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COURT OF APPEALS
DIVISION II

2013 JUN 19 PM 12: 00

STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

FEDWAY MARKETPLACE WEST, LLC, a Washington limited liability company, and GARLAND & MARKET INVESTORS, LLC, a Washington limited liability company, on behalf of themselves and all others similarly situated,

Appellants,

v.

THE STATE OF WASHINGTON,

Respondent.

OPENING BRIEF OF APPELLANTS FEDWAY MARKETPLACE WEST, LLC AND GARLAND & MARKET INVESTORS, LLC

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I. INTRODUCTION

State agencies must follow the law. They can no more disregard the express directives of a voter initiative than a legislative command. Yet that is exactly what the State Liquor Control Board did when it knowingly disregarded and indeed rewrote Initiative 1183's mandate to sell at public auction "the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises" and instead auctioned a different right – the right to operate a liquor store at any location within a one-mile radius of the state store location.

The State's unilateral decision to separate retail licenses from state store locations violated the express terms of the Initiative and resulted in punishing monetary losses to state store landlords, including the Plaintiffs. The State knew that such landlord losses would likely occur and that, as written, the Initiative protected the landlords' interests, but in its zeal to drive up auction prices for retail liquor licenses the State charged ahead with its radical rewrite. Adding insult to injury, the State also disregarded the Initiative's requirement that it adopt rules "to address claims that this act unconstitutionally impairs any contract . . . and to provide a means for reasonable compensation of claims it finds valid." No such rules were adopted and no such compensation was paid.

The trial court excused and validated the State's failure to follow the statutory requirements when it granted the State's motion for judgment on the pleadings and summarily dismissed Plaintiffs' Complaint without even considering evidence showing the State's willful repudiation of its statutory obligations. The court's rulings effectively gave the State a free pass for its lawless behavior, and were erroneous. The orders should be reversed and the case remanded for trial.

II. ASSIGNMENTS OF ERROR

1. The State was required to follow the express directive in Initiative 1183 ("I-1183") to sell by auction "the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises." RCW 66.24.620(4)(c). It willfully disregarded this directive and instead auctioned a different right – the right to operate a liquor store within one radius mile of each state store location. The State knew that this radical alteration of the directive had no textual support in the statute and that its implementation would seriously impair the rights of state-store landlords. The State Liquor Control Board ("LCB") plunged ahead anyway, in order to drive up prices for the rights being auctioned, and thus agency revenues. In allowing the LCB to terminate Plaintiffs' leases based on a deliberate misinterpretation of the statute, the trial court erred.

2. Even if the LCB had the power to terminate the leases based on I-1183, it breached its duty of good faith and fair dealing in terminating them without honoring and implementing provisions of I-1183 intended to protect landlord interests. In granting the State's motion for dismissal the trial court failed to apply the standard for a CR 12(c) motion for judgment on the pleadings and failed to treat the motion as one for summary judgment as CR 12(c) required. Genuine issues of material fact precluded summary judgment and the motion should have been denied.

3. The trial court erred in striking and refusing to consider Plaintiff's evidence, based on a patent misapprehension of the parol evidence rule. The evidence was admissible under the context rule and relevant to the meaning of specific contract terms. It was also relevant to proving Plaintiffs' claim that the State breached its contractual obligation of good faith and fair dealing when it terminated Plaintiffs' leases without honoring provisions of I-1183 intended to protect landlords.

4. The trial court erred in dismissing Plaintiffs' alternative constitutional claims for impairment of contract and taking of private property where the State not only presented no supporting argument or authority supporting dismissal but admitted that it took no steps to satisfy I-1183's directive that it adopt rules "to address claims that this act

unconstitutionally impairs any contract . . . and to provide a means for reasonable compensation of claims it finds valid."

III. STATEMENT OF THE CASE

Since this appeal is from an order granting a motion for judgment on the pleadings, the allegations of Plaintiffs' Complaint are the starting point for the Court's review. Those allegations are summarized below and followed by a discussion of key additional facts developed in discovery.

A. Allegations of Plaintiffs' Complaint

Plaintiffs' First Amended Complaint ("Complaint" [CP 3-42]) alleges in pertinent part as follows:

1. Plaintiffs Fedway Marketplace West, LLC ("Fedway") and Garland & Market Investors, LLC ("Garland") are former lessors of state liquor store locations. In 2007, Garland leased premises in Spokane to the LCB as Store No. 051. In 2010, Fedway leased premises in Federal Way to the LCB as Store No. 015. (The two leases are referred to herein as the "Store Leases.") Each lease was for a 10-year term. As required by the Store Leases, Fedway and Garland constructed tenant improvements conforming to LCB's strict specifications. LCB agreed to pay rent for the term of each lease. (¶¶ 7, 8, 12 [CP 4-6].)[1]

[1] Unless otherwise indicated, "LCB" as used herein refers to the agency, not to the Board itself.

2. The Store Leases contained an identical provision allowing lease termination in the event that the enactment of a law "shall prevent either party hereto from complying with or carrying out the terms of this Lease." (¶ 11 [CP 5-6].)

3. Pursuant to the express language of Section 102(4)(c) of I-1183, approved by the voters in the November 8, 2011 election, LCB was directed to sell by auction "the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises." (¶ 14 [CP 6-7].)

4. Instead of auctioning the right at each state-owned store location to operate a liquor store upon the premises, LCB advised bid winners that they could request an alternative location within one radius mile of the existing store location if they were unable to secure a lease with the landlord of the state store. (¶ 15 [CP 7-8].)

5. LCB did not auction the Store Leases and did not require bid winners to assume the Store Leases. (¶ 16 [CP 8].) Nothing in the Store Leases and nothing in I-1183 prohibited LCB from assigning the Store Leases or subletting the leased premises to the bid winners for each location. (Id.) LCB had the authority to auction off state-run liquor store facilities operated in leased premises by assigning and requiring the bid

winner for each location to assume the unexpired Store Lease for that store facility, and could have done so. (Id.)

6. LCB notified Fedway that it was terminating its Store Lease effective May 31, 2012 and notified Garland that it was terminating its Store Lease effective July 31, 2012. (¶¶ 17-18 [CP 8-9].) The sole basis cited by LCB for terminating the Stores Leases was the termination provision in the Store Leases.

7. In February 2012, LCB advised landlords of state liquor stores in writing that "LCB will pay for remaining unamortized tenant improvement expenses." (¶ 20 [CP 9].) LCB has not paid Fedway and Garland for unamortized tenant improvement expenses. (¶ 21 [CP 9].)

8. Solely to mitigate its damages arising from LCB's termination of its lease, Fedway entered into a 12-month lease (despite Fedway wanting a term to match the remaining 8 years under the LCB lease) with the bid winner for its store location at a rent that is $3,832 less per month than the LCB was paying. (¶ 22 [CP 10].)[2] Garland does not have a tenant to occupy its store space and is receiving no rental income. (Complaint ¶ 23 [CP 10].) As a result of LCB's actions, Plaintiffs will suffer a substantial loss of rental income and will incur other incidental and consequential damages. (¶ 24 [CP 10].)

[2] The tenant defaulted and ceased operating two months later. [CP 122 at ¶ 5]

9. I-1183 expressly required LCB to auction all assets over which it had power of disposition. (¶ 14(d) [CP 7].) The Store Leases were assets over which LCB had power of disposition. (¶ 38 [CP 13].)

10. I-1183 required LCB to auction off "state liquor store facilities" including "the right at each state-owned store location" to operate a liquor store "upon the premises." In auctioning off state liquor store facilities without their associated unexpired Store Leases, LCB exceeded the authority granted to it under I-1183, acted in derogation of that authority and violated I-1183's express provisions. (¶ 38 [CP 13].)

11. At the time the Store Leases were entered into, it was actually foreseen by LCB, or reasonably should have been foreseen, that laws would be passed privatizing the sale of liquor in Washington State. (¶ 39 [CP 14].)

12. The Store Leases were drafted by LCB and failed to include any provision allowing termination in the event LCB became unable to sell liquor. Rather, the Store Leases permitted termination only if "the enactment of any law or the decision of any court of competent jurisdiction shall prevent either party hereto from complying with or carrying out the terms of this Lease." While I-1183 directs LCB to close all state liquor stores, it does not direct it to terminate Store Leases or to repudiate its obligation to pay rent for the unexpired terms of Store

Leases. Accordingly, I-1183 does not prevent LCB from complying with or carrying out the terms of the Store Leases, and its attempt to terminate the Store Leases on that basis is wrongful. (¶ 40 [CP 14].)

13. Section 303 of I-1183 provides that the Department of Revenue "must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act." In failing to develop and implement such rules and procedures to compensate landlords holding Store Leases impaired as a result of the State's actions and inaction, the State violated Section 303 and the covenant of good faith and fair dealing in the Store Leases. (¶ 46 [CP 15].)

B. Additional Evidence Submitted

In addition to the allegations in the Complaint, Plaintiffs submitted compelling evidence consisting of deposition testimony and documents authored by LCB officials.[3] The evidence included the following:

Privatization of liquor had been a topic of discussion and contingency planning at the LCB for years prior to the November 2011

[3] The LCB officials who gave deposition testimony were Christopher Marr (LCB Board Member), Patricia Kohler (LCB Administrative Director), Pat McLaughlin (former LCB Director of Business Enterprise), Steven Meissner (former LCB District Manager) and Suzanne Lewis (former LCB Leasing Manager). [CP 118-19 at ¶ 2]

election. (McLaughlin Dep. at 11:11-18 [CP 168]; Kohler Dep. at 7:15-23 [CP 140] ("privatization discussions have probably been going on for the last five years").)

At the time I-1183 took effect on December 8, 2011, the LCB and its senior management clearly understood that the initiative directed it to auction the right to operate a liquor store at each existing store location (hereafter the "Existing Location Requirement"). When asked about a PowerPoint presentation dated December 12, 2011 which stated that "the auction is for the right to operate a liquor store at the existing location," Board Member Chris Marr testified "Yes, that fits with my understanding of what the initiative addressed." (Marr Dep. at 19:24-20:9 [CP 127]; see also McLaughlin Exh. 4 (the PowerPoint presentation) at 549 [CP 336] and Marr Exh. 2 at 271 [CP 234] ("LCB is directed to . . . sell by auction open to the public, the right to operate a liquor store at each state-operated store location.")

Agency Director Patricia Kohler likewise admitted that "the initiative directed the agency to auction stores at existing location[s]." (Kohler Dep. at 18:15-19:2 [CP143].) Director of Business Enterprise Pat McLaughlin, whom Kohler tapped to lead the agency's asset divestiture under I-1183, testified to his understanding "that the auction that was going to be conducted was for the right to operate a liquor store at the

existing state store location." (McLaughlin Dep. at 18:5-19, 86:20-24 [CP 171].) And LCB District Manager Steven Meissner, who led the Auction Team, authored a February 1, 2012 Auction Issue Paper stating, "Initiative 1183 requires the LCB to conduct public auctions for the right to sell spirits at the existing location of each state liquor store." (Meissner Dep. at 30:24-31:9 [CP 201]; see also McLaughlin Dep. at 34:13-35:1 [CP 174].)

Despite this unanimous understanding that the Initiative required the agency to auction the right to sell liquor at existing store locations, LCB management felt that the requirement gave landlords a lot of negotiating power with bid winners and was concerned that honoring the requirement would reduce auction proceeds. In a January 2012 email, Director of Retail Chris Liu stated that the Existing Location Requirement could create a "landlord oligarchy" and "lessen[ ] the value of the license" being auctioned. (McLaughlin Exh. 7 at 3391 [CP 347].) Director Kohler noted that if the license was auctioned for the existing store location only, "that would give the landlords a lot of control." (Kohler Dep. at 38:25-39:4 [CP 150].) McLaughlin recalled "acknowledging that if indeed the rights are associated to a specific store it could give leverage to a landlord." (McLaughlin Dep. at 24:13-25:2 [CP 172].)

In fact, Director Kohler felt that the framers of I-1183 had made a mistake in requiring the LCB to auction the right to operate at the existing store locations. In talking points for a television interview given in the first half of 2012, Kohler acknowledged that the LCB had been "directed to auction stores at existing location[s]" but said this was a "flaw in [the] initiative" because the LCB leases but does not own the stores. (Kohler Exh. 1 at 43 [CP 294]; see also Lewis Exh. 18 at 260 [CP 436] (Kohler email stating "this is a flaw in the initiative").)

To implement I-1183's auction provision, LCB staff developed a set of recommendations and presented them to the Board on February 1, 2012 in an Auction Issue Paper. The Auction Issue Paper recommended that each landlord be given the right to either opt in or opt out of leasing to the bid winner. "For any State Store location where a landlord opts out or a successful bidder cannot be identified, an alternate location in the community will be selected and pursued for auction for 'rights' as if it were the original location." (McLaughlin Exh. 10 at 46 [CP 350].) McLaughlin explained that the opt-out recommendation was intended to address instances where a landlord was contractually unable to lease to the bid winner because of restrictive lease covenants with other tenants. (McLaughlin Dep. at 45:25-46:15 [CP 175].)

The Auction Issue Paper recognized that a "drawback" of the recommended approach was that "[s]electing alternate community locations [for landlords contractually unable to lease to persons other than the State] could draw some criticism from a literal interpretation of what I-1183 allows." (McLaughlin Exh. 10 at 46 [CP 350].) McLaughlin acknowledged that the "literal interpretation" he was referring to was the Existing Location Requirement. (McLaughlin Dep. at 40:5-8 [CP 175].)

Consistent with the Auction Issue Paper's recommended approach, a PowerPoint presentation was given to landlords at an LCB Landlord Informational Forum stating that "Landlords have the option of allowing their premise to be included in the auction process." (Lewis Exh. 31 at 456 [CP 451]; see also Kohler Dep. at 28:2-17 [CP 145] (confirming that the PowerPoint was used at February 1, 2012 Landlord Forum); Meissner Exh. 7 at 13 [CP 383] ("strategy . . . will incorporate information from landlords re: bundling and selling store contents **and lease**").)

Within days of this February 1, 2012 meeting, however, the LCB did a complete about-face. Rejecting the recommendation for landlord opt-in/opt-out (see Kohler Dep. at 34:7-14, 35:22-36:4 [CP 148-149]), it decided to give bid winners the right to relocate from the existing store locations. Instead of auctioning "the right **at** each state-owned store location of a spirits retail licensee to operate a liquor store upon **the**

premises," as the language of Section 102(4)(c) of I-1183 directed (now codified at RCW 66.24.620(4)(c)), the LCB decided to auction the right at the existing location or within one radius mile of the existing location (hereafter the "Relocation Policy"). This is reflected in notes from a February 13, 2012 Board Caucus Meeting (McLaughlin Exh. 16 at 007 [CP 354]: "allow consideration for alternate locations") and auction information emailed to the third-party auctioneer on February 14, 2012 that refers to auctioning the right at the existing location "with option for alternate w/i 1 mile." (McLaughlin Exh. 17 at 005 [CP 360].)

The LCB material sent to the auctioneer candidly observed that "[a]llowing for alternate locations could be interpreted as violating the intent of I-1183." (Id. at 006 [CP 361].) McLaughlin acknowledged that he "recognized as of February 14, 2012 that there was risk associated with allowing for alternate locations." (McLaughlin Dep. at 70:24-71:7 [CP 186].) In a meeting with the LCB Board and executive management, McLaughlin further noted that allowing the bid winner to move locations "gives [the] potential bidder a lot of control." (Meissner Exh. 5 at 032 [CP 380]; McLaughlin Dep. at 44:19-45:4 [CP 176-177] (Q: "If the bidder can move the liquor rights to another location, that takes away from the amount of landlord control and gives control to the bidders, do you agree?

A: I can see that, yes. Q: And that's what you were referencing here at this February 1st meeting? A: Yes.").)

The Relocation Policy was approved on an informal basis before the auction. (McLaughlin Dep. at 92:17-22 [CP 191].) But it was not until many months later, in September 2012, long after the auction had been held, that it was formalized as LCB Policy. (Kohler Exh. 10 [CP 326-327]; Kohler Dep. at 59:16-22 [CP 157].)

LCB's executive team admits there is nothing in I-1183 that provides for relocating the right being auctioned and nothing about a one radius mile exception to the Existing Location Requirement. See Marr Dep. at 39:4-25 [CP 132] ("I'm not aware that the word 'relocation' appears in the initiative. Q: Does the word or words 'one mile from existing location' – A: Not to my understanding."); Kohler Dep. at 55:10-14 [CP 155] (agreeing that there is "nothing in I-1183 about a one radius mile relocation"); McLaughlin Dep. at 49:22-50:3 [CP 178-179] (same).

Concerned about the risk posed by the Relocation Policy, LCB management sought approval from the Attorney General's office. See Kohler Dep. at 54:9-55:9 [CP 155]; McLaughlin Dep. at 51:4-8 [CP 179] ("We didn't go to legal counsel for every policy decision but I think much of the areas that you're asking questions around were based on our legal advice and I could see, you know, the court, they could decide to uphold

or to challenge that advice. I can see that."); Marr Dep. at 31:14-32:2 [CP 131] ("not saying AG's interpretation is infallible"). After consulting with counsel, new, euphemistic phraseology quickly appeared which described the auction as being for the right to a retail license "associated with" the former state store location. (McLaughlin Exh. 22 at 050 [CP 366]; Exh. 24 at 400 [CP 370] ("A successful bidder owns the exclusive rights to apply for a spirit retail license associated with the location of the former state liquor store") and McLaughlin Dep. at 96 [CP 193]: the "associated-with" wording "was developed in consultation with our legal counsel.")

The obvious purpose of the Relocation Policy was to drive up the price of the rights being auctioned in order to produce a higher return to the LCB. McLaughlin agreed that "driving maximum value for the state" was an objective (McLaughlin Dep. at 25:18-22 [CP 172]) and Director Kohler testified that "the goal" of the auction was to generate maximum reasonable value. (Kohler Dep. at 53:17-19 [CP 154].) Concerns had been expressed by senior management that "if licenses and locations are not transferable it lessens the value of the license" and thus the agency's ability to maximize proceeds. (McLaughlin Exh. 7 at 3991 [CP 347].)

Another threat to maximizing the LCB's return was the unexpired store leases. In 2011, the LCB determined it would cost more than $50 million to buy out the unexpired leases, plus millions more to reimburse

unamortized tenant improvements. (Marr Exh. 3 at 007 [CP 240]; Lewis Exh. 4 at 3516 [CP 391].) Board Member Marr testified that eliminating costs was a guiding principle. (Marr Dep. at 30:25-31:8 [CP 130-131].)

After I-1183 passed, LCB Store Leasing Manager Suzanne Lewis began getting calls from landlords. She reported to McLaughlin and Kohler that landlords were "starting to panic" and wanted information, and prepared a letter to send them. (Lewis Exh. 16 at 233 [CP 433].) The initial draft prepared on November 16, 2011 stated that "The initiative directs the Board to 'sell at auction the right to operate a private liquor store at the location of any existing state liquor store.' We are working at how to implement this direction and we will contact all of our state landlords with further information in the near future when we have defined a process." (Kohler Exh. 12 at 462 [CP329].) McLaughlin responded positively, saying "I think this letter is at an appropriate level of detail given what we know and should be sent to officially engage this stakeholder group." (Lewis Exh. 16 at 233 [CP 433].)

The next day, Lewis emailed her boss (Chris Liu) saying "how important I feel it is to send <u>something</u> to the landlords ASAP." (Lewis Exh. 17 [CP 435], emphasis in original.) Later that day, Liu emailed Lewis saying, "We are not sending a letter to the landlords at this time," and instructed Lewis that in communications with landlords she should

"not embellish any other details that have not been defined at this time." (Lewis Exh. 19 [CP 439].) Lewis testified that she spoke to landlords who called "[b]ut I couldn't give them any information." (Lewis Dep. at 110:17-19 [CP 225].) Director Kohler confirmed that "the decision to put the brakes on" the letter was hers. (Kohler Dep. at 66:23-25 [CP 161].)

In January 2012, Lewis again tried to send an informative letter to store landlords and was again shot down. (See Lewis Exh. 22 [CP 440]: "Do not disseminate and [sic] written documents or make any verbal statements until Mrs. Kohler approves.") On or about May 15, 2012, the LCB finally communicated with the landlords – by sending them "notice that it is exercising its right to terminate said lease." (Lewis Exh. 26 [CP 441-442]; see also notices to Fedway [CP 41] and Garland [CP 42].)

The LCB recognized that its Relocation Policy would cause harm to state store landlords, who were "increasingly unhappy about the process." (McLaughlin Dep. at 73:19-22 [CP 187].) By contrast, the policy "created an opportunity" for bidders that already had a retail business within one mile of the state store location. (McLaughlin Dep. at 93:13-19 [CP 192].) Director Kohler specifically discussed the issue of harm to landlords with the Attorney General's office and concluded that the agency had no obligation to avert such harm because, in contrast to tribal, military and contract liquor stores, nothing in the initiative itself

expressly required it. (Kohler Dep. at 44:5-45:4 [CP 151].) Within the agency, Kohler said she thought the LCB was responsible for reimbursing unamortized tenant improvements. (Kohler Dep. at 64:15-19 [CP 160]; see also Lewis Exh. 16 at 233 [CP 433].) Ultimately, reimbursement for unamortized tenant improvements was made only if the lease contained an express clause. (Rafel Decl. Exh. K at 17:4-10 [CP 468].) Fedway and Garland received no such reimbursement. (Complaint ¶ 21 [CP 9].)

Section 303 of I-1183 provides that the Department of Revenue "must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act." (Appendix 1 at 60.) No such rules and procedures were ever developed. (Kohler Dep. at 70:4-71:13 [CP 162].)

In order to take advantage of the Relocation Policy, all a bid winner had to do was fill out a Store Relocation Request form stating that he or she was unable to reach agreement with the landlord at the existing store location. The Board did not fact-check the representation by the bid winner; it did not require a statement from the landlord; it did not question the bid winners; and in all cases except one it simply accepted the representation of the bid winner that it had been unable to reach agreement

with the landlord. (McLaughlin Dep. at 61:12-19 [CP 182], 63:19-23 [CP 183], 64:23-65:11 [CP 184], 65:22-66:6 [CP 185]; Kohler Dep. at 72:5-10 [CP 163]; Marr Dep. at 61:4-62:7 [CP 135-136].) Not a single relocation request was turned down. (McLaughlin Dep. at 63:4-7 [CP 183]; see also Marr Exh. 10 [CP 260-284].) McLaughlin agreed that a hypothetical bid winner who offered to pay a landlord a mere $100 a month in rent and then requested relocation on the grounds that she could not reach agreement with the landlord would satisfy the relocation criteria. (McLaughlin Dep. at 89:19-90:12 [CP 190].)

In June 2012, after the auction was completed, Board Chair Sharon Foster gave a speech to the staff and employees of the LCB, stating: "We got into the auction business. We essentially auctioned off a concept that generated a $32 million windfall for the state." (Marr Exh. 13 [CP 285-290]; see also Marr Dep. at 68-69 [CP 137].)

IV. ARGUMENT

A. The Standard of Review is De Novo

This is an appeal from an order granting a CR 12(c) motion for judgment on the pleadings. The court's review is de novo. *P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). The de novo standard applies to all trial court rulings made in conjunction with a dismissal order subject to de novo review, including evidentiary rulings.

See *Cornish College of the Arts v. 1000 Virginia Ltd. P'ship,* 158 Wn. App. 203, 215, 242 P.3d 1 (2010) (summary judgment motion) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). "This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party . . . and . . . with the requirement that the appellate court conduct the same inquiry as the trial court." *Folsom*, 135 Wn.2d at 663 (internal citations omitted).

The trial court's inquiry under CR 12(c) is exacting: a motion for judgment on the pleadings should be granted "'sparingly and with care' and 'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" *M.H. v. Corporation of the Catholic Archbishop of Seattle,* 162 Wn. App. 183, 189, 252 P.3d 914 (2011), quoting *Tenore v. A.T.&T. Wireless Services,* 136 Wn.2d 322, 330, 962 P.3d 104 (1995) (emphasis added). Dismissal under CR 12(c) is appropriate only when "'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, that would entitle the plaintiff to relief.'" Id., quoting *Haberman v. Wash. Public Power Supply System,* 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). On a CR 12(c) motion, the "allegations asserted in the complaint are presumed to be true and a court may consider hypothetical facts not included in the record." *Tenore,* 136 Wn.2d at 330.

The facts in the complaint, as well as hypothetical facts, must be viewed in the light most favorable to the nonmoving party. *M.H.*, 162 Wn. App. at 189. "'[A]ny hypothetical situation conceivably raised by the complaint'" defeats a motion to dismiss if it is legally sufficient to support plaintiff's claims. Id., quoting *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

Properly evaluated under the foregoing standard, the State's motion should have been denied. Plaintiffs' direct allegations and the "hypothetical" facts raised by the Complaint and the body of additional evidence submitted do not show an insuperable bar to relief but show, rather, that the State is liable for violating I-1183, breach of contract and bad faith termination of Plaintiffs' leases.

But CR 12(c) also provides that if "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56 . . . ." Plaintiffs submitted matters outside the pleadings. There was no proper basis for excluding the evidence, which consisted of internal agency documents showing a calculated decision to depart from express statutory requirements and testimony from state officials confirming the same. This evidence was relevant and admissible and the State's motion should have been evaluated under rule 56 and denied.

Under rule 56, a trial is "absolutely necessary" if there is a genuine issue as to any material fact. *Jacobsen v. State,* 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The moving party bears the burden to demonstrate an absence of any such issue. *Hash by Hash v. Children's Orthopedic Hosp. and Medical Center*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). Any doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). All evidence and inferences from the evidence must be considered in the light most favorable to the non-moving party. *Id.*, citing *Citizens for Clean Air v. Spokane,* 114 Wn.2d 20, 38, 785 P.2d 447 (1990). Summary judgment must be denied if reasonable persons can reach more than one conclusion from the evidence. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). The State did not begin to meet its burden of showing the absence of genuine issues of fact and entitlement to judgment as a matter of law under this standard.

B. The LCB Deliberately Misinterpreted the Initiative and Wrongfully Terminated Plaintiffs' Leases

1. The LCB Deliberately Misinterpreted I-1183

Section 102(4)(c) of I-1183, codified at RCW 66.24.620(4)(c), provides in full as follows (emphasis added):

> The board must sell by auction open to the public the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises. Such right must be freely alienable and subject to all state and local zoning and land use requirements applicable to the property. Acquisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store and does not confer any privilege conferred by a spirits retail license. Holding the rights does not require the holder of the right to operate a liquor-licensed business or apply for a liquor license.

The LCB clearly understood that this provision meant what it said and required the Board to auction the right to sell liquor at each state store location. When asked about this in deposition, Board Member Chris Marr testified, "Yes, that fits with my understanding of what the initiative addressed." (Marr Dep. at 19:24-20:9 [CP 127]; see also Marr Exh. 2 at 271 [CP 234] ("LCB is directed to . . . sell by auction open to the public, the right to operate a liquor store at each state-operated store location.").) Director Kohler similarly admitted that "the initiative directed the agency to auction stores at existing location[s]." (Kohler Dep. at 18:15-19:2 [CP143].) Pat McLaughlin, who managed the I-1183 asset divestiture, testified "that the auction that was going to be conducted was for the right to operate a liquor store at the existing state store location." (McLaughlin Dep. at 18:5-19, 86:20-24 [CP 171].) Auction Leader Meissner wrote in an internal paper that "Initiative 1183 requires the LCB to conduct public auctions for the right to sell spirits at the existing location of each state

liquor store." (Meissner Dep. at 30:24-31:9 [CP 201].) In short, it was unanimous within the agency that I-1183 required the Board to auction the right to sell liquor at the existing state store locations.

But the LCB did not do what the law commanded. It did not sell by auction the right "at each state-owned store location" to sell liquor "upon the premises." It discarded this express requirement and instead sold by auction the right to sell liquor at existing store locations or at alternate locations within one radius mile of existing locations. Nothing in I-1183 authorized the agency to eliminate the location requirement. See Marr Dep. at 39:4-25 [CP 132] ("I'm not aware that the word 'relocation' appears in the initiative. Q: Does the word or words 'one mile from existing location' – A: Not to my understanding."); Kohler Dep. at 55:10-14 [CP 155] ("nothing in I-1183 about a one radius mile relocation"); McLaughlin Dep. at 49:22-50:3 [CP 178-179] (same). Nor did I-1183 contain any general grant of rulemaking authority to the LCB. Indeed, the LCB did not create its Relocation Policy through rule-making at all. It simply adopted a "policy" which was not even reduced to writing until months after the auction. (See McLaughlin Dep. at 92:17-22 [CP 191] (policy informally approved before the auction); Kohler Dep. at 59:16-22 [CP 157] (written policy approved in September 2012 after multiple drafts and revisions); Kohler Exh. 10 [CP 326-327] (Signed Relocation Policy).)

The LCB knew that the Relocation Policy would harm state store landlords. Director Kohler discussed this with the Attorney General's office but concluded that the agency had no obligation to avert the harm. (See Kohler Dep. at 44:5-45:4 [CP 151]; McLaughlin Dep. at 44:19-45:4 [CP 176-177] (Q: "If the bidder can move the liquor rights to another location, that takes away from the amount of landlord control and gives control to the bidders, do you agree? A: I can see that, yes. Q: And that's what you were referencing here at this February 1st [Board] meeting? A: Yes.").) The agency also understood that the policy "could be interpreted as violating the intent of I-1183." (McLaughlin Exh. 17 at 006 [CP 361].)

But the agency went ahead with its Relocation Policy anyway, disregarding what it knew the Initiative expressly required. The obvious reason was to maximize auction proceeds (see Kohler Dep. at 53:17-19 [CP 154] ("the goal" was to maximize value)), and address the expressed concern that "if licenses and locations are not transferable it lessens the value of the license." (McLaughlin Exh. 7 at 3991 [CP 347].)

2. I-1183 Did Not Prevent the State From Complying With or Carrying Out the Terms of the Leases; the State's Lease Termination Was Wrongful

The State relied on a single provision in I-1183 for its argument that the law forced it to break its leases: the provision requiring the LCB to effect "closure of all state liquor stores" by June 1, 2012 and the LCB to

"thereafter refrain" from the sale of liquor. (See State's Motion at 12:18-21 [CP 65]; RCW 66.24.620(2).) But nothing in I-1183 directed the State to stop paying rent to landlords under unexpired leases. The State could have met its obligation to effect closure of state stores without breaching its lease obligations. Likewise, nothing in I-1183 prevented the State from assigning leases to licensees. I-1183 only required the LCB to refrain from liquor sales; it expressly authorized liquor sales by licensees. The State asked the trial court to *infer* that, in requiring the closure of state-run stores and precluding liquor sales by the state itself, the Initiative must have intended store leases to be broken. There is no textual support in the Initiative for that inference; instead, all inferences should have been drawn in favor of Plaintiffs as the non-moving party. As discussed below, I-1183 directed the LCB to sell "all assets"; these included the Store Leases, which were freely assignable. (Complaint ¶¶ 14(d), 38 [CP 7, 13].)

In *Amalgamated Transit Union Local No. 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000), the Supreme Court explained the trial court's role in interpreting a voter initiative, stating:

> [I]n determining the meaning of a statute enacted through the initiative process, the court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure. Where the voters' intent is clearly expressed in the statute, the court is not required to look further. In determining intent from the language of the statute, the court focuses on the language as the average informed voter voting on

> the initiative would read it. Where the language of an initiative enactment is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation. . . .
>
> [I]t is not the prerogative nor the function of the judiciary to substitute what they may deem to be their better judgment for that of the electorate in enacting initiatives ... unless the errors in judgment clearly contravene state or federal constitutional provisions.

142 Wn.2d at 205-06 (internal citations omitted) (emphasis added). In the present case the State asked the trial court to read into the law a provision that is not there. This the court could not do. Reading the language as the average voter would, the law says that state stores must be closed and "all assets" sold, RCW66.24.620(3); it nowhere says that the state can break leases and elect not to sell certain assets for strategic reasons.

Section 3 of the leases, on which the State's termination defense is based, provides in full as follows [CP 22, 33]:

> [***Ground one***:] In the event of the issuance of any proclamation or order by any department of the executive branch of the government of the United States of America which shall prevent or make wholly unfeasible the use of the leased premises by the Washington State Liquor Control Board for the sale or storage of liquor; [***Ground two***:] or in the event that the enactment of any law or the decision of any court of competent jurisdiction shall prevent either party hereto from complying with or carrying out the terms of this Lease; [***Ground three***:] or in the event that the operation of a liquor store upon the above-described premises is made unlawful as the result of an election held under RCW 66.40, then this Lease shall terminate and the parties hereto shall be released from any and all liability for any damage or loss which may result from such inability to comply therewith.

In the court below, the State relied solely on "ground two," conceding that neither ground one nor ground three applied. (See State's Motion at 11:8-20 [CP 64].) Ground one applies if a federal executive branch order prevents or makes unfeasible "the use of the leased premises by the Washington State Liquor Control Board for the sale or storage of liquor." Ground two does not include that language; it does not make the trigger a legislative enactment or court decision preventing "the use of the leased premises by the [LCB]" for the sale or storage of liquor. Rather it applies only when "the enactment of any law . . . shall prevent" a party from complying with or carrying out the terms of the lease.

Under settled rules of contract construction, the decision not to employ the trigger from ground one in the ground-two provision must be considered intentional. As the Court held in *Ball v. Stokely Foods*, 37 Wn.2d 79, 83, 221 P.2d 832 (1950), "in the interpretation of contracts . . . every word and phrase must be presumed to have been employed with a purpose and must be given a meaning and effect whenever reasonably possible." The State argued that it would be "anomalous" to interpret ground two as not triggered by a law preventing the LCB from selling liquor, "when both grounds one and three are triggered by events preventing the WSLCB from selling liquor." (State's Motion at 11:21-12:2 [CP 64-65].) This argument merely highlights the fact that ground

two does not contain a trigger based on being prevented from selling liquor, whereas grounds one and three do. The Court would have to ignore settled rules of contract construction to accept the State's argument and graft the language from ground one onto ground two. A court cannot make a contract for parties that they did not make for themselves. *Dragt v. Dragt/De Tray, LLC*, 139 Wn. App. 560, 573, 161 P.3d 473 (2007).

Plaintiffs submit that ground two means what it says: If "the enactment . . . shall prevent" lease compliance, termination may occur. For this provision to apply, the enactment itself must actually prevent compliance with the terms of the lease. Mere impacts on the State's ability to "use" leased premises to sell liquor are not within the contemplation of ground two and insufficient to trigger termination, since the "use trigger" of ground one is not contained in ground two and the omission must be presumed to be intentional and meaningful. The Court should reject the State's invitation to expand the scope of ground two to allow lease termination when the express terms of the enactment do not prevent the State from paying rent under executory lease contracts and nowhere direct the State to break its leases. "We do not interpret what was intended to be written but what was written." *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). The State was the author of these provisions. At a minimum,

Section 3 is ambiguous and must be construed against the State as the drafter. See *Chevalier v. Woempner*, 172 Wn. App. 467, 476, 290 P.3d 1031 (2012); (State's Answer to Interrogatory No. 7 [CP 466].)

The other answer to the State's argument that I-1183 "prevented" it from complying with or carrying out the terms of the leases is that nothing in I-1183 (or in the Store Leases) prevented the State from selling (i.e., assigning) and requiring bid winners to assume the unexpired leases. To the contrary, I-1183 specifically directed the LCB to sell "all assets" over which it had power of disposition. RCW66.24.620(3). This obviously included the leasehold interests to which the LCB was a party.

Washington strongly favors free alienability of estates in land. Unless a lease has a restrictive covenant, the tenant may freely assign or sublet. *Cupples v. Level*, 54 Wash. 299, 304, 103 P. 430 (1909); *Bellevue Square Managers, Inc. v. GRS Clothing, Inc.*, 124 Wn. App. 238, 244, 98 P.3d 498 (2004) ("*Any* restrictions on assignment are for the landlord's benefit" and waivable at the option of the landlord) (emphasis in original).

Plaintiffs' leases do not contain any restrictions on assignment or sublet. The State therefore had the right to assign or sublet them, without Plaintiffs' consent. LCB management in fact considered "bundling" the leases with store contents. (Meissner Exh. 7 at 013 [CP 383].) Its contention in the court below that it could not assign or sublet because

Paragraph 2 required that the premises be "occupied by the WSLCB" [CP 65:23-66:2 and 512:3-15] was legally unfounded; that provision was entirely waivable by the landlord. The leases included no covenant of continuous operation by the LCB and such a restriction cannot be implied. See *Fuller Market Basket, Inc. v. Gillingham & Jones, Inc.*, 14 Wn. App. 128, 134, 539 P.2d 868 (1975). Moreover, the LCB was directed in the initiative to sell "all assets . . . over which the board has power of disposition," RCW 66.24.620(3), not to pick and choose the assets that would generate the highest return. The LCB was thus obligated to sell the leasehold interests along with the other assets at its disposal.

The final injury to landlords came when the agency approved a Relocation Policy allowing for relocation based solely on the say-so of the bid winner. (See McLaughlin Dep. at 61, 63- 65 [CP 182-184]; Kohler Dep. at 72:5-10 [CP 163]; Marr Dep. at 61:4-62:7 [CP 135-136].) Bidders merely had to say that they could not reach agreement with the landlord to receive permission to relocate. (McLaughlin Dep. at 89-90 [CP 190].) The bidder's representation was never questioned and the circumstances never examined. In truth, the Relocation Policy – and the "associated with" language used to describe it – was a fig leaf intended to cover the fact that the agency had created, out of whole cloth, a scheme that directly

contravened the express requirements of the statute and reversed the legal and economic model embodied in I-1183.

For the foregoing reasons, the State's argument that I-1183 prevented it from complying with or carrying out the terms of the leases was without merit and its motion should have been denied.[4]

C. Even if the LCB had the Power to Terminate Plaintiffs' Leases Based on I-1183, It Breached its Duty of Good Faith and Fair Dealing

As shown above, the State did not have the power to terminate the leases. Assuming for argument's sake that the State had the power to terminate, however, there are genuine issues of material fact over whether it breached its obligation of good faith and fair dealing in the way that it

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[4] The State also argued that ground two constitutes a contractually agreed upon frustration-of-purpose provision. (State's Motion at 10:1-3 [CP 63].) Because the LCB was directed to sell all assets and the leaseholds were freely assignable, frustration of purpose did not occur. Assuming otherwise, however, if an event that frustrates performance is foreseeable and there is no provision addressing it, an inference arises that the promisor assumed the risk of the event. *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 96 Wn.2d 558, 563-64, 637 P.2d 647 (1981). In *Weyerhaeuser*, the event was "unanticipated" but here the LCB had been making contingency plans for privatization for five years prior to I-1183. Although privatization was foreseen and foreseeable, the agency failed to include anything specific in the leases to address the consequences of privatization, if it were to occur. Frustration of purpose is not a defense to enforcement of the leases where, as here, the allegedly frustrating event was anticipated by the LCB and was the subject of contingency planning. See also *Washington State Hop Producers, Inc. Liq. Trust v. Goschie Farms, Inc.*, 112 Wn.2d 694, 708, 773 P.2d 70 (1989) (foreseeability is meaningful where party claiming frustration could have controlled the language in the contract).

carried out the termination and failed to implement Section 303 requiring compensation for impairment of the contracts.

Agencies must faithfully follow the law. Where construction of a statute by an administrative agency is concerned, the error of law standard applies. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000), citing RCW 34.05.570(3)(d). Under this standard, the court may substitute its interpretation of the law for the agency's. "Where a statute is within the agency's special expertise, the agency's interpretation is accorded great weight, provided that the statute is ambiguous. However, an agency's view of a statute will not be accorded deference if it conflicts with the statute." 142 Wn.2d at 77 (internal citations omitted) (emphasis added).

The auction provisions of I-1183 were not within the special expertise of the LCB. As Board Chair Sharon Foster said at a recognition event for the agency in June 2012, "We got into the auction business." (Marr Exh. 13 at 434 [CP 289].) Prior to I-1183, the LCB had not been in the auction business. And indeed the person the agency put in charge of the auction, Steven Meissner, by his own admission had "very low level" prior auction experience. (Meissner Dep. at 8:17-9:3 [CP 197].) Also, while LCB top management may have considered Section 102(4)(c) of the initiative "flawed," they did not deem it ambiguous. (Kohler Exh. 1 at 43

[CP 294]; Lewis Exh. 18 at 260 [CP 436].) To the contrary, the executive team was unanimous – before the Relocation Policy was devised – that "the initiative directed the agency to auction stores at existing location." (E.g., Kohler Dep. at 18:15-19:2 [CP 143].) And as shown, the Relocation Policy conflicts directly with the Existing Location Requirement that the management team repeatedly admitted was applicable. Under the rule stated in *Postema*, therefore, no deference is owed to the agency's interpretation of the auction provisions of I-1183.

"There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). While the duty does not inject substantive terms into the contract, it requires "that the parties perform in good faith the obligations imposed by their agreement." Id. When a party carries out its express contractual obligations in a manner intended to protect its interests at the expense of its contract counterparty, it can become liable for breach of the duty. Such was the case in *Frank Coluccio Construction Co. v. King County*, 136 Wn. App. 751, 150 P.3d 1147 (2007). There, King County actively sought to prevent its contractor from obtaining coverage under an insurance policy it was obligated to provide. The court held that this conduct "plainly

contravened King County's duties of good faith and fair dealing, which exist to promote 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" Id. at 766.

The actions of the State in the present case are analogous. Mindful that the initiative had protected the rights and interests of landlords by imposing an Existing Location Requirement, but concerned that honoring that requirement would lessen the value of the license being auctioned and thus reduce the amount of money generated at auction, LCB management and counsel literally invented a Relocation Policy that took the legal and economic rights and benefits conferred by the Initiative on landlords and redistributed those rights and benefits to bidders in order to drive up auction prices. The evidence presented by Plaintiffs amply supports these inferences. In so doing, the LCB, like King County in the *Coluccio* case, "pursued a course intended only to protect [its] position and interests, to the detriment of [the landlords]." Id. at 764. And the detriment to landlords was severe: in giving bidders the right to relocate for the asking, landlords lost the rights and benefits of the existing leases and further lost all negotiating power, forcing them to take what they could get. Plaintiff Fedway got a short-term lease with a much reduced rent payment (from a tenant who defaulted two months later) and no compensation for the

tenant improvements it had constructed to state specifications. Plaintiff Garland got no tenant at all and no compensation for tenant improvements.

In essence, the LCB played Robin Hood with the statutory scheme, taking from the landlords and giving to the bidders in order to generate the "$32 million windfall" that Board Chair Foster crowed about shortly after the auction. (Marr 13 Exh. at 434 [CP 289].) In doing this the agency took a calculated risk and went to substantial lengths to cover up its audacious action by deliberately keeping landlords in the dark, repeatedly refusing their requests for information, and by deploying euphemistic language to try to make its actions sound innocuous.

These actions breached the State's duty of good faith and fair dealing under the leases, even if the State had the power to terminate. The State could have exercised its termination powers, assuming they were triggered, in a way that conformed to the Existing Location Requirement, by giving landlords the right to opt out if they were unable to rent to the bid winner because of agreements with other tenants, and selling and assigning to bid winners the unexpired leases in all other cases.[5] This was what I-1183 required and what senior staff recommended.[6] The State

[5] Some landlords had leases with shopping center anchor tenants, such as supermarkets, which precluded a liquor store other than one operated by the State.

[6] The staff recommendation was also consistent with the provision in the initiative that holders of the auctioned rights are not obligated to operate a liquor store and rights are

could have also honored its commitment to pay landlords for unamortized tenant improvements. (Lewis Exh. 31 at 454 [CP 449].) Instead, it sacrificed every opportunity to assure that landlords got the full benefit of lease performance, regardless of termination, pursuing the singular goal of maximizing revenue.

Further, although Section 303 of the Initiative expressly directed the State to develop rules and procedures "to address claims that this act unconstitutionally impairs any contract . . . and to provide a means for reasonable compensation of claims it finds valid" (Appendix 1 at 60), no such rules were developed. (Kohler Dep. at 70:4-71:13 [CP 162].) The State simply abdicated its statutory obligation to develop rules for compensating parties, like Plaintiffs, whose contracts were impaired by the initiative or the State's wrongful interpretation of it. The State's failure to address compensation for landlords pursuant to Section 303 is a breach of that provision and further evidence of its bad faith.

On the record presented, there are genuine issues of fact as to whether the State's actions in terminating the leases, even assuming arguendo it had the power to terminate, violated its duty of good faith and fair dealing. Summary disposition was not appropriate.

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freely alienable. RCW 66.24.620(4)(c). Bid winners could open stores or not, and sell and further assign their rights, including the leasehold interest.

D. The Court Erred in Striking Plaintiffs' Evidence

Confronted with evidence that it deliberately misinterpreted I-1183 to advantage itself at the expense of state store landlords, the State did not offer a substantive response. Instead it moved to strike, even though the evidence came entirely from testimony given and documents authored by its own officials. In granting the motion to strike, the trial court showed a profound misunderstanding of the context rule. For example, at argument the court stated:

> The Court: Tell me some authority that says if the terms of the contract are not [sic] clear, the court can still look outside the terms of the contract, outside the four corners of the contract.
>
> Mr. Rafel: If the terms of the contract are ambiguous –
>
> The Court: I understand if they're ambiguous, yes, I can, but my understanding is if they're clear, if they're clearly understood, then I'm not to consider anything outside the four corners.

(RP at 13:22-14:6.) The court's misunderstanding was so apparent that, after further colloquy between Plaintiffs' counsel and the court, the State's counsel interjected, stating, "I actually think Mr. Rafel is correct on this point." (RP at 15:19-20.)

The law is clear that extrinsic evidence is admissible even when the court believes the terms of a contract are unambiguous:

> Washington courts apply the "context rule" of contract interpretation in ascertaining the parties' intent. *Shafer,* 76

> Wash.App. at 275, 883 P.2d 1387. This rule "allows a court, while viewing the contract as a whole, to consider extrinsic evidence, such as the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties' respective interpretations." *Shafer,* 76 Wash.App. at 275, 883 P.2d 1387. "**The 'context rule' applies even when the disputed provision is unambiguous**." *Shafer,* 76 Wash.App. at 275, 883 P.2d 1387.

Roats v. Blakely Island Maint. Comm'n, Inc., 169 Wn. App. 263, 274, 279 P.3d 943, 948 (2012) (emphasis added). Although this controlling rule was pointed out to the court, the court failed to apply it and refused to consider Plaintiffs' evidence. (See RP at 31:14-32:15; Order Granting State's Motion to Strike [CP 538-539].) This was error.

The court's order striking Plaintiffs' evidence, made in conjunction with its order for summary dismissal of Plaintiffs' Complaint, is subject to de novo review. See *Cornish College of the Arts,* 158 Wn. App. at 215 (summary judgment motion) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). Moreover, the court's misapplication of the parol evidence rule was an error of substantive law, not an evidentiary ruling. "The parol evidence rule is not a rule of evidence, but is a rule of substantive law." *Buyken v. Ertner*, 33 Wn.2d 334, 342, 205 P.2d 628 (1949) (citation omitted); *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 505, 761 P.2d 77 (1988). Accordingly, de novo review applies.

Plaintiffs' evidence was relevant and admissible under the context rule. It was also relevant to determining the meaning of specific lease terms and to present "hypothetical" facts in response to the State's motion for judgment on Plaintiffs' First Claim for anticipatory repudiation and breach of contract. The evidence was clearly relevant in response to the State's motion for judgment on Plaintiffs' Second Claim for breach of the implied covenant of good faith and fair dealing because it showed that, if the State had the power to terminate the leases (which Plaintiffs dispute), it exercised that power in bad faith.

1. The Evidence Is Admissible Under the Context Rule

The evidence showed the circumstances under which the leases were made: it showed that while the LCB had been discussing and making contingency plans for privatization for five years before I-1183 was adopted, it made no provision for privatization in the leases. These circumstances were relevant and admissible under the context rule. The State asserted as an affirmative defense that "the purpose of the leases were [sic] frustrated and/or performance made impossible as a matter of law, due to the effect of I-1183." (State's Answer at 10:6-7 [CP 52].) If an event that frustrates performance of a lease is foreseeable, and there is no provision in the lease addressing it, an inference arises that the

promisor assumed the risk of that event. *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 96 Wn.2d at 563. Although this rule was called to the trial court's attention [CP 110], the court refused to consider Plaintiffs' evidence showing the State's foreknowledge of privatization.

Evidence of the subsequent conduct of the parties is also admissible under the context rule, and important here. The evidence shows that, after I-1183 was adopted, the LCB acknowledged internally that the law required it to auction the right to operate a liquor store at each existing store location (the Existing Location Requirement), and that it understood that the Existing Location Requirement protected the interests of state store landlords. The evidence then shows, however, that the LCB willfully disregarded the Existing Location Requirement, inventing a Relocation Policy that had no basis in the statute in order to drive up auction prices. It did so fully cognizant that this "could be interpreted as violating the intent of I-1183." (McLaughlin Exh. 17 at 006 [CP 361].)

The record shows that LCB management quashed several attempts by its own Store Leasing Manager to provide truthful information to state store landlords about the upcoming auction, even as the agency internally estimated that buying out unexpired store leases would cost more than $50 million. It shows further that to comply with the Existing Location Requirement and the directive to dispose of "all assets," staff suggested

"bundling" store leases with liquor rights at auction (i.e., assigning leases) and recommended a procedure whereby landlords contractually unable to accept such assignments could opt out, but that those recommendations were rejected by LCB management. (Meissner Exh. 7 at 13 [CP 383]; Kohler Dep. at 34:7-14, 35:22-36:4 [CP 148-149].)

There was no proper basis for striking this evidence of the LCB's subsequent contractual conduct. The State's numerous admissions show its understanding of its obligations, and the landlords' rights, under both the leases and I-1183. Nothing could have been more relevant in response to the State's motion for summary dismissal of Plaintiffs' claims.

For the same reasons, the evidence was relevant in assessing the reasonableness of the parties' respective interpretations of the leases. This is another recognized basis for admitting extrinsic evidence under the context rule. In the present case, it is impossible for the Court to assess the reasonableness of the parties' interpretations of the leases without also understanding the requirements of I-1183, since the State contends that I-1183 prevented it from carrying out the leases. The context rule allows the Court to compare the State's prior, internal acknowledgement of its rights and obligations under the law with the position it took in the court below. This is not to show an intention independent of the contracts but to assess the reasonableness of the parties' respective interpretations thereof.

2. The Evidence Is Relevant to Determining the Meaning of Lease Terms

The State's motion to strike radically minimized Plaintiffs' First Claim in an attempt to establish a false predicate for striking Plaintiffs' evidence. The State's truncation of Plaintiffs' claim should have been rejected by the trial court. On a CR 12(c) motion, the "allegations asserted in the complaint are presumed to be true and a court may consider hypothetical facts not included in the record." *Tenore v. A.T.&T. Wireless Services,* 136 Wn.2d 322, 330, 962 P.3d 104 (1995). In *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978), the court reversed the dismissal of a wrongful death claim against the City of Seattle, finding that hypothetical facts not included in the pleading precluded dismissal:

> Because the legal standard is whether any state of facts supporting a valid claim can be conceived, there can be no prejudice or unfairness to a defendant if a court considers specific allegations of the plaintiff to aid in the evaluation of the legal sufficiency of plaintiff's claim.

Id. at 675. In that case, the hypothetical allegations were made for the first time on appeal, and the court still held them relevant.

If a court can consider hypothetical facts, it can certainly consider proved facts. On the State's CR 12(c) motion, the trial court was required to take the allegations of Plaintiffs' Complaint as true and consider as additional, "hypothetical" facts the admissions of the LCB presented by

the evidence. Unless it appeared "beyond doubt" that Plaintiffs could prove no set of facts consistent with the Complaint that would entitle them to relief, the motion had to be denied. *Tenore*, 136 Wn.2d at 330.

With this in mind, it is apparent that evidence showing the LCB's internal understanding and interpretation of its lease obligations to store landlords after the passage of I-1183 was relevant to the meaning of specific words and terms used in Section 3 of the leases. That section states that termination may occur only if the enactment of any law shall "prevent" either party from "complying with or carrying out" the terms of the lease. The evidence Plaintiffs submitted, viewed through the prism of the CR 12(c) standard and taken in the light most favorable to Plaintiffs, showed that, at least internally, the LCB considered assigning leases to bid winners unless landlords opted out due to contractual obligations to other parties; computed what it would cost to buy out unexpired leases and pay landlords for unamortized tenant improvements; and acknowledged internally that I-1183 imposed an Existing Location Requirement which, if followed, would have permitted the leases to be honored and thus would not have "prevented" the LCB from "complying with or carrying out" the lease terms. This evidence and the reasonable inferences from it are relevant and admissible in determining the meaning of specific words and terms used in Section 3 of the leases. The meaning suggested by the

evidence is consistent with and does not add to, subtract from, modify or contradict the terms of the leases, for all the reasons discussed above.

3. The Evidence Is Relevant to Plaintiffs' Claim for Breach of the Duty of Good Faith and Fair Dealing

In moving to strike the evidence supporting Plaintiffs' Second Claim, the State again failed to acknowledge the full scope of the claim and the allegations made. Most critically, the State ignored the heart of Plaintiffs' Second Claim that, in deliberately misinterpreting I-1183 to eviscerate the statutory protection accorded to store landlords, the LCB acted in bad faith.

The State argued below from cases rejecting a "free-floating" duty of good faith. Those cases are inapposite. Plaintiffs allege that the LCB breached its duty of good faith and fair dealing in relation to the performance of a specific contractual provision – Section 3. If it had the power to terminate, the LCB nonetheless was not privileged to "stomp" on the rights of landlords by deliberately contravening express requirements of I-1183. The LCB was obliged to follow the law, including the Existing Location Requirement and the direction to sell "all assets" over which the LCB had power of disposition. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). Instead, the agency devised and implemented an entirely different scheme than the statute mandated.

The new scheme substantially disadvantaged the store landlords, sacrificing their legally protected interests so the agency could make more money.

The evidence Plaintiffs submitted is directly relevant to whether the State acted in bad faith in the way that it exercised its contractual termination powers, assuming those powers were even triggered by I-1183. Under the standards applicable to either a CR 12(c) motion or a CR 56 motion, the evidence clearly creates genuine issues of fact as to whether the State breached the covenant of good faith and fair dealing in its performance of the lease terms.

E. Plaintiffs' Alternative Constitutional Claims Should Not Have Been Dismissed

The State's motion for judgment on the pleadings included just one sentence addressing Plaintiffs' Contract Clause claims and one sentence addressing Plaintiffs' Takings Clause claims. The State argued that no impairment of contract or taking could have occurred because the Store Leases terminated. (See State's Motion at 16:6-16 [CP 69].) In their opposition brief and at hearing, Plaintiffs argued that these two sentences did not begin to satisfy the State's burden on a motion for summary dismissal. (Response to State's Motion at 25 n.5 [CP 117]; RP 45:21-46:2.) Despite acknowledging that "I haven't seen briefing on the

constitutional claims" (RP 35:17-18), the trial court summarily dismissed those claims. [CP 536-537] This was error.

First, Plaintiffs' leases were not terminated by operation of I-1183; they were supposed to be sold and assigned to bid winners as discussed above. Accordingly, the State's termination was wrongful. "[W]hen a state interferes with its own contracts, those impairments 'face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties.'" *Pierce County v. State*, 159 Wn.2d 16, 28, 148 P.3d 1002 (2006) (citation omitted). In this case, the trial court conducted *no* examination of the State's actions, refusing even to consider uncontroverted evidence establishing the State's knowing and deliberate decision to eliminate, by agency fiat, the Existing Location Requirement imposed by the voters in I-1183. The court's dismissal of Plaintiffs' Impairment of Contract claims was particularly egregious in light of the State's admitted failure to "develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid," as directed in Section 303 of I-1183. The State argued below that Plaintiffs should have brought a suit against the Department of Revenue (RP 34:9-16), but this was a red herring: defendant is the State of Washington and Plaintiffs

alleged that the Department of Revenue failed to implement the required compensation scheme. (Complaint ¶ 14(g) [CP 7].)

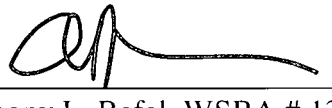
Plaintiffs' Takings Claims should not have been dismissed either. Agency regulation may constitute a taking "if it 'goes beyond preventing a public *harm* [to] actually enhance [ ] a publicly owned right in property.'" *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 14, 829 P.2d 765 (1992) (citing *Presbytery of Seattle v. Seattle*, 114 Wn.2d 320, 329, 787 P.2d 907 (1990) (emphasis in original)). Here, the LCB enhanced public ownership of the liquor rights the LCB was selling by public auction by diminishing the property rights of state store landlords. Plaintiffs should have been permitted to pursue their proper remedies: either invalidation of I-1183 or just compensation. (See Complaint, Prayer for Relief ¶¶ B & C [CP 18].)

V. CONCLUSION

The trial court's orders should be reversed and the case remanded for trial.

DATED: June 17, 2013.

RAFEL LAW GROUP PLLC

By 

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Attorneys for Appellants

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COURT OF APPEALS
DIVISION II
2013 JUN 19 PM 12:00
STATE OF WASHINGTON
BY
DEPUTY

44509-3-II

UNITED STATES COURT OF APPEALS
DIVISION II

FEDWAY MARKETPLACE WEST, LLC, a Washington limited liability company, and GARLAND & MARKET INVESTORS, LLC, a Washington limited liability company, on behalf of themselves and all others similarly situated,

Appellants,

v.

THE STATE OF WASHINGTON,

Respondent.

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON
2013 JUN 17 PM 3:57

ORIGINAL

The undersigned hereby certifies as follows:

1. I am over 18 years of age and a U.S. citizen. I am employed as a legal assistant by the law firm of Rafel Law Group PLLC.

2. I certify that on Monday, June 17, 2013, I caused a copy of the following documents to be served via the method(s) listed below on the following parties:

DOCUMENTS

1. Opening Brief of Appellants Fedway Marketplace West, LLC and Garland & Market Investors, LLC;

2. Appendix 1 to Opening Brief of Appellants; and

3. Certificate of Service.

Party	SERVICE VIA
Mr. Brian Faller Ms. Mary Tennyson Assistant Attorney General 1110 Capitol Way South P. O. Box 40119 Olympia, WA 98504-0119 brianf@atg.wa.gov; maryt@ atg.wa.gov; beckym@ atg.wa.gov *All Counsel State of Washington*	[X] Email [] U.S. Mail [] Messenger [] Fax

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this certificate was executed on June 17, 2013, at Seattle, Washington.

Leah Katzer

44509-3-II

UNITED STATES COURT OF APPEALS
DIVISION II

FEDWAY MARKETPLACE WEST, LLC, a Washington limited liability company, and GARLAND & MARKET INVESTORS, LLC, a Washington limited liability company, on behalf of themselves and all others similarly situated,

Appellants,

v.

THE STATE OF WASHINGTON,

Respondent.

APPENDIX 1 TO OPENING BRIEF OF APPELLANTS

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ORIGINAL

INITIATIVE MEASURE _____

AN ACT Relating to liquor; amending RCW 66.24.360, 82.08.150, 66.08.050, 66.08.060, 66.20.010, 66.20.160, 66.24.310, 66.24.380, 66.28.030, 66.24.540, 66.24.590, 66.28.060, 66.28.070, 66.28.170, 66.28.180, 66.28.190, 66.28.280, 66.04.010, 43.19.19054, 66.08.020, 66.08.026, 66.08.030, 66.24.145, 66.24.160, 66.32.010, 66.44.120, 66.44.150, 66.44.340, 19.126.010, and 19.126.040; reenacting and amending RCW 66.28.040 and 19.126.020; adding new sections to chapter 66.24 RCW; adding new sections to chapter 66.28 RCW; creating new sections; repealing RCW 66.08.070, 66.08.075, 66.08.160, 66.08.165, 66.08.166, 66.08.167, 66.08.220, 66.08.235, 66.16.010, 66.16.040, 66.16.041, 66.16.050, 66.16.060, 66.16.070, 66.16.100, 66.16.110, 66.16.120, and 66.28.045; contingently repealing ESSB 5942, 2011 1st sp.s. c ... ss 1 through 10; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

PART I

LICENSED SALE OF SPIRITS

NEW SECTION. **Sec. 101.** (1) The people of the state of Washington, in enacting this initiative measure, find that the state government monopoly on liquor distribution and liquor stores in Washington and the state government regulations that arbitrarily restrict the wholesale distribution and pricing of wine are outdated, inefficient, and costly to local taxpayers, consumers, distributors, and retailers. Therefore, the people wish to privatize and modernize both wholesale distribution and retail sales of liquor and remove outdated restrictions on the wholesale distribution of wine by enacting this initiative.

(2) This initiative will:

(a) Privatize and modernize wholesale distribution and retail sales of liquor in Washington state in a manner that will reduce state government costs and provide increased funding for state and local government services, while continuing to strictly regulate the distribution and sale of liquor;

(b) Get the state government out of the commercial business of distributing, selling, and promoting the sale of liquor, allowing the state to focus on the more appropriate government role of enforcing liquor laws and protecting public health and safety concerning all alcoholic beverages;

(c) Authorize the state to auction off its existing state liquor distribution and state liquor store facilities and equipment;

(d) Allow a private distributor of alcohol to get a license to distribute liquor if that distributor meets the requirements set by the Washington state liquor control board and is approved for a license by the board and create provisions to promote investments by private distributors;

(e) Require private distributors who get licenses to distribute liquor to pay ten percent of their gross spirits revenues to the state during the first two years and five percent of their gross spirits revenues to the state after the first two years;

(f) Allow for a limited number of retail stores to sell liquor if they meet public safety requirements set by this initiative and the liquor control board;

(g) Require that a retail store must have ten thousand square feet or more of fully enclosed retail space within a single structure in order to get a license to sell liquor, with limited exceptions;

(h) Require a retail store to demonstrate to state regulators that it can effectively prevent sales of alcohol to minors in order to get a license to sell liquor;

(i) Ensure that local communities have input before a liquor license can be issued to a local retailer or distributor and maintain all local zoning requirements and authority related to the location of liquor stores;

(j) Require private retailers who get licenses to sell liquor to pay seventeen percent of their gross spirits revenues to the state;

(k) Maintain the current distribution of liquor revenues to local governments and dedicate a portion of the new revenues raised from liquor license fees to increase funding for local public safety programs, including police, fire, and emergency services in communities throughout the state;

(l) Make the standard fines and license suspension penalties for selling liquor to minors twice as strong as the existing fines and penalties for selling beer or wine to minors;

(m) Make requirements for training and supervision of employees selling spirits at retail more stringent than what is now required for sales of beer and wine;

(n) Update the current law on wine distribution to allow wine distributors and wineries to give volume discounts on the wholesale price of wine to retail stores and restaurants; and

(o) Allow retailers and restaurants to distribute wine to their own stores from a central warehouse.

NEW SECTION. **Sec. 102.** A new section is added to chapter 66.24 RCW to read as follows:

(1) The holder of a spirits distributor license or spirits retail license issued under this title may commence sale of spirits upon issuance thereof, but in no event earlier than March 1, 2012, for distributors, or June 1, 2012, for retailers. The board must complete application processing by those dates of all complete applications for

spirits licenses on file with the board on or before sixty days from the effective date of this section.

(2) The board must effect orderly closure of all state liquor stores no later than June 1, 2012, and must thereafter refrain from purchase, sale, or distribution of liquor, except for asset sales authorized by this act.

(3) The board must devote sufficient resources to planning and preparation for sale of all assets of state liquor stores and distribution centers, and all other assets of the state over which the board has power of disposition, including without limitation goodwill and location value associated with state liquor stores, with the objective of depleting all inventory of liquor by May 31, 2012, and closing all other asset sales no later than June 1, 2013. The board, in furtherance of this subsection, may sell liquor to spirits licensees.

(4)(a) Disposition of any state liquor store or distribution center assets remaining after June 1, 2013, must be managed by the department of revenue.

(b) The board must obtain the maximum reasonable value for all asset sales made under this section.

(c) The board must sell by auction open to the public the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises. Such right must be freely alienable and subject to all state and local zoning and land use requirements applicable to the property. Acquisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store and does not confer any privilege conferred by a spirits retail license. Holding the rights does not require the holder of the right to operate a liquor-licensed business or apply for a liquor license.

(5) All sales proceeds under this section, net of direct sales expenses and other transition costs authorized by this section, must be deposited into the liquor revolving fund.

(6)(a) The board must complete the orderly transition from the current state-controlled system to the private licensee system of spirits retailing and distribution as required under this chapter by June 1, 2012.

(b) The transition must include, without limitation, a provision for applying operating and asset sale revenues of the board to just and reasonable measures to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts for supply by the board of distilled spirits, taking into account present value of issuance of a spirits retail license to the holder of such interest. The provision may extend beyond the time for completion of transition to a spirits licensee system.

(c) Purchases by the federal government from any licensee of the board of spirits for resale through commissaries at military installations are exempt from sales tax based on selling price levied by RCW 82.08.150.

NEW SECTION. **Sec. 103.** A new section is added to chapter 66.24 RCW to read as follows:

(1) There is a spirits retail license to: Sell spirits in original containers to consumers for consumption off the licensed premises and to permit holders; sell spirits in original containers to retailers licensed to sell spirits for consumption on the premises, for resale at their licensed premises according to the terms of their licenses, although no single sale may exceed twenty-four liters, unless the sale is by a licensee that was a contract liquor store manager of a contract liquor store at the location of its spirits retail licensed premises from which it makes such sales; and export spirits.

(2) For the purposes of this title, a spirits retail license is a retail license, and a sale by a spirits retailer is a retail sale only if not for resale. Nothing in this title authorizes sales by on-sale licensees to other retail licensees. The board must establish by rule an obligation of on-sale spirits retailers to:

(a) Maintain a schedule by stock-keeping unit of all their purchases of spirits from spirits retail licensees, indicating the identity of the seller and the quantities purchased; and

(b) Provide, not more frequently than quarterly, a report for each scheduled item containing the identity of the purchasing on-premise licensee and the quantities of that scheduled item purchased since any preceding report to:

(i) A distributor authorized by the distiller to distribute a scheduled item in the on-sale licensee's geographic area; or

(ii) A distiller acting as distributor of the scheduled item in the area.

(3)(a) Except as otherwise provided in subsection (c) of this section, the board may issue spirits retail licenses only for premises comprising at least ten thousand square feet of fully enclosed retail space within a single structure, including storerooms and other interior auxiliary areas but excluding covered or fenced exterior areas, whether or not attached to the structure, and only to applicants that the board determines will maintain systems for inventory management, employee training, employee supervision, and physical security of the product substantially as effective as those of stores currently operated by the board with respect to preventing sales to or pilferage by underage or inebriated persons.

(b) License issuances and renewals are subject to RCW 66.24.010 and the regulations promulgated thereunder, including without limitation rights of cities, towns, county legislative authorities, the public, churches, schools, and public institutions to object to or prevent

issuance of local liquor licenses. However, existing grocery premises licensed to sell beer and/or wine are deemed to be premises "now licensed" under RCW 66.24.010(9)(a) for the purpose of processing applications for spirits retail licenses.

(c) The board may not deny a spirits retail license to an otherwise qualified contract liquor store at its contract location or to the holder of former state liquor store operating rights sold at auction under section 102 of this act on the grounds of location, nature, or size of the premises to be licensed. The board shall not deny a spirits retail license to applicants that are not contract liquor stores or operating rights holders on the grounds of the size of the premises to be licensed, if such applicant is otherwise qualified and the board determines that:

(i) There is no retail spirits license holder in the trade area that the applicant proposes to serve;

(ii) The applicant meets, or upon licensure will meet, the operational requirements established by the board by rule; and

(iii) The licensee has not committed more than one public safety violation within the three years preceding application.

(d) A retailer authorized to sell spirits for consumption on or off the licensed premises may accept delivery of spirits at its licensed premises or at one or more warehouse facilities registered with the board, which facilities may also warehouse and distribute nonliquor items, and from which the retailer may deliver to its own licensed premises and, pursuant to sales permitted under subsection (1) of this section:

(i) To other retailer premises licensed to sell spirits for consumption on the licensed premises;

(ii) To other registered facilities; or

(iii) To lawful purchasers outside the state. The facilities may be registered and utilized by associations, cooperatives, or comparable

groups of retailers, including at least one retailer licensed to sell spirits.

(4) Each spirits retail licensee must pay to the board, for deposit into the liquor revolving fund, a license issuance fee equivalent to seventeen percent of all spirits sales revenues under the license, exclusive of taxes collected by the licensee and of sales of items on which a license fee payable under this section has otherwise been incurred. The board must establish rules setting forth the timing of such payments and reporting of sales dollar volume by the licensee, with payments required quarterly in arrears. The first payment is due October 1, 2012.

(5) In addition to the payment required under subsection (4) of this section, each licensee must pay an annual license renewal fee of one hundred sixty-six dollars. The board must periodically review and adjust the renewal fee as may be required to maintain it as comparable to annual license renewal fees for licenses to sell beer and wine not for consumption on the licensed premises. If required by law at the time, any increase of the annual renewal fee becomes effective only upon ratification by the legislature.

(6) As a condition to receiving and renewing a retail spirits license the licensee must provide training as prescribed by the board by rule for individuals who sell spirits or who manage others who sell spirits regarding compliance with laws and regulations regarding sale of spirits, including without limitation the prohibitions against sale of spirits to individuals who are underage or visibly intoxicated. The training must be provided before the individual first engages in the sale of spirits and must be renewed at least every five years. The licensee must maintain records documenting the nature and frequency of the training provided. An employee training program is presumptively sufficient if it incorporates a "responsible vendor program" promulgated by the board.

(7) The maximum penalties prescribed by the board in WAC 314-29-020 through 314-29-040 relating to fines and suspensions are doubled for violations relating to the sale of spirits by retail spirits licensees.

(8)(a) The board must promulgate regulations concerning the adoption and administration of a compliance training program for spirits retail licensees, to be known as a "responsible vendor program," to reduce underage drinking, encourage licensees to adopt specific best practices to prevent sales to minors, and provide licensees with an incentive to give their employees on-going training in responsible alcohol sales and service.

(b) Licensees who join the responsible vendor program under this section and maintain all of the program's requirements are not subject to the doubling of penalties provided in this section for a single violation in any period of twelve calendar months.

(c) The responsible vendor program must be free, voluntary, and self-monitoring.

(d) To participate in the responsible vendor program, licensees must submit an application form to the board. If the application establishes that the licensee meets the qualifications to join the program, the board must send the licensee a membership certificate.

(e) A licensee participating in the responsible vendor program must at a minimum:

(i) Provide on-going training to employees;

(ii) Accept only certain forms of identification for alcohol sales;

(iii) Adopt policies on alcohol sales and checking identification;

(iv) Post specific signs in the business; and

(v) Keep records verifying compliance with the program's requirements.

Sec. 104. RCW 66.24.360 and 2011 c 119 s 203 are each amended to read as follows:

(1) There ((~~shall be~~)) is a ((~~beer and/or wine retailer's license to be designated as a~~)) grocery store license to sell wine and/or beer, including without limitation strong beer((~~, and/or wine~~)) at retail in ((~~bottles, cans, and~~)) original containers, not to be consumed upon the premises where sold((~~, at any store other than the state liquor stores~~)).

((~~(1)~~)) (2) There is a wine retailer reseller endorsement of a grocery store license, to sell wine at retail in original containers to retailers licensed to sell wine for consumption on the premises, for resale at their licensed premises according to the terms of the license. However, no single sale may exceed twenty-four liters, unless the sale is made by a licensee that was a contract liquor store manager of a contract-operated liquor store at the location from which such sales are made. For the purposes of this title, a grocery store license is a retail license, and a sale by a grocery store licensee with a reseller endorsement is a retail sale only if not for resale.

(3) Licensees obtaining a written endorsement from the board may also sell malt liquor in kegs or other containers capable of holding less than five and one-half gallons of liquid.

((~~(2)~~)) (4) The annual fee for the grocery store license is one hundred fifty dollars for each store.

((~~(3)~~)) (5) The annual fee for the wine retailer reseller endorsement is one hundred sixty-six dollars for each store.

(6) The board ((~~shall~~)) must issue a restricted grocery store license authorizing the licensee to sell beer and only table wine, if the board finds upon issuance or renewal of the license that the sale of strong beer or fortified wine would be against the public interest. In determining the public interest, the board ((~~shall~~)) must consider at least the following factors:

(a) The likelihood that the applicant will sell strong beer or fortified wine to persons who are intoxicated;

(b) Law enforcement problems in the vicinity of the applicant's establishment that may arise from persons purchasing strong beer or fortified wine at the establishment; and

(c) Whether the sale of strong beer or fortified wine would be detrimental to or inconsistent with a government-operated or funded alcohol treatment or detoxification program in the area.

If the board receives no evidence or objection that the sale of strong beer or fortified wine would be against the public interest, it ((~~shall~~)) must issue or renew the license without restriction, as applicable. The burden of establishing that the sale of strong beer or fortified wine by the licensee would be against the public interest is on those persons objecting.

((~~(4)~~)) (7) Licensees holding a grocery store license must maintain a minimum three thousand dollar inventory of food products for human consumption, not including pop, beer, strong beer, or wine.

((~~(5)~~)) (8) A grocery store licensee with a wine retailer reseller endorsement may accept delivery of wine at its licensed premises or at one or more warehouse facilities registered with the board, which facilities may also warehouse and distribute nonliquor items, and from which it may deliver to its own licensed premises and, pursuant to sales permitted by this title, to other licensed premises, to other registered facilities, or to lawful purchasers outside the state. Facilities may be registered and utilized by associations, cooperatives, or comparable groups of grocery store licensees.

(9) Upon approval by the board, the grocery store licensee may also receive an endorsement to permit the international export of beer, strong beer, and wine.

(a) Any beer, strong beer, or wine sold under this endorsement must have been purchased from a licensed beer or wine distributor licensed to do business within the state of Washington.

(b) Any beer, strong beer, and wine sold under this endorsement must be intended for consumption outside the state of Washington and the United States and appropriate records must be maintained by the licensee.

(c) Any beer, strong beer, or wine sold under this ((~~license~~)) endorsement must be sold at a price no less than the acquisition price paid by the holder of the license.

(d) The annual cost of this endorsement is five hundred dollars and is in addition to the license fees paid by the licensee for a grocery store license.

((~~(6)~~)) (10) A grocery store licensee holding a snack bar license under RCW 66.24.350 may receive an endorsement to allow the sale of confections containing more than one percent but not more than ten percent alcohol by weight to persons twenty-one years of age or older.

NEW SECTION. **Sec. 105.** A new section is added to chapter 66.24 RCW to read as follows:

(1) There is a license for spirits distributors to (a) sell spirits purchased from manufacturers, distillers, or suppliers including, without limitation, licensed Washington distilleries, licensed spirits importers, other Washington spirits distributors, or suppliers of foreign spirits located outside of the United States, to spirits retailers including, without limitation, spirits retail licensees, special occasion license holders, interstate common carrier license holders, restaurant spirits retailer license holders, spirits, beer, and wine private club license holders, hotel license holders, sports entertainment facility license holders, and spirits, beer, and wine nightclub license holders, and to other spirits distributors; and (b) export the same from the state.

(2) By January 1, 2012, the board must issue spirits distributor licenses to all applicants who, upon the effective date of this

section, have the right to purchase spirits from a spirits manufacturer, spirits distiller, or other spirits supplier for resale in the state, or are agents of such supplier authorized to sell to licensees in the state, unless the board determines that issuance of a license to such applicant is not in the public interest.

(3)(a) As limited by (b) of this subsection and subject to (c) of this subsection, each spirits distributor licensee must pay to the board for deposit into the liquor revolving fund, a license issuance fee calculated as follows:

(i) In each of the first two years of licensure, ten percent of the total revenue from all the licensee's sales of spirits made during the year for which the fee is due, respectively; and

(ii) In the third year of licensure and each year thereafter, five percent of the total revenue from all the licensee's sales of spirits made during the year for which the fee is due, respectively.

(b) The fee required under this subsection (3) is calculated only on sales of items which the licensee was the first spirits distributor in the state to have received:

(i) In the case of spirits manufactured in the state, from the distiller; or

(ii) In the case of spirits manufactured outside the state, from an authorized out-of-state supplier.

(c) By March 31, 2013, all persons holding spirits distributor licenses on or before March 31, 2013, must have paid collectively one hundred fifty million dollars or more in spirits distributor license fees. If the collective payment through March 31, 2013, totals less than one hundred fifty million dollars, the board must, according to rules adopted by the board for the purpose, collect by May 31, 2013, as additional spirits distributor license fees the difference between one hundred fifty million dollars and the actual receipts, allocated among persons holding spirits distributor licenses at any time on or before

March 31, 2013, ratably according to their spirits sales made during calendar year 2012. Any amount by which such payments exceed one hundred fifty million dollars by March 31, 2013, must be credited to future license issuance fee obligations of spirits distributor licensees according to rules adopted by the board.

(d) A retail licensee selling for resale must pay a distributor license fee under the terms and conditions in this section on resales of spirits the licensee has purchased on which no other distributor license fee has been paid. The board must establish rules setting forth the frequency and timing of such payments and reporting of sales dollar volume by the licensee, with payments due quarterly in arrears.

(e) No spirits inventory may be subject to calculation of more than a single spirits distributor license issuance fee.

(4) In addition to the payment set forth in subsection (3) of this section, each spirits distributor licensee renewing its annual license must pay an annual license renewal fee of one thousand three hundred twenty dollars for each licensed location.

(5) There is no minimum facility size or capacity for spirits distributor licenses, and no limit on the number of such licenses issued to qualified applicants. License applicants must provide physical security of the product that is substantially as effective as the physical security of the distribution facilities currently operated by the board with respect to preventing pilferage. License issuances and renewals are subject to RCW 66.24.010 and the regulations promulgated thereunder, including without limitation rights of cities, towns, county legislative authorities, the public, churches, schools, and public institutions to object to or prevent issuance of local liquor licenses. However, existing distributor premises licensed to sell beer and/or wine are deemed to be premises "now licensed" under RCW 66.24.010(9)(a) for the purpose of processing applications for spirits distributor licenses.

Sec. 106. RCW 82.08.150 and 2009 c 479 s 65 are each amended to read as follows:

(1) There is levied and ((~~shall be~~)) collected a tax upon each retail sale of spirits in the original package at the rate of fifteen percent of the selling price((~~. The tax imposed in this subsection shall apply to all such sales including sales by the Washington state liquor stores and agencies, but excluding sales to spirits, beer, and wine restaurant licensees~~)).

(2) There is levied and ((~~shall be~~)) collected a tax upon each sale of spirits in the original package at the rate of ten percent of the selling price on sales by ((~~Washington state liquor stores and agencies to spirits, beer, and wine restaurant licensees~~)) a spirits distributor licensee or other licensee acting as a spirits distributor pursuant to Title 66 RCW to restaurant spirits retailers.

(3) There is levied and ((~~shall be~~)) collected an additional tax upon each ((~~retail~~)) sale of spirits in the original package by a spirits distributor licensee or other licensee acting as a spirits distributor pursuant to Title 66 RCW to a restaurant spirits retailer and upon each retail sale of spirits in the original package by a licensee of the board at the rate of one dollar and seventy-two cents per liter. ((~~The additional tax imposed in this subsection shall apply to all such sales including sales by Washington state liquor stores and agencies, and including sales to spirits, beer, and wine restaurant licensees.~~))

(4) An additional tax is imposed equal to fourteen percent multiplied by the taxes payable under subsections (1), (2), and (3) of this section.

(5) An additional tax is imposed upon each ((~~retail~~)) sale of spirits in the original package by a spirits distributor licensee or other licensee acting as a spirits distributor pursuant to Title 66 RCW to a restaurant spirits retailer and upon each retail sale of spirits

in the original package by a licensee of the board at the rate of seven cents per liter. ((~~The additional tax imposed in this subsection shall apply to all such sales including sales by Washington state liquor stores and agencies, and including sales to spirits, beer, and wine restaurant licensees.~~)) All revenues collected during any month from this additional tax ((~~shall~~)) must be deposited in the state general fund by the twenty-fifth day of the following month.

(6)(a) An additional tax is imposed upon retail sale of spirits in the original package at the rate of ((~~one and seven-tenths percent of the selling price through June 30, 1995, two and six-tenths percent of the selling price for the period July 1, 1995, through June 30, 1997, and~~)) three and four-tenths percent of the selling price ((~~thereafter. This additional tax applies to all such sales including sales by Washington state liquor stores and agencies, but excluding sales to spirits, beer, and wine restaurant licensees~~)).

(b) An additional tax is imposed upon retail sale of spirits in the original package to a restaurant spirits retailer at the rate of ((~~one and one-tenth percent of the selling price through June 30, 1995, one and seven-tenths percent of the selling price for the period July 1, 1995, through June 30, 1997, and~~)) two and three-tenths percent of the selling price ((~~thereafter. This additional tax applies to all such sales to spirits, beer, and wine restaurant licensees~~)).

(c) An additional tax is imposed upon each ((~~retail~~)) sale of spirits in the original package by a spirits distributor licensee or other licensee acting as a spirits distributor pursuant to Title 66 RCW to a restaurant spirits retailer and upon each retail sale of spirits in the original package by a licensee of the board at the rate of ((~~twenty cents per liter through June 30, 1995, thirty cents per liter for the period July 1, 1995, through June 30, 1997, and~~)) forty-one cents per liter ((~~thereafter. This additional tax applies to all such~~

~~sales including sales by Washington state liquor stores and agencies, and including sales to spirits, beer, and wine restaurant licensees~~)).

(d) All revenues collected during any month from additional taxes under this subsection ((~~shall~~)) must be deposited in the state general fund by the twenty-fifth day of the following month.

(7)(a) An additional tax is imposed upon each retail sale of spirits in the original package at the rate of one dollar and thirty-three cents per liter. ((~~This additional tax applies to all such sales including sales by Washington state liquor stores and agencies, but excluding sales to spirits, beer, and wine restaurant licensees.~~))

(b) All revenues collected during any month from additional taxes under this subsection ((~~shall~~)) must be deposited by the twenty-fifth day of the following month into the general fund.

(8) The tax imposed in RCW 82.08.020 ((~~shall~~)) does not apply to sales of spirits in the original package.

(9) The taxes imposed in this section ((~~shall~~)) must be paid by the buyer to the seller, and each seller ((~~shall~~)) must collect from the buyer the full amount of the tax payable in respect to each taxable sale under this section. The taxes required by this section to be collected by the seller ((~~shall~~)) must be stated separately from the selling price, and for purposes of determining the tax due from the buyer to the seller, it ((~~shall be~~)) is conclusively presumed that the selling price quoted in any price list does not include the taxes imposed by this section. Sellers must report and return all taxes imposed in this section in accordance with rules adopted by the department.

(10) As used in this section, the terms, "spirits" and "package" ((~~shall~~)) have the same meaning ((~~ascribed to them~~)) as provided in chapter 66.04 RCW.

Sec. 107. RCW 66.08.050 and 2011 c 186 s 2 are each amended to read as follows:

The board, subject to the provisions of this title and the rules, ((~~shall~~)) must:

(1) ((~~Determine the localities within which state liquor stores shall be established throughout the state, and the number and situation of the stores within each locality;~~

~~(2) Appoint in cities and towns and other communities, in which no state liquor store is located, contract liquor stores. In addition, the board may appoint, in its discretion, a manufacturer that also manufactures liquor products other than wine under a license under this title, as a contract liquor store for the purpose of sale of liquor products of its own manufacture on the licensed premises only. Such contract liquor stores shall be authorized to sell liquor under the guidelines provided by law, rule, or contract, and such contract liquor stores shall be subject to such additional rules and regulations consistent with this title as the board may require. Sampling on contract store premises is permitted under this act;~~

~~(3) Establish all necessary warehouses for the storing and bottling, diluting and rectifying of stocks of liquors for the purposes of this title;~~

~~(4) Provide for the leasing for periods not to exceed ten years of all premises required for the conduct of the business; and for remodeling the same, and the procuring of their furnishings, fixtures, and supplies; and for obtaining options of renewal of such leases by the lessee. The terms of such leases in all other respects shall be subject to the direction of the board;~~

~~(5)~~)) Determine the nature, form and capacity of all packages to be used for containing liquor kept for sale under this title;

((~~(6)~~)) (2) Execute or cause to be executed, all contracts, papers, and documents in the name of the board, under such regulations as the board may fix;

((~~(7)~~)) (3) Pay all customs, duties, excises, charges and obligations whatsoever relating to the business of the board;

((~~(8)~~)) (4) Require bonds from all employees in the discretion of the board, and to determine the amount of fidelity bond of each such employee;

((~~(9)~~)) (5) Perform services for the state lottery commission to such extent, and for such compensation, as may be mutually agreed upon between the board and the commission;

((~~(10)~~)) (6) Accept and deposit into the general fund-local account and disburse, subject to appropriation, federal grants or other funds or donations from any source for the purpose of improving public awareness of the health risks associated with alcohol consumption by youth and the abuse of alcohol by adults in Washington state. The board's alcohol awareness program ((~~shall~~)) must cooperate with federal and state agencies, interested organizations, and individuals to effect an active public beverage alcohol awareness program;

((~~(11)~~)) (7) Perform all other matters and things, whether similar to the foregoing or not, to carry out the provisions of this title, and ((~~shall have~~)) has full power to do each and every act necessary to the conduct of its ((~~business, including all buying, selling, preparation and approval of forms, and every other function of the business whatsoever, subject only to audit by the state auditor: PROVIDED, That the board shall have~~)) regulatory functions, including all supplies procurement, preparation and approval of forms, and every other undertaking necessary to perform its regulatory functions whatsoever, subject only to audit by the state auditor. However, the board has no authority to regulate the content of spoken language on licensed premises where wine and other liquors are served and where there is not

a clear and present danger of disorderly conduct being provoked by such language or to restrict advertising of lawful prices.

Sec. 108. RCW 66.08.060 and 2005 c 231 s 3 are each amended to read as follows:

((~~(1) The board shall not advertise liquor in any form or through any medium whatsoever.~~

~~(2) In-store liquor merchandising is not advertising for the purposes of this section.~~

~~(3)~~)) The board ((~~shall have~~)) has power to adopt any and all reasonable rules as to the kind, character, and location of advertising of liquor.

Sec. 109. RCW 66.20.010 and 2011 c 119 s 213 are each amended to read as follows:

Upon application in the prescribed form being made to any employee authorized by the board to issue permits, accompanied by payment of the prescribed fee, and upon the employee being satisfied that the applicant should be granted a permit under this title, the employee ((~~shall~~)) must issue to the applicant under such regulations and at such fee as may be prescribed by the board a permit of the class applied for, as follows:

(1) Where the application is for a special permit by a physician or dentist, or by any person in charge of an institution regularly conducted as a hospital or sanitorium for the care of persons in ill health, or as a home devoted exclusively to the care of aged people, a special liquor purchase permit, except that the governor may waive the requirement for a special liquor purchase permit under this subsection pursuant to an order issued under RCW 43.06.220(2);

(2) Where the application is for a special permit by a person engaged within the state in mechanical or manufacturing business or in

scientific pursuits requiring alcohol for use therein, or by any private individual, a special permit to purchase alcohol for the purpose named in the permit, except that the governor may waive the requirement for a special liquor purchase permit under this subsection pursuant to an order issued under RCW 43.06.220(2);

(3) Where the application is for a special permit to consume liquor at a banquet, at a specified date and place, a special permit to purchase liquor for consumption at such banquet, to such applicants as may be fixed by the board;

(4) Where the application is for a special permit to consume liquor on the premises of a business not licensed under this title, a special permit to purchase liquor for consumption thereon for such periods of time and to such applicants as may be fixed by the board;

(5) Where the application is for a special permit by a manufacturer to import or purchase within the state alcohol, malt, and other materials containing alcohol to be used in the manufacture of liquor, or other products, a special permit;

(6) Where the application is for a special permit by a person operating a drug store to purchase liquor at retail prices only, to be thereafter sold by such person on the prescription of a physician, a special liquor purchase permit, except that the governor may waive the requirement for a special liquor purchase permit under this subsection pursuant to an order issued under RCW 43.06.220(2);

(7) Where the application is for a special permit by an authorized representative of a military installation operated by or for any of the armed forces within the geographical boundaries of the state of Washington, a special permit to purchase liquor for use on such military installation ((~~at prices to be fixed by the board~~));

(8) Where the application is for a special permit by a vendor that manufactures or sells a product which cannot be effectively presented to potential buyers without serving it with liquor or by a

manufacturer, importer, or distributor, or representative thereof, to serve liquor without charge to delegates and guests at a convention of a trade association composed of licensees of the board, when the said liquor is served in a hospitality room or from a booth in a board-approved suppliers' display room at the convention, and when the liquor so served is for consumption in the said hospitality room or display room during the convention, anything in this title ((~~66 RCW~~)) to the contrary notwithstanding. Any such spirituous liquor ((~~shall~~)) must be purchased from ((~~the board or a spirits, beer, and wine restaurant licensee~~)) a spirits retailer or distributor, and any such ((~~beer and wine shall be~~)) liquor is subject to the taxes imposed by RCW 66.24.290 and 66.24.210;

(9) Where the application is for a special permit by a manufacturer, importer, or distributor, or representative thereof, to donate liquor for a reception, breakfast, luncheon, or dinner for delegates and guests at a convention of a trade association composed of licensees of the board, when the liquor so donated is for consumption at the said reception, breakfast, luncheon, or dinner during the convention, anything in this title ((~~66 RCW~~)) to the contrary notwithstanding. Any such spirituous liquor ((~~shall~~)) must be purchased from ((~~the board or a spirits, beer, and wine restaurant licensee~~)) a spirits retailer or distributor, and any such ((~~beer and wine shall be~~)) liquor is subject to the taxes imposed by RCW 66.24.290 and 66.24.210;

(10) Where the application is for a special permit by a manufacturer, importer, or distributor, or representative thereof, to donate and/or serve liquor without charge to delegates and guests at an international trade fair, show, or exposition held under the auspices of a federal, state, or local governmental entity or organized and promoted by a nonprofit organization, anything in this title ((~~66 RCW~~)) to the contrary notwithstanding. Any such spirituous liquor ((~~shall~~))

must be purchased from ((~~the board~~)) a liquor spirits retailer or distributor, and any such ((~~beer or wine shall be~~)) liquor is subject to the taxes imposed by RCW 66.24.290 and 66.24.210;

(11) Where the application is for an annual special permit by a person operating a bed and breakfast lodging facility to donate or serve wine or beer without charge to overnight guests of the facility if the wine or beer is for consumption on the premises of the facility. "Bed and breakfast lodging facility," as used in this subsection, means a facility offering from one to eight lodging units and breakfast to travelers and guests.

Sec. 110. RCW 66.20.160 and 2005 c 151 s 8 are each amended to read as follows:

((~~Words and phrases~~)) As used in RCW 66.20.160 ((~~to~~)) through 66.20.210, inclusive, ((~~shall have the following meaning:~~

~~"Card of identification" means any one of those cards described in RCW 66.16.040.~~))

"licensee" means the holder of a retail liquor license issued by the board, and includes any employee or agent of the licensee.

((~~"Store employee" means a person employed in a state liquor store to sell liquor.~~))

Sec. 111. RCW 66.24.310 and 2011 c 119 s 301 are each amended to read as follows:

(1)(a) Except as provided in (b) of this subsection, no person ((~~shall~~)) may canvass for, solicit, receive, or take orders for the purchase or sale of liquor, nor contact any licensees of the board in goodwill activities, unless ((~~such person shall be the accredited representative of a person, firm, or corporation holding a certificate of approval issued pursuant to RCW 66.24.270 or 66.24.206, a beer distributor's license, a microbrewer's license, a domestic brewer's~~

~~license, a beer importer's license, a domestic winery license, a wine importer's license, or a wine distributor's license within the state of Washington, or the accredited representative of a distiller, manufacturer, importer, or distributor of spirituous liquor, or foreign produced beer or wine, and shall have~~)) the person is the representative of a licensee or certificate holder authorized by this title to sell liquor for resale in the state and has applied for and received a representative's license.

(b) (a) of this subsection ((~~shall~~)) does not apply to: (i) Drivers who deliver spirits, beer, or wine; or (ii) domestic wineries or their employees.

(2) Every representative's license issued under this title ((~~shall be~~)) is subject to all conditions and restrictions imposed by this title or by the rules and regulations of the board; the board, for the purpose of maintaining an orderly market, may limit the number of representative's licenses issued for representation of specific classes of eligible employers.

(3) Every application for a representative's license must be approved by a holder of a certificate of approval ((~~issued pursuant to RCW 66.24.270 or 66.24.206~~)), a licensed beer distributor, a licensed domestic brewer, a licensed beer importer, a licensed microbrewer, a licensed domestic winery, a licensed wine importer, a licensed wine distributor, or by a distiller, manufacturer, importer, or distributor of ((~~spirituous liquor~~)) spirits, or of foreign-produced beer or wine, as required by the rules and regulations of the board ((~~shall require~~)).

(4) The fee for a representative's license ((~~shall be~~)) is twenty-five dollars per year.

((~~(5) An accredited representative of a distiller, manufacturer, importer, or distributor of spirituous liquor may, after he or she has applied for and received a representative's license, contact retail~~

~~licensees of the board only in goodwill activities pertaining to spirituous liquor products.~~))

Sec. 112. RCW 66.24.380 and 2005 c 151 s 10 are each amended to read as follows:

There ((~~shall be~~)) is a retailer's license to be designated as a special occasion license to be issued to a not-for-profit society or organization to sell spirits, beer, and wine by the individual serving for on-premises consumption at a specified event, such as at picnics or other special occasions, at a specified date and place; fee sixty dollars per day.

(1) The not-for-profit society or organization is limited to sales of no more than twelve calendar days per year. For the purposes of this subsection, special occasion licensees that are "agricultural area fairs" or "agricultural county, district, and area fairs," as defined by RCW 15.76.120, that receive a special occasion license may, once per calendar year, count as one event fairs that last multiple days, so long as alcohol sales are at set dates, times, and locations, and the board receives prior notification of the dates, times, and locations. The special occasion license applicant will pay the sixty dollars per day for this event.

(2) The licensee may sell spirits, beer, and/or wine in original, unopened containers for off-premises consumption if permission is obtained from the board prior to the event.

(3) Sale, service, and consumption of spirits, beer, and wine is to be confined to specified premises or designated areas only.

(4) ((~~Spirituous~~)) Liquor sold under this special occasion license must be purchased ((~~at a state liquor store or contract liquor store without discount at retail prices, including all taxes~~)) from a licensee of the board.

(5) Any violation of this section is a class 1 civil infraction having a maximum penalty of two hundred fifty dollars as provided for in chapter 7.80 RCW.

Sec. 113. RCW 66.28.030 and 2004 c 160 s 10 are each amended to read as follows:

Every domestic distillery, brewery, and microbrewery, domestic winery, certificate of approval holder, licensed liquor importer, licensed wine importer, and licensed beer importer ((~~shall be~~)) is responsible for the conduct of any licensed spirits, beer, or wine distributor in selling, or contracting to sell, to retail licensees, spirits, beer, or wine manufactured by such domestic distillery, brewery, microbrewery, domestic winery, manufacturer holding a certificate of approval, sold by an authorized representative holding a certificate of approval, or imported by such liquor, beer, or wine importer. Where the board finds that any licensed spirits, beer, or wine distributor has violated any of the provisions of this title or of the regulations of the board in selling or contracting to sell spirits, beer, or wine to retail licensees, the board may, in addition to any punishment inflicted or imposed upon such distributor, prohibit the sale of the brand or brands of spirits, beer, or wine involved in such violation to any or all retail licensees within the trade territory usually served by such distributor for such period of time as the board may fix, irrespective of whether the distiller manufacturing such spirits or the liquor importer importing such spirits, brewer manufacturing such beer or the beer importer importing such beer, or the domestic winery manufacturing such wine or the wine importer importing such wine or the certificate of approval holder manufacturing such spirits, beer, or wine or acting as authorized representative actually participated in such violation.

Sec. 114. RCW 66.24.540 and 1999 c 129 s 1 are each amended to read as follows:

(1) There ((~~shall be~~)) is a retailer's license to be designated as a motel license. The motel license may be issued to a motel regardless of whether it holds any other class of license under this title. No license may be issued to a motel offering rooms to its guests on an hourly basis. The license authorizes the licensee to:

((~~(1)~~)) (a) Sell, at retail, in locked honor bars, spirits in individual bottles not to exceed fifty milliliters, beer in individual cans or bottles not to exceed twelve ounces, and wine in individual bottles not to exceed one hundred eighty-seven milliliters, to registered guests of the motel for consumption in guest rooms.

((~~(a)~~)) (i) Each honor bar must also contain snack foods. No more than one-half of the guest rooms may have honor bars.

((~~(b)~~)) (ii) All spirits to be sold under the license must be purchased from a spirits retailer or a spirits distributor licensee of the board.

((~~(c)~~)) (iii) The licensee ((~~shall~~)) must require proof of age from the guest renting a guest room and requesting the use of an honor bar. The guest ((~~shall~~)) must also execute an affidavit verifying that no one under twenty-one years of age ((~~shall have~~)) has access to the spirits, beer, and wine in the honor bar.

((~~(2)~~)) (b) Provide without additional charge, to overnight guests of the motel, spirits, beer, and wine by the individual serving for on-premises consumption at a specified regular date, time, and place as may be fixed by the board. Self-service by attendees is prohibited. All spirits, beer, and wine service must be done by an alcohol server as defined in RCW 66.20.300 and comply with RCW 66.20.310.

(2) The annual fee for a motel license is five hundred dollars.

(3) For the purposes of this section, "motel" ((~~as used in this section~~)) means a transient accommodation licensed under chapter 70.62 RCW.

((~~As used in this section, "spirits," "beer," and "wine" have the meanings defined in RCW 66.04.010.~~))

Sec. 115. RCW 66.24.590 and 2011 c 119 s 403 are each amended to read as follows:

(1) There ((~~shall be~~)) is a retailer's license to be designated as a hotel license. No license may be issued to a hotel offering rooms to its guests on an hourly basis. Food service provided for room service, banquets or conferences, or restaurant operation under this license ((~~shall~~)) must meet the requirements of rules adopted by the board.

(2) The hotel license authorizes the licensee to:

(a) Sell spirituous liquor, beer, and wine, by the individual glass, at retail, for consumption on the premises, including mixed drinks and cocktails compounded and mixed on the premises;

(b) Sell, at retail, from locked honor bars, in individual units, spirits not to exceed fifty milliliters, beer in individual units not to exceed twelve ounces, and wine in individual bottles not to exceed three hundred eighty-five milliliters, to registered guests of the hotel for consumption in guest rooms. The licensee ((~~shall~~)) must require proof of age from the guest renting a guest room and requesting the use of an honor bar. The guest ((~~shall~~)) must also execute an affidavit verifying that no one under twenty-one years of age ((~~shall~~)) will have access to the spirits, beer, and wine in the honor bar;

(c) Provide without additional charge, to overnight guests, spirits, beer, and wine by the individual serving for on-premises consumption at a specified regular date, time, and place as may be fixed by the board. Self-service by attendees is prohibited;

(d) Sell beer, including strong beer, wine, or spirits, in the manufacturer's sealed container or by the individual drink to guests through room service, or through service to occupants of private residential units which are part of the buildings or complex of buildings that include the hotel;

(e) Sell beer, including strong beer, spirits, or wine, in the manufacturer's sealed container at retail sales locations within the hotel premises;

(f) Sell beer to a purchaser in a sanitary container brought to the premises by the purchaser or furnished by the licensee and filled at the tap in the restaurant area by the licensee at the time of sale;

(g) Sell for on or off-premises consumption, including through room service and service to occupants of private residential units managed by the hotel, wine carrying a label exclusive to the hotel license holder;

(h) Place in guest rooms at check-in, a complimentary bottle of ((~~beer, including strong beer, or wine~~)) liquor in a manufacturer-sealed container, and make a reference to this service in promotional material.

(3) If all or any facilities for alcoholic beverage service and the preparation, cooking, and serving of food are operated under contract or joint venture agreement, the operator may hold a license separate from the license held by the operator of the hotel. Food and beverage inventory used in separate licensed operations at the hotel may not be shared and ((~~shall~~)) must be separately owned and stored by the separate licensees.

(4) All spirits to be sold under this license must be purchased from a spirits retailer or spirits distributor licensee of the board.

(5) All on-premise alcoholic beverage service must be done by an alcohol server as defined in RCW 66.20.300 and must comply with RCW 66.20.310.

(6)(a) The hotel license allows the licensee to remove from the liquor stocks at the licensed premises, liquor for sale and service at event locations at a specified date and place not currently licensed by the board. If the event is open to the public, it must be sponsored by a society or organization as defined by RCW 66.24.375. If attendance at the event is limited to members or invited guests of the sponsoring individual, society, or organization, the requirement that the sponsor must be a society or organization as defined by RCW 66.24.375 is waived.

(b) The holder of this license ((~~shall~~)) must, if requested by the board, notify the board or its designee of the date, time, place, and location of any event. Upon request, the licensee ((~~shall~~)) must provide to the board all necessary or requested information concerning the society or organization that will be holding the function at which the endorsed license will be utilized.

(c) Licensees may cater events on a domestic winery, brewery, or distillery premises.

(7) The holder of this license or its manager may furnish spirits, beer, or wine to the licensee's employees who are twenty-one years of age or older free of charge as may be required for use in connection with instruction on spirits, beer, and wine. The instruction may include the history, nature, values, and characteristics of spirits, beer, or wine, the use of wine lists, and the methods of presenting, serving, storing, and handling spirits, beer, or wine. The licensee must use the ((~~beer or wine~~)) liquor it obtains under its license for the sampling as part of the instruction. The instruction must be given on the premises of the licensee.

(8) Minors may be allowed in all areas of the hotel where ((~~alcohol~~)) liquor may be consumed; however, the consumption must be incidental to the primary use of the area. These areas include, but are not limited to, tennis courts, hotel lobbies, and swimming pool areas.

If an area is not a mixed use area, and is primarily used for alcohol service, the area must be designated and restricted to access by ((~~minors~~)) persons of lawful age to purchase liquor.

(9) The annual fee for this license is two thousand dollars.

(10) As used in this section, "hotel," "spirits," "beer," and "wine" have the meanings defined in RCW 66.24.410 and 66.04.010.

Sec. 116. RCW 66.28.040 and 2011 c 186 s 4, 2011 c 119 s 207, and 2011 c 62 s 4 are each reenacted and amended to read as follows:

Except as permitted by the board under RCW 66.20.010, no domestic brewery, microbrewery, distributor, distiller, domestic winery, importer, rectifier, certificate of approval holder, or other manufacturer of liquor ((~~shall~~)) may, within the state of Washington, give to any person any liquor; but nothing in this section nor in RCW 66.28.305 prevents a domestic brewery, microbrewery, distributor, domestic winery, distiller, certificate of approval holder, or importer from furnishing samples of beer, wine, or spirituous liquor to authorized licensees for the purpose of negotiating a sale, in accordance with regulations adopted by the liquor control board, provided that the samples are subject to taxes imposed by RCW 66.24.290 and 66.24.210((~~, and in the case of spirituous liquor, any product used for samples must be purchased at retail from the board; nothing in this section shall prevent the furnishing of samples of liquor to the board for the purpose of negotiating the sale of liquor to the state liquor control board~~)); nothing in this section ((~~shall~~)) prevents a domestic brewery, microbrewery, domestic winery, distillery, certificate of approval holder, or distributor from furnishing beer, wine, or spirituous liquor for instructional purposes under RCW 66.28.150; nothing in this section ((~~shall~~)) prevents a domestic winery, certificate of approval holder, or distributor from furnishing wine without charge, subject to the taxes imposed by RCW 66.24.210, to a

not-for-profit group organized and operated solely for the purpose of enology or the study of viticulture which has been in existence for at least six months and that uses wine so furnished solely for such educational purposes or a domestic winery, or an out-of-state certificate of approval holder, from furnishing wine without charge or a domestic brewery, or an out-of-state certificate of approval holder, from furnishing beer without charge, subject to the taxes imposed by RCW 66.24.210 or 66.24.290, or a domestic distiller licensed under RCW 66.24.140 or an accredited representative of a distiller, manufacturer, importer, or distributor of spirituous liquor licensed under RCW 66.24.310, from furnishing spirits without charge, to a nonprofit charitable corporation or association exempt from taxation under ((~~section~~)) 26 U.S.C. Sec. 501(c)(3) or (6) of the internal revenue code of 1986 ((~~(26 U.S.C. Sec. 501(c)(3) or (6))~~)) for use consistent with the purpose or purposes entitling it to such exemption; nothing in this section ((~~shall~~)) prevents a domestic brewery or microbrewery from serving beer without charge, on the brewery premises; nothing in this section ((~~shall~~)) prevents donations of wine for the purposes of RCW 66.12.180; nothing in this section ((~~shall~~)) prevents a domestic winery from serving wine without charge, on the winery premises; nothing in this section ((~~shall~~)) prevents a craft distillery from serving spirits without charge, on the distillery premises subject to RCW 66.24.145; nothing in this section prohibits spirits sampling under chapter 186, Laws of 2011; and nothing in this section ((~~shall~~)) prevents a winery or microbrewery from serving samples at a farmers market under section 1, chapter 62, Laws of 2011.

Sec. 117. RCW 66.28.060 and 2008 c 94 s 7 are each amended to read as follows:

Every distillery licensed under this title ((~~shall~~)) must make monthly reports to the board pursuant to the regulations. ((~~No such~~

~~distillery shall make any sale of spirits within the state of Washington except to the board and as provided in RCW 66.24.145.~~))

Sec. 118. RCW 66.28.070 and 2006 c 302 s 8 are each amended to read as follows:

(1) Except as provided in subsection (2) of this section, it ((~~shall be~~)) is unlawful for any retail spirits, beer, or wine licensee to purchase spirits, beer, or wine, except from a duly licensed distributor, domestic winery, domestic brewer, or certificate of approval holder with a direct shipment endorsement((~~, or the board~~)).

(2)(a) A spirits, beer, or wine retailer ((~~licensee~~)) may purchase spirits, beer, or wine:

(i) From a government agency ((~~which~~)) that has lawfully seized ((~~beer or wine from~~)) liquor possessed by a licensed ((~~beer~~)) distributor or ((~~wine~~)) retailer((~~, or~~));

(ii) From a board-authorized ((~~retailer~~)) manufacturer or certificate holder authorized by this title to act as a distributor of liquor((~~, or~~));

(iii) From a licensed retailer which has discontinued business if the distributor has refused to accept spirits, beer, or wine from that retailer for return and refund((~~. Beer and wine~~));

(iv) From a retailer whose license or license endorsement permits resale to a retailer of wine and/or spirits for consumption on the premises, if the purchasing retailer is authorized to sell such wine and/or spirits.

(b) Goods purchased under this subsection ((~~shall~~)) (2) must meet the quality standards set by ((~~its~~)) the manufacturer of the goods.

(3) Special occasion licensees holding a special occasion license may only purchase spirits, beer, or wine from a spirits, beer, or wine retailer duly licensed to sell spirits, beer, or wine for off-premises

consumption, ((~~the board,~~)) or from a duly licensed spirits, beer, or wine distributor.

Sec. 119. RCW 66.28.170 and 2004 c 160 s 17 are each amended to read as follows:

It is unlawful for a manufacturer of spirits, wine, or malt beverages holding a certificate of approval ((~~issued under RCW 66.24.270 or 66.24.206~~)) or the manufacturer's authorized representative, a distillery, brewery, or a domestic winery to discriminate in price in selling to any purchaser for resale in the state of Washington. Price differentials for sales of spirits or wine based upon competitive conditions, costs of servicing a purchaser's account, efficiencies in handling goods, or other bona fide business factors, to the extent the differentials are not unlawful under trade regulation laws applicable to goods of all kinds, do not violate this section.

NEW SECTION. **Sec. 120.** A new section is added to chapter 66.28 RCW to read as follows:

(1) No price for spirits sold in the state by a distributor or other licensee acting as a distributor pursuant to this title may be below acquisition cost unless the item sold below acquisition cost has been stocked by the seller for a period of at least six months. The seller may not restock the item for a period of one year following the first effective date of such below cost price.

(2) Spirits sold to retailers for resale for consumption on or off the licensed premises may be delivered to the retailer's licensed premises, to a location specified by the retailer and approved for deliveries by the board, or to a carrier engaged by either party to the transaction.

(3) In selling spirits to another retailer, to the extent consistent with the purposes of this act, a spirits retail licensee must comply with all provisions of and regulations under this title applicable to wholesale distributors selling spirits to retailers.

(4) A distiller holding a license or certificate of compliance as a distiller under this title may act as distributor in the state of spirits of its own production or of foreign-produced spirits it is entitled to import. The distiller must, to the extent consistent with the purposes of this act, comply with all provisions of and regulations under this title applicable to wholesale distributors selling spirits to retailers.

(5) With respect to any alleged violation of this title by sale of spirits at a discounted price, all defenses under applicable trade regulation laws are available, including without limitation good faith meeting of a competitor's lawful price and absence of harm to competition.

(6) Notwithstanding any other provision of law, no licensee may import, purchase, distribute, or accept delivery of any wine that is produced outside of the United States or any distilled spirits without the written consent of the brand owner or its authorized agent.

Sec. 121. RCW 66.28.180 and 2009 c 506 s 10 are each amended to read as follows:

(1) Beer and/or wine distributors.

(a) Every beer ((~~or wine~~)) distributor ((~~shall~~)) must maintain at its liquor-licensed location a price list showing the wholesale prices at which any and all brands of beer ((~~and wine~~)) sold by ((~~such beer and/or wine~~)) the distributor ((~~shall be~~)) are sold to retailers within the state.

(b) Each price list ((~~shall~~)) must set forth:

(i) All brands, types, packages, and containers of beer ((~~or wine~~)) offered for sale by ((~~such beer and/or wine~~)) the distributor; and

(ii) The wholesale prices thereof to retail licensees, including allowances, if any, for returned empty containers.

(c) No beer ((~~and/or wine~~)) distributor may sell or offer to sell any package or container of beer ((~~or wine~~)) to any retail licensee at a price differing from the price for such package or container as shown in the price list, according to rules adopted by the board.

(d) Quantity discounts of sales prices of beer are prohibited. No distributor's sale price of beer may be below the distributor's acquisition cost.

(e) Distributor prices below acquisition cost on a "close-out" item ((~~shall be~~)) are allowed if the item to be discontinued has been listed for a period of at least six months, and upon the further condition that the distributor who offers such a close-out price ((~~shall~~)) may not restock the item for a period of one year following the first effective date of such close-out price.

(f) Any beer ((~~and/or wine~~)) distributor ((~~or employee authorized by the distributor-employer~~)) may sell beer ((~~and/or wine~~)) at the distributor's listed prices to any annual or special occasion retail licensee upon presentation to the distributor ((~~or employee~~)) at the time of purchase or delivery of an original or facsimile license or a special permit issued by the board to such licensee.

(g) Every annual or special occasion retail licensee, upon purchasing any beer ((~~and/or wine~~)) from a distributor, ((~~shall~~)) must immediately cause such beer ((~~or wine~~)) to be delivered to the licensed premises, and the licensee ((~~shall~~)) may not thereafter permit such beer to be disposed of in any manner except as authorized by the license.

(h) Beer ((~~and wine~~)) sold as provided in this section ((~~shall~~)) must be delivered by the distributor or an authorized employee either

to the retailer's licensed premises or directly to the retailer at the distributor's licensed premises. When a ((~~domestic winery,~~)) brewery, microbrewery, or certificate of approval holder with a direct shipping endorsement is acting as a distributor of beer of its own production, a licensed retailer may contract with a common carrier to obtain the ((~~product~~)) beer directly from the ((~~domestic winery,~~)) brewery, microbrewery, or certificate of approval holder with a direct shipping endorsement. A distributor's prices to retail licensees ((~~shall~~)) for beer must be the same at both such places of delivery. Wine sold to retailers must be delivered to the retailer's licensed premises, to a location specified by the retailer and approved for deliveries by the board, or to a carrier engaged by either party to the transaction.

(2) Beer ((~~and wine~~)) suppliers' contracts and memoranda.

(a) Every domestic brewery, microbrewery, ((~~domestic winery,~~)) certificate of approval holder, and beer and/or wine importer offering beer ((~~and/or wine~~)) for sale to distributors within the state and any beer ((~~and/or wine~~)) distributor who sells to other beer ((~~and/or wine~~)) distributors ((~~shall~~)) must maintain at its liquor-licensed location a beer price list and a copy of every written contract and a memorandum of every oral agreement which such brewery ((~~or winery~~)) may have with any beer ((~~or wine~~)) distributor for the supply of beer, which contracts or memoranda ((~~shall~~)) must contain:

(i) All advertising, sales and trade allowances, and incentive programs; and

(ii) All commissions, bonuses or gifts, and any and all other discounts or allowances.

(b) Whenever changed or modified, such revised contracts or memoranda ((~~shall~~)) must also be maintained at its liquor licensed location.

(c) Each price list ((~~shall~~)) must set forth all brands, types, packages, and containers of beer ((~~or wine~~)) offered for sale by such ((~~licensed brewery or winery~~)) supplier.

(d) Prices of a domestic brewery, microbrewery, ((~~domestic winery,~~)) or certificate of approval holder ((~~shall~~)) for beer must be uniform prices to all distributors or retailers on a statewide basis less bona fide allowances for freight differentials. Quantity discounts of suppliers' prices for beer are prohibited. No price ((~~shall~~)) may be below the supplier's acquisition((~~/~~)) or production cost.

(e) A domestic brewery, microbrewery, ((~~domestic winery,~~)) certificate of approval holder, ((~~beer or wine~~)) importer, or ((~~beer or wine~~)) distributor acting as a supplier to another distributor must file ((~~a distributor appointment~~)) with the board a list of all distributor licensees of the board to which it sells or offers to sell beer.

(f) No domestic brewery, microbrewery, ((~~domestic winery,~~)) or certificate of approval holder may sell or offer to sell any package or container of beer ((~~or wine~~)) to any distributor at a price differing from the price list for such package or container as shown in the price list of the domestic brewery, microbrewery, ((~~domestic winery,~~)) or certificate of approval holder and then in effect, according to rules adopted by the board.

(3) In selling wine to another retailer, to the extent consistent with the purposes of this act, a grocery store licensee with a reseller endorsement must comply with all provisions of and regulations under this title applicable to wholesale distributors selling wine to retailers.

(4) With respect to any alleged violation of this title by sale of wine at a discounted price, all defenses under applicable trade regulation laws are available including, without limitation, good faith

meeting of a competitor's lawful price and absence of harm to competition.

Sec. 122. RCW 66.28.190 and 2003 c 168 s 305 are each amended to read as follows:

((~~RCW 66.28.010~~)) (1) Any other provision of this title notwithstanding, persons licensed under ((~~RCW 66.24.200 as wine distributors and persons licensed under RCW 66.24.250 as beer distributors~~)) this title to sell liquor for resale may sell at wholesale nonliquor food and food ingredients on thirty-day credit terms to persons licensed as retailers under this title, but complete and separate accounting records ((~~shall~~)) must be maintained on all sales of nonliquor food and food ingredients to ensure that such persons are in compliance with ((~~RCW 66.28.010~~)) this title.

(2) For the purpose of this section, "nonliquor food and food ingredients" includes, without limitation, all food and food ingredients for human consumption as defined in RCW 82.08.0293 as it ((~~exists~~)) existed on July 1, 2004.

NEW SECTION. **Sec. 123.** A new section is added to chapter 66.28 RCW to read as follows:

A retailer authorized to sell wine may accept delivery of wine at its licensed premises or at one or more warehouse facilities registered with the board, which facilities may also warehouse and distribute nonliquor items, and from which it may deliver to its own licensed premises and, pursuant to sales permitted by this title, to other licensed retailers, to other registered facilities, or to lawful purchasers outside the state; such facilities may be registered and utilized by associations, cooperatives, or comparable groups of retailers including at least one retailer licensed to sell wine. A restaurant retailer authorized to sell spirits may accept delivery of

spirits at its licensed premises or at one or more warehouse facilities registered with the board, which facilities may also warehouse and distribute nonliquor items, from which it may deliver to its own licensed premises and, pursuant to sales permitted by this title, to other licensed retailers, to other registered facilities, or to lawful purchasers outside the state; such facilities may be registered and utilized by associations, cooperatives, or comparable groups of retailers including at least one restaurant retailer licensed to sell spirits. Nothing in this section authorizes sales of spirits or wine by a retailer holding only an on-sale privilege to another retailer.

Sec. 124. RCW 66.28.280 and 2009 c 506 s 1 are each amended to read as follows:

((~~The legislature recognizes that Washington's current three-tier system, where the functions of manufacturing, distributing, and retailing are distinct and the financial relationships and business transactions between entities in these tiers are regulated, is a valuable system for the distribution of beer and wine.~~)) The legislature ((~~further~~)) recognizes that the historical total prohibition on ownership of an interest in one tier by a person with an ownership interest in another tier, as well as the historical restriction on financial incentives and business relationships between tiers, is unduly restrictive. The legislature finds the ((~~modifications contained in chapter 506, Laws of 2009 are appropriate, because the modifications~~)) provisions of RCW 66.28.285 through 66.28.320 appropriate for all varieties of liquor, because they do not impermissibly interfere with ((~~the goals of orderly marketing of alcohol in the state, encouraging moderation in consumption of alcohol by the citizens of the state,~~)) protecting the public interest and advancing public safety by preventing the use and consumption of

alcohol by minors and other abusive consumption, and promoting the efficient collection of taxes by the state.

NEW SECTION. **Sec. 125.** A new section is added to chapter 66.04 RCW to read as follows:

In this title, unless the context otherwise requires:

(1) "Retailer" except as expressly defined by RCW 66.28.285(5) with respect to its use in RCW 6.28280 through 66.28.315, means the holder of a license or permit issued by the board authorizing sale of liquor to consumers for consumption on and/or off the premises. With respect to retailer licenses, "on-sale" refers to the license privilege of selling for consumption upon the licensed premises.

(2) "Spirits distributor" means a person, other than a person who holds only a retail license, who buys spirits from a domestic distiller, manufacturer, supplier, spirits distributor, or spirits importer, or who acquires foreign-produced spirits from a source outside of the United States, for the purpose of reselling the same not in violation of this title, or who represents such distiller as agent.

(3) "Spirits importer" means a person who buys distilled spirits from a distiller outside the state of Washington and imports such spirits into the state for sale or export.

PART II

LIQUOR CONTROL BOARD--DISCONTINUING RETAIL SALES--TECHNICAL CHANGES

Sec. 201. RCW 43.19.19054 and 1975-'76 2nd ex.s. c 21 s 7 are each amended to read as follows:

The provisions of RCW 43.19.1905 ((~~shall~~)) do not apply to materials, supplies, and equipment purchased for resale to other than public agencies by state agencies, including educational institutions.

((~~In addition, RCW 43.19.1905 shall not apply to liquor purchased by the state for resale under the provisions of Title 66 RCW.~~))

Sec. 202. RCW 66.08.020 and 1933 ex.s. c 62 s 5 are each amended to read as follows:

The administration of this title((~~, including the general control, management and supervision of all liquor stores, shall be~~)) is vested in the liquor control board, constituted under this title.

Sec. 203. RCW 66.08.026 and 2008 c 67 s 1 are each amended to read as follows:

Administrative expenses of the board ((~~shall~~)) must be appropriated and paid from the liquor revolving fund. These administrative expenses ((~~shall~~)) include, but not be limited to: The salaries and expenses of the board and its employees, ((~~the cost of opening additional state liquor stores and warehouses,~~)) legal services, pilot projects, annual or other audits, and other general costs of conducting the business of the board. The administrative expenses ((~~shall~~)) do not include ((~~costs of liquor and lottery tickets purchased, the cost of transportation and delivery to the point of distribution, the cost of operating, maintaining, relocating, and leasing state liquor stores and warehouses, other costs pertaining to the acquisition and receipt of liquor and lottery tickets, agency commissions for contract liquor stores, transaction fees associated with credit or debit card purchases for liquor in state liquor stores and in contract liquor stores pursuant to RCW 66.16.040 and 66.16.041, sales tax, and~~)) those amounts distributed pursuant to RCW 66.08.180, 66.08.190, 66.08.200, or 66.08.210 ((~~and 66.08.220~~)). Agency commissions for contract liquor stores ((~~shall~~)) must be established by the liquor control board after consultation with and approval by the director of the office of financial management. All expenditures and payment of obligations

authorized by this section are subject to the allotment requirements of chapter 43.88 RCW.

Sec. 204. RCW 66.08.030 and 2002 c 119 s 2 are each amended to read as follows:

((~~(1) For the purpose of carrying into effect the provisions of this title according to their true intent or of supplying any deficiency therein, the board may make such regulations not inconsistent with the spirit of this title as are deemed necessary or advisable. All regulations so made shall be a public record and shall be filed in the office of the code reviser, and thereupon shall have the same force and effect as if incorporated in this title. Such regulations, together with a copy of this title, shall be published in pamphlets and shall be distributed as directed by the board.~~

~~(2) Without thereby limiting the generality of the provisions contained in subsection (1), it is declared that~~)) The power of the board to make regulations ((~~in the manner set out in that subsection shall~~)) under chapter 34.05 RCW extends to

((~~(a) regulating the equipment and management of stores and warehouses in which state liquor is sold or kept, and prescribing the books and records to be kept therein and the reports to be made thereon to the board;~~

~~(b)~~)):

(1) Prescribing the duties of the employees of the board, and regulating their conduct in the discharge of their duties;

((~~(c) governing the purchase of liquor by the state and the furnishing of liquor to stores established under this title;~~

~~(d) determining the classes, varieties, and brands of liquor to be kept for sale at any store;~~

~~(e) prescribing, subject to RCW 66.16.080, the hours during which the state liquor stores shall be kept open for the sale of liquor;~~

~~(f) providing for the issuing and distributing of price lists showing the price to be paid by purchasers for each variety of liquor kept for sale under this title;~~

~~(g)~~)) (2) Prescribing an official seal and official labels and stamps and determining the manner in which they ((~~shall~~)) must be attached to every package of liquor sold or sealed under this title, including the prescribing of different official seals or different official labels for different classes of liquor;

((~~(h) providing for the payment by the board in whole or in part of the carrying charges on liquor shipped by freight or express;~~

~~(i)~~)) (3) Prescribing forms to be used for purposes of this title or the regulations, and the terms and conditions to be contained in permits and licenses issued under this title, and the qualifications for receiving a permit or license issued under this title, including a criminal history record information check. The board may submit the criminal history record information check to the Washington state patrol and to the identification division of the federal bureau of investigation in order that these agencies may search their records for prior arrests and convictions of the individual or individuals who filled out the forms. The board ((~~shall~~)) must require fingerprinting of any applicant whose criminal history record information check is submitted to the federal bureau of investigation;

((~~(j)~~)) (4) Prescribing the fees payable in respect of permits and licenses issued under this title for which no fees are prescribed in this title, and prescribing the fees for anything done or permitted to be done under the regulations;

((~~(k)~~)) (5) Prescribing the kinds and quantities of liquor which may be kept on hand by the holder of a special permit for the purposes named in the permit, regulating the manner in which the same ((~~shall be~~)) is kept and disposed of, and providing for the inspection of the same at any time at the instance of the board;

((~~(l)~~)) (6) Regulating the sale of liquor kept by the holders of licenses which entitle the holder to purchase and keep liquor for sale;

((~~(m)~~)) (7) Prescribing the records of purchases or sales of liquor kept by the holders of licenses, and the reports to be made thereon to the board, and providing for inspection of the records so kept;

((~~(n)~~)) (8) Prescribing the kinds and quantities of liquor for which a prescription may be given, and the number of prescriptions which may be given to the same patient within a stated period;

((~~(o)~~)) (9) Prescribing the manner of giving and serving notices required by this title or the regulations, where not otherwise provided for in this title;

((~~(p)~~)) (10) Regulating premises in which liquor is kept for export from the state, or from which liquor is exported, prescribing the books and records to be kept therein and the reports to be made thereon to the board, and providing for the inspection of the premises and the books, records and the liquor so kept;

((~~(q)~~)) (11) Prescribing the conditions and qualifications requisite for the obtaining of club licenses and the books and records to be kept and the returns to be made by clubs, prescribing the manner of licensing clubs in any municipality or other locality, and providing for the inspection of clubs;

((~~(r)~~)) (12) Prescribing the conditions, accommodations, and qualifications requisite for the obtaining of licenses to sell beer ((~~and~~)), wines, and spirits, and regulating the sale of beer ((~~and~~)), wines, and spirits thereunder;

((~~(s)~~)) (13) Specifying and regulating the time and periods when, and the manner, methods and means by which manufacturers ((~~shall~~)) must deliver liquor within the state; and the time and periods when, and the manner, methods and means by which liquor may lawfully be conveyed or carried within the state;

((~~(t)~~)) (14) Providing for the making of returns by brewers of their sales of beer shipped within the state, or from the state, showing the gross amount of such sales and providing for the inspection of brewers' books and records, and for the checking of the accuracy of any such returns;

((~~(u)~~)) (15) Providing for the making of returns by the wholesalers of beer whose breweries are located beyond the boundaries of the state;

((~~(v)~~)) (16) Providing for the making of returns by any other liquor manufacturers, showing the gross amount of liquor produced or purchased, the amount sold within and exported from the state, and to whom so sold or exported, and providing for the inspection of the premises of any such liquor manufacturers, their books and records, and for the checking of any such return;

((~~(w)~~)) (17) Providing for the giving of fidelity bonds by any or all of the employees of the board((~~: PROVIDED, That~~)). However, the premiums therefor ((~~shall~~)) must be paid by the board;

((~~(x)~~)) (18) Providing for the shipment ((~~by mail or common carrier~~)) of liquor to any person holding a permit and residing in any unit which has, by election pursuant to this title, prohibited the sale of liquor therein;

((~~(y)~~)) (19) Prescribing methods of manufacture, conditions of sanitation, standards of ingredients, quality and identity of alcoholic beverages manufactured, sold, bottled, or handled by licensees and the board; and conducting from time to time, in the interest of the public health and general welfare, scientific studies and research relating to alcoholic beverages and the use and effect thereof;

((~~(z)~~)) (20) Seizing, confiscating and destroying all alcoholic beverages manufactured, sold or offered for sale within this state which do not conform in all respects to the standards prescribed by this title or the regulations of the board((~~: PROVIDED,~~)). However, nothing herein contained ((~~shall~~)) may be construed as authorizing the

liquor board to prescribe, alter, limit or in any way change the present law as to the quantity or percentage of alcohol used in the manufacturing of wine or other alcoholic beverages.

Sec. 205. RCW 66.24.145 and 2010 c 290 s 2 are each amended to read as follows:

(1) Any craft distillery may sell spirits of its own production for consumption off the premises, up to two liters per person per day. ((~~Spirits sold under this subsection must be purchased from the board and sold at the retail price established by the board.~~)) A craft distillery selling spirits under this subsection must comply with the applicable laws and rules relating to retailers.

(2) Any craft distillery may contract distill spirits for, and sell contract distilled spirits to, holders of distillers' or manufacturers' licenses, including licenses issued under RCW 66.24.520, or for export.

(3) Any craft distillery licensed under this section may provide, free of charge, one-half ounce or less samples of spirits of its own production to persons on the premises of the distillery. The maximum total per person per day is two ounces. Every person who participates in any manner in the service of samples must obtain a class 12 alcohol server permit. ((~~Spirits used for samples must be purchased from the board.~~))

(4) The board ((~~shall~~)) must adopt rules to implement the alcohol server permit requirement and may adopt additional rules to implement this section.

(5) Distilling is an agricultural practice.

NEW SECTION. **Sec. 206.** A new section is added to chapter 66.24 RCW to read as follows:

Any distiller licensed under this title may act as a retailer and/or distributor to retailers selling for consumption on or off the

licensed premises of spirits of its own production, and any manufacturer, importer, or bottler of spirits holding a certificate of approval may act as a distributor of spirits it is entitled to import into the state under such certificate. The board must by rule provide for issuance of certificates of approval to spirits suppliers. An industry member operating as a distributor and/or retailer under this section must comply with the applicable laws and rules relating to distributors and/or retailers, except that an industry member operating as a distributor under this section may maintain a warehouse off the distillery premises for the distribution of spirits of its own production to spirits retailers within the state, if the warehouse is within the United States and has been approved by the board.

Sec. 207. RCW 66.24.160 and 1981 1st ex.s. c 5 s 30 are each amended to read as follows:

A ((~~liquor~~)) spirits importer's license may be issued to any qualified person, firm or corporation, entitling the holder thereof to import into the state any liquor other than beer or wine; to store the same within the state, and to sell and export the same from the state; fee six hundred dollars per annum. Such ((~~liquor~~)) spirits importer's license ((~~shall be~~)) is subject to all conditions and restrictions imposed by this title or by the rules and regulations of the board, and ((~~shall be~~)) is issued only upon such terms and conditions as may be imposed by the board. ((~~No liquor importer's license shall be required in sales to the Washington state liquor control board.~~))

Sec. 208. RCW 66.32.010 and 1955 c 39 s 3 are each amended to read as follows:

((~~Except as permitted by~~)) The board may, ((~~no liquor shall be kept or had by any person within this state unless the package in which the liquor was contained had, while containing that liquor, been~~)) to the

extent required to control unlawful diversion of liquor from authorized channels of distribution, require that packages of liquor transported within the state be sealed with ((~~the~~)) such official seal as may be adopted by the board, except in the case of:

(1) ((~~Liquor imported by the board; or~~

~~(2)~~)) Liquor manufactured in the state ((~~for sale to the board or for export~~)); or

((~~(3) Beer,~~)) (2) Liquor purchased within the state or for shipment to a consumer within the state in accordance with the provisions of law; or

((~~(4)~~)) (3) Wine or beer exempted in RCW 66.12.010.

Sec. 209. RCW 66.44.120 and 2011 c 96 s 46 are each amended to read as follows:

(1) No person other than an employee of the board ((~~shall~~)) may keep or have in his or her possession any official seal ((~~prescribed~~)) adopted by the board under this title, unless the same is attached to a package ((~~which has been purchased from a liquor store or contract liquor store~~)) in accordance with the law; nor ((~~shall~~)) may any person keep or have in his or her possession any design in imitation of any official seal prescribed under this title, or calculated to deceive by its resemblance thereto, or any paper upon which any design in imitation thereof, or calculated to deceive as aforesaid, is stamped, engraved, lithographed, printed, or otherwise marked.

(2)(a) Except as provided in (b) of this subsection, every person who willfully violates this section is guilty of a gross misdemeanor and ((~~shall be~~)) is liable on conviction thereof for a first offense to imprisonment in the county jail for a period of not less than three months nor more than six months, without the option of the payment of a fine, and for a second offense, to imprisonment in the county jail for

not less than six months nor more than three hundred sixty-four days, without the option of the payment of a fine.

(b) A third or subsequent offense is a class C felony, punishable by imprisonment in a state correctional facility for not less than one year nor more than two years.

Sec. 210. RCW 66.44.150 and 1955 c 289 s 5 are each amended to read as follows:

If any person in this state buys alcoholic beverages from any person other than ((~~the board, a state liquor store, or some~~)) a person authorized by the board to sell ((~~them, he shall be~~)) alcoholic beverages, he or she is guilty of a misdemeanor.

Sec. 211. RCW 66.44.340 and 1999 c 281 s 11 are each amended to read as follows:

(1) Employers holding grocery store or beer and/or wine specialty shop licenses exclusively are permitted to allow their employees, between the ages of eighteen and twenty-one years, to sell, stock, and handle ((~~beer or wine~~)) liquor in, on or about any establishment holding a ((~~grocery store or beer and/or wine specialty shop~~)) license ((~~exclusively: PROVIDED, That~~)) to sell such liquor, if:

(a) There is an adult twenty-one years of age or older on duty supervising the sale of liquor at the licensed premises((~~: PROVIDED, That~~)); and

(b) In the case of spirits, there are at least two adults twenty-one years of age or older on duty supervising the sale of spirits at the licensed premises.

(2) Employees under twenty-one years of age may make deliveries of beer and/or wine purchased from licensees holding grocery store or beer and/or wine specialty shop licenses exclusively, when delivery is made

to cars of customers adjacent to such licensed premises but only, however, when the underage employee is accompanied by the purchaser.

Sec. 212. RCW 19.126.010 and 2003 c 59 s 1 are each amended to read as follows:

(1) The legislature recognizes that both suppliers and wholesale distributors of malt beverages and spirits are interested in the goal of best serving the public interest through the fair, efficient, and competitive distribution of such beverages. The legislature encourages them to achieve this goal by:

(a) Assuring the wholesale distributor's freedom to manage the business enterprise, including the wholesale distributor's right to independently establish its selling prices; and

(b) Assuring the supplier and the public of service from wholesale distributors who will devote their best competitive efforts and resources to sales and distribution of the supplier's products which the wholesale distributor has been granted the right to sell and distribute.

(2) This chapter governs the relationship between suppliers of malt beverages and spirits and their wholesale distributors to the full extent consistent with the Constitution and laws of this state and of the United States.

Sec. 213. RCW 19.126.020 and 2009 c 155 s 1 are each reenacted and amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agreement of distributorship" means any contract, agreement, commercial relationship, license, association, or any other arrangement, for a definite or indefinite period, between a supplier and distributor.

(2) "Authorized representative" has the same meaning as "authorized representative" as defined in RCW 66.04.010.

(3) "Brand" means any word, name, group of letters, symbol, or combination thereof, including the name of the distiller or brewer if the distiller's or brewer's name is also a significant part of the product name, adopted and used by a supplier to identify ((a)) specific spirits or a specific malt beverage product and to distinguish that product from other spirits or malt beverages produced by that supplier or other suppliers.

(4) "Distributor" means any person, including but not limited to a component of a supplier's distribution system constituted as an independent business, importing or causing to be imported into this state, or purchasing or causing to be purchased within this state, any spirits or malt beverages for sale or resale to retailers licensed under the laws of this state, regardless of whether the business of such person is conducted under the terms of any agreement with a distiller or malt beverage manufacturer.

(5) "Importer" means any distributor importing spirits or beer into this state for sale to retailer accounts or for sale to other distributors designated as "subjobbers" for resale.

(6) "Malt beverage manufacturer" means every brewer, fermenter, processor, bottler, or packager of malt beverages located within or outside this state, or any other person, whether located within or outside this state, who enters into an agreement of distributorship for the resale of malt beverages in this state with any wholesale distributor doing business in the state of Washington.

(7) "Person" means any natural person, corporation, partnership, trust, agency, or other entity, as well as any individual officers, directors, or other persons in active control of the activities of such entity.

(8) "Spirits manufacturer" means every distiller, processor, bottler, or packager of spirits located within or outside this state, or any other person, whether located within or outside this state, who enters into an agreement of distributorship for the resale of spirits in this state with any wholesale distributor doing business in the state of Washington.

(9) "Successor distributor" means any distributor who enters into an agreement, whether oral or written, to distribute a brand of spirits or malt beverages after the supplier with whom such agreement is made or the person from whom that supplier acquired the right to manufacture or distribute the brand has terminated, canceled, or failed to renew an agreement of distributorship, whether oral or written, with another distributor to distribute that same brand of spirits or malt beverages.

((~~(9)~~)) (10) "Supplier" means any spirits or malt beverage manufacturer or importer who enters into or is a party to any agreement of distributorship with a wholesale distributor. "Supplier" does not include: (a) Any ((~~domestic~~)) distiller licensed under RCW 66.24.140 or 66.24.145 and producing less than sixty thousand proof gallons of spirits annually or any brewery or microbrewery licensed under RCW 66.24.240 and producing less than two hundred thousand barrels of malt liquor annually; (b) any brewer or manufacturer of malt liquor producing less than two hundred thousand barrels of malt liquor annually and holding a certificate of approval issued under RCW 66.24.270; or (c) any authorized representative of distillers or malt liquor manufacturers who holds an appointment from one or more distillers or malt liquor manufacturers which, in the aggregate, produce less than two hundred thousand barrels of malt liquor or sixty thousand proof gallons of spirits.

((~~(10)~~)) (11) "Terminated distribution rights" means distribution rights with respect to a brand of malt beverages which are lost by a

terminated distributor as a result of termination, cancellation, or nonrenewal of an agreement of distributorship for that brand.

((~~(11)~~)) (12) "Terminated distributor" means a distributor whose agreement of distributorship with respect to a brand of spirits or malt beverages, whether oral or written, has been terminated, canceled, or not renewed.

Sec. 214. RCW 19.126.040 and 2009 c 155 s 3 are each amended to read as follows:

Wholesale distributors are entitled to the following protections which are deemed to be incorporated into every agreement of distributorship:

(1) Agreements between wholesale distributors and suppliers ((~~shall~~)) must be in writing;

(2) A supplier ((~~shall~~)) must give the wholesale distributor at least sixty days prior written notice of the supplier's intent to cancel or otherwise terminate the agreement, unless such termination is based on a reason set forth in RCW 19.126.030(5) or results from a supplier acquiring the right to manufacture or distribute a particular brand and electing to have that brand handled by a different distributor. The notice ((~~shall~~)) must state all the reasons for the intended termination or cancellation. Upon receipt of notice, the wholesale distributor ((~~shall have~~)) has sixty days in which to rectify any claimed deficiency. If the deficiency is rectified within this sixty-day period, the proposed termination or cancellation is null and void and without legal effect;

(3) The wholesale distributor may sell or transfer its business, or any portion thereof, including the agreement, to successors in interest upon prior approval of the transfer by the supplier. No supplier may unreasonably withhold or delay its approval of any transfer, including wholesaler's rights and obligations under the terms of the agreement,

if the person or persons to be substituted meet reasonable standards imposed by the supplier;

(4) If an agreement of distributorship is terminated, canceled, or not renewed for any reason other than for cause, failure to live up to the terms and conditions of the agreement, or a reason set forth in RCW 19.126.030(5), the wholesale distributor is entitled to compensation from the successor distributor for the laid-in cost of inventory and for the fair market value of the terminated distribution rights. For purposes of this section, termination, cancellation, or nonrenewal of a distributor's right to distribute a particular brand constitutes termination, cancellation, or nonrenewal of an agreement of distributorship whether or not the distributor retains the right to continue distribution of other brands for the supplier. In the case of terminated distribution rights resulting from a supplier acquiring the right to manufacture or distribute a particular brand and electing to have that brand handled by a different distributor, the affected distribution rights will not transfer until such time as the compensation to be paid to the terminated distributor has been finally determined by agreement or arbitration;

(5) When a terminated distributor is entitled to compensation under subsection (4) of this section, a successor distributor must compensate the terminated distributor for the fair market value of the terminated distributor's rights to distribute the brand, less any amount paid to the terminated distributor by a supplier or other person with respect to the terminated distribution rights for the brand. If the terminated distributor's distribution rights to a brand of <u>spirits or</u> malt beverages are divided among two or more successor distributors, each successor distributor must compensate the terminated distributor for the fair market value of the distribution rights assumed by that successor distributor, less any amount paid to the terminated distributor by a supplier or other person with respect to the

terminated distribution rights assumed by the successor distributor. A terminated distributor may not receive total compensation under this subsection that exceeds the fair market value of the terminated distributor's distribution rights with respect to the affected brand. Nothing in this section ((~~shall~~)) may be construed to require any supplier or other third person to make any payment to a terminated distributor;

(6) For purposes of this section, the "fair market value" of distribution rights as to a particular brand means the amount that a willing buyer would pay and a willing seller would accept for such distribution rights when neither is acting under compulsion and both have knowledge of all facts material to the transaction. "Fair market value" is determined as of the date on which the distribution rights are to be transferred in accordance with subsection (4) of this section;

(7) In the event the terminated distributor and the successor distributor do not agree on the fair market value of the affected distribution rights within thirty days after the terminated distributor is given notice of termination, the matter must be submitted to binding arbitration. Unless the parties agree otherwise, such arbitration must be conducted in accordance with the American arbitration association commercial arbitration rules with each party to bear its own costs and attorneys' fees;

(8) Unless the parties otherwise agree, or the arbitrator for good cause shown orders otherwise, an arbitration conducted pursuant to subsection (7) of this section must proceed as follows: (a) The notice of intent to arbitrate must be served within forty days after the terminated distributor receives notice of terminated distribution rights; (b) the arbitration must be conducted within ninety days after service of the notice of intent to arbitrate; and (c) the arbitrator or

arbitrators must issue an order within thirty days after completion of the arbitration;

(9) In the event of a material change in the terms of an agreement of distribution, the revised agreement must be considered a new agreement for purposes of determining the law applicable to the agreement after the date of the material change, whether or not the agreement of distribution is or purports to be a continuing agreement and without regard to the process by which the material change is effected.

NEW SECTION. **Sec. 215**. The following acts or parts of acts are each repealed:

(1) RCW 66.08.070 (Purchase of liquor by board--Consignment not prohibited--Warranty or affirmation not required for wine or malt purchases) and 1985 c 226 s 2, 1973 1st ex.s. c 209 s 1, & 1933 ex.s. c 62 s 67;

(2) RCW 66.08.075 (Officer, employee not to represent manufacturer, wholesaler in sale to board) and 1937 c 217 s 5;

(3) RCW 66.08.160 (Acquisition of warehouse authorized) and 1947 c 134 s 1;

(4) RCW 66.08.165 (Strategies to improve operational efficiency and revenue) and 2005 c 231 s 1;

(5) RCW 66.08.166 (Sunday sales authorized--Store selection and other requirements) and 2005 c 231 s 2;

(6) RCW 66.08.167 (Sunday sales--Store selection) and 2005 c 231 s 4;

(7) RCW 66.08.220 (Liquor revolving fund--Separate account--Distribution) and 2011 c 325 s 8, 2009 c 271 s 4, 2007 c 370 s 15, 1999 c 281 s 2, & 1949 c 5 s 11;

(8) RCW 66.08.235 (Liquor control board construction and maintenance account) and 2011 c 5 s 918, 2005 c 151 s 4, 2002 c 371 s 918, & 1997 c 75 s 1;

(9) RCW 66.16.010 (Board may establish--Price standards--Prices in special instances) and 2005 c 518 s 935, 2003 1st sp.s. c 25 s 928, 1939 c 172 s 10, 1937 c 62 s 1, & 1933 ex.s. c 62 s 4;

(10) RCW 66.16.040 (Sales of liquor by employees--Identification cards--Permit holders--Sales for cash--Exception) and 2005 c 206 s 1, 2005 c 151 s 5, 2005 c 102 s 1, 2004 c 61 s 1, 1996 c 291 s 1, 1995 c 16 s 1, 1981 1st ex.s. c 5 s 8, 1979 c 158 s 217, 1973 1st ex.s. c 209 s 3, 1971 ex.s. c 15 s 1, 1959 c 111 s 1, & 1933 ex.s. c 62 s 7;

(11) RCW 66.16.041 (Credit and debit card purchases--Rules--Provision, installation, maintenance of equipment by board--Consideration of offsetting liquor revolving fund balance reduction) and 2011 1st sp.s. c ... (ESSB 5921) s 16, 2005 c 151 s 6, 2004 c 63 s 2, 1998 c 265 s 3, 1997 c 148 s 2, & 1996 c 291 s 2;

(12) RCW 66.16.050 (Sale of beer and wine to person licensed to sell) and 1933 ex.s. c 62 s 8;

(13) RCW 66.16.060 (Sealed packages may be required, exception) and 1943 c 216 s 1 & 1933 ex.s. c 62 s 9;

(14) RCW 66.16.070 (Liquor cannot be opened or consumed on store premises) and 2011 c 186 s 3 & 1933 ex.s. c 62 s 10;

(15) RCW 66.16.100 (Fortified wine sales) and 1997 c 321 s 42 & 1987 c 386 s 5;

(16) RCW 66.16.110 (Birth defects from alcohol--Warning required) and 1993 c 422 s 2;

(17) RCW 66.16.120 (Employees working on Sabbath) and 2005 c 231 s 5; and

(18) RCW 66.28.045 (Furnishing samples to board--Standards for accountability--Regulations) and 1975 1st ex.s. c 173 s 9.

NEW SECTION. **Sec. 216.** The following acts or parts of acts are each repealed:

(1) ESSB 5942 ss 1 through 6, as later assigned a session law number and/or codified;

(2) ESSB 5942 ss 7 through 10, as later assigned a session law number; and

(3) Any act or part of act relating to the warehousing and distribution of liquor, including the lease of the state's liquor warehousing and distribution facilities, adopted subsequent to May 25, 2011 in any 2011 special session.

PART III

MISCELLANEOUS PROVISIONS

NEW SECTION. **Sec. 301.** This act does not increase any tax, create any new tax, or eliminate any tax. Section 106 of this act applies to spirits licensees upon the effective date of this section, but all taxes presently imposed by RCW 82.08.150 on sales of spirits by or on behalf of the liquor control board continue to apply so long as the liquor control board makes any such sales.

NEW SECTION. **Sec. 302.** A new section is added to chapter 66.24 RCW to read as follows:

The distribution of spirits license fees under sections 103 and 105 of this act through the liquor revolving fund to border areas, counties, cities, towns, and the municipal research center must be made in a manner that provides that each category of recipients receive, in the aggregate, no less than it received from the liquor revolving fund during comparable periods prior to the effective date of this section. An additional distribution of ten million dollars per year from the spirits license fees must be provided to border areas, counties,

cities, and towns through the liquor revolving fund for the purpose of enhancing public safety programs.

NEW SECTION. **Sec. 303.** The department of revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act.

NEW SECTION. **Sec. 304.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of this act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 305.** This act takes effect upon approval by the voters. Section 216, subsections (1) and (2) of this act take effect if Engrossed Substitute House Bill No. 5942 is enacted by the legislature in 2011 and the bill, or any portion of it, becomes law. Section 216, subsection (3) of this act takes effect if any act or part of an act relating to the warehousing and distribution of liquor, including the lease of the state's liquor warehousing and distribution facilities, is adopted subsequent to May 25, 2011 in any 2011 special session.