

NOs. 42827-0-II

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

WASHINGTON STATE LIQUOR CONTROL BOARD,

Appellant,

v.

DUBLIN DOWN, LLC; and TOP SHELF, LLC,

Respondents (Consolidated on appeal).

BRIEF OF APPELLANT

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I. INTRODUCTION

The Appellant, Washington State Liquor Control Board (Board) seeks to hold two Vancouver bars responsible for their acts of selling alcohol to persons under the age of 21. Respondents, Dublin Down, LLC and Top Shelf, LLC (collectively "Licensees"), admit their employees sold alcohol to an 18-year old investigative aide on December 2, 2008. Licensees seek to escape responsibility for their unlawful actions through numerous claims.

The Court should reject each of the Licensees' arguments. The Licensees cannot establish collateral estoppel applies here nor can they demonstrate the Board's Liquor Enforcement Officers acted outside of their authority. The Licensees voluntarily participate in the sale of alcohol, a pervasively regulated business which requires they comply with all liquor laws and regulations. Their arguments seek to release them from the effective supervision of the Board and allow them to violate liquor laws and rules without consequence. This Court should affirm the Board's Final Orders that the Licensees violated RCW 66.44.270 and WAC 314-11-020(1) when they sold alcohol to a person under 21.

II. COUNTERSTATEMENT OF THE ISSUES

1. Does the Liquor Control Board retain its authority to regulate the sale of liquor even in light of the dismissal of criminal charges against their employees where, contrary to the Licensees'

argument, the elements of collateral estoppel have not been established?

2. Can the Board conduct compliance checks under its broad grant of statutory authority to enforce all liquor laws and rules; does such a compliance check conducted in the public portions of a licensee's premises constitute a search?
3. Is the defense of entrapment available in administrative proceedings?
4. Did the Board act arbitrarily or capriciously?
5. Should the request for attorney's fees be denied?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Statement

Dublin Down, LLC¹ (Dublin Down) is the holder of a liquor license, issued by the Board, in Clark County, Washington. Administrative Record for Liquor Control Board Case No. 22, 893 (AR) 22, 162.² Similarly, the Board issued Top Shelf, LLC (Top Shelf) a liquor license to operate in Clark County, Washington. Administrative

¹ This matter began as two separate cases before the Board arising from two distinct administrative cases involving the same issues of law and similar facts. The two matters were consolidated by this Court on a motion by the Board. Accordingly, the Licensees have produced a single brief and speak on appeal with a single voice. To avoid confusion, the Board will only refer to Dublin Down and Top Shelf individually when addressing factual matters. In referring to or quoting arguments posited by these parties, positions taken, or statements made in their shared brief, the Board will simply refer to both parties as "the Licensees".

² Because the administrative record in both cases is nearly identical, and most page numbers correspond to the same document in those records, "AR" will refer to *both* the Administrative Record in the Dublin Down and Top Shelf case found at Clerk's Papers (CP) Dublin Down (DD) Pg. 17 and Top Shelf (TS) Pg. 17 respectively. Any variances will be noted in the Top Shelf administrative record and cited as "AR-TS".

Record for Liquor Control Board Case No. 22,892 (AR-TS 22), 162. As holders of liquor licenses, the Licensees are subject to the Board's jurisdiction and must comply with all liquor statutes and Board rules. AR 22, 168. They are prohibited from selling liquor to any person under the age of twenty-one (21) years. AR 168; RCW 66.44.270(1); WAC 314-11-020(1). Further, they are restricted from allowing persons under the age of twenty-one (21) years to enter or remain on their licensed premises. AR 22.

On December 2, 2008, Lieutenant Marc Edmonds, Officer Almir Karic, Officer Kendra Ogren, and Investigative Aide (IA) Kyle Uren conducted compliance checks at the licensed premises' of both Dublin Down and Top Shelf.³ AR 22, 28, 34, 35-36, 162. During a compliance check, an underage IA attempts to enter a restricted licensed premise and purchase alcohol. AR 22, 166-67. The IA operates as an agent of the Board during these compliance checks. The purpose of a compliance check is to determine if licensees are complying with the state's prohibition against minors entering restricted premises and/or acquiring alcohol. *Id.* The checks are part of the Board's statutory duty and

³ Lieutenant Edmonds, Officer Karic and Officer Ogren are liquor enforcement officers with the Washington State Liquor Control Board Enforcement and Education Division. AR 22, 32-33, 162. Kyle Uren was an IA employed by the Enforcement Division. IA Uren's date of birth is October 5, 1990, and he was eighteen years old on December 2, 2008. AR 22, 162.

authority to supervise and regulate licensed establishments by evaluating their compliance with liquor laws and rules. RCW 66.44.010.

IA Uren had his valid Washington State issued driver's license on his person when he entered Dublin Down's premises. AR 22. He sat at the bar and was waited on by Cody Jones, a Dublin Down employee. AR 22, 162. IA Uren ordered a Bud Light from Mr. Jones. *Id.* Mr. Jones took Mr. Uren's order without asking him for his identification, and then served IA Uren a glass of Bud Light beer. *Id.*

Lieutenant Edmonds stood outside the licensed premises and watched Mr. Jones serve IA Uren a glass of beer. AR 22, 163. Once IA Uren was served alcohol, Lieutenant Edmonds entered the premises to notify Mr. Jones that he sold alcohol to an underage person. AR 22-23, 163. Mr. Jones freely admitted serving IA Uren a beer, which contained alcohol and is considered liquor pursuant to RCW 66.04.010(25). AR 23, 33, 163.

The same evening, in a separate compliance check, IA Uren and Officer Treco entered the Top Shelf licensed premises. IA Uren had his valid Washington State issued driver's license on his person at that time. AR-TS 22, 162. They sat together at a table and were waited on by Anthony Colavecchio, an employee of Top Shelf. AR-TS 22, 162. IA Uren ordered a Budweiser beer for Officer Treco and a Fat Tire beer for

himself. *Id.* Mr. Colavecchio took Mr. Uren's order without asking him for his identification, and then served IA Uren a Fat Tire beer. AR-TS 22, 163.

Officer Karic stood outside of Top Shelf and watched Mr. Colavecchio serve IA Uren a Fat Tire beer. AR-TS 22, 163. Once IA Uren was served the beer, Officer Karic entered the premises to notify Mr. Colavecchio that he had sold alcohol to an underage person. AR-TS 30. Mr. Colavecchio freely admitted serving IA Uren a beer, which contained alcohol and is considered liquor pursuant to RCW 66.04.010(25). AR-TS 23, 37, 163.

B. Procedural History

As a result of the December 2, 2008 compliance checks, the Liquor Enforcement Officers served both Dublin Down and Top Shelf an Administrative Violation Notice (AVN) for serving or supplying alcohol to an underage person. AR 23, 26, 163. The Licensees requested a formal hearing for their individual cases. AR 27. On February 11, 2009, the Board issued separate administrative complaints to each Licensee alleging that "on or about December 2, 2008, the Licensee, and/or employee thereof, gave, sold, and/or otherwise supplied liquor to a person under the age of twenty-one (21), in violation of RCW 66.44.270 and WAC 314-11-020(1)." AR 82-83.

The Clark County Prosecuting Attorney's Office separately filed criminal charges against Mr. Jones and Mr. Colavecchio for the misdemeanor crime of supplying alcohol to a minor. AR 64. On March 23, 2009, the Clark County District Court, in a consolidated proceeding, dismissed the criminal charges against the two men after suppressing the evidence gathered during the compliance checks.⁴ AR 64-66. The District Court ruled that the Liquor Enforcement Officers' compliance checks were not authorized by law and therefore actions occurring during the checks were contrary to criminal laws and rules amounting to governmental misconduct on the part of the officers. AR 66. The District Court specifically held the Board's "sting" violated RCW 9A.52.070; RCW 66.44.316; RCW 66.44.290; WAC 314-21-025; and RCW 19.48.110. *Id.* The District Court concluded suppression of the relevant evidence and dismissal of the case was warranted, on its finding of governmental misconduct, pursuant to Criminal Rule (CrR) 8.3(b). *Id.* The District Court did not conclude as a matter of law or find that the Board's compliance check was a "search" or in any way violated the Fourth Amendment of the United States Constitution or Article 1, Section 7 of the Washington State Constitution. AR 65-66.

⁴ A third individual, Shawn Cavanaugh, was also a party to the District Court criminal proceedings, but was not a party to the administrative action below. His employer, another liquor licensee, is not a party in the instant appeal. AR 64.

The Prosecutor appealed the District Court's dismissal order to the Superior Court. AR 200-02; AR-TS 213-15. The Superior Court upheld the evidence suppression, but reversed the dismissal concluding that dismissal was not justified when suppression was an adequate remedy as the suppression effectively eliminated the possibility of the charges moving forward. AR 202; AR-TS 215. The Superior Court's opinion provided no legal basis for the remedy of suppression, other than to simply agree with the District Court. *Id.* Neither the Board nor either Licensee was a party to the criminal proceedings before the District Court or the Superior Court. AR 64, 200; AR-TS 213.

In April 2009, the Licensees and the Liquor Enforcement staff entered stipulated facts in the separate administrative cases. AR 21-25. The stipulations did not include any finding of fact made by the District Court in the consolidated criminal proceedings against Mr. Cody and Mr. Colavecchio. *Id.* In the administrative proceedings, the Licensees moved to suppress all evidence from the compliance checks and dismiss the administrative matters. AR 42-54. They argued that the Board was collaterally estopped from pursuing an administrative action because of the District Court dismissal. They also argued that the compliance checks were unconstitutional searches under the U.S. Constitution's Fourth

Amendment and Washington's Constitution, Article 1, Section 7.⁵ AR 50-53. In the course of additional briefing, they also argued the compliance check constituted entrapment. AR 133.

The Administrative Law Judge (ALJ) denied the motions on November 18, 2009. *See* AR 42-158. The ALJ concluded that collateral estoppel did not apply and that the Board's broad regulatory authority and the lack of any rule or law prohibiting the Board from engaging in compliance checks, demonstrated the Liquor Enforcement Officers had acted lawfully. AR 165-68. The ALJ also concluded that entrapment was not available as a defense in a civil administrative proceeding. AR 169.

On July 2, 2010, the ALJ issued Findings of Fact, Conclusions of Law, and Initial Order in both cases based on the stipulated facts. AR 161-70. The ALJ did not adopt any of the finding of fact or conclusions of law set out by the District Court in its order in the consolidated criminal proceedings against Mr. Cody and Mr. Colavecchio. *Id.* The judge concluded that the Licensees sold liquor to a person under the age of twenty-one (21), and sustained the Board's complaint. *Id.* The ALJ then recommended the standard penalty of a five hundred (\$500)

⁵ Although the ALJ issued separate initial orders for Dublin Down and Top Shelf, and the Board issued separate final orders, all of the briefing and oral argument in the administrative case was consolidated. Dublin Down and Top Shelf pled identical arguments under nearly identical facts with the same counsel. AR 42-61.

dollar monetary penalty or a five (5) day suspension of each Licensee's liquor license. *Id.*

The Licensees filed petitions for review with the Board⁶, requesting rejection of the initial order and dismissal of the complaint because collateral estoppel prevented the Board from taking enforcement action. AR 171-73. In the alternative, the Licensees again argued that the evidence from the compliance check should be suppressed and the complaints dismissed. AR 177-84. They argued this remedy was appropriate because the compliance check was not authorized by any Board rule and therefore, constituted an unlawful search. AR 177-84.

The Board issued its Final Order on August 17, 2010. AR 246-48; AR-TS 259-61. The Board adopted the initial order, sustained the complaints, and imposed the standard penalty of either a five-day suspension of each licensee's liquor license or a five hundred dollar monetary penalty. *Id.*

The Licensees then filed separate Motions for Reconsideration to the Board on August 26, 2010. AR 251-53; AR-TS 264-66. The Board

⁶ Pursuant to WAC 314-42-095, after an ALJ issues an initial order, the Board members may concur and adopt the initial order or reject the order in part or in its entirety. The Board then issues a final order which is the final, binding, agency action in the matter. WAC 314-42-095. Prior to issuing its final order either the licensee affected by the order, or the assistant attorney general representing the enforcement division, may file with the Board a petition for review urging the Board to reject or alter the initial order. WAC 314-42-095.

denied both motions on September 22, 2010. AR 261-62; AR-TS 274-75. The Licensees then sought judicial review of the Board's Final Orders. CP-DD 7; CP-TS 7. The Clark County Superior Court reversed the Board's Final Order in both cases. CP-DD 96; CP-TS 99.

The Board timely appealed the superior court's decisions. The two matters were then consolidated by this Court on a motion by the Board. Pursuant to this Court's General Order 2010-1, as this Court sits in the same position as the superior court below and the burden remains on the Licensee to prove the invalidity of agency action, the Licensee's filed an opening brief on February 6, 2012. The Board now responds.

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. State 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).

Questions of law are reviewed de novo. *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 515, 137 P.3d 31 (2006). Questions of law include whether: (1) an agency had statutory authority or jurisdiction to act; (2) the agency engaged in an unlawful decision-

making process or failed to follow a prescribed procedure; and, (3) the agency erroneously interpreted or applied the law. *Preserve Our Islands*, 133 Wn. App. at 515. Notwithstanding the *de novo* standard of review, courts grant substantial weight to an agency's interpretations of the statutes it administers. *Pub. Utility No. 1 of Pend Oreille County v. State 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*, 122 Wn.2d at 403.

V. ARGUMENT

A. **The Licensees Fail To Establish Any Basis To Estop The Board from Exercising The Board's Regulatory Authority To Ensure Compliance With State Liquor Laws**

The Licensees argue the Board was collaterally estopped from acting in the administrative matters below when the evidence in the criminal cases against their employees was suppressed and the cases dismissed by the district court. Respondent's Br. at 14; AR 64-66. The Licensees' argument is incorrect.

In Washington, criminal cases and the Board's administrative proceedings are separate matters and have no determinative impact on each other. Furthermore, even if rulings in a criminal case could estop the Board from acting, the Licensees did not meet their burden of establishing all the elements of collateral estoppel.

1. The outcome of a criminal proceeding does not determine the outcome of a Board administrative action.

A criminal proceeding against an employee cannot bar a subsequent Board administrative action against the employer licensee. *Jow Sin Quan v. Wash. State Liquor Control Board*, 69 Wn.2d 373, 418 P.2d 424 (1966). In *Jow Sin Quan*, a liquor licensee's employee sold alcohol to an undercover Board agent in violation of both criminal law and Board regulation.⁷ The employee was charged with three misdemeanor criminal counts. *Jow Sin Quan*, 769 Wn.2d at 375. Ultimately, the prosecution dismissed one of the counts, and after a jury trial, the employee was acquitted of the two remaining counts. *Id.*

Then, the Board issued an administrative complaint to the licensee based on the employee's misconduct. *Id.* An administrative hearing was held many months after the employee's acquittal in the criminal proceeding. *Id.* The Board revoked the licensee's liquor license. *Id.* at 376.

The licensee sought review of the Board's order, arguing that its employee's acquittal of the criminal charges "constituted a bar to the

⁷ The sale of alcohol in *Jow Sin Quan* was in violation of now repealed RCW 9.76.010 and WAC 314-16-050. RCW 9.76.010 made it a misdemeanor crime to sell alcohol on Sunday, and WAC 314-16-050 made the same a violation of a liquor license and subjected the licensee to suspension or revocation of the license. *Jow Sin Quan*, 769 Wn.2d at 375.

instant administrative proceedings against the licensee.” *Id.* at 381. The Supreme Court unequivocally rejected this argument. The Court held that:

Board action, directed toward the suspension or cancellation of a retail liquor license is not a criminal proceeding. Essentially, it is an administrative regulatory proceeding-civil and disciplinary in nature-the purpose of which is to protect the public health, safety and morals from imprudent, improper, and/or unlawful actions of the board's licensees in the exercise of the privilege conferred upon them. A criminal prosecution of the licensee is not a condition precedent to regulatory action by the board, and acquittal of the licensee in a criminal proceeding does not oust the jurisdiction of the board. In short, criminal prosecution does not debar board discipline; nor does board discipline debar criminal prosecution.

Jow Sin Quan, 769 Wn.2d at 382 (internal citation omitted).

The Court found that the Board, by legislative enactment, exercises broad and extensive authority over the regulation and supervision of liquor licensees. *Id.* Moreover, a licensee voluntarily accepts a liquor license upon the condition that it is subject to the “continuing regulation, supervision, and jurisdiction” of the Board. *Id.* The Court concluded that the Board was entitled to conduct “its own administrative proceeding, make its own findings, and act within the scope of its authority and responsibility upon those finding.” *Id.* at 383.

The instant case fits squarely within the decision in *Jow Sin Quan*. The Licensees’ employees admit to selling alcohol to a person under the age of 21 in violation of both a criminal statute and the Board’s

regulations. AR 22-23. Both employees were charged criminally, and the criminal charges against both employees were dismissed. AR 24. Separately, the Board issued complaints to the *individual licensees* pursuant to its broad and extensive authority and jurisdiction in regulating liquor licenses. AR 82-83; RCW 66.08.010; RCW 66.24.010. An administrative hearing was held, after which the Board issued separate disciplinary orders against both licensees. AR 246-47.

Any argument that *Jow Sin Quan* does not apply to this case because the decision does not refer to the words ‘collateral estoppel’, should be rejected.⁸ To the contrary, *Jow Sin Quan* addresses the very essence of the Licensees’ argument - that the dismissal of its employee’s criminal charges constitutes a bar to the Board’s administrative proceeding. Respondent’s Br. at 25. Under *Jow Sin Quan*, the prior criminal proceedings against the Licensees’ employees have no effect on a subsequent licensing action against the Licensees themselves. The prior criminal proceedings did not, and could not, deprive the Board of its duty and authority to engage in administrative action against the Licensees to protect the health and safety of the public.

⁸ The licensee in *Jow Sin Quan* argued the Board’s action was “arbitrary, capricious, and/or unreasonable” because the dismissal and acquittal of the employee’s charges “constituted a bar to the instant administrative proceedings.” *Jow Sin Quan*, 769 Wn.2d at 375.

Additionally, any argument that *Jow Sin Quan* is not applicable here because, as the Licensee's incorrectly assert, the Board was not acting within its authority in conducting the compliance checks in the instant cases on appeal, is equally without merit. Such an assertion does not control the separate legal question of whether the Board was estopped entirely from conducting an administrative proceeding. *Jow Sin Quan* squarely answers that question by establishing the Board was not precluded from holding an administrative hearing, civil and disciplinary in nature –the purpose of which was to protect the public health and safety. *Jow Sin Quan*, 69 Wn.2d at 382.

The Licensees do not cite to *Jow Sin Quan* in their brief but instead rely almost entirely on *Thompson v. State Dept. of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999) and *Barlindal v. City of Bonney Lake*, 84 Wn.App. 135, 925 P.2d 1289 (1996) to support its collateral estoppel argument.⁹ Respondent's Br. at 15-25. Both cases are distinguishable.

⁹ In *Thompson* an individual defendant was prosecuted for driving under the influence; at his criminal trial, the blood alcohol content (BAC) evidence was suppressed arguably due to a lack of probable cause for the initial stop of his commercial vehicle. *Thompson*, 138 Wn.2d at 787. The Department of Licensing initiated a civil administrative proceeding seeking to revoke his commercial license. *Id.* At the Administrative Hearing, the defendant argued the Department was collaterally estopped from admitting the BAC evidence. *Id.* at 788. At the administrative hearing, the hearing examiner heard evidence and concluded probable cause did exist for the stop and revoked his license. *Id.* at 788-89. On appeal, the Supreme Court ultimately held that the collateral estoppel applied as to the suppression of the BAC evidence. In *Barlindal* evidence of various items of contraband were seized during a search of the individual defendant's home. *Barlindal*, 84 Wn.App. at 137. The Pierce County Prosecuting

Neither *Thompson* nor *Barlindal* involved the Board as a party or discussed the Board's specific authority or jurisdiction. Neither case overturned the Court's ruling in *Jow Sin Quan*. *Thompson*, 138 Wn.2d at 786-87; *Barlindal*, 84 Wn.App. at 137-39. *Jow Sin Quan* remains the law and controls in this case.

Because the prior criminal proceedings against the Licensees' employees had no effect on the separate licensing proceeding against the Licensees, the Board's Final Order should be affirmed.

2. The Licensees cannot establish all elements of collateral estoppel.

Even if *Jow Sin Quan* did not control this matter, the Licensees could not meet their burden of proving collateral estoppel applied here. *Christensen v. Grant County Hospital Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). The party asserting collateral estoppel bears the burden of proving each of the following elements: (1) the issues decided in the prior action are identical with those presented in the case at bar; (2) the prior action ended in a final judgment on the merits; (3) the party against whom the doctrine is being asserted, was a party to, or in privity with, the

Attorney's Office filed criminal charges, but due to a search warrant defect, all evidence seized was suppressed. *Id.* at 137-38. The City of Bonney Lake attempted a civil forfeiture of the action for some of the items seized. *Id.* In the civil action, the defendant successfully argued the city was collaterally estopped from seizing his property as the search warrant which led to the actual seizure was found to have been invalid in the criminal case against him. *Id.* at 144-45.

party to the prior action; and (4) the application of the doctrine in the case at bar would not work an injustice against whom it is applied. *Christensen*, 152 Wn.2d at 307. In order to prevail, the Licensees must establish all elements of the test. *Lemond v. State Dept. of Licensing*, 143 Wn. App. 797, 804, 180 P.3d 829 (2008). “[F]ailure to establish any one element is fatal to [Licensee’s] claim.” *Id.* Here, the Licensees did not satisfy their burden, as they cannot establish all elements of collateral estoppel, and their argument should fail.

a. The issues decided in the prior criminal case against the employees are not identical to those raised in the administrative proceeding against the Licensees.

For collateral estoppel to apply, the issues presented in the administrative licensing matter against the Licensees must be identical in *all respects* to the issues *decided* in the prior criminal proceeding against the employees, including the applicable legal rules. *Lemond*, 143 Wn. App. at 806; *Cloud ex rel. Cloud v. Summers*, 98 Wn. App. 724, 730, 991 P.2d 1169 (1999). Further, the courts have determined that collateral estoppel is only appropriate if the issue raised in the second case “involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment,” even if the facts and issues were identical. *Lemond*, 143 Wn. App. at 805; *see also Standalee v. Smith*, 83

Wn.2d 405, 408, 518 P.2d 721 (1974). The moving party must prove the identity of the issues by competent evidence. *Lemond*, 143 Wn. App at 803.

Here, the issues decided in the employees' criminal cases are not identical to the issues decided in the administrative licensing actions. The district court found the Board's agent's violated rules and statutes such that their conduct constituted governmental misconduct under CrR 8.3(b).¹⁰ AR 66. On this basis alone, the District Court suppressed the evidence. *Id.* The District Court then dismissed the criminal charges against the employees on the same basis. *Id.* On appeal, the Superior Court upheld the District Court's conclusion that the Liquor Enforcement Officers violated "specific provisions regarding minors in the premises and attempting to purchase alcohol".¹¹ AR 201. The Superior Court decision upheld the suppression of evidence, but never explicated on what legal theory suppression was warranted. AR 202.

¹⁰ CrR 8.3(b) provides: "the court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order."

¹¹ The Superior Court also upheld the District Court's decision that the "investigative aide was 'deceptively mature in appearance' in violation of WAC 314-21-025". AR 201. However, this is no longer relevant here, as the Licensees have conceded that WAC 314-21 does not apply to or address the compliance checks conducted by the Liquor Enforcement Officers. Respondent's Br. at 29-30.

Contrary to what was asserted in the administrative proceeding, nowhere in either the District Court or the Superior Court's decisions is any discussion or analysis of any unlawful search issue, under either the Washington State Constitution or the United States Constitution. AR 65-66, 201-02. The issue of whether an unlawful search occurred, under any theory, was never decided in the prior criminal matters. *Id.*

In *Lemond*, the court held that the mere existence of a prior decision is not enough to establish identity of the issue – the party must identify the issues and underlying legal principles litigated in the prior proceeding. *Lemond*, 143 Wn. App. at 804. In *Lemond*, a municipal court suppressed evidence of a defendant's BAC in a criminal driving under the influence case. *Id.* In a subsequent administrative licensing hearing against the same defendant, the defendant argued that the BAC evidence should be suppressed based on the municipal court action. *Id.* The Supreme Court held that it was not enough for the defendant to merely establish the BAC had been suppressed in the prior proceeding – she had to prove that “the issue presented in the second proceeding was identical in all respects to the issue decided in the prior proceeding, including the applicable legal rules.” *Id.* at 806. Because she could not establish that the legal basis for suppression in her prior criminal proceeding was the

same as that presented in the administrative case, collateral estoppel did not apply. *Id.* at 807.

Similarly, the Licensees now assert that in the criminal matters, “the State could not convict if the compliance checks were not lawful, because Article 1, Section 7 of the Washington State Constitution provides that no searches may be conducted ‘without authority of law’ and the remedy for a violation of Article 1, Section 7 is suppression of evidence.” (Emphasis in original). Respondent’s Br. at 17-18. While the issue of an unlawful search was raised by the Licensees in the administrative hearings, this issue was not decided in the prior criminal action against the employees. AR 50, 53, 136, 137, 181.

Here, the only evidence presented to the ALJ or the Board by the Licensees on any issue decided in the District or Superior Courts were those courts’ orders. AR 64-66, 200-02. The district court relied on criminal procedural rules not applicable to the administrative hearing to support its decision to suppress, and included no discussion of an unlawful search claim. AR 66. The superior court failed to identify a specific basis for upholding the suppression at all. AR 200-02. Neither of those orders decided the legal issue regarding whether the Liquor Enforcement Officers’ actions constituted an unlawful search, as raised by the Licensees in their administrative proceedings. AR 64-66, 200-02. As

such, the legal issues presented to the ALJ and the Board were not “identical in all respects” to the issues decided in the prior criminal case. *See Lemond*, 143 Wn. App. at 806. The Licensees fail to meet their burden in establishing this element; therefore their estoppel argument fails.

b. The Licensees were not parties to the employees’ criminal proceedings, and non-mutual collateral estoppel is not available.

Traditionally, Washington courts required mutuality in collateral estoppel claims, meaning, there had to be the same antagonistic parties in both proceedings for the doctrine to apply. *State v. Mullin-Coston*, 152 Wn.2d 107, 113-14, 95 P.3d 321, 324 (2004). In the context of civil cases, Washington courts have retreated from the traditional rule. *Id.* A party asserting collateral estoppel in a civil case need only establish the party against whom preclusion is sought was a party, or in privity with a party, in the prior case, commonly referred to as “non-mutual collateral estoppel.” *Id.* at 114-15. However, non-mutual collateral estoppel is not available in criminal matters. *Id.* at 114. Furthermore, the United States Supreme Court has also held that non-mutual collateral estoppel is not available when the party the estoppel is being asserted against is the Government. *United States v. Mendoza*, 464 U.S. 154, 162, 104 S. Ct. 568, 78 L.Ed.2d 379 (1984).

Neither Dublin Down nor Top Shelf was a party in the prior criminal proceeding. The Licensees cite no case law supporting their position that non-mutual collateral estoppel is available when a party tries to use a prior criminal proceeding to estop a subsequent administrative action against a different party. Instead, the Licensees rely primarily on *Thompson* and *Barlindal*. Respondent's Br. at 21-25. However, neither of these cases supports the Licensees' position. Unlike the situation here, in both *Thompson* and *Barlindal*, the individual seeking application of the doctrine was the defending party in both the prior criminal case and the subsequent civil actions. *Thompson*, 138 Wn.2d at 794; *Barlindal*, 84 Wn.App. at 137-39. The Licensees fail to cite any authority or make any supported argument that they may rely on a prior criminal proceeding which they were not a party to as the grounds for non-mutual collateral estoppel. Accordingly, collateral estoppel does not apply, and the Board's Final Order should stand.

c. Applying collateral estoppel would work an injustice in this case.

When considering the final element of collateral estoppel, namely, the working of an injustice if estoppel were applied, courts consider both procedural fairness and policy implications. *See Christensen*, 152 Wn.2d at 309-10; *Thompson*, 138 Wn.2d at 794-98. Collateral estoppel may be

rejected when its application would contravene public policy. *See State v. Dupard* 93 Wn.2d 268, 276, 609 P.2d 961 (1980). When analyzing policy considerations, the courts look to the nature and purpose of the two proceedings. *See Christensen*, 152 Wn.2d at 309-10. In an administrative proceeding, the courts recognize that purposes underlying an administrative hearing and a criminal trial are “wholly distinct.” *See State v. Williams*, 132 Wn.2d 248, 257, 937 P.2d 1052.

Here, the underlying purpose of the administrative proceedings was to determine if a licensee violated the conditions of the license, namely not selling alcohol to underage persons. RCW 66.44.270; WAC 314-07-065; WAC 314-16-150; WAC 314-29-020. The question of the Licensees liquor license privileges was not before the criminal court. The Board, not the criminal courts, is charged with regulating liquor licenses for the public’s health, safety, and welfare. RCW 66.08.010; RCW 66.08.020. This administrative process is the sole avenue by which the Board can bring these actions against licensees. Allowing either Dublin Down or Top Shelf, who both stipulated their employees sold alcohol to an underage person, to avoid responsibility for their actions defeats the purpose of the Liquor Act and the Board’s duty to enforce it. *See AR 22-23; AR-TS 22-23.* The Licensees do not address the public

policy concerns, or any public policy issues in their brief, and therefore, fail to satisfy this element of collateral estoppel.

Because the Licensees fail to satisfy all elements of collateral estoppel, their claim must fail and the Board's Final Orders should stand.

B. The Board has authority to conduct compliance checks with minor IAs

The Licensees argue that the Liquor Enforcement Officers conducted the compliance checks at issue here without authority of law. Respondent's Br. at 25-37. Because of this lack of authority, the Licensees assert, the compliance checks were unlawful searches under the Fourth Amendment to the United States Constitution; therefore, the appropriate remedy is exclusion of the evidence and the subsequent dismissal of the cases. *Id.* at 25, 38-40.

The Licensee's argument hinges on its assertion that RCW 66.44.290 requires the Board promulgate rules before its officers may utilize compliance checks as an enforcement method. Respondent's Br. at 28-31. The Licensees do not contest that the Board may employ staff to enforce RCW Title 66.44. Respondent's Br. at 27, 30. Nor do they appear to contest the Board does so through Liquor Enforcement Officers who have authority to enforce liquor laws and rules. *Id.*, see also RCW 66.44.010(2)-(4); WAC 314-29-005(1). However, the Licensees

argue this authority is insufficient to engage in compliance checks. Respondent's Br. at 30. In the alternative, the Licensee's suggest the compliance check was unlawful because the Liquor Enforcement Officers instructed an IA to enter licensed premises off limits to persons under the age of twenty-one. *Id.* at 31-33.¹²

The Licensees are incorrect. Their argument rests on an interpretation of RCW 66.44.290 that is contrary to the purpose and intent of the Liquor Act as a whole, the plain language of the statute, and the entire context of the statute. The Liquor Enforcement Officers here had authority to enforce all liquor laws and rules. All enforcement methods they utilized are lawful under Washington law. Furthermore, as this Court has recently held, a compliance check conducted by Liquor Enforcement Officers in the public portions of licensed premises is not a "search" under either the Fourth Amendment or Article 1, Section 7.

1. RCW 66.44.290 does not apply to, or restrict, Board enforcement activities.

The Licensees note that, under the second sentence of RCW 66.44.290(1), a person between the ages of eighteen and twenty has committed a violation by purchasing, or attempting to purchase alcohol,

¹² The Licensees also assert entrapment as well as arbitrary and capricious action arguments. Respondent's Br. at 33-38. However, these arguments go to how the compliance checks were conducted; entirely separate from whether the Liquor Enforcement Officers had the *authority* to engage in compliance checks at all. Consequently, they will be addressed in separate sections of this brief.

unless they are “participating in a controlled purchase program authorized by the liquor control board under rules adopted by the board”. *Id.* at 28-29; RCW 66.44.290(1). The Licensees conclude that this second sentence means:

[u]nless Enforcement’s use of a minor investigative aide in its compliance checks was authorized by and conducted pursuant to rules adopted by the Board, the Enforcement officers were not acting pursuant to any authority granted by the Legislature to the Board in using a minor investigative aide to conduct the compliance check.

Respondent’s Br. at 29. The Licensees’ interpretation is unsupported by any substantive legal analysis. *See* Respondent’s Br. at 28-29.

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). 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.” *Id.* An act is to be construed as a whole, giving effect to all of the language used. *Id.* Courts avoid statutory interpretation that leads to strained or absurd results or renders a portion of a statute a nullity. *State v. Hall*, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010); *Wright v. Jeckle*, 158 Wn.2d 375, 379-80, 144 P.3d 301 (2006).

A court will not add to or subtract from the clear language of a statute, even if it thinks the Legislature intended something else. *Ingram v. Dept. of Licensing*, 162 Wn.2d 514, 526, 173 P.3d 259 (2007). Courts may not read into a provision any restrictions that are not there nor create legislation or promulgate additional rules under the guise of interpreting a provision. *Dept. of Licensing v. Cannon*, 147 Wn.2d 41, 57-58, 50 P.3d 627 (2002); *see also Ingram*, 162 Wn.2d at 265.

RCW 66.44.290, in its entirety, provides the following:

(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.

Nothing in the plain language of the second sentence of RCW 66.44.290(1) discusses the Board's authority to enforce liquor laws and rules, nor is that the subject matter of this provision. It instead relates to the applicability of the provision as a whole to minors. *Id.* There is no language restricting the methods that the Board may employ in enforcing liquor laws and rules, or even any language implying that the Board promulgate rules before its enforcement officer utilize compliance checks. *Id.* There is no requirement that the Board must promulgate any rules at all. *Id.* Had the legislature intended for the Board to promulgate rules in order for its officers to utilize compliance checks, it could easily command that the Board "shall" promulgate such rules, yet the entirety of RCW Title 66 is devoid of such a command.

The interpretation proffered by the Licensees would require the Court to insert an entire unrelated clause into the statute: that the Board must promulgate rules before its liquor enforcement officers may enforce liquor laws and rules through the use of compliance checks. Respondent's

Br. at 29. Dublin seeks to have this Court read a restriction and create legislation that does not exist in the statute.

The second sentence of RCW 66.44.290(1) must be considered in the context of both the entirety of RCW 66.44.290 and the Liquor Act as a whole. *See Thurston County*, 148 Wn.2d at 12. RCW 66.44.290 primarily establishes that it is a violation of law for a person under the age of twenty-one years to purchase or attempt to purchase alcohol and the penalty for such a violation. Second, the statute authorizes liquor licensees to engage in controlled purchase programs with the approval of the Board. RCW 66.44.290(2), (3).

The stated purpose of the controlled purchase programs authorized by the statute is “employee training and employer self-compliance checks,” not Board liquor law enforcement. RCW 66.44.290(3). Nowhere in the statute is there any restriction on how the Board’s agents may enforce liquor laws. Additionally, that the statute includes specific immunities for both licensees and the minors they would employ, further demonstrates the purpose of the statute. RCW 66.44.290(1).

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 State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245 (1973); *State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966); *City of*

Seattle v. Gleiser, 29 Wn.2d 869, 189 P.2d 967 (1948). Individuals who are directed by law enforcement to engage in criminal activity have a complete defense from conviction of such activity. RCW 9A.16.070(1)(a). Therefore, any additional authorization for liquor enforcement officers to utilize compliance checks, beyond their lawful mandate to enforce all liquor laws and rules, is unnecessary. See RCW 66.44.010(4); WAC 314-29-005(1); see also RCW 66.08.050. Similarly, any specific immunity for a minor decoy that a liquor enforcement officer may direct to attempt to purchase alcohol is also unnecessary.

This authorization and immunity, however, does not extend to licensees or minors they may employ in controlled purchase programs authorized under RCW 66.44.290. As a result, in authorizing licensees to engage in controlled purchase programs, the Legislature *necessarily* had to include a corollary immunity for both the licensee and any minor it employed in the program. Otherwise the “controlled purchase” portion of the statute would be a nullity. Licensees, their employees, and the minors utilized would all otherwise be subject to criminal liability for engaging in such acts. Establishing immunity where there would otherwise be none is the clear purpose of the second and third sentence of RCW 66.44.290(1).

Here, in the unlikely and entirely hypothetical event a prosecutor’s office charged IA Uren with a violation of RCW 66.44.290, the second

sentence of the first section would not apply to him -- because he was not participating in a controlled purchase program conducted by a licensee. However, this is immaterial as he would have a complete defense under RCW 9A.16.070(1)(a) as he was directed to enter restricted premises and purchase alcohol by law enforcement officers. AR 21-25, 28, 31, 34; AR-TS 29-30, 33, 36.

Furthermore, the Legislature requires that the provisions of the entire Liquor Act be “liberally construed” to accomplish the legislative purpose of protecting the “welfare, health, peace, morals, and safety of the people.” RCW 66.08.010. It is not a “liberal construction” of the statute to read into this provision a restriction that hinders the Board’s ability to protect the welfare of the public when no such restriction exists in the plain language. The Board’s orders should be sustained.

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

The very purpose of the Liquor Act is to exercise the police powers of the state “for the protection of the welfare, health, peace, morals and safety of the people of the state.” RCW 66.08.010; RCW 66.08.020; RCW 66.44.010. The Legislature specifically granted the Board the power to enforce the penal portions of the Liquor Act and employ liquor enforcement officers to effectuate that enforcement. RCW 66.44.010(2)-

(4). Liquor enforcement officers also have the authority to enforce Board rules. WAC 314-29-005(1).

In addition to these express powers, the Board and its officers also possess those powers necessarily implied from this statutory delegation of authority. See *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. State Dep't of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994). The declaration of purpose contained in the enabling statute is also an “important guide” when a court considers the breadth of the agency’s authority. *Armstrong v. State*, 91 Wn. App. 530, 537, 958 P.2d 1010 (1998). Again, courts avoid statutory interpretation that leads to strained or absurd results or renders a portion of a statute a nullity. *Hall*, 168 Wn.2d at 737; *Wright*, 158 Wn.2d at 379-80.

Dublin also appears to argue that the Board cannot conduct compliance checks because they are not specifically authorized by RCW 66.44.010. Respondent’s Br. at 30. But, RCW 66.44.010 does not enumerate *any* investigative methods for enforcing liquor laws. Accordingly, the Licensees’ interpretation leads to an absurd result: liquor officers may enforce liquor laws and rules, but cannot employ any

methods to do so, 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, and no such methods are provided, the statute is meaningless. *Id.*

To the contrary, the Board and its officers may utilize “everything lawful and necessary” to effectuate the powers granted to it by the Legislature. *Tuerk*, 123 Wn.2d at 125. Again, the Legislature has commanded that this grant of authority must be liberally construed to protect the welfare and safety of the public. RCW 66.08.010. Neither RCW 66.44.290 nor any other statute dictates which investigative methods may or may not be used by the Board in effecting this grant of authority.

Therefore, in order to best protect the public, and in accordance with the implied authority to engage in lawful conduct when exercising the Board’s powers, Washington’s case law regarding permissible enforcement methods controls this matter. Law enforcement officers generally, and liquor enforcement officers specifically, have authority to engage in deceit, limited participation in criminal activity, undercover operations and the use of decoys or informants when enforcing the law. *State v. Lively*, 130 Wn.2d 1, 20, 921 P.2d 1035 (1996); *Playhouse Corp.*

v. Liquor Control Board, 35 Wn. App. 539, 667 P.2d 1136 (1983); See *Emerson*, 10 Wn. App. at 242.

This Court recently recognized in *Dodge City* that “the Liquor Board monitors its licensees through a program of compliance checks wherein investigatory aides under the age of 21 attempt to enter a licensed establishment and make a controlled liquor purchase from the bar.” *Dodge City Saloon, Inc. v. Washington State Liquor Control Board*, __Wn.App.__, 271 P.3d at 365. The utility of this technique is well illustrated in this case; it was through compliance checks that the Board discovered both Dublin Down and Top Shelf would sell alcohol to an eighteen-year-old. AR 22.

In conducting the compliance checks at both Dublin Down and Top Shelf, Liquor Enforcement Officers used a decoy to determine if the Licensees’ employees would comply with the law. AR 21-24. In both cases IA Uren, under the direction of Liquor Enforcement Officers, entered the public portion of the establishments and did nothing more than order alcohol. *Id.* Both Licensees’ employees had every opportunity to determine if this individual was underage. *Id.* Instead, they both sold him alcohol, a fact which neither Dublin Down nor Top Shelf has ever contested. AR 22. The methods utilized by the Board and its agents in this compliance check were lawful.

It furthers the purpose of the regulatory scheme, and the interest of public safety, for the Board's officers to utilize effective and lawful enforcement techniques. A compliance check is one such technique and was utilized effectively and lawfully in the instant cases.

3. Minor on Restricted Premises.

In the alternative, the Licensees argue the compliance checks were unlawful because IA Uren entered premises restricted to persons less than twenty-one years of age pursuant to RCW 66.44.310. Respondent's Br. at 31-32. They reason that the statutory exceptions that allow persons under the age of twenty-one onto restricted premises, as set forth in RCW 66.44.316, RCW 66.44.350, and RCW 66.44.290, do not apply to minors in a "controlled purchase program". *Id.* at 32.

As an initial matter, IA Uren operated as part of a compliance check, not a private controlled purchase program operated by a licensee pursuant to RCW 66.44.290. Each statute the Licensees cite apply only to rights and interests of either a licensee or a minor. Respondent's Br. at 31-32. Under the cited statutes, a licensee may lawfully allow certain categories of minors to enter areas of its premises otherwise restricted to minors. Similarly, the statutes provide protections to this same narrow category of minors. None of the statutes provide how the Board may enforce liquor rules; the statutes simply create exceptions for when a

licensee may allow minors in its restricted premises, none of which apply here.¹³

As established above, liquor enforcement officers may utilize decoys, undercover operations and limited participation in unlawful activity when enforcing the law. *Gray*, 69 Wn.2d at 432; *Playhouse*, 35 Wn. App. at 542. Here, IA Uren entered two different restricted premises, at the direction of Board officers, as a decoy, solely to assist in the Board's monitoring of Dublin Down and Top Shelf's compliance with the law. AR 22. Both Dublin Down and Top Shelf allowed a minor to remain on their restricted premises and served him alcohol in violation of the law. AR 22. Nothing about IA Uren's involvement invalidates the Board's enforcement action. Like the Licensees' other argument, this one also fails.

4. The Liquor Enforcement Officers' compliance check did not constitute a search under either the State or Federal Constitution.

As set forth above, the compliance checks at issue here were lawful and well within the authority of the Liquor Enforcement Officers involved. Moreover, this Court recently determined that a Liquor Enforcement Officer's compliance check that is conducted entirely in the

¹³ The Licensees also suggest that RCW 66.44.290 prohibits controlled purchase programs in licensed premises restricted from minors. While the Board would disagree with this position, it is irrelevant here because, as already established, RCW 66.44.290 does not control or restrict the Board's ability to enforce liquor laws and rules.

portions of a licensed premises observable by or open to the public is not a “search” under either the Fourth Amendment to the United States Constitution or Article 1, Section 7 of our State Constitution. *Dodge City Saloon, Inc.* 271 P.3d at 363.

Dublin asserts that the compliance checks conducted by the Board violated constitutional protections against unreasonable searches. Respondent’s Br. at 25-26, 31. Dublin concludes that, as a result, the exclusionary rule applies and all evidence acquired through the compliance check should have been suppressed. *Id.* at 38-39. Dublin’s argument fails.

The facts here are nearly identical to those in *Dodge City*. In *Dodge City*, during the course of a compliance check, Liquor Enforcement Officers instructed a minor investigative aide to attempt to enter the licensee’s premises that was restricted to persons over the age of twenty-one. *Dodge City*, 271 P.3d at 366. The investigative aide was allowed inside by one of the licensee’s employees. *Id.* This was observed by the officers stationed both outside the licensed premises and waiting inside the premises in an undercover capacity. *Id.* This court held that the compliance check was not a “search”, and did not implicate constitutional considerations or result in suppression of evidence, because the officers

and agents entered only the public portions of the premises and observed only what members of the public could also observe. *Id.*

Here, in both the Dublin Down and Top Shelf compliance checks, IA Uren entered only the public portion of the business and sat only in the public service areas where any member of the public could enter and be served. AR 22-23. During the course of both compliance checks, Liquor Enforcement Officers observed IA Uren being served alcohol either from outside the premises, or while in the public areas of the licensed premises, observing what any member of the public could observe. *Id.*

Those portions of the premises observable by the general public may be observed by Liquor Enforcement Officers and their agents without a warrant. *Dodge City Saloon Inc.*, 271 P.3d at 368-69. Thus, the activities here were not searches when Board officers and agents entered the public portions of Dublin Down and Top Shelf's premises and observed what any other patron could have observed. AR 22-23. Nor was it a "search" when Liquor Enforcement Officers observed IA Uren being served alcohol at both Dublin Down and Top Shelf from outside the respective establishments. AR 22. Because neither the officers nor IA Uren ever intruded upon any reasonable privacy interest, no "search" occurred. Their request to suppress the compliance check testimony was

properly rejected both by the ALJ and the Board. AR 50, 166-67, 247-48; AR-TS 259-60.

C. The Licensees Cannot Assert Entrapment As An Affirmative Defense In This Administrative Action; Even If It Were A Proper Defense, The Licensees Cannot Establish It Occurred Here

The Licensees argue they were entrapped because IA Uren was “deceptively mature.” Respondent’s Br. at 35. As an initial matter, their attempt to raise this issue goes beyond the facts to which this Court is confined. In both cases, that IA Uren was “deceptively mature in appearance” was not stipulated to nor was it found as fact by the ALJ or the Board.¹⁴ AR 22-23, 161-64, 246; AR-TS 259.

More importantly, the affirmative defense of entrapment is not available in administrative proceedings. RCW 9A.16.070(1); *Dodge City Saloon Inc*, 271 P.3d at 369. The Legislature has not provided entrapment as a defense in civil enforcement proceedings. *Id.* The Licensees may not assert the defense of entrapment in the administrative proceedings here and its argument otherwise is without merit. *Id.*

Even if entrapment was available to the Licensees as a defense, they could not establish it here. Entrapment occurs only when police

¹⁴ The Licensees cite to the District and Superior Court opinions to support its assertions; but these do not control here and whatever facts found in that matter were not stipulated to by the parties below or adopted by either the ALJ or the Board. Respondent’s Br. at 34-35; AR 22-23, 161-164, 246; AR-TS 259.

induce or coerce a law-abiding person to engage in criminal conduct he or she would not otherwise have committed. RCW 9A.16.070; *Dodge City Saloon Inc.*, 271 P.3d at 369; *see also Gray*, 69 Wn.2d. at 435 (use of a decoy to afford an opportunity to commit a crime does not constitute entrapment). There is no evidence of inducement, pressure or coercion to get either employee to serve IA Uren alcohol. AR 162-63. They had every opportunity to determine IA Uren's actual age, and instead chose not to. AR 162-63. All of the evidence in the record demonstrates that had IA Uren been acting on his own and not as an investigative aide, both Dublin Down and Top Shelf still would have sold alcohol to him. AR 162-63. Both of the Licensee's employee's sold alcohol to an underage person without any inducement or coercion, thus, even if available their entrapment argument fails.

D. The Board's action was neither arbitrary nor capricious

The Licensees appears to claim the Board acted in an arbitrary or capricious manner. Respondent's Br. at 36-38. However, they fail to clearly enunciate exactly what Board action constitutes arbitrary or capricious action.

An agency decision is arbitrary or capricious only if it is a "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." RCW 34.05.570(3)(i);

Alpha Kappa Lambda Frat. v. Washington State University, 152 Wn. App. 401, 421, 216 P.3d 451 (2009); *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 460, 467, 959 P.2d 1091 (1998). “If there is room for two opinions, a decision is not arbitrary and capricious if it’s made honestly and upon due consideration,” even if the reviewing court thinks a different conclusion could have been reached. *See Alpha Kappa Lambda Frat.*, 152 Wn. App. at 421. The scope of review under an arbitrary or capricious standard is extremely narrow and the party asserting it “must carry a heavy burden.” *Id.* at 422.

The Licensees fail to cite to any portion of the record or any decision that they claim supports their arbitrary and capricious argument. Instead, their argument returns to the unfounded assertion that IA Uren was “deceptively mature.” Respondent’s Br. at 36. They then speculate at length about other possible age-related deceptions that did not happen in these cases or any other case.¹⁵ *Id.* at 37.

The Licensees concede the Board has established internal policies for conducting compliance checks. Respondent’s Br. at 37. All relevant authority demonstrates the lawfulness of law enforcement officers, and specifically liquor enforcement officers, utilizing undercover operations and decoys during compliance checks. *See e.g. Gray*, 69 Wn.2d at 432;

¹⁵ As noted above, there was no finding of fact, or evidence presented, that the IA was “deceptively mature in appearance”. AR 22-23, 161-64, 246; AR-TS 259.

Dodge City Saloon Inc., 271 P.3d at 368-69; *Playhouse*, 35 Wn. App. at 542.

That it is unlawful for Dublin Down and Top Shelf to serve alcohol to any person younger than twenty-one years of age is not in debate. WAC 314-11-020(1). As a matter of law and public safety then, Dublin Down and Top Shelf's employees are not free to serve alcohol to those persons they subjectively believe are old enough. It is the responsibility of the licensee to ascertain the actual age of a patron before they serve them alcohol, not merely guess and then claim innocence. *See* WAC 314-11-020(1).

Unsupported speculation and vague references to what could happen cannot satisfy the Licensees' "heavy burden" of demonstrating arbitrary and capricious action. *See Alpha Kappa Lambda Frat.*, 152 Wn. App. at 421. This argument is without merit and must be rejected.

E. The Attorney Fees Request Should Be Denied

The Licensees' request for fees and costs under RCW 4.84.350 should likewise be rejected. Even if they prevail in this case, 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 Dept. of Labor and Industries*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007) (internal citation omitted). The standard “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.

The only argument the Licensees make to support their request for costs and fees is that the Board’s “refusal to honor the criminal proceedings and continued prosecution of an administrative action against Licensees were not substantially justified [sic]”. Respondent’s Br. at 41-42. Their supportive arguments fail as identified above. The Board has a statutory duty to enforce all liquor laws and rules and protect the public. AR 50-52, 162; AR-TS 201 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). The Board utilized investigative methods which have been long upheld as constitutionally valid. *See e.g. Playhouse*, 35 Wn. App. at 542. Entrapment was not a valid or applicable defense in the administrative proceedings. RCW 9A.16.070. The Board sufficiently justified its actions against the

Licensees for their violations of RCW 66.44.270 and WAC 314-11-020(1). Accordingly, any request for an award of attorney's fees should be denied.

VI. CONCLUSION

Based on the foregoing, the Licensees' challenges should all be rejected by this Court. Rather than take responsibility for their service of alcohol to an underage person, they seek to undermine the Board's ability to effectively enforce liquor laws and rules to the detriment of the public health, welfare, and safety. Accordingly, the Board respectfully requests the Court affirm the Final Orders issued against each Licensee and dismiss this appeal.

RESPECTFULLY SUBMITTED this 9 day of April, 2012.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read 'GORDON P. KARG', is written over a horizontal line.

GORDON P. KARG
Assistant Attorney General
WSBA No. 37178

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

WASHINGTON STATE LIQUOR
CONTROL BOARD,

Appellant,

v.

DUBLIN DOWN, LLC,

Respondent,

v.

TOP SHELF, LLC,

Respondent.

CERTIFICATE OF
SERVICE



I, Courtney Grubb, 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 April 9, 2012, I caused to be served a true and correct copy of the Brief of Appellant and this Certificate of Service via U.S. Mail

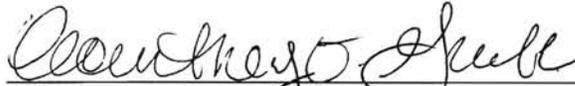
to:

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WILLIAM V. BAUMGARTNER
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of April, 2012.


COURTNEY GRUBB, Legal Assistant

360-586-0674