

BEFORE THE WASHINGTON STATE LIQUOR AND CANNABIS BOARD

In the Matter of:
The Petition of Kittitas County
For a Declaratory Order

No. 01-2017
DECLARATORY ORDER

BACKGROUND

On February 17, 2017, the Washington State Liquor and Cannabis Board (WSLCB or Board) received a Petition for Declaratory Ruling, from Chief Civil Deputy Prosecuting Attorney Neil A. Caulkins on behalf of Kittitas County, on the issue of whether the Board must comply with local zoning requirements and only issue a marijuana license when the application/location is congruent with local zoning. A copy of the Petition is attached as Appendix B.

Under RCW 35.04.240, any person may petition an agency for a “declaratory order with respect to the applicability of specified circumstances of a rule, order or statute enforced by the agency.”

Kittitas County’s Petition asserts that the Board must consider all local zoning in its license review process, and that issuance of a license that does not comply with local zoning or land use plans violates RCW 36.70A.103.

RCW 34.05.240 requires the Board, within thirty days of receiving a Petition for Declaratory Order, to take one of the following actions; (1) enter a declaratory order; (2) notify the petitioner that no order will be entered; (3) set a date by which the Board will enter an order, or (4) set a date and time for a hearing. The Board may enter a declaratory order upon a showing that:

- (a) Uncertainty necessitating a resolution exists;
- (b) There is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- (c) The uncertainty adversely affects the petitioner; and
- (d) The adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested.

By Notice dated March 8, 2017, the Board solicited statements of fact and law from all interested persons, requesting that all responses be received by the Board no later than April 6, 2017. The Board received statements or briefs from Kittitas County, Douglas County Board of Commissioners, Kitsap County Board of Commissioners, Board Staff, Eric Eisenberg, Deputy Prosecuting Attorney for Lewis County, The Cannabis Alliance, Spokane County, Walla Walla County, King County, Julie Smith, Doug Russell, Dennis Conley, David Morgan, City of Pasco, City of Lynnwood, City of Kenmore, Black Diamond Cannabis, LLC, and Anonymous Tier 3 Producer and Processor.

On May 16, 2017, the Board issued a Notice of Extension, stating that a Declaratory Order would be issued no later than May 25, 2017. The Board has considered all the submissions and the laws relating to the Kittitas County petition, and now issues the following:

DECLARATORY ORDER

The Board finds that the provisions of RCW 36.70A.103 do not require that the Board determine that an applicant for a marijuana license is in compliance with all local zoning and land use ordinances prior to granting a license. The local jurisdiction has the ability to determine whether to grant a local business license and/or any required permits before a state-licensed marijuana business may legally conduct that business within the jurisdiction, and to enforce its own zoning and land use ordinances.

APPLICABLE FACTS

Kittitas County, and others who provided responses to the Board's Notice, have asserted that local jurisdictions have local ordinances and/or land use plans adopted pursuant to the Growth Management Act that affect whether an applicant for a marijuana license can operate in particular areas in the local jurisdictions. After the passage of Initiative 502 (I-502) many local jurisdictions, both cities and counties, adopted temporary moratoria which prohibited marijuana licensees from operating within the jurisdiction, with many variations in the nature and scope of the prohibition. Local ordinances have been modified in many of those jurisdictions, with some lifting an original ban, others modifying the scope of the prohibitions, some imposing a permanent ban, and other variations. The Board does not maintain a comprehensive list of the local ordinances, or the nature and scope of the prohibitions or conditions that they may contain.

In accord with RCW 69.50.331, the Board provides local jurisdictions with notice of applications for marijuana licenses, and for renewal of licenses that are within the local jurisdiction. This Declaratory Order addresses only the siting of marijuana licenses, and not any other type of license or permit issued by the WSLCB.

Kittitas County and other local jurisdictions have objected to the issuance of marijuana licenses based on local ordinances or land use plans, but the Board has not denied the license based on those objections. The Board's notifications to local jurisdictions in response to those objections state that the Board cannot support denial of an application based on a local zoning issue, as local zoning issues are not within the Board's jurisdiction. Under WAC 314-55-050, an objection based on local zoning is not grounds for seeking denial of an application.

Applicable statutes and rules are attached to this Declaratory Order as Appendix A.

ANALYSIS

In addition to the question raised by the Kittitas County Petition, the Board also considered whether the question presented is proper for a Declaratory Order, given the criteria set out in RCW 34.05.240. If the Board had determined that RCW 36.70A.103 required it to deny a license when a local jurisdiction asserted that its zoning or land use ordinances would not allow a license

in the specified location, the Board believes that it would be required to engage in rulemaking, at a minimum, in order to allow for broad public input on that issue, prior to making such change. If the Board's Declaratory Order found that RCW 36.70A.103 applied to its licensing decisions, numerous applicants and licensees could be affected, and would need to be allowed to exercise their right to due process before any negative decision affecting their license could be made. Although the Board does not believe there is any uncertainty about the ability of local jurisdictions to enforce their own local ordinances, the Board uses this opportunity to clarify its position on the issues raised by the petition.

The Board finds that RCW 36.70A.103 does not require the Board to deny issuance of a marijuana license to any applicant based on an assertion by a local authority that its zoning and/or land use ordinances forbid the operation of a marijuana business at the designated location. From the exceptions included in the text of RCW 36.70A.103, it is clear that the statute governs the siting of locations owned, operated, or occupied by state agencies, and not to the location of businesses licensed by a state agency.

Consistent with the guidance provided on the Board's website (FAQs) and its adopted rules, issuance of a license does not prevent the local jurisdiction from applying its ordinances to deny an applicant or licensee a business license or other required permit. However, if the Board based a denial of a license solely on a local ordinance, the Board would be put in the position of defending the local ordinance—a form of enforcement.

RCW 69.50.331(7) allows a local jurisdiction to object to a license application, and requires that the local jurisdiction provide the "facts" that support its objection. While the nature and content of the objection is not limited, the law contemplates that the local jurisdiction will provide the facts necessary to support the objection. If the objection is based on an ordinance or land use requirement adopted by the local jurisdiction, the Board is not in a position to evaluate the validity of the ordinance, or its applicability to the application in question. RCW 69.50.331(7)(c) requires the Board's representatives to present the case in defense of the Board's denial of a license, if the Board denies the license based on a local authority objection, and the applicant requests a hearing. Thus, if the Board denies a license on the sole basis that a local ordinance or land use plan does not allow the applicant to operate at that location, or within the jurisdiction, the Board is put in the position of defending and interpreting the local ordinance. Not only would this be burdensome for the Board and its staff, but the Board does not have the authority to enforce local ordinances.

The Board's application process, rules, and information available to applicants all provide notice to applicants that they must operate in compliance with local jurisdiction requirements, even if that means they cannot open their business at the location licensed by the Board. In addition, if the Board grants a license over the objection of a local authority, the Board provides the local authority a notice in compliance with RCW 69.50.331. This notice allows the local jurisdiction to contact the applicant/licensee directly about any potential compliance issues, and avoids the Board being put in the position of defending or interpreting the local ordinance. The Board's issuance of a marijuana license does not prevent a local jurisdiction from requiring the licensee to comply with local zoning ordinances and land use requirements.

While Kittitas County and other commenters assert that the Growth Management Act applies to the WSLCB's licensing decisions, they cite no case law that has required a state agency to deny (or revoke or non-renew) a license application because the activity is not permitted by local zoning. The Board has found no such authority. While the Board agrees that if it were actually siting a building or facility, such as one of its regional enforcement offices, or the former state-operated stores, the Board would be required, as an operator of a business location, to comply with local zoning, it would be required to comply with local zoning requirements, RCW 36.70A.103 clearly does not apply to the Board's decision to grant a marijuana license.

The Board agrees that marijuana licenses are location-specific. The issuance of a license at a particular location allows the Board to evaluate the operating plan presented by the licensee, including the cost of leasing or renovating the space, or purchase cost of the building, source of funds issues, as well as camera placement, and required distances from certain other uses spelled out in RCW 69.50.331(8). However, the Board's review of the location does not encompass local concerns such as whether the plumbing, sewer requirements, power service, or fire codes are met, as those matters are within the purview and authority of the local jurisdiction.

CONCLUSION

Consistent with the analysis above, the Board denies the Petition for Declaratory Order requested by Kittitas County at page 4 of its Petition, paragraphs numbered 13 through 16, as follows:

13. The Liquor and Cannabis Board must consider all local zoning in its review process and must only issue licenses when the application is congruous with local zoning.

Response: The Board rejects this assertion as inconsistent with the law.

14. The Liquor and Cannabis Board must consider objections to marijuana licenses based on local zoning as valid, and provide for a box for such objection on the notice form sent to municipalities.

Response: The Board considers objections from local authorities as required by RCW 69.50.331. Local authorities are required by law to provide the facts and reasons for their objections, and there is no need for addition of the "check box" on the notice form.

15. The Liquor and Cannabis Board must revise its WAC to provide for consideration of local zoning when reviewing applications for marijuana licenses.

Response: Local jurisdictions cannot delegate enforcement of local zoning and land use ordinances to the WSLCB. The Board's current rules are a valid exercise of the Board's authority.

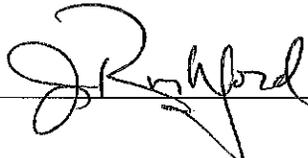
16. By issuing site-specific licenses without regard to local zoning, the Liquor and Cannabis Board is violating RCW 36.70A.103 and claiming a level of authority not granted in Ch. 69.50 RCW.

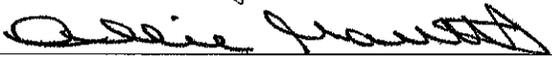
Response: Kittitas County's interpretation of RCW 36.70A.103 is inconsistent with the plain language of the law, and with the rules adopted to implement that law. Granting the petition would place the Board in a position of exceeding its delegated authority, and enforcing local ordinances, which is beyond its authority and would require resources the Board does not have.

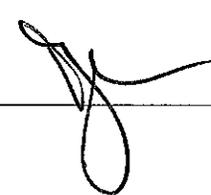
The Board concludes that the provisions of RCW 36.70A.103 do not require that the Board determine that an applicant for a marijuana license is in compliance with all local zoning and land use ordinances prior to granting a license. The local jurisdiction has the ability to determine whether to grant a local business license and/or any required permits before a state-licensed marijuana business may legally conduct that business within the jurisdiction, and to enforce its own zoning and land use ordinances. The Board is not required to deny a marijuana license based on an objection from a local jurisdiction that the location is not compliant with local zoning and land use requirements. Enforcement of local ordinances is the responsibility of the local jurisdiction.

ISSUED this 23rd day of May, 2017

WASHINGTON STATE LIQUOR AND CANNABIS BOARD







APPENDIX A

STATUTES AND RULES

RCW 69.50.331(7)

(7)(a) Before the state liquor and cannabis board issues a new or renewed license to an applicant it must give notice of the application to the chief executive officer of the incorporated city or town, if the application is for a license within an incorporated city or town, or to the county legislative authority, if the application is for a license outside the boundaries of incorporated cities or towns.

(b) The incorporated city or town through the official or employee selected by it, or the county legislative authority or the official or employee selected by it, has the right to file with the state liquor and cannabis board within twenty days after the date of transmittal of the notice for applications, or at least thirty days prior to the expiration date for renewals, written objections against the applicant or against the premises for which the new or renewed license is asked. The state liquor and cannabis board may extend the time period for submitting written objections.

(c) The written objections must include a statement of all facts upon which the objections are based, and in case written objections are filed, the city or town or county legislative authority may request, and the state liquor and cannabis board may in its discretion hold, a hearing subject to the applicable provisions of Title 34 RCW. If the state liquor and cannabis board makes an initial decision to deny a license or renewal based on the written objections of an incorporated city or town or county legislative authority, the applicant may request a hearing subject to the applicable provisions of Title 34 RCW. *If a hearing is held at the request of the applicant, state liquor and cannabis board representatives must present and defend the state liquor and cannabis board's initial decision to deny a license or renewal.*

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

(Emphasis added).

RCW 36.70A.103

State agencies required to comply with comprehensive plans.

State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except as otherwise provided in RCW 71.09.250 (1) through (3), 71.09.342, and 72.09.333. The provisions of chapter 12, Laws of 2001 2nd sp. sess. do not affect the state's authority to site any other essential public facility under RCW 36.70A.200 in conformance with local comprehensive plans and development regulations adopted pursuant to chapter 36.70A RCW.

WAC 365-196-530

State agency compliance.

(1) RCW 36.70A.103 requires that state agencies comply with the local comprehensive plans and development regulations, and subsequent amendments, adopted pursuant to the act. An exception to this requirement exists for the state's authority to site and operate a special commitment center and a secure community transition facility to house persons conditionally released to a less restrictive alternative on McNeil Island under RCW 36.70A.200.

(2) The department construes RCW 36.70A.103 to require each state agency to meet local siting and building requirements when it occupies the position of an applicant proposing development, except where specific legislation explicitly dictates otherwise. This means that development of state facilities is subject to local approval procedures and substantive provisions, including zoning, density, setbacks, bulk and height restrictions.

(3) Under RCW 36.70A.210(4), state agencies must follow adopted county-wide planning policies. Consistent with other statutory mandates, state programs should be administered in a manner which does not interfere with implementation of the county framework for interjurisdictional consistency, or the exercise by any local government of its responsibilities and authorities under the act.

(4) Overall, the broad sweep of policy contained in the act implies a requirement that all programs at the state level accommodate the outcomes of the growth management process wherever possible. The exercise of statutory powers, whether in permit functions, grant funding, property acquisition or otherwise, routinely involves such agencies in discretionary decision making. The discretion they exercise should take into account legislatively mandated local growth management programs. State agencies that approve plans of special purpose districts that are required to be consistent with local comprehensive plans should provide guidance or technical assistance to those entities to explain the need to coordinate their planning with the local government comprehensive plans within which they provide service.

(5) After local adoption of comprehensive plans and development regulations under the act, state agencies should review their existing programs in light of the local plans and regulations. Within relevant legal constraints, this review should lead to redirecting the state's actions in the interests of consistency with the growth management effort.

RCW 34.05.240

Declaratory order by agency—Petition.

(1) Any person may petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency. The petition shall set forth facts and reasons on which the petitioner relies to show:

- (a) That uncertainty necessitating resolution exists;
- (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- (c) That the uncertainty adversely affects the petitioner;

(d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and

(e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.

(2) Each agency may adopt rules that provide for: (a) The form, contents, and filing of petitions for a declaratory order; (b) the procedural rights of persons in relation thereto; and (c) the disposition of those petitions. These rules may include a description of the classes of circumstances in which the agency will not enter a declaratory order and shall be consistent with the public interest and with the general policy of this chapter to facilitate and encourage agencies to provide reliable advice.

(3) Within fifteen days after receipt of a petition for a declaratory order, the agency shall give notice of the petition to all persons to whom notice is required by law, and may give notice to any other person it deems desirable.

(4) RCW 34.05.410 through 34.05.494 apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order.

(5) Within thirty days after receipt of a petition for a declaratory order an agency, in writing, shall do one of the following:

(a) Enter an order declaring the applicability of the statute, rule, or order in question to the specified circumstances;

(b) Set the matter for specified proceedings to be held no more than ninety days after receipt of the petition;

(c) Set a specified time no more than ninety days after receipt of the petition by which it will enter a declaratory order; or

(d) Decline to enter a declaratory order, stating the reasons for its action.

(6) The time limits of subsection (5) (b) and (c) of this section may be extended by the agency for good cause.

(7) An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

(8) A declaratory order has the same status as any other order entered in an agency adjudicative proceeding. Each declaratory order shall contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusions.