Notable Administrative Law Cases in Washington

2020 NAA CLE

Bill Pardee, Tax Referee

Washington State Board of Tax Appeals

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

- In 1988, Fields pleaded guilty to attempted second degree robbery
- As a result of robbery conviction, Fields was permanently disqualified from working at any licensed childcare facility in Washington pursuant to regulations promulgated by the Department of Early Learning (DEL)
- In 2013, Fields submitted a portable background check to DEL, and based on the information Fields provided, DEL cleared Fields to work at a childcare facility
- Fields worked in the childcare facility for six months after she received her background clearance
- A local news report on childcare centers brought Fields' undisclosed criminal history to DEL's attention

2

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

- DEL's licensing supervisor then sent a disqualification notice to Fields, meaning that effective immediately she could not work with or have access to a childcare center
- Fields appealed to the Office of Administrative Hearings (OAH), where she did not challenge her 1988 conviction, but contended that DEL's disqualification regulations violated her constitutional right to due process of law, both facially and as applied
- OAH determined that such constitutional questions were beyond the scope of its review and granted SJ to DEL
- Fields then petitioned for review in superior court, again arguing that the disqualification regulations violated her state and federal rights to procedural and substantive due process, both facially and as applied

3

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

- The superior court dismissed the petition for review and determined that Fields had not met her burden of proving that the disqualification regulations were unconstitutional
- The Court of Appeals subsequently affirmed
- The Washington Supreme Court then granted Fields' petition for review
- The 4-member lead opinion by Justice Yu observed that DEL's regulations provide that an individual who has a background containing any of the permanent convictions on the director's list (former WAC 170-06-210), 50 in all, including robbery, will be permanently disqualified from providing licensed childcare

4

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

- The lead opinion notes that Fields is claiming that her permanent disqualification based solely on her 30-year old robbery conviction constitutes an arbitrary deprivation of her protected interest in pursuing lawful employment in her chosen field
- To resolve Fields' as applied challenge, the lead opinion states that it must determine whether APA review is sufficient to protect against an erroneous deprivation of Fields' protected interest in light of the specific circumstances presented
- The lead opinion reasoned that using Fields' robbery conviction as the sold basis for her permanent disqualification, with no opportunity for an individualized determination presented an unusually high risk of arbitrary, erroneous deprivation

5

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

- Because of this, the lead opinion concluded that the additional procedure of an individualized determination at the administrative level would be "extremely valuable," because it would mitigate the risk of erroneous deprivation
- The lead opinion also noted that APA review does not provide sufficient procedural protections given the high risk of erroneous deprivation
- Although the lead opinion recognized that DEL has a legitimate interest in easing administrative burdens that would come with requiring a case-by-case evaluation of every person who seeks to work in childcare, it emphasized that DEL's interest was extremely minimal given the as applied nature of the challenge

6

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

- The lead opinion stated that it does not hold that every person with a permanently disqualifying conviction must be given an individualized hearing, but only holds that in light of the unusually high risk of erroneous deprivation in Fields' particular case, the additional protection of an individualized determination of her qualifications is required as a matter of procedural due process
- In her concurrence, Justice McCloud believed that DEL violated Fields' federal right to substantive due process
- While the concurrence disagreed with the lead opinion's reasoning, it concurred in the result
- The concurrence noted that DEL may not permanently disqualify Fields based solely upon her conviction because doing so violates substantive due process

7

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

- The concurrence reasoned that because the right to pursue a trade or profession is a protected right, but not a fundamental right, the court applies a rational basis test
- The concurrence concluded that the challenged DEL regulation, as applied to Fields, was not rationally related to any legitimate state interest
- The concurrence viewed the issue before it as whether barring Fields because of her conviction is rationally related to a legitimate state interest, which is a question of substantive due process
- While recognizing that DEL has a legitimate interest in avoiding the administrative burden holding an individualized inquiry in every case, the concurrence stated that DEL is not required to in every case, and that if DEL can write a bright-line regulation that seldom, if ever, violates substantive due process as applied, it can avoid such inquiries in most, if not all, cases

8

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

- The concurrence adds that in drafting a rule that is less likely to violate a person's substantive due process rights, DEL might consider how old the person was when he or she committed the crime and the amount of time that has elapsed since the crime was committed
- The 4-person dissent lead by C.J. Fairhurst observes that Fields' true claim is one of substantive due process, and that she fails to meet the heavy burden of showing that the decision to permanently disqualify her from providing childcare services based on her conviction is not rationally related to the legitimate government interest in protecting children
- The dissent adds that the fact that Fields was unable to challenge the constitutionality of the DEL rule within the administrative process itself is not a procedural due process violation, citing *Dixon v. Love*, 431 U.S. 105 (1977)

9

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

- The dissent notes that Fields is arguing for the right to appear in person in the administrative process to argue that DEL should leniency and depart from its own rules
- The dissent notes that in *Dixon* the US Supreme Court rejected the argument that procedural due process grants this right, and it would reject it here also
- Applying *Doe*, 538 U.S. 1 (2003), the dissent reasoned that Fields is not entitled to an individualized hearing administrative hearing because she cannot show that the facts she seeks to establish in that hearing are relevant under the statutory scheme
- The dissent indicates that the lead opinion fails to acknowledge the extent of the increase in the administrative burden on DEL based on its ruling, which it believes will be great

10

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

- The dissent explains that DEL receives 21,000 applications per year, and therefore concludes that it is inevitable with that number of applications that others, like Fields, will also argue they are rehabilitated despite their convictions for disqualifying crimes
- As such, DEL will be forced to make a choice each time a person claims to be rehabilitated, whereby it can provide individualized hearings to everyone who makes this claim, or it can deny individualized hearings other applicants, in which case this court may decide that this violates their procedural due process rights
- The dissent adds that by holding that Fields was denied procedural due process in this case, the lead opinion will require the agency to consider the argument that its own rule is unconstitutional as applied

11

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

- The dissent notes that even if these decisions could be easily made, having to hear these new challenges would impose a large burden on DEL and the court system, and the burden on the state of granting individualized hearings would be great
- As for Fields' substantive due process claim, the dissent observes that DEL's disqualification regulations are a reasonable means to advance the state's legitimate interests, and that Fields has failed to meet her heavy burden under the rational basis test to show that DEL's decision to permanently disqualify her based on her robbery conviction is not rationally related to the state's strong interest in protecting children and avoiding the administrative expense of holding an individualized hearing

12

Ass'n of Washington Business v. Dep't of Ecology, 195 Wn.2d 1, 455 P.3d 1126 (2020)

- The 5-member majority opinion by C.J. Stephens noted that the Department of Ecology (Ecology) promulgated the clean air rule (Rule), ch. 173-442 WAC
- The majority stated that relying on Ecology's authority under the Washington Clean Air Act (Act), ch. 70.94 RCW, the Rule creates greenhouse emission standards for 3 types of businesses: (1) certain stationary sources; (2) petroleum product producers and importers; and (3) natural gas distributors
- The Rule gives covered businesses two nonexclusive options reducing their greenhouse gas emissions: (1) Businesses can modify their operations at their facilities to lower their actual emissions; or (2) They can acquire and submit "emission reduction units," which are accounting units representing the reduction of one metric ton of carbon dioxide or its equivalent

13

Ass'n of Washington Business v. Dep't of Ecology, 195 Wn.2d 1, 455 P.3d 1126 (2020)

- The majority stated that the emission reduction program provides the sole mechanism through which natural gas distributors and petroleum product producers and importers can address the emissions generated by the products they sell, and the Rule essentially requires these businesses to pay to offset the emissions caused by third parties using their products
- Soon after Ecology promulgated the Rule in 2016, the Association of Washington Business joined with seven other industry trade organizations (collectively AWB) and filed a petition for review under the Administrative Procedure Act (APA), RCW ch. 34.05. Among other things, AWB argued Ecology lacked statutory authority under the Act to promulgate the Rule. Four utility companies that distribute natural gas throughout Washington also filed a petition for review. The two petitions were consolidated into a single challenge to the Rule. The trial court permitted the Washington Environmental Council and two other environmental organizations (collectively WEC) to intervene in defense of the Rule.

14

Ass'n of Washington Business v. Dep't of Ecology, 195 Wn.2d 1, 455 P.3d 1126 (2020)

- In 2017, the trial court ruled that Ecology's authority under the Act is limited to entities who introduce contaminants into the air, not entities who sell commodities. The trial court subsequently held that the Rule was invalid under the APA because the Rule exceeds the statutory authority of the agency conferred by law. The trial also denied Ecology's request to sever the portions of the Rule that were held invalid. Ecology and WEC filed notices of direct review with the Washington Supreme Court, and the latter granted review
- The majority stated that the heart of this case is whether the plain meaning of the Act empowers Ecology to use emission standards to regulate businesses that do not emit greenhouse gases
- The majority concluded that the plain meaning of the Act's "emission standard" definition limits the scope of Ecology's authority to promulgate emission standards to those entities that actually emit air pollutants. RCW 70.94.030(12)

15

Ass'n of Washington Business v. Dep't of Ecology, 195 Wn.2d 1, 455 P.3d 1126 (2020)

- The majority stated that the court does not defer to agency interpretations of their own authority because their interpretation *could* have been what the legislature intended
- The majority observed that the legislature has not empowered Ecology to do whatever Ecology deems best for the environment. To the contrary, the legislature has provided Ecology with a variety of tools to fulfill its environmental responsibilities. One such tool is an air quality standard. Another tool is emission standards, which govern sources that directly emit air contaminants into the atmosphere. Emission standards govern what is emitted, while air quality standards govern permissible levels of a given air contaminant in the air as a whole.

16

Ass'n of Washington Business v. Dep't of Ecology, 195 Wn.2d 1, 455 P.3d 1126 (2020)

- The majority concluded that the Rule is an improper emission standard when applied to businesses that do not directly emit greenhouse gases
- The majority held that the Rule exceeds Ecology's authority under the Act and is invalid to the extent it purports to regulate via emission standards businesses that do not directly emit greenhouse gases, but whose products ultimately do
- As to whether the remaining provisions of the Rule survived without the invalid provisions (i.e., are severable), the Rule contains an express severability clause, WAC 173-442-370, and Ecology therefore asked the court to preserve those portions of the Rule, including its application to actual emitters, that are a valid exercise of its regulatory authority

17

Ass'n of Washington Business v. Dep't of Ecology, 195 Wn.2d 1, 455 P.3d 1126 (2020)

- The majority noted that although the court not addressed severability in the context of an administrative rule before, the court has recognized with regard to statutes that the presence of a severability clause "may provide the assurance that the legislative body would have enacted the remaining sections even if others are found invalid," though it "is not necessarily dispositive on that question." *McGowan v. State*, 148 Wn.2d 278, 294-95, 60 P.3d 67 (2002). The court states that it examines the challenged statute as a whole to determine whether the legislature could have intended to enact valid sections alone and whether those valid sections alone work to achieve the legislature's goals. *Id.* When evaluating the severability of regulations, the court observes that the US Supreme Court looks to similar questions of intent and workability. See *K Mart Cor. v. Cartier, Inc.*, 486 U.S. 281, 294, 108 S. Ct. 1181, 100 L.Ed. 2d 313 (1988)

18

Ass'n of Washington Business v. Dep't of Ecology, 195 Wn.2d 1, 455 P.3d 1126 (2020)

- The majority concluded that like the US Supreme Court, the test for severability of regulations should be governed by the concepts of intent and workability that inform our test for the severability of statutes. To determine whether an invalid portion or aspect of a regulation is severable, the court asks (1) whether the authorized and unauthorized portions of the regulation are so intertwined that the agency would not have believably promulgated one without the other and (2) whether the invalid portion is so intimately connected with the purpose of the regulation as to make the severed regulation useless to advance the purpose of the statute under which it is promulgated
- Applying this test, the majority concluded that the portions of the Rule applying to natural gas distributors and petroleum product producers and importers are severable from the remainder of the Rule, which will continue to advance the purpose of the Act even without these provisions
- Because Ecology would have reasonably promulgated a rule regulating only direct emitters of greenhouse gases and such a rule would still advance the purposes of the Act, the majority held that the unauthorized portions of the Rule were severable from its validly authorized provisions

19

Ass'n of Washington Business v. Dep't of Ecology, 195 Wn.2d 1, 455 P.3d 1126 (2020)

- The 4-member dissent authored by Justice Owens observed that "when passing laws that protect Washington's environmental interests, the legislature intended those laws to be broadly construed to achieve the statute's goals." *Quinalt Indian Nation v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460,470, 387 P.3d 670 (2017)
- The dissent reasoned that the majority concluded "it naturally follows" that emission standards serve as regulations for entities "that directly cause such releases," but this conclusion does not follow
- The dissent noted that at no point do these provisions state that only entities *directly* emitting air contaminants may be regulated under the Act
- The dissent observed that since the Act's focus is to reduce emissions across the state from various sources, this potential ambiguity under the Act should be broadly construed to encompass both direct and indirect emission sources.
- The dissent concluded that because the Rule properly constitutes an emissions standard as applied to natural gas distributors and petroleum product producers and importers, the Ecology did not exceed its statutory authority in promulgating the Rule.

20

Loyal Pig, LLC v. Dep't of Ecology, 13 Wn. App. 2d. 127, 463 P.3d 106 (2020)

- Loyal Pig, LLC held a water right certificate granted in 1970 to apply water to Franklin County farmland
- The law limits a water right to an amount of use per year, a rate of flow, a point of diversion, and a location of application. The water right holder may apply for a change in the site of diversion, the place or application, or both
- In 2014 Loyal Pig's predecessor applied to the Benton County Water Conservancy Board (Benton County Board) for a change in the location of the diversion and the site of application of a portion of the water right
- When reviewing the 2014 change application, the Benton County Board calculated the annual consumptive quantity (ACQ) of water on the Franklin County farmland

21

Loyal Pig, LLC v. Dep't of Ecology, 13 Wn. App. 2d. 127, 463 P.3d 106 (2020)

- The law calculates the ACQ by averaging the most recent five-year period of continuous beneficial water consumption used by the irrigator
- The Benton County Board calculated the ACQ with average water use from 2009 to 2013, the five most recent years before the 2014 application for change
- In January 2017 Loyal Pig submitted another application with the Franklin County Water Conservancy Board (Franklin County Board) for an addition change in diversion location and place of application for the water right
- In May 2017, the Franklin County Board issued its decision approving the January application. In doing so, the board adopted the 2014 ACQ amount rather than calculating a new amount based on years 2012 to 2016. The board reasoned that it need not perform a new ACQ calculation since Loyal Pig filed the 2017 application within five years of the 2014 calculation

22

Loyal Pig, LLC v. Dep't of Ecology, 13 Wn. App. 2d. 127, 463 P.3d 106 (2020)

- The Department of Ecology reversed the Franklin County Board's decision because the Franklin County Board failed to perform a new annual ACQ calculation for years 2012 to 2016
- Loyal Pig, together with the Columbia Snake River Irrigators Association, an association of Mid-Columbia irrigation growers, appealed to the Washington State Pollution Control Hearings Board (PCHB), Ecology's reversal of the Franklin Board's approval of the 2017 change application. The challengers are collectively referred to as the Loyal Pig
- Before the PCHB, the Department of Ecology argued that RCW 90.03.380 requires a full formal ACQ calculation from the most recent five-year period no matter if the applicant for a change obtained a change approval within the last five years

23

Loyal Pig, LLC v. Dep't of Ecology, 13 Wn. App. 2d. 127, 463 P.3d 106 (2020)

- The PCHB granted the Department of Ecology's motion for summary judgment
- Loyal Pig appealed to the Benton County Superior Court
- The superior court reversed the PCHB and ruled that the Department of Ecology may not require a new ACQ calculation when a water right holder applies for a second change in the water right within a five-year window
- The superior court also ruled that Ecology had abused its rulemaking authority and issued a permanent injunction that barred Ecology requiring sequential ACQ calculations unless Ecology engaged in the formal rulemaking process
- On appeal to the Washington State Court of Appeals, Division III, the court stated that the appeal raises the principal question of whether, under RCW 90.03.380, the Department of Ecology may insist that a water right holder calculate anew its ACQ when Ecology, within the last five years, already calculated the holder's ACQ because of earlier application for change

24

Loyal Pig, LLC v. Dep't of Ecology, 13 Wn. App. 2d. 127, 463 P.3d 106 (2020)

- The court stated that RCW 90.03.380(1) governs its decision
- The court agreed with the Department of Ecology that RCW 90.03.380(1) shows legislative intent to require a new ACQ with every application for a change in the water right certificate
- The court reasoned that the statute above demands a review of the last five years of water consumption, and admits no exception simply because the applicant applied for a change in the water right during the last five years
- The court noted that a water right holder may apply to the Department of Ecology to change the location of diversion or the situs of irrigation. RCW 90.03.380(1) authorizes this change or transfer. RCW 90.03.380 impliedly granted Ecology the right to limit the extent of the change to the current ACQ, which could be lower than the initial water right

25

Loyal Pig, LLC v. Dep't of Ecology, 13 Wn. App. 2d. 127, 463 P.3d 106 (2020)

- The court observed that the profitable production of most crops east of the Cascade Mountains demands irrigation; and alternating crops grown on the same land helps to preserve the land, but different crops require different amounts of irrigation
- The court added that frequent changes in transfer diversion points and application sites, even with a five-year window of time, accommodate an efficient use of irrigation water from crop to crop and site to site
- The court recognized that under RCW 90.03.380(1), these frequent changes could penalize irrigators by reducing a water right
- The court noted that the current law also promotes excessive use of irrigation water in order to save the water rights, and because of this, stated it "would welcome a change in the law"

26

Loyal Pig, LLC v. Dep't of Ecology, 13 Wn. App. 2d. 127, 463 P.3d 106 (2020)

- The Department of Ecology requested that the court reverse the superior court's entry of an order enjoining Ecology's implementation of its interpretation of RCW 90.03.380(1)
- The superior deemed Ecology's requirement of a new calculation for an ACQ within a five-year window to constitute an adoption of a rule, such that Ecology needed to comply with rulemaking procedures
- Ecology argued to the court that an interpretation of an unambiguous statute by an administrative agency does not qualify as a rule
- The court stated that RCW 34.05.010(16), and the definition of "rule," controlled the issue

27

Loyal Pig, LLC v. Dep't of Ecology, 13 Wn. App. 2d. 127, 463 P.3d 106 (2020)

- The court noted that assuming any shift in Ecology's policy or interpretation of the statute, the law demanded that shift because of the unambiguous nature of the statute
- The court reasoned that just as it must enforce a statute adopted by the legislature even against the court's wishes, an administrative agency must also enforce a statute
- The court observed that an administrative agency's practice does not qualify as a rule, for purposes of the Administrative Procedure Act, when the practice does not create a new standard, formula, or requirement, but simply applies and interprets a statute. *Budget Rent A Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 896, 31 P.3d 1174 (2001)

28

Loyal Pig, LLC v. Dep't of Ecology, 13 Wn. App. 2d. 127, 463 P.3d 106 (2020)

- The court added that an agency does not engage in rulemaking when following an explicit statute. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002)
- The court stated that even if an agency announces a new statutory interpretation, the agency may do so through adjudication, and may give retroactive effect to the interpretation in the case in which the new interpretation is announced without rulemaking, because the agency is not really effecting a change in the law. *Andrews v. District of Columbia Police & Firefighters Retirement & Relief Bd.*, 991 A.2d 763, 771 (D.C. 2010)
- The court deemed *Campbell & Gwinn* controlling. Because Ecology merely interpreted a clear statute, the court held it did not engage in rulemaking
- Therefore, the court reinstated the ruling of the PCHB

29

Heritage Grove v. Dep't of Health, 11 Wn. App. 2d 406, 453 P.3d 1022 (2019)

- Washington created the certificate of need (CN) program (the Program). The Department of Health (DOH) administers the Program. RCW 70.38.105(1). Health care providers may open certain health care facilities, including nursing homes, only after receiving a CN from DOH. RCW 70.38.025(6), .105(4)(a). RCW 70.38.115(13)(b) provides that "[w]hen an entire nursing home ceases operation, the licensee or any other party who has secured an interest in the beds may reserve his or her interest in the beds for eight years or until a [CN] to replace them is issued, whichever occurs first." This procedure is referred to as "banking" beds. The statute and regulations then allow the party who has banked their beds to "unbank" them in a new facility
- For providers filing a CN application seeking to unbank beds, assuming certain conditions are met including that the new beds are located in the same planning area where they were before they were banked, the applicant does not need to prove the "need" criterion, WAC 246-310-21- in their CN application. RCW 70.38.115(13)(b); WAC 246-310-396

30

Heritage Grove v. Dep't of Health, 11 Wn. App. 2d 406, 453 P.3d 1022 (2019)

- Until October 15, 2009, Heritage Grove operated a 97-bed nursing home. The facility closed, and Heritage Grove sent a letter to DOH requesting to bank its beds. DOH granted Heritage Grove's request and stated that Heritage Grove's reservation of the beds would expire on October 15, 2017, unless it issued a CN before then
- In December 2014, Heritage Grove submitted an application for a CN and sought to build a facility and unbank its 97 beds. The Program received public comments on Heritage Grove's application, including those by Respondent Nursing Homes, and held a public hearing
- On July 15, 2015, the Program conditionally approved Heritage Grove's CN application, provided that Heritage Grove agreed to five conditions. Heritage Grove accepted all five conditions, and shortly thereafter, in August, the Program approved Heritage Grove's CN application. The document the program sent stated: "ISSUANCE OF THIS [CN] IS BASED ON THE DEPARTMENT'S RECORD AND EVALUATION"

31

Heritage Grove v. Dep't of Health, 11 Wn. App. 2d 406, 453 P.3d 1022 (2019)

- Respondent Nursing Homes then requested an adjudicative proceeding to contest the CN approval. After a hearing, a health law judge affirmed the Program's approval of the CN
- Respondent Nursing Homes then administratively appealed the decision. On August 25, 2017, at the end of the administrative appeal process, the Secretary of DOH, via a designee, issued the Final Order denying the CN because the application failed both the financial feasibility and cost containment criteria. Heritage Grove did not petition the Secretary's designee to stay the Final Order
- On September 21, 2017, Heritage Grove sought judicial review of the Final Order in superior court. Heritage Grove did not file a petition to stay the Final Order before October 15, 2017, which was eight years from when Heritage Grove "banked" its beds
- On August 16, 2018, the superior court affirmed the Final Order on the merits. It also dismissed the petition on mootness grounds. Heritage Grove appeals

32

Heritage Grove v. Dep't of Health, 11 Wn. App. 2d 406, 453 P.3d 1022 (2019)

- The court stated it was undisputed that Heritage Grove's CN application failed to prove "need"
- Rather, the court noted that Heritage Grove's CN application relied on the RCW 70.38.115(13)(b) exception so that its application did not have to prove the "need" criterion
- The court reasoned that if DOH never "issued" Heritage Grove a CN within eight years, then Heritage Grove's need-exempt status expired. RCW 70.38.115(13)(b)
- Furthermore, the court observed if Heritage Grove's need-exempt status expired and we are bound to remand to the agency for it to reconsider the Final Order, DOH would simply deny Heritage Grove's CN application because the application failed to prove "need" and, in turn, failed to prove all of the requisite CN application criteria

33

Heritage Grove v. Dep't of Health, 11 Wn. App. 2d 406, 453 P.3d 1022 (2019)

- Heritage Grove contends that DOH issued a CN when the Program approved Heritage Grove's application in August 2015, and that the issuance of the CN is simply in the appeals process.
- The court disagreed, and stated that a party's reservation of beds expires after eight years unless they are "issued" a CN within those eight years
- The court reasoned that the only way Heritage Grove was "issued" a CN within eight years is if the Program's August 2015 initial approval of Heritage Grove's CN application counted as such
- The court concluded that the Program's initial approval of Heritage Grove's CN application did not constitute the issuance of a CN for the purpose of RCW 70.38.115(13)(b). The court reasoned that the principles of finality illustrated their conclusion. "An administrative determination is not a final order where it is a mere preliminary step in the administrative process, but it becomes final when a legal relationship is subsequently fixed upon 'consummation of the administrative process.'" *Lewis County v. Pub. Emp't Relations Comm'n*, 31 Wn. App. 853, 862, 644 P.2d 1231 (1982). Thurs, the Court noted that here the initial approval was merely a preliminary step in the administrative process

34

Heritage Grove v. Dep't of Health, 11 Wn. App. 2d 406, 453 P.3d 1022 (2019)

- The court concluded that Heritage Grove could not justifiably rely on the subordinate order because that order was appealable, was in fact appealed, and was later overruled. Additionally, the court observed, the appeal to the superior court and to this court is from the Final Order, not the subordinate order. Although the court recognized that the subordinate order contained language indicating it was the "issuance" of a CN, the nomenclature used in that subordinate order does not overrule the fact that the subordinate order was appealable and thus subject to be overturned, which it later was
- Furthermore, Heritage Grove did not file a stay of the Final Order as permitted under the APA. RCW 34.05.467. It had approximately two months, from the time the Final Order issued and the time its banked-bed status expired, to do so. Accordingly, the court concluded that DOH did not issue a CN to Heritage Grove within eight years from when Heritage Grove banked its beds. Therefore, Heritage Grove's reservation of beds expired

35

Heritage Grove v. Dep't of Health, 11 Wn. App. 2d 406, 453 P.3d 1022 (2019)

- Heritage Grove argued the court could nonetheless provide meaningful relief because it had the authority under RCW 34.05.574 to correct the Final Order's errors and reinstate the Program's initial approval of the CN
- The court disagreed, stating that under RCW 34.05.574(1), a court "shall not itself undertake to exercise the discretion that legislature has placed in the agency." The dispositive question for the court was whether the issuance of a CN is within the DOH's discretion
- The court concluded that the legislature had vested the discretion to issue CNs solely with DOH. Accordingly, the court said it would not and could not exercise the agency's discretion on its behalf. Because Heritage Grove's CN application was based on a now-expired exception to showing the "need" criterion, on remand, DOH would not consider granting the CN application
- In other words, the court stated that even agreeing substantively with Heritage Grove that the Final Order was unlawful would not provide Heritage Grove meaningful relief. The court therefore conclude that the case was moot

36