

STATE
COURT OF APPEALS
DIVISION II

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

LINSKY, INC.,

Appellant,

v.

WASHINGTON STATE LIQUOR CONTROL BOARD,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

WAC 314-16-150 is a valid rule promulgated by the Board acting under its broad statutory authority under the Liquor Act. Its purpose is to protect the public health, safety and welfare. It does this by requiring licensee's prevent an apparently intoxicated patron from obtaining, possessing or consuming alcohol on the licensed premises.

A liquor license is not an absolute right; it is a privilege "to engage in a business that would otherwise be unlawful." *Jow Sin Quan v. Washington State Liquor Control Board*, 69 Wn.2d 373, 382, 418 P.2d 424 (1966). With that privilege comes many responsibilities, including the responsibility to control the conduct of patrons and to maintain order on the premises. Licensees cannot be permitted to turn a blind eye to a potential problem because addressing it might take more effort on their part. Being alleviated of its responsibilities under WAC 314-16-150 is precisely what Linsky seeks in the instant matter.

II. STATEMENT OF THE ISSUES

1. Is WAC 314-16-150(2), the Possess or Consume Rule, a proper exercise of the Board's rulemaking authority when it was promulgated pursuant to the Board's broad grant of authority and is consistent with the language, intent and spirit of the Liquor Act?
2. Is the Possess or Consume Rule valid when the statutorily defined term "sell" is broad and not confined to sale of alcohol through a formal agreement involving contractual privity?

3. Does the Possess or Consume Rule remain valid when neither it nor the plain meaning of RCW 66.44.200(1) was affected by any legislative amendment?

III. STATEMENT OF THE CASE

Appellant Linsky, Inc. (Linsky), doing business as Stewart's Place, is a restaurant and spirits bar that possesses a liquor license issued and enforced by the Respondent, Washington State Liquor Control Board. Clerks Papers (CP) 4-8.

In August 2009, the Board's Enforcement Division issued Linsky an Administrative Violation Notice (AVN)¹ alleging that Linsky or one of its employees allowed or permitted an apparently intoxicated person to consume and/or possess alcohol on a licensed premise in violation of the Board's rule, WAC 314-16-150, referred to as the Possess and Consume Rule. CP 10. In conformity with its procedures, on October 28, 2009, the Board filed an administrative complaint based on the AVN. CP 90. In December 2009, the Board's Enforcement Division issued Linsky a second AVN for a different incident but also alleging a violation of WAC 314-16-150. CP 10. On March 17, 2010, the Board filed an administrative complaint based on the second AVN. CP 90-91. Linsky

¹ An Administrative Violation Notice, or "AVN," is the mechanism used by the Board to allege violations of the laws and rules controlling the sale and service of spirits in Washington. WAC 314-29-005(1).

requested administrative hearings in both cases, and the matters were referred to the Office of Administrative Hearings for adjudication.

On June 29, 2010, prior to a hearing on the merits in either case, Linsky filed a Complaint for Declaratory and Injunctive Relief in Thurston County Superior Court. CP 4-8. In the complaint, Linsky asserted that WAC 314-16-150 is a nullity and outside the Board's statutory authority granted pursuant to RCW 66.44.200. *Id.* Linsky sought an order permanently enjoining the Board from enforcing WAC 314-16-150. *Id.* On August 31, 2010, the Board filed its Answer and Affirmative Defenses. CP 9-13. The parties agreed to continue the administrative proceedings on the two AVNs pending the outcome of the superior court declaratory action.

Following briefing from the parties on the issue of whether WAC 314-16-150 was a nullity (CP 72-89, 95-122), the Superior Court determined that the Board properly enacted WAC 314-16-150 pursuant to its broad grant of authority and that the word "sell" as defined by RCW 66.04.010(38) and applied to RCW 66.44.200, did not invalidate the rule. Verbatim Report of Ruling 4-8; CP 145. On June 20, 2011, the Superior Court issued an Order Dismissing Plaintiff's Motion for Declaratory Judgment. CP 145-46. Linsky timely filed this appeal.

IV. STANDARD OF REVIEW

An agency's rule-making authority is a question of law that the court reviews *de novo* at each stage of judicial review. *Armstrong v. State*, 91 Wn. App. 530, 536, 958 P.2d 1010 (1998). Notwithstanding the *de novo* standard of review, courts grant substantial weight to an agency's interpretations of the statutes it administers. *Pub. Util. Dist. 1 v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). Courts also give substantial weight to an agency's interpretation of its own rules. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). When reviewing an agency's action, an appellate court sits in the same position as the superior court. *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 295-96, 197 P.3d 1153 (2008).

V. ARGUMENT

The state Legislature explicitly provided that the entire Washington State Liquor Act is an exercise of the state's police power for the protection of the health, welfare, peace, and safety of the people that is to be liberally construed. RCW 66.08.010. To effectuate and enforce the Liquor Act, the state Legislature granted the Board authority to promulgate rules to further that legislative purpose. RCW 66.08.030(1); RCW 66.07.020. In fulfilling that mandate, the Board properly enacted WAC 314-16-150 as the rule is consistent with RCW 66.44.200 and the

Liquor Act as a whole. Neither RCW 66.44.200 nor its subsequent 1998 amendment invalidated the Board's rule.

A. Linsky Fails To Meet Its Burden To Demonstrate That WAC 314-16-150 Is Invalid

A duly enacted rule is presumed valid. *Washington Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). The burden of demonstrating the invalidity of a rule is on the party asserting the invalidity. RCW 34.05.570(1)(a); *Armstrong v. State*, 91 Wn. App. at 537. Under the Administrative Procedure Act, a rule is invalid *only* if: 1) the rule violates constitutional provisions; 2) the rule exceeds the statutory authority of the agency; 3) the rule was adopted without compliance with statutory rule-making procedures; or 4) the rule is arbitrary and capricious. RCW 34.05.570(2)(c). Courts cannot invalidate a rule on any ground other than those enumerated in RCW 34.05.570(2)(c). *Ass'n of Wash Bus. v. Dep't of Rev.*, 121 Wn. App. 766, 776, 90 P.3d 1128 (2004).

Linsky asserts WAC 314-16-150 exceeds the Board's statutory authority. In such a challenge, a duly enacted rule will be upheld provided the rule is reasonably consistent with the intent and purpose of the legislation it implements. *Wash. Pub. Ports Ass'n*, 148 Wn.2d at 646; *Hi-Starr Inc. v. Liquor Control Board*, 106 Wn.2d 455, 459, 722 P.2d 808

(1986). The wisdom or desirability of a rule is not relevant. *St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990) (internal citation omitted).

When reviewing the meaning of a statute to determine an agency's authority, the first step is to look to the plain meaning of the statute's terms. *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002). A statute's plain meaning 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." *Cooper Point Ass'n*, 148 Wn.2d at 12, quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). An act is to be construed as a whole, giving effect to all of the language used. *Cooper Point Ass'n*, 148 Wn.2d at 12. The declaration of purpose contained in the enabling statute is also an "important guide" when a court considers the validity of a rule and the breadth of the agency's authority. *Armstrong*, 91 Wn. App. at 537.

In addition to express powers, an agency also has those powers necessarily implied from its statutory delegation of authority. *Ass'n of Washington Business v. State of Washington, Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005). When a power is granted to an agency, "everything lawful and necessary to the effectual execution of the

power” is also granted by implication of law. *Tuerk v. Washington State Dep’t of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994). Agencies have implied authority to determine specific factors necessary to meet a legislatively mandated general standard. *Id.* Likewise, implied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature. *Id.*

As discussed below, the Board properly promulgated WAC 314-16-150 pursuant to its rule-making authority, and the rule is consistent with the Liquor Act as a whole and RCW 66.44.200(1) specifically. Linsky’s argument that the Board exceeded its authority in enacting the rule is without merit and it fails to meet its burden of showing that the rule is invalid. The rule is consistent with the intent and purpose of the legislation it implements and must be upheld.

B. The Board Promulgated WAC 314-16-150 Pursuant To Properly Delegated Authority

1. The Board’s General Authority Under The Washington State Liquor Act

The Legislature enacted the Washington State Liquor Act (Liquor Act) in 1933. Laws of 1933, Ex. Sess., ch. 62, § 3, p. 177.² The Liquor Act was codified as Title 66 RCW. When enacting the Liquor Act, the Legislature declared:

² Relevant portions of Laws of 1933, Ex. Sess., ch. 62 are attached hereto as Appendix A.

This entire act shall be deemed an exercise of the *police power* of the state, for the *protection of the welfare, health, peace, moral and safety of the people* of the state, and all its provisions shall be *liberally construed* for the accomplishment of that purpose.

Laws of 1933, Ex. Sess., ch. 62, § 2, p. 173 (emphasis added);

RCW 66.08.010. The Legislature granted the Board broad authority, enabling it to promulgate rules, saying that:

[f]or 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.

RCW 66.08.030(1) (emphasis added).

The courts have affirmed the Board's broad constitutional and statutory authority to regulate and control the dispensation of liquor for the protection of the people. *See Sukin v. Washington State Liquor Control Board*, 42 Wn. App. 649, 653, 710 P.2d 814 (1985) ("The dominion of the Board over the regulation, supervision and licensing of liquor is broad and extensive"); *Cosro, Inc. v. Washington State Liquor Control Board*, 107 Wn.2d 754, 757, 733 P.2d 539 (1987) (recognizing the Board is charged with administering the Liquor Act). The Supreme Court recognizes that the Board possesses this authority to protect the "public health, safety and morals." *Jow Sin Quan*, 69 Wn.2d at 379.

2. The Purpose And Intent Of RCW 66.44.200

Since its enactment in 1933, the Liquor Act has provided that “[n]o person³ shall sell any liquor to any person apparently under the influence of liquor.” Laws of 1933, Ex. Sess., ch. 62, § 36, p. 193; RCW 66.44.200(1). The term “sell,” as applied to RCW 66.44.200(1), is defined by the Legislature. When the Legislature adopted the Liquor Act, it defined “sell” and “sale” to include:

exchange, barter, and traffic; and also include the selling or supplying or distributing, by any means whatsoever, of liquor, or of any liquid known or described as beer or by any name whatever commonly used to describe malt or brewed liquor or of wine, by any person to any person

Laws of 1933, Ex. Sess., ch. 62, § 3, p. 177; RCW 66.04.010(38) . The prohibition against selling to an apparently intoxicated individual has not changed since 1933. Laws of 1933, Ex. Sess., ch. 62, § 36, p. 193; RCW 66.44.200(1). Similarly, the broad definition of sell and sale has also not materially changed since 1933.⁴

³ Under RCW 66.04.010(31), a “person” includes co-partnerships, associations and corporations; thus, a licensee is a “person” as defined by statute whether the license is held by a sole proprietor or some other business entity.

⁴ The Legislature amended the definitions section of the Liquor Act in 1935, but the language defining “sale” and “sell” has remained the same from 1933 to the present. Relevant portions of Laws of 1935, ch. 158, § 3, p. 498 are attached hereto as Appendix B.

In 1998, the Legislature amended RCW 66.44.200. *See* Laws of 1998, ch. 259 § 1; AR 19-21.⁵ The original 1933 statutory language became subsection one and, with the amendment adding two additional subsections, the now current form of RCW 66.44.200 provides:

- (1) No person shall sell any liquor to any person apparently under the influence of liquor.
- (2)(a) No person who is apparently under the influence of liquor may purchase or consume liquor on any premises licensed by the board.
 - (b) A violation of this subsection is an infraction punishable by a fine of not more than five hundred dollars.
 - (c) A defendant's intoxication may not be used as a defense in an action under this subsection.
 - (d) Until July 1, 2000, every establishment licensed under RCW 66.24.330 or 66.24.420 shall conspicuously post in the establishment notice of the prohibition against the purchase or consumption of liquor under this subsection.
- (3) An administrative action for violation of subsection (1) of this section and an infraction issued for violation of subsection (2) of this section arising out of the same incident are separate actions and the outcome of one shall not determine the outcome of the other.

RCW 66.44.200. The addition of subsection (2) makes the purchase or consumption of alcohol by an apparently intoxicated person a civil infraction for the intoxicated person. The longstanding prohibition against selling liquor to an apparently intoxicated person remains in full force and

⁵ The record on review was compiled and submitted by stipulation of the parties, and contains a variety of materials relating to the 1998 amendment of RCW 66.44.200 and the Board's rulemaking for WAC 314-16-150. *See* CP 14-71. Linsky refers to this stipulated record by the designation "Administrative Record ('AR')." *See* Appellant's Br. at 5. To maintain consistency and clarity, the Board also refers to the stipulated record as the "AR."

effect in subsection (1) and has never changed. RCW 66.44.200; AR 19-21.

3. WAC 314-16-150's Prohibition Against Allowing An Apparently Intoxicated Person To Possess Alcohol Is Consistent With The Liquor Act Generally And RCW 66.44.200(1) Specifically

WAC 314-16-150 was originally adopted by the Board in 1963.

AR 7. It provided, in pertinent part:

No retail licensee shall give or otherwise supply liquor . . . to any person apparently under the influence of liquor; or to any interdicted person (habitual drunkard); nor shall any licensee or employee thereof permit any person . . . in said condition or classification to consume liquor on his premises, or on any premises adjacent thereto and under his control

AR 7. In 1994, the Board adopted subsection (2) to WAC 314-16-150, which reads:

No class A, B, C, D or H licensee shall permit any person apparently under the influence of liquor to physically possess liquor on the licensed premise.

AR 12.⁶

WAC 314-16-150(2), the Possess or Consume Rule, serves as an administrative tool to carry out RCW 66.44.200(1)'s intent and purpose of preventing an apparently intoxicated person from having alcohol supplied

⁶ The stated purpose of the rulemaking was to strengthen the rule by making it an administrative violation for a licensee to permit an intoxicated person to physically possess liquor on the licensed premises. AR 9-10. The 1994 amendment also made some minor changes to the language of the existing text. The rule was amended one final time in 1998, but the changes were not substantive.

or distributed to him or her, while on a licensed premises “by any means whatsoever.” RCW 66.44.200(1); RCW 66.04.010(38); RCW 66.08.030(1). The Board’s rule and RCW 66.04.010(38) both recognize, and Linsky concedes, that there are ways other than direct service by which a licensee or its employees could, purposefully or inadvertently, supply or distribute alcohol to an apparently intoxicated person. Appellant’s Br. at 14. For example, an apparently intoxicated person could pick up an alcoholic drink left unattended or have another person purchase alcohol on his or her behalf. Both of these scenarios present just as much of a threat to public safety as the direct person-to-person service of alcohol to an apparently intoxicated person.

The prohibitions in the rule fall squarely within the statutory authority granted to the Board nearly eighty years ago and are consistent with the Board’s directive to protect the “*welfare, health, peace, moral and safety of the people* of the state.” RCW 66.08.010 (emphasis added).

C. The Board Acted Within The Legislature’s Grant Of Authority When Enacting WAC 314-16-150

Linsky appears to have two primary arguments for why WAC 314-16-150 exceeds the Board’s statutory authority: that the term “sell” in RCW 66.44.200 requires contractual privity between the licensee and the patron; and the Legislature intended to limit the responsibilities of a

Licensee when it amended RCW 66.44.200. However, both arguments are misplaced and without merit.

1. There Is No Privity Requirement In RCW 66.44.200(1)'s Prohibition Against Selling Alcohol To An Apparently Intoxicated Person

Linsky argues that the prohibition against allowing an apparently intoxicated person to possess and consume alcohol is inconsistent with RCW 66.44.200(1) because a licensee's duty is limited to the act of not *selling* liquor to an apparently intoxicated person. Appellant's Br. at 13. Linsky erroneously contends that the Legislature intended the definition of the term "sell" in RCW 66.44.200(1) to be limited to transactions involving contractual privity. Appellant's Br. at 26. Linsky, based upon its proffered interpretation of the word "sell," argues the Board has imposed upon it a duty that goes beyond the duty that was intended by RCW 66.44.200(1).⁷ Appellant's Br. at 11-12. Linsky's erroneous definition of "sell," renders its analysis of RCW 66.44.200(1) invalid.

If a statute is unambiguous, its meaning should be derived from the language of the statute alone. *Cherry v. Municipality of Metropolitan Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991). In some cases, it may

⁷ Linsky's opening brief includes recitation of three cases: *Lone Star Industries v. Dept. of Revenue*; *Burton v. Lehman*; and *Duncan Crane Service v. Dept. of Revenue*. Appellant's Br. at 9-11. The specific facts and outcomes in these cases, while all involving the topic of agency regulations, are not specifically related here. Moreover, Linsky makes no attempt to analyze the cases, compare them to these circumstances, or articulate how the holdings in those cases should apply in this appeal.

be appropriate to give a nontechnical statutory term its dictionary meaning when engaging in statutory construction and interpretation. *Cooper Point Ass'n*, 148 Wn.2d at 12. However, the court should only look to the dictionary when determining the plain meaning of an *undefined* statutory term. *See Bowie v. Washington Dep't of Revenue*, 171 Wn.2d 1, 11, 248 P.3d 504 (2011) (emphasis added). If the Legislature has defined a statutory term, the Legislature's definition is controlling. *See Schrom v. Board For Volunteer Fire Fighters*, 153 Wn.2d 19, 27, 100 P.3d 814 (2004).

RCW 66.44.200(1) has always provided: "No person shall sell any liquor to any person apparently under the influence of liquor." Laws of 1933, Ex. Sess., ch. 62, § 3, p. 177; *Purchase v. Meyer*, 108 Wn.2d 220, 225, 737 P.2d 661 (1987) (recognizing the prohibition set out in RCW 66.44.200(1) has existed since 1933 and is enforced by the Board). Similarly, since 1933, the Legislature has always defined the term "sell" as to include "exchange, barter, and traffic; and also include selling or supplying or distributing, *by any means whatsoever*, of liquor . . ." Laws of 1933, Ex. Sess., ch. 62, § 3, p. 177; RCW 66.04.010(38) (emphasis added). The Legislature unambiguously intended a broad definition of "sell" to be applied to RCW 66.44.200(1) and the Liquor Act as a whole.

In contrast to this history, Linsky asserts that this Court must ignore the statutory definition and, instead, narrowly construe the word “sell” as it is used in RCW 66.44.200(1) to mean only a formal sale of property, for consideration, between two parties in contractual privity. Appellant’s Br. at 26. The only authority Linsky cites to for this narrow definition of “sell” is *Spokane v. Baughman*, 54 Wash. 315, 103 P. 14 (1909). While the case does involve the sale of alcohol, it predates the Liquor Act, does not cite, discuss, or define any part of the Liquor Act, and has no bearing on the legislative definition. *Id.*

The Liquor Act’s broad definition of “sale” or “sell” provides three independent clauses: “selling,” “supplying” or “distribution,” each being potentially accomplished by “any means whatsoever”. RCW 66.04.010(38). Therefore, any one of these methods, through any means, independent of the others, constitutes a “sale” or the act of “selling” under the Liquor Act. *Id.* Additionally, these individual methods are also distinct from “exchange, barter, and traffic,” which are all additional modes of “sale” or “sell”. *Id.* The Legislature’s definition encompasses as wide a range of methods as possible which a licensee could be responsible for a patron acquiring alcohol and is not confined to sale via contractual privity. *Id.* Had the Legislature intended to adopt

Linsky's narrow interpretation of "sell," it could have so said; instead, it did not choose to so limit its definition. *See Schrom*, 153 Wn.2d at 27.⁸

Linsky further argues that, to read the definition of "sell" so broadly would be absurd. *See* Appellant's Br. at 27-28. To the contrary, Linsky's position that RCW 66.44.200(1) requires privity runs counter to the spirit and intent of the Liquor Act. Linsky's definition, when applied to RCW 66.44.200(1), would allow a licensee to serve a pitcher of beer to one sober person and then be absolved of any responsibility as he watches an apparently intoxicated person at the same table drink the beer. Similarly, a licensee would be free to ignore an apparently intoxicated person who, over the course of an evening, is observed drinking multiple drinks that are never "sold" to him.

Any benefit that RCW 66.44.200 holds for the welfare of the public is largely defeated if a licensee is free to allow an apparently intoxicated person to continue to possess and consume alcohol on its licensed premises. Linsky's proffered definition of "sell" renders RCW 66.44.200(1) virtually meaningless. A statute must not be interpreted in such a way that it renders its enactment meaningless. *Pasco v. Napier*, 109 Wn.2d 769, 773, 755 P.2d 170 (1988). Linsky's interpretation must, therefore, be rejected.

⁸ Linsky cites to no legal authority that would allow this Court to disregard the definition of "sell" provided in RCW 66.04.010(38). Appellant's Br. at 13.

2. The 1998 Amendment Of RCW 66.44.200 Did Not Alter A Licensee's Statutory Obligation

Linsky asserts the Legislature's 1998 addition of two subsections to RCW 66.44.200 somehow invalidated the Board's Possess and Consume rule. It claims that this amendment changed the statutory duties of the licensee. Appellant's Br. at 17-18. A plain reading of RCW 66.44.200(2) and (3), however, establishes that the Legislature had no intention of altering a licensee's responsibility.

In 1998, the Legislature added RCW 66.44.200(2) to further regulate the conduct of apparently intoxicated patrons. The Legislature added a punishment for the apparently intoxicated patron by making it an infraction to purchase or consume alcohol while on a licensed premise. Aside from a requirement that licensees post signage about the statute, nothing in RCW 66.44.200(2) changed the licensee's duties and responsibilities regarding apparently intoxicated persons, nor suggested that the Legislature intended to make any change. In fact, the Legislature maintained the original 1933 language in RCW 66.44.200(1) without any addition or deletion. Adding responsibility to patrons does not diminish the responsibility of the licensee. Responsibility is not finite.

As to subsection 3, its inclusion confirms the legislative intent to maintain parallel duties for both licensees and patrons: an administrative

case against a licensee for a violation of RCW 66.44.200(1) cannot be affected by the outcome of a civil infraction issued to an apparently intoxicated person under RCW 66.44.200(2).⁹ Nothing about the plain language of any section of RCW 66.44.200 alters the Legislature's previously expressed intent that RCW 66.44.200(1) be applied broadly or suggests that the Legislature intended to interfere with the Board's authority to enact and enforce WAC 314-15-160. Linsky's arguments to the contrary should be disregarded.

3. The Legislative History Surrounding The 1998 Amendment Of RCW 66.44.200(1) Demonstrates An Intent To Maintain The Longstanding Duties Of A Licensee

Linsky characterizes the legislative intent of the 1998 amendment to RCW 66.44.200(1) as shifting responsibility for monitoring apparently intoxicated patrons *from* the licensee *to* the patrons themselves. Appellant's Br. at 15, 19. Linsky goes on to argue that this shift necessarily invalidates WAC 314-16-150(2). *Id.* The legislative history for the amendment, however, does not support this position; nor can Linsky rely upon such history as demonstrative of legislative intent.

⁹ This is consistent with the Supreme Court's determination that the Board's administrative cases are separate matters from all other civil or criminal proceedings and the outcome of one should not determine the outcome of the other. *See Jow Sin Quan*, 69 Wn.2d at 382.

Linsky asserts that various comments made by Board representatives and members of the Legislature during committee meetings and hearings somehow prove the intent of the Legislature. Appellant's Br. at 21-24. These arguments are without merit because they are based on testimony at committee hearings or summaries of testimony set forth in the Senate and House Committee Bill Reports. AR at 22-27; 30-40. Preliminary reports to the Legislature – including bill reports – are not demonstrative of legislative intent and are given little weight. See *Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118 Wn.2d 46, 64, 821 P.2d 18 (1991).¹⁰ Additionally, testimony of outside parties is also not indicative of legislative intent; the value of such statements in determining intent is “minimal at best”. *Id.*

Even a legislator's comments from the floor of the Legislature are not necessarily indicative of legislative intent, and are given minimal weight. *Id.* at 63. To the extent such comments can be considered here, they do not support Linsky's position. Senator Roach introduced

¹⁰ To the extent comments made in committee hearings are at all illustrative of legislative intent, here they do not necessarily support Linsky's contention. For example, Representative Constantine expressed reservations about imposing any duty on patrons. AR at 37. He questioned:

whether a person who's—who's drunk is in a condition to make a rational decision about whether they're now going to break the law by ordering another drink. Which is, of course, one of the reasons why you want a sober person, a bartender, to cut them off. [sic]

Id. In so doing, Representative Constantine reasserted the intent of keeping licensees and servers responsible for keeping alcohol away from inebriated patrons.

SSB 5582 in the Senate floor debate, noting that it “puts, uh, *some* responsibility on the people who are actually buying liquor.” AR at 42 (emphasis added). Nowhere in the debate is there any mention of lessening or altering any existing duty to licensees or servers – there is only reference to *adding* “some responsibility” to individuals acquiring liquor. AR at 42-56.

Linsky fails to provide any proof that the Legislature intended the amendment to invalidate a portion of WAC 314-16-150. In fact, the entire administrative record on review is deplete of any evidence that the Possess or Consume Rule was ever discussed or considered by the Legislature. AR 13-56. A court will not assume that the Legislature would affect a significant change in policy by mere implication. *State v. Calderon*, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984). Linsky’s assertions to the contrary are simply inaccurate, and they are not grounds for invalidating WAC 314-16-150.

4. Linsky’s Arguments Concerning The Practical Application Of WAC 314-16-150 Are Misplaced

Finally, Linsky argues that the duty imposed by WAC 314-16-150 is “impractical” because licensees serve alcoholic and non-alcoholic drinks in the same glassware, and a licensee cannot determine what kind of drink a patron has by looking at the glass. Appellant’s Br. at 14.

It would also be “difficult,” Linsky argues, for a licensee to prevent an apparently intoxicated person from obtaining alcohol from someone other than a server.¹¹ Appellant’s Br. at 14. These arguments fail when examined against the Board’s statutory requirement to ensure the health, welfare and safety of the public. RCW 66.08.010. The purpose of the Liquor Act, and the rules effectuating it, is not to make a licensee’s business more convenient; it is to protect the public. *See Id.* WAC 314-16-150 helps protect the public health, welfare and safety by requiring that a licensee prevent patrons who are apparently intoxicated from obtaining alcohol. The rule acknowledges that a patron might be supplied alcohol on licensed premises without an employee, or all employees, being initially aware of the acquisition. Therefore, the rule imposes a reasonable corollary duty requiring the licensee to remove alcohol from patrons who are observed possessing or consuming alcohol when apparently intoxicated. Without the rule, the legislatively intended benefit to public health, welfare and safety would be compromised.

¹¹ Linsky also argues that WAC 314-16-150 imposes a requirement that “contradicts a long standing principle of liquor law: a licensee does not have a duty to remove an intoxicated person from its premises.” Appellant’s Br. at 21. Linsky provides no explanation as to how WAC 314-16-150 imposes a duty to remove intoxicated patrons from the premises, when the plain language of the rule never imposes such and requires instead that a licensee monitor its apparently intoxicated patrons closely *while on the premises*.

VI. CONCLUSION

WAC 314-16-150 is a valid rule promulgated by the Board acting under its broad statutory authority under the Liquor Act. Linsky has not met its burden of demonstrating otherwise. RCW 66.44.200(1), the longstanding statutory underpinning for the rule, continues to be in full force and effect. The Legislature's 1998 amendments to RCW 66.44.200 did not nullify the valid rule that pre-existed the unrelated statutory changes. Accordingly, Linsky's challenge to the validity of WAC 314-16-150 should be rejected.

RESPECTFULLY SUBMITTED this 6th day of February, 2012.

ROBERT M. MCKENNA
Attorney General



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Appendix A

CHAPTER 62.

[S. B. 7.]

WASHINGTON STATE LIQUOR ACT.

AN ACT relating to intoxicating liquors, providing for the control and regulation thereof, creating state offices, defining crimes and providing penalties therefor, providing for the disposition of public funds and declaring that this act shall take effect immediately.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. This act may be cited as the "Washington State Liquor Act." Title.

SEC. 2. This entire act shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose. Police power.
Liberally construed.

SEC. 3. In this act, unless the context otherwise requires:

"Alcohol" is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation or distillation of grain, starch, molasses, or sugar, or other substances including all dilutions and mixtures of this substance. "Alcohol."

"Beer" means any beverage obtained by the alcoholic fermentation of an infusion or decoction of pure hops, or pure extract of hops and pure barley malt or other wholesome grain or cereal in pure water containing not more than four per cent of alcohol by weight, and not less than 1/2 of one per cent of alcohol by volume. For the purposes of this act any such beverage, including ale, stout and porter, containing more than four per cent of alcohol by weight shall be referred to as "strong beer." "Beer."
"Strong beer."

habitually furnished to the public, not including drug stores and soda fountains.

“Sale” and “sell” include exchange, barter, and traffic; and also include the selling or supplying or distributing, by any means whatsoever, of liquor, or of any liquid known or described as beer or by any name whatever commonly used to describe malt or brewed liquor or of wine, by any person to any person; and also include a sale or selling within the state to a foreign consignee or his agent in the state. “Sale, sell.”

“Soda fountain” means a place especially equipped with apparatus for the purpose of dispensing soft drinks, whether mixed or otherwise. “Soda fountain.”

“Spirits” means any beverage which contains alcohol obtained by distillation, including wines exceeding seventeen (17) per cent of alcohol by weight. “Spirits.”

“Store” means a state liquor store established under this act. “Store.”

“Tavern” means any establishment with special space and accommodation for sale by the glass and for consumption on the premises, of beer, as herein defined. “Tavern.”

“Vendor” means a person employed by the board as a store manager under this act. “Vendor.”

“Winery” means a business conducted by any person for the manufacture of wine for sale. “Winery.”

“Farmers’ winery” means a place where any farmer in this state who grows grapes or other fruits upon his land, manufactures wine out of such grapes or other fruits grown by himself and no other, and sells by wholesale under the provisions of this act: *Provided*, That said wine shall not contain more than seventeen per cent (17%) of alcohol by weight. “Farmers’ winery.”

“Wine” means any alcoholic beverage obtained by fermentation of fruits (grapes, berries, apples, etc.) or other agricultural product containing sugar, to which any saccharine substances may have been “Wine.”

SEC. 34. Except as permitted by this act, no person shall open the package containing liquor or consume liquor in a public place. Every person who violates any provision of this section shall be guilty of a misdemeanor, and on conviction therefor shall be fined not more than ten dollars (\$10).

Misdemeanor to consume liquor in public place.

SEC. 35. No person who is intoxicated shall be or remain in any public place, and every person who violates any provision of this section shall be liable, on conviction for a first offense to a penalty of not more than ten dollars (\$10); for a second offense to a penalty of not more than twenty-five dollars (\$25); and for a third or subsequent offense to imprisonment for not more than thirty days, with or without hard labor, without the option of a fine.

Intoxicated person subject to fine.

SEC. 36. No person shall sell any liquor to any person apparently under the influence of liquor.

Sale to intoxicated persons.

SEC. 37. 1. Except in the case of liquor given or permitted to be given to a person under the age of twenty-one years by his parent or guardian for beverage or medicinal purposes, or administered to him by his physician or dentist for medicinal purposes, no person shall give, or otherwise supply liquor to any person under the age of twenty-one years, or permit any person under that age to consume liquor on his premises or on any premises under his control.

Sale to minors.

2. Every person under the age of twenty-one years who makes application for a permit shall be guilty of an offense against this act.

Application for permit by minor.

SEC. 38. Except in the case of liquor administered by a physician or dentist or sold upon a prescription in accordance with the provisions of this act, no person shall procure or supply, or assist directly or indirectly in procuring or supplying, liquor for or to any one whose permit is suspended or has been cancelled.

Ineligible persons.

Appendix B

"Sale and
sell."

"Sale" and "sell" include exchange, barter, and traffic; and also include the selling or supplying or distributing, by any means whatsoever, of liquor, or of any liquid known or described as beer or by any name whatever commonly used to describe malt or brewed liquor or of wine, by any person to any person; and also include a sale or selling within the state to a foreign consignee or his agent in the state.

"Soda
fountain."

"Soda fountain" means a place especially equipped with apparatus for the purpose of dispensing soft drinks, whether mixed or otherwise.

"Spirits."

"Spirits" means any beverage which contains alcohol obtained by distillation, including wines exceeding seventeen per cent (17%) of alcohol by weight.

"Store."

"Store" means a state liquor store established under this act.

"Tavern."

"Tavern" means any establishment with special space and accommodation for sale by the glass and for consumption on the premises, of beer, as herein defined.

"Vendor."

"Vendor" means a person employed by the board as a store manager under this act.

"Winery."

"Winery" means a business conducted by any person for the manufacture of wine for sale, other than a domestic winery.

"Domestic
winery."

"Domestic winery" means a place where wines are manufactured or produced within the State of Washington from fruits or fruit products grown exclusively and entirely within the State of Washington.

"Wine."

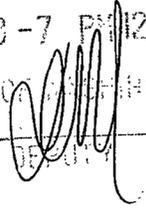
"Wine" means any alcoholic beverage obtained by fermentation of fruits (grapes, berries, apples, et cetera) or other agricultural product containing sugar, to which any saccharine substances may have been added before, during or after fermentation, and containing not more than seventeen per cent (17%) of alcohol by weight, including sweet wines fortified

COURT OF APPEALS
DIVISION II

NO. 42389-8

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

STATE OF WASHINGTON
BY 

LINSKY, INC.,

Appellant,

v.

WASHINGTON STATE LIQUOR
CONTROL BOARD,

Respondent.

DECLARATION OF
SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on February 6, 2012, I served a true and correct copy of the Brief of Respondent and this Declaration of Service by placing same in the U.S. mail via state Consolidated Mail Service with proper postage affixed to:

DAVID R. OSGOOD
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SEATTLE, WA 98101-2247

DATED this 6th day of February, 2012, at Olympia, Washington.



MARLENA MULKINS
Legal Assistant