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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. Feel free to 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

Homan Award – Professor Larry A. Weiser

Gonzaga Law Professor **Larry A. Weiser** has been selected as the 2011 recipient of the Administrative Law Section's Frank Homan Award. Established in 2005, the award is given in recognition of noteworthy contributions to the improvement or application of administrative law.

Professor Weiser, who received his JD from Gonzaga in 1976, has been on the faculty of Gonzaga Law School since 1981. He is director of the clinical law programs and the Elder Law Project, and teaches clinical law, administrative law, alternative dispute resolution and elder law.

Prof. Weiser is a former board member of the Spokane Chapter of the Alzheimer's Association, WSBA's Alternative Dispute Resolution Section, and past chair of the Dispute Resolution Center of Spokane and ADR Section of the Spokane County Bar Association. Professor Weiser is currently a member of the Spokane County Superior Court Guardian Ad Litem Committee. He has mediated many cases over the past 20 years and is a certified mediator with the Northwest Conflict Management Center and the Washington Mediation Association. He has been certified as an Elder Law attorney by the American Bar Association and National Academy of Elder Law Attorneys (NAELA). He is past chair of the Administrative Law Section.

Frank Homan's commitment to promoting justice for all and the practice of administrative law is the inspiration for this award. Like Frank Homan, Prof. Weiser embodies the distinguishing qualities of being a dedicated teacher and mentor, and is passionate about improving the law. The Administrative Law Section is pleased to present Prof. Weiser with the Frank Homan award.

SAVE THE DATE!

CLE and Homan Award Presentation

June 4, 2012

Gonzaga University School of Law, Spokane

3:00 - 4:30 p.m. – CLE: The Spirit of the Homan Award: Administrative Law Today

Speakers: **Milton G. Rowland**, Adjunct Professor, Gonzaga University School of Law

Larry Weiser, Gonzaga University School of Law and Director, University Legal Assistance.

FREE to Section members and law students; $20 for non-Section members.

5:00 p.m. – Reception honoring 2011 Homan Award Winner Larry A. Weiser

The Homan Award will be presented to Prof. Weiser at a public ceremony immediately following the CLE.

For additional information, contact Lisa Malpass Childress: lisa@malpasslawoffice.com.

Message from the Chair

Anthony Broadman

Greetings, members of the Administrative Law Section. Like it or not, WSBA sections will never be the same. Whether you think the budget referendum reducing licensing fees was a much-needed change, or a damaging move, we as a Section have to embrace our mission in light of the new WSBA budget reality.

We can expect that the WSBA will modify its support of all sections, including ours. This could mean the elimination of the per-member subsidy. Your Executive Board has been told to think about how we might either absorb the higher per member charge or raise Section dues. Expect more information from us as the WSBA adjusts to new fiscal constraints.

The Executive Board remains committed to the Section's mission: facilitating administrative law scholarship, improving the administration of justice, and providing services and benefits to our members. Regardless of the Section's budget, we will make the most with what we have, which is quite a lot: Our most valuable assets remain the legal minds of our membership. As always, I encourage you to take advantage of the resources, event announce ments, and information in this valuable newsletter.

Diversity Conference Scholarships Available

The seventh annual Statewide Diversity Conference will be held on **June 1, 2012**, at Seattle University School of Law. The Administrative Law Section continues to support this annual event, and as part of our ongoing commitment to this important program, we are offering scholarships for two current members of the Administrative Law Section to attend the conference at no charge. **If you would like to be considered for a scholarship, contact John Gray at john.m.gray@comcast.net.**

The Administrative Law Section welcomes articles and items of interest for publication. The editors and Board of Trustees reserve discretion whether to publish submissions.

Send submissions to: Merrilee Harrell (mharrell@rtwcg.com).

Desktop Publisher • Ken Yu/Quicksilver • k.yu@earthlink.net

Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and would like to contribute a summary (approx. 250 – 500 words), please contact Merrilee Harrell: mharrell@rtwcg.com.

Case Summaries – Washington Supreme Court

***Stafne v. Snohomish County*, 84894-7 (Mar. 8, 2012)**

This case regarding the state's Growth Management Act (GMA) and Land Use Petition Act (LUPA) includes a detailed discussion of what is required for a petitioner to be excused from exhausting administrative remedies based on a futility analysis. Mr. Stafne owned a 20-acre lot in an area designated as low-density rural residential under Snohomish County's comprehensive plan ("plan"). Stafne purchased adjacent land from the Department of Natural Resources that was designated under the plan as commercial forest land (CFL) and forest transition area (FTA). When Stafne received a boundary line adjustment and incorporated the newly acquired land onto his existing lot, the new land retained its CFL and FTA status. Stafne petitioned the County Council to amend the plan to redesignate the part of his land classified as CFL and FTA to low-density rural residential. The County did *not* adopt Stafne's proposal. Stafne filed a complaint and a land use petition under LUPA in superior court; he did not first appeal to the growth board. The superior court granted the County's motion to dismiss. The County had argued that amendments to the comprehensive plan are legislative acts and the superior court lacks subject matter jurisdiction if the matter had not been appealed to the growth board. While the court of appeals affirmed, it held that Stafne did not need to exhaust his administrative remedies at the growth board because it would have been futile; therefore, LUPA was his exclusive means to obtain review in the superior court.

The Supreme Court held that not only was Stafne required to exhaust his administrative remedies under the GMA, if he had been excused from doing so it would not have given the court jurisdiction over the matter under LUPA. The Court held Stafne was seeking a legislative action and not a land-use decision; therefore LUPA did not apply. The Court said that Stafne should have appealed first to the growth board and next to the superior court under the Administrative Procedure Act. Decisions related to amendment of comprehensive plans must be appealed to the growth board; failure to do so precludes superior court review.

Suzanne L. Mager

***ZDI Gaming, Inc. v. State ex rel. State Gambling Comm'n*, 83745-7 (Jan. 12, 2012)**

ZDI sought judicial review after the Washington State Gambling Commission denied their application to distribute a new type of electronic gaming machine because the machine's use of a "cash card" violated Washington Administrative Code's requirement that all prizes be awarded in either cash or merchandise. ZDI distributes pull-tabs and pull-tab machines. The Gambling Commission has heavily regulated pull-tabs and pull-tab machines and has historically prohibited giving gifts or extending credit to players for the purpose of gambling. Players were required to pay in full by cash, check, or electronic point-of-sale transfer, prior to participation. ZDI's VIP machine features a video display screen, a currency bill acceptor, and, in its new version, a cash card acceptor. This version of the machine would allow a player to purchase pull-tabs from the machine using a prepaid card. The VIP machine credits pull-tab winnings of $20 or less back to the card. If a player wins more than $20, the VIP machine directs the player to an employee to receive payment. A player who stops playing the VIP machine with a balance on the card can use it to purchase food, drink, merchandise, or turn it in for cash at the establishment featuring the VIP machine. In 2002, an earlier version of the VIP machine was approved by the Gambling Commission, however, they became concerned over the addition of the cash card acceptor. After working with Gambling Commission staff for some time, ZDI submitted a formal application to the Commission requesting permission to distribute the new VIP machine, with the cash card acceptor, in Washington. The agency denied the application, so ZDI filed a petition for declaratory relief. An administrative law judge (ALJ) agreed with ZDI that the VIP machines did not violate gambling statutes. However, the ALJ found that the machines extended credit and allowed gambling without prepayment by cash, check, or electronic point-of-sale transfer and rejected ZDI's argument that the cash card was functionally equivalent to cash because the cash card was only valid at one location.

ZDI filed a petition for review in Pierce County Superior Court challenging the validity of the rules the ALJ and the Gambling Commission found it had violated. The Gambling Commission moved for dismissal stating that RCW 9.46.095 gave the Superior Court for Thurston County exclusive subject matter jurisdiction over cases in which the Gambling Commission was a party. Pierce County denied the motion to dismiss, but transferred the case to Thurston County,

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Case Summaries – Washington Supreme Court *continued*

which reversed the Gambling Commission's denial of ZDI's application. The Court of Appeals affirmed, holding that dismissal was not required insofar as the statute related to venue rather than subject matter jurisdiction and the Gambling Commission's denial of ZDI's application was not supported by substantial evidence.

On appeal, the Supreme Court focused on whether RCW 9.46.095 gave exclusive subject matter jurisdiction to Thurston County over cases in which the Gambling Commission was a party. If the Court found that it did not, then the second question was whether the Gambling Commission's denial of ZDI's application was supported by substantial evidence. The Court affirmed the Court of Appeals, concluding that Article IV §6 of the State Constitution precluded the legislature from withdrawing original jurisdiction from superior courts, therefore RCW 9.46.095 must be interpreted as relating to venue rather than subject matter jurisdiction. The Court also held that the Gambling Commission erred in denying ZDI's application.

Melanie deLeon

***Tesoro Refining and Marketing Co. v. Department of Rev.*, 85556-1 (Jan. 12, 2012)**

Tesoro owns and operates a refinery near Anacortes. Among other products, it produces marine bunker fuel, the majority of which it ships for sale to customers engaged in foreign commerce. Washington's Business and Occupation (B&O) tax is a tax on gross receipts from engaging in business activities. Tesoro engaged in both "manufacturing" and "wholesaling/retailing," and so reported its B&O tax under both of those classifications. Under the multiple activities tax credit (RCW 82.04.440), Tesoro reduced its wholesaling/retailing B&O tax liability. Additionally, RCW 82.04.433(1) allowed a deduction for the amount of tax "derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce." Tesoro deducted its bunker fuel sales from both its manufacturing and wholesaling B&O tax liabilities. Pursuant to a Department of Revenue ("DOR") audit, only the deduction from "wholesaling/retailing" was allowed. Tesoro requested a partial tax refund, which was denied. The DOR Appeals Division upheld the denial.

Tesoro filed a refund action in Thurston County Superior Court. At issue was whether Tesoro qualified for the §433(1) deduction on its manufacturing B&O tax liability. One day before the parties argued their cross-motions for summary judgment, the governor signed a bill "clarifying" RCW 82.04.433. The new legislation, which said §433(1) applied only to the "wholesaling/retailing" classification, applied both prospectively and retroactively. The Superior Court granted summary judgment to DOR without addressing the issue of retroactivity. The Court of Appeals reversed because the plain language of RCW 82.04.433 allowed the bunker fuel deduction from both tax classifications and because the new legislation could not be applied retroactively. The Supreme Court said the issue was one of statutory interpretation. The Court found the statute's language unambiguous because the deduction was allowed for amounts "derived from the sales of fuel." The Supreme Court reversed the Court of Appeals and affirmed the Superior Court's grant of summary judgment to the DOR, allowing the §443(1) deduction from the "wholesaling/retailing" classification, but not from the "manufacturing" classification.

John M. Gray

Case Summaries – Washington Court of Appeals

***Shear, et al. v. King County Dept. of Development & Environmental Svcs*, CA-I 66432-8 (Apr. 2, 2012)**

This case involves a notice that the King County Department of Development and Environmental Services (DDES) issued because Shear was operating an organic materials processing business on Spencer's farm. DDES believed this use of Spencer's farm was an unauthorized operation of a processing facility within a critical area. A hearing officer disagreed, concluding that Shear and Spencer had established a valid nonconforming use, and the use did not occur in a critical area. DDES filed an appeal to the superior court under the Land Use Petition Act, and the superior court reversed the hearing examiner. The Court of Appeals reversed again, upholding the hearing examiner.

The majority of the issues addressed in this case are land use issues, but the final section involves the hearing officer's jurisdiction to impose conditions and limitations on the DDES upon remand. The hearing officer found in most part for Shear and Spencer, but also found that any expansion of their processing activity would require a conditional use permit. The hearing examiner imposed restrictions on that permitting process that were "designed to preserve . . . the successful elements of (Shear and Spencer's) appeal and . . . retain Hearing Officer jurisdiction to the extent necessary to assure that these limitations are observed." DDES claimed that the hearing officer did not have authority to impose conditions on a future permitting process. The Court of Appeals disagreed. The Court recognized that it has previously held the King County Code allows a hearing officer to grant an appeal with conditions, but a hearing officer cannot place conditions on the denial of an appeal. Here, the hearing officer had granted Shear and Spencer's appeal, and thus, he could also set the conditions necessary to preserve the effect of his ruling.

Rebecca Glasgow

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Case Summaries – Washington Court of Appeals *continued*

***Raven v. DSHS*, 40809-1-II (March 27, 2012)**

This is a case about the duty of care owed by a limited guardian to a vulnerable adult. The vulnerable adult, "Ida," became bedridden in 1996 due to a fall. She became increasingly fragile, had numerous physical ailments, and also suffered from dementia and hallucinations. She lived in an apartment with her husband and refused to go into a nursing home. Her husband and their daughter provided some care, but could not care for her as she needed. DSHS suspected self-neglect and petitioned the superior court for a guardian *ad litem*, who concluded that a professional guardian was needed to assess Ida's needs and make competent health care decisions. In 2004, the court appointed Raven as Ida's limited guardian (for health care).

Ida suffered from bed sores, and "was often hostile, uncooperative, and physically abusive to her care providers." Raven believed that because Ida refused to go into a nursing home, that she (Raven) should do all she could to keep Ida out of a nursing home. But all caregivers came to recognize that in-home care was not working. In December 2006, a violent wind storm knocked out power and caused extensive damage in Thurston County (where Ida lived). A hospice worker and nurse found Ida lying on the floor (an inflatable mattress, used to alleviate Ida's chronic bed sores, had deflated) and soaked in urine. Catholic Community Services, which had provided in-home care to Ida, could no longer provide services by 2007. Ida died in April 2007.

DSHS Adult Protective Services issued notices of neglect to Raven, alleging two specific occasions where she failed to obtain medical care for Ida, and a general failure to ensure that Ida received the care she needed. On review, the ALJ reversed DSHS, then the DSHS Board of Appeals reversed the ALJ and affirmed the finding of neglect. The Superior Court reversed the Board of Appeals. The Court of Appeals distinguished between a common law action of negligence and an action pursuant to the Abuse of Vulnerable Adults Act, under which DSHS issued its findings of neglect. At common law, it must be shown that "the claimed harm would not have occurred but for the claimed negligence." Under the Act, however, DSHS must "prove a pattern of conduct resulting in a deprivation of care." The court concluded that the Act did not require DSHS to prove that a pattern of conduct caused harm. It noted that Ida's needs were "immediate and critical," but that Raven's pattern of conduct was to push for in-home care after it had become clear that such care was not working. The court found that the findings of fact challenged by Raven were supported by substantial evidence. The Court also affirmed that the standard of proof on DSHS was "preponderance of the evidence," not "clear, cogent, and convincing evidence." The court expressly rejected Raven's argument that the neglect finding was the equivalent of a license revocation.

John M. Gray

***Probst v. Washington State Department of Retirement Systems*, 40861-9-II (Mar. 13, 2012)**

Class representatives for plaintiffs are members of the Teachers Retirement System (TRS) who transferred from TRS Plan 2 to TRS Plan 3. Plaintiffs argued that the Department of Retirement Systems (DRS) was required to pay class members daily (rather than quarterly) interest on the full balance of employee contributions transferred between Plan 2 and Plan 3. In analyzing the relevant statute, RCW 41.50.033, the Court held that DRS has statutory authority to determine how interest is earned. Therefore, the Court determined that the TRS statutes do not require DRS to pay daily interest of balances transferred from Plan 2 to Plan 3. However, the Court determined that even though DRS has statutory authority to determine how interest is earned, DRS's decision to use a quarterly interest calculation was arbitrary and capricious. The Court noted that DRS was aware that the quarterly interest calculation method was unfair and did not conform to industry standards, yet DRS failed to undertake any consideration of the benefits and drawbacks of retaining the quarterly calculation method. The decision to continue using the quarterly interest calculation method was therefore taken in willful and unreasoning disregard of the facts and circumstances, making it arbitrary and capricious.

Katy A. Hatfield

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Public Service Grant Project

Janell Stewart

Congratulations to the recipients of the Administrative Law Section's 2011 Public Service Grant! The Center for Justice in Spokane was granted $1,500 for their driver re-licensing program. The Seattle Community Law Center also received $1,500 for their Social Security advocacy program.

Each year, the Administrative Law Section donates resources to at least one public service project. Several applications were submitted for the 2011 grant. It was very exciting to see the wide variety of non-profit organizations dedicated to public service and assisting Washington state residents with administrative law needs.

Applications for our 2012 Public Service Grant Project will be available soon. See the Section's website (http://www.wsba.org/Legal-Community/Sections/Administrative-Law-Section) for details.

Case Summaries – Washington Court of Appeals *continued*

***Chicago Title Insurance Co. v. Wash. State Office of Ins. Comm'r*, 40752-3-II (Feb. 29, 2012)**

The court held that the Office of the Insurance Commissioner (OIC) did not have statutory, inherent, or common law authority to impose vicarious liability on Chicago Title for regulatory violations committed by another title company with which it had an underwritten title insurance agreement. In addition to providing title insurance nationally, Chicago Title underwrites policies marketed, maintained, and researched by other title companies. Chicago Title had an underwritten title insurance agreement with Land Title Insurance, which agreed to comply with applicable rules and regulations. The OIC found that Land Title had violated a marketing regulation and attempted to collect a fine of $114,500 from Chicago Title for Land Title's violations. Chicago Title disputed its obligation to pay for Land Title's violations. An ALJ ruled that although the insurance code provisions of Washington statutes granted the OIC "broad authority" to take action against a title insurer directly for its own violations, these code provisions did not authorize imposing vicarious liability where the common law of agency did not support such imposition. The OIC hearings unit accepted review of the matter and rejected the ALJ's reliance on the common law rules of agency, instead turning to the insurance code and finding that Chicago Title could be held liable for Land Title's violations.

On appeal, the court rejected the OIC's argument that the insurance code eliminates the need for a case-by-case common law analysis to establish vicarious liability. The court found that because Chicago Title could not and did not control Land Title's marketing practices, it could not be vicariously liable for those practices under the common law of agency.

Gabriel Verdugo

***Mason v. Georgia-Pacific Corp.*, 41138-5-II (Feb. 29, 2012)**

Mrs. Mason and the Department of Labor and Industries ("L&I") appealed the Superior Court's calculations of Mrs. Mason's surviving spouse pension under the Industrial Insurance Act. Mr. Mason worked for Georgia-Pacific (G-P) and retired April 30, 1986. During his employment, he was exposed to caustic chemicals, specifically asbestos and chlorine dioxide. In June 1988, Mr. Mason filed a claim for Industrial Insurance benefits based on bilateral lung conditions related to exposure to chemicals while employed by G-P. He died in December 2006. In April 2007, L&I approved benefits for the surviving spouse, using Mr. Mason's retirement date of April 30, 1986, as the date of manifestation of his condition. G-P protested using this date, arguing that the wife should get the minimum pension rate because the husband's condition didn't manifest itself until after he had voluntarily retired. The use of the retirement date was affirmed by L&I and BIIA, but reversed by the Superior Court.

The Court of Appeals reviews workers' compensation cases like other non-administrative civil cases pursuant to RCW 51.52.140. The issue came down to a question of law regarding statutory construction regarding conflicting statutes (RCW 51.32.050 and .180(b)). The Court held that when two statutes conflict, specific statutes control over more general ones, and ambiguous statutes are construed in favor of the worker. The Court concluded that Mrs. Mason's survivor benefits should be based upon her husband's wages at the time of retirement, reversing the lower court's decision.

Melanie deLeon

***Germeau v. Mason County*, CA-II 41293-4 (Feb. 28, 2012)**

This case addresses two issues: 1) whether Richard Germeau had standing to bring a public records lawsuit where he was acting in his capacity as a Deputy Sherriff's Guild representative when making his request, and 2) what constitutes fair notice to a public agency that a request is being made pursuant to the Public Records Act (PRA). In his capacity as a Deputy Sheriff's Guild representative, Germeau sent a letter to the Chief Deputy of the Mason County Sheriff's Office. The letter declared that Germeau was acting as Martin Borcherding's guild representative and invoked the guild's "right to be privileged to any work product, or investigative findings regarding any investigation involving (Borcherding). This includes any notes, interoffice memo(s) or emails that may be related." Germeau was informed that the Sheriff's Office was not conducting an internal affairs investigation of Borcherding at that time, but the Sheriff's Office never provided Germeau with a written acknowledgment of his letter. Germeau eventually filed a complaint for violation of the PRA. The Superior Court granted summary judgment in favor of Mason County, concluding that Germeau lacked standing to bring the lawsuit because he was not acting in his personal capacity when he submitted the letter and because the letter was not a clear request for a public record.

The Court of Appeals reversed on the issue of standing, concluding that Germeau had a sufficient personal stake in the outcome of the PRA action because, even when acting in his capacity as a guild representative, Germeau had an interest in receiving the requested information. Holding otherwise would create a hypertechnical barrier to PRA lawsuits. The Court of Appeals affirmed on the second issue, however, concluding that Germeau's letter was not a clear request for a public record. In order for a request to trigger a public agency's obligation to comply with the PRA, a request must be made "with sufficient clarity to give the agency fair notice that it had received a request for a public record." Here, Germeau included nothing in his

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letter to indicate he was requesting records under the PRA. Thus, it was reasonable for the County to conclude that he was simply establishing himself as the point of contact for any internal investigation of Borcherding. It was also reasonable for the County to conclude that Germeau was requesting documents pursuant to the applicable collective bargaining agreement, which created a basis for the request entirely independent from the PRA. In sum, the letter did not provide fair notice to the County that Germeau was making a request specifically under the PRA.

Rebecca Glasgow

***Dodge City Saloon, Inc. v. Washington State Liquor Control Board*, 41454-6-II (Feb. 28, 2012)**

The Court of Appeals affirmed the Liquor Control Board's final order finding that Dodge City Saloon allowed an underage person into an area off limits to persons under the age of 21. The Court rejected Dodge City's arguments that the Liquor Board's compliance check was an illegal search in violation of the state and federal constitutions, that the Liquor Board's violation notice should have been dismissed under the doctrines of entrapment and outrageous conduct, and that the administrative law judge should have granted its motion for a continuance.

The Liquor Board issues licenses to businesses throughout Washington and monitors licensees through a program of compliance checks. The Liquor Board conducted a compliance check of Dodge City Saloon's off-limits areas by having a 17-year-old, carrying his actual Washington state identification card listing him as 17 years old, attempt to enter the saloon. Liquor enforcement officers, acting undercover, observed the operation from both outside and inside the bar. The 17-year-old presented his identification card to the Dodge City bouncer, who inspected the card and then allowed admission. The liquor enforcement officers served an administrative violation notice on Dodge City Saloon charging the bouncer with violating a law that prohibits allowing a person under 21 years old into an area considered off limits. The violation was upheld by an administrative law judge and by the Liquor Board's appellate division.

In challenging the Liquor Board's final order, Dodge City first argued that the compliance check violated constitutional prohibitions on unreasonable searches and that all evidence and testimony from the state actors should have been suppressed. The Court disagreed, holding that the compliance check was not a "search" within the meaning of the state or federal constitution because the liquor enforcement officers neither viewed beyond what would be observable by the public nor entered any areas of the premises not open to the public. Dodge City next argued that the violation should have been dismissed under the doctrine of entrapment and outrageous conduct. The Court rejected Dodge City's argument, finding that these criminal law defenses are not available in a civil administrative proceeding. Lastly, Dodge City argued that the administrative law judge erred in denying its motion for a continuance when the bouncer invoked his privilege against self-incrimination and declined to testify at the hearing. The Court rejected this argument because Dodge City did not argue with any specificity that it had been prejudiced and failed to show good cause for why the continuance should have been granted.

Katy A. Hatfield

***Double H, L.P. v. Washington Department of Ecology*, 29918-0-III (Feb. 23, 2012)**

Double H appealed the trial court's PRA penalty calculation, asserting the court erred by treating withheld records as one group instead of multiple groups (based on production dates), which had the effect of reducing the penalty awarded. The Court of Appeals upheld the trial court, noting that deciding the number of penalty days (which was not in dispute) involves statutory interpretation and is reviewed *de novo*, but deciding record groupings and the per diem penalty rate involve the exercise of discretion and are reviewed under the abuse of discretion standard. Double H made an initial request and, later, a refresher request for records related to the Department's investigation of hazardous waste disposal at Double H's farm. The Court of Appeals found that since all the requests related to the same subject, the trial court did not abuse its discretion by treating them as one group for penalty calculation purposes; it approved the trial court's rationale of encouraging agencies to make productions as records are found, rather than waiting until all responsive documents are assembled.

Richard Potter

***Applewood Estates Homeowners Association v. City of Richland*, 29806-0-II (Jan. 31, 2012)**

This land use dispute arose under the Land Use and Petition Act ("LUPA"). The City of Richland received a proposal in 2005 to create the Badger Mountain "planned unit development" ("PUD"). The developer submitted three PUD amendments to Richland's development services manager. Two were approved, but a third was considered a "major change" under the applicable municipal code. After discussions bet ween the developer and the development services manager, a written decision was issued on June 16, 2010, approving the amendment as a "minor amendment." On August 4, 2010, Richland affirmed the decision and approved the proposal as a "revised final PUD plan" under its municipal code. Richland issued building permits to the developer on September 20, 2010.

The petitioners (referred to in the decision as "the neighbors") filed a LUPA petition in Superior Court on October 4, 2010, alleging they learned of the June 16 decision on or about September 17, 2010. The developer and the

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Case Summaries – Washington Court of Appeals *continued*

city filed motions to dismiss, arguing, among other things, that the neighbors failed to file their LUPA petition within 21 days of the City's June 16 decision. The Superior Court denied the motions to dismiss, and the neighbors prevailed in Superior Court on other grounds. At issue on appeal was whether the neighbors' LUPA petition was timely under RCW 36.70C.040(3), which requires a party to petition for review with the Superior Court within 21 days of the date a land use decision is issued. The court found that LUPA's statute of limitations begins to run on the date a land use decision is issued, noting that specific notice to interested parties is not required. The August 4 affirmation by Richland and the issuance of the building permits on September 20 were actions taken after the written decision of June 16 triggered the running of the statute of limitations. Consequently, the Court of Appeals concluded that the neighbors' LUPA petition was filed four months too late.

John M. Gray

***Hook v. Lincoln County Noxious Weed Control Bd.*, 29608-3-III (Jan. 26, 2012)**

After his property was subjected to a lien for the cost of weed eradication by the Lincoln County Noxious Weed Control Board, Bert Hook challenged the establishment of the Board and its authority to act. The Court of Appeals affirmed summary judgment in favor of the Board and County because Hook failed to establish that Lincoln County's resolution activating the Board was improper. The Court also affirmed the trial court's refusal to grant Hook's motion for reconsideration and motion to amend his complaint.

Chapter 17.10 RCW is a comprehensive scheme for regulating weed eradication. The legislation grants authority to county weed control boards or alternatively to the director of agriculture to conduct searches of private property, issue citations and infractions, control the spread of noxious weeds, and place liens on property. The legislation created a noxious weed control board in every county of the state, but provided that the county boards were inactive until activated. Hook argued that Lincoln County's weed control board was improperly established because Lincoln County gave only five days of notice before activating the Board, which Hook asserted was inadequate because RCW 36.32.120(7) requires ten days of prior notice before a county can enact a resolution to exercise local police power. The Court agreed that regulating the destruction or removal of noxious weeds is an exercise of police power, but the Court disagreed with Hook that the power was a "local" power. Rather, the Court determined that chapter 17.10 RCW is a proper exercise of the Legislature's statewide police power, and that the activation of a county weed control board is not sufficient to transform a state statute into a local law. Because the County's activation of the Board simply caused the *state* regulation to be exercised by the county weed board and did not create a new local law, the ten day requirement was not applicable. Summary judgment in favor of the Board and County was affirmed.

Katy A. Hatfield

***KS Tacoma Holdings, LLC v. Shorelines Hearings Board*, 41361-2-II (Jan. 24, 2012)**

The court affirmed the Shoreline Hearings Board's summary judgment order dismissing KS Tacoma's claim for lack of standing. In 2007, the city of Tacoma approved a shoreline substantial development permit (SSDP) for a mixed-use building along the Thea Foss Waterway that included hotel rooms, residential units, and retail/commercial uses. KS Tacoma owns the Hotel Murano, which is approximately five blocks from the planned building site. KS Tacoma did not appeal the 2007 SSDP or a 2008 permit revision, which decreased the number of residential units and increased the number of hotel rooms. Sometime after the permit revision, Hollander purchased the proposed building site and in 2009 it applied for a second permit revision, this time eliminating the remaining residential units, increasing the number of hotel rooms, and modifying the original building design. The court found that KS Tacoma had not met the injury-in-fact requirement to establish standing. As an initial matter, the court found that it would only consider KS Tacoma's injuries from the 2009 revision because KS Tacoma did not timely appeal the 2007 permit approval or the 2008 revision. Among other injuries, KS Tacoma claimed that the 2009 revision would hinder its aesthetic enjoyment of the waterway. The court noted that KS Tacoma had not claimed any direct and specific harm from an "unattractive" building design, and that any such injury would not be redressable because Hollander would remain free to finish the project according to its own aesthetics.

Gabriel Verdugo

***Griffith v. Seattle School District No. I*, 66167-1-I (Dec. 27, 2011)**

Two special education teachers refused to follow an order from their school principal requiring them to administer a federally mandated test to their six students. After having missed a key deadline for providing results, the teachers claimed the students' parents had refused the test. The school district suspended the teachers for ten days without pay for insubordination. A hearing officer found, after a full hearing at which the teachers and two parents testified, that the teachers refused to give the test on principle, not because of parental refusal. The Court of Appeals upheld the hearing officer's factual finding that the teachers refused to give the test based on principle, recognizing that the finding was based on credibility determinations and was not clearly erroneous. These facts were sufficient

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Case Summaries – Washington Court of Appeals *continued*

to sustain a finding of insubordination. In turn, insubordination amounted to sufficient cause to impose the ten-day suspension. In its analysis, the Court discussed application of factors developed in *Clarke v. Shoreline Sch. Dist. No. 412,* 106 Wn.2d 102 (1986), and *Hoagland v. Mount Vernon Sch. Dist. No. 320,* 95 Wn.2d 424 (1981), to determine whether sufficient cause for discharge exists. But the Court expressed doubt as to whether these factors were applicable where the issue was whether the teachers performed their duties, rather than how they had performed them, and the discipline imposed was suspension, not discharge. Ultimately, the Court declined to address the applicability of the *Clarke* and *Hoagland* factors, recognizing instead that even if they were to apply, the hearing officer did not err in concluding the factors were met. Thus, this case left open for another day the scope of the *Clarke* and *Hoagland* factors.

Rebecca Glasgow

Case Summaries – Federal

***Sackett v. EPA*, US-SC 10-1062 (March 21, 2012)**

This case revolves around the scope of "the navigable waters" subject to the Clean Water Act ("the Act"), which prohibits the discharge of any pollutants by any person without a permit into navigable waters. After determining a violation of the Act has occurred, the Environmental Protection Agency (EPA) may either issue a compliance order or initiate civil enforcement action. The resulting civil penalty cannot exceed $37,500 per day for each violation. The government contends that the fine may be doubled to $75,000 per day when the EPA prevails against a person who has been issued a compliance order, but who has not complied.

The Sacketts own a residential lot in Bonner County, Idaho. Their property lies just north of Priest Lake, but is separated from the lake by several lots containing permanent structures. In preparation for constructing a house, the Sacketts filled in part of their lot with dirt and rock. Some months later, they received a compliance order from the EPA asserting that their property is subject to the Act, that they have violated its provisions by placing fill material on the property and directed them to immediately restore the property pursuant to an EPA work plan. The Sacketts requested declarative and injunctive relief in Federal District Court, contending that the compliance order was "arbitrary and capricious" under the Administrative Procedure Act, 5 U.S.C. §706(2)(A), and that it deprived them of due process in violation of the Fifth Amendment. The District Court dismissed the claims for want of subject-matter jurisdiction. The Ninth Circuit affirmed, concluding that the Act precluded pre-enforcement judicial review of compliance orders and that such a preclusion did not violate due process. The Sacketts petitioned for review by the U.S. Supreme Court under Chapter 7 of the APA, which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U. S. C. §704.

The Court first considered whether the compliance order was a final agency action. The APA's judicial review provision requires that the person seeking the review of final agency action have no other adequate remedy in a court. In Clean Water Act enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA, but the Sacketts could not initiate that process, and each day they waited for the agency they accrue an additional $75,000 in potential liability. The Court concluded that the compliance order was a final agency action for which there was no adequate remedy other than APA review and that the Clean Water Act did not preclude that review. The Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings.

Melanie deLeon

***National Meat Ass'n v. Harris*, No. 10-224, ___ U.S. ___ (Jan 23, 2012): Federal Preemption Provision Means What It Says.**

This case juxtaposes vivid descriptions of animal health and slaughterhouse practices (and prohibitions) with the Supreme Court's conclusion that the Federal Meat Inspection Act (FMIA) preempted California's attempt to impose different practices for sick and disabled livestock in slaughterhouses than apparently minimally required by the FMIA. This case involved the simple question of whether a preemption provision in the FMIA expressly prohibited the California law (Cal. Pen. Code § 599f). The California law addresses livestock animals generally, but the case focused on pigs, because the National Meat Association represents processors of swine and pork products who claimed that California's law would prevent slaughter of approximately 2.5 percent of their pigs. *National Meat Assn.* v. *Brown*, 599 F.3d 1093, 1096–97 (9th Cir. 2010). The FMIA preemption provision is quite broad. It states, "Requirements within the scope of (the FMIA) with respect to premises, facilities and operations of any establishment at which inspection is provided under . . . (the FMIA) which are in addition to, or different than those made under (the FMIA) may not be imposed by any State." 21 U.S.C. § 678. The Ninth Circuit concluded that the FMIA did not preempt California law because the California law regulates only "the kind of animal that maybe slaughtered," and not the inspection or slaughtering process itself. 599 F.3d at 1098. The Supreme Court disagreed, thoroughly rejecting each argument in favor of applying California law, weaving in gory details of the treatment of sick and disabled animals in the slaughterhouse process. Spoiler alert: read this case on an empty stomach.

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Case Summaries – Federal *continued*

The Supreme Court seems to have accepted the case for review merely to correct an erroneous decision; there is no discussion of implied preemption, a more usual suspect for Supreme Court attention. The main lesson of this case might be that the Supreme Court will broadly enforce federal preemption statutes. A corollary take-away might be to eat vegetarian or kosher.

Jeffrey B. Litwak

***Gulf Power Company v. FCC*, D.C. Circuit # 11-1215 (Feb. 21, 2012)**

The court found that Gulf Power's challenge of an FCC rule concerning pole attachment prices was barred by collateral estoppel/issue preclusion because a similar-enough issue was litigated several years before by Alabama Power, a corporate affiliate of Gulf Power, both of which are owned by Southern Company. The court conceded that the current petitioner and the former petitioner are not the "identical party," but it invoked an "exception" to that requirement based on common control.

Richard Potter

Frank Homan Award – Call for Nominations

The Frank Homan Award is given annually to an individual who has demonstrated contribution to the improvement or application of administrative law. The award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law.

Only AdLaw Section members can nominate, but a nominee does not have to be an attorney or a Section member. **To make a nomination, send an email to kristal.wiitala@dshs.wa.gov** that includes the following information:

- Your name and contact information
- Information about the person being nominated (name, position, affiliation)
- Why you think this person should be recognized

The deadline for nominations is **July 15, 2012**.

Case Summaries – Other Jurisdictions

***Page v. Parsons*, No. A139103 (Or. App. April 25, 2012): Discovery in Special Motion to Strike Cases.**

The Oregon Court of Appeals affirmed a trial court's dismissal of a complaint pursuant to Oregon's special motion to strike (a.k.a. anti-SLAPP suit (SLAPP standing for "strategic lawsuit against public participation")) statute. Washington has a similar statute at RCW 4.24.525. There is only one reported case involving RCW 4.24.525, *Am. Traffic Solutions v. City of Bellingham*, 163 Wn. App. 427, 260 P.3d 245 (2011), and that case simply concluded the trial court erred in dismissing the complaint because the plaintiff had relied on long established case law. At issue in *Page* was the ability of the plaintiff to conduct discovery prior to the trial court's dismissal of the complaint. Both Oregon's and Washington's special motion statutes stay discovery, but allow the court to order limited discovery for good cause. ORS 31.152(2); RCW 4.24.525(5)(c). The plaintiff had originally filed a broad discovery request, but following an initial hearing on the special motion at which the defendants met their burden, the trial court allowed the plaintiff to request with particularity the discovery it needed to respond. The plaintiff, however, moved to request discovery that the court described "as nothing more than a general letter that was sent out with a couple of things struck out of it," a "fishing expedition," and a "general request for discovery." The trial court thus denied discovery and granted the special motion to strike. On appeal, the Oregon Court of Appeals noted that the second discovery request was "essentially the same" as the initial request, and affirmed the trial court.

Ostensibly, special motion cases are civil procedure cases, but they typically arise in the context of a defendant exercising some right to public participation. Indeed, Washington's special motion statute specifically states that it applies to "any claim, however characterized, that is based on an action involving public participation and petition." RCW 4.24.525(2). Public participation and petition are, of course, fundamental qualities of rulemaking, exhaustion of administrative remedies, and other administrative processes. Another Oregon special motion case is winding its way through U.S. District Court in Oregon. *O'Connor v. Clackamas County*, No. Cv 11-1297-SI. Oregon law is not usually helpful; however, because Washington's special motion statute is quite similar to Oregon's statute, and because there is a dearth of Washington precedent, Washington courts might look to their southern neighbor for guidance.

Jeffrey B. Litwak

Legislative Roundup

Richard Potter

For the 2012 session, the Section's Legislative Committee reviewed approximately 20 bills. Most were referred to the committee by the WSBA legislative office, and the committee spotted a couple of additional proposals that it reviewed. Two of the reviewed bills were enacted.

2SSB 5355 (which had been carried forward from the 2011 session) amends the Open Public Meetings Act to specify notice requirements for special meetings, including display at the agency's main office entrance and at the meeting site, and posting on the agency's website (with exclusions for very small agencies). It will be effective on June 7, 2012.

SSB 6187 does not really affect APA or general administrative law practice, but WSBA sent it to the Section's committee for review. The bill expands the pre-litigation claims-filing process for tort claims against the state to now include health care injury claims, which must be submitted to the Department of Enterprise Services. It will be effective on June 7, 2012.

Copies of the enacted legislation may be found at http://apps.leg.wa.gov/billinfo.

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The Section also has seven committees whose members are responsible for planning CLE programs, publishing this newsletter, tracking legislation of interest to administrative law practitioners, and much more. Feel free to contact the chair of any committee you have an interest in for more information. Committee chairpersons are listed on page 2 of this newsletter, and on the Section's website.

UPCOMING CLE:

Advocacy in Administrative Law

Thursday, September 13, 2012
WSBA CLE Center, Seattle

Speakers and topics to be announced

FOLLOWED BY:
Administrative Law Section
Annual Business meeting and reception