

FILED IN THE  
COURT OF APPEALS  
STATE OF COLORADO

2007 MAY 16 P 12:20

COURT OF APPEALS, STATE OF COLORADO  
Colorado State Judicial Building  
2 East 14<sup>th</sup> Avenue, 3<sup>rd</sup> Floor  
Denver, Colorado 80203  
(303) 861-1111

JOHN P. DOERNER  
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COURT OF APPEALS

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**Trial Court:** Denver District Court  
**Trial Court Case No:** 06-CV-12325, Courtroom 22  
**Trial Judge:** Honorable J. Stephen Phillips  
**Agency Subject to  
Judicial Review:** Colorado Department of  
Revenue, Liquor Enforcement  
Division  
**Agency Case No:** Not Applicable  
**Party Initiating Appeal:** Plaintiff Kevin Minh Le

07CA 927

**Case No.:**  
**Div.:**                      **Ctrm.:**

**Plaintiff(s) / Appellant(s):**

KEVIN MINH LE d/b/a MARINA POINTE LIQUORS

v.

**Defendant(s) / Appellee(s):**

COLORADO DEPARTMENT OF REVENUE, LIQUOR  
ENFORCEMENT DIVISION, an agency of the State of Colorado.

**Attorney for Plaintiff / Appellant Kevin Minh Le:**

**Name:** Adam P. Stapen, No. 27506  
**Address:** DILL DILL CARR STONBRAKER & HUTCHINGS, PC  
455 Sherman Street, Suite 300  
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**PLAINTIFF KEVIN MINH LE'S NOTICE OF APPEAL**

## I.

**General Statement of Nature of Controversy:** The Colorado Department of Revenue, Liquor Enforcement Division (“Department of Revenue”), is the duly-appointed state agency authorized to administer the liquor laws of the State of Colorado. At all relevant times, the Executive Director of the Department of Revenue was M. Michael Cook. The Department of Revenue is authorized to conduct public hearings and impose sanctions for violations of the Colorado Liquor Code, or any rule or regulation adopted thereunder, on a statewide basis.

Kevin Minh Le, d/b/a Marina Pointe Liquors (“Marina Pointe Liquors”) is appealing a decision from the Executive Director that revoked its retail liquor license. Marina Pointe Liquors initiated this judicial review of agency action for the following reasons:

- (1) The Executive Director erroneously interpreted the law by ruling that an expired out-of-state Michigan driver’s license containing the picture and information of a person other than the one who presented it to Marina Pointe Liquors for the purpose of inducing Marina Pointe Liquors to sell alcohol was not a “fraudulent proof of age” or “fraudulent identification.”
- (2) The Executive Director also abused her discretion in revoking the liquor license because a reasonable person, when considering all the evidence in the record, would fairly and honestly be compelled to reach a different, less severe sanction.

Marina Pointe Liquors timely filed its Rule 106 action for judicial review. On April 19, 2007, the trial court entered its Order affirming the Executive Director’s erroneous interpretation of the law and revocation of the liquor license. In doing so, the trial court failed to address the issues raised by Marina Pointe Liquors. This appeal ensued.

**Judgment / Order Being Appealed:** Honorable J. Stephen Phillips’ Order dated April 19, 2007. See Attachment A.

**Basis for Appellate Court’s Jurisdiction:** Section 24-4-106(9) C.R.S., and Colorado Appellate Rule 3.

**Whether the Judgment / Order Resolved All Issues:** Yes, the Order resolved all issues pending in the Rule 106 proceeding.

**Whether the Judgment / Order is Final for Purposes of Appeal:** Yes.

**The Date the Judgment / Order was Served:** The trial court issued its written order on April 19, 2007, and Plaintiff / Appellant’s counsel received the Order in the mail on April 21, 2007.

**Whether Extensions were Granted to File Post-Trial Relief:** No.

**The Date of Filing Motion for Post-Trial Relief.** None.

**The Date the Motion for Post-Trial Relief was Denied.** None.

**Whether Extensions were Granted to File Notice of Appeal.** No.

**The Date Notice of Intent to Seek Appellate Review was Filed in Trial Court.** Notice was provided on April 24, 2007, and also contemporaneously with the filing of this appeal.

## II.

### ADVISORY LISTING OF ISSUES

A. Whether the trial court erred in ruling that the Executive Director did not misconstrue the law.

B. Whether the trial court erred in ruling that the Executive Director did not act arbitrary or capricious when she interpreted the law and revoked the liquor license.

C. Whether the trial court erred in ruling that the Executive Director did not abuse her discretion when she interpreted the law and revoked the liquor license.

D. Whether the trial court erred in ruling that the Executive Director did not exceed her jurisdiction when she interpreted the law and revoked the liquor license.

E. Whether the trial court erred in ruling that the Executive Director did not deny Plaintiff his statutory affirmative defense.

F. Whether the trial court erred in ruling that the Executive Director did not (1) act contrary to Plaintiff's constitutional right, power, privilege or immunity, (2) act in excess of statutory jurisdiction, authority, purposes or limitations, (3) act outside of the procedures or procedural limitations of the Colorado Administrative Procedures Act or as otherwise required by law, and (4) make decisions that were based on findings of fact that are clearly erroneous on the record, unsupported by competent substantial evidence, or contrary to law.

## III.

### TRANSCRIPT INFORMATION

**Whether a Transcript is Necessary:** A transcript from the agency proceeding is necessary to resolve the issues on appeal, and will be provided in the record on appeal.

**Approximate Number of Pages of Transcript:** 207 pages.

IV.

**ATTORNEY INFORMATION**

**Attorneys for Plaintiff / Appellant Kevin Minh Le**

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**Attorneys for Defendant / Appellee Department of Revenue**

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(303) 866-5671- fax

V.

**APPENDICES TO NOTICE OF APPEAL**

Attached to this Notice of Appeal are copies of the following:

- A. Judge Phillips' Order dated April 19, 2007.
- B. Executive Director's Order dated November 27, 2006.
- C. Certificate Of Service in Compliance with C.A.R. 25.

Respectfully submitted this 16 day of May, 2007.

**DILL DILL CARR STONBRAKER  
& HUTCHINGS, P.C.**

By: 

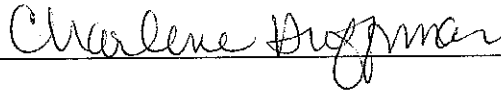
Adam P. Stapen, No. 27506  
*Attorneys for Appellant / Plaintiff Kevin Minh Le*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16 day of May, 2007, I placed a true and correct copy of the above and forgoing **PLAINTIFF KEVIN MINH LE'S NOTICE OF APPEAL** in the United States mail, postage prepaid and properly addressed to the following:

Tina Bowman, Esq.  
Assistant Attorney General  
COLORADO ATTORNEY GENERAL'S OFFICE  
1525 Sherman Street, 7<sup>th</sup> Floor  
Denver, Colorado 80203

Denver District Court  
Attn: Clerk of Courtroom 22  
1437 Bannock Street, Suite 256  
Denver, Colorado 80202  
*VIA HAND-DELIVERY*

  
\_\_\_\_\_

DISTRICT COURT, CITY AND COUNTY OF DENVER,  
STATE OF COLORADO

Court Address:  
1437 Bannock St., Denver, CO 80202

Plaintiff/ Appellant  
KEVIN MINH LE d/b/a MARINA POINTE LIQUORS

v.

Defendant/ Appellee  
COLORADO DEPARTMENT OF REVENUE, LIQUOR  
ENFORCEMENT DIVISION

APR 21 2007

▲ COURT USE ONLY ▲

Case Number: 06 CV 12325

Courtroom: 22

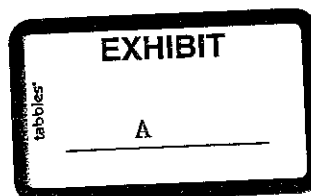
**ORDER**

This judicial review action follows an agency decision revoking the retail liquor license of Kevin Minh Le, d/b/a Marina Pointe Liquors. The administrative hearing Record was certified to the District Court on November 29, 2006.

Kevin Minh Le is the sole proprietor of Marina Pointe Liquors ("Marina Pointe"), a retail liquor store, which is located in Littleton, Colorado. On July 12, 2006, a Marina Pointe employee sold alcohol, on two separate occasions, to Paul Orndish who was twenty years old. Before each sale, Orndish presented the employee with his older brother's expired Michigan driver's license.

Defendant, Colorado Department of Revenue Liquor Enforcement Division ("Department") brought administrative charges against Marina Pointe for selling alcohol to a minor. The Hearing Officer found that Marina Pointe violated Colorado Revised Statutes ("C.R.S.") § 12-47-901(1)(a.5)(I) by selling alcohol to a minor and concluded that Marina Pointe did not have an affirmative defense for the display of an expired driver's license by the minor. On November 27, 2006 the Executive Director approved the Hearing Officer's recommendation for revocation.

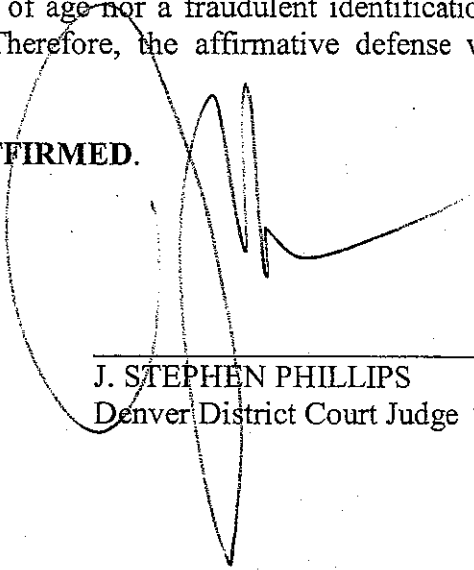
The question before this Court is whether a sale of alcohol by a licensee to a minor, who used an expired out-of-state driver's license containing the picture and information of a person other than the minor, is considered "fraudulent proof of age," pursuant to C.R.S. § 12-47-901(5)(a)(I), which precludes the licensing authority from revoking the licensee's retail liquor license or "fraudulent identification" affording the licensee an affirmative defense against revocation under Regulation 47-912.



This Court agrees with the Hearing Officer that a genuine, but expired, license of another person is neither a fraudulent proof of age nor a fraudulent identification since the driver's license itself was genuine. Therefore, the affirmative defense was not factually available.

The decision of the Department is **AFFIRMED**.

Dated this 14 day of April, 2007.



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J. STEPHEN PHILLIPS  
Denver District Court Judge

cc: parties, counsel

**BEFORE THE EXECUTIVE DIRECTOR  
DEPARTMENT OF REVENUE  
STATE OF COLORADO  
BY HEARING OFFICER JULIAN**

**FINDINGS, CONCLUSIONS, RECOMMENDATION FOR SANCTION AND ORDER**

**IN THE MATTER OF: KEVIN MINH LE  
D/B/A MARINA POINT LIQUORS  
7444 W. CHATFIELD AVENUE  
LITTLETON, COLORADO 80128**

**LICENSE NUMBER: 40-94326-0000**

**APPEARANCES**

**For the Division**

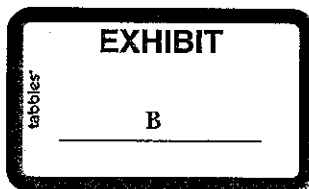
**Tina Bowman  
Assistant Attorney General  
Robert Dodd  
Assistant Attorney General  
General Legal Services Section  
Department of Law**

**Donald Pace  
Investigator  
Advisory Witness, Liquor Enforcement Division  
Colorado Department of Revenue**

**For the Respondent**

**Adam Stapen  
Dill Dill Carr Stonebraker & Hutchings, P.C.  
455 Sherman Street  
Suite 300  
Denver, CO 80203**

**Kevin Minh Le  
Licensee**





On August 29, 2006, an Order to Show Cause and Notice of Hearing was issued to Kevin Minh Le, d/b/a Marina Pointe Liquor (Licensee). In that Order to Show Cause and Notice of Hearing, the Liquor Enforcement Division of the Colorado Department of Revenue (Department) alleged a violation of the Liquor laws in Article 47 of Title 12 of the Colorado Revised Statutes. The Department alleged that the Licensee and/or his agent, Loc Quang Truon, sold, or permitted the selling, serving, or delivering of alcohol beverages (two(2), one-liter bottles of Bacardi Limon Rum brand spirituous liquor) to Paul Francis Ondrish, a person under the age of twenty-one years (born, March 10, 1986, age twenty).

A notice of hearing was sent to the Licensee for the time of 10:00 a.m. on November 2, 2006 in the Liquor Enforcement Division Conference Room, Suite 108, 1881 Pierce Street, Lakewood, Colorado.

The hearing began at 10:00 a.m. The Department's and Licensee's evidence, statements and recommendations for sanction were received.

### STATEMENT OF ISSUES

1. Whether the licensee or his agent sold alcohol beverages to a person under the age of 21 in violation of C.R.S. §12-47-901(1)(a.5)(I).
2. Whether an affirmative defense is sustained under C.R.S. §12-47-901(5)(a)(I) which states in pertinent part: "If a person who, in fact, is not twenty-one years of age exhibits a fraudulent proof of age, any action relying on such fraudulent proof of age shall not constitute grounds for the revocation or suspension of any license issued under this article."

### WITNESS LIST

For the State :

- Officer Firko, Colorado State Patrol
- Don Pace, Investigator, Liquor Enforcement Division, Colorado Department of Revenue
- Paul Ladewig
- Corey Grubich

For the Licensee

- Loc Quang Truon
- Thai Chung Nguyen
- Kevin Minh Le

### LIST OF EXHIBITS

For the State:

Exhibit A: Photocopy of a Michigan driver's license issued to Joseph Patrick Ondrish Number O 536 441 676 574 showing a date of birth of 7-21-1983 and a license expiration date of 7-21-2004.

Exhibit B: Numbered 1-12 Photographs of the Licensee's liquor store from various perspectives.

Exhibit C: Letter to "Hearing Official" from the family and friends of the deceased Brandon Nichols.

Exhibit D: Untitled Letter from Frank and Patti Ondrish and Family of the deceased Paul Ondrish.

For the Licensee:

Exhibit 1: Written Statement by Paul Ladewig on July 17, 2006.

Exhibit 2: 2004 Driver License Booklet published by Anheuser-Busch, Inc.

Exhibit 3: Colorado Dossier of Paul Ondrish, including photograph and fingerprint.

Exhibit 4: Six letters from Jefferson County Sheriff from 2002 to June 20, 2005, indicating compliance with liquor laws in the operation of the Licensee's business.

Exhibit 5: Lease renewal agreement for the Licensee's liquor store entered into August 5, 2005.

Exhibit 6: Stipulation and agreement in the matter of the liquor license of Horseshoe Saloon, Inc. License 41-42996-0000.

### FINDINGS

Based on evidence presented at Hearing, the Hearing Officer finds:

1. Kevin Minh Le d/b/a Marina Point Liquors, is the holder of Colorado Liquor License number 40-94326-0000 in effect on July 12, 2006.
2. On July 12, 2006, Loc Quang Truon was an employee and agent of the Licensee and had been so employed since the summer of 2005.
3. At approximately 6:00 or 7:00 p.m., Paul Ondrish drove to the parking lot of and entered Marina Point Liquors.
4. Paul Ondrish displayed the expired Michigan license of his brother, Joseph Ondrish, to Loc Quang Truon in order to purchase a one liter bottle of Bacardi Limon Rum.
5. Thai Chung Nguyen, a friend of Loc Quang Truon, was in Marina Point Liquor that evening from approximately 6:00 p.m. until closing at approximately 11:00 p.m.
6. Loc Quang Truon accepted the expired license as proof of age and sold the Bacardi Limon Rum to Paul Ondrish.
7. At approximately 10:50 p.m., Paul Ondrish returned to Marina Point Liquors. Loc Quang Truon and his friend, Thai Chung Nguyen, were in the store, preparing to close.

8. Mr. Nguyen asked Loc Quang Truon if he would accept another customer. Mr. Truon replied in the affirmative and Mr. Nguyen opened the door for Paul Ondrish.
9. Paul Ondrish then purchased another one-liter bottle of Bacardi Limon Rum from Loc Quang Truon.

### DISCUSSION

The basic facts of the case are virtually uncontested. The Department presented evidence that Paul Ondrish purchased two one liter bottles of Bacardi Limon Rum from the Licensee, through the agent, Loc Quang Truon. The Licensee did not present any evidence that contradicted the State's evidence.

The portion of the evidence at hearing that was in dispute was whether Paul Ondrish displayed the expired Michigan license to agent of the Licensee, Loc Quang Truon. The license was in Paul Ondrish's wallet at the time of the purchase and had been previously displayed to the witness, Paul Ladewig. Mr. Ladewig acknowledged the presence of the license in Mr. Ondrish's wallet and it was found at the collision site. It is clear to me that Mr. Ondrish was prepared to display the license in order to purchase the liquor, and it is more likely than not that he did so. It is my finding of fact, after reviewing all the evidence, that Mr. Ondrish presented the expired license in order to obtain the rum.

The Licensee argues that the display of the license constitutes an affirmative defense under C.R.S. §12-47-901(5)(a)(I) - "...If a person who, in fact, is not twenty-one years of age exhibits a fraudulent proof of age, any action relying on such fraudulent proof of age shall not constitute grounds for the revocation or suspension of any license issued under this article..." I disagree.

The term "fraudulent proof of age" is the crucial issue. I conclude that the law could only mean that a "fraudulent proof of age" means a fraudulent document that purports to be a valid document. Expired documents are not valid documents. The Department's Regulation 47-912 *Identification* declares that position. That rule states, in part, "Licensees may refuse to sell alcohol beverages to any person unable to produce adequate, *currently valid* identification of age. The kind and type of identification deemed adequate shall be limited to the following." (emphasis added). The Licensee asserted he relied on the "Anheuser-Busch 2004 Driver License Booklet" for verifying the validity of the appearance of the document. However, that very booklet, on the back cover, states in the first paragraph titled "what to look for" - "the card's expiration date. Do not accept the license if the date is expired." The Licensee acknowledged the combined intent of the law and regulation by posting on the doorway of his own business "MUST HAVE VALID DRIVERS LICENSE AND BE 21 TO PURCHASE ANY ALCOHOLIC BEVERAGE" (sic) The meaning and intent of the legislature and the Department are unambiguous and were clear to the Licensee. The presentment of an expired license by a customer is inadequate proof of age for the purpose of the purchase of alcohol beverages.

The logic of that position is inescapable. A valid document is of much more value to the rightful owner than an expired one. It is much easier to acquire an expired document than a valid one. It is easier to convince an older sibling to pass an expired document along. It is easier to take one without the loss being noticed. It is easier to find one in the trash. It is for these reasons that valid documents are to be the only ones relied upon.

The declaration by the legislature that allows for an affirmative defense for a fraudulent proof of age cannot reasonably include documents that are, on their face, expired or otherwise not valid.

In this case, the license from another state was expired by two years. The expiration date is conspicuously shown on the face of the document in red ink contrasted against a white background when most of the other printing is in black and blue ink. The license also says, "Under 21 Until 7-21-2004" and is also in red ink which emphasizes that the license had expired.

Therefore, the presentation of a license, issued by another state, expired by nearly two years is not a fraudulent document for the purposes of granting an affirmative defense under C.R.S. §12-47-901(5)(a)(I).

### CONCLUSIONS

1. C.R.S. §12-47-901 prohibits the sale of alcohol beverages to minors.
2. The Licensee was bound to adhere to that law as a condition of maintaining Liquor License 40-94326-0000
3. The underage person, Paul Ondrish, aged 20 years, did purchase from Loc Quang Truon, an agent of the Licensee, alcohol beverages in the form of two one-liter bottles of Bacardi Limon Rum on July 12, 2006 on two separate sales of one bottle at each sale.
4. The Licensee violated C.R.S. §12-47-901(1)(a.5)(I).
5. The Licensee does not have an affirmative defense for the display of an expired out-of-state driver's license by Paul Ondrish.
6. C.R.S. §12-47-601 grants broad authority to the Department in the range of sanctions for offenses. That section states, in pertinent part,

“(1) In addition to any other penalties prescribed by this article or article 46 or 48 of this title, the state or any local licensing authority has the power, on its own motion or on complaint, after investigation and public hearing at which the licensee shall be afforded an opportunity to be heard, to suspend or revoke any license or permit issued by such authority for any violation by the licensee or by any of the agents, servants, or employees of such licensee of the provisions of this

article, or any of the rules or regulations authorized pursuant to this article..."

### RECOMMENDATIONS FOR SANCTION

The Hearing Officer recommends the revocation of the liquor license of Kevin Minh Le, d/b/a Marina Point Liquors.

Before making the recommendations for sanction, the Hearing Officer considered the following factors in aggravation and mitigation.

#### In aggravation:

- Twice in one night, Loc Quang Truon made the sale of alcohol beverage to a minor who displayed a conspicuously inappropriate form of identification. The license has in red type on a white background that it was expired. Failing to notice such a glaring flaw or not requiring identification on each purchase is a flagrant violation.
- Failure of the Licensee to retain and provide investigators with records of sales from the evening of July 12, 2006.
- Previous violation of sale to minor in 2002.
- Paul Ondrish, having purchased a total of 2 liters of rum and as a consequence of his being intoxicated, died that night as did one of his passengers. Three others were injured.
- The statements from the parents, families and friends of the two deceased young men were considered in aggravation.

#### In mitigation:

- I considered the statement of practices of the Licensee since the violation in 2002.
- I considered the financial impact on the Licensee and his family.
- I considered the multiple commendations from the Jefferson County Sheriff's Office for good conduct of the Licensee's establishment from 2002 to June 20, 2005.

#### Rationale for the recommendation:

The use of alcohol beverages by minors in this state has resulted in the deaths and injuries of too many. The frequency and notoriety of such events makes the harm of each sale easily foreseeable. The legislature and the Department have taken cognizance of the dangers involved in the mishandling of alcohol by minors and others by the passage of the laws and regulations governing the distribution and use of alcohol beverages. Those laws and regulations focus on a theme - unregulated alcohol distribution and consumption are dangerous, therefore prohibited. In light of the possible dangers inherent in alcohol sales and use, the state rightly regulates the

licensing of persons who wish to manufacture, distribute or sell alcohol beverages.

So long as the manufacturers, distributors or retailers of alcohol beverages adhere strictly to the laws and regulations, they will enjoy the ability to exercise the privileges of the license. A liquor Licensee must see that a customer is not a minor or in any other proscribed class.

Since any violation must be considered in the light of the history of the licensee, the character and reputation of the licensee, the nature of the violation and gravity of the consequences, the legislature has granted authority to apply a broad range of sanctions to licensees, including the revocation of a license for a singular violation. (C.R.S. §12-47-601)

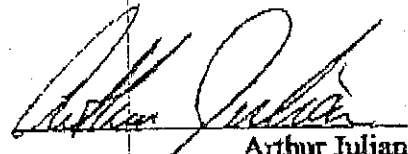
In this case, the nature of the violation and the gravity of the consequences weigh most heavily in aggravation. The Licensee sold alcohol beverages to an underage person twice in one evening. The Licensee accepted a document that should not have been used, according to all authorities, as proof of age. The Department and the liquor industry, through Anheuser-Busch's publication on the use of identification, each warn licensees to not use expired documents. The Licensee acknowledged that standard by posting it on his own front door. However, the Licensee did not adequately enforce the regulation of the Department, the recommendation of the liquor industry or his own asserted policy.

While the Licensee asserts that he impressed on his employees the seriousness of the violation of sales to minors, he is not convincing. The failure to so impress his employee is evident by the fact that two sales were made in one night.

After the two violations, that night, of the regulation, recommendations and policy, two young men died. Three other young people were hurt. No consequence could be more grave.

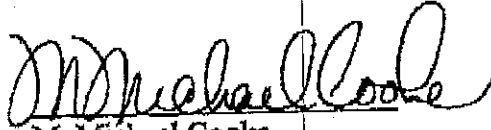
The revocation of this Licensee's liquor license is a recognition of the serious nature of the duties imposed by a liquor license and the consequence of the failure to fulfill those duties.

November 18, 2006

  
Arthur Julian  
Hearing Officer

ORDER

The Executive Director of the Department of Revenue, the State Liquor Licensing Authority, concurs in the Recommendation for Sanction as set forth above and hereby ORDERS that the above referenced liquor license be, and hereby is, REVOKED in the manner provided, this 27 day of Nov., 2006



M. Michael Cooke,  
Department of Revenue  
State Liquor Licensing Authority