mr. Stephens knew that Bellevue would not allow two marijuana retail stores to be located so close together. Testimony of Stephens; Ex. G. Neither

Mr. Stephens nor Mr. Truesdell wanted to own the Main Street property except if they could place a marijuana retail store there. Testimony of Stephens.

21. In addition to the Bellevue application, Mr. Stephens submitted an application for a marijuana retail license in Issaquah as well. Testimony of Stephens. In mid-March, Mr. Stephens and Mr. Truesdell were in active negotiations to purchase a property in Issaquah for locating a marijuana retail store. Testimony of Stephens. Mr. Stephens realized that the negotiations would not be completed before his pre-screen submission was due for that application. Testimony of Stephens. So Mr. Stephens called the Board and asked what he should submit regarding his connection to his proposed location. Testimony of Stephens; Ex. U. Mr. Stephens does not know who he talked to. Testimony of Stephens. Ms. Stephens was told to submit a letter of intent signed by the prospective purchaser. Testimony of Stephens.

22. Given the circumstances Mr. Stephens faced regarding the Bellevue pre-screen submission and given the instructions he received regarding the Issaquah submission, Mr. Stephens decided to include with his Bellevue pre-screen submission a letter of intent signed by Mr. Truesdell, in which Mr. Truesdell stated that he intended to purchase the Main Street property and lease it to Mr. Stephens for use as a marijuana retail store. Testimony of Stephens; Ex. D; Testimony of Houlihan; Ex. 3, p. 12. Mr. Truesdell was not the owner of the property or the owner's designee. Testimony of Houlihan; Testimony of Stephens. Mr. Truesdell had no rights to the property. Testimony of Houlihan; Testimony of Stephens.

23. Mr. Stephens completed and submitted the pre-screen information, with the aforementioned letter of intent. Testimony of Stephens; Ex. 3; Ex. F.

<u>The Board processed the Mr. Stephens's pre-screen submission and included Mr. Stephens in the lottery</u>

24. The Board processed Mr. Stephens's pre-screen submission, including the aforementioned letter of intent, and included Mr. Stephens in the lottery.

25. The record is not clear whether the Board approved Mr. Stephens's letter of intent or failed to recognize that it was not signed by the property owner. However, the Board did not review in detail, pre-lottery, the content of letters of intent. Testimony of Smith.

26. Mr. Stephens received number three in the lottery for the Bellevue area. Testimony of Stephens; Ex. K. The Board allocated four retail licenses for the Bellevue area. Testimony of Stephens. Accordingly, Mr. Stephens was eligible to be awarded a marijuana retail license if he successfully navigated the investigation phase.

The investigation phase

27. The Board issued a letter to lottery "winners" explaining that "winning" the lottery did not assure the applicant of a license. Testimony of Smith; *see, e.g.*, Ex. U. Rather, "winning" the lottery merely advanced the applicant to the investigative phase. Testimony of Smith; *see, e.g.*, Ex. U.

28. On May 13, 2014, post-lottery, Investigator Sean Houlihan's supervisor assigned to him 43 marijuana retailer applications to investigate, including Mr. Stephens's. Testimony of Houlihan.

29. On May 16, 2014, Mr. Houlihan talked with Mr. Stephens by phone and scheduled an investigative interview on June 5, 2014. Testimony of Houlihan; Ex. N; Testimony of Stephens.

30. During that conversation, Mr. Stephens told Mr. Houlihan that another lottery winner was directly across the street and that Bellevue would not allow two marijuana retail stores to operate in that close proximity. Testimony of Houlihan; Testimony of Stephens. Mr. Stephens asked if he could find another qualifying location. Testimony of Houlihan; Testimony of Stephens. Mr. Houlihan approved that request. Testimony of Houlihan; Testimony of Stephens. At that time, the Board did not re-examine the letter of intent or inquire into the specific circumstances of Mr. Stephens's connection to the Main Street property. Testimony of Houlihan. However, at some point, Mr. Houlihan would have required a purchase/sale agreement or a lease for the property where Mr. Stephens was locating his marijuana retail store. Testimony of Houlihan.

31. Typically, the Board allowed applicants 30 days, occasionally more, following the investigative interview to provide documentation requested by the Board during the interview. Testimony of Houlihan.

32. Later on May 16, 2014, after Mr. Houlihan talked with Mr. Stephens, the Board received a complaint from Zach Fleet, an attorney who represented Green Sun Seattle, a lottery competitor of Mr. Stephens's, asserting that Mr. Stephens did

not have and did not submit a letter of intent signed by the property owner. Testimony of Houlihan; Ex. 5.

33. The complaint caused the Board to review Mr. Stephens's file and specifically the letter of intent. Testimony of Houlihan. The Board determined that Mr. Stephens's letter of intent was deficient because it was not signed by the property owner. Testimony of Houlihan. Applicants that submitted invalid letters of intent during the pre-screen process were denied marijuana retail licenses. Testimony of Rathbun. The Board determined to deny Mr. Stephens's application for a marijuana retail license. Testimony of Houlihan. Once the pre-screen process closed, the Board has not allowed an applicant to correct or replace the letter of intent signed by someone other than the property owner. Testimony of Rathbun.

34. Mr. Houlihan sent Mr. Stephens an e-mail informing him that his letter of intent was invalid and that he would receive a Statement of Intent to Deny Marijuana License. Testimony of Houlihan; Testimony of Stephens.

35. Mr. Houlihan discontinued his investigation because the invalid letter of intent was a disqualifying issue. Testimony of Houlihan.

36. The Board issued a Statement of Intent to Deny Marijuana License to the Applicant. Ex. P; Ex. 1.

37. The Board's denial occurred post-lottery but was based on Mr. Stephens's pre-lottery, pre-screen submission. The Board determined that Mr. Stephens had not been qualified to be entered into the lottery and should have been excluded.

38. The Board has not allowed applicants who were disqualified during the pre-screen process to change locations. Testimony of Houlihan. Only applicants whose proposed location satisfied the requirements of the pre-screen process were allowed to relocate after the pre-screen process ended, and then only for a limited number of prescribed reasons. Testimony of Houlihan; Testimony of Rathbun; Ex. L; Testimony of Smith.

5. CONCLUSIONS OF LAW

Based on the facts above, I make the following conclusions:

Jurisdiction

1. I have jurisdiction over the persons and subject matter of this case under RCW 69.50.334, Chapter 34.05 RCW, Chapter 34.12 RCW, and WAC 314-55-070.

The letter of intent was invalid and Mr. Stephens should have been excluded from the lottery

2. The legislature directed the Board to adopt rules "that establish the procedures and criteria necessary to implement" licensing of marijuana retailers. RCW 69.50.345(1) (in pertinent part).

3. "For the purpose of considering any application for a license to . . . sell marijuana, ... the board . . . may inquire into all matters in connection with the construction and operation of the premises." RCW 69.50.331(1).

4. "The board may inquire and request documents regarding all matters in connection with the marijuana license application." WAC 314-55-020.

5. "Upon failure to respond to the board licensing and regulation division's requests for information within the timeline provided, the application may be administratively closed or denial of the application will be sought." WAC 314-55-020(12).

6. "Every marijuana retailer's license shall be issued in the name of the applicant [and] shall specify the location of the retail outlet the licensee intends to operate . . . ." RCW 69.50.325(3) (in pertinent part).

7. The board shall notify local authority of every application for a marijuana license so that local authority can object if it wishes to do so. RCW 69.50.331(7).

8. "The state liquor control board shall 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." RCW 69.50.331(8).

9. The foregoing illustrates that location was key to investigating a marijuana retail application and determining whether to grant or deny a license. The purpose of

the lottery was to reduce and prioritize investigations. The purpose of the pre-screen submission was to better assure that lottery "winners" were likely to have met certain basic criteria, again to reduce and prioritize investigations. To be licensed, one had to have a qualifying location. It was reasonable for the Board to design the pre-screen and lottery process to complement that basic criterion. Accordingly, the Board required the applicant to establish during the pre-screen process that the applicant owned or leased the location it proposed for licensure, or at least had made preliminary arrangements likely to result in a lease. The letter of intent represented a lesser criterion than the applicant would ultimately have to meet. Mr. Stephens did not satisfy even the lesser criterion. Point in fact, he specifically did not intend to prematurely obligate himself to the Main Street property because he was concerned that Bellevue's rule about the marijuana retailer locations would preclude him from operating there. Therefore, Mr. Stephens's letter of intent was invalid and he should have been excluded from the lottery.

<u>The pre-screen and lottery process did not require rules promulgated under the APA</u>

10. The legislature directed the Board to adopt rules that established the procedures and criteria necessary to implement the licensing of marijuana retailers. RCW 69.50.345(1).

11. The Board did so. *See* Chapter 315-55 WAC. "The purpose of this chapter is to outline the application process [and the] qualifications and requirements to obtain and maintain a marijuana license . . . ." WAC 314-55-005 (in pertinent part).

12. As also discussed in part above, the location at which the marijuana retailer applicant intends to operate is significant and well-established in the rules. *See, e.g.*, WAC 314-55-015(5) (access without cause or notice by law enforcement); WAC 314-55-015(6) (not on federal lands); WAC 314-55-015(7) (not a shared with another business); WAC 314-55-020 (1), WAC 314-55-050(9) and WAC 314-55-160 (local authority may object to the location); WAC 314-55-050(10) (denial based on proximity to a specified entity); and WAC 314-55-125(1) (changes in location require a new application).

13. Moreover, the rules specifically provided for a lottery: "Once the number of applications per city and at large have identified, the eligible applicants will be selected by lottery in the event the number of applications exceeds the allotted amount for the cities and county." WAC 314-55-081(1) (in pertinent party).

14. None of the rules recited when the Board would not require the applicants to submit information regarding their proposed location nor did any such rule describe in what form the Board would ask any such information to be produced. Here, the Board determined to collect preliminary information about location during the pre-screen process so as to exclude from the lottery entities who had not established a connection to the proposed location. Ultimately, an applicant would need to prove that it either owned the location or had leased it. Here, by requiring as a prerequisite to inclusion into the lottery, that the applicant establish at a minimum that the owner of the property was willing to lease it to them, the Board was asking the applicant to establish a lesser connection than the applicant ultimately would have to establish. In other words, the Board did not change the requirements of licensure, merely the timing of a selected requirement. Therefore, the Board's actions were consistent with rules already adopted under the Administrative Procedures Act ("APA"). No further rules were needed.

15. Thus, the pre-screen and lottery process, generally, and the letter of intent, specifically, did not require rules promulgated under the APA.

16. <u>The Board's decision to deny Mr. Stephens's application for a marijuana retail license was not arbitrary or capricious</u>

17. "An action that is arbitrary and capricious is not substantially justified. *Raven*, 177 Wn.2d at 832. 'Arbitrary and capricious action is willful and unreasoning action, without consideration and in disregard of facts and circumstances.' *Johnson v. Wash. Dep't of Health*, 133 Wn.App. 403, 414, 136 P.3d 760 (2006)." *Morawek v. City of Bonney Lake*, ___ Wn.App. ___, 337 P.3d 1097, 1101 (Div. 2 2014).

18. Mr. Stephens argued that the letter-of-intent requirement was arbitrary and capricious because it did not fulfill its purpose. However, the purpose of the letter of intent was not to prove a legal right to use the property proposed as the location for the marijuana retailer. Rather, its purpose was to confirm that the applicant had diligently pursued that legal right without requiring the applicant to expend resources purchasing or leasing the property prior to the lottery. The purpose of the lottery was to accelerate the investigation process by limiting the number of investigations. The pre-screen process, including the letter of intent, merely facilitated that purpose. The process interfered with applicants who wished to do precisely what Mr. Stephens did, wait until after the lottery results before making an effort to secure the property. There is nothing arbitrary or

capricious about that action. Moreover, that the process disadvantaged Mr. Stephens does not convert the conduct to that which is arbitrary or capricious.

19. Mr. Stephens argued that denying him the investigation phase, with interview and a chance to comply, was arbitrary and capricious. To be sure, the Board denied Mr. Stephens's application during the post-lottery investigation phase. But the basis for denial was a pre-lottery issue. Mr. Stephens should not have been included in the lottery because he did not submit a valid letter of intent. The relevant remedy was to exclude him from the lottery, although retroactively. Thus, given that Mr. Stephens did not qualify for the lottery, there was not a basis for the Board to allow him to relocate his proposed business post-lottery. Not only was denying Mr. Stephens the privilege to do so not arbitrary and capricious, allowing him to do so would have been inconsistent with the Board's rules and practice, and thus itself arbitrary and capricious.

20. Mr. Stephens argued that the Board told him in advance that his letter of intent was sufficient and so later denying it to be so was arbitrary and capricious. However, the evidentiary record here did not establish that the Board in any way approved or pre-approved the letter of intent for the Main Street property. At most, the Board failed to determine during the pre-screen process that the letter of intent was deficient and invalid. Accordingly, by correcting itself later, the Board did not act arbitrarily and capriciously.

21. Mr. Stephens apparently argued as a corollary to the preceding argument that, if the Board erred in including him in the lottery, nevertheless correcting that error after the fact was arbitrary and capricious. I disagree. Quite the opposite, to ignore its error and deviation from its process would have been arbitrary and capricious.

22. Mr. Stephens argued that not allowing him to relocate was arbitrary and capricious. However, as already discussed, the Board allowed relocation when the location submitted to the lottery was qualifying and became disqualifying or otherwise not apt because of events that occurred post-lottery. Here, Mr. Stephens's location did not qualify pre-lottery because his letter of intent was invalid. Therefore, not allowing him to move was consistent with the Board's practice and, thus, not arbitrary and capricious.

/ / / / /

The Board's decision to deny should be affirmed

23. Here, the Board denied Mr. Stephens's application for a marijuana retailer license because he did not qualify for the lotter because his pre-screen submission included an invalid letter of intent. Based on the foregoing, that decision and action should be affirmed.

6. INITIAL ORDER

The Liquor Control Board's action to deny the marijuana retailer license application filed by Joshua Stephens dba High Society, Inc., as expressed in the Statement of Intent to Deny Marijuana License dated June 27, 2014, is AFFIRMED.

Dated: February 23, 2015.

Terry A Schuh
Senior Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

Petition for Review of Initial Order: Either the licensee or permit holder or the assistant attorney general may file a petition for the review of the initial order with the Liquor Control Board within twenty (20) days of the date of service of the initial order. RCW 34.05.464, WAC 10-08-211 and WAC 314-42-095.

The petition for review must:

(i) Specify the portions of the initial order to which exception is taken;
(ii) Refer to the evidence of record which is relied upon to support the petition; and
(iii) Be filed with the liquor control board within twenty (20) days of the date of service of the initial order.

A copy of the petition for review must be mailed to all of the other parties and their representatives at the time the petition is filed. Within ten (10) days after service of the petition for review, any of the other parties may file a response to that petition with the Liquor Control Board. WAC 314-42-095(2)(b). Copies of the reply must be mailed to all other parties and their representatives at the time the reply is filed.

Mail the petition for review of initial order to:

Washington State Liquor Control Board
Attention: Kevin McCarroll
P.O. Box 43076
Olympia, Washington 98504-3076

Final Order and Additional Appeal Rights: The administrative record, the initial order, any petitions for review, and any replies filed by the parties will be circulated to the board members for review. WAC 314-42-095(3).

Following this review, the board will enter a final order. WAC 314-42-095(4). Within ten days of the service of a final order, any party may file a petition for reconsideration with the board, stating the specific grounds upon which relief is requested. RCW 34.05.470 and WAC 10-08-215.

The final decision of the board is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598 (Washington Administrative Procedure Act).

RECEIVED
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Liquor Control Board
Board Administration

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE LIQUOR CONTROL BOARD

IN THE MATTER OF: JOSHUA STEPHENS DBA HIGH SOCIETY, INC., Location Address: 10600 Main Street Bellevue, WA 98004 Applicant, License Application No. 414499 UBI 603-354-306-001-0001	OAH Docket No. 2014-LCB-0068 Agency No. M-25,207 APPLICANT HIGH SOCIETY, INC.'S PETITION FOR REVIEW OF INITIAL ORDER

I. INTRODUCTION

High Society, Inc.'s ("Applicant") hereby petitions the Washington State Liquor Control Board ("LCB") to review the initial order of Senior Administrative Law Judge Terry A Schuh in this matter. The denial is arbitrary and capricious and the result of improper rulemaking in violation of the requirements of the Administrative Procedures Act ("APA").

The Applicant applied to the LCB for a retail license to sell marijuana and marijuana-infused products in Bellevue, Washington. Per WAC 314-55-081, the LCB initiated a lottery to determine a ranked order of applications to be processed to determine whether the applicant qualified for one of the four locations allowed in the City of Bellevue. However, without undertaking APA rulemaking, LCB staff implemented a prescreening process to reduce the number of applicants prior to holding the lottery. As part of this prescreening process, the LCB required that all retail applicants submit a document to purportedly show the applicant's right to real property should the applicant be successful in the lottery. The LCB provided a list of examples of documents that would suffice such as a signed purchase

and sale agreement with the current property owner or a letter of intent to lease ("LOI") signed by the current property owner.

The Applicant applied on a property that it hoped to purchase in the event that it was successful in the lottery. On two occasions prior to submitting prescreen information, the Applicant contacted the owner of the subject property who indicated that he would be open to offers to purchase the property. Around the time that the Applicant was preparing to submit prescreen documents, the City of Bellevue adopted an ordinance that prohibited retail marijuana stores from being located within 1,000 feet of one another. Since the subject property was less than 1,000 feet from other applicants, the Applicant desired to refrain from negotiating the purchase until the lottery results were released. Based on the Applicant's discussions with the LCB regarding a separate property in Issaquah, the Applicant believed that submitting a document stating an intent to purchase the property and then lease to the Applicant, signed by the purchaser, would be sufficient for the prescreen process. The Applicant believed that this document would be sufficient and after the lottery the Applicant could either negotiate the purchase of the building or seek another qualifying location depending on lottery rank.

The LCB used its six most qualified investigators to review the prescreen documents submitted by the applicants. If adequate documents were not submitted, the applicant was withheld from the lottery. The LCB determined that Applicant's LOI was sufficient even though it was plainly missing the current property owner's signature. The Applicant was placed in the lottery and was successful, entitling the Applicant to further processing of its application. However, another applicant ranked higher than the Applicant was located directly across the street. As a result, Applicant did not pursue purchasing the property any

longer and sought to move to a new compliant location. Sean Houlihan acknowledged that the Applicant could move to a new location and scheduled an initial interview for June 5, 2014.

Prior to the initial interview, another applicant brought attention to Applicant's LOI and pointed out to Applicant's investigator that the LOI did not have the current property owner's signature. The LCB then issued a Statement of Intent to Deny to Applicant without any further discussion or inquiry and prior to holding the initial interview. The Applicant subsequently appealed the decision.

During the hearing in this matter, Sean Houlihan, Allan Rathbun, and Rebecca Smith all testified that the absence of the current property owner's signature on the LOI was a fatal flaw for the Applicant. Sean Houlihan testified that if the LOI had the required signature, then he would have permitted the Applicant to relocate to a new location. Further, he testified that, as he does with all applicant types, he would have sought a signed lease or other document conclusively demonstrating the Applicant's right to real property and would not have relied on the LOI. Sean Houlihan also testified that he would have conducted his ordinary licensing investigation including an initial interview, a formal request for documents, and an eventual site inspection. None of this happened prior to the denial in this case. Due to the absence of the current owner's signature during the prescreen process, on a document that previously passed LCB muster, the Applicant was not given his anticipated time period to negotiate the purchase of the subject property or to locate a new compliant location. Despite the denial, the Applicant still obtained a signed LOI with the owner of an alternative compliant location. Had the LCB moved forward with the investigation process as originally expected, the Applicant would have had a signed lease

within 30 days of its initial interview per the ordinary investigation timeline and the store would be open today.

II. CHALLENGES TO INITIAL ORDER

The Applicant takes issue with Findings of Fact Nos. 3, 8, and 25 and Conclusions of Law Nos. 9, 14, 15, 16, 18, 19, 20, 21, 22, and 23. Additionally, three necessary Findings of Fact are absent from the Initial Order. First, a finding should have been made indicating that Mr. Stephens intended to move forward with the property identified in prescreen lottery submittals if the location across the street from his intended location was not successful in the lottery. Second, a finding should have been made that the Applicant was able to secure a valid LOI on a qualifying property within what would have been the 30 day period for responding to an initial Request for Documents. Third, a finding should have been made that the LCB investigator did not allow the Applicant to demonstrate that he could secure actual rights to the property on which he applied during the 30 day period following an initial interview.

III. ARGUMENT

A. Denial in this Matter is Arbitrary and Capricious

i. The LOI requirement does not fulfill its stated purpose.

One of the primary arguments made by Enforcement is that the LOI requirement is an important step in the licensing process. However, the argument disregards the facts and circumstances that show that the LOI does not actually fulfill its allegedly important role.

First, LOIs did not actually establish any rights to real property. The LCB was willing to accept numerous LOIs from multiple applicants for the same property.[1] The lottery results in Bellevue demonstrate this fact where five (more than 25%) of the applicants applied using the same address and unit number, and presumably all had LOIs for the property.[2] Such circumstances clearly demonstrate that not all of those applicants could be seen to have a valid right to real property.

Second, denial here also disregards the fact that the LCB does not actually rely on LOIs to determine whether an applicant has an actual right to real property before issuing a license. Instead, the LCB separately requests an actual lease or purchase and sale agreement later on in the licensing process regardless of whether the applicant is a producer, process, or retailer.[3] This request typically occurs 30 days after the initial interview is held, but the 30 day deadline is flexible and can be extended upon an applicant's request.[4] Mr. Houlihan specifically testified that if the Applicant here had submitted a valid LOI during the prescreen process, he would still have sought a signed lease or purchase and sale agreement during his request for documents following the initial interview.[5] Furthermore, Mr. Houlihan acknowledged that he would have had no reason to

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[1] Mr. Houlihan acknowledged that the LCB would accept multiple LOIs from the same property and that LOIs demonstrate "the *potential* to have the rights to that piece of real property." 11.19.14 Hearing Audio (HHA) at 1:41:40–1:44:35.

[2] Exhibit K (12121 Northrup Way, Ste 205).

[3] Mr. Houlihan testified that, regardless if an LOI has been received, he will seek a signed lease or purchase and sale agreement from applicants during the licensing process which will be used to determine if the applicant has a right to real property. 1.19.14 Hearing Audio (HHA) at 1:41:00 – 1:41:23. Mr. Houlihan acknowledged that for producers and processors, only the final lease or purchase and sale agreement is sought and not an LOI despite having the same locational requirements. 1.19.14 Hearing Audio (HHA) at 1:25:00–1:26:16.

[4] The ordinary investigation process includes an initial interview and a request for documents that has a loose deadline of 30 days after the initial interview, which can be extended upon an applicant's request. 11.19.14 Hearing Audio (HHA) at 1:16:40 – 1:17:15.

[5] 11.19.14 Hearing Audio (HHA) at 1:30:12–1:31:30.

ever review the Applicant's LOI in this matter if he had not received a complaint regarding the lack of current owner's signature.[6]

Third, denial here also disregards the fact that the LCB does not rely on the LOIs to send required notice to municipalities or to determine whether an applicant's location complies with the 1,000 foot rule. Testimony from Mr. Houlihan revealed that the LOI is not used for that purpose and that the investigators instead will take the address from the application or an alternative address provided by the applicant for this purpose.[7] Further, Mr. Houlihan testified that applicants can move locations during the licensing process, including the Applicant if it had submitted a valid LOI.[8] The fact that the LCB will allow applicants to move locations after providing an LOI indicates that the possible need to reevaluate distance and to provide new notice to municipalities is not overly burdensome.[9]

Thus, LCB's decision to deny the application in this matter prior to an initial interview, based solely on the content (or lack thereof) contained in the Applicant's LOI, is arbitrary and capricious because the LCB disregards that it would accept non-binding LOIs from applicants that did not actually demonstrate any right to real property, and such applicants without a right to real property were allowed to continue in the licensing process and later submit leases, often for entirely different locations.

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[6] 11.19.14 Hearing Audio (HHA) at 1:39:00-25.

[7] 11.19.14 Hearing Audio (HHA) at 1:40:00-1:40:55.

[8] Producers and processors are allowed to freely move despite having the same 1,000 foot rule restrictions and required notice to municipalities. 11.19.14 Hearing Audio (HHA) at 1:26:00-1:26:16. Retailers are allowed to move if they provided a valid LOI during the prescreen process. 11.19.14 Hearing Audio (HHA) at 1:09:50-1:10:54. In fact, Mr. Houlihan specifically told the Applicant that he could move locations in this case. 11.19.14 Hearing Audio (HHA) 1:31:14 - 1:31:30; 1:32:20 - 1:32:39; Exhibit N.

[9] Mr. Houlihan testified that a retail applicant that submitted a LOI and made it through the lottery process would have been allowed to move locations. 11.19.14 Hearing Audio (HHA) at 1:09:50-1:10:54.

ii. Denial Prior to Initial Interview and Formal Request for Documents is Improper.

Enforcement acknowledged that the Applicant was entitled to further processing of its application based on the results of the lottery and the Initial Order confirms that the Applicant was entitled to a license if the Applicant could navigate the remainder of the investigation process in Finding of Fact 26. This is consistent with all of the notice provided by the LCB to retail applicants in advance of the lottery.[10] It was only after the lottery that the LCB informed applicants that it would use the prescreen information as a basis for disqualification despite already being entitled to further processing of their applications.[11]

Denial in this case is arbitrary and capricious because the LCB has completely disregarded that further processing of an application should include the LCB's ordinary license investigation process. The first step in the license investigation process is an initial interview with the applicant's investigator.[12] After the initial interview, the investigator sends a request for documents to the applicant seeking documents that actually demonstrate the applicant's qualifications, including a signed lease or purchase and sale agreement that will conclusively determine whether the applicant has a right to real property.[13] This uniform process is followed for all applicant types, including producers, processors, and retailers.[14] However, despite being entitled to further processing of the application, the Applicant was denied without ever receiving an initial interview or having the LCB request the documents that would actually be used to determine whether the Applicant had a right to real property.

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[10] Exhibit F (declaration states "failure to provide all documentation requested within 30 days may result in in may application being excluded from the lottery and my application being administratively withdrawn").

[11] 11.19.14 Hearing Audio (HHB) at 1:18:50 – 1:23:45.

[12] 11.19.14 Hearing Audio (HHA) at 1:16:40 – 1:17:15; 1:23:09 – 1:24:00.

[13] *Id.*

[14] *Id.*

The failure to provide the Applicant in this matter with the ordinary licensing procedures was significant for a number of reasons. First, the Applicant was not afforded the 30 day period to obtain a lease or purchase and sale agreement for the property on which it applied. The LCB can only presume that the Applicant would not have had a right to the real property used on the application and cannot know conclusively. It is entirely possible that had the Applicant been given that period of time to negotiate with the owner of the property, that a lease or purchase and sale agreement would have been provided. As the owner previously told the Applicant on two occasions, he was open to offers to purchase the property.[15]

Second, the Applicant was not afforded the opportunity to secure an alternative compliant location with the 30 day period. Enforcement argued that an applicant should not be allowed to move if it did not provide proof of the right to real property during the prescreen process, but again, this ignores the fact that the LCB has routinely allowed retail applicants to move locations even though they had previously only provided a non-binding LOI that did not establish any right to real property. This is evidenced by the fact that the investigator in this matter, Sean Houlihan, was going to allow the Applicant to find a new location.[16] The only reason that did not happen was the absence of the property owner's signature on a document that would have been non-binding. The denial of the opportunity to move was significant in this case because the Applicant would have been able to secure the rights to a different compliant property. Mr. Stephens testified that he had been looking for a location when Sean Houlihan gave him permission to move. The Applicant's initial

[15] 1.19.14 Hearing Audio (HHB) at 1:48:00 - 1:48:13; 1:59:55 - 2:00:49.

[16] 11.19.14 Hearing Audio (HHA) at 1:09:50-1:10:54; 1:31:14 - 1:31:30; 1:32:20 - 1:32:39; Exhibit N.

interview was scheduled for June 5, 2014,[17] so the 30 day period for providing the LCB with a signed lease would have occurred no earlier than July 5, 2014. By June 26, 2014, the Applicant had obtained a signed LOI for another compliant location in Bellevue and the Applicant testified that a lease could have been obtained by that deadline.[18]

Here, the Applicant submitted documents to the LCB that it thought would satisfy the LCB's retail lottery prescreen requirements. The LCB acknowledge that it had its "most qualified investigators" review the documents to determine compliance with the prescreen process.[19] By placing the Applicant into the retail lottery, the LCB acknowledged that the Applicant's documents satisfied the prescreen process and that the Applicant would be entitled to further processing of its application based on its rank in the lottery. The LCB's denial here is arbitrary and capricious where the Applicant was not provided with the ordinary licensing procedures of having an initial interview, having the opportunity to submit qualification documents 30 days later, and having the opportunity to find an alternative compliant location within that time span consistent with the LCB's treatment of other retail applicants that only had non-binding LOIs without any true right to real property.

B. The LOI Requirement is an Invalid Rule and Cannot Be Used As a Basis for Denial.

Washington's APA provides statutory procedures that all state agencies must follow before adopting a rule. Any rule "adopted without compliance with statutory rulemaking procedures" is invalid and cannot be enforced. RCW 34.05.570(2)(c). "The purpose of such rule-making procedures is to ensure that members of the public can participate meaningfully in the development of agency policies which affect them." *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 649, 835 P.2d 1030 (1992). The APA defines

[17] Exhibit M.
[18] Exhibit Q; 11.19.14 Hearing Audio (HHB) at 2:11:50 – 2:13:20.
[19] 11.19.14 Hearing Audio (HHB) at 123:45 – 125:40; 127:30 – 1:30:00.

"rule" to mean "any agency order, directive, or regulation of general applicability . . . (d) which establishes, alters, or revokes any qualifications or standards for the issuance . . . of licenses to pursue any commercial activity, trade, or profession." RCW 34.05.010(16). The LCB's LOI requirement satisfies this definition.

First, the LOI requirement satisfies the first portion of this definition because it was an "agency order, directive, or regulation of general applicability." The Washington Supreme Court has interpreted "agency order, directive, or regulation" to include any policy, requirement, or standard imposed by the agency uniformly on a class of entities. *See Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 494, 886 P.2d 147 (1994); *Simpson v. Tacoma Kraft Co. v. Dept of Ecology*, 119 Wn.2d 640, 648, 835 P.2d 1030 (1992). Through the LCB's efforts at denial here, there is no question that the LCB's request for applicants to provide an LOI signed by the current property owner prior to the lottery was a requirement imposed by the agency on retail applicants, and thus was an "agency order, directive, or regulation of general applicability."

The second portion of the definition, whether the requirement "establishes . . . qualifications or standards for the issuance . . . of licenses," is also satisfied. The LCB has treated the requirement that all retail applicants provide an LOI signed by the current property owner during the prescreening process as a license qualification. If the qualification is not satisfied, the LCB will seek denial of the application regardless of placement in the lottery as indicated by the LCB's action here. The LCB has treated this qualification as a bright line rule. This is demonstrated by the testimony of Allan Rathbun, where he indicated that LCB would seek denial without further investigation in the same manner as it would when the LCB finds noncompliance with other bright line rules, such as

the Washington residency requirement.[20] The bright line nature of this qualification is also demonstrated by the LCB's efforts here, where the Statement of Intent to deny is based on solely on the absence of the property owner's signature on the Applicant's LOI,[21] and in Rebecca Smith's testimony where she admitted that the only basis for denial in this case was the absence of the property owner's signature on the Applicant's LOI.[22] There should be no question that the prescreening requirement of providing an LOI signed by the current property owner is a qualification for a retail license, and thus is a rule which must be adopted pursuant to the APA in order to be enforceable.

Enforcement did not contest that the qualification was implemented without complying with proper rulemaking procedure. Instead, the LCB attempted to circumvent the statutory rulemaking requirements by arguing for an overbroad interpretation of its existing properly adopted rules. The Statement of Intent to Deny provides three sources of alleged authority to deny the application: RCW 69.50.331(1), WAC 314-55-020(12), and WAC 314-55-050(2). The Statement of Intent to Deny pointed to RCW 69.50.331(1) as granting authority to the LCB to inspect the subject property and inquire into all matters in connection with the construction and operation of the property. WAC 314-55-020(12) states that "[u]pon failure to respond to . . . requests for information within the timeline provided, the application may be administratively closed or denial of the application will be sought." WAC 314-55-050(2), which states that the LCB may seek denial for "[f]ailure or refusal to submit information or documentation requested by the board during the evaluation process." Together, these provisions allow the LCB to deny an application when an Applicant refuses

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[20] 11.19.14 Hearing Audio (HHB) at 42:54 – 44:25.

[21] *See* ¶¶2.2 and 4 of Statement of Intent to Deny (Exhibit 1), which identifies the missing signature of the property owner as the sole basis for denial and the Applicant's pre-screening forms as the only documents reviewed by the LCB in making its decision to deny.

[22] 11.19.14 Hearing Audio (HHB) at 1:25:18–40.

or fails to cooperate with the licensing process. For example, an applicant that refuses to provide fingerprints, refuses to disclose sources of funds, or does not provide a criminal and personal history statement could be denied. These examples are vastly different than what the LCB is attempting to do here, which is to create wholly new licensing qualifications through its authority to request documents.

For example, the LCB cannot request a college diploma from applicants and then deny applicants when they fail to produce evidence of an education level that was never obtained. The requirement to have graduated college would be a new qualification that would need to be a properly adopted rule. Additionally, while integrity is an issue investigated by the LCB,[23] the LCB cannot require a letter of recommendation from a former employer as a license qualification unless it is also a properly adopted rule. A third example involves financial backgrounds. While the LCB is entitled to investigate an applicant's financial background,[24] the LCB cannot require a record of an applicant's savings account when no such savings account exists. Here, if the LCB desires to make a preliminary LOI signed by the current property owner a license qualification, despite the fact that it provides no actual right to real property, then such a qualification must be adopted pursuant to APA rulemaking procedures in order to be enforceable.

Enforcement argued that the LCB is only moving the requirement to prove the right to real property forward during the investigation timeline.[25] However, this ignores the fact that the LCB does not use LOIs as a basis for actually determining an applicant's right to real

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[23] The LCB may deny applications when criminal and personal history statements contain misrepresentations per WAC 314-55-050(3).

[24] WAC 314-55-050(6) allows the LCB to deny an application when the source of funds cannot be verified.

[25] Enforcement's Brief at page 7 ("the prescreen simply put the demand for specified information a bit earlier in the process than it otherwise would have been made").

property and that aspect of the investigation timeline remains the same. Instead, the LCB still requires retail applicants to submit a signed lease or purchase and sale agreement to determine the applicant's right to real property at the ordinary point in the licensing process, 30 days after the initial interview. Further, as noted above, the acceptance of non-binding LOIs means that the LOIs do not actually establish an applicant's right to real property. Given these facts, the requirement to produce an LOI during the prescreening process is a standalone license qualification separate and apart from the LCB's later determination of whether an applicant actually has a right to real property. As such, the LOI requirement is an independent license qualification that cannot be used as a basis for denial because it was not properly adopted pursuant to APA rulemaking.

IV. CONCLUSION

The LCB's denial of the application in this matter based on the absence of the current property owner's signature on an LOI is arbitrary and capricious for a number of reasons. First, denial ignores fact that the LCB has previously reviewed and approved of the LOI. Second, denial ignores the fact that the LCB does not actually rely on LOIs to determine an applicant's right to real property. Third, denial ignores the fact that the Applicant here was never given an initial interview or the time to produce an actual signed lease or purchase and sale agreement pursuant to the ordinary investigation timeline. In the event that the denial is not determined to be arbitrary and capricious, then denial must still be reversed because it is based on a bright line licensing qualification that was never adopted pursuant to APA rulemaking procedures. As such, the Applicant respectfully requests that LCB reverse the Initial Order and allow the application be reinstated for further processing.

Dated this 17th day of March, 2015.

GORDON THOMAS HONEYWELL, LLP

By:_____

Ryan C. Espegard, WSBA No. 41805
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Attorney for Applicant

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE LIQUOR CONTROL BOARD

IN THE MATTER OF: JOSHUA STEPHENS DBA HIGH SOCIETY, INC., Location Address: 10600 Main Street Bellevue, WA 98004 Applicant, License Application No. 414499 UBI 603-354-306-001-0001	OAH Docket No. 2014-LCB-0068 Agency No. M-25,207 CERTIFICATE OF SERVICE

I, Linda J. Vandiver, declare and state that on the date below, I caused to be served true and correct copy of:

- Applicant High Society, Inc.'s Petition for Review of Initial Order

on the following in this action via the method indicated below.

Kim O'Neal Senior Counsel Office of The Attorney General of Washington 1125 Washington St SE P.O. Box 40100 Olympia, WA 98504	Method of Delivery ☐ Hand Delivery/Messenger ☒ Facsimile ☒ U.S. Mail ☐ Email ☐ FedEx/Overnight Delivery
Terry A. Schuh, Judge Office of Administrative Hearings 2420 Bristol Court SW Olympia, WA 98502	Method of Delivery ☐ Hand Delivery/Messenger ☒ Facsimile ☒ U.S. Mail ☐ Email ☐ FedEx/Overnight Delivery
Kevin McCarroll Adjudicative Proceedings Coordinator P.O. Box 43076 Olympia, WA 98504-3076	Method of Delivery ☐ Hand Delivery/Messenger ☒ Facsimile ☒ U.S. Mail ☐ Email ☐ FedEx/Overnight Delivery
Joshua Stephens High Society, Inc. 625 Pickett Avenue NE North Bend, WA 98045	Method of Delivery ☐ Hand Delivery/Messenger ☐ Facsimile ☒ U.S. Mail ☐ Email ☐ FedEx/Overnight Delivery

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 17th day of March, 2015.

Linda J. VanDiver, Legal Assistant
GORDON THOMAS HONEYWELL LLP

FAX COVER SHEET

GORDON THOMAS HONEYWELL LLP
SEATTLE OFFICE

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Telephone: (206) 676-7500
Facsimile: (206) 676-7575

Date: March 17, 2015

Send To:	Company	Fax	Telephone
Kevin McCarroll, Adjudicative Proceedings Coordinator	Liquor Control Board	360-586-3190	360-664-1602

FROM: Ryan C. Espegard

RE: High Society, Inc. v. WSLCB // OAH Dkt. No. 2014-LCB-0068 // LCB No. M-25,207

Number of Pages (Including cover sheet): 17

After faxing, return to:	Linda Vandiver	Ext. 7579

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MESSAGE: Please see attached. Hard copy of same follows via regular U.S. Mail.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that today I served a copy of this document, by placing it in the mail with postage prepaid, addressed to the following parties of record:

Kim O'Neal Assistant Attorney General PO Box 40100 Olympia, WA 98504-0100	Agency Representative
Joshua Stephens High Society, Inc. 625 Picket Avenue NE North Bend, WA 98045	Appellant
Ryan C Espegard 600 University St., Ste 2100 Seattle, WA 98101	Appellant Representative
Kevin McCarroll Adjudicative Proceedings Coordinator P.O. Box 43076 Olympia, WA 98504-3076	Agency Contact

Dated February 23, 2015, at Olympia, Washington.
(DATE OF MAILING)

Karen Williams

Representative
Office of Administrative Hearings
2420 Bristol Court SW
Olympia, WA 98502

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: HIGH SOCIETY INC. d/b/a HIGH SOCIETY 10600 MAIN ST BELLEVUE, WA 98004-5922 APPLICANT LICENSE APPLICATION NO. 414499	LCB NO. M-25,207 OAH NO. 2014-LCB-0068 ORDER GRANTING LICENSING'S MOTION TO EXTEND THE FILING TIME FOR PETITION FOR REVIEW

The above-captioned matter coming on regularly before the Board, and it appearing that:

1. An Initial Order in this matter was issued by Administrative Law Judge Terry Schuh on February 23, 2015.
2. On March 17, 2015, the Applicant, through attorney Ryan Espeguard, filed a Petition for Review of Initial Order.
3. On April 3, 2015, the Licensing Division of the Board, through Assistant Attorney General Kim O'Neal, filed a Motion for Extension of Time to File Response to Petition for Review in this matter. The Motion was supported by the Declaration of Kim O'Neal.
4. The Board finds that the Licensing Division has made a clear and convincing showing of good cause to extend the date for filing a Response to Petition for Review, due to exigent circumstances.

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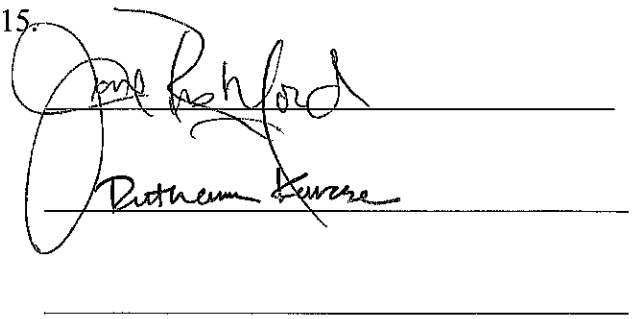
Washington State Liquor Control Board
3000 Pacific Ave, S.E.
P.O. Box 43076
Olympia, WA 98504-3076
Phone: 360-664-1602

The Board hereby ORDERS that the Licensing Division's Motion is granted. Licensing may file a Response to the Petition for Review by April 13, 2015

DATED this 7th day of April, 2015.



Washington State Liquor Control Board
3000 Pacific Ave, S.E.
P.O. Box 43076
Olympia, WA 98504-3076
Phone: 360-664-1602

McCarroll, Kevin P (LCB)

From: Roth, Jeanne (ATG)
Sent: Tuesday, May 05, 2015 8:55 AM
To: McCarroll, Kevin P (LCB)
Cc: O'Neal, Kim (ATG)
Subject: RE: High Society M-25,207 Petition for Review
Attachments: 20150505081925334.pdf

Hi Kevin:

I mistakenly filed our response with OAH on April 13th instead of with LCB. I've attached a copy. So sorry.

-Jeanne

From: McCarroll, Kevin P (LCB)
Sent: Monday, May 04, 2015 4:43 PM
To: O'Neal, Kim (ATG)
Cc: Roth, Jeanne (ATG)
Subject: ACP-C [redacted]

Good afternoon Kim,

ACP-C [redacted]

Thank you,

Kevin McCarroll
Adjudicative Proceedings Coordinator
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STATE OF WASHINGTON LIQUOR CONTROL BOARD

In the Matter of: JOSHUA STEPHENS d/b/a HIGH SOCIETY, INC. 10600 Main Street Bellevue, WA 98004, Applicant. Application No. 414499	OAH No. 2014-LCB-0068 LCB No. M-25,207 RESPONSE IN OPPOSITION TO PETITION FOR REVIEW OF INITIAL ORDER.

I. INTRODUCTION

Judge Schuh correctly ruled that High Society's retail marijuana application was appropriately denied. The Washington State Liquor Control Board Licensing Division reviewed the information and documents the Applicant submitted in response to the Board's request for prescreening information from all retail marijuana license applicants. The Applicant admits that he failed to submit a valid letter of intent from a property owner or person legally authorized to grant the use of the property it had listed as its proposed business location in the prescreen documentation. The Applicant chose to designate as his proposed location a property that he knew he had no connection to and no legal right to do business on. His attack after-the-fact that the process is invalid is a futile attempt to shift blame that belongs upon himself as the Applicant. He knew and understood the requirements, and he did

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not fulfill them. Judge Schuh correctly ruled that the decision to deny the High Society application was supported by the record, and the petition for review should be denied.

II. STATEMENT OF FACTS

By statute, the Board is authorized to adopt rules to establish the procedures and criteria necessary to license marijuana retailers. RCW 69.50.342. The Board has broad discretion to grant or deny marijuana license applications. RCW 69.50.331(1). The Board's rules also established a process of accepting and processing retail marijuana license applications. WAC 314-55-081. Applicants denied a license have the right to an administrative hearing. WAC 314-55-070.

By statute, the Board was directed to determine how many retail outlets there should be throughout the state. RCW 69.50.354. In addition, statutory language listed the criteria to use to make that determination. RCW 69.50.345(2). The Board had broadly stated statutory authority to adopt rules regarding nearly every aspect of the implementation of Initiative 502, including the forms to be used, the terms and conditions to be contained in licenses, and the qualifications for receiving a license. RCW 69.50.342(8).

Because the Board determined that 334 retail licenses were appropriate to be granted throughout the state, and received over 2,100 applications for those licenses, both a prescreen process and a lottery process were adopted to evaluate and rank the qualified applicants for further processing for a retail license. The Board conducted a lottery process during the week of April 21, 2014, to determine the ranked order of license applications in each jurisdiction in which the number of applications received exceeded the number of licenses that were planned to be granted. That ranking established the order in which the applications for each jurisdiction, including Bellevue, will be processed to determine whether the applicants are qualified to hold a retail marijuana license. The lottery process did not grant licenses, but simply ranked the order in which further processing to determine qualification for licensure would be done. Hearing Exhibit J, U. The lottery process granted no other legal right other

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than to have a license application processed further to determine whether the applicant was qualified for licensure. Contrary to the argument by the Applicant, the prescreen review did not result in a final determination that the screened applicants were qualified for licensure or even that the applicants' qualifications in those areas examined during the prescreen was finally decided upon. To the contrary, as staff testified at hearing, the prescreen was only a preliminary review, and all qualifications for licensure, including those looked at during the prescreen, were reexamined and reinvestigated after the lottery as applicants were processed to determine qualifications for licensure. As staff testified, there was a brief period between the end of the prescreen submission period and the lottery process. While staff attempted to be thorough in their review of the prescreen submissions, there were a number of applications that were erroneously put into the lottery which were denied once a fuller investigation uncovered the disqualifications.

License applicants were notified beginning in February, 2014, that they were required to submit several specific kinds of information for pre-screening prior to the lottery process being done. The required information to be submitted included a declaration of what business location the applicant proposed to use for the business to be licensed and documentation that the applicant had a right to use that business location. Hearing Exhibit 3, page 1. Testimony at the hearing confirmed that the location of the proposed licensed business was critical to nearly all aspects of the application investigation process. The license is issued to the Applicant for a specific location, the local authority where the business is located is required to be notified and given 20 days to object, the proximity to statutorily prohibited entities must be verified, and many aspects of the rest of the investigation, including the financial investigation, are dependent upon the proposed business location. Testimony further confirmed that the Licensing staff's experience with producer/processer applicants who were processed before the retail applicants showed many of those applicants were not ready to proceed with the investigation, causing substantial delays in processing them for licensure. Staff also testified

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that other retail applicants demanded that some kind of check or prescreen be done of retail applicants because of the large numbers of applicants falsely claiming a business location with which they had no connection or being otherwise unable to proceed toward licensure. Other applicants did not want to compete with unqualified applicants who were perceived to be "gaming the system" to participate in the lottery but who had not done the work or expended the resources necessary to be ready to proceed to be licensed.

As a result, the staff created a prescreen process that required retail applicants to produce several specific pieces of information to demonstrate that they were "ready to go," that is, that they were ready to participate in the application investigation process and demonstrate qualification for licensure. The applicants were notified that the failure to supply these specific things to the Board would result in elimination from the retail lottery process and the closing of their applications. Exhibit 3, page 1. The consequence of failing to supply the required documents by the date specified was exclusion from the lottery of retail marijuana license applicants and/or license denial. Mr. Joshua Stephens, who signed the Retail Pre-screen Information form and submitted the pre-screen information for the Applicant, signed the form over a declaration that he understood the consequences of failing to supply the requested information to the Board within the timeline stated. Exhibit 3, page 1. Plaintiff was included in the retail lottery of applicants for Bellevue, and it was ranked fourth.

The document the Applicant filed with the Board to demonstrate it had the legal right to do business in the location specified in its application was signed by Mr. Hans C. Truesdell, who stated that he intended to purchase the Main Street Building, the location listed in Plaintiff's marijuana license application. Exhibit 3, page 12. Mr. Truesdell further stated that when he purchased the building, he would lease to High Society, Inc. Upon further processing of Applicant's application, Board staff learned that the owner of the Main Street Building is the Allen Building Partnership. Mr. Ali Biria, a partner and manager of that entity, provided a declaration stating that neither he nor the partnership has listed the property

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for sale in the past twelve months. Mr. Biria also declared that he has not entered into any agreement or executed any letter of intent to lease or sell the Main Street Building or any portion of it to Hans C. Truesdell or High Society, Inc. Exhibit 3, page 9. Mr. Biria goes on to confirm that he had entered into a lease agreement with different marijuana retail applicants. *Id.* High Society, Inc., did not have the legal authority to do business at the location specified in its application, and failed to demonstrate that authority during the prescreen, which disqualifies it from licensure. Further, Seth Simpson and David Ahl, who are the applicants in a different, unrelated application for a retail marijuana license in Bellevue, Washington, specified the Main Street Building as their proposed location, and filed a signed lease for that location with their application to the Board. Exhibits 5 and 6.

III. ARGUMENT

A. The High Society Application Was Properly Denied For Failure To Comply With The Prescreen Submission Process

The Licensing Division's grounds for denying the application is that the Applicant did not submit the required proof of a legal right to use the business location listed in the application. The prescreen application that the Applicant filled out stated on the face of its first page that the failure to submit the required information by the deadline set would result in exclusion from the lottery and the withdrawal of the application. See Exhibit 3, Page 1. By statute, the Board is authorized to investigate all license applications, to inquire into all matters it believes necessary, and to require the submission of information necessary to the license investigation. RCW 69.50.331(1). By regulation, the Board makes the submission of information it requests during a license investigation to be mandatory, and the consequences of failing to submit such information as requested is the denial of the application. WAC 314-55-020(12); WAC 314-55-050(2). The location where an Applicant proposes to do business under the license it is applying for is critical to the license investigation because the license is issued for a specific location, because the proximity of a number of public entities is

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critical to whether the license can be issued, and because the Licensing staff is legally mandated to give notice to the local jurisdiction based upon the proposed location to be licensed. RCW 69.50.331; WAC 314-55-020(1); WAC 314-55-050(10).

Licensing staff developed the prescreen process for retail marijuana applicants due to the large number of applications received for the 334 licenses available to grant; due to the experience they had with producer applicants not being ready to proceed with the investigation process; and due to input received from retail applicants critical of being forced to compete in the lottery with applicants who had not put forth any effort to be viable or to prepare to proceed to licensure. Due to all of these concerns, staff created a prescreen process to require retail applicants to submit information showing they were ready to proceed with the licensing investigation should they be successful in the lottery.

Among the pieces of information required to be submitted in the prescreen was the address where the licensed business would be located and proof that the applicant possessed the legal right to operate a business at that location. Because of concerns that property owners had expressed over their rights to have an opportunity to lease or sell to applicants successful in the lottery, staff did not require a completed sales agreement or a fully executed lease. Several examples of the kind of document that would be acceptable were given, among them, a signed letter of intent to lease signed by the property owner or someone legally authorized to act for the owner. Staff agreed that property owners could provide such letters for more than one applicant, again because of property owners' concerns that they not be penalized by the lottery process but that they have the maximum opportunity to sell or lease to successful lottery applicants.

The proof that the applicant had the right or the firm expectation of obtaining the right to operate at the location identified in the prescreen submission was important because there were relatively few qualifying locations, because the location is critical to so many aspects of the licensing investigation process, and because of numerous allegations by applicants and

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others that some applicants had simply applied at a location they had no connection with. Licensing staff testified that their experience with processing the producer applicants was that the failure to have a viable location caused long delays in being able to process the applications. Staff also testified that when applicants changed their location, the staff work done on the original location was wasted and had to be completely re-done. Staff testified that requiring proof that the location submitted was viable in the sense that the applicant could reasonably expect to do business there if successful in the lottery was critically important to being able to proceed expeditiously to process and grant retail licenses.

The prescreen submissions were mandatory, and a 30-day period of submission was also mandatory. Applicants were warned more than once that failure to comply with the submissions requirements within the set deadline would result in withdrawal or denial of their application.

Mr. Stephens submitted a letter signed by Hans Truesdell stating that he intended to purchase the property listed in High Society's application, and that when he purchased it he would lease to High Society. Exhibit 3, page 12. However, Mr. Truesdell did not own the property, and had no expectation of owning or purchasing the property. He had not even spoken with Ali Biria, who did own the property. Mr. Stephens did speak with Mr. Biria, who said he would entertain offers. That is not sufficient for a letter of intent to lease, and Mr. Stephens made no attempt to obtain such a letter from Mr. Biria. He chose to designate as his proposed business location an address he had no connection with and no reasonable expectation of being able to do business on. His application was properly denied.

High Society's argument on page 5 of the petition that the letter of intent did not establish a true legal right to the property does not change the importance of either the location or the showing of a reasonable expectation of being able to operate at the location identified. Those five Bellevue applicants who had letters of intent for the same location had all done what Mr. Stephens did not do. They went out and negotiated with a property owner

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of a qualifying location for documentation that they could reasonably expect to do business at that location. He could have done that to comply with the prescreen requirements, and he chose not to do so. While it may be true that not all those who had letters of intent for a location could actually do business there, it is also true that not all applicants were going to be successful in the lottery. In the example given, the five Bellevue applicants with letters for one location would all receive different rankings. Once the location had been secured by a successful lottery applicant, the others would be permitted to seek another location. Mr. Stephens could have had this opportunity had he submitted a letter of intent for the location he chose to designate in his prescreen submission. It was his choice instead to designate a location he knew he had no connection to. Mr. Stephens' decision in no way invalidates the prescreen process.

Again, Mr. Stephens may be correct in his argument on page 5 of his petition that when an applicant proceeds to the full license investigation, he will be required to produce a fully executed lease agreement. That requirement does not negate or invalidate the requirement to submit a preliminary showing of negotiations or tentative agreement with the property owner during the prescreen. That requirement eliminated the opportunity to try to apply with a location with which the applicant had no connection or which he had no expectation of being able to use. The fact that a fully executed lease would be required later in the process makes no difference.

It is true that staff who initially reviewed Mr. Stephens' prescreen submissions incorrectly believed he had complied and submitted a qualifying letter of intent. Upon quick glance, the document Mr. Stephens submitted appears to bear the signature of someone other than himself, and staff likely concluded without reading the document closely that it qualified. The result of that mistake is that Mr. Stephens' application was incorrectly included in the retail lottery. That mistake did not require staff to disregard the problems with the letter of intent once they realized it did not contain the signature of the property owner. Once staff

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read carefully what the letter said, which was merely that Mr. Stephens' cousin Mr. Truesdell intended to try to purchase the property at some time in the future; they realized that the letter did not qualify.

Mr. Stephens states that it was a complaint from a rival applicant which focused staff's attention back onto his letter of intent. Again, there is no significance to Mr. Stephens' argument. It makes no difference that the rival applicant raised the issue. The point is that Mr. Stephens had no connection to the location he claimed in his prescreen submission. Once staff checked on it and discovered not only that the property owner denied having made any agreement with Mr. Stephens but that the rival applicants already possessed a valid, executed lease for that location, the source of the complaint made no difference whatsoever.

Mr. Stephens argues on page 6 of his petition that staff do not use the letter of intent to do the notifications of local authorities. This is a reference to one of the tasks staff testified to that is dependent upon the correct location of the proposed licensed business. Staff are legally required to notify the local authorities of the jurisdiction in which the proposed licensed business will be located. Those authorities have 30 days to file objections or to approve of the application, and that period may be extended by staff for good cause. Staff testified that if this notification were done on one location and then had to be re-done because the applicant changed to a different location, considerable time and effort would be wasted and would need to be re-done. It is immaterial whether the notification is done from the letter of intent. The point is that the location Mr. Stephens identified in his prescreen information form was not a location where he could do business. So, the notification of Bellevue authorities using that location would be wasted effort because he could never have expected to actually operate there. He was not ready to proceed with the necessary steps in the licensing process, including notifying local authorities because he did not have a qualifying location where he could expect to do business at the time he submitted his prescreen documents.

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Mr. Stephens was treated exactly the same way as all other retail applicants, and all of the staff who testified made that clear. There was nothing about the processing or requirements asked of Mr. Stephens that was any different for any other retail applicant. It is true that the processing of producer applicants was somewhat different in some ways, as Ms. Smith, and other staff testified. There was no lottery process for them, and the limitations upon the licenses to grant were much different for them. However, there were limitations upon their ability to move as well, and they were given time limits within which to produce valid locations. The prescreen submission deadline was a point beyond which retail applicants could not change their proposed location if they had not complied with the prescreen submission requirements. They had months, though, between the filing of their initial applications in November or December, 2013, and the prescreen deadline at the end of March, 2014, within which they also could and did freely change their proposed locations.

Mr. Stephens argues on pages 7 and 8 of his petition that Licensing denied his application without affording him an initial interview with a licensing investigator. In the first place, once staff determined that Mr. Stephens had failed to meet the prescreen submission requirements, denial was going to occur regardless of whether an investigator interviewed him or not. The interview would have consisted of the same questions that were asked of Mr. Stephens about the letter of intent he submitted. The fact that these questions were posed by telephone and not in an "initial interview," makes no difference whatever.

Contrary to Mr. Stephens' contention, all retail applicants were notified of the prescreen requirements and of the consequence of failing to comply by submitting the required documents by the prescreen deadline. Furthermore, all applicants were notified that the licensing investigation process would also review the submissions and requirements of the prescreen and that their entry into the lottery was neither a guarantee of licensure or a final decision of any other kind. All participation in the lottery granted to the applicants was the opportunity to be ranked for further processing. That further processing included a more

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detailed review of all of the information submitted in the prescreen in addition to requirements to submit additional information and documentation.

Mr. Stephens refers to the LCB's "ordinary license investigation process" on page 7 of his petition. In the first place, for marijuana applicants, there is no "ordinary license investigation process" because all of these procedures were being created for the first ever application process for marijuana applicants. All retail applicants were required to go through the prescreen as Mr. Stephens did. All retail applicants were required to submit the same documents and the same information with the same consequences for failure to do so. Mr. Stephens experienced the ordinary licensing process for retail marijuana applicants, and he was treated no differently than any other retail applicant. Mr. Stephens is flat wrong when he argues on page 8 that other retail applicants in his situation were allowed to freely move their location. The record is simply unequivocal and it is completely undisputed that no other retail applicant who failed to submit in the prescreen a qualifying proof of a right to use the property designated as the proposed location of the licensed business was permitted to change their location. All retail applicants were required to submit by the prescreen deadline both their proposed business location and proof that they had a reasonable expectation of being able to use that location. Mr. Stephens tries to argue that by the property owner saying he would be open to offers is sufficient demonstration of an expectation of being able to use that location. He conveniently fails to mention the proof at the hearing that this same property owner had concluded a fully executed lease for that location with another marijuana retail applicant. It was also undisputed that neither Mr. Stephens nor anyone else on his behalf had ever spoken with the property owner of the location he listed to attempt to lease or purchase that property or to attempt to obtain a letter of intent to lease. Mr. Stephens alleges that Mr. Houlihan testified that he was going to permit him to move. That is correct only as to the time period before Mr. Houlihan became aware that Mr. Stephens had not submitted a qualifying letter of

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intent for his listed location. Mr. Houlihan testified clearly that no retail applicant having failed to submit a qualifying letter of intent was ever allowed to move to a different location.

B. Judge Schuh Correctly Ruled That The Prescreen Requirements Were Within The Board's Existing Regulations

Mr. Stephens argues on pages 9 and 10 that the Board should have adopted specific regulations for the prescreen process required of retail marijuana applicants. Judge Schuh correctly ruled that the Board's existing regulations provide sufficient legal authority for requiring license applicants to supply information necessary for licensure within a set deadline.

Mr. Stephens is incorrect when he alleges on page 11 of his petition that *Enforcement* did not contest that the prescreen process was implemented without complying with proper rulemaking procedure. Mr. Stephens makes frequent reference to *Enforcement* in his petition incorrectly as it was the Board's Licensing and Regulatory Division that received and processed the license applications, and not Enforcement. More importantly, though, Licensing consistently and strongly argued that the Board's existing regulations were completely adequate to support the prescreen process it implemented. As Mr. Rathbun testified at the hearing, the only thing different about the prescreen process was that it required applicants to produce the identified information sooner in the process than it would otherwise have been requested. Both by statute and by regulation the Board and its Licensing Division are authorized to demand of applicants that they produce information and documents within a specified timeline with withdrawal or denial of the application as the consequence of failing to comply. RCW 69.50.331(1); WAC 314-55-020(12); and WAC 314-55-050(2).

As Mr. Stephens concedes on page 12 of his petition, those provisions authorize the Board to require information and documentation of applicants with withdrawal or denial as the consequence of failing or refusing to comply. He is incorrect when he tries to distinguish the information he was asked to supply from what those provisions authorize. The location of

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the proposed business is not a new or unsupported requirement. As Judge Schuh noted, both by statute and by staff testimony, we established that the proposed business location is key to the license investigation process. RCW 69.50.33 provides that each license is required to be issued to a specific location. The required notification of the local authorities has been discussed above. The need to assure that the location qualified under RCW 69.50.331(8) also requires the location of the proposed business. This is not a new or an unjustified requirement of license applicants, and it is fully covered by existing statutory and regulatory authority.

IV. CONCLUSION

It was Mr. Stephens' own decision to designate as the proposed location of his retail licensed marijuana business a location with which he had no contact whatsoever. The consequences of that decision are his alone. He could have obtained a letter of intent for a qualifying location in compliance with the prescreen submission requirements, as he freely admitted at hearing. His choice not to do so but to designate a location that he had no connection with was the denial of his license. That denial is fully supported by the record in this case, and Judge Schuh's order correctly construes the Board's statutory and regulatory authority to fully support the process and the decision made in this case. The petition for review should be denied, and the Initial Order should be affirmed as the Board's Final Order.

DATED this 13th day of April, 2015.

ROBERT W. FERGUSON
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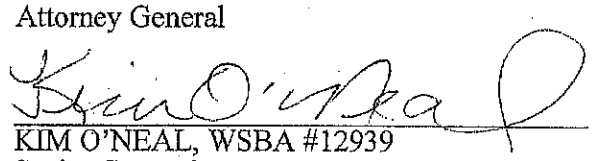

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13 day of April, 2015.

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