

NO. 41454-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DODGE CITY, INC.

Appellant,

v.

WASHINGTON STATE LIQUOR CONTROL BOARD,

Respondent.

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STATE OF WASHINGTON
BY [Signature]
DODGE CITY

COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENT

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I. INTRODUCTION

On May 16, 2008, Appellant Dodge City Inc. (Dodge City) allowed 17-year-old Christopher Mangan, a Washington State Liquor Control Board (Board) agent, to enter its premises which are restricted to persons over the age of twenty-one (21). Dodge City permitted Mangan to enter despite the fact that the identification which was provided to, and was inspected by its employee, showed Mangan's correct date of birth. Dodge City does not deny these facts. Instead, Dodge City seeks to escape responsibility through unsupportable claims.

Dodge City is a bar that voluntarily participates in the sale of alcohol, a pervasively regulated business. Its arguments seek to release it from the effective supervision of the Board and hamstring liquor law enforcement. As did the Clark County Superior Court, this Court should affirm the Board's finding that Dodge City violated RCW 66.44.310(1)(a) and WAC 314-11-020(2).

II. COUNTERSTATEMENT OF THE ISSUES

1. Where Board officers and agents entered the public area of Dodge City was there a search in violation of the Fourth Amendment to the United States Constitution and Article 1, Section 7, of the Washington State Constitution?

2. Does the Board's authority to enforce liquor laws and rules authorize it to engage in compliance checks?
3. Is the statutory criminal defense of Entrapment applicable in administrative adjudications and if it is, did Dodge City meet its burden of proving it applies in this case?
4. Where the Board's officers complied with all applicable case law and statute can their conduct be considered "outrageous"?
5. Is the correct burden of proof in a civil administrative hearing the "preponderance of the evidence" standard when the adjudication does not involve a professional license, or an individual interest, and only a monetary interest is at stake?
6. Where the ALJ denied Dodge City's motion for continuance, which was untimely and without good cause, was it error?
7. Even if the reviewing court had erred in sustaining the Board's Final Order, would an award of costs or fees be appropriate under RCW 4.84.350(1) when the Board's actions were substantially justified?

III. COUNTERSTATEMENT OF THE CASE

A. Facts

Dodge City holds a liquor license issued by the Board. AR 501.¹ Dodge City's entire premises were restricted from allowing any person under the age of twenty-one (21) to enter and remain. AR 52-53. On December 15, 2007, Board enforcement officers and City of Vancouver police officers found a minor frequenting Dodge City's premises and consuming liquor. AR 56, 193, 491-93. The Board issued an administrative violation notice and Dodge City stipulated to the violation and paid a monetary penalty. AR 491-93.

Nearly five (5) months later, on May 16, 2008, Board enforcement officers, Board investigative aide Christopher Mangan, and City of Vancouver police officers engaged in a series of compliance checks of various license holders' premises, including Dodge City. AR 193, 501-02.

A "compliance check" is conducted with the use of an underage investigative aide (IA) employed by the Board. The IA attempts to enter a licensed premise and purchase alcohol. AR 50. The purpose of a compliance check is to determine if licensees are complying with state laws and rules that prohibit minors from entering restricted premises and/or acquiring alcohol. *Id.* The checks are part of the Board's statutory

¹ References to the Administrative Record will be referred to as "AR" and are located at Clerk's Papers 23.

obligation to supervise and regulate licensed establishments. AR 50-52,501; *See also* RCW 66.44.010.

IA Mangan, who was 17 years old, carried his vertical Washington State Driver's License and a separate vertical Washington State Identification card on his person.² AR 82-83, 502. Both pieces of identification were issued to Christopher Mangan, were valid, and clearly indicated that he was under the age of twenty-one (21). AR 82-83, 502.

Board Enforcement Officer Lt. Marc Edmonds consulted with Mangan prior to the compliance check and was assured that Mangan had only his own valid identification on his person. AR 54, 61, 99, 195, 502.³ Neither Lt. Edmonds nor Board Enforcement Officer Almir Karic were aware that Mangan had two pieces of valid Washington State identification; Mangan simply forgot to take one of them out of his wallet. AR 54, 81, 196.

Before and during the compliance check, Mangan acted as a Board employee and his parents had consented to his work as an IA. AR 78. Mangan had successfully passed a criminal background check. AR 195. Mangan wore clothes he would normally wear and did not alter his

² Washington driver's licenses issued to minors are printed vertically so as to distinguish them from those of drivers over the age of 21. AR 202.

³ Lt. Edmonds, Officer Karic, and Mangan, nearly a year after the incident, had differing recollections as to the details of the ID check that occurred. All of these witnesses agree, however, that Lt. Edmonds consulted with Mangan prior to the compliance check and determined that he had only valid identification on his person.

appearance or make any statements to appear older. AR 81. At the time of this compliance check, Mangan had been working as an IA for the Board and had been a Police Explorer for approximately two (2) years. AR. 78-79.

On that evening, Mangan, under the direction of Board officers, approached the front door of Dodge City's establishment. AR 84, 450, 503. At the door Mangan encountered Dodge City employee Jeffery Hilker. AR 84-85, 450, 503. When requested by Mr. Hilker, Mangan presented his valid, vertically-oriented Washington State identification card. AR 85-86, 450, 449, 503. Mr. Hilker examined the identification card for 15 to 25 seconds, put it under a "black light" to test its authenticity, confirmed with Mangan the identification was his, and then allowed him to enter the premises. AR 86-87, 173, 450, 503. Mangan paid a five (5) dollar cover charge inside the establishment. AR 87, 450, 503. Mangan entered Dodge City's public area, purchased alcohol, was never asked to leave, and then left the premises approximately three (3) minutes later. AR 87, 503.

Mangan's interaction with Mr. Hilker, his entrance into Dodge City and his exit, were observed by both Board Officer Karic and Officer Spencer Harris of the City of Vancouver Police Department. AR 113-14, 198-200. Both officers made their observations from a parked vehicle on

a public street. AR 113-14, 198-200. Mangan's entrance into Dodge City was also observed by Board Enforcement Officer Diana Peters and Officer Jeremy Free of the City of Vancouver Police Department, while they were seated in Dodge City's public service area. AR 125-127.

After Mangan returned to Officer Karic's vehicle, Officer Karic approached Mr. Hilker and informed him he had allowed a minor into the establishment. AR 202. Mr. Hilker became defensive, insisting the identification was a "fake." AR 202. Officer Karic went to Mangan who provided him with the same identification previously provided to Mr. Hilker. AR 203. At this time, Officer Karic learned Mangan had two (2) pieces of valid identification on his person. AR 203. Officer Karic presented Mangan's own valid, vertical, Washington State issued identification card to Mr. Hilker and Tony Kutch, a partial owner of the licensed premises. AR 173, 203, 449.

Soon after the officers and the IA left the area, Mr. Kutch, by telephone, asked them to return so he could question and search Mangan. AR 175, 204-205. Dodge City asserts that this request was declined solely because Officer Karic "feared a lawsuit by Mr. Mangan's parents." AB at 7. This is not accurate. Officer Karic declined to allow Dodge City employees to interrogate and physically frisk a Board employee for reasons of policy, safety, and potential liability. AR 205.

Mr. Kutch admitted he was nearby when IA Mangan approached Mr. Hilker and that Mr. Hilker saw a vertical identification card. AR 172-73. Mr. Kutch concurred that Mr. Hilker tested it under the black light, and affirmed to Mangan: “yep, that’s you.” AR 173. Mr. Kutch also agreed that it was highly likely Mr. Hilker would have discovered if the identification provided was a “fake.” AR 178.

B. Procedural History

As a result of the compliance check, the Board charged Dodge City with allowing an underage person to enter and remain in a licensed premises off-limits to persons under the age of twenty-one (21), a violation of RCW 66.44.310(1)(a) and WAC 314-11-020(2).⁴ AR 246. Dodge City requested a formal hearing. AR 460. Prior to hearing, Dodge City filed a motion to dismiss, arguing that the Board’s officers and agents had acted unconstitutionally when they entered into public areas of the premises. AR 295-312.

At the same time, Dodge City filed a separate motion to dismiss arguing that it had been entrapped; that the Board’s enforcement officers

⁴ Complete texts of both RCW 66.44.310(1)(a) and WAC 314-11-020(2) have been included in the appendices. Additionally, WAC 314-11-015(1)(a) provides that “Liquor licensees are responsible for the operation of their licensed premises in compliance with the liquor laws and rules of the board (Title 66 RCW and Title 314 WAC). Any violations committed or permitted by employees will be treated by the board as violations committed or permitted by the licensee.” Thus, a violation committed by its employee is no different from a violation being committed by Dodge City, the licensee.

lacked authority to conduct compliance checks; and that the enforcement officers had engaged in “outrageous conduct” during the check. *Id.* Finally, on May 5, 2009, Dodge City filed a motion for continuance arguing one of its witnesses, Mr. Hilker, had been advised by his attorney not to testify at the May 14 hearing. AR 409-11. The Administrative Law Judge (ALJ) denied Dodge City’s motions. AR 500.

The hearing took place on May 14-15, 2009. AR 500. The ALJ issued an Initial Order, holding that Dodge City had violated the law. AR 352-360. The Board issued its Final Order on December 29, 2009, upholding the Initial Order. AR 551-554. The Board imposed a penalty of a seven (7) day suspension of Dodge City’s liquor license. AR 553. Dodge City filed a petition for judicial review in Clark County Superior Court, which affirmed the Board’s Final Order. CP 49-54. Dodge City appeals.

IV. STANDARD OF REVIEW

When reviewing an agency’s decision, an appellate court sits in the same position as the superior court and applies the standards of review set forth in RCW 34.05.570(3) directly to the agency record. *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). “The burden of demonstrating the invalidity of agency action is on the party asserting invalidity[.]” RCW 34.05.570(1)(a). The Board’s findings of

fact are reviewed under the substantial evidence standard. RCW 34.05.570(3)(e).

The error of law standard applies to issues relating to whether: (1) an agency has statutory authority or jurisdiction to act; (2) the agency engaged in an unlawful decision-making process or has failed to follow a prescribed procedure; and, (3) the agency erroneously interpreted or applied the law. These issues are reviewed *de novo*. *Preserve Our Islands v. The Shorelines Hrgs. Bd.*, 133 Wn. App. 503, 515, 137 P.3d 31 (2006). Notwithstanding the *de novo* standard of review, courts grant substantial weight to an agency's interpretation of its own regulations. *Tapper*, 122 Wn.2d at 403.

V. SUMMARY OF ARGUMENT

Dodge City primarily argues that Mangan's entry constituted an illegal search and consequently all associated evidence should be suppressed. This argument is without merit. As a threshold matter, there was no search. Mangan entered the public service area of Dodge City and law enforcement officers observed his entry from a public street. This compliance check process falls squarely within the Board's authority to enforce liquor laws and to regulate those who voluntarily engage in the pervasively regulated liquor sales industry. Furthermore, had a search

occurred, the Board is explicitly authorized by statute to conduct warrantless inspections of liquor licensed premises.

Plain statutory language provides that the defense of entrapment applies to criminal prosecutions and Dodge City may not assert it in an administrative proceeding. Moreover, no entrapment occurred here as Dodge City's employees were merely given an opportunity to either obey the law or not in the course of the compliance check. The Board's officers engaged only in investigative methods approved by Washington courts and acted under authority set out in statute and rule.

The Burden of proof in this matter is the "preponderance of the evidence" standard. Relying on case law that only applies to professional license adjudications, Dodge City suggests that the burden of proof in this case should be the "clear and convincing evidence" standard. But a liquor license is not a professional license, and no Washington case law or analysis supports Dodge City's claims. Additionally, the ALJ's denial of Dodge City's motion for continuance, which was plainly strategic and lacking in good cause, was appropriate.

VI. ARGUMENT

A. **The Board's Compliance Check Was A Lawful Exercise Of Its Regulatory Authority And Not An Unlawful Search.**

Dodge City's principal argument in this matter is that the Board's compliance check constituted an illegal search and therefore all associated evidence should be suppressed. AB at 12-20. As a threshold matter, Dodge City's argument fails because it could have had no reasonable expectation of privacy in the portions of its premises observable by or held open to the public and therefore no "search" of its commercial property occurred. *State v. Evans*, 159 Wn.2d 402, 409, 150 P.3d 105 (2007) (defendant must "exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private"). Additionally, Dodge City fails to set forth authority invoking the exclusionary rule, or establish why it is applicable or why it is an appropriate remedy in this matter.⁵ Reaching beyond the search question, warrantless inspections of liquor licensed premises are explicitly authorized by statute.

⁵ The exclusionary rule provides for the potential suppression of evidence that is unconstitutionally obtained. *Hudson v. Michigan*, 547 U.S. 586, 590-92, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006). However, "whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Id.* at 591-92 (internal citations omitted). Moreover, the issue is irrelevant here as no search occurred.

1. There was no search of Dodge City's premises.

The Fourth Amendment to the United States Constitution provides protection against warrantless searches and seizures. *State v. Carter*, 151 Wn.2d 118, 127, 85 P.3d 887 (2004). Establishing that a “search” within the ambit of Fourth Amendment protection occurred requires a demonstration that a party has both “a justifiable, reasonable, or legitimate expectation of privacy” in the thing or location examined and a subjective expectation of such privacy. *Carter*, 151 Wn.2d at 127; *See also State v. Crandall*, 39 Wn. App. 849, 852, 697 P.2d 250 (1985). Similarly, Article I, Section 7, of the Washington State Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The protections of Article I, Section 7, and the Fourth Amendment are triggered only when a governmental agent disturbs a party’s private affairs or a person’s home is entered. *Carter*, 151 Wn.2d at 126; *See also City of Seattle v. McCready*, 123 Wn.2d 260, 270, 868 P.2d 134 (1994). Where there is no privacy interest there is no search and Constitutional considerations are not implicated. *Centimark Corp. v. Dep’t of Labor & Industries*, 129 Wn. App. 368, 375, 119 P.3d 865 (2005). (“[t]he constitutional right to privacy does not apply to areas in which there is no reasonable expectation of privacy”).

“The Fourth Amendment’s prohibition against unreasonable searches applies to administrative inspections of private commercial property.” *Seymour v. State Dep’t. of Health, Dental Quality Assurance Commission*, 152 Wn. App 156, 164-65, 216 P.3d 1039 (2009); *citing Donovan v. Dewey* 452 U.S. 594, 598, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981). In the absence of a *Gunwall* analysis, these provisions of the state and federal constitutions are viewed as being coextensive in the context of administrative inspections. *Seymour*, 152 Wn. App at 165; *Murphy v. State* 115 Wn. App 297, 311, 62 P.3d 533(2003). Dodge City has provided no *Gunwall*⁶ analysis.

The expectation of privacy in a commercial property is less than the expectation of privacy in an individual’s home. *Seymour* 152 Wn. App. at 165; *citing New York v. Burger*, 482 U.S. 691, 699-700, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987); *Centimark* 129 Wn. App. at 376. “The expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual’s home.” *Donovan*, 452 U.S. at 598-99; *Dow Chemical Co. v. United States*, 476 U.S. 227, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986). In contrast to a homeowner’s privacy interest, “[t]he interest of the owner of

⁶ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) sets forth criteria for determining if a state constitutional provision is more protective than its federal counterpart.

commercial property is not one in being free from any inspections." *Donovan*, 452 U.S. at 599.

Accordingly, the United States Supreme Court has recognized that regulatory inspections of commercial premises held open to the public, as opposed to commercial premises or portions of such premises restricted to all but employees or owners, is not a search and does not require a warrant. *See, e.g., See v. City of Seattle*, 387 U.S. 541, 545, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967); *See generally Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967) (the Fourth Amendment does not protect what a person knowingly exposes to the public). In *See v. City of Seattle*, the appellant challenged the attempted warrantless search of his locked, restricted access, commercial warehouse.⁷ *Id.* at 540. The search was intended to be part of a routine, city-wide administrative code enforcement inspection conducted by City of Seattle officials. *Id.* The warehouse owner argued that a warrantless inspection of his locked warehouse would violate the Fourth Amendment. *Id.* at 542. The U.S. Supreme Court held that "administrative entry, without consent, upon the portions of commercial premises *which are not open to the public* may only be compelled through prosecution or physical

⁷ The appellant was arrested and fined for refusing entry into the warehouse. *See* 387 U.S. at 542. The remedy sought by the appellant was not exclusion of evidence, but relief from prosecution for denying the inspector entry into the warehouse absent a warrant. *Id.*

force within the framework of a warrant procedure”. *Id.* at 545 (emphasis added).

Following *See*, in *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 309-10, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978), the U.S. Supreme Court again considered the Fourth Amendment protections afforded a commercial property. There, an Occupational Safety and Health Act (OSHA) inspector sought access to the areas of a plumbing and electrical business restricted to employees. *Id.* at 310. The Court concluded those areas of the business restricted to employees were not open to government inspection absent a warrant. *Id.* at 315. However, the Court also held that a government agent conducting a regulatory inspection stands in the same position as a member of the public and “what is observable by the public is observable, without a warrant, by the Government inspector as well.” *Id.* at 315; *See also Dow Chemical Co.*, 476 U.S. at 238 (reaffirming the *Marshall* holding).

In contrast, where government agents deliberately inspect beyond what would be observable by the public in commercial premises, or enter areas of the premises not open to the public, a warrant or warrant exception is required. In *Lo-Ji Sales Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979), the Court considered the validity of a criminal search warrant for commercial premises operated as an “adult

store.”⁸ *Lo-Ji*, 442 U.S. at 322-23. The government suggested that even if the warrant was infirm, no search occurred because the materials seized were exposed to the general public. *Id.* at 329. A Town Justice seized most of the store’s films and magazines after compelling a clerk to show him the films in a manner that the general public would not have viewed them and removing cellophane covers from and reviewing magazines in a manner different from how they were displayed. *Id.* at 322-23, 329.

The *Lo-Ji* Court determined that the Town Justice did not view the films and magazines “in the same manner as a customer would ordinarily see them”. *Id.* at 329. Because customers could not view *Lo-Ji*’s movies and read its magazines while in the public areas of the business, government agents could not claim that the material was exposed to the general public. *Id.*

Dodge City runs a business it holds open to the public. IA Mangan entered the public portion of the business. AR 87, 125. He presented his own identification, indicating his true age, and was allowed to enter Dodge City’s service area—an area already containing other members of the public. AR 84-87, 450. Two officers observed this event from a

⁸ The Board anticipates Dodge City may rely on *Lo-Ji* in its reply brief. It should be noted that *Lo-Ji* is distinguishable because the search that occurred was not a regulatory inspection; it was a search for evidence of allegedly criminally “obscene” materials. *Lo-Ji* 442 U.S. at 321. However, to the extent it is relevant; it supports the Board’s position.

public street, and two other officers observed him from the public portion of Dodge City in an undercover capacity. A.R. 125-127. Dodge City presented no evidence, and no facts were found, showing that Mangan or any officer ever entered a portion of Dodge City's commercial property that was not open to the general public or restricted only to employees. Everything observed by the Board's agents could have been observed by members of the public, including Dodge City's patrons.

Dodge City argues it had a reasonable expectation of privacy in its bar because it sought to exclude persons under the age of twenty-one (21). AB at 23-24. However, as the Court established in *See* and *Marshall*, the issue is not whom a commercial premises would individually allow or disallow on their property. *See*, 387 U.S. at 545; *Marshall*, 436 U.S. at 309-10; *Dow Chemical*, 476 U.S. at 238. The issue is whether access to Dodge City's commercial premises is restricted to employees or owners. *See*, 387 U.S. at 545 (where a commercial property owner had a privacy interest in a locked warehouse with no apparent public access); *Marshall*, 436 U.S. 307, 309-10 (where a commercial property owner had a privacy interest in those areas restricted to employees, but not those areas open to the general public).

Dodge City had no reasonable subjective or societal expectation of privacy in areas of its licensed premises that it actively invited the public

to enter. Its exclusion of a narrow category of individuals, an exclusion required by law, does not change that fact.⁹ Those portions of Dodge City's premises observable by the general public may be observed by the Board's officers and their agents without a warrant. *See*, 387 U.S. at 545; *Marshall*, 436 U.S. at 315; *Dow Chemical*, 476 U.S. at 238. Thus, it was not a "search" when the Board's officers observed Mangan's entry into Dodge City from a public street. AR 113-14, 198-200. Nor was it a search when Board officers and agents entered the public portions of Dodge City's premises and observed only what members of the public would observe. Because the officers and Mangan never intruded upon any reasonable privacy interest, no "search" occurred and no warrant was required. *See Carter*, 151 Wn. 2d at 126.

2. RCW 66.28.090 lawfully authorizes administrative inspections in connection with the sale of liquor, a pervasively regulated industry.

Because no search occurred in the instant matter, the Board's officers and agents did not require a warrant or a warrant exception in order to perform a compliance check at Dodge City. Moreover,

⁹ Dodge City's argument, if correct, would mean that all business owners have a reasonable expectation of privacy if the business prohibits a group of people – or even a single person – from entering. This would include, for example, adult book stores and dance clubs, horse racing tracks, and retail establishments that prohibit known shoplifters from entering.

warrantless inspections of liquor licensed premises are explicitly authorized by statute. RCW 66.28.090(1) provides that:

(1) All licensed premises used in the manufacture, storage, or sale of liquor, or any premises or parts of premises used or in any way connected, physically or otherwise, with the licensed business, and/or any premises where a banquet permit has been granted, shall at all times be open to inspection by any liquor enforcement officer, inspector or peace officer. (2) Every person, being on any such premises and having charge thereof, who refuses or fails to admit a liquor enforcement officer, inspector or peace officer demanding to enter therein in pursuance of this section in the execution of his/her duty . . . shall be guilty of a violation of this title.

Relying solely on *Washington Massage Foundation v. Nelson*, 87 Wn.2d 948, 558 P.2d 231 (1976), Dodge City argues RCW 66.28.090 is “infirm. AB at 21. It fails to meet its burden of proving its claim.

Statutes are presumed constitutional. *Lujan v. G&G Fire Sprinklers Inc.*, 532 U.S. 189, 198, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001). A party challenging a statute's constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 414, 120 P.3d 56 (2005). Any analysis of RCW 66.28.090 must be done in the context of the entire statute and its purpose. *See State v. Manro*, 125 Wn. App. 165, 173, 104 P.3d 708 (2005).

Even when—unlike the facts here—a business owner has some expectation of privacy, an administrative inspection may be authorized by statute under certain limited circumstances. *Nelson*, 87 Wn.2d at 953.¹⁰ A statute authorizing inspections of a pervasively regulated industry is constitutionally sound so long as it is relevant to the public interest in regulating the industry and sufficiently delineates: 1) the scope of inspection; 2) when inspections can occur; and 3) the places which are subject to inspection. *Id.* RCW 66.28.090(1) is such a statute.

As a threshold matter, the sale of alcohol is a pervasively regulated industry, in Washington and throughout the nation, and subject to extensive governmental control. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970); *See also Nelson*, 87 Wn.2d at 953; *Jow Sin Quan v. Washington State Liquor Control Board*, 69 Wn.2d 373, 382, 418 P.2d 424 (1966). The authority of the Board in regulating, supervising, and licensing the retail sale of alcohol is “broad and extensive”; a reality that Washington's courts have recognized for decades. RCW 66.08.050; *Jow Sin Quan*, 69 Wn.2d at 379; *See, e.g., Anderson, Leech & Morris, Inc.*, 89 Wn.2d 688, 694, 575

¹⁰ “When an industry or business is subject to extensive governmental regulation and frequent unannounced inspections are necessary to insure compliance, warrantless inspections are valid if authorized by a statute which sufficiently delineates the scope, time and place of inspection. And the authorized inspection must be relevant to the purposes of the statute, i.e., in furtherance of the public interest in regulating particular conduct or conditions.” *Nelson*, 87 Wn. 2d at 953.

P.2d 221 (1978); *Sukin v. Washington State Liquor Control Board*, 42 Wn. App. 649, 653, 710 P.2d 814 (1985); *Corral Inc., v. Washington State Liquor Control Board*, 17 Wn. App. 753, 760-761, 566 P.2d 214 (1977).

Courts have also recognized that a license to engage in the sale of liquor is “a temporary permit, in the nature of a privilege, to engage in a business that would otherwise be unlawful”, not a vested property right. *Jow Sin Quan*, 69 Wn.2d at 382; *See also Scottsdale Insurance Co. v. Int’l. Protective Agency, Inc.*, 105 Wn. App. 244, 249, 19 P.3d 1058 (2001) (a liquor license is “merely representative of a privilege granted by the state”). A liquor licensee accepts that it is subject to certain conditions upon issuance of the license. *See Jow Sin Quan*, 69 Wn.2d at 382. Chief among those conditions is compliance with all laws and rules related to the sale of alcohol, combined with extensive regulation and supervision by the Board. *Id*

Alcohol is a controlled substance, and much of the conduct licensee’s are prohibited from engaging in, including allowing minors into restricted areas or providing alcohol to them, is a threat to the public safety and welfare. It furthers the purpose of the regulatory scheme, and the interest of public safety, for the Board’s officers to enter a licensed premise, unannounced, to ensure that the laws and rules are being

followed by a licensee. There can be no dispute that Dodge City engages in a pervasively regulated business.

Turning to the specific *Nelson* criteria, the scope of the inspection authorized by RCW 66.28.090 is limited to the enforcement of liquor laws and rules. A liquor enforcement officer or inspector has a duty to enforce all liquor laws and rules. *See* RCW 66.44.010(4); WAC 314-29-005(1). General peace officers have the same duty. *See* RCW 66.44.010(1). RCW 66.28.090 delineates the scope and purpose of the inspection: a liquor enforcement officer, inspector or peace officer may not be prevented from entering the premises when he or she demands to enter “in the execution of his/her duty.” RCW 66.28.090(2). Considered in the context of the entire statutory scheme, RCW 66.28.090(2) sufficiently delineates that any such inspection is for the enforcement of liquor laws and rules; laws and rules to which Dodge City has knowingly subjected itself. *See Nelson*, 87 Wn.2d at 954; *Jow Sin Quan*, 69 Wn.2d at 382.

Second, the statute specifies that inspections may take place at any time. RCW 66.28.090(1). Given the purpose of the statute and the overall regulatory scheme, this provision is appropriate and necessary. Many regulations applying to liquor-licensed premises are in effect at all times, not just during business hours or the hours in which alcohol can be legally

sold.¹¹ RCW 66.28.090 must, by its very purpose and the purposes of the overall regulatory scheme, allow for inspection of the premises at any time a violation might take place.

Finally, there is no question that the statute clearly delineates the place to be inspected: “All licensed premises used in the manufacture, storage, or sale of liquor, or any premises or parts of premises used or in any way connected, physically or otherwise, with the licensed business, and/or any premises where a banquet permit has been granted”. RCW 66.28.090.

Even if a search had occurred here, which it did not, it would have been authorized by statute. RCW 66.28.090, when considered in the context of the entire Liquor Control Act, its purpose and the nature of the alcohol sales industry, provides adequate safeguards to allow warrantless inspections of liquor licensed premises. *See Nelson*, 87 Wn.2d at 953.¹² Inspections performed under the statute are, accordingly, constitutional.

¹¹ A licensee must adhere to rigid rules regarding what hours alcohol may be sold, consumed or possessed on the licensed premises. WAC 314-11-070. At all times a licensee must comply with rules restricting the type of alcohol that can be permitted and stored on the licensed premises. WAC 314-11-065; -080. Similarly, at all times a licensee is prohibited from supplying alcohol to persons under the age of twenty-one. WAC 314-11-020. A licensee at all times may not allow, permit or encourage a wide variety of lewd behavior. WAC 314-11-050. A licensee has the responsibility to “control their conduct and the conduct of employees and patrons on the premises *at all times*.” WAC 314-11-015(3) (emphasis added).

¹² Moreover, *Nelson* is distinguishable from the instant case. In *Nelson*, the Court considered statutes relating to inspection of massage parlors. *Id.* at 949. Unlike the massage industry, the sale of alcohol is historically a pervasively regulated industry.

3. Dodge City improperly raises a new issue on appeal that fails under both fact and law.

For the first time on appeal, Dodge City challenges the Board's authority to conduct compliance checks on the basis that they are "random" and therefore "infirm". AB at 22. This Court has held that it will not address a new issue on appeal unless a party can demonstrate manifest error affecting a constitutional right. *State v. Eggleston*, 129 Wn. App. 418, 437, 118 P.3d 959 (2005).¹³ Dodge City has made no such showing.

Even if this argument had been properly raised, it fails on both factual and legal grounds. First, Dodge City insists that, "on May 16, 2008, the Board had no particular reason to believe that Dodge City was allowing under-aged persons onto its premises." AB at 21. This contention is inaccurate. Five (5) months prior to Dodge City's May 16, 2008 violation, Board Enforcement Officers discovered a minor in Dodge City's premises drinking liquor, and Dodge City subsequently stipulated to that violation. AR 56, 193, 491-493. Accordingly, the Board had

Nelson, 87 Wn.2d at 952-54. By accepting the privilege to sell liquor in the State of Washington, Dodge City accepted that it would be subject to the continuing supervision of the Board.

¹³ "Under RAP 2.5(a)(3), a defendant must show how an alleged constitutional error actually affected his rights at trial. It is this showing of actual prejudice that makes the error "manifest." A "manifest" error is "unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *Eggleston*, 129 Wn. App. 418, 437.

substantial reason to investigate whether Dodge City was allowing minors to enter their premises and acquire alcohol.

Second, the only relevant authority Dodge City cites involving a regulatory inspection, *Seymour v. Washington Dep't. of Health*, 152 Wn. App. 156, 167, 216 P.3d 1039 (2009), does not support its argument.¹⁴ AB at 21. The Court in *Seymour* did not hold that a random or unannounced inspection of a pervasively regulated business pursuant to statutory authority is unconstitutional. *Seymour*, 152 Wn. App. at 167. On the contrary, the *Seymour* Court quoted *Nelson's* holding that unannounced inspections are valid if authorized by statute. *Id.* at n.5. Finally, as set forth above, no “search” occurred here. Therefore, whether the compliance check here was “random” or not is irrelevant.

B. Liquor Enforcement Officers Have Legislative Authority To Enforce All Liquor Laws And Regulations.

Dodge City also challenges the Board’s ability to utilize compliance checks to enforce liquor laws and rules. AB 16-20. However, it never clearly articulates if this is part of its “unlawful search” argument, or a separate ground for dismissal. *Id.* Dodge City appears to assert that

¹⁴ Most of the authority Dodge City relies on involves the privacy interests of *individuals*, none of them involve administrative inspections of a commercial premises engaged in a pervasively regulated industry such as the sale of alcohol. See *State v. Marchand*, 104 Wn.2d 434, 706 P.2d 225 (1985); *City of Seattle v. Messiani*, 110 Wn.2d 454, 755 P.2d 775 (1988); *State v. Jorden*, 160 Wn.2d 121, 156 P.3d 893 (2007); *York v. Wahkiakum School District*, 163 Wn.2d 297, 178 P.3d 995 (2008); See also *Nelson*, 87 Wn.2d at 952-54 (noting that the sale of alcohol is a pervasively regulated industry).

even if Board agents were lawfully on its premises, they have no authority to conduct compliance checks. *Id.* Whatever Dodge City's assertion, its contention is wrong.

1. **RCW 66.44.310(1)(b), 66.44.316, 66.44.290, and 66.44.350 do not apply to or limit Board enforcement activities.**

Dodge City argues that no statute authorizes the Board or its agents to conduct compliance checks. AB at 17. It cites to several inapplicable statutes to support its argument. *Id.* 17-19. In reviewing the meaning of a statute the first step is to look to the plain meaning of the statute's terms. *See Thurston County v. Cooper Point Association*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002). The plain meaning of a statute should be "discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 12.

Each statute Dodge City cites, RCW 66.44.290, RCW 66.34.316, and RCW 66.44.350¹⁵, apply only to rights and interests of either a licensee or a minor. None of them address how Board agents may engage in regulating licensees. Specifically, RCW 66.44.290(1) provides prosecutorial immunity to minors between the ages of eighteen (18) and twenty (20) who participate in "controlled purchase programs." The only

¹⁵ Full texts of these statutes are included in the appendices.

“controlled purchase programs” referred to in the statute are private, in house programs, conducted by licensees for employee training, not the Board’s enforcement activities. RCW 66.44.290.¹⁶

Similarly, under RCW 66.44.316 and RCW 66.44.350, licensees may lawfully allow certain categories of minors to enter areas of its premises otherwise restricted to minors. Neither statute provides how the Board may enforce liquor rules; both statutes simply create exceptions for the *licensee* to allow minors in its premises, none of which apply here.¹⁷

Nothing in the plain language of any statute cited by Dodge City indicates it was promulgated to establish or limit methods by which the Board, or its officers, may enforce liquor laws and rules it has been legislatively authorized to enforce.

2. RCW 66.44.010(4) allows for compliance checks.

Dodge City argues the Board cannot rely on RCW 66.44.010(4) as authority to utilize compliance checks because the statute does not specifically mention this enforcement technique. AB at 16-17. Dodge City insists this must be deemed an intentional exclusion by the legislature. *Id.* The argument fails.

¹⁶ Additionally, Dodge City was not charged with sale of alcohol to a minor; RCW 66.44.290 is not applicable to the facts in this matter.

¹⁷ RCW 66.44.290, RCW 66.44.316, and RCW 66.44.350 do not apply to the facts here or Mangan’s employment and activities with the Board. However, because his activities were at the direction of law enforcement officers, he has a complete defense from any type of prosecution. RCW 9A.16.070 (1)(a); AR 450, 503.

RCW 66.44.010(4) in pertinent part provides:

The board may appoint and employ . . . officers to be designated as liquor enforcement officers. Such liquor enforcement officers shall have the power, under the supervision of the board, to enforce the penal provisions of this title and the penal laws of this state relating to . . . sale of liquor.

Similarly, WAC 314-29-005(1) provides that if a Board officer “believes that a licensee or a mandatory alcohol server training permit-holder has violated a board statute or regulation” he or she may issue an administrative violation notice.

Courts avoid statutory interpretation that leads to absurd results or renders a portion of a statute a nullity. *State v. Hall*, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010); *John H. Castillo v. Kincheloe*, 43 Wn. App 137, 149, 715 P.2d 1358 (1986). Dodge City’s argument is based on the false premise that when the Legislature gives an agency the authority to enforce laws and rules, it must also enumerate all allowable enforcement techniques. *See* AB at 17. Dodge City’s interpretation leads to an absurd result: Board officers may enforce liquor laws and rules, but cannot employ any methods to actually engage in that enforcement, as no specific methods are enumerated in RCW 66.44.010(4). *See Hall*, 168 Wn.2d at 737. Likewise, this interpretation renders the statute a nullity. If an officer may only use those enforcement methods set out in RCW

66.44.010(4), and no such methods are provided, the statute is meaningless. *See Kincheloe*, 43 Wn. App. at 149.

The authority to conduct compliance checks is derived from the Board's authorization to employ and use liquor enforcement officers. RCW 66.44.010(4), WAC 314-29-005(1). Neither the Legislature nor the Board has promulgated laws or rules micromanaging what investigative methodology the Board's officers must use. As set forth below, Washington's case law regarding permissible law enforcement conduct controls this matter.

3. The Board's Enforcement Division has statutory, regulatory, and case law authority to engage in compliance checks.

Officers of the Washington State Liquor Control Board are limited purpose law enforcement officers. They have broad police powers to enforce the Washington alcohol laws and rules and are essential to the Board's mandate to regulate alcohol sale and distribution. RCW 66.44.010(4); WAC 314-29-005(1); *See* RCW 66.08.050.

Washington courts have consistently held that law enforcement may utilize undercover operations and deceitful conduct. *See State v. Athan*, 160 Wn.2d 354, 371, 377, 158 P.3d 27 (2007); *State v. Smith*, 101 Wn.2d 36, 43, 677 P.2d 100 (1984); *State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966); *State v. Enriquez*, 45 Wn. App. 580, 585, 725 P.2d 1384

(1986). “Public policy allows for some deceitful conduct and violation of criminal laws by the police in order to detect and eliminate criminal activity.” *State v. Lively*, 130 Wn.2d 1, 20, 921 P.2d 1035 (1996); *State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245 (1973). Washington Courts have consistently ruled that law enforcement may use a decoy or informer when affording a person with an opportunity to violate the law. *See City of Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d 967 (1948); *State v. Trujillo*, 75 Wn. App. 913, 919, 883 P.2d 320 (1994).

In *Playhouse Inc. v. Liquor Control Board*, 35 Wn. App. 539, 667 P.2d 1136 (1983), undercover Board officers, while enforcing Board rules, entered a licensed premises. The officers purchased “table dances” with public funds. *Id.* at 540. The licensee was charged with violating Board rules prohibiting “suggestive, lewd and/or obscene conduct on the licensed premises.” *Id.* at 541. On appellate review, the court considered whether the officer’s conduct was so violative of due process that it should be dismissed. *Id.* at 542. The Court held that “the use of undercover agents and limited police participation in unlawful enterprises, are not constitutionally prohibited” and affirmed the final order of the Board.¹⁸ *Id.* The *Playhouse* decision establishes that the Board’s officers may use

¹⁸ The *Playhouse* court also held that the conduct engaged in by the liquor officers “could not be accurately characterized as ‘shocking to the universal sense of justice.’” *Playhouse Inc.*, 35 Wn. App. at 542.

undercover agents and some otherwise unlawful conduct when enforcing liquor rules. *See Id*

In conducting this compliance check, Board officers used a decoy to determine if Dodge City employees were allowing minors into their premises and/or selling them alcohol, as they had in the past. AR 56, 83, 85-87, 193, 491-493, 502-503. It utilized undercover officers to observe Dodge City's operations. AR 85-87, 450, 502-503. The methods utilized by the Board and its agents in this compliance check were lawful.

C. Entrapment Is Neither Available Nor Applicable As An Affirmative Defense In This Matter.

Dodge City argues that it was “entrapped” and that it may claim that defense in the civil administrative proceedings below. AB at 25. But the defense of entrapment is specifically available “[i]n any prosecution for a crime.” RCW 9A.16.070(1). The Board issued an administrative complaint charging Dodge City violated RCW 66.44.310(1)(a) and WAC 314-11-020(2). AR 246. The former is the enabling statute for the latter, and the charge is administrative in nature. No criminal charges were filed against Dodge City, and no criminal prosecution occurred. There is no Washington authority allowing the entrapment defense in the civil context. Dodge City concedes this by stating “no Washington case has yet decided whether entrapment can be used as a defense in administrative proceedings.” AB at 26.

Dodge City suggests the entrapment defense may be raised in an administrative adjudication by citing to foreign case law. AB at 26. However, other states' court opinions are not binding authority for Washington courts and tribunals. *Rickert v. State Public Disclosure Comm'n*, 129 Wn. App. 450, 467, 119 P.3d 379 (2005). Nor is the proffered case law persuasive: other state courts cannot authoritatively subvert the plain language of a Washington statute. "If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone." *State v. M.C.*, 148 Wn. App. 968, 971, 201 P.3d 413 (2009). The plain language of RCW 9A.16.070(1) provides the defense of entrapment is available in criminal prosecutions; it therefore is not available to Dodge City in a civil administrative proceeding.

Even if the defense of entrapment was available, Dodge City would bear the burden of establishing entrapment occurred. *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996). Dodge City cannot meet its burden under the facts here. RCW 9A.16.070(2) provides that: "The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime." *See also Gray*, 69 Wn.2d at 432. ("the use of a decoy or informer to present an opportunity for commission of a crime does not constitute entrapment").

IA Mangan requested only to be allowed into Dodge City's premises and provided his own valid identification when asked by Mr. Hilker for identification. AR 85-87, 448-449, 502-503. The record demonstrates Mr. Hilker was provided all the information necessary to not violate the law. *Id.* There is no evidence of pressure or coercion to allow Mangan into the premises. Dodge City's employees were merely afforded an opportunity to violate the law and Mr. Hilker did so by allowing a minor into the licensed establishment, as they have in the past. AR 56, 85-87, 193, 450, 491-493, 502-503. Entrapment is not a defense available to Dodge City here and, even if it was, it cannot meet its burden of proving that entrapment occurred.

D. Dodge City Has Failed To Demonstrate "Outrageous Conduct" On The Part Of The Board.

Dodge City argues that the actions of the Board officers in this matter were so outrageous as to require dismissal. AB at 39-40. To support this contention Dodge City relies on a single Washington Supreme Court opinion, *State v. Lively*. In doing so, Dodge City has failed to properly apply *Lively* or compare the facts in that case to this matter.

An "outrageous conduct" argument requires a showing that law enforcement officers acted in a manner "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction". *Lively*, 130 Wn.2d at 19; *See also*

Playhouse Inc., 35 Wn. App. at 542. The Supreme Court in *Lively* held that “a due process claim based on outrageous conduct requires more than a mere demonstration of flagrant police conduct.” *Lively*, 130 Wn.2d at 20. Indeed, a claimant must demonstrate the conduct was “so shocking that it violates fundamental fairness.” *Id.* at 19. The Court also held that a dismissal based on outrageous conduct must be reserved for only the most egregious circumstances and “it is not to be invoked each time the government acts deceptively.” *Id.* at 20.

The *Lively* case is the only instance where the Washington Supreme Court dismissed a conviction on the “outrageous conduct” principle. In *Lively*, a police informant befriended a recovering addict at an alcoholics anonymous (AA) meeting, developed a live-in relationship with her, and then convinced her, despite her deep reluctance, to arrange drug sales. *Id.* at 26. The Washington Supreme Court found that having police agents attend AA meetings to lure recovering drug-addicts to commit illegal acts was repugnant to a sense of justice. *Id.*

The same cannot be said in the instant case. Dodge City asserts “the Board’s directing of a ‘compliance check’ at Dodge City was not based on any information it had obtained to suggest that Dodge City was letting minors onto restricted premises as a matter of course.” AB at 40.

Again, this assertion is inaccurate; Dodge City has a previous history of allowing a minor to enter the restricted portion of its premises and serving him alcohol. AR 193; 491-493.

Dodge City claims there is evidence “from Mr. Hilker and Mr. Kutch that Mr. Mangan attempted to bribe them to allow entry onto the premises.” AB at 40. Dodge City never cites to any portion of the record in support of this speculation. *Id.* Mr. Hilker’s statement explicitly notes Mangan was trying to give him money for the cover charge, which the IA was required to pay inside and did pay. AR 87, 96, 450. Mr. Anthony Kutch provided no testimony regarding any attempted bribe, but instead supported Mr. Hilker’s account. AR 172, 450.

Dodge City also suggests the conduct of Board officers and agents was outrageous because Mangan engaged in limited unlawful conduct. AB at 41-42. But, it has already been established that Board officers and agents may engage in limited unlawful conduct to assist officers in detecting and eliminating violations of the law. *See Lively*, 130 Wn.2d at 20; *Playhouse Inc.*, 35 Wn. App. at 340.

The Board’s officers used a decoy to determine whether Dodge City’s employees were complying with the law, a valid enforcement action which cannot be considered outrageous under the standards of

Lively.¹⁹ See *Lively*, 130 Wn.2d at 20; See also *Playhouse Inc.*, 35 Wn. App. at 542. Indeed, this cannot be “outrageous conduct” when the legislature allows licensees to also conduct controlled purchase programs, using underage persons, to help train and evaluate their own staff. RCW 66.44.290. Here, the Board was exercising its lawful duty to investigate Dodge City’s compliance with liquor laws and rules-laws and rules it had previously violated. See RCW 66.44.010(4); WAC 314-29-005(1); *Playhouse Inc.*, 35 Wn. App. at 542; AR 193; 491-493. By the very standards set forth in *Lively*, this conduct does not even begin to approach the level of “outrageousness.” See *Lively*, 130 Wn.2d at 19-20.

E. The Administrative Law Judge Applied The Burden Of Proof Required Under Washington State Law.

Dodge City incorrectly asserts that the ALJ applied the wrong standard of evidence in the administrative proceeding below. AB at 29. In making its assertion, Dodge City relies primarily on the analysis and holdings of *Nguyen v. Dep’t of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001) and *Ongom v. State Dep’t of Health, Office of Prof’l Standards*, 159 Wn.2d 132, 148 P.3d 1029 (2006). Dodge City recognizes that under *Nguyen* and *Ongom* “the clear and convincing standard” applies only to

¹⁹ Indeed, all the evidence in the record indicates that had the IA engaged in the exact same conduct entirely on his own, without Board approval, Dodge City’s employees would have still allowed that minor to enter and purchase alcohol. AR 86-87, 113-14, 126-127, 193, 198-200, 450, 491-493, 502-503.

“proceedings to suspend or revoke any professional license.” AB at 30. Dodge City asks this Court to ignore Washington case law and find there is “no distinction” between its liquor license and a professional license. *Id.* at 31.

1. Liquor licenses are distinctly different from professional licenses.

In Washington, the preponderance of evidence standard used in civil proceedings is applied in administrative hearings unless otherwise mandated by statute or due process principles. *Thompson v. Dep’t of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); *Bonneville v. Pierce County*, 148 Wn. App. 500, 517, 202 P.3d 309 (2008). An exception to the general rule in *Thompson* was created for professional license disciplinary proceedings in *Nguyen* and *Ongom*. *Nguyen*, 144 Wn.2d at 524; *Ongom v. Dep’t of Health*, 159 Wn.2d at 139. The *Nguyen* and *Ongom* opinions establish only that professional license revocation proceedings are held under a clear and convincing evidence standard. *Nguyen*, 144 Wn.2d at 534; *Ongom*, 159 Wn.2d at 139. Dodge City argues that there is no distinction between its liquor license and a professional license. *See* AB at 31-32. This Court has already rejected this argument in several cases.

In *Brunson v. Pierce County*, 149 Wn. App. 855, 205 P.3d 963 (2009), erotic dancers holding licenses required by Pierce County

appealed suspension of those licenses. The dancers argued that the clear and convincing evidence standard applied to the proceeding, relying on both *Ngyuen* and *Ongom*. *Id.* at 862-63. This Court noted that the *Ngyuen* and *Ongom* opinions only applied to the revocation or suspension of professional licenses. *Id.* at 865. This Court held that RCW 18.118.020 established what constitutes a “professional license” in Washington State:

‘Professional license’ means an *individual*, nontransferable authorization to carry on an activity based on qualifications which include: (a) Graduation from an accredited or approved program, and (b) acceptable performance on a qualifying examination or series of examinations.

Brunson, 149 Wn. App. at 865 (emphasis added). This Court held that because no Washington court had extended the same due process guarantees to erotic dance permit-holders, and the dancers were not holders of a professional license as the permit met none of the RCW 18.118.020 conditions, their argument failed. *Id.* at 866.

Dodge City attempts to distinguish this case by arguing its requirements to obtain a liquor license are greater than those of the exotic dancers in *Brunson*. AB at 33. That is irrelevant because Dodge City’s liquor license does not satisfy the *Brunson* requirements—the license is not individual but corporate, it can be transferred, and it does not require graduation from a program or passing an examination. RCW 18.118.020;

Brunson, 149 Wn. App. at 865. Dodge City cannot demonstrate a liquor license is a “professional license” and, accordingly, it may not rely on *Ngyuen* and *Ongom*.

Nor is Dodge City’s contention supported by this Court’s decision in *Hardee v. State Dep’t of Social & Health Services*, 152 Wn. App 48, 215 P.3d 214 (2009), *review granted*, *Hardee v. State*, 168 Wn.2d 1006, 226 P.3d 781(2010).²⁰ In *Hardee*, a home daycare operator argued that due process required a proceeding to revoke its license was subject to the clear and convincing standard. This Court, again, noted that neither *Ongom* nor *Ngyuen* compelled the application of the clear and convincing standard because those cases were limited to professional licenses. *Id.* at 56. Citing to *Brunson*, the Court held that the daycare license was more in the nature of an occupational license than a professional license, and therefore the application of the preponderance standard in the proceeding below was appropriate. *Id.* at 56-57.

Similarly, in *Bonneville*, 148 Wn. App. 500, 202 P.3d 309, this court rejected the same argument with respect to a conditional use permit to conduct a business out of a home. The county examiner in that case revoked a permit after concluding by a preponderance of the evidence that the appellant violated conditions of the permit. *Bonneville*, 148 Wn. App.

²⁰ *Hardee* was recently argued before the Washington State Supreme Court and an opinion is pending.

at 510. Relying on *Nguyen*, on appeal, the former permit-holder argued the county erred by failing to apply the clear, cogent, and convincing standard of proof. *See Id.* at 515. This Court held that the appellant's reliance on *Nguyen* was misplaced as the interest at issue in *Nguyen* was a far more significant interest, namely, a professional medical license.²¹ *Id.* This Court concluded by reasserting the general rule: namely, that the preponderance standard generally applies to all civil matters, including administrative proceedings. *Id.*

Contrary to Dodge City's argument, Washington courts have established a bright-line distinction between a professional license and other types of licenses issued by the state. A liquor license simply conveys the privilege to sell alcohol out of a licensed business. RCW 66.24.010. Liquor licenses are issued to business entities, not individuals. RCW 66.24.010; WAC 314-07-010(4); WAC 314-07-035. A liquor license is transferrable when ownership of the licensed business entity changes. WAC 314-07-080. In short, a liquor license fails to meet any of the criteria established by this Court in *Brunson* or *Bonneville* for determining what qualifies as a "professional license." *Id.* at 865-66.

²¹ In *Bonneville*, this Court also held that "if the preponderance standard met due process for a 14-day involuntary civil commitment . . . it surely meets due process for revoking a conditional land use permit." *Bonneville*, 148 Wn. App. at 517, *citing In re Det. of LaBelle*, 107 Wn.2d 196, 220-21, 728 P.2d 138 (1986).

Accordingly, neither *Ngyuen* nor *Ongom* applies to administrative proceedings involving liquor licenses.

2. The “clear and convincing” standard applies only to individual interests where more is at stake than a “mere monetary interest”.

This Court has made a clear distinction between a professional license and other types of state issued licenses. Even if such clear authority was absent, Dodge City could not satisfy the *Ngyuen* and *Ongom* analysis.

Dodge City asserts that the test set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 983, 47 L. Ed. 2d 18 (1976) is controlling. AB at 30. However, as our Supreme Court noted, the *Mathews* test does not consider what burden of proof is applicable in an administrative proceeding. *Nguyen*, 144 Wn. 2d at 526; *See also Mathews* 424 U.S. at 335; AB at 30. Instead, *Mathews* considered only what type of due process was required prior to terminating social security benefits. *Id.* The *Ngyuen* Court instead relied primarily on the reasoning and holding in *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), which sets out criteria for applying a clear, cogent, and convincing burden of proof in a civil matter.

The intermediate clear, cogent, and convincing evidence standard is only imposed when some particularly important individual interest is at

stake in a civil matter. *See Addington*, 441 U.S. at 423; *Nguyen*, 144 Wn.2d at 524-25. This intermediate standard is generally confined to a narrow category of adjudications such as the indefinite civil commitment of an individual or the revocation of an individual's professional license. *See Addington*, 441 U.S. at 424; *Nguyen*, 144 Wn.2d at 524; *Ongom*, 159 Wn.2d at 139. In *Nguyen* the Washington Supreme Court specifically held that due process requires the clear and convincing standard in civil adjudications only when necessary "to protect particular important individual interests." *Nguyen*, 144 Wn.2d at 525. The Court went on to note that the standard was only appropriate when "the individual interests at stake are more substantial than mere loss of money." *Id.* at 527-28.

Dodge City is a corporation and not an individual. AB at 2. Liquor licenses do not represent an individual property interest, but rather a property interest held by a recognized business entity.²² WAC 314-07-035. Because no individual right is at issue here, Dodge City's argument fails.

Even if an individual did hold a liquor license, for the heightened standard to be applied there must be an important, substantial individual

²² Those individuals who have some potential control over a business entity applying for a liquor license must be investigated for potentially troubling criminal or liquor law violation history at the time of application. WAC 314-07-035, 040, 045. Dodge City, a corporation, may suggest that because of this background check, its officers and shareholders each hold liquor licenses. This assertion is incorrect; none of these individuals holds a liquor license in his name.

interest at stake that is more than “a mere loss of money”. *Addington*, 441 U.S. at 424; *Nguyen*, 144 Wn.2d at 525. The interest at stake in this matter, and in all liquor license hearings, is always the same--“a mere loss of money”.

Dodge City asserts its interest in its liquor license is the same as a physician’s license because its “retail liquor license is also valuable”. AB at 31. *Nguyen* and *Ongom* refute this assertion. It was not the monetary value of a physician or nursing assistant license that was at stake in those cases. In *Nguyen* the Supreme Court reiterated “the loss of a professional license is more than a monetary loss.” *Nguyen*, 144 Wn.2d at 525. The Court in *Ongom* held that both Dr. Nguyen and Ms. Ongom had a liberty interest in their *professional* reputations and that *professional* discipline was stigmatizing to an individual. *Ongom*, 159 Wn.2d at 139. In *Ongom* the court held that because professional discipline is stigmatizing: “it is more than a mere loss of money and is thus entitled to a higher standard of proof.” *Ongom*, 159 Wn.2d at 139, citing *Addington*, 441 U.S. at 424.

Here, the only interest at stake is a temporary suspension of Dodge City’s ability to sell alcohol. AR 459, 553. Dodge City cannot demonstrate it will suffer individual professional stigma, because it is

neither an individual nor a professional.²³ The only result of a liquor license suspension is a temporary loss of revenue from alcohol sales. WAC 314-29-020; AR 459, 553. It is no different than a monetary penalty in terms of the interest at stake. It is purely monetary interest.

In the administrative proceeding below, the ALJ applied the preponderance of the evidence standard, as required by law. AR 505. The burden of demonstrating that some other evidentiary standard should have been applied is borne by Dodge City. Dodge City fails to meet this burden and its arguments are contrary to Washington law. The preponderance of the evidence standard is the appropriate burden of proof in this matter, just as it is in all other administrative hearings absent statute or other authority to the contrary. *Thompson*, 138 Wn.2d 783 at 797. Finally, the record demonstrates without doubt that Dodge City unlawfully allowed a 17-year-old to enter and remain in its premises. AR 84-87, 173, 450, 449, 503. Even if the burden of proof had been “clear and convincing evidence”, the record would support the Board’s action in this matter.

²³ Dodge City again attempts to sway this Court with authority from another jurisdiction in the form of two opinions from Florida state courts: *Ferris v. Turlington*, 510 So.2d 292, 12 Fla. L. Weekly 393 (Fla. 1987) and *Pic N’ Save Central Florida Inc, v. Dep’t of Business Regulations*, 601 So.2d 245, 17 Fla. L. Weekly D1379 (Fla. App. 1992). Again, case law generated by other state courts is not binding on Washington courts. *Rickert*, 129 Wn. App. at 467. This is especially so given that *Washington* case law has already provided conclusive authority on this issue.

F. Mr. Hilker's Refusal To Cooperate With Dodge City Was Not Grounds For A Continuance And His Statement Was Already Admitted As Evidence.

Dodge City asserts that the Administrative Law Judge erred in denying a motion for continuance of the administrative hearing below. AB at 38. While not entirely clear, and without support from substantial authority, Dodge City essentially claims that Mr. Hilker was unable to testify because its motion for continuance was denied. *Id.* However, Dodge City had the authority to subpoena Mr. Hilker to testify at the hearing and that authority was not affected by the ALJ's ruling. RCW 34.05.446(1); WAC 10-08-120(1).

Dodge City states "Mr. Hilker, quite understandably declined to testify so as to preserve his privilege against self incrimination."²⁴ AB at 37-38. The Fifth Amendment privilege permits a person to refuse to testify at a trial or other proceeding, where an answer might tend to incriminate him or her in future criminal proceedings. *King v. Olympic Pipeline*, 104 Wn. App. 338, 349, 16 P.3d 45 (2000). Importantly, Washington courts have held that:

There is no blanket Fifth Amendment right to refuse to answer questions based on an assertion that any and all questions might tend to be incriminatory. The privilege must be claimed as to each question and the matter

²⁴ Mr. Hilker was criminally cited for allowing a minor to enter Dodge City's restricted premises.

submitted to the court for its determination as to the validity of each claim.

Eastham v. Arndt, 28 Wn. App. 524, 532, 624 P.2d 1159 (1981).

Mr. Hilker's Fifth Amendment privilege would not have provided him a right to simply ignore a subpoena or refuse to answer every question asked in the course of the proceedings below. *Arndt*, 28 Wn. App. at 532. Had Dodge City subpoenaed Mr. Hilker, he would have been required to testify at the hearing. Mr. Hilker's Fifth Amendment privilege would have only extended to answering questions for which the answer might incriminate him criminally. *Olympic Pipeline*, 104 Wn. App. at 349.

Furthermore, knowing and voluntary statements, of any kind, made to law enforcement agents are not protected by the Fifth Amendment privilege. See *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Mr. Hilker had already made a knowing and voluntary statement to an enforcement officer that was admitted into the record at hearing without objection from either party. AR 450. Everything contained in Mr. Hilker's sworn statement is non-incriminating and he would have been obliged to testify in regards to it at hearing.²⁵ See AB at 38. Additionally, Dodge City made an offer of

²⁵ On reply, Dodge City may argue subpoenaing Mr. Hilker would have been futile because virtually any question asked of Mr. Hilker might have furnished a "link in the chain" of evidence leading to conviction and he would have refused to answer. Such

proof, setting forth what else Mr. Hilker would have testified to. AB at 8. None of that anticipated testimony was incriminating and he could have provided it at hearing.²⁶

Instead of choosing to subpoena Mr. Hilker, Dodge City, instead made what appears to be a strategic decision to seek a potentially permanent stay of the proceedings. The motion never expressed when Mr. Hilker might be willing to testify and provided no time frame for how long the stay would be. AR 409-411. Moreover, the Board would have been severely prejudiced by a stay as one of its primary witnesses, the IA Mangan, would have been physically unavailable as of July 2009. AR 419.

Dodge City did not move for a stay on this basis until ten (10) days prior to the scheduled hearing. AR 411. Mr. Hilker's criminal citation related to the events in this matter was issued almost a full year prior to the administrative hearing. AR 411. Had Dodge City thought Mr. Hilker's situation was a serious issue it could have raised it in a timely

an assertion, though, rings false. First, Mr. Hilker has already admitted to virtually all the facts Dodge City seeks from him in his sworn statement and he could not refuse to answer questions regarding information already provided in his statement. AR 450. Second, such an argument ignores the law. Mr. Hilker could not claim a blanket exemption to all questions. Third, Dodge City made a decision to not subpoena Mr. Hilker, so it is unknown what would or would not have happened.

²⁶ Dodge City claims Mr. Hilker's testimony would have assisted in its defense of entrapment. AB at 38. That testimony would have been non-incriminating and as the defense of entrapment is not available here such testimony would have been irrelevant. RCW 9A.16.070.

manner. Instead it chose not to exercise its subpoena rights, wait until the last minute to bring a motion that it did not adequately support, and now claims its failure is the error of others. The Court should reject these arguments.

G. The Attorney Fees Request Should Be Denied.

Dodge City seeks fees and costs under RCW 4.84.350. A fee award under RCW 4.84.350 is not mandatory when an agency decision is reversed on appeal. Attorney's fees are not to be awarded if it is determined the agency action was substantially justified. RCW 4.84.350(1). Substantially justified means "justified to a degree that would satisfy a reasonable person". *Silverstreak Inc. v. Washington State Dep't. of Labor & Industries*, 159 Wn. 2d 868, 892, 154 P.3d 891 (2007) (internal citation omitted). "It requires the State to show that its position had a reasonable basis in law and fact." *Id.* at 892. The relevant factors in determining whether the Board was substantially justified here are "the strength of the factual and legal basis for the action, not the manner of the investigation and the underlying legal decision." *Id.* As demonstrated above, the Board's actions were substantially justified.

Dodge City never denies, and the record demonstrates without doubt, that Dodge City allowed a 17-year-old person to unlawfully enter and remain in its licensed premises, which are off limits to persons under

the age of twenty-one (21). AR 84-87, 173, 450, 449, 503. The Board was substantially justified in finding Dodge City violated RCW 66.44.310(1)(a) and WAC 314-11-020(2) on these facts.

The Board and its officers have a statutory duty to enforce all liquor laws and rules. AR 50-52,501; RCW 66.44.010; WAC 314-29-005(1); *Silverstreak*, 159 Wn.2d at 893 (where the agency action was substantially justified in part because it had a statutory duty). Board officers and agents made all observations in this case from either a public street or areas of Dodge City's premises that are open to the public. AR 113-14, 125-127, 198-200. Additionally, the Board's officers could reasonably rely on their statutory authority to inspect licensed premises, a statute that is presumed constitutional. RCW 66.28.090; *Chadha*, 462 U.S. 919, 103 S.Ct. 2764 (1983). The Board's officers utilized investigative methods which have been long upheld as constitutionally valid and may also be utilized by licensee's to train their employees if they wish to do so. RCW 66.44.290; *See, e.g., Playhouse*, 35 Wn. App. at 542.

Finally, the Board was justified in relying on current Washington Supreme Court precedent that the "preponderance of the evidence" burden of proof applies to an administrative hearing not involving a professional license.

The Liquor Board is confident that the Court will reject Dodge City's challenges and affirm the Board. In addition, the Board's action was substantially justified. Accordingly, any request for an award of attorney's fees is without merit and should be denied.

VII. CONCLUSION

Dodge City unlawfully allowed a minor into its liquor licensed premises. Rather than take responsibility for this action, Dodge City sought to undermine the effective ability of the Board to enforce liquor laws and rules to the detriment of the public health, welfare, and safety. Its arguments to avoid responsibility for this unlawful act are unsupported by law or fact. Accordingly, the Board respectfully requests the Court affirm its Final Order in the above captioned case.

RESPECTFULLY SUBMITTED this 23 day of March, 2011.

ROBERT M. MCKENNA
Attorney General



GORDON P. KARG, WSBA No. 37178
Assistant Attorney General

APPENDIX A

LAWS AND RULE

RCW 66.44.310

Minors frequenting off-limits area — Misrepresentation of age — Penalty — Classification of licensees.

(1) Except as otherwise provided by RCW 66.44.316, 66.44.350, and 66.24.590, it shall be a misdemeanor:

(a) To serve or allow to remain in any area classified by the board as off-limits to any person under the age of twenty-one years;

(b) For any person under the age of twenty-one years to enter or remain in any area classified as off-limits to such a person, but persons under twenty-one years of age may pass through a restricted area in a facility holding a spirits, beer, and wine private club license;

(c) For any person under the age of twenty-one years to represent his or her age as being twenty-one or more years for the purpose of purchasing liquor or securing admission to, or remaining in any area classified by the board as off-limits to such a person.

(2) The Washington state liquor control board shall have the power and it shall be its duty to classify licensed premises or portions of licensed premises as off-limits to persons under the age of twenty-one years of age.

[2007 c 370 § 12; 1998 c 126 § 14; 1997 c 321 § 53; 1994 c 201 § 8; 1981 1st ex.s. c 5 § 24; 1943 c 245 § 1 (adding new section 36-A to 1933 ex.s. c 62); Rem. Supp. 1943 § 7306-36A. Formerly RCW 66.24.130 and 66.44.310.]

Notes:

Effective date — 2007 c 370 §§ 10-20: See note following RCW 66.04.010.

Effective date -- 1998 c 126: See note following RCW 66.20.010.

Effective date — 1997 c 321: See note following RCW 66.24.010.

Severability — Effective date — 1981 1st ex.s. c 5: See RCW 66.98.090 and 66.98.100.

Minors, access to tobacco, role of liquor control board: Chapter 70.155 RCW.

RCW 66.28.090

Licensed premises or banquet permit premises open to inspection — Failure to allow, violation.

(1) All licensed premises used in the manufacture, storage, or sale of liquor, or any premises or parts of premises used or in any way connected, physically or otherwise, with the licensed business, and/or any premises where a banquet permit has been granted, shall at all times be open to inspection by any liquor enforcement officer, inspector or peace officer.

(2) Every person, being on any such premises and having charge thereof, who refuses or fails to admit a liquor enforcement officer, inspector or peace officer demanding to enter therein in pursuance of this section in the execution of his/her duty, or who obstructs or attempts to obstruct the entry of such liquor enforcement officer, inspector or officer of the peace, or who refuses to allow a liquor enforcement officer, and/or an inspector to examine the books of the licensee, or who refuses or neglects to make any return required by this title or the regulations, shall be guilty of a violation of this title.

[1981 1st ex.s. c 5 § 20; 1935 c 174 § 7; 1933 ex.s. c 62 § 52; RRS § 7306-52.]

Notes:

Severability -- Effective date -- 1981 1st ex.s. c 5: See RCW 66.98.090 and 66.98.100.

RCW 66.44.290

Minor purchasing or attempting to purchase liquor — Penalty.

(1) Every person under the age of twenty-one years who purchases or attempts to purchase liquor shall be guilty of a violation of this title. This section does not apply to persons between the ages of eighteen and twenty-one years who are participating in a controlled purchase program authorized by the liquor control board under rules adopted by the board. Violations occurring under a private, controlled purchase program authorized by the liquor control board may not be used for criminal or administrative prosecution.

(2) An employer who conducts an in-house controlled purchase program authorized under this section shall provide his or her employees a written description of the employer's in-house controlled purchase program. The written description must include notice of actions an employer may take as a consequence of an employee's failure to comply with company policies regarding the sale of alcohol during an in-house controlled purchase.

(3) An in-house controlled purchase program authorized under this section shall be for the purposes of employee training and employer self-compliance checks. An employer may not terminate an employee solely for a first-time failure to comply with company policies regarding the sale of alcohol during an in-house controlled purchase program authorized under this section.

(4) Every person between the ages of eighteen and twenty, inclusive, who is convicted of a violation of this section is guilty of a misdemeanor punishable as provided by RCW 9A.20.021, except that a minimum fine of two hundred fifty dollars shall be imposed and any sentence requiring community restitution shall require not fewer than twenty-five hours of community restitution.

[2003 c 53 § 301; 2001 c 295 § 1; 1965 c 49 § 1; 1955 c 70 § 4. Prior: 1935 c 174 § 6(1); 1933 ex.s. c 62 § 37(1); RRS § 7306-37(1).]

Notes:

Intent -- Effective date -- 2003 c 53: See notes following RCW 2.48.180.

RCW 66.44.316

Certain persons eighteen years and over permitted to enter and remain upon licensed premises during employment.

It is lawful for:

(1) Professional musicians, professional disc jockeys, or professional sound or lighting technicians actively engaged in support of professional musicians or professional disc jockeys, eighteen years of age and older, to enter and to remain in any premises licensed under the provisions of Title 66 RCW, but only during and in the course of their employment as musicians, disc jockeys, or sound or lighting technicians;

(2) Persons eighteen years of age and older performing janitorial services to enter and remain on premises licensed under the provisions of Title 66 RCW when the premises are closed but only during and in the course of their performance of janitorial services;

(3) Employees of amusement device companies, which employees are eighteen years of age or older, to enter and to remain in any premises licensed under the provisions of Title 66 RCW, but only during and in the course of their employment for the purpose of installing, maintaining, repairing, or removing an amusement device. For the purposes of this section amusement device means coin-operated video games, pinball machines, juke boxes, or other similar devices; and

(4) Security and law enforcement officers, and firefighters eighteen years of age or older to enter and to remain in any premises licensed under Title 66 RCW, but only during and in the course of their official duties and only if they are not the direct employees of the licensee. However, the application of the [this] subsection to security officers is limited to casual, isolated incidents arising in the course of their duties and does not extend to continuous or frequent entering or remaining in any licensed premises.

This section shall not be construed as permitting the sale or distribution of any alcoholic beverages to any person under the age of twenty-one years.

[1985 c 323 § 1; 1984 c 136 § 1; 1980 c 22 § 1; 1973 1st ex.s. c 96 § 1.]

RCW 66.44.350

Employees eighteen years and over allowed to serve and carry liquor, clean up, etc., for certain licensed employers.

Notwithstanding provisions of RCW 66.44.310, employees holding beer and/or wine restaurant; beer and/or wine private club; snack bar; spirits, beer, and wine restaurant; spirits, beer, and wine private club; and sports entertainment facility licenses who are licensees eighteen years of age and over may take orders for, serve and sell liquor in any part of the licensed premises except cocktail lounges, bars, or other areas classified by the Washington state liquor control board as off-limits to persons under twenty-one years of age: PROVIDED, That such employees may enter such restricted areas to perform work assignments-including picking up liquor for service in other parts of the licensed premises, performing clean up work, setting up and arranging tables, delivering supplies, delivering messages, serving food, and seating patrons: PROVIDED FURTHER, That such employees shall remain in the areas off-limits to minors no longer than is necessary to carry out their aforementioned duties: PROVIDED FURTHER, That such employees shall not be permitted to perform activities or functions of a bartender.

[1999 c 281 § 12; 1988 c 160 § 1; 1975 1st ex.s. c 204 § 1.]

RCW 9A.16.070
Entrapment.

(1) In any prosecution for a crime, it is a defense that:

- (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
- (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

[1975 1st ex.s. c 260 § 9A.16.070.]

WAC 314-11-020

What are the guidelines regarding sales to persons under twenty-one years of age and where persons under twenty-one are allowed on a licensed premises?

(1) Per RCW 66.44.270, licensees or employees may not supply liquor to any person under twenty-one years of age, either for his/her own use or for the use of any other person.

(2) Per RCW 66.44.310, licensees or employees may not allow persons under twenty-one years of age to remain in any premises or area of a premises classified as off-limits to persons under twenty-one. (See RCW 66.44.310 (1)(b) regarding nonprofit, private club licensees.)

(3) Per RCW 66.20.180, at the request of any law enforcement officer, a holder of a card of identification must present his/her card of identification if the person is on a portion of a premises that is restricted to persons over twenty-one years of age, or if the person is purchasing liquor, attempting to purchase liquor, consuming liquor, or in the possession of liquor. If the person fails or refuses to present a card of identification it may be considered a violation of Title 66 RCW and:

(a) The person may not remain on the licensed premises after being asked to leave by a law enforcement officer; and

(b) The person may be detained by a law enforcement officer for a reasonable period of time and in such a reasonable manner as is necessary to determine the person's true identity and date of birth.

[Statutory Authority: RCW 66.08.030, 66.12.160, 66.44.010, 66.44.200, 66.44.240, 66.44.270, 66.24.291 [66.44.291], 66.44.310 . 04-15-162, § 314-11-020, filed 7/21/04, effective 8/21/04. Statutory Authority: RCW 66.08.030, 66.28.100, 66.28.040, 66.28.090, 66.44.010, 66.44.070, 66.44.200, 66.44.270, 66.44.291, 66.44.292, 66.44.310, 66.44.316, 66.44.318, 66.44.340, and 66.44.350. 02-11-054, § 314-11-020, filed 5/9/02, effective 6/9/02. Statutory Authority: RCW 66.08.030, 66.28.100, 66.28.040, 66.28.090, 66.44.010, 66.44.070, 66.44.200, 66.44.270, 66.44.291, 66.44.292, 66.44.310, 66.44.316, 66.44.318, 66.44.340, 66.44.350, and chapter 66.44 RCW. 01-06-014, § 314-11-020, filed 2/26/01, effective 3/29/01.]

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

NO. 41454-6-II

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

DODGE CITY SALOON, INC,

Appellant,

v.

WASHINGTON STATE LIQUOR
CONTROL BOARD,

Respondent.

**CERTIFICATE OF
SERVICE**

I, Saphron Weatherly, make the following declaration:

1. I am over the age of 18, a resident of Thurston County, and not a party to the above action.
2. On March 23, 2011, I caused to be served a true and correct copy of the Brief of Respondent and this Certificate of Service via U.S.

Mail and email to:

Ben Shafton
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
Email: bshafton@ccrslaw.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 23rd day of March, 2011.

[Signature]
Saphron Weatherly, Legal Assistant