WORD COUNT: 4960

COURT OF APPEALS, STATE COLORADO Court Address: 2 East 14th Ave., Ste. 300 Denver, CO 80203	
DISTRICT COURT, COUNTY OF PUEBLO, STATE OF COLORADO The Honorable Deborah R. Eyler Case No. : 09CV171, Division A	ΔCOURT USE ONLY Δ
Appellant: Zippers, LLC d/b/a Zippers Bar and Grill v. **Appellee:** Pueblo Liquor & Beer Licensing Board	
Attorney for Appellant Name: DOUGLAS GRADISAR Address: 1836 Vinewood, #200 Phone Number: 719-566-8844 Fax Number: 719-561-8436 Atty. Reg. #: 34326	Case No.: 09CA 1930
APPELLANT'S REPLY BRIEF	

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Plaintiff-Appellant Zippers, LLC, d/b/a Zippers Bar and Grill ("Zippers"), by its attorneys, Gradisar, Trechter, Ripperger & Roth, submits this Reply brief.

I. INTRODUCTION

The central issue in this case is whether the Board's determinations that Zippers violated the Liquor Code are supported by competent evidence in the record. In this appeal, Zippers challenges the sufficiency of the form and content of the Board's determinations in Cases 1 & 2. The Board relied upon hearsay for its determinations and before doing so, failed to engage in any analysis as to the reliability of the hearsay being relied upon. The Board failed to articulate a basis for its determinations, failed to make specific enough findings, and created a record of proceedings that do not permit meaningful judicial review. Without reliance on the hearsay at issue, there is not competent evidence in the record to support the Board's determinations and this court must reverse the Board's determinations in Case 1 and Case 2.

II. ARGUMENT

A. Zippers has preserved all issues raised on appeal

The Pueblo Liquor and Beer Licensing Board (the "Board"), argues that Zippers is unable to pursue this appeal because it failed to: object to the introduction of hearsay evidence during the administrative hearings under review; object to the Board's failure to do any analysis of the reliability of the hearsay

evidence at issue; and failed to object to the Board's having relied upon the hearsay evidence at issue. The Board argues Zippers cannot now raise these matters on appeal. This arguments fails.

As Zippers pointed out in its pleadings filed with the district court initially during the Rule 106(a)(4) proceeding, the issue for the court in this appeal is not whether the hearsay the Board relies upon should have been admitted or excluded. Instead, the issue here is whether the Board's determinations in Cases 1 and 2 demonstrate that the Board exceeded its jurisdiction and/or abused its discretion by finding Zippers violated provisions of the liquor code in Cases 1 and 2, when the determinations were based exclusively on hearsay which contains no indicia of reliability and were not trustworthy. In other words, Zippers challenges the sufficiency of the form and content of the Board's determinations.

Zippers did not and could not have objected to the introduction of hearsay evidence at the administrative hearings at issue. Under Colorado law, it is beyond dispute that hearsay evidence is admissible during administrative hearings. See, e.g., Industrial Claims Appeals Office v. Flower Stop Marketing Corp., 782 P.2d 13, 18 (Colo. 1989)(en banc)(establishing non-mandatory factors helpful in determining whether hearsay admitted in administrative hearings bears an "indicia of reliability."); see also Colorado Dept. of Revenue, Motor Vehicle Division v. Kirke, 743 P.2d 16, 22 (Colo. 1987)(en banc)(indicating the law requires hearsay

evidence accepted in administrative proceedings "bear satisfactory indicia of reliability."); Benke v. Neenan, 658 P.2d 860, 862 (Colo. 1983)(stating, in the context of a school board administrative hearing, that "[g]enerally, in a hearing of this nature, the rules of evidence are somewhat relaxed and certain hearsay testimony is allowed."); Johnson v. City Council for City of Glendale, 595 P.2d 701, 704 (Colo. Ct. App. 1979)(discussing that "[s]trict rules of evidence need not be followed in an administrative hearing."). Given the litany of Colorado cases, of course Zippers did not object to the receipt of the hearsay presented.

The Board's citation to the Campbell decision is not persuasive. In Campbell v. IBM Corporation, 867 P.2d 77, 80 (Colo. App. 1993), a single sentence in the opinion states "[w]e do not address the claimant's hearsay objection because it was not preserved in a timely objection at hearing." The court in Campbell cited to C.R.E. 103 and to the case Hancock v. State Dept. of Revenue, Motor Vehicle Div., 758 P.2d 1372 (Colo. 1988). Campbell, 867 P.2d at 80. However the matter for the court in Campbell addressed the ***admissibility*** of certain evidence. This appeal does not relate to whether the Board's admission of hearsay evidence was proper or not. Consequently the issues discussed in Campbell are not on point to the issue involved in the instant case. The Board's argument on this point is misplaced and not applicable.

The Hancock decision is also not applicable to the issues on appeal in the instant case. Hancock appealed an order from the Boulder County district court, which had affirmed the administrative decision of the Department of Revenue to revoke Hancock's driver's license after Hancock was found to have operated a motor vehicle under the influence of alcohol. Id. at 1374. At the administrative hearing, Hancock's attorney attempted to elicit, by cross-examination, how Hancock performed in a series of roadside sobriety tests. Id. at 1375. The proffered evidence was argued to be relevant to contradict the results of chemical tests indicating Hancock had more alcohol in his blood than permitted by law. Id. The hearing officer concluded Hancock's performance on the sobriety tests was not relevant to the issue needing to be resolved and refused to admit the evidence. Id. Just as in Campbell, the issue on appeal in Hancock related to the ***admission*** of evidence. The admission of evidence is not on point to the issues involved in the instant appeal. Additionally, the cases cited in Hancock are criminal and/or civil cases, each with standards that differ from the standard of review applicable to this C.R.C.P. 106 (a)(4) appeal.

As the matters on appeal do not relate to the ***admission*** or exclusion of evidence, the giving or failing to give a jury instruction, or any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review, the requirements of C.A.R. 28 (k)(2), which

requires appellate briefs to contain specific citation to the location in the record where the issue was raised and ruled upon is inapplicable. During the administrative hearings at issue, Zippers did not need to vocalize an objection to the Board's ruling, Zippers did not need to object to the Board's failure of analyzing the reliability of the hearsay evidence allowed into evidence, and Zippers did not need to object when the Board utilized the unanalyzed hearsay evidence as support for its determinations. Pursuant to Rule C.R.C.P. 106(a)(4), Zippers timely sought the judicial review provided for in the rule, Jayhawk Café v. Colorado Springs Liquor and Beer Licensing Board, 165 P.3d 821, 824 (Colo. App.), and by so doing, preserved its ability to argue the Board's determinations exceed the Board's authority and/or constitute an arbitrary and capricious exercise of the Board's discretion. Id. at 824 (suggesting nothing other than timely filing a C.R.C.P. 106 (a)(4) action is needed to preserve the ability to seek judicial review of administrative agency's actions).

According to the Board's own logic, Zippers ought to have objected when the Board accepted hearsay to begin with, Zippers ought to have objected when the Board failed to analyze the hearsay pursuant to Colorado law (assuming Zippers knew this was required of the Board), and Zippers ought to have objected after it was made clear the Board was going to find violations occurred in Case 1 and Case 2. The disruptive nature to such a requirement would drag the proceedings to a

crawl and does not promote the orderly process of, or respect for, these administrative hearings. Such an approach goes beyond the requirements of what licensees must do to obtain judicial review of the Board's determinations.

While the Board argues it has cited cases which this court can rely upon to conclude Zippers failed to preserve the issues on appeal by not objecting, it is significant that the cases cited by the City all predate the Jayhawk Café decision. Despite this, the court in Jayhawk Café indicated that "the Board does not cite, nor can we locate, any authority preventing review of the sufficiency and the form and content of the Board's decision when such a challenge was not presented to the Board before the C.R.C.P. 106 (a)(4) process was initiated." Jayhawk Café, 165 P.3d at 827. This indicates the cases cited by the Board, which predate the Jayhawk Café decision do not support the proposition offered by the Board. If those cases supported the Board's position, the court in Jayhawk Café likely would have recognized those cases as being determinative of the issue. By timely filing this C.R.C.P. 106 (a)(4) case and meeting all other appeal timelines, Zippers has preserved its ability to seek judicial review of the sufficiency and the form and content of the Board's determinations.

B. The Board failed to make sufficeint findings

In the absence of having expressly analyzed the reliability of the hearsay evidence it based its determinations on, there is nothing for a reviewing court to

review regarding the matter. A reviewing court therefore risks substituting its own factual determinations for that of the Board, which exceeds a court's judicial review available under C.R.C.P. 106(a)(4). "The weighing of evidence and the determinations of fact are functions of the . . . . .Board and not matters for consideration by the reviewing court." Colman v. Gormley, 748 P.2d 361, 364 (Colo. App. 1987).

Without the Board having articulated the reasoning behind its determinations, or what its determinations were based on, it is not possible to determine whether the Board misconstrued or misapplied applicable law, which is a ground under C.R.C.P. 106 (a)(4) that would allow this Court to reverse the Board. Cooper v. Civil Service Commission, 604 P.2d 1186, 1190 (Colo. App. 1979). The very absence in the record of the Board doing this analysis indicates the Board misconstrued or misapplied the applicable law and this Court must reverse the determinations on this basis. Id.

The Board's complete failure to analyze the evidence prior to issuing its determination, and the Board's failure to articulate what its decisions were based on has created, insofar as the issues on appeal are concerned, an inadequate record for this court to review. As a result, this court must reverse the determinations of the Board. Gear v. Presto, 313 P.2d 980, 981-82 (Colo. 1957). ("[i]mperfection of the determination of an administrative Board which leaves no avenue for the court

to take in reviewing the matter, which furnishes no basis upon which to resolve whether the Board may or may not be sustained, requires reversal"; "[f]indings must be adequate to aprise the parties in any reviewing tribunal of the basis of the [administrative agency's] decision").

In Brass Monkey, Inc. v. Louisville City Counsel, 870 P.2d 636 (Colo. App. 1994), a reviewing court reviewed the record developed during a liquor license hearing conducted before the local City Council. Id. at 641. The City Council's determination and the reasoning behind its determination was scrutinized by the reviewing court. Id. The Council had articulated, with enough specificity, the basis for its determination. Id. This permitted a meaningful judicial review and as a result, the determinations of the City Council were found to be arbitrary and capricious, in violation of C.R.C.P. 106(a)(4). Id. Had the record developed in Brass Monkey been as deficient as the record developed by the Board in this Zippers appeal, it would have been impossible for the reviewing court in Brass Monkey to recognize and determine the "inconsistent treatment" City Council applied to the data underlying a survey forming the crux of the appeal. Id. at 641-42. It was the articulated reasoning set forth by the City Council that permitted the court to discern the arbitrary and capricious nature of the City Council's determination. If this court were to accept the Board's position in this case, and an administrative agency is not required to provide the basis for its determintations or

provie any analysis whatsoever, it would become even more unlikely that a court could determine an administrative agency's determination was arbitrary and capricious,requiring reversal under C.R.C.P. 106(a)(4).

In Jayhawk Café, 165 P.3d at 824, the court of appeals reviewed a record developed during a liquor licensing hearing. Meaningful judicial review was able to occur due to the record developed at the administrative hearing. Contrary to the Board's assertion that nothing requires it to artiulate or specify, or discuss the reasoning behind its determinations, the ability for judicial review requires these things to occur. In Jayhawk Café, the court of appeals pointed out that "[t]he record includes a verbtim transcript of the Board's discussion of the evidence presented at the hearing and its findings based on that evidence." Id. at 827. The record reflected that the Board members discussed the owners record of past liquor violations that had been admitted into evidence," and other admissions made by the owner. Id. The Board specifically explained the basis of its decision, including its determination that based on the owner's prior record, the owner was not "conversant on the law", and did not comprehend the importance or gravity of the prior violations. Id. The Board further discussed statements the owner made, and how the Board was troubled overall by the owner's testimony. Id. The totality of this reasoning led the Board to conclude that the evidence demonstrated the owner was unable to conduct her business according to the law. In affirming the

determination, the court of appeals specifically noted that "[b]ecause the record contained sufficient findings, we conclude that the Board did not exceed its jurisdiction or abuse its descretion." Id.

Zippers recognizes that the focus of the court in an appeal under C.R.C.P. 106 (a)(4) is on the decision of the administrative agency and not the decision of the district court. Jayhawk Café, 165 P.3d at 823. Nevertheless, the district court's determination demonstrates the inadequacy of available judicial review that exists based upon the record developed by the Board. For example, the district court, while recognizing the record indicated there was no analysis under Flower Stop Marketing provided to the hearsay at issue, nevertheless indicated "it is a reasonable inference that [the Board] acted in accordance with the advice of their counsel and considered the reliability of the officer's hearsay testimony when [the Board] proceeded to to find that Zippers had violated the Liquor Code." District Court Order of July 21, 2009, Transaction ID: 26207473, CD Rom pgs. 236-236, at paragraph 11.[1] This is not meaningful judicial review.

Contrast the specific discussions and reasoning behind the determinations made in Brass Monkey and Jayhawk Café, with the record that was developed at the hearings at issue here in the Zippers appeal. In Zippers, the Board failed to deliberate, failed to analyze the evidence presented, and completely failed to

[1] There are 2 paragraphs listed as 11 and the citation is to the second paragraph 11 cited on page 3 of the Order.

articulate a basis for its determinations. The Board entirely failed to follow, or the Board misconstrued, applicable Colorado law, Flower Stop Marketing, 782 P.2d at 18, in relation to the hearsay evidence at issue. The totality of all of this indicates that the Board failed to make sufficient findings necessary for adequate judicial review. Jayhawk Café, 165 P.3d at 827. This deficiency is in addition to the Board having failed to engage in an express analysis of the reliability of the hearsay. Tilley v. Industrial Claim Appeals Office of the State of Colo., 924 P.2d 1173, 1176 (Colo. App. 1996). The Board exceeded its jurisdiction and/or abused its discretion in Case 1 & Case 2 and must be reversed. C.R.C.P. 106 (a)(4).

C. The hearsay at issue is not reliable

A cursory analysis of the Flower Stop Marketing factors demonstrates the hearsay at issue is wholly unreliable, inconsistent and cannot form the basis for evidence in the record.

i) The Flower Shop Marketing factors applied to the hearsay in Case 1 reflect:

Factor 1) The statements of Mrs. Rowe and Mrs. Brown are not written and signed by them but instead, were testified to by officer Petkosek. Transaction ID: 25058597, CD rom pg. 77, ll. 19-25 – pg. 78, ll. 1-4; pg.78, ll. 11-14; pg.79, ll. 8-14; pg. 83, ll. 9-13;

Factor 2) the statements at issue were made by Mrs. Brown and Mrs. Rowe and

were not sworn to;

Factor 3) Mrs. Brown and Mrs. Rowe were not disinterested and may have had bias or been motivated by a desire to end the police encounter as quickly as possible—willing to say anything;

Factor 4) the hearsay statements are denied or contradicted by other evidence. For example, one of the owners of Zippers, Mrs. Donielle Gonzales indicated that when she spoke with Mrs. Brown and Mrs. Rowe, they denied taking the beer out of Zippers, Transaction ID: 25058597, CD rom pg. 92, ll. 3-25 – pg. 93, ll. 1-3; pg. 93, ll. 4-14;

Factor 5) Mrs. Rowe and Mrs. Brown are not credible. By officer Petkosek's own admission and testimony, Mrs. Rowe and Mrs. Brown lack credibility. Mrs. Brown initially indicated to the officer that she didn't know anything about the beer, Transaction ID: 25058597, CD rom pg. 77, ll. 19-25 –pg. 78, ll. 1-4 (officer testifying that once Mrs. Brown was confronted by the officer, she said "she didn't know anything about [the beer]"); when Mrs. Rowe was interviewed by the officer she at first also denied knowing about the beer, when the officer told Mrs. Rowe that he had seen her with beer in her hand, she finally told the officer "I won't lie to you, I walked— I got it from inside Zippers."), Transaction ID: 25058597, CD rom pg. p. 77, l. 25 – pg. 78, ll. 1-44; but yet in still another statement Mrs. Rowe made to the officer, she nodded her head up and down as if to admit that the beer

was removed from Zippers, but at the same time she made this physical gesture, she also verbalized "No she [Mrs. Brown] did not remove the beer from Zippers", Transaction ID: 25058597, CD rom pg. 79, ll. 8-14 (officer testifying that Mrs. Rowe "did finally admit to me that [Mrs.] Brown did take it out [from Zippers], but, 'cause they were friends'" Mrs. Rowe told the officer that Mrs. Brown "did take it out, nodding her head [up and down as if to indicate yes], but yelled loud enough "No, she didn't [take the beer from Zippers]" because Mrs. Brown told the officer she didn't want Mrs. Rowe to think she was ratting on her). Officer Petkosek testified that both Mrs. Rowe and Mrs. Brown were not happy to be questioned by the officer, and the officer recognized Mrs. Brown lied to him. The officer's testimony is that "Mrs. Brown, she lied, you know she was denying everything, and it—then talking with Rowe, she told me yes, but yelled, you know she didn't." Transaction ID: 25058597, CD rom pg. 121, ll. 3-6. Given Mrs. Brown's and Mrs. Rowe's inconsistent statements, and the fact that officer Petkosek recognized both were drunk, Transaction ID: 25058597, CD rom pg. 120, ll. 9-12, and believed at least one was not being truthful with him, the statements Mrs. Brown and Mrs. Rowe made are simply not worthy of any credibility;

Factor 6) there is no corroboration of the hearsay in the record for Cases 1 & 2;

Factor 7) unquestionably this case turns on the credibility of witnesses: the sole basis for the Boards findings in this case is the hearsay of Mrs. Rowe and Mrs.

Brown;

Factor 8) it is unclear exactly why Mrs. Brown and Mrs. Rowe were not present at the hearing, or even whether the City issued subpoena's requiring their attendance. Transaction ID: 25058597, CD rom pg. 72, ll. 21-25 – pg. 73, l. 1; pg. 73, ll. 23-25 – pg. 74, ll. 1-2; pg. 75, ll. 5-18; pg. 125, ll. 3-9 (indicating the subpoenas to Mrs. Rowe and Mrs. Brown were issued but were not served, and that the City "did not get a report back . . . on either of the subpoenas or the returns, so we have no idea exactly what they—what their status was."). Clearly it is the Board that is intending on relying upon the hearsay statements to prove a violation of the liquor code occurred and so it is incumbent upon the board to provide an adequate explanation for the failure to call the declarant to testify. The explanation in the record that that there is "no idea exactly" what the status of the subpoena's are falls far short of an acceptable position;

Factor 9) Zippers, the party against whom the hearsay is used, could have had access to the statements of Mrs. Rowe and Mrs. Brown prior to the hearing if Zippers had obtained a copy of the police incident report generated by officer Petkosek. However, the issuance of any subpoena seems to be discretionary with the Board, and in any event, that step ought to have been unnecessary given the Board's position that subpoenas were issued to Mrs. Brown and Mrs. Rowe. Flower Stop Marketing, 782 P.2d at 18 (discussing factors to consider when

evaluating hearsay). The factors clearly side with Zippers. The statements of Mrs. Rowe and Mrs. Brown are hearsay and do not bear the signs of sufficient reliability or trustworthiness to constitute competent evidence in the record. The board's determination, relying as it does, on this hearsay, is not supported by competent evidence in the record.

ii) The Flower Shop Marketing factors applied to the hearsay in Case 2 reflect:

Factor 1) the statements provided by the Yazzie brothers were not written and not signed, but instead were testified to by Officer Petkosek or shown by way of videotape, Transaction ID: 25058597, CD rom pg. 146, ll. 21-25 – pg. 147, ll. 1-15; pg.149, ll. 14-25 – pg. 150, ll. 1-25 – pg. 151, ll. 1-2;

Factor 2) the statements by the Yazzie brothers were not sworn statements provided under oath. Nothing in the transcription of the hearing, or in the transcription of the DVD indicates the Yazzie brothers under oath to provide a truthful or sworn statement, Transaction ID: 25058597, CD rom pg. 149, ll. 14-25 – pg. 150, ll. 1-25 – pg. 151, ll. 1-2;

Factor 3) nothing in the record indicates that the statements made to Officer Petkosek by the Yazzie brothers were "free and voluntary acts", or that at the time the Yazzie brothers made statements to Officer Petkosek, they were disinterested or did not have a bias. Ryan Yazzie had just been stopped by the

police for walking on Union Avenue while carrying an open container of beer. He was visibly intoxicated and was not originally from Colorado. Transaction ID: 25058597, CD rom pg. 148, l. 23-25 – pg. 149, l. 1 (showing Officer Petkosek testify that the Yazzie brothers were "Comanche Plant employees from out of Arizona."). The Yazzie brothers were being videotaped by Officer Petkosek and questioned by the officer. The record is not clear whether they were free to leave or not, and whether they provided the videotaped statement voluntarily. Certainly the Yazzie brothers were not disinterested witnesses and may have had potential biases. At a minimum, the Yazzie brothers had every reason to end the police encounter as soon as possible;

Factor 4) The hearsay statements of the Yazzie brothers were denied and contradicted by the evidence. During the hearing, Sergeant Loren Unger testified about statements made by a bouncer for Zippers to Sgt. Unger, when Sgt. Unger went to Zippers to advise the establishment that the Yazzie's claimed to have removed a bottle of beef from the premises. Transaction ID: 25058597, CD rom pg. 159, ll. 1-25 – pg. 160, ll. 1-17. The statements from the Zippers bouncer reflected that although the Yazzie brothers had been in Zippers earlier in the night, that had been at least an hour before the time the officer encountered the Yazzie's on Union Avenue, and in any event, the Zipper's doorman explained to Sergeant Unger that he had been working the door when the Yazzie brothers left. Id.

Furthermore, the owners of Zippers, provided sworn testimony before the Board. The record created indicates that in the three blocks between Zippers and the location where the Yazzie brothers were stopped, there were multiple other establishments from which a beer could have been obtained. Transaction ID: 25058597, CD rom pg. 154, ll. 22-25 – pg. 155, ll. 1-23;

Factor 5) Under the record available, neither of the Yazzie brothers are credible. Officer Petkosek testified that Ryan Yazzie was observed to be visibly intoxicated and swaying from side to side by Officer Petkosek, Transaction ID: 25058597, CD rom pg. 147, ll. 7-9; pg. 156, ll. 5-7; and the video of Ryan Yazzie visibly depicts his intoxicated state. Transaction ID: 25058597, CD rom pg. 156, ll. 5-10. Officer Petkosek testified that Ryan Yazzie was "very drunk", Transaction ID: 25058597, CD rom pg. 173, ll. 11-13, and further implied Ryan Yazzie's brother also drunk, though not as drunk as Ryan Yazzie. Transaction ID: 25058597, CD rom pg. 174, ll. 4-7. These individuals were in an intoxicated state in the middle of the night, roaming along Union Avenue, Ryan Yazzie possessed an open container of alcohol in violation of the law and both of the Yazzie brothers failed to appear in compliance with the subpoenas issued. These declarants have no credibility whatsoever.

Factor 6) The record contains no corroboration of the hearsay statements;

Factor 7) unquestionably this case turns on the credibility of witnesses: the sole

basis for the Board's findings is the hearsay of the Yazzie brothers;

Factor 8) it is unclear exactly why the Yazzie brothers were not present at the hearing. The record reflects that each may have been served a subpoena prior to the hearing, but failed to appear. Transaction ID: 25058597, CD rom pg. 145, ll. 2-7. The record contains discussion that the Yazzie brothers are temporary or transitory workers from Arizona, Transaction ID: 25058597, CD rom pg. 148, l. 25- pg. 149, l. 1. There is no adequate explanation in the record for why the Yazzie brothers were not present at the hearing to testify;

Factor 9) Zippers, the party against whom the hearsay is used, could have had access to the statements of the Yazzie brothers prior to the hearing if Zippers had obtained a copy of the police incident report generated by officer Petkosek. However, the issuance of any subpoena seems to be discretionary with the Board, and in any event, the Board issued its own subpoenas to the Yazzie brothers and they still failed to show up for the hearing.

Flower Stop Marketing, 782 P.2d at 18 (discussing factors to consider when evaluating hearsay). In reviewing these factors in combination, the factors clearly side with Zippers. The statements of the Yazzie brothers are hearsay and do not bear the signs of sufficient reliability or trustworthiness to constitute competent evidence in the record.

The hearsay evidence admitted and relied upon in Cases 1 & 2 does not possess the "indicia of reliability" sufficient to form the requisite competent evidence in the record to support the Board's determinations. For these reasons combined, the Board's determination in Cases 1 and 2 must be reversed.

D. Without the unreliable hearsay, sufficient evidence in the record does not exist to support the Board's determinations.

Without consideration of the hearsay contained in the record in Cases 1 & 2, there is insufficient evidence to support the Board's determination. The record reflects that other than the hearsay at issue, there is no evidence to conclude the open containers of alcohol came from Zippers or that Zippers violated provisions of the liquor code. The record only establishes that citizens of Pueblo were found with open containers of alcohol in some proximity to any number of licensed establishments, including Zippers. To this extent, the instance case is akin to Costiphx Enterprises, Inc. v. City of Lakewood, 728 P.2d 358, 360 (Colo. App. 1986), where the court of appeals determined that allegations that a licensed establishment permitted professional gambling on its premises were not supported by the evidence in the record. The court noted the record only demonstrated that a known "bookie" was present at the licensed establishment in order to place and pay off bets." Id. There was "no evidence that the owners or any employees . . . were aware of these acitvities, and therefore it could not be said that" the owner or any

employees "permitted" or "authorized" professional gambling as prohibited by the regulation at issue in the case. Id.

While it may be argued that the Board's determinations hinge on circumstantial evidence which does support the Board's determinations, Zippers disagrees. The record reflects the Board did no analysis of any evidence whatsoever prior to issuing its rulings. The Board clearly did not base its decision by weighing the strengths and weaknesses on circumstantial evidence. Without reliance upon the hearsay evidence at issue the Board's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." Jayhawk Café, 165 P.3d at 824 (quoting Ross v. Fire & Police Pension Ass'n, 713 P.2d 1304, 1309 (Colo. 1986). The Board's determinations in Case 1 & Case 2 must be reversed as the decisions reflect the Board exceeded its jurisdiction, and/or because the determinations are an arbitrary and capricious exercise of the Board's discretion.

III. CONCLUSION

Zippers timely filed this C.R.C.P. 106(a)(4) action seeking judicial review of the Board's determination in Cases 1 & 2 and has preserved its ability to have this court review the Board's determination. In Cases 1 & 2 the Board failed to make specific findings and an inadequate record for meaningful judicial review exists. Without consideration of the hearsay at issue, the records in Cases 1 & 2 do not

support the Board's determinations and the Board exceeded its jurisdiction and/or its determinations are arbitrary and capricious. This court must reverse the Board's determinations pursuant to C.R.C.P. 106 (a)(4).

Respectfully submitted this 2nd day of March ,2010.

GRADISAR, TRECHTER, RIPPERGER &ROTH

BY: /s/ Douglas Gradisar

Douglas Gradisar, #34326
Attorney for Plaintiff
1836 Vinewood, Suite 200
Pueblo, CO 81005
719-566-8844
719-561-8436 (fax)
Original signed document on file at the law firm of Gradisar,
Trechter, Ripperger & Roth

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2010, a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was sent via LexisNexis addressed to the following:

Pueblo County District Court
Attn: Appeals Clerk
320 W. 10th Street
Pueblo, CO 81003

Kirk G. Stiegelmeier
Assistant City Attorney
Attorney for Defendants-Appellees
Thatcher Building
503 N. Main, Ste. 203

Pueblo, CO 81003

/s/ Catherine Baca
Catherine Baca