

**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

KAGE, INC. d/b/a  
PETE'S LIQUOR & WINES  
PO BOX 3001  
WOODINVILLE, WA 98072-3001

LOCATION ADDRESS:  
20617 BOTHELL-EVERETT HWY,  
SUITE C  
BOTHELL, WA 98012-8558

APPLICANT

LICENSE APPLICATION NO. 409440  
UBI: 600-212-037-001-0003

LCB NO. 24,708  
OAH NO. 2013-LCB-0020

FINAL ORDER OF THE BOARD

The above-captioned matter coming on regularly before the Board, and it appearing that:

1. The Licensing Division of the Liquor Control Board issued a Statement of Intent to Deny Liquor License Application and to Revoke Temporary Pre-Approval Permit dated March 20, 2013 asserting that the sole rights to operate a retail spirits liquor store at this location were held by auction bid winner Abi Eshagi. Mr. Eshagi submitted a Title document establishing his exclusive rights to operate as a spirits retail licensee at this location.
2. The Applicant submitted a request for a hearing.
3. The parties agreed that this matter did not require a fact-finding hearing, and submitted stipulated facts and exhibits. Legal argument was presented to Administrative Law Judge Jane Cantor Shefler on August 28, 2013.

4. On September 16, 2013, Administrative Law Judge Jane Cantor Shefler issued her Findings of Fact, Conclusions of Law and Initial Order, affirming the issuance of the Statement of Intent to Deny Liquor License Application and to Revoke Temporary Pre-Approval Permit.

5. The Applicant filed a Petition for Review. The Licensing Division of the Board filed a Brief in Response to the Petition for Review.

6. The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises; the Board adopts the Findings of Fact, Conclusions of Law and Initial Order, with the following modifications:

**Paragraph 10 of the Findings of Fact is revised to read:** Kage and TCSC signed a lease on April 27, 2012, with the actual tenancy beginning in December, 2012. The lease has an initial term of five years for the property commonly known as 20617 Bothell-Everett Hwy, Suites B and C, Bothell, WA. Kage is still bound under the terms of that lease. Exhibit C.

**Paragraph 15 of the Conclusions of Law is modified to read:**

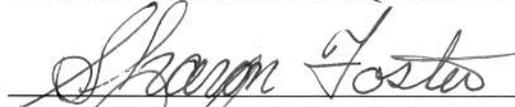
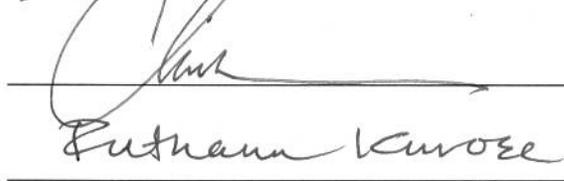
Kage asserts that it is not bound by the provisions of RCW 66.24.620 because it seeks a license for a space which fully encompasses the footprint of former State Store No. 87. If the Board were to grant Kage a license for a space which fully encompasses former Store No. 87, it would be contrary to the exclusive right acquired by Eshagi at auction, and could cause a breach of the contract between the Board and Eshagi. Granting such a license to Kage would limit Eshagi's use of the right, contrary to the contract.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Statement of Intent to Deny Liquor License to Revoke Temporary Pre-Approval Permit for case 24,708 in this matter is ADOPTED.

IT IS HEREBY FURTHER ORDERED that the liquor license application number 409440 for Kage, Inc. d/b/a Pete's Liquor & Wines is DENIED.

DATED at Olympia, Washington this 29 day of OCTOBER 2013.

WASHINGTON STATE LIQUOR CONTROL BOARD

  
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Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Washington State Liquor Control Board, Attn: Kevin McCarroll, 3000 Pacific Avenue Southeast, PO Box 43076, Olympia, WA 98504-3076, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board's office. RCW 34.05.010(6). A copy shall also be sent to Mary M. Tennyson, Senior Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An

order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Stay of Effectiveness. The filing of a petition for reconsideration does not stay the effectiveness of this Order. The Board has determined not to consider a petition to stay the effectiveness of this Order. Any such request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

Judicial Review. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).



Washington State  
Liquor Control Board

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October 30, 2013

John Mitchell  
Attorney for Applicant  
Law Office of John Mitchell  
PO Box 11287  
Bainbridge Island, WA 98110-5287

Michael D. Ross  
Attorney for Applicant  
Ross Law Advisor, PLLC  
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George Kingen, Applicant  
Kage, Inc  
d/b/a Pete's Liquor & Wines  
PO Box 3001  
Woodinville, WA 98072-3001

Kim O'Neal, AAG  
GCE Division, Office of Attorney General  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100

**RE: FINAL ORDER OF THE BOARD**

**LICENSEE: Kage, Inc**

**TRADE NAME: Pete's Liquor & Wines**

**LOCATION: 20617 Bothell-Everett Hwy, Ste C, Bothell, WA 98012**

**LICENSE APPLICATION NO. 409440**

**LCB HEARING NO. 24,708**

**OAH NO. 2013-LCB-0020**

**UBI: 600-212-037-001-0003**

Dear Parties:

Please find the enclosed Final Order of the Board and Declaration of Service by Mail in the above-referenced matter. If you have any questions, please contact me at (360) 664-1602.

Sincerely,

Kevin McCarroll  
Adjudicative Proceedings Coordinator

Enclosures (2)

CC: Sharon Hendricks, Policy and Compliance Manager, WSLCB Licensing

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

LCB NO. 24,708

OAH NO. 2013-LCB-0020

KAGE, INC. d/b/a  
PETE'S LIQUOR & WINES  
PO BOX 3001  
WOODINVILLE, WA 98072-3001

DECLARATION OF SERVICE BY MAIL

LOCATION ADDRESS:  
20617 BOTHELL-EVERETT HWY,  
SUITE C  
BOTHELL, WA 98012-8558

APPLICANT

LICENSE APPLICATION NO. 409440  
UBI: 600-212-037-001-0003

I certify that I caused a copy of the FINAL ORDER OF THE BOARD in the above-referenced matter to be served on all parties or their counsel of record by US Mail Postage Prepaid via Consolidated Mail Service for applicants and licensees, by campus mail for state offices, on the date below to:

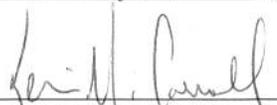
John Mitchell  
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Law Office of John Mitchell  
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Michael D. Ross  
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George Kingen, Applicant  
Kage, Inc  
d/b/a Pete's Liquor & Wines  
PO Box 3001  
Woodinville, WA 98072-3001

Kim O'Neal, AAG  
GCE Division, Office of Attorney General  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100

DATED this 30<sup>th</sup> day of October, 2013, at Olympia, Washington.

  
Kevin McCarroll, Adjudicative Proceedings Coordinator

RECEIVED

OCT 03 2013

Liquor Control Board  
Board Administration

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE LIQUOR CONTROL BOARD

In the Matter of the Denial of the Liquor  
License Application for the Privileges of a  
Beer/Wine Specialty Shop/  
Growlers/Spirits Retailer/Keg Sales for:

KAGE, INC.  
PETE'S LIQUOR & WINES  
PO BOX 3001  
WOODINVILLE, WA 98072-3001

LICENSEE

Location Address:  
20617 Bothell-Everett Hwy, Suite C  
Bothell, WA 98012-8558

LICENSE NO. 409440  
UBI NO. 600 212 037

OAH Docket No. 2013-LCB-0020

LCB No. 24,708

FINDINGS OF FACT,  
CONCLUSIONS OF LAW and  
INITIAL ORDER

Pursuant to due and proper notice to all interested parties, a hearing was held in the above-entitled matter before Administrative Law Judge Jane Cantor Shefler, Office of Administrative Hearings, at Tacoma, Washington, on August 28, 2013.

The Licensee/Appellant Kage, Inc. dba Pete's Liquor & Wines ("Kage") appeared and was represented by John Mitchell, Attorney at Law. The Liquor Control Board appeared and was represented by Kim O'Neal, Assistant Attorney General.

The hearing was digitally recorded.

**STATEMENT OF THE CASE**

On March 20, 2013, the Liquor Control Board issued a Statement of Intent to Deny Liquor License and to Revoke Temporary Pre-Approval Permit (TPP). Kage timely requested an administrative hearing under WAC 314-09-315.

During the Prehearing Conference held on June 16, 2013, the parties agreed this matter did not require a fact-finding hearing. They agreed to submit stipulated facts and exhibits (see *below*). Legal argument was presented on August 28, 2013.

At issue is whether the Board erred in the issuance of the Statement of Intent to Deny Liquor License and to Revoke Temporary Pre-Approval Permit (TPP) under the provisions of RCW 66.24.620(4)(c).

**RECORD RELIED UPON**

1. Brief of Licensee/Appellant Kage, Inc. DBA Pete's Liquor & Wines
2. Board's Response Brief
3. Reply Brief of Licensee/Appellant Kage, Inc. DBA Pete's Liquor & Wines
4. Agreed Exhibits:
  - A. WSLBC Press Release; March 6, 2012; 2 pages.
  - B. WSLBC Auction Information; date unknown, sometime between April 20, 2012 and May 24, 2012; 3 pages.
  - C. Shopping Center Lease between TCSC and Kage; dated June 27, 2012; 70 pages.
  - D. Premises Floor Plan to Suites B & C, 201617 Bothell-Everett Hwy, Bothell, WA; undated; 1 page.
  - E. Title issued by WSLBC to Abi Eshagi re Store No. 87; September 27, 2012; 1 page.
  - F. WSLBC Statement of Intent to Deny Liquor License, etc.; March 20, 2013; 3 pages.
  - G. Protest Letter of attorney David H. Gehrke on behalf of Abi Eshagi; July 11, 2012; 2 pages.
  - H. WSLBC Report on Application re Kage, Inc. license application; date unknown; 3 pages.
  - I. WSLBC State Store Auction Terms & Conditions; as amended April 17, 2012; 6 pages.
  - J. WSLBC Fact Sheet: Action Approach Details; March 22, 2012; 4 pages.
  - K. WSLBC State Liquor Store Rights: Auction Frequently Asked Questions (FAQs); March 9, 2012; 4 pages.
  - L. WSLBC Landlord Informational Forum; February 3, 2012; 2 pages.
  - M. WSLBC Landlord Informational Forum; February 16, 2012; 2 pages.
  - N. WSLBC Winners Conference, April 25, 2012; 4 pages.

## **FINDINGS OF FACT**

### *Statement of Agreed Facts<sup>1</sup>*

1. On November 8, 2011, the voters of the State of Washington approved Initiative No. 1183, codified in part as RCW 66.24.620, which directed the Washington State Liquor Control Board (hereinafter the "Board") to sell by public auction "the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises." RCW 66.24.620(4)(c).
2. On March 6, 2012, the Board issued a press release regarding the auction of the rights to operate spirits retail stores upon the premises of former state liquor stores. Exhibit A.
3. Subsequent to its online auction, which ended on April 20, 2012, the Board scheduled a live auction to take place on May 24, 2012, at which time the rights to the eighteen state stores that were not purchased during the online auction, were to be auctioned. Exhibit B.
4. The owner of Thrasher's Corner Shopping Center, located in Bothell, Washington, is Thrasher's Corner Shopping Center, LLC, a Washington limited liability company ("TCSC").
5. For a number of years, TCSC had been pursuing Kage, a well-known and well respected retail wine merchant at two existing locations in Bellevue and in Seattle, as a tenant for Thrasher's Corner Shopping Center. Upon adoption of I-1183, TCSC began discussions with Kage in earnest regarding Kage seeking a liquor license and operating at Thrasher's Corner Shopping Center.
6. Former state liquor Store No. 87 occupied all of 20617 Bothell-Everett Hwy, Suite C at Thrasher's Corner Shopping Center. Its premises measured 5,690 square feet. On April 24, 2012, the Board received Kage's application for a new beer and wine specialty shop, spirits retailer, growlers and keg sales license for a proposed location that included not only Suite C at 20617 Bothell-Everett Hwy, but also the adjacent Suite B. The premises of Suites B and C together occupy 10,200 square feet as measured by a Board enforcement officer.
7. Prior to the close of the online auction TCSC received numerous inquiries from potential bidders for Store No. 87. In response to these inquiries, TCSC made it clear that it was in negotiations with a potential tenant for space in excess of 10,000 square feet and the space occupied by Store No. 87 would likely not be available to the successful bidder at the auction.
8. The bidding on the Board's online auction was completed on April 20, 2012. The successful bidder with respect to former Store No. 87 was Abi Eshagi.
9. On September 27, 2012, the Board issued to Abi Eshagi a "Title" document, which set forth the rights he obtained as successful bidder with respect to Store No. 87. Exhibit E.

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<sup>1</sup> The Statement of Agreed Facts was submitted by the parties on July 19, 2013 and accepted by the Administrative Law Judge.

10. Kage and TCSC entered into a lease, commencing in December 2012, with an initial term of five years for the property commonly known as 20617 Bothell-Everett Hwy, Suites B and C, Bothell, WA. Kage is still bound under the terms of the said lease. Exhibit C.
11. On June 29, 2012, a Board enforcement officer posted a public notice on the premises of Kage's application.
12. On July 13, 2012, the Board received a letter dated July 11, 2012 from David H. Gehrke, attorney for Abi Eshagi, protesting the issuance of a license pursuant to Kage's application. Exhibit G.
13. By his letter dated July 20, 2012, attorney Michael D. Ross, on behalf of both TCSC and Kage, submitted a statement to the Board in response to Mr. Gehrke's protest letter.
14. The Board issued Kage a Temporary Pre-Approval Permit ("TPP") on November 20, 2012, and Kage opened its Thrasher's Corner Shopping Center store in early December 2012.
15. While Kage's application was being considered, the Board issued a series of TPPs, the last of which was issued on March 26, 2013.
16. On March 20, 2013, the Board issued its Statement of Intent to Deny Liquor License And To Revoke Temporary Pre-Approval Permit (TPP). Exhibit F.
17. Kage timely requested an administrative hearing under WAC 314-09-315.

*Additional Facts*

18. The Title document, dated September 27, 2012, provides:

This title is awarded to

Abi Eshagi

The above named individual or organization hold the exclusive rights to apply for a spirit retail license at the address listed below within the square footage previously associated with the state liquor store:

Address: 20617 Bothell-Everett Hwy #C  
Bothell, WA 98012

The holder of this right may seek to exercise it by applying for a license, sell or transfer it, request an alternate location within one radius mile of the above stated address, or hold on to it for future action. Any changes in ownership of this title must be registered with the Washington State Liquor Control Board within thirty days of said action.

Exhibit E.

19. The Board denied Kage's application for a liquor license "under the provisions of RCW 66.24.620(4)(c) because the applicant has not acquired the rights to operate a retail spirits store at this location which are a precondition to granting the license." Exhibit F, page 2.
20. In reaching its decision to issue the Statement of Intent, the Board considered the following materials:
  - Report on Application dated October 17, 2012 by Manager Kathe McDaniel
  - Protest/Objection letter dated July 11, 2012 by David Gehrke on behalf of bid winner Abi Eshgi.
  - Bid winner Title document dated September 27, 2012 by Abi Eshagi
  - Applicant's response to protest dated July 30, 2012
  - Spirits retailer Acknowledgment dated June 24, 2012 by George Kingen, applicant
  - Premises measurement confirmation dated October 16, 2012 by Lead Investigator March Wilsie.

Exhibit F, page 2.

## **CONCLUSIONS OF LAW**

### *Jurisdiction*

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter herein under RCW 66.24.010 and WAC 314-09-015, and more generally under and chapter 34.05 RCW, chapters 314-42 and 10-08 WAC.
2. Proceedings involving agency action are adjudicative proceedings under chapter 34.05 RCW. The Board has authority to assign such proceedings to an administrative law judge pursuant to chapter 34.12 RCW. The Board has authority to convene a formal hearing subject to the provisions of Title 34 RCW either before or after disposition of the application. See RCW 66.24.010(8). A proper hearing was provided in this case.

### *Standard of Review*

3. RCW 66.08.010 provides that Title 66 RCW 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.
4. The issuance of liquor licenses is governed by RCW 66.24.010. The Board has authority to grant or deny a retail liquor license. RCW 66.24.010(2).
5. As a licensed retail seller of liquor, the licensee is subject to the jurisdiction of the Board. The license is subject to the conditions and restrictions imposed by Title 66 RCW. RCW 66.24.010(6).

6. As the party challenging the Board's decision to deny its liquor license application, Kage bears the burden of establishing that the agency decision was unlawful. RCW 35.04.570.

7. Standards for judicial review of decisions of an administrative nature are set forth in the Administrative Procedures Act, RCW 34.05.570(4)(c):

Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion ... can be granted only if the court determines that the action is:

- (i) Unconstitutional;
- (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law.
- (iii) Arbitrary or capricious; or
- (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

8. In *Hayes v. Yount*, 87 Wn.2d 280, 286, 552 P.2d 1038 (1976), the court held:

[Administrative decisions] are to be affirmed unless the administrative findings, conclusions, or decisions are "clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or . . . arbitrary or capricious." RCW 34.04.130(6)(e), (f); *Department of Ecology v. Ballard Elks Lodge*, 827, 84 Wn.2d 551, 555, 527 P.2d 1121 (1974); *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 113-14, 508 P.2d 166 (1973). Agency action is "arbitrary or capricious" if there is no support in the record for the action which is therefore "wilful and unreasoning action, in disregard of facts and circumstances." *Northern Pac. Transp. Co. v. State Util. & Transp. Comm'n*, 69 Wn.2d 472, 478, 418 P.2d 735 (1966).

#### *Denial of License Application*

9. The provisions of Initiative 1183 are codified in RCW 66.24.620. Under RCW 66.24.620(3), the Board was directed to sell all assets of the former state liquor stores, "including without limitation goodwill and location value associated with state liquor stores."

10. RCW 66.24.620(4)(a) directed the Board to obtain the maximum reasonable value for all asset sales.

11. RCW 66.24.620(4)(c) governs the sale to the public of the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon such premises:

The board must sell by auction open to the public the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the

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

12. At auction, Abi Eshagi ("Eshagi") acquired the exclusive right to apply for a spirit retail license at the site of former Store No. 87. Eshagi may seek to exercise this right by applying for a license, sell or transfer it, request an alternate location within one radius mile of the above stated address, or hold on to it for future action. The Board issued a Title document formalizing the terms of Eshagi's purchase.
13. Kage argues that the Board's denial of its application for a liquor license is invalid under RCW 66.24.620(4). Kage asserts that the rights acquired by Eshagi are limited to those identified in the Title document and do not include the right to protest the application of another entity for a license to operate a retail spirits store within the square footage of former Store No. 87, or the right to cause the Board to exercise its police powers to put Kage out of business by denying its license application. Kage maintains that "but for" the letter of protest submitted on behalf of Eshagi, its application for a license would have been approved.
14. Pursuant to RCW 66.24.620(4), the Title document is a valid contract between the Board and Eshagi. Implicit in any contract is the right to protect and enforce its terms. When Eshagi reminded the Board that he had acquired the right to apply for a liquor license to operate a retail spirits store at the location of former Store No. 87, he acted well within his contract right to protect what he had acquired through auction. Eshagi did not *cause* the Board to deny Kage's application. Eshagi's letter of protest was but one of several documents the Board considered as it reached its decision to deny Kage's application.
15. Kage asserts that it is not bound by the provisions of RCW 66.24.620 because it seeks a license for a space that is larger than, but which fully encompasses, the footprint of former Store No. 87. However, to grant a license for a space which fully encompasses former Store No. 87 would abrogate the exclusive rights acquired by Eshagi and would be a breach of the contract between the Board and Eshagi. Granting such a license would destroy the ability to hold that right for future action or to sell or transfer the right to someone else.
16. Kage argues that the Board's application of RCW 66.24.620(4)(c) to deny a spirits retail license unconstitutionally impairs its contract rights under the lease with TCSC, citing the US Constitution, Article 1, § 10 and Article 1, §23. Kage does not seek a determination that RCW 66.24.620(4)(c) is unconstitutional,<sup>2</sup> but rather that the Board's action to deny the license unconstitutionally impairs its contract rights.

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<sup>2</sup> The issue of the constitutionality of a statute cannot be resolved by this tribunal: *See, Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974) ("An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power.") and *Yakima County Clean Air Authority v. Glascam Builders, Inc.*, 85 Wn.2d 255, 257, 534 P.2d 33 (1975) ("An administrative tribunal is without authority to determine the constitutionality of a statute.")

17. The lease agreement between Kage and TCSC was entered into after the passage of Initiative 1183 and after the auction on April 20, 2012. *Birkenwald Distributing Co. v. Heublein, Inc.*, 55 Wn.App. 1, 5, 776 P.2d 721 (1989), quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n. 17 (1977), is applicable:

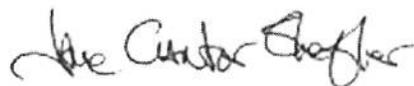
The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement. "This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.'" [Citations omitted] This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached.

18. At the time they entered into the lease agreement, Kage and TCSC knew or should have known that Eshagi was the successful bidder of the right to operate a retail spirits store at the location of former Store No. 87. They entered into their agreement subject to the laws in effect at that time. The constitutional prohibitions concerning the impairment of contracts are not pertinent to this matter.
19. The Board's action to deny a liquor license to Kage is valid under RCW 66.24.620(4)(c). Kage does not own the right to operate a liquor store at the location of former Store No. 87. Kage does not possess the requisite pre-condition of holding the exclusive right to apply for an operating license for that location. This right was purchased by and is currently held by Eshagi.
20. Based upon the record herein, Kage did not prove that the Board's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Kage did not establish that the Board acted unconstitutionally, beyond the scope of its authority, or arbitrarily or capaciously.

**Now therefore it is ORDERED:**

The action of the Liquor Control Board in the issuance of the Statement of Intent to Deny Liquor License and to Revoke Temporary Pre-Approval Permit (TPP) is **AFFIRMED**.

**Signed and Issued** at Tacoma, Washington, on the date of mailing.



Jane Cantor Shefler  
Administrative Law Judge  
Office of Administrative Hearings

**CERTIFICATION OF MAILING IS ATTACHED**

**NOTICE OF APPEAL RIGHTS – PLEASE READ CAREFULLY**

**Petition for Review of Initial Order**

**Either the licensee or permit holder or the assistant attorney general may file a petition for review of the initial order with the Liquor Control Board within twenty (20) days of the date of service of the initial order.** RCW 34.05.464; WAC 10-08-211; WAC 314-42-095.

The petition for review must:

- (i) Specify the portions of the initial order to which exception is taken;
- (ii) Refer to the evidence of record which is relied upon to support the petition; and
- (iii) Be filed with the liquor control board within twenty (20) days of the date of service of the initial order.

A copy of the petition for review must be mailed to all of the other parties and their representatives at the time the petition is filed. **Within ten (10) days after service of the petition for review, any of the other parties may file a response to that petition with the Liquor Control Board.** WAC 314-42-095(2)(a) and (b). Copies of the reply must be mailed to the all other parties and their representatives at the time the reply is filed.

**Address for filing a petition for review with the board:**

Washington State Liquor Control Board  
Attention: Kevin McCarroll  
3000 Pacific Avenue, PO Box 43076  
Olympia, Washington 98504-3076.

**Final Order and Additional Appeal Rights:** The administrative record, the initial order, any petitions for review, and any replies filed by the parties will be circulated to the board members for review. WAC 314-42-095(3).

Following this review, the board will enter a final order. WAC 314-42-095(4). Within ten days of the service of a final order, any party may file a petition for reconsideration with the board, stating the specific grounds upon which relief is granted. RCW 34.05.470; WAC 10-08-215.

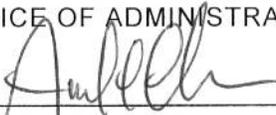
The final decision of the board is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598 (Washington Administrative Procedure Act).

**CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 2013-LCB-0020**

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

<p>George Kingen Kage, Inc. Pete's Liquor &amp; Wines PO Box 3001 Woodinville, WA 98072-3001 <b>Licensee</b></p>	<p><input checked="" type="checkbox"/> First Class US mail, postage prepaid <input type="checkbox"/> Certified mail, return receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> First Class, postage prepaid, Certified mail, return receipt</p>
<p>Michael D. Ross Attorney at Law Ross Law Advisors PLLC 1191 2nd Ave Ste 1800 Seattle, WA 98101-2996 <b>Fax:</b> (206) 260-2989 <b>Licensee Representative</b></p>	<p><input checked="" type="checkbox"/> First Class US mail, postage prepaid <input type="checkbox"/> Certified mail, return receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> First Class, postage prepaid, Certified mail, return receipt</p>
<p>John J. Mitchell Attorney at Law Law Office of John Mitchell PO Box 11287 Bainbridge Island, WA 98110-5287 <b>Fax:</b> (888) 701-4936 <b>Licensee Representative</b></p>	<p><input checked="" type="checkbox"/> First Class US mail, postage prepaid <input type="checkbox"/> Certified mail, return receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> First Class, postage prepaid, Certified mail, return receipt</p>
<p>Kevin McCarroll Adjudicative Proceedings Coordinator Liquor Control Board 3000 Pacific Ave SE PO Box 43076 Olympia, WA 98504-3076 <b>Fax:</b> (360) 586-3190 <b>Department Representative</b></p>	<p><input checked="" type="checkbox"/> First Class US mail, postage prepaid <input type="checkbox"/> Certified mail, return receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> First Class, postage prepaid, Certified mail, return receipt</p>

Date: Monday, September 16, 2013 OFFICE OF ADMINISTRATIVE HEARINGS

By:   
Audrey C. Chambers  
Legal Secretary

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OCT 07 2013

Liquor Control Board  
Board Administration

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STATE OF WASHINGTON  
WASHINGTON STATE LIQUOR CONTROL BOARD

In the Matter of the Denial of the liquor  
license application for the privileges of a  
Beer/Wine Specialty  
Shop/Growlers/Spirits Retailer/Keg Sales  
for:

) OAH Docket No. 2013-LCB-0020

) LCB No. 24,708

) Kage, Inc.  
) Pete's Liquor & Wines  
) P.O. Box 3001  
) Woodinville, WA 98072-3001

) PETITION FOR REVIEW OF INITIAL  
) ORDER OF LICENSEE/APPELLANT  
) KAGE, INC. DBA PETE'S LIQUOR &  
) WINES

) Location Address: 20617 Bothell-Everett  
) Hwy, Ste. C  
) Bothell, WA 98012-  
) 8558

) License Application No. 409440  
) UBI 600-212-037-001-0003

COMES NOW Licensee/Appellant Kage, Inc. dba Pete's Liquor & Wines, through its undersigned attorneys, and petitions the Liquor Control Board to review the Initial Order in this matter dated September 16, 2013.

I.

INTRODUCTION

This appeal involves the denial by the Liquor Control Board (the "Board") of the application of Kage, Inc. dba Pete's Liquor & Wines ("Kage") for a Beer/Wine Specialty Shop/Growlers/Spirits Retailer/Keg Sales license at Thrasher's Corner Shopping Center in

ORIGINAL

1 Bothell, Washington. After being granted Temporary Pre-Approval Permits allowing it to  
2 operate its new store in Bothell, and after entering into a lease with the owner of Thrasher's  
3 Corner Shopping Center for an initial term of five years, Kage opened its Bothell store in early  
4 December 2012. On March 20, 2013, the Board issued its Statement Of Intent To Deny Liquor  
5 License And To Revoke Temporary Pre-Approval Permit (TPP), by which the Board denied  
6 Kage's license application for its location at Thrasher's Corner Shopping Center and revoked its  
7 TPP, effectively putting it out of business at that location after more than three months in  
8 operation.

9 The Board's denial of Kage's license application was based on a protest letter dated July  
10 11, 2012 from David H. Gehrke, attorney for Abi Eshagi, the successful bidder at the Board's  
11 online auction for the operating rights associated with Store No. 87, which had been located in  
12 Thrasher's Corner Shopping Center, who asserted that Mr. Eshagi "acquired the sole right to  
13 operate a liquor store at that location." The Board agreed with Mr. Eshagi and denied Kage's  
14 application.

15 The essence of Kage's argument before the Administrative Law Judge was that in  
16 denying Kage's application on the basis of a protest letter submitted by Mr. Eshagi, the Board  
17 misconstrued the rights acquired by Mr. Eshagi as successful bidder under his auction contract  
18 of sale with the Board, which rights do **not** include the "sole right to operate a liquor store at that  
19 location," as asserted in Mr. Eshagi's Protest Letter. This appeal is not, therefore, about the  
20 language of RCW 66.24.620(4)(c); instead, this appeal involves the meaning of terms of the  
21 Board's own auction contract of sale under which Mr. Eshagi submitted his protest, in response  
22 to which the Board denied Kage's application.

23 Kage argued that the Board's denial of its license application was based solely on the  
24 letter of protest submitted by Mr. Eshagi, *i.e.*, in the absence of a protest, Kage's application for  
25 a license would have been approved. In her Findings Of Fact, Conclusions Of Law And Initial  
26 Order (the "Order"), Administrative Law Judge Shefler rejected this argument, concluding that

1 Mr. Eshagi simply “reminded the Board that he had acquired the right to apply for a liquor  
2 license to operate a retail spirits store at the location of the former Store No. 87.” *See*  
3 Conclusions of Law 13 and 14.

4 ALJ Shefler went on to conclude as follows:

5 19. The Board’s action to deny a liquor license to Kage is valid under RCW  
6 66.24.620(4). Kage does not own the right to operate a liquor store at the  
7 location of the former Store No. 87. Kage does not possess the requisite  
8 pre-condition of holding the exclusive right to apply for a operative  
9 license for that location. This right was purchased by and is currently  
10 held by Eshagi.

11 Conclusion of Law 19.

12 Subsequent to the issuance of the Order, Kage and its attorneys learned that the Board  
13 had issued a Beer/Wine Specialty Shop/Spirits Retailer license to an applicant that was not the  
14 successful bidder at the 2012 auction of the operating rights to the State’s former liquor stores,  
15 to operate at a location that included the “footprint” of a former State store. *See* the  
16 accompanying Declaration of John J. Mitchell (the “Mitchell Declaration”). The Board’s public  
17 records contained on its website, establish the following facts:

18 1. Former Store No. 98 was located at 1100 Bellevue Way NE, Suite 5, in Bellevue,  
19 Washington. *See* Exhibit A to the Mitchell Declaration.

20 2. Store No. 98 comprised 7,792 square feet. *See* Exhibit B to the Mitchell Declaration.

21 3. Bevmo! was issued Beer/Wine Specialty Shop/Spirits Retailer license No. 409547 on  
22 February 1, 2013 for its store at 1100 Bellevue Way NE, Suites 5-6, Bellevue, Washington.

23 The material facts of the situation described above with respect to Store No. 98 are  
24 exactly the same as those in the instant case, with one significant difference: Bevmo! was issued  
25 a license for a liquor store at a location that included the “footprint” of the former State No. 98,  
26 *i.e.*, Suite 5 at 1100 Bellevue Way NE, Bellevue, Washington, as well as additional contiguous  
space, *i.e.*, Suite 6 at 1100 Bellevue Way NE, when the landlord declined to enter into a lease  
with the successful bidder at auction; whereas, Kage was denied a liquor license to operate its  
store at a proposed location that included not only Suite C at 20617 Bothell-Everett Hwy,

1 Thrasher's Corner Shopping Center, which was occupied by Store No. 87, but also the adjacent  
2 Suite B, after the landlord of former Store No. 87 declined to enter into a lease with Mr. Eshagi,  
3 the successful bidder for Store No. 87.

4 The reason for the difference in the outcomes of the liquor license applications of  
5 Bevmo! and Kage is not obvious, although it is believed that the successful bidder at the auction  
6 for Store No. 98 did not protest the issuance of a liquor license to Bevmo! to operate a liquor  
7 store in space that included the "footprint" occupied by Store No. 98; whereas, the successful  
8 bidder at the auction for Store No. 87, did, in fact, protest the issuance of Kage's license to  
9 operate a liquor store in space that included the "footprint" occupied by Store No. 87.

10 II.

11 EXCEPTION

12 ALJ Shefler concluded that "Kage does not own the right to operate a liquor store at the  
13 location of the former Store No. 87. Kage does not possess the requisite pre-condition of holding  
14 the exclusive right to apply for a operative license for that location. This right was purchased  
15 by and is currently held by Eshagi." Conclusion of Law 19. Accordingly, if Bevmo! did not own  
16 the right to operate a liquor store at the location of former Store No. 98, how could it be issued  
17 License No. 409547 on February 1, 2013? If follows that, if Bevmo! was entitled to the issuance  
18 of a license when it did not own the right to operate a liquor store at the location of former Store  
19 No. 98, then how could the Board deny Kage's license under similar circumstances on March  
20 20, 2013? It seems that Bevmo! was issued license No. 409547 because the successful bidder  
21 for former Store No. 98 neglected "to remind" the Board of its rights acquired at auction by  
22 submitting a protest of Bevmo!'s license application. Or, could it be that the Board was  
23 somehow biased in favor of Bevmo! and prejudiced against Kage?

24 Kage contends that both the Board's denial of its license application, as well as the Order,  
25 are inconsistent with the Board's issuance of a spirits retail license to Bevmo! for the same  
26 location as former Store No. 98. Kage agrees that the Board properly issued Bevmo! License

1 No. 409547. By its issuance of License No. 409547 to Bevmo!, however, the Board established  
2 a practice of granting liquor license applications for the location of a former State store to an  
3 entity other than the holder of the operating rights to that store, which were acquired at auction.  
4 The Board's denial of Kage's license application under similar circumstances, must, therefore,  
5 be considered arbitrary and capricious. An "arbitrary and capricious" judicial decision is defined  
6 as one "founded on prejudice or preference rather than on reason or fact." Black's Law  
7 Dictionary 100 (7<sup>th</sup> ed. 1999). There is no "reason or fact" that justifies the denial by the Board  
8 of a license to one entity, while denying a license to another entity, when, as in the case of Kage  
9 and Bevmo!, the parties are similarly situated.

10 III.

11 CONCLUSION

12 For all of the reasons set forth in Kage's briefing herein, the Board's Statement Of Intent  
13 To Deny Liquor License And to Revoke Temporary Pre-Approval Permit should be vacated and  
14 the Board ordered forthwith to issue Kage the license for which it applied. To do otherwise  
15 would result in the Board deciding to issue a liquor license based on prejudice or preference,  
16 rather than reason or fact, and inconsistent with its issuance of License No. 409547 to Bevmo!.

17 DATED this 4<sup>th</sup> day of October, 2013.

18 ROSS LAW ADVISORS PLLC

19  FOR

20 Michael D. Ross  
21 WSBA No. 13891

22 LAW OFFICE OF JOHN J. MITCHELL

23 

24 John J. Mitchell  
25 WSBA No. 12757  
26 P. O. Box 11287  
Bainbridge Isl., WA 98110  
(206) 780-8982

Attorneys for Kage, Inc.

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**CERTIFICATE OF SERVICE**

JOHN J. MITCHELL declares as follows:

On October 4, 2013, I deposited into the U.S. Mail, with postage prepaid, a copy of this document addressed as follows:

Ms. Kim O’Neal  
Assistant Attorney General  
1125 Washington St. SE  
P. O. Box 40100  
Olympia, WA 98504-0100

On the same date I also emailed a copy of this document to Ms. O’Neal at the following email address: KimO@atg.wa.gov.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Bainbridge Island, Washington on October 4, 2013.

  
John J. Mitchell

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Liquor Control Board  
Board Administration

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STATE OF WASHINGTON  
WASHINGTON STATE LIQUOR CONTROL BOARD

In the Matter of the Denial of the liquor license application for the privileges of a Beer/Wine Specialty Shop/Growlers/Spirits Retailer/Keg Sales for:	)	OAH Docket No. 2013-LCB-0020
	)	
	)	LCB No. 24,708
	)	
Kage, Inc.	)	
Pete's Liquor & Wines	)	
P.O. Box 3001	)	DECLARATION OF
Woodinville, WA 98072-3001	)	JOHN J. MITCHELL
Location Address: 20617 Bothell-Everett Hwy, Ste. C	)	
Bothell, WA 98012-8558	)	
License Application No. 409440	)	
UBI 600-212-037-001-0003	)	

JOHN J. MITCHELL declares as follows:

1. I am one of the attorneys for Kage, Inc. dba Pete's Liquor & Wines ("Kage"), the licensee/appellant in this proceeding. I make this declaration on personal knowledge and am competent to testify to the matters stated herein.

2. Subsequent to the Administrative Law Judge's Initial Order in this matter, I learned that the Liquor Control Board had issued a Beer/Wine Specialty Shop/Spirits Retailer license to an applicant, which was not the successful bidder at the 2012 auction of the operating rights to the State's former liquor stores, to operate at a location that included the "footprint" of

DECLARATION OF JOHN J. MITCHELL -

**ORIGINAL**

ROSS LAW ADVISORS PLLC  
1191 Second Avenue, Suite 1800  
Seattle, Washington 98101  
Phone: 206.682.5900  
Facsimile: 206.260.2989

1 a former State store.

2 3. On October 2, 2013, I personally visited the Liquor Control Board's website and  
3 downloaded numerous public records contained thereon. Among said documents were the  
4 following:

5 A. List of state store phone numbers and addresses. Attached hereto as Exhibit A is a  
6 true and correct excerpt from that list, an Excel spreadsheet, which reflects that Store No. 98 was  
7 located at 1100 Bellevue Way NE, Suite 5, in Bellevue, Washington.

8 B. List of Square footage of each state store. Attached hereto as Exhibit B is a true and  
9 correct excerpt from that list, an Excel spreadsheet, which reflects Store No. 98 comprised 7,792  
10 square feet.

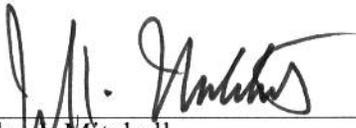
11 C. List of Off Premises licensees as of 9/30/2013. Attached hereto as Exhibit C is a true  
12 and correct excerpt from that list, an Excel spreadsheet, which reflects that Bevmo! was issued  
13 Beer/Wine Specialty Shop/Spirits Retailer license No. 409547 on February 1, 2013 for its store  
14 at 1100 Bellevue Way NE, Suites 5-6, Bellevue, Washington.

15 4. The material facts of the situation described above with respect to Store No. 98  
16 are exactly the same as those in the instant case, with one significant difference: Bevmo! was  
17 issued a license for a liquor store at a location that included the "footprint" of the former State  
18 No. 98, *i.e.*, Suite 5 at 1100 Bellevue Way NE, Bellevue, Washington, as well as additional  
19 contiguous space, *i.e.*, Suite 6 at 1100 Bellevue Way NE, when the landlord declined to enter  
20 into a lease with the successful bidder at auction; whereas, Kage was denied a liquor license to  
21 operate its store at a proposed location that included not only Suite C at 20617 Bothell-Everett  
22 Hwy, Thrasher's Corner Shopping Center, which was occupied by Store No. 87, but also the  
23 adjacent Suite B, after the landlord of former Store No. 87 declined to enter into a lease with Mr.  
24 Eshagi, the successful bidder for Store No. 87.

25 5. The reason for the difference in the outcomes of the liquor license applications  
26 of Bevmo! and Kage is not obvious, although on information and belief the successful bidder at

1 the auction for Store No. 98 did not protest the issuance of a liquor license to Bevmo! to operate  
2 a liquor store in space that included the "footprint" occupied by Store No. 98 after said  
3 successful bidder was unable to obtain a lease from the landlord of Store No. 98; whereas, the  
4 successful bidder at the auction for Store No. 87, did, in fact, protest the issuance of Kage's  
5 license to operate a liquor store in space that included the "footprint" occupied by Store No. 87,  
6 after the successful bidder, Mr. Eshagi, was unable to obtain a lease from the landlord of Store  
7 No. 87.

8 I declare under penalty of perjury under the laws of the State of Washington that the  
9 foregoing is true and correct. Executed on Bainbridge Island, Washington on October 4, 2013.

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13 John J. Mitchell

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Bainbridge Island, Washington on October 4, 2013.

  
John J. Mitchell

# **EXHIBIT A**

LIQUOR STORE #098 STATE LIQUOR STORE 98

BELLEVUE-DOWNTOWN

1100 BELLEVUE WAY NE

STE 5

BELLEVUE WA 98004-4280

(425) 453-3080 | 1100 BELLEVUE WAY NE

| STE 5

|

**EXHIBIT B**

<b>Store</b>	<b>Location</b>	<b>Square Feet</b>
98	BELLEVUE-NORTH	7,792

## **EXHIBIT C**

BEVMO!	409547
BEVMO!	409547

6031729710010006	1100 BELLEVUE WAY NE STE 5-6	
6031729710010006	1100 BELLEVUE WAY NE STE 5-6	

	BELLEVUE	WA	980044280	9256096000
	BELLEVUE	WA	980044280	9256096000

1401 WILLOW PASS RD STE 900	CONCORD	CA	945207968
1401 WILLOW PASS RD STE 900	CONCORD	CA	945207968

KING	20120822	20130201	20140131	20130201
KING	20120822	20130201	20140131	20130201

ACTIVE (ISSUED)	BEER/WINE SPECIALTY SHOP
ACTIVE (ISSUED)	SPIRITS RETAILER

20120503	20120822	0
20120503	20120822	0

NEW APPLICATION
NEW APPLICATION

BEVERAGES & MORE, INC.
BEVERAGES & MORE, INC.

OCT 15 2013

Liquor Control Board  
Board Administration

## WASHINGTON STATE LIQUOR CONTROL BOARD

In the Matter of the Denial of the  
Liquor License Application for the  
privileges of a Beer/Wine Specialty  
Shop/Growlers/Spirits Retailer/Keg  
Sales for:

Kage, Inc.  
Pete's Liquor & Wines  
P. O. Box 3001  
Woodinville, WA 98072-3001

Location Address: 20617 Bothell-  
Everett Hwy., Ste. C  
Bothell, WA 98012-8558

License Application No. 409440  
UBI 600-212-037-001-0003,

NO. OAH Docket No. 2013-LCB-0020

BOARD'S BRIEF IN RESPONSE TO  
PETITION FOR REVIEW**I. INTRODUCTION**

The Liquor Control Board denied Kage, Inc.'s application for a liquor license including the right to sell spirits at retail at 20617 Bothell-Everett Hwy., Suite, Bothell, WA, because that location was the site of a state-owned liquor store, and Kage, Inc. is not the successful bidder from the auction. The right to operate a liquor store at that location is held by a party other than Kage, Inc., and Kage has not acquired that right. By statute, RCW 66.24.620(4)(c), holding that right to operate a liquor store is a precondition to the issuance of a spirits retail license for a location that was a prior state liquor store. Because

1 Kage does not hold that right to operate, its application for a spirits retail license for that  
2 location must be denied. The Administrative Law Judge agreed with this position and  
3 affirmed the decision to deny Kage's license application. Kage has raised neither a factual nor  
4 a legal issue or error in the decision to deny, and the Board should deny its license application.

## 5 II. STATEMENT OF FACTS

6 Because of the passage of Initiative 1183, as codified in Title 66, RCW, the Liquor  
7 Board was required to cease the sale of spirits at retail and issue spirits retail licenses to  
8 persons and businesses. RCW 66.24.620(2), 66.24.630(1). As part of the transition from state  
9 sales to licensed sales, the Board was required to sell "all assets of state liquor stores and  
10 distribution centers, and all other assets of the state over which the board has power of  
11 disposition, including without limitation, goodwill and location value associated with state  
12 liquor stores, . . ." RCW 66.24.620(3). The Board was directed by statute to "obtain the  
13 maximum reasonable value for all asset sales made under this section."  
14 RCW 66.24.620(4)(b). The Board was required by statute to:

15  
16 "sell by auction open to the public the right at each state-owned store location  
17 of a spirits retail licensee to operate a liquor store upon the premises. Such right must  
18 be freely alienable and subject to all state and local zoning and land use requirements  
19 applicable to the property. Acquisition of the operating rights must be a precondition  
20 to, but does not establish eligibility for, a spirits retail license at the location of a state  
store and does not confer any privilege conferred by a spirits retail license. Holding  
the rights does not require the holder of the right to operate a liquor-licensed business  
or apply for a liquor license."

21 RCW 66.24.630(4)(c).

22 The Liquor Board held public auctions at which the right to operate a liquor store at  
23 the location of former state store number 87 was sold to a person who is not Kage, Inc. or  
24 affiliated with that business. The successful bidder protested the issuance of a spirits retail  
25 license to Kage, and the bidder's right to operate a retail liquor store was not acquired by  
26 Kage.

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### III. ARGUMENT

Kage, Inc., does not claim that they hold the right to operate a liquor store at the previous location of a Store No. 87, which is the proposed location for which they have applied for a liquor license. Kage, Inc., does not deny that the location for which they are applying was the site of a state liquor store. The simple answer to Kage, Inc.'s challenge to the Liquor Board's decision is that the Board is complying with the mandates of applicable state statutes, and their decision to deny the license must be affirmed.

The statute in which the relevant provisions of Initiative 1183 were codified states that, "[A]quisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store. . . ." RCW 66.24.620(4)(c). That section also mandates that those operating rights, which the Board was required to sell at public auction and obtain the maximum reasonable value for, must be "freely alienable." *Id.* The statute also mandates that the holder of the operating right has no duty to operate a liquor-licensed business or to apply for a liquor license. *Id.*

Kage, Inc.'s arguments all ignore the statute's mandates, and its argument that the Liquor Board has misunderstood or misapplied the statute is incorrect. A plain reading of the statute confirms that the Board is correct in refusing to grant a liquor license for the location of a state Store No. 87 to an applicant which does not hold the operating rights for that location. Neither Kage, Inc., nor its landlord acquired the right to operate a liquor store at the location where it is applying for a liquor license. Neither of them acquired that right at the Board's public auction, and neither has acquired the right from the successful bidder, Mr. Eshagi, who still holds the right he purchased from the Board at auction. By the terms of the statute, Mr. Eshagi may hold the right, it must be freely alienable, he is under no obligation to apply for a license or run a liquor-licensed business, and he continues to hold the operating right which is a precondition to granting a spirits retail license at the location. RCW 66.24.630(4)(c).

1 Kage argues that it was granted a temporary pre-approval permit to operate at the site  
2 of former store 87, but the issuance of a temporary permit is not a guarantee that a permanent  
3 license will be issued. The grant of a temporary permit does not bind or constrain the decision  
4 whether to grant a permanent liquor license. Nothing about whether a temporary permit was  
5 granted changes the effect of the statutory language of RCW 66.24.620(4)(c) or makes Kage  
6 legally entitled to a permanent license to sell spirits at retail at the location of former store 87.

7 Kage also argues for the first time here on review that the existence of a different case  
8 involving a different former liquor store should be considered in determining whether its  
9 license should be granted. Kage is not entitled to raise new issues on review or to offer facts  
10 or exhibits for the first time on review. RCW 34.05.464(5). *Towle v. Washington State Dept.*  
11 *of Fish and Wildlife* 94 Wn. App. 196, 204-205, 971 P.2d 591 (1991). The review of the  
12 Administrative Law Judge's Initial Order is on the record created below, and Kage did not  
13 present any facts about the other store's situation before the ALF or make any argument  
14 regarding that situation in the hearing below. Kage is not entitled to raise issues about any  
15 other applicant's or licensee's situation, and it is not entitled to make this argument for the  
16 first time on review.

17 Even if Kage were entitled to raise a different applicant and different store location in  
18 this case, it has not established facts to show that its situation and that other applicant's  
19 situation are similar. All Kage has presented is that the Bellevue location of former store  
20 number 98 is the site of a BevMo store. Kage has not proven that BevMo was not the  
21 successful bidder or that any of the other facts are similar to its situation. The declaration of  
22 Kage's counsel is insufficient by itself to establish facts, and the attached exhibits prove  
23 nothing more than that BevMo is the licensee operating at the location of former store number  
24 98. That is not sufficient to show that the facts there and the facts of Kage's situation are  
25 similar or identical. There is nothing to show whether or not the successful bidder was  
26 someone other than BevMo or that any other party protested or objected to the grant of the

1 license to BevMo. Even if Kage's argument were properly before the Board, it has not  
2 established that the facts of the two situations are similar.

3 Kage has not established that the grant of a license to BevMo makes the Board's  
4 decision to deny its license application in this case was either legally incorrect or arbitrary and  
5 capricious. The administrative record in this case establishes the factual and legal basis of the  
6 decision to deny Kage's application, and the Administrative Law Judge agreed with that  
7 argument affirming the decision to deny the license to Kage. Simply alluding to a completely  
8 separate application does not establish grounds to question the decision to deny in this case or  
9 a basis to overrule either the Administrative Law Judge's Initial Order or the original decision  
10 to deny Kage's application. The record shows the basis for the denial, and that decision  
11 should be affirmed.

#### 12 IV. CONCLUSION

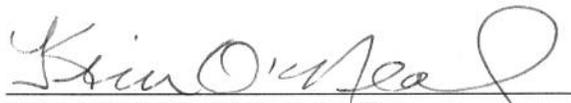
13 By the plain terms of RCW 66.24.620(4)(c), as well as the other related statutory  
14 provisions discussed above, the Board was directed to obtain the maximum value for the  
15 assets it was required to sell when state sale of spirits was transferred to private licensees.  
16 That transfer included the statutory requirement to sell the value acquired at prior store  
17 locations by offering at a public auction the right to operate a liquor store on the premises  
18 where the state stores operated. The plain language of that statute mandated that the  
19 acquisition of those operating rights was a precondition to the issuance of a liquor license to  
20 operate a liquor store at such locations. The statutory mandate stated that the successful  
21 bidder for those operating rights also held the right to relocate if a building lease were  
22 unavailable, that those rights were required to be freely alienable, and that the successful  
23 bidder could hold the rights with no action or obligation to apply for a license or operate a  
24 store.

25 Kage did not acquire the operating right which is a precondition to granting a liquor  
26 license to operate a liquor store in the location of former state store number 87.

1 RCW 66.24.620(4)(c). The Board cannot grant the license Kage applied for without violating  
2 state statute and destroying rights it sold in compliance with state statute. The Board's  
3 decision to deny Kage's liquor license application is both legally within its statutory authority  
4 and mandated by statutes which control its actions in this case. Kage's reference to a  
5 completely separate license decision is not appropriate on review, it has not shown the  
6 situations are similar, and it does not provide either a factual or a legal basis to change the  
7 decision to deny its license. The decision to deny Kage's license application must be  
8 affirmed.

9 DATED this 14th day of October, 2013.

10  
11 ROBERT W. FERGUSON  
12 Attorney General

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14 KIM O'NEAL, WSBA #12939  
15 Assistant Attorney General  
16 Attorneys for Defendant, Liquor Control Board  
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1 **PROOF OF SERVICE**

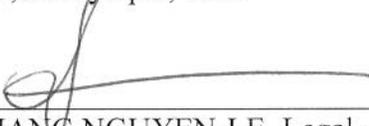
2 I certify that I served a true and correct copy of this document on all parties or their  
3 counsel of record on the date below by placing same in the U.S. mail via state Consolidated  
4 Mail Service with proper postage affixed to:

5 Michael D. Ross  
6 Ross Law Advisor, PLLC  
7 1191 Second Avenue, Suite 1800  
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9 John Mitchell  
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11 P.O. Box 11287  
12 Bainbridge Island, WA 98110

13 I certify under penalty of perjury under the laws of the state of Washington that the  
14 foregoing is true and correct.

15 DATED this 14th day of October, 2013, at Olympia, WA.

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18 HANG NGUYEN-LE, Legal Assistant  
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