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Administrative Law

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Welcome to the Administrative Law Section's E-Newsletter!

We hope you enjoy our newsletter and encourage your feedback.

Please forward our newsletter to your colleagues and encourage them to join the Section if they find the newsletter informative! We also welcome your suggestions for topics for future newsletters.

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Inside This Issue

Frank Homan Award for 2021 Goes to John Gray

By William Pardee

The Administrative Law Section's Executive Committee has approved the nomination of John Gray, a Section member, to be the 2021 recipient of the Section's Frank Homan Award. Congratulations, John! The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law. The Section plans to host an in-person reception honoring Mr. Gray, and also to recognize last year's recipient, Richard Potter, who did not have an in-person reception. The nomination the Section received for John Gray from attorneys Eileen Keiffer and Katy Hatfield, the Section Executive Committee's current Chair and Treasurer respectively, which Frank Homan Award Section Committee head Lea Dickerson provided the Committee, reads as follows:

May 20, 2021
Lea Anne Dickerson
WSBA Administrative Law Section Homan Award Coordinator
Office of Administrative Hearings
2420 Bristol Ct SW
Olympia, WA 98502-6004
Email: lea.dickerson@oah.wa.gov

Dear Judge Dickerson,

The Frank Homan Award is presented annually by the WSBA Administrative Law Section to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law. We nominate John Gray for the 2021 Frank Homan Award.

John dedicated his entire career to the practice of administrative law. John worked as an Assistant Attorney General from 1979 to 1991, before becoming an Administrative Law Judge (now known as a Tax Review Officer) at the Department of Revenue from 1991 until his retirement in 2008. After retirement, John worked part-time for nearly another decade—from 2009 until 2017—as a Pro Tem Administrative Law Judge with the Office of Administrative Hearings.

At the Attorney General's Office, where John worked on tax cases and bankruptcy work, one of his former colleagues remembers John as being "constantly supportive" and "unfailingly professional," and describes John as someone who has "always been a kind and compassionate person." Another AAG appreciated John's efforts to encourage her to get involved in pro bono work and professional organizations, calling John "one of the kindest people I've met."

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A third AAG who worked with John stated that "John is a passionate believer in protecting the legal interests of those in most need of legal services. He is a strong believer in making sure those interacting with their government were treated with the highest respect and ethical standards."

According to one of John's former colleagues at the Department of Revenue, John was "universally respected for his legal chops and loved for his kindness and good sense of humor." In addition to his ALJ duties, John also represented the Department of Revenue in informal cases at the Board of Tax Appeals. At that time, only John and one other individual handled the work that a team of 10 does now. And yet, somehow John still found time to mentor younger attorneys and was the kind of person that younger staff "felt safe talking to and bouncing ideas off of."

At OAH, John was on the Specialized Caseload Team, where he worked mostly on unemployment insurance hearings and licensing hearings. One of John's OAH ALJ colleagues described John as a "great choice" for the Homan Award, and another OAH ALJ "whole-heartedly supports John's nomination." John was described by OAH ALJs as "well-respected," "distinguished," "highly regarded," "extremely collegial," and "very good at what he does."

In addition to his distinguished career, John also spent decades contributing to the practice of administrative law through his volunteer work with the WSBA's Administrative Law Section. Records exist showing that John was on the Administrative Law Section's Board of Trustees dating back to at least 2002. He served as Board Chair for two terms in a row from 2007 to 2009, and also served as multiple committee chair positions over the decades including newsletter chair, publications chair, and diversity and outreach chair. John also served as an active member of the legislative committee for many years. He contributed many case summaries and articles to the Section newsletter including "Agency Profile – the Office of Administrative Hearings," "Agency Profile – The Employment Security Department," "Spotlight on Diversity," "State Agencies' Indexes of Orders and Statements," and "State Agencies' Indexes of Orders and Statements – Part 2: New DCFY Rule and Online Resource." John was also instrumental in planning many CLEs, including the first-ever joint Washington-Oregon Administrative Law CLE held in 2014. John was also an influential member of the Government Lawyers Bar Association and helped give public sector attorneys a voice within the WSBA.

John continues to provide contributions to the Section, including serving on the legislative committee and nominating committee. John (and his wife Margie Gray) serve crucial roles due to their institutional knowledge of the Section and the development of administrative law within Washington state. John is welcoming to all new members and extremely generous with his time and wealth of knowledge. To borrow the words of one of John's former colleagues, John "is never too busy to say hello to the many friends and acquaintances to whom he encounters." We have no doubt that John is a friend to everyone he encounters.

We strongly recommend John Gray for the Frank Homan Award.

—Katy Hatfield and Eileen Keiffer

MARK YOUR CALENDAR!

Upcoming Administrative Law Section Mini-CLEs

Over the past year, the Administrative Law Section has sponsored several very successful Mini-CLEs on a wide array of topics. That said, the Section is busy organizing and planning another upcoming two-hour Mini-CLE in August 2021, which they hope you will attend. The details are as follows:

12:00 – 2:00 p.m.
AUGUST 26, 2021
"101 Cell Site Leasing & Small Cell Deployment 5G"

Presented by **Sophie Geguchadze** and **Dr. Jonathan Kramer** of *Telecom Law Firm*

2.0 L&LP Credit
$25.00 for WSBA Administrative Law Section members and law students ($35/Non-members)

Join Our Section!

We encourage you to become an active member of the Administrative Law Section.

Benefits include a subscription to this newsletter and networking opportunities in the field of administrative law.

Click here to join!

The Section also has six committees whose members are responsible for **planning CLE programs, publishing this newsletter, tracking legislation of interest to administrative law practitioners**, and more.

Feel free to contact the chair of any committee you have an interest in or for more information.

Committee chairpersons are listed on page two of this newsletter, and on the Section's website.

Recap of 2021 Legislative Session

By Richard Potter

The 2021 session was the first ("long") session of the Legislature's 2021-2022 biennium. During the session the Administrative Law Section's Legislative Committee reviewed 60 bills (not counting companion bills).

The areas of interest to the committee were the Administrative Procedure Act (34.05 RCW), the Public Records Act (42.56 RCW), the Open Public Meetings Act (42.30 RCW), the Office of Administrative Hearings law (34.12 RCW), and other statutes that affect administrative agency procedures, processes, hearings, rulemakings, appeals/judicial review, etc. (as opposed to the substantive law implemented by agencies).

Bills that the committee monitored included 12 affecting the APA, three affecting the OPMA, 27 concerning public records, and five with miscellaneous applications to administrative law. Eleven of these bills were passed by the Legislature and signed by the governor. One of these bills was passed by the Legislature but vetoed by the governor. The bills are described below and affect the APA and public records laws, although Senate Bill 5051 also has a few miscellaneous impacts on administrative law. Unless otherwise stated, the bills' effective dates are July 25, 2021. The text of bills and committee reports are available on the Legislature's website at apps.leg.wa.gov/billinfo/.

Bills Affecting the APA

HB 1192 includes an amendment of RCW 34.05.272 (re: Dept. of Ecology "significant actions") to update references to toxic pollution statutes.

HB 1259 expands public contracting opportunities for women and minority business enterprises. It refers to the APA regarding subpoena enforcement.

SB 5225 authorizes some judicial review cases brought under the APA and the Land Use Petition Act to be directly appealed to the court of appeals. The Section provided a formal letter of support for this bill. This bill was effective on June 13.

Bills affecting Public Records

HB 1068 adds a new subsection (7) to RCW 42.56.420 to exempt from disclosure certain election security information. It became effective on April 14 and applies to any public records requests made prior to that date for which the disclosure of records has not already occurred.

HB 1267 concerns investigations of potential criminal conduct arising from police use of force. It creates the Office of Independent Investigations in the Governor's Office and

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designates the Office as an "investigative law enforcement agency" for PRA disclosure purposes (see RCW 42.56.240).

SB 5046 concerns workers' compensation claim resolution settlement agreements. It includes two amendments to RCW 42.56.230. New subsection (7) concerns possible reports from the Department of Licensing to the Legislature of non-exempt personal information about vehicle, vessel, and drivers' licenses. New subsection (8) requires the Board of Industrial Insurance Appeals to provide DOL a copy of all final claim resolution settlement agreements. The bill was effective on April 16.

SB 5051 concerns state oversight and accountability of peace officers and corrections officers. It is a lengthy bill that mostly amends RCW 43.101, which concerns the Criminal Justice Training Commission, the hiring, training, certification, discipline, decertification, and reinstatement of peace and corrections officers, and the investigation of complaints and administrative hearings that are part of these processes. The bill amends RCW 43.101.380 by adding a subsection (6) stating that the transcripts, admitted evidence, and written decisions of the Commission's hearings panel are not exempt from public disclosure. The bill amends RCW 43.101.400(1) to state that the Commission's initial background check records are exempt from disclosure, except to the extent they become part of any decertification case records, and it amends subsection (4) to require the Commission to create a searchable, publicly available database of its disciplinary proceedings. The bill also adds a subsection (4) to RCW 40.14.070 (Preservation and destruction of public records) requiring officers' personnel records, including disciplinary actions, to be retained for the duration of employment plus 10 years. And it amends RCW 34.12.035 (Office of administrative hearings) by adding that OAH ALJ's assigned to Commission cases must have "subject matter expertise."

SB 5152 concerns privacy protections for vehicle and driver data. It makes several changes to RCW 46 (Motor Vehicles), adding a new section, adding definitions to RCW 46.04, and amending RCW 46.12.630, -.635, and -.640 regarding the disclosure of information about the registered owners of motor vehicles. It amends RCW 46.52.130 regarding "abstract[s] of driving record[s]." It makes minor changes to RCW 46.12.635, which concerns ownership records (and already expressly supersedes the Public Records Act regarding to whom and under what circumstances such records may be disclosed).

SB 5251 is a lengthy bill "modifying tax and revenue laws by easing compliance burdens for taxpayers, clarifying ambiguities, making technical corrections, and providing administrative efficiencies." It includes amending RCW 82.32.330 by adding subsections (3)(v) and (w), which describe some exceptions to disclosure prohibitions applicable to the Department of Revenue.

SB 5303 amends RCW 42.56.380 of the Public Records Act (agricultural and livestock information) to exempt from disclosure certain information obtained from the USDA.

SB 5345 establishes a statewide industrial waste coordination program. It includes amending RCW 42.56.270 (Financial, commercial, and proprietary information) of the Public Records Act to exempt from disclosure certain information provided to the Department of Commerce under this program.

HB 1127 was passed by the Legislature but vetoed by the governor. It would have protected the privacy and security of certain COVID-19 health data. It included adding a new subsection (5) to RCW 42.56.360 (Health Care) of the Public Records Act. The governor vetoed the bill on the grounds that "the plain language of the bill is very broad and covers other COVID-related information that was not contemplated at the time of drafting. For example, this bill appears to prohibit efforts by public and private entities to offer incentives to become vaccinated or to make certain opportunities available to those persons who are vaccinated." The Legislature did not take an override vote.

The newly enacted public records disclosure exemptions will be added to the Code Reviser's comprehensive list, which is available at www.atg.wa.gov/sunshine-committee (scroll down). ■

Help us Make this Newsletter MORE RELEVANT to Your Practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please email Edward Pesik at edward.pesik@oah.wa.gov.

Case Law Update

Washington Association of Municipal Attorneys v. Washington Coalition for Open Government, Court of Appeals Div. I, 2020 WL 7342171 (Dec. 14, 2020, unpublished)

By Eileen Keiffer

This case clarified which entities are subject to the Washington Public Records Act, RCW Ch. 42.56 (PRA), finding that the Washington Association of Municipal Attorneys (WSAMA) is not subject to the PRA. WSAMA is a committee of municipal attorneys, formed for the purposes of promoting educational opportunities for municipal attorneys, such as continuing legal education. It was formed in 1986 and is a private, nonprofit organization. WSAMA's main activities are hosting CLEs and submitting amicus curiae briefs on matters of municipal interest.

The genesis of the case stems from a public records request by the Washington Coalition for Open Government (WCOG) to WSAMA for all records "relating to any proposed amicus brief in any case involving the Public Records Act." WSAMA fulfilled the request, providing over 1,200 pages of responsive records to WCOG, as well as an exemption log; however, WSAMA also stated that WSAMA did not consider itself an agency subject to the PRA. WCOG objected to the listed exemptions and made another request under the PRA. WSAMA again provided the records and reiterated that it did not take the position that it was an agency for purposes of the PRA. In August 2018, WSAMA sued for declaratory judgment on the grounds that it is not an "agency" under the PRA. The trial court agreed with WCOG on cross motions for summary judgment, and held that WSAMA was the functional equivalent of an agency and subject to the PRA.

The Washington Court of Appeals, Division I, disagreed and overturned the trial court, expressly holding that WSAMA is not an agency for PRA purposes. RCW 42.56.010(1) defines agency as "all state agencies and all local agencies," including "every state office, department, division, bureau, board, commission, or other state agency," and "every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." The court noted that private agencies can be agencies under the PRA if they are the "functional equivalent" of an agency. *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 512, 387 P.3d 690 (2017).

To determine whether a private entity is the functional equivalent of an agency, the courts use a four criterial test. *Telford v. Thurston Cty. Board of Commissioners*, 95 Wn. App. 149, 157, 974 P.2d 886 (1999). The four criteria are: "(1) whether the entity performs a government function, (2) the extent to which the government funds the entity's activities, (3) the extent of government involvement in the entity's activities, and (4) whether the entity was created by the government." *Woodland Park Zoo*, 187 Wn.2d at 518. The courts do not necessarily weigh each Telford factor equally, but rather consider whether "'the criteria on balance … suggest that the entity in question is the functional equivalent of a state or local agency.'" Id. at 518 (quoting *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192, 181 P.3d 881 (2008)).

Applying the Telford test, the court found the factors inured against WSAMA being an agency. With respect to the first factor, the court found that "WSAMA's actions promote governmental interests, but they do not rise to the level of core governmental functions." There is no legislative delegation of authority to WSAMA. Indeed, WSAMA's hosting of CLE conferences is a function that private entities often engage in. Similarly, WSAMA's amicus activities are also activities that private entities often engage in. The court also found WSAMA, in its amicus activities, had no control over the outcome of the case or even the scope of issues before the court.

With respect to the second Telford factor, the court found that WSAMA receives no funding directly from government sources. WSAMA's largest source of revenue is its annual CLE conferences. While there may be some reimbursement from cities for either conference fees, as these are fees for services, they did not lean toward a finding of functional equivalence. With respect to city facilities used for WSAMA purposes, there was only little evidence in the record that city facilities (such as laptops) are used for WSAMA purposes. Taken as a whole, "because WSAMA does not receive significant funding or in-kind support from the government, the second factor weighs against function equivalence."

With respect to the third factor, the court fund the third factor to be equally balanced for or against functional equivalence. There was no evidence that any governmental entity provided oversight over WSAMA's actions. WSAMA is instead run by its members, which are a combination of public employees and attorneys who work for private firms. While the WSAMA board is almost entirely public employees, the private attorneys often have significant control through committee membership.

Finally, with respect to the fourth Telford factor, the Court found against functional equivalence. The Legislature did not instruct WSAMA to form. Indeed, not all municipal attorneys are WSAMA members. Therefore, the court found WSAMA's origin was not governmental in nature.

In balancing the four Telford factors, the court found WSAMA is not functionally equivalent to an agency under the PRA. The court noted that "no Washington case has held that an entity is the functional equivalent without finding that the entity was government funded and controlled and

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was serving a core government function." The court found none of the factors established that WSAMA is functionally equivalent to government. Therefore, the court found "on balance, the degree of governmental control over WSAMA does not establish that it is the functional equivalent of an agency for purposes of the PRA."

Wright's Crossing, LLC. et. al. v. Island County, et. al, Court of Appeals Div. I, 2021 WL 1346122 (Apr. 12, 2021, unpublished)

By Eileen Keiffer

Wright's Crossing, LLC submitted a request to Island County (County) for expansion of the Oak Harbor Urban Growth Area (UGA) by approximately 300 acres. The County conducted an initial review of the proposed UGA expansion and declined to place the proposal on its annual review docket. Wright's Crossing appealed the decision to the Growth Management Hearings Board (GMHB), which dismissed the appeal, because the County had discretion not to docket Wright's Crossing's proposal. Wright's Crossing appealed under the Administrative Procedure Act (APA) to Thurston County Superior Court, which affirmed the GMHB. Upon further appeal, the Court of Appeals also affirmed.

The Washington Growth Management Act (GMA), RCW Ch. 36.70A, requires periodic review of certain planning policies. UGAs are crucial pieces of planning policy because they delineate where urban growth will be encouraged (and conversely, areas outside of UGA are designed to support growth that is not urban in nature). RCW 36.70A.110(1), (6). Counties must review their UGAs on an eight-year cycle to determine whether revisions are necessary. RCW 36.70A.130(3)–(5). Additionally, modifications to the UGA (and to a county's comprehensive plan generally) may occur outside of the periodic review schedule. Indeed, the GMA requires counties to establish a schedule for the county to consider proposed revisions or amendments no more than annually. RCW 36.70A.130(2)(a). Indeed, members of the public may apply for an amendment to the comprehensive plan. These are frequently referred to colloquially as the "docketing process." In Island County, such schedule and procedures are contained at Island County Code (ICC) Chapter 16.26.

Wright's Crossing owns development rights to approximately 250 acres of the 300 acres it requested be included within the Oak Harbor UGA. The County's Planning Commission reviewed Wright's Crossing's proposal to expand the UGA and recommended the County Board of Commissioners exclude the proposal from the annual review docket. As a basis for this recommendation, the Planning Commission noted the UGA expansion would require other amendments to the Comprehensive Plan, that it conflicted with certain Comprehensive Plan goals, and that full review of such a proposed UGA expansion would be extremely resource intensive. The County Board of Commissioners agreed and excluded the proposal from the County's annual review docket.

Wright's Crossing appealed to the GMHB, which dismissed the appeal for failure to state a claim upon which relief could be granted, because the decision to docket a proposal (or to exclude a proposal) is discretionary. Wright's Crossing further appealed, contenting that County Comprehensive Plan Section 1.5.1.2.3 imposed a mandatory duty to place Wright's Crossing's proposal on the annual review docket.

The Administrative Procedure Act, RCW Ch. 34.05, governs appeals from GHMB decisions. In APA appeals, the reviewing appellate courts sit "in the same position as the superior court, applying the standards of the APA directly to the record before the agency." *Top Cat Enters., LLC v. City of Arlington*, 11 Wn.App. 2d 754, 759, 455 P.3d 225 (2020). GMHB decisions are thus only reversible if the agency erred per any of the standards listed in RCW 34.05.570(3). Wright's Crossing alleged that the GMHB "erroneously interpreted or applied the law" under RCW 34.05.570(3)(d).

The court reviewed the GMHB's legal conclusions "de novo," but giving substantial weight to the GMHB's interpretation of the Growth Management Act, pursuant to *Whatcom County v. Hirst*, 186 Wn.2d 648, 667, 381 P.3d 1 (2016).

The relevant language from the Comprehensive Plan provided that UGAs could be expanded outside of the periodic update cycle if it was necessary for one of four stated reasons. Further, the Comprehensive Plan provided that amendment proposals "shall be … placed on the County's annual review docket." Comprehensive Plan Section 1.5.1.2.3. However, when used in the Comprehensive Plan, the word "shall" did not implicate a mandatory duty, the court found. Additionally, the court looked to the GMA, the relevant WACs implementing the GMA, the CWPPs, and the County's Code.

The court noted that in the event of a conflict between the Countywide Planning Policies (CWPPs) and comprehensive plans, the CWPPs control. See RCW 36.70A.210 and *Stickney v. Cent. Puget Sound GMHB*, 11 Wn.App.2d 228, 232, 453 P.3d 25 (2019). The relevant CWPP provided that docketing proposals by individuals or cities should be placed on the docket per the Island County Code (ICC) Ch. 16.26. ICC 16.26.060 provides discretion to recommend docketing items first to the Planning Commission, and also gives discretion to the County

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Board of Commissioners as to whether to place a proposed amendment on the annual review docket. The County adhered to the process contained in ICC Ch. 16.26.

Based on the ICC language and the substantial weight afforded to the GMHB on matters of GMA interpretation, the court held the GMHB did not err in concluding there was no duty of the County to docket Wright's Crossing's UGA expansion proposal.

The court further disagreed with Wright's Crossing's allegation that the Comprehensive Plan language providing if population growth criteria are met, it will trigger reevaluation of population projections establishes a mandatory duty to docket. The court noted the language in question does not even mention the docketing process—just reevaluation of population projections.

Finally, the court upheld the GMHB's decision to dismiss for failure to state a claim upon which relief could be granted, noting the discretionary authority to place (or not) a proposal on the annual review docket. Without a mandatory duty to docket, the GMHB simply could not provide relief.

Martin Luther King, Jr. County Labor Council of Washington v. City of Seattle, Court of Appeals Div. I, 2021 WL 1175303 (March 29, 2021, unpublished op.)

By Bill Pardee

The Burke-Gilman Trail (BGT) is a regional bicycle and pedestrian trail between Golden Parks Park in Seattle and the Sammamish River Trail in Bothell. The BGT has 1.4-mile gap through the Ballard neighborhood known as the "Missing Link." Completion of the BGT's Missing Link has been discussed and analyzed since the 1980s. In 2001, the Seattle City Council (Council) directed the Seattle Department of Transportation (SDOT) to evaluate alternative routes for the Missing Link. In 2008, SDOT developed a plan to bridge that gap by building the Missing Link through Ballard's maritime and industrial district.

SDOT conducted an environmental review for the State Environmental Policy Act (SEPA) and prepared a draft environmental impact statement (DEIS), which it published in June 2016. After public comments and responses to the DEIS, in May 2017 SDOT issued the final environmental impact statement (FEIS).

In June 2017, the Coalition, consisting of labor, business, and industry groups, challenged the adequacy of the FEIS before a city hearing examiner. The Coalition named the city of Seattle and SDOT as respondents in the proceeding. The Seattle Hearing Examiner assigned the appeal to Seattle Deputy Hearing Examiner Ryan Vancil.

Meanwhile, in fall 2017, the Council began the process of replacing Seattle's retiring hearing examiner. In October 2017, Deputy Hearing Examiner Vancil applied for the position. Vancil heard the Coalition's challenge to the FEIS in November and December 2017. The hearings consisted of six days of expert testimony addressing the adequacy of the Missing Link FEIS. On January 31, 2018, Vancil issued his findings and decision in favor of the City. On February 1, 2018, the Seattle Office of the Hearing Examiner announced that the Council selected Vancil as the replacement for the retiring hearing examiner. On February 5, 2018, the Council confirmed Vancil's appointment.

The Coalition appealed Vancil's findings and decision to the King County Superior Court, challenging the adequacy of the FEIS. It also named the Seattle hearing examiner as a respondent and alleged that Vancil violated the appearance of fairness doctrine by applying and interviewing for the chief hearing examiner position while presiding over the FEIS challenge. The parties cross moved for summary judgment on the appearance of fairness issue. In July 2018, the trial court dismissed the Coalition's claim on partial summary judgment. In December 2018, the trial court subsequently reviewed the merits of the Coalition's challenge to the FEIS. The trial court issued an order granting in part and denying in part the Coalition's challenge to the adequacy of the FEIS. The trial court found the FEIS did not adequately disclose adverse economic impacts associated with the potential risks from vehicle to bicycle/pedestrian traffic conflicts. The trial court found the FEIS adequate in all other respects.

Both sides appealed. The City appealed the trial court's finding that the FEIS's economic impact analysis was inadequate. The Coalition appealed the trial court's dismissal of their appearance of fairness claim and the trial court's finding that the FEIS was adequate in all areas other than the economic impact analysis.

While the appeals were pending, SDOT hired consultants to perform another analysis of the economic impacts of vehicle to bicycle and pedestrian conflicts as ordered by the trial court. The consultants concluded their analysis was consistent with the previous analyses of the FEIS and supporting documentation. In April 2019, SDOT published this information as an addendum to the FEIS.

In May 2019, the Coalition moved to enforce the December 2018 order in the trial court. It asked the trial court to stop SDOT from beginning the construction of the Missing Link because even with the addendum, the FEIS remained inadequate. The trial court granted the motion. The City appealed the May 2019 order.

The Coalition argues the trial court erred in dismissing its appearance of fairness challenge on summary judgment

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and refusing to grant its cross motion. It claims Deputy Hearing Examiner Vancil violated the appearance of fairness doctrine by applying and interviewing with his future bosses while he was adjudicating a case involving his prospective employer. We agree that the facts here undermine the appearance of fairness in the hearing process.

The appearance of fairness doctrine "aspires to the maintenance of public confidence in just, disinterested decisions of public agencies." *Fleck*, 16 Wn. App. at 673 (1977). Whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well. *Smith*, 75 Wn.2d at 739 (1969). The principle applies equally to judicial and administrative hearings. *Chi., Milwaukee, St. Paul & Pac. R.R.*, 87 Wn.2d at 807 (1976). A party asserting a violation of the appearance of fairness must show actual or potential bias. *Magula*, 116 Wn. App. at 972 (2003). The critical analysis for the appearance of fairness doctrine is how the proceedings would appear to a reasonably prudent and disinterested person. *Chi., Milwaukee*, 87 Wn.2d at 810. We presume that public officers properly perform their duties. *Magula*, 116 Wn. App. at 972.

The Coalition relies on *Fleming v. City of Tacoma*, 81 Wn.2d 292 (1972), *Chicago, Milwaukee*, 87 Wn.2d at 802, and *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019), to argue that a decisionmaker who has prospective employment with a stakeholder violates the appearance of fairness doctrine by failing to disclose the potential conflict.

In *Fleming*, a councilman who first voted against a zoning amendment supported by a land developer later moved to reconsider and changed his vote. The amendment passed. Less than two days later, the land developer who prevailed in the rezoning hired the same councilman as their attorney. The court inferred that the councilman arranged his employment with the land developer before he changed his vote, which amounts to an appearance of unfairness "'so strong … that those who oppose[d] the zoning and who thought this thing through will never, never believe that somehow this wasn't kind of wired before the final vote was taken.'"

Chicago, Milwaukee involved a tribunal investigating a discrimination complaint against a railroad company. An applicant for a railroad job filed a complaint with the Washington State Human Rights Commission, alleging discrimination based on physical handicap. The Commission argued the issue in a hearing before an appointed tribunal. The tribunal ruled for the Commission, awarding relief to the job applicant. It was later discovered that one of the members of the tribunal had a pending job application with the Commission. The Commission offered the job to the tribunal member after the tribunal ruled in favor of the Commission. While there was no direct evidence of any bias by the tribunal member, the court concluded the proceedings violated the appearance of fairness because "the fact of her pending application for a job with the very Commission appearing before the tribunal as an advocate … strips the proceeding of the appearance of fairness."

And in *Al-Nashiri*, a military judge presided over a military commission trial against a detainee at the United States Naval Station Guantanamo Bay detention camp at the same time he applied for a position as an immigration judge with the United States Department of Justice (DOJ). The DOJ assigned at assistant attorney general (AAG) to help prosecute Al-Nashiri and the AAG "appear[ed] to have been the prosecution team's second-in-command for at least part of the time." The United Sate Office of the Attorney General also consulted on the military commission trial procedures and would have helped defend a conviction on appeal. The "Attorney General himself" is also directly involved in selecting and supervising immigration judges. The D.C. Circuit determined that "the Attorney General was a participant in Al-Nashiri's case from start to finish" and that the attorney general's role in the military commission posed a challenge for the judge "to treat the Justice Department with neutral disinterest in his courtroom while communicating significant personal interest in his job application." The judge's job application "cast an intolerable cloud of partiality over … subsequent judicial conduct." Plainly stated, "Judges may not adjudicate cases involving their prospective employers" because a "judge cannot have a prospective financial relationship with one side yet persuade the other that he can judge fairly in the case."

Here, the City of Seattle was a named a party in the dispute pending before Vancil, and the Council was an interested stakeholder. The city advocated for approval of the Missing Link project that the Council had championed since the late 1990s. In 2014, it adopted a "Bicycle Master Plan" identifying completion of the BGT as a priority. And the Council reviewed and approved the City of Seattle's 2005 and 2035 comprehensive plans that identify completion of the Missing Link as a priority.

Deputy Hearing Examiner Vancil applied for the position of Seattle Hearing Examiner while he was presiding over the Coalition's challenge to the adequacy of the Missing Link FEIS. Vancil initiated hearings to consider the issue on November 27, 2017 and recessed the hearing on December 4 to participate in the first round of interviews for the hearing examiner position. The second round of interviews occurred on January 18, 2018 and included two members of the Council. On January 31, Vancil issued his decision in favor of the City, affirming the adequacy of the Missing Link FEIS. The next day, the Seattle Office of the Hearing Examiner announced Vancil's selection by the Council as the new hearing examiner. On February 5, the Council confirmed Vancil's appointment. As in *Fleming*,

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the time coincidence between Vancil's ruling and his appointment as hearing examiner "is devastating."

While the Coalition presents no evidence that Vancil was actually biased in favor of the City in an effort to improve his chances for appointment as the new hearing examiner, the simultaneous timing of the appointment process and the hearing in which the appointing body was an interested stakeholder "strip[ped] the proceeding of the appearance of fairness." The hiring committee for Vancil's second interview consisted of at least two Council members, one of whom was serving as the Council president. Less than two weeks after his second interview, Vancil announced his ruling in favor of the facility. Only five days after he issued his findings and decision, the whole Council confirmed Vancil's appointment.

Deputy Hearing Examiner Vancil served as a neutral decision-maker in a matter while simultaneously seeking appointment to a higher position from an interested stakeholder. Because he did not disclose the potential conflict to the parties, the proceedings could appear to be unfair to a reasonably prudent and disinterested person. We reverse the trial court's summary judgment in favor of the City, enter summary judgment for the Coalition, and remand for a new hearing.

Blue Spirits Distilling, LLC v. Washington State Liquor & Cannabis Bd., 15 Wn. App. 2d 779, 478 P.3d 153 (2020)

By Bill Pardee

RCW 66.24.140 grants the Washington State Liquor and Cannabis Board (Board) authority to collect a $2,000 fee each year to license distillers in the state. The Board also adopted WAC 314-28-070, which expands the amount of required fees on licensed distillers.

Among the fees the Board authorized in WAC 314-28-070 were an annual fee of 10 percent of a distiller's gross spirits revenue on spirits sold for on- or off-premises consumption during the first 27 months of licensure and 5 percent of their gross spirits revenues to the Board in the 28th month and thereafter (10 percent fee), and a fee of 17 percent of their gross spirits revenue to the Board on sales to customers of off-premises consumption (17 percent fee). Former WAC 314-28-070(3)(2018).

In August 2017, we published a decision invalidating the 10 percent fee and calling into question the 17 percent fee. *Washington Rest. Ass'n v. Washington State Liquor Bd.* 200 Wn. App. 119, 401 P.3d 428 (2017).

Appellant is a licensed distiller in Washington state. Since 2012, in addition the $2,000 fee, appellant has paid the 10 percent and 17 percent fees. After our decision in *Washington Rest. Ass'n*, the appellant engaged in two parallel actions: it corresponded with the Board regarding these fees and filed a lawsuit in superior court for a refund.

In September 2017, the Board was conducting an audit of appellant. On September 20, appellant sent a letter to the Board requesting a refund based on our decision in *Washington Rest. Ass'n* for all fees it paid, except the $2,000 annual license fee. The Board did not directly respond to appellant's refund request, but its audit cover letter alluded to the fact that its authority to collect the 17 percent fee was questionable.

On April 9, 2018, the Board issued appellant's audit results wherein the Board admitted to the removal of the 10 percent fees, but claimed it lacked the authority to refund the 17 percent fees. On April 25, appellant responded to the audit results with a request for hearing before the Board, citing this court's decision in *Washington Rest. Ass'n*, and requesting a full refund of fees beyond the $2,000 license fee. Our record is silent as to any further administrative proceedings.

On September 20, 2017, the same day it sent the letter to the Board requesting a refund, appellant filed a lawsuit for damages in superior court, seeking a refund. In November, appellant filed a motion for summary judgment, arguing it was entitled to relief because both the 10 percent and 17 percent fee rules were invalid. The Board responded, among other things, that appellant had failed to exhaust its administrative remedies. The trial court denied appellant's motion, ruling that appellant had not demonstrated a procedural mechanism by which the court may grant the requested relief and the court had no power to compel any refund. The Board then filed a motion to dismiss under CR 12(b)(6). The court granted the Board's motion and dismissed the complaint without prejudice.

The appellant appeals the trial court's order denying its motion for summary judgment and the order granting the Board's motion to dismiss. Appellant argues that it brought a cognizable claim for a refund, but we disagree.

With limited exceptions, the Administrative Procedure Act (APA) establishes the exclusive means for judicial review of agency action. RCW 34.05.510. Two exceptions to the APA's rule of exclusivity are at issue here. First, RCW 34.05.510(1) provides that the APA's review procedures "do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim." RCW 34.05.510(1). Second, a party need not exhaust any or all administrative remedies upon a showing that the exhaustion of administrative remedies would be futile. RCW 34.05.534(3)(b).

Exhaustion of administrative remedies is required when: (1) a claim is cognizable in the first instance by the agency alone; (2) the agency has clearly established

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mechanisms for the resolutions of complaints by aggrieved parties; and (3) the administrative remedies can provide the relief sought. A party is required to exhaust administrative remedies after a final agency order or action. An agency action is final when it imposed an obligation, denies a right, or fixes a legal relationship as a consummation of the administrative process.

The appellant argues that because this action falls under the exceptions in RCW 34.05.510(1) and RCW 34.05.534(3), it was not required to bring a claim under the APA to obtain a refund, and therefore the exhaustion of administrative remedies rule does not apply. First, the appellant argues it was not subject to the APA—and therefore summary judgment was improper—because the sole issue is a claim for money damages or compensation and the Board does not have statutory authority to determine the claim. RCW 34.05.510(1). Second, the appellant argues that exhaustion would be futile. We disagree that the appellant is exempt from proceeding under the APA.

Because the statutory language of RCW 34.05.510(1) is in the conjunctive, for this exception to apply appellant must show that its claim was solely for money damages or compensation and that the Board does not have authority to determine the claim.

In *Washington Rest. Ass'n* we held that the 10 percent fee went beyond the authority granted to it by the Legislature and the $2,000 distillers' license fee in RCW 66.24.140 was the exclusive fee authorized by the people. As a result we invalidated WAC 314-28-070(3). The Board argues that because only the 10 percent fee was at issue in *Washington Rest. Ass'n* it follows that the 17 percent fee still stands. We disagree. First, in *Washington Rest. Ass'n*, we defined 10 percent license fee rules as the whole of WAC 314-28-070(3). Second, if the whole of WAC 314-28-070(3) was thereby invalidated, then its subparts were invalidated too. Finally, the Board ignores that the explicit reason we overturned the 10 percent fee: the Legislature imposed only one fee for licensed distillers, the $2000 annual license fee. As a result, *Washington Rest. Ass'n* invalidated any other fee. Because the 17 percent fee was invalid, we hold that appellant's sole issue is for a refund claim.

The appellant argues that the Board lacks authority under the APA to adjudicate a refund claim and that the appellant would be left without relief, explaining there is no provision of law expressly authorizing the refund of distiller's license fees paid under an invalid regulation promulgated by the Board. We disagree based upon RCW 43.88.170 and RCW 43.01.072.

There are no published cases that apply either RCW 43.88.170 or RCW 43.01.072, but the Washington State Attorney General has issued formal opinions interpreting these statutes. We generally accord great weight to formal attorney general opinions interpreting statutes. In 1966, the attorney general took up a question of excess automobile licensing fees paid to the state by military members under a mistake of law. The attorney general concluded that RCW 43.88.170 applies when "there is not a specific provision for refunds in the particular statute authorizing the collection of the tax or fee." 1966 Op. Att'y Gen. No. 98, at 9. Similarly, in 1977, when examining whether jury fees could be refunded at the county level, the attorney general concluded that they could not, noting the "absence, at the county level, of a general statute similar to either RCW 43.01.072 or RCW 43.88.170, both of which expressly provided for refunds of or erroneous fee payments to state agencies. 1977 Op. Att'y Gen. No. 20, at 6 n.3.

Applying the plain meaning of these statutes (RCW 43.01.072 and RCW 43.88.170), it is clear that the Board has authority to refund fees. First, there is a "law which provides for the collection of fees" that does "not authorize the refund of erroneous or excessive payments thereof." RCW 43.88.170. Both RCW 66.24.640 and 66.24.140, as well as WAC 314-28-070, establish fees without mechanism for a refund. Second, there was a fee "received by the agency in consequence of error, either of fact or of law." RCW 43.88.170. Both the 10 percent and 17 percent fees collected by the Board under former WAC 314-28-070(3) were collected in error of law. The Board went beyond the statutory authority granted to it by the Legislature in drafting fees beyond the $2,000 distillers' license fee. The Board's erroneous interpretation of the statute, an error of law, resulted in the appellant paying the excess fees. We hold that RCW 43.88.170 (or RCW 43.01.072) gives the Board the statutory authority to issue a refund.

Because the Board has the statutory authority to determine the appellant's claim, appellant's argument fails on the second part of the exception test. RCW 34.05.510(1). As a result, we hold that appellant's claim does not fall under this exception to the APA.

The appellant also argues that it is exempt from exhausting administrative remedies because any attempt would have been futile. RCW 34.05.534(3). It claims this is so because the Board has yet to respond to their request for refund or a request for hearing. We disagree. Futility sufficient to excuse exhaustion arises only in rare factual situations. Futility is not shown by speculation that appeal would have been futile. An agency is required to act on applications for adjudication within 90 days of receipt of such application. RCW 34.05.419(1). Here, the appellant filed its lawsuit less than 90 days after sending the Board a letter demanding a refund. Even assuming the letter constituted an application for adjudication, it is pure speculation to now claim that the Board would not have accepted the letter even if the appellant had not filed an action in superior court.

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Because the appellant was not excused from seeking remedies under the APA, we hold that the trial court did not err in denying the appellant's motion for summary judgment.

The appellant argues that the trial court erred when it granted the Board's motion to dismiss under CR 12(b)(6). We disagree. The appellant brought its claim for refund as a civil claim for damages, but the trial court had no authority to make a ruling on the facts because that claim was properly before the court. First, the appellant is required to exhaust administrative remedies. If the Board denies it a refund, the appellant may then file a complaint under the APA for judicial review under RCW 34.05.570(3) or (4). Because the APA was the appropriate procedural mechanism for the appellant to bring its claim before the trial court, and the appellant brought this claim outside the APA, dismissal under CR 12(b)(6) was appropriate. ■