



## 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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In anticipation of the Joint Washington-Oregon Administrative Law Institute, which will be held on September 19-20, 2014, in Vancouver, Washington, the Administrative Law Section's newsletter is publishing a two-part article comparing the Washington and Oregon administrative procedure acts. Part I, published in the Winter 2013-2014 newsletter, available [here](#), introduced the two APAs and focused on contested cases (Oregon term) and adjudicatory proceedings (Washington term).

Part II, published below, focuses on key differences in judicial review between the Washington and Oregon administrative procedure acts. The article does not discuss rulemaking because in both states, agency staff, rather than attorneys, commonly handle rulemaking tasks. Both parts of the article focus on principles that the authors believe are helpful for practitioners to understand as paradigmatic differences rather than specific points for limited situations.

## Ten Key Differences Between the Oregon Administrative Procedure Act and the Washington Administrative Procedure Act

by John Gray and Jeffrey B. Litwak

### Inside This Issue

Ten Key Differences Between the Oregon Administrative Procedure Act and the Washington Administrative Procedure Act .....	1
2014 Retreat Summary and Greetings from the Chair.....	2
Announcement of Upcoming Annual Meeting And CLE.....	2
Northwest Administrative Law Institute .....	3
Homan Award – Nominations Due August 22, 2014.....	4
Case Summaries – Washington Supreme Court .....	5
Case Summaries – Washington Court of Appeals.....	7

### PART II – JUDICIAL REVIEW

#### Burdens for Challenging an Agency Order

In Oregon, the proponent of a fact or position in a contested case has the burden to present evidence to support that fact or position, ORS 183.450(2), but judicial review of an order focuses on the standards of review in ORS 183.482(7) and (8) without specifically imposing burdens on judicial review. In contrast, in Washington, RCW 34.05.570(1)(a) specifies the burden of demonstrating the invalidity of agency action is on the party asserting invalidity.

#### APA as Exclusive Remedy

The Oregon and Washington APAs both provide the exclusive remedy. In Oregon, common law specifies the exclusivity rule; in Washington, the APA specifies the rule.

Oregon appellate courts have consistently held that the Oregon APA establishes a comprehensive pattern for the judicial review of administrative decisions. The various APA statutes governing judicial review provide the sole and exclusive methods of obtaining judicial review. *School Dist. No. 48 v. Fair Dis. App. Bd.*, 14 Or. App. 35, 512 P2d 799 (1973); *Bay River, Inc. v. Envtl. Quality Com.*, 26 Or. App. 717, 720, 554 P2d 620 (1976). See also *Eppler v. Bd. of Tax Serv. Exam'rs*, 189 Or. App. 216, 219, 75 P3d 900 (2003); *Kerivan v. Water Res. Comm'n*, 188 Or. App. 491, 496, 72 P3d 659 (2003); *Wallace v. State ex rel. PERB*, 245 Or. App. 16, 263 P3d 1020 (2011).

In Washington, RCW 34.05.510 specifies that the Washington APA is the exclusive means of judicial review of agency action with three listed exceptions. *Wells Fargo Bank, NA v.*

(continued on page 3)

## 2014 Retreat Summary and Greetings from the Chair

by Dawn Reitan

Hello, and summer greetings to my friends and colleagues of the Administrative Law Section of the WSBA. I can hardly believe that it is already summer, and we are seven months into 2014. I am honored and grateful to be working with the very talented, creative, and hard-working attorneys that make up the Administrative Law Section and its Board. The Board has been quite active so far this year.

For the first time, the Section combined its Annual Retreat in June (held at Alderbrook Resort) with a mini-CLE. Thank you to Ramsey Ramerman for speaking at the mini-CLE about the Public Records Act. There were many non-Board members who attended the CLE and who stayed to socialize with Board members after the CLE at a Section-sponsored reception.

The Administrative Law Section will be producing significant and substantive content for all administrative law practitioners this year. For example, for the first time ever, the Administrative Law Sections of the Washington State Bar Association and the Oregon State Bar will be sponsoring the Northwest Administrative Law Institute (see article below) which will be held on September 19-20, 2014, in Vancouver, Washington. In addition, the much anticipated second edition of the *Public Record Act Deskbook: Washington Public Disclosure Laws and Open Public Meetings Act* will be published in November of 2014, and the section will hold a corresponding Public Records Act CLE with the release of the Deskbook on November 12, 2014. The Section has also recently updated the *Washington Administrative Law Practice Manual* (published and located at Lexis).

I have found both publications and the section's newsletters to be invaluable tools in my practice, and believe they can help all civil practitioners in Washington. I am proud of the hard work and content the Administrative Law Section is producing and hope it assists all administrative law practitioners in their daily legal practice.

## Announcement of Upcoming Annual Meeting And CLE

Please join us on Friday, September 19, 2014 for the Administrative Law Section's Annual Meeting. The meeting will be held in conjunction with the hosted reception following the first day of the Northwest Administrative Law Institute. The meeting will begin at 5:30 pm. The Homan Award will be presented at the meeting. Location: Hilton Vancouver, 301 W. Sixth Street Vancouver, WA.

### WSBA Administrative Law Section Executive Committee Officers & Board of Trustees 2013-2014

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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: Katy Hatfield ([katyk1@atg.wa.gov](mailto:katyk1@atg.wa.gov)).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association or its officers or agents.

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## Ten Key Differences Between the Oregon Administrative Procedure Act and the Washington Administrative Procedure Act *continued from page 1*

*Dep't of Revenue*, 166 Wn. App. 342, 271 P.3d 268 (2012), is a recent example of how Washington courts narrowly construe the exceptions. Wells Fargo's claim included a claim for declaratory judgment in addition to money; therefore it did not fall within the exception for litigation in which the sole issue is money damages or compensation.

### Arbitrary and Capricious Review

Probably the most distinctive difference in judicial review of contested cases or adjudicatory proceedings is the availability of arbitrary and capricious review under the Washington APA, RCW 34.05.570(3)(i). The Oregon APA does not specify arbitrary and capricious review.

The Washington Supreme Court has defined arbitrary or capricious agency action as action that "is willful and unreasoning and taken without regard to the attending facts or circumstances. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). "The scope of review under the arbitrary and capricious standard 'is very narrow,' 'highly deferential' to the agency and the party challenging an agency decision carries 'a heavy burden.'" *Alpha Kappa Lambda Fraternity v. Wash. St. Univ.*, 152 Wn. App. 401, 418-22, 216 P.3d 451 (2009).

Parties in Oregon sometimes argue that agency action has been arbitrary and capricious. In these cases, the Oregon appellate courts may restate the argument in terms of one of the statutory standards of review. *See, e.g., Forelaws on Bd. v. Energy Facility Siting Council*, 306 Or. 205, 223, 760 P.2d 212 (1988) (also referring to the term "arbitrary and capricious" as "conclusory epithets"); *Cherry v. Dep't of Educ.*, 253 Or. App. 90, 94, 289 P.3d 344 (2012).

### Review of Orders for Consistency With Interpretive and Policy Statements

The Oregon APA does not authorize agencies to adopt interpretive or policy statements outside of rulemaking; nevertheless, ORS 183.482(8)(b)(B) provides, as grounds for remand, consideration of whether a contested case order is inconsistent with an officially stated agency position or a prior agency practice if the agency does not explain the inconsistency. This recognizes that agencies should act consistently even with informal policies, interpretations, and practices.

In contrast, in Washington, RCW 34.05.230 expressly encourages agencies "to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. To better inform and

*Save the Date*

## Northwest Administrative Law Institute

September 19-20, 2014

Hilton Vancouver, Vancouver Washington

*Cosponsored by the  
Administrative Law Sections of the Washington State  
Bar Association and Oregon State Bar.*

Oregon: 9.75 general CLE credits and 1.25 ethics credits  
Washington: credits pending

For the first time, practitioners and professionals from Oregon and Washington will come together to explore administrative law topics and practice issues that span both sides of the Columbia River. Procedural similarities and agency differences will be explored, as well as concerns common to both states, such as the legal ethics and professionalism involved with going over or around an agency lawyer. Breakout sessions will focus on the best practices for administrative hearings in the Beaver State and the Evergreen State, and cannabis administrative rulemaking and enforcement in the two states will be compared.

Elle n Rosenblum, Oregon's Attorney General and a former Oregon Appeals Court Judge, will give the lunch presentation, "Administrative Law from Both Sides of the Bench." Administrative law developments by the courts will be noted by the Honorable Mary Fairhurst, Washington Supreme Court, and the Honorable Jack Landau, Oregon Supreme Court, while the future of administrative regulatory law in Oregon, Washington, and the U.S. will be examined by a panel of law professors.

View the brochure [here](#).

Registration now open. [Register](#) before September 5 for a discount.

involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules." Consistent with the advisory nature of interpretive or policy statements, judicial review focuses on the consistency with the rule; there is no express review of an action for consistency with an interpretive or policy statement. RCW 34.05.570(3)(h) provides as grounds for granting relief from an agency decision that its "order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency." (Emphasis added.)

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## Ten Key Differences Between the Oregon Administrative Procedure Act and the Washington Administrative Procedure Act *continued*

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### Deference

Deference to an agency's interpretation of the statutes it administers differs in the two states. In Oregon, the level of deference to an agency's interpretation of a statutory term depends on the type of statutory term at issue. *Springfield Educ. Assn. v. Springfield School Dist. No. 19*, 290 Or. 217, 221–30, 621 P.2d 547 (1980) (explaining the difference between exact terms, which need no interpretation; inexact terms, which contain a complete express of legislative intent and leave no role for agency interpretation; and delegative terms, for which the legislature provided a role for the agency to complete).

In contrast, in Washington, the appellate courts accord deference to an agency's interpretation of a statute if "(1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency's special expertise." *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007). But there are a number of situations in which Washington courts do not defer to the agency, such as an agency determining the scope of its authority, e.g., *U.S. West Commc'ns, Inc. v. Wash. Utils. and Transp. Comm'n*, 134 Wn.2d 48, 56, 949 P.2d 1321 (1997), and when the court is reviewing a "pure question of law," e.g., *Hunter v. Univ. of Wash.*, 101 Wn App 283, 292, n3, 2 P.3d 1022 (2000). Washington courts also commonly explain that the court retains the ultimate authority to interpret a statute.

Courts in both states defer to an agency's interpretation of the rules it adopts. E.g., *Don't Waste Oregon Comm. v. Energy Facility Siting Council*, 320 Or. 132, 142, 881 P.2d 119 (1994); *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App 402, 409, 97 P.3d 17 (2004). As with their statutory deference cases, Washington courts almost always caution that the courts retain the ultimate responsibility to interpret a regulation.

### Conclusion

Judicial review is complicated. Practitioners who practice primarily in one state, but dabble in the other, should carefully study the applicable burdens, other available remedies, differences in the standards of review and deference.

## Homan Award – Nominations Due August 22, 2014

The Frank Homan Award is (usually) given annually to an individual who has demonstrated contribution to the improvement or application of administrative law. Only WSBA Administrative Law Section members can nominate someone for the Homan Award, but a nominee does not have to be a Section member or even an attorney.

To make a nomination, send an email **no later than August 22, 2014** to Marjorie Gray at [schaergirl@comcast.net](mailto:schaergirl@comcast.net) 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 award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law. After receiving his law degree from Cleveland State University of Law in 1965, he began practicing law in Washington in 1968, serving as an Employment Security Department hearings examiner from 1970 to 1974, and as a senior administrative law judge at the Office of Administrative Hearings from 1975 to 1993. He continued to serve as an ALJ pro tem after his retirement in 1993. He was an early proponent for the creation of a central hearings panel, and played an important role in the creation of the Office of Administrative Hearings (ch. 34.12 RCW). Frank was generous with his time and expertise, and is well remembered for his sense of humor, his command of the English language, and his writing style — including his knowledge of legal terminology and history. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name.

### Prior Recipients

- 2013 — Alan Copsey
- 2011 — Larry A. Weiser
- 2010 — Jeffrey Goltz
- 2008 — Kristal Wiitala
- 2007 — C. Dean Little
- 2006 — William R. Andersen
- 2005 — Bob Wallis

## 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 contact Katy Hatfield at [katyk1@atg.wa.gov](mailto:katyk1@atg.wa.gov).

## Case Summaries – Washington Supreme Court

### ***PT Air Watchers v. Department of Ecology*, 179 Wn.2d 919, 319 P.3d 23 (2014)**

This case, reviewed under the APA, demonstrates that when an agency evaluates a proposal under the State Environmental Policy Act (SEPA), the agency need not consider all possible environmental impacts when making a threshold determination. The court stressed the deference owed to an agency when interpreting laws involving matters of the agency's own expertise. The court noted that it is not bound by an agency's decision, but owes the agency's SEPA determinations substantial weight, and should only overturn an agency determination if the decision is not supported by substantial evidence or is based on an erroneous interpretation.

Plaintiff PT Air Watcher along with a number of other environmental groups (collectively PT Air Watchers or PTAW) questioned Washington State Department of Ecology's compliance with SEPA when analyzing environmental impacts from a proposed energy facility modification by Port Townsend Paper Corporation (PTPC). PTPC proposed a modification that reduced the facility's burning of fossil fuels, but increased its burning of biomass (wood material left over from logging and lumber operations). PTPC applied for and was issued a notice of construction (NOC) permit by Washington State Department of Ecology (Ecology) for the modification. Prior to the permit issuance, Ecology reviewed the proposal's SEPA checklist. After reviewing the available information, Ecology determined PTPC's burning of biomass in place of fossil fuels would result in a decrease of greenhouse gases. Based in part on that finding, Ecology issued a determination of nonsignificance (DNS), concluding that the new cogeneration project would probably not result in significant environmental impacts. Because the project received a DNS, no environmental impact statement was required.

PTAW challenged Ecology's issuance of the NOC and its underlying SEPA DNS. PTAW argued that Ecology improperly determined that the proposal would not result in a significant environmental impact (yet the record reflected that the proposal would result in some increased emissions of carbon dioxide). In response to PTAW's appeal, the Pollution Control Hearings Board (Board) granted summary judgment to Ecology and PTAW appealed via the Administrative Procedure Act to Thurston County Superior

Court. The superior court denied review, upholding summary judgment. PTAW appealed to the Court of Appeals, which certified the matter to the Supreme Court. The Supreme Court determined two major SEPA issues (along with an ancillary one): (1) Did Ecology and the Board properly consider legislative directive favoring biomass generation under RCW 70.235.020 when issuing the DNS? (2) Did Ecology and the Board properly conclude that the proposal would not result in adverse impacts to forest resources?

On the first issue, the court determined that Ecology and the Board properly considered possible air emissions and related legislative policy when issuing the DNS. PTAW argued that the checklist lacked information necessary to make a meaningful comparison between the use of biomass over fossil fuels at the facility. PTAW wanted the checklist to report specific emissions of the two alternatives. During its review, Ecology considered the possible emissions from the project: the checklist indicated decreases of fossil fuels burned by 1.8 million gallons per year. In addition, the checklist invoked RCW 70.235.020, which demonstrates the legislature's preference for burning biomass over fossil fuels. The court found that in light of the checklist and the legislative directive, Ecology and the Board properly considered the air emission impacts of the project. The court noted that Ecology's decision was reasonable in light of the deference afforded to the agency.

On the second issue, the court determined that Ecology and the Board correctly concluded that the project would not result in adverse impacts to forest resources. PTAW claimed that Ecology failed to explain the impacts of the new cogeneration project, specifically impacts of increased competition for forest woodwaste, increased consumption of woodwaste, and resulting forest health impacts. The court rejected PTAW's claim because other state and federal laws prevented adverse forest health impacts associated with any future expansion of biomass usage. In light of the protections offered by other forest regulations and the deference offered to Ecology's determination, the court could not see a reason to require Ecology to delve deeper into a forest impacts analysis.

In finding that the agency had adequately reviewed the relevant information, the Court clarified the nature of SEPA review: "(a)n agency does not have to consider

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**2013 Homan Award Recipient** *continued*


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every conceivable environmental impact when making its threshold SEPA determination, and certainly not a potential impact that is not permitted by the (agency action)."

*Scott Hilgenberg*

**Fisher Broadcasting d/b/a/ KOMO 4 v. City of Seattle, Wn.2d \_\_\_\_, 326 P.3d 688 (2014)**

A news reporter sued the Seattle Police Department (SPD) for violating the PRA by refusing to provide records of "dash-cam" videos taken by SPD officers. The court held that the PRA obligated the police to turn over a list of videos and that the Privacy Act did not provide a blanket exemption for any video that might be the subject of litigation.

The SPD keeps all dash-cam videos for 90 days unless an officer tags an individual video as necessary for investigation or prosecution, in which case the video is kept for at least three years. A KOMO news reporter made a series of requests related to videos that officers had tagged for retention. The SPD did not provide the records.

The court held that the SPD violated the PRA by not disclosing the list of all retained videos. The SPD argued that, due to the limitations of its database system, it would have needed to produce a new record to respond to the reporter's request. The PRA does not require the creation of a new record to fulfill a request. The court noted the difficulty in distinguishing between creation of new electronic records and mere production of existing records, stating that "(w)hether a particular public records request asks an agency to produce or create a record will likely often turn on the specific facts of the case and thus may not always be resolved at summary judgment." Largely because a separate requester had obtained a partially responsive document, however, the court held that the SPD violated the PRA by not disclosing the list.

The court also held that the SPD violated the PRA by withholding the retained videos themselves. The SPD argued that the Privacy Act barred it from releasing the videos. The relevant provision allows recordings by equipment mounted on law enforcement vehicles without consent of the persons recorded. RCW 9.73.090(1)(c). However, the Privacy Act does not allow law enforcement agencies to make a video public until final resolution of any criminal and civil litigation that is related to the video. RCW 9.73.090(1)(c). The court held that this provision restricted the release of the dash-cam recordings only when there is actual, pending litigation.

*Gabe Verduga*

## Administrative Law Section Listserv

The Administrative Law Section has a "closed" Listserv, which means only current subscribers of the Listserv can send an email to the Listserv. You can request to receive the Listserv messages in a daily digest format by contacting the list administrator below.

**Sending Messages:** To send a message to everyone currently subscribed to this list, address your message to [administrative-law-section@list.wsba.org](mailto:administrative-law-section@list.wsba.org). The Listserv will automatically distribute the email to all subscribers. A subject line is required on all email messages sent to the Listserv.

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## 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 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 two of this newsletter, and on the Section's website.

## Case Summaries – Washington Court of Appeals

### ***Seattle v. Egan*, 179 Wn. App. 333, 317 P3d 568 (2014)**

In this case, the Washington Court of Appeals Division 1 denied local DUI attorney James Egan's suit for damages against the city of Seattle under Washington's anti-SLAPP statute, RCW 4.24.510, which prohibits a government body from filing a Strategic Lawsuit Against Public Participation. The suit resulted from a complicated set of facts and a prior decision involving Washington's Public Records Act (PRA), chapter 42.56 RCW.

In 2011, Egan, who made 316 public records requests of the city between 2008 and 2012, requested records from the Seattle Police Department's Office of Professional Accountability's (OPA) internal investigation related to complaints against four officers. Included in the request were 36 "dash-cam" videos that OPA reviewed in the investigations of those complaints. The city provided Egan with some records but refused to release 35 of the 36 dash-cam videos. The city released only the video of Egan's client, but made the 35 remaining videos available to the participants and any attorneys they had hired. The city claimed that those were exempt from disclosure to Egan under RCW 9.73.090(1)(c). RCW 9.73.090(1)(c) prohibits the city from providing police dash-cam videos to the public until final disposition of any criminal or civil litigation that arises from the event or events that were recorded. All of the videos in Egan's request had been tagged for either ongoing or threatened litigation.

The city, already involved in another lawsuit related to dash-cam videos, sued for declaratory judgment and an injunction against Egan under RCW 42.56.540 after Egan sent the city a demand letter stating that he would pursue damages unless the videos were released to him. Penalties for a PRA violation can accumulate for each day a requested record is refused. RCW 42.56.540 authorizes a court to protect a public record falling under an exemption if release would not be in the public interest, would substantially or irreparably damage a person, or would substantially or irreparably damage vital government functions. The city asked the court for clarification of the conflict between the broad disclosure encouraged by the PRA and the criminal penalties imposed for violation of RCW 9.73.090(1)(c). As noted above, RCW 9.73.090(1)(c) protects police videos and other records that are subject to a pending or threatened lawsuit.

The court ruled for the city under RCW 42.56.540, but awarded attorney fees to Egan. Egan then filed a motion to strike and dismiss the city's suit under RCW 4.24.525, Washington's anti-SLAPP statute. After losing in the lower court, Egan appealed to the Supreme Court.

The purpose of RCW 4.24.525, Washington's anti-SLAPP statute, is to protect the exercise of individuals' First Amendment rights under the United States Constitution and rights

under article I, section 5 of the Washington State Constitution. To prevail, Egan needed to prove his claim was based on an action involving public participation and petition as defined under RCW 4.24.525(2).

The court ruled against Egan for three reasons: First, Egan was a necessary party to the city's declaratory action. The court stated that, while Egan's suit arose from a protected activity, it did not necessarily follow that the cause of action arose from the protected activity. According to the court, Egan's original records request was at issue, not Egan's threat to sue the city. RCW 4.24.525 was intended to prevent the government from intimidating private citizens with threats of a lawsuit. The city did not sue Egan to chill his right to sue, which he retained. The city brought Egan into the suit as a necessary party because he had requested the records that were the subject of the declaratory order. Second, the city's suit did not interfere with Egan's right to petition. The court cited *John Doe No. 1 v. Reed*, in which the United States Supreme Court distinguished disclosure requests under the Washington PRA from activity protected by the First Amendment, stating "the PRA is not a prohibition on speech, but a disclosure requirement." Disclosure items, according to the court, may make it harder to exercise a right to speech, but they do not prevent it. Third, the U.S. Constitution does not provide a right to access government records. Egan's rights to public records arise under the state's PRA. The PRA is a legislatively created right of access to public records and must be construed consistently with other state statutes, including chapter 9.73 RCW. The legislature can restrict or even eliminate access without affecting federal constitutional rights, and the city won its declaratory order and injunction against Egan under state law.

*Liz DeBagara*

### ***Worthington v. WestNET*, 179 Wn. App. 788, 320 P3d 721 (2014)**

John Worthington sued the West Sound Narcotics Enforcement Team (WestNET), alleging a PRA violation. Several public entities created WestNET through an interlocal agreement in order to collaborate in fighting drug-related crime. The interlocal agreement states that the entities did not intend to create a separate legal entity subject to suit and that all personnel participating in WestNET were to be considered employees of the contributing agency.

Based on the terms of the interlocal agreement, the court held that WestNET was not its own legal entity subject to suit or the "functional equivalent" of a public agency subject to the PRA.

*Gabe Verduga*

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**Case Summaries – Washington Court of Appeals** *continued*


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***Gerow and ZDI Gaming v. Washington State Gambling Commission*, \_\_\_ Wn. App. \_\_\_, 324 P.3d 800 (2014)**

The Court of Appeals reversed the superior court's dismissal of ZDI's petition to invalidate two regulations adopted by the Gambling Commission. ZDI, a manufacturer of gaming supplies, developed an electronic pull-tab dispensing machine that was approved by the Commission in 2002. In 2005, ZDI sought approval of a new machine, the "VIP," nearly identical to the first, but with the added feature of cash card technology, which allows a player to purchase pull tabs with a prepaid cash card. Winnings of \$20 or less are credited back to the cash card, and the card can be used to purchase food, drink or merchandise, or cashed out. In 2005, the Commission denied ZDI's application to distribute the VIP machine based on a then-existing rule that "(a)ll prizes from the operation of punch boards and pull-tabs shall be awarded in cash or in merchandise." In August 2007, the superior court ruled that the Commission had acted arbitrarily and capriciously in denying ZDI's application. Following the superior court's decision, the Commission began discussing whether a machine such as the VIP was consistent with the Gambling Act, which led to rule proposals related to electronic pull-tab machines.

The Gambling Commission is composed of five members, a majority of which constitutes a quorum. In January 2008, at a Commission meeting where three commissioners were present, two of the three commissioners voted to adopt two new rules governing electronic video pull-tab dispensers, including a rule defining "cash." ZDI challenged the new rules on a number of grounds, but the prevailing argument was that the rules were invalid because they were not approved by a majority of Commission members.

The Gambling Act provides that "all actions of the commission relating to the regulation of licensing under this chapter shall require an affirmative vote by three or more members of the commission." The court analyzed whether the new regulations related to the "regulation of licensing," which would require the three-vote minimum. The Commission argued that the new rules relate to standards for electronic video pull-tab dispensers and are not related to the process for licensing an entity involved in gambling activities; thus, they argued, the 2-1 vote of the quorum was valid.

RCW 9.46.310 requires licensure of entities that provide gambling devices in the state. Such licenses can be issued only with respect to devices "which are designed and permitted for use in connection with activities authorized under" the Gambling Act. The court pointed out that in addition to licensure of entities, gambling devices must also be licensed. Because the regulations adopted by the Commission address requirements that electronic video

pull-tab dispensers must meet to be approved, three votes were required.

*Merrilee Harrell*

***Gradinaru v. Dept. of Soc. And Health Services*, \_\_\_ Wn. App. \_\_\_, 325 P.3d 209 (2014)**

Ms. Gradinaru was the co-owner of an adult family home in Bellevue. One of the residents of the home was in hospice care and had been prescribed comfort medications, including liquid morphine. Ms. Gradinaru, complaining of being distressed and in physical pain, took the resident's morphine and ingested a half capful of the morphine. She was later taken to the hospital and told staff there that she had taken the morphine in a failed suicide attempt. DSHS investigated and made a finding of financial exploitation of a vulnerable adult against Ms. Gradinaru for taking medication belonging to the resident. After an administrative hearing, the ALJ reversed the finding by DSHS, but the finding was reinstated by the DSHS Board of Appeals. King County Superior Court on APA judicial review affirmed the DSHS Board's decision. Ms. Gradinaru then appealed to the Court of Appeals. RCW 74.34.020(6) defines financial exploitation as "the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage." Ms. Gradinaru argued that her attempted suicide was not an advantage to her and thus, her taking of morphine was not financially exploitive. Even though Ms. Gradinaru attempted to committed suicide, the court held that the use of the resident's property benefited Ms. Gradinaru by allowing her to further her goals, even if those goals were self-destructive. The court held that financial exploitation extends to the illegal or improper use of a vulnerable adult's property to further a goal of the person who took that property.

*Stephen Manning*

***Miotke and Neighborhood Alliance of Spokane v. Spokane County*, \_\_\_ Wn. App. \_\_\_, 325 P.3d 434 (2014)**

This decision, decided under the APA, demonstrates the breadth of analysis required for determining if a repeal of an improper Urban Growth Area (UGA) expansion in itself results in compliance with the Growth Management Act.

Spokane County passed a resolution that improperly expanded its Urban Growth Area (UGA), violating the Growth Management Act's goals involving urban growth, public facilities, and transportation. Kathy Miotke and the Neighborhood Alliance of Spokane (collectively Miotke) petitioned the Eastern Washington Growth Management

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**Case Summaries – Washington Court of Appeals** *continued*

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Hearings Board (Board) for review of the expansion. The Board found the expansion to be invalid, and in response, the county passed a resolution that repealed the UGA expansion resolution. The Board found that based on this repeal, the county was in compliance with the GMA. Miotke appealed the Board's Final Order to the Superior Court, where it was affirmed. Miotke appealed to the Court of Appeals, arguing that the mere repeal of the expansion did not result in GMA compliance, as certain property owners had already vested their urban development rights during the time of the appeal, that such development violated GMA goals, and the Board's Final order and compliance finding was not supported by substantial evidence.

As an APA case, the court applied APA standards directly to the Board's record. The court accorded the Board's interpretation substantial weight, yet the court remanded the Board's Final Order, concluding that the Board failed to properly determine if the sole repeal of the initial resolution resulted in GMA compliance. The court determined that GMA compliance could not be determined because the Board did not request, and the county failed to show, how the vested urban development rights were in line with the GMA goals. In addition, the court rejected the county's argument that because the development occurred under a county-approved UGA, it was de facto in line with the GMA.

Therefore, the court found that the Board's compliance finding was not based on substantial evidence, and required remand back to the Board to determine whether the county's approved development no longer substantially interferes with GMA goals.

*Scott Hilgenberg*



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