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COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, 3rd Floor Denver, Colorado 80203 (303) 861-1111	▲ COURT USE ONLY ▲
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 **Plaintiff/Appellant:** KEVIN MINH LE, d/b/a MARINA POINTE LQUORS, v. **Defendants/Appellees:** COLORADO DEPARTMENT OF REVENUE, LIQUOR ENFORCEMENT DIVISION, an agency of the State of Colorado.	**Case No.: 2007 - CA - 927**
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STATEMENT OF ISSUES

A. Did the Department of Revenue misconstrue the law by ruling that an expired out-of-state driver's license containing the picture and information of a person other than the one who presented it was not a "fraudulent proof of age" as set forth in C.R.S. § 12-47-901(5)(a)(I)?

B. Did the Department of Revenue abuse its discretion by revoking Marina Pointe's liquor license?

C. Did the Department of Revenue act arbitrarily and capriciously when it misconstrued the law and revoked the liquor license?

D. Did the Department of Revenue exceed its jurisdiction and deny Marina Pointe its statutorily mandated affirmative defense?

STATEMENT OF THE CASE

This case involves the judicial review of agency action under the Colorado Administrative Procedures Act, C.R.S. § 24-4-106(9). Plaintiff Kevin Minh Le d/b/a Marina Pointe Liquors ("Marina Pointe") holds a retail liquor license for the operation of a liquor store at 7444 West Chatfield Avenue, Littleton, Colorado. On August 24, 2006, the Colorado Department of Revenue, Liquor Enforcement Division ("Department of Revenue") issued an order to show cause, alleging that Marina Pointe permitted the sale of alcohol to a minor under the age of 21 years.

On November 2, 2006, a public hearing was held before the duly appointed hearing officer. On November 18, 2006, the hearing officer issued his recommended decision for revocation of the liquor license. On November 27, 2006, without notice or an opportunity to submit objections, the Executive Director approved the recommended decision and revoked the liquor license.

Marina Pointe timely filed its complaint in the Denver District Court for judicial review of agency action and, pursuant to C.R.S. § 24-4-106(5), was granted stay of the revocation pending the ongoing appellate proceedings. On April 19, 2007, the trial court entered an order affirming the Executive Director's decision. Marina Pointe timely filed this appeal pursuant to C.A.R., Rule 4.

STATEMENT OF THE FACTS

Marina Pointe is a sole proprietorship of Kevin Minh Le. In 2002, Mr. Le entered into an agreement to purchase the assets and inventory of an existing liquor store located at 7444 West Chatfield Avenue, Littleton, Colorado. (Tr., pp. 134-136). Mr. Le paid $340,000 for the assets, and an additional $100,000 for the inventory. Mr. Le financed the purchase by borrowing money from his family, a home equity line of credit, an owner carry-back promissory note, and a Small Business Administration Loan. *Id.* In furtherance of the purchase, Mr. Le applied

for and was granted the transfer of the liquor license. *Id.* Mr. Le has owned and operated the liquor store since March 2002.

The 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 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.

On August 24, 2006, the Department of Revenue issued an Order to Show Cause and Notice of Hearing pursuant to C.R.S. § 12-47-128(1)(a) ("Order"), alleging that on or about July 12, 2006, Marina Pointe permitted the sale of alcohol to Paul Ondrish (age 20), a minor under the age of 21 years. (Agency Record, Vol. I, Part A, p. 1). The Order required that Marina Pointe appear and show cause why its liquor license should not be suspended or revoked.

A public hearing was held on November 2, 2006. *Id.*, p. 4. Arthur Julian presided over the hearing as the Department of Revenue's duly appointed hearing officer. *Id.* The hearing was first conducted to determine whether Marina Pointe permitted the sale of alcohol to a minor and, if so, whether Marina Pointe was presented with a "fraudulent proof of age." If Marina Pointe was presented with a

"fraudulent proof of age" at the time of sale, its reliance on the intentional misrepresentations cannot constitute grounds for administrative revocation or suspension of its liquor license. *See* C.R.S. § 12-47-901(5)(a)(I) and Regulation 47-912.B. Accordingly, if the hearing officer found that a sale to minor did occur, and the affirmative defense did not apply, the parties would then be allowed to present aggravating or mitigating circumstances relating to the hearing officer's recommendation for sanction.

At the hearing, the Department of Revenue submitted evidence that Paul Ondrish, age 20, entered Marina Pointe on two different occasions on July 12, 2006, and on each occasion he purchased a bottle of Bacardi Limon Rum. The Department of Revenue also submitted evidence that Marina Pointe had allegedly failed to check the identification of Mr. Ondrish at the time of each sale.

Marina Pointe introduced evidence that it requested and reviewed the identification of Mr. Ondrish prior to each sale. Marina Pointe introduced evidence that Mr. Ondrish intentionally presented an expired out-of-state Michigan driver's license containing the picture and information of Mr. Ondrish's older brother, and not himself. The date of birth on the Michigan driver's license was July 21, 1983. Thus, Mr. Ondrish represented to Marina Pointe that he was 22 years of age.

At the conclusion of the evidence, the hearing officer made oral findings and rulings. The hearing officer found that, on July 12, 2006, Marina Pointe sold two bottles of Barcardi Limon Rum to Mr. Ondrish. (Tr., p. 186, l. 3-7). The hearing officer also found that Marina Pointe did check the identification of Mr. Ondrish at the time of each sale. The hearing officer found that that Mr. Ondrish "did present the Michigan license for the purchase of that liquor. It was his game plan, as it were, going in." (Tr., p. 186, l. 16-24). The hearing officer then concluded that the affirmative defense did not apply. The hearing officer found that "an expired license or other expired lawful document" does not "rise to the level of the fraudulent proof of age contemplated in § 12-47-901 as an affirmative defense." (Tr., p. 187, l. 16-19).

The hearing then proceeded to the presentation of aggravating or mitigating circumstances. After hearing the evidence and closing arguments, the hearing officer took the matter under advisement. On November 18, 2006, the hearing officer issued his written Findings, Conclusions, Recommendation for Sanction and Order ("Recommended Decision"), recommending revocation of the liquor license. (Agency Record, Vol. I., Part A, p. 11). The Recommended Decision was not served on Marina Pointe as required by the Colorado Administrative Procedures Act, C.R.S. § 24-4-105(14)(a). On November 27, 2006, without notice

or an opportunity to submit objections, the Executive Director approved the Recommended Decision and revoked the liquor license. (Agency Record, Vol. I., Part A, p. 18).

On November 29, 2006, Marina Pointe timely filed its complaint for judicial review and declaratory relief in the Denver District Court. The trial court held a forthwith hearing and granted Marina Pointe's motion for stay of revocation pursuant to C.R.S. § 24-4-106(5). On April 19, 2007, after the parties submitted their briefs, the trial court entered an order affirming the revocation. On May 16, 2007, Marina Pointe timely filed this appeal pursuant to C.A.R., Rule 4.

ARGUMENT

A. Summary of Argument.

The Department of Revenue misconstrued the law by requiring a "fraudulent proof of age" to be a currently valid, binding and meritorious identification. The Department of Revenue rendered meaningless the statutorily mandated affirmative defense because if a minor presents his or her currently valid, binding and meritorious identification, there would be no "fraudulent proof of age" as the minor would have presented his or her true and accurate identification. The Department of Revenue also abused its discretion by revoking the liquor license because Marina Pointe did not intentionally sell alcohol to minor.

B. General Standard of Review.

The Department of Revenue's decision will be reversed "if the court finds that the agency acted in an arbitrary and capricious manner, made a determination that is unsupported by the evidence in the record, erroneously interpreted the law, or exceeded its constitutional or statutory authority." *Ginny's Kids Intern. v. Sec'y of State*, 29 P.3d 333, 335 (Colo. App. 2000); C.R.S. § 24-4-106(7).

C. The Department of Revenue Misconstrued and Erroneously Interpreted the Law.

When the court is presented with an issue involving statutory or regulatory construction, its review is *de novo*. *See Nededog v. Colo. Dept. of Health Care Policy*, 98 P.3d 960, 962 (Colo. App. 2004). When construing a statute or regulation, the court's primary task is "to determine and give effect to the intent of the General Assembly." *Ginny's Kids Intern*, 29 P.3d at 335. The statute or regulation must be construed "as a whole so as to give consistent, harmonious, and sensible effect to all of its parts and, if possible, give effect to every word in the statute." *Id.* The court will give deference to the agency's interpretation and will generally accept the interpretation if it has a reasonable basis in the law and is warranted by the record. *See Nededog*, 98 P.3d at 962.

Here, it is submitted that the Department of Revenue, by ordering the revocation of the liquor license, failed to give effect and meaning to the statutorily mandated affirmative defense. C.R.S. § 12-47-901(5)(a)(I) states:

> 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 or article 46 of this title.

In furtherance of the General Assembly's intent to protect a licensee from the intentional misrepresentations of others, the Department of Revenue promulgated Regulation 47-912, which states:

> A. 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:
>
> 1. An operator's, chauffeur's or similar type driver's license containing a picture and date of birth, issued by any state, Canada, Mexico, or United States Territory.
>
> 2. An identification card containing a picture, issued by any state for the purpose of proof of age as in accordance with C.R.S. 42-2-402.
>
> 3. A military identification card.
>
> 4. A passport.
>
> 5. An alien registration card.

> 6. A valid employment authorization card containing a picture and date of birth issued by the U.S. Department of Justice, Immigration and Naturalization Service.
>
> B. It shall be an affirmative defense to any administrative action brought against a licensee for alleged sale to minor if the minor presented fraudulent identification of the type established above and the licensee possessed an identification book issued within the past three years which contained a sample of the kind of identification presented for compliance purposes. As an affirmative defense, the burden of proof is on the licensee to establish by a preponderance of the evidence that the minor presented fraudulent identification.

In *Romero v. Liquor & Beer Licens. Bd. of City of Pueblo*, 540 P.2d 1152 (Colo. App. 1975), the court construed the predecessor statute and regulation. In *Romero*, the local licensing authority suspended a liquor license for the sale of alcohol to a minor. At the hearing before the local licensing authority, the licensee submitted evidence that the minor presented a "fraudulent proof of age," which was an "altered Colorado Temporary Operator's Permit." At that time, the pertinent language of the statute was identical to the current statute, except that the lawful drinking age was "eighteen years of age." *Id.* at 1154. With regards to the then-applicable regulation, it stated:

> Licensees may refuse to sell fermented malt beverages to any person unable to provide adequate identification of age. The kind and type of identification deemed adequate under this article shall be limited to the following:
>
> 1. Colorado Operator's License;
> 2. Colorado Provisional Operator's License;

3. Colorado Chauffeur's License;
4. Identification Card issued in accordance with C.R.S. 1963, 13-26-1;
5. An operator's, chauffeur's or similar type driver's license containing a picture issued by another state;
6. Identification card containing a picture by another state for the purpose of proof of age;
7. Military identification cards;
8. Valid passport;
9. Alien registration card.

The *Romero* court analyzed the statute and regulation, and other language of the Colorado Liquor Code that authorized the Department of Revenue to approve specified types of identification, and held the "fraudulent proof of age" language contained within the statute must be construed in conjunction with regulation. *Id.* at 1154-1155. Thus, the court held that a "Colorado Temporary Operator's Permit" was not an approved form of identification, as it was not one of the types listed in the regulation. *Id.* The court also held that the enumerated types of identification had a "common thread of a picture as well as the date of birth of the person identified," and the Department of Revenue's limitation on the type of identification was reasonable and valid. *Id.* Thus, the affirmative defense was not available to the licensee. *Id.*

Here, it is submitted that Marina Pointe has proved, by the preponderance of the evidence, all elements of the affirmative defense. Consistent with the holding

in *Romero* and the now-applicable Regulation 47-912.B., the elements are as follows: (1) the minor presented a "fraudulent proof of age" of the type established in Regulation 47-912.A; and, (2) "the licensee possessed an identification book issued within the past three years which contained a sample of the kind of identification presented for compliance purposes."

With regards to the first element, the expired Michigan driver's license is a "fraudulent proof of age." The hearing officer found that it was Mr. Ondrish's "game plan, as it were, going in," to present the driver's license containing the picture and information of a person other than Mr. Ondrish. (Tr., p. 186, l. 24). The hearing officer found that when Mr. Ondrish purchased the alcohol from Marina Pointe, he presented a driver's license that contained the name, address, weight, height, eye color, blood type, endorsements and restrictions of his older brother, "Joseph Patrick Ondrish." (Agency Record, Vol. I., Part B, p. 20). The hearing officer found that the picture of Joseph Patrick Ondrish, as contained on the driver's license, "strikingly resembles the minor who purchased the alcohol." (Tr., p. 187, l. 13-15). By intentionally presenting a driver's license of a person other than himself, Mr. Ondrish, age 20, intentionally misrepresented to Marina Pointe that he was 21 years of age or older. It is submitted that there is no escaping

the conclusion that Mr. Ondrish intended to, and did, submit a "fraudulent proof of age" to Marina Pointe to induce Marina Pointe to sell the alcohol.

Moreover, the "fraudulent proof of age" presented by Mr. Ondrish is a type of identification as contained in Regulation 47-912.A. If each word and phrase is given its plain meaning as required by law, it is submitted that the form of identification presented by Mr. Ondrish was a "driver's license," "containing a picture and date of birth," and "issued by" the state of Michigan. (Agency Record, Vol. I., Part B, p. 20). *See* Regulation 47-912.A.(1) ("An operator's, chauffeur's or similar type driver's license containing a picture and date of birth, issued by any state"). Thus, it is submitted Marina Pointe has satisfied its burden of proof regarding the first element.

With regards to the second element of the affirmative defense, Marina Pointe is required to possess "an identification book issued within the past three years which contained a sample of the kind of identification presented for compliance purposes." *See* Regulation 47-912.B. The record contains undisputed evidence that Marina Pointe had in its possession, and next to the cash register, at the time of sale, a 2004 Driver License Booklet for the United States and Canada ("Driver License Booklet"). (Agency Record, Vol. I, Part B, pp. 32-77; Tr., p. 82, p. 86, l. 17-23). It was undisputed that the Driver License Booklet contained "a

sample" of the Michigan's driver's license that was presented by Mr. Ondrish. (Agency Record, Vol. I, Part B, p. 46; Tr., p. 106, l. 21-25, p. 107, l. 1-2). Thus, it is submitted that in accordance with the plain and unambiguous language of Regulation 47-912.B, Marina Pointe also proved, by the preponderance of the evidence, the second element of the affirmative defense.

Instead of finding that Marina Pointe had established both elements of the affirmative defense, the Executive Director, by affirming the hearing officer's Recommended Decision, erroneously interpreted Regulation 47-912. The hearing officer and Executive Director (collectively, "Department of Revenue") exceeded the scope of their authority by ruling that "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***." (Agency Record, Vol. I, Part A, p. 15) (emphasis added).

It is submitted that the Department of Revenue disregarded and rendered meaningless the affirmative defense by requiring a "fraudulent proof of age" to be a currently valid identification. First, the Department of Revenue erroneously interpreted the first sentence of Regulation 47-912.A., which states: "Licensees ***may*** refuse to sell alcohol beverages to any person unable to produce adequate, ***currently valid identification of age***." (Emphasis added). The Department of

Revenue misconstrued the word "may" as an absolute requirement, as it found that "the presentment of an expired license by a customer is inadequate proof of age for the purpose of the purchase of alcohol beverages." (Agency Record, Vol. I, Part A, p. 14.)

The language in Regulation 47-912.A. specifically contains the word "may," and not "shall." The court will interpret the regulatory words and phrases in context and construe them literally in accordance to their common usage, unless they have acquired a technical meaning by legislative definition. *Klinger v. Adams County School Dist. No. 50*, 130 P.3d 1027, 1031 (Colo. 2006). Here, it is submitted that the term "may" does not have an acquired technical meaning. The *Romero* court had previously upheld the constitutionality of the predecessor Regulation 47-912, so the term "may" is not required to mean "shall" in order to avoid an unconstitutional result. Accordingly, the term "may" should be construed in accordance with its common and ordinary meaning, which is "discretionary and not required." *See People ex rel. A.C.*, 991 P.2d 304, 306 (Colo. App. 1999), *aff'd*, 16 P.3d 240 (2001).

The "discretionary and not required" definition of the term "may" is in harmony with the legislative intent and the sensible effect of the Colorado Liquor Code. There is not a single statute, rule or regulation that provides the Department

of Revenue with authority to suspend or revoke a liquor license if a licensee sells alcohol without first being presented with a "currently valid identification." For example, if a person 21 years of age or older enters a licensed establishment and purchases alcohol without first being asked for his identification, the licensee is not subject to administrative sanctions. If the same person was asked for identification, but failed to have any on his or her person, and was still allowed to purchase alcohol, there is no authority for administrative sanctions. To the point, if the same person presented his or her driver's license, and the driver's license happened to be expired by one day, one month, one year, five years, ten years, and the licensee sold the person alcohol, the Department of Revenue would have no authority to revoke or suspend the liquor license, as the sale would not violate any law or regulation. Put simply, the Department of Revenue's interpretation of the word "may" as meaning an absolute requirement for a valid, currently issued identification lacks any reasonable basis in the law and is not warranted by the record.

Also, by ruling that the affirmative defense will apply only when a minor presents a currently valid identification, the Department of Revenue rendered meaningless the statutorily mandated affirmative defense. In reviewing Regulation 47-912.B., the affirmative defense is triggered when a minor presents a

"fraudulent identification." The meaning of "fraudulent identification" is entirely inapposite to the meaning of "currently valid identification." The term "valid" is defined as "1. Legally sufficient, binding. 2. Meritorious." *See* Black's Law Dictionary (8th ed. 2004). It is submitted that a "fraudulent identification" can never be a "currently valid identification."

The phrase "currently valid identification" is contained within the first sentence that authorizes a licensee to "refuse to sell alcohol." Obviously, if a person fails to present a currently valid identification, a licensee may lawfully refuse the sale of alcohol. However, if a minor presents his or her currently valid identification, a licensee is ***prohibited*** from making the sale, as the minor would have presented his or her current, legally binding, meritorious identification that contained the true and accurate birth date, picture, name, address, weight, height, eye color, blood type, endorsements and restrictions. No fraud or misrepresentation would have occurred and, thus, the affirmative defense would not be triggered.

The Department of Revenue's erroneous interpretation of requiring that a "fraudulent identification" be a "currently valid identification" eliminates and renders meaningless the statutorily mandated affirmative defense. *See* C.R.S. § 12-47-901(5)(a)(I). To accept the Department of Revenue's interpretation, the court

would have to add, omit, ignore, or render meaningless the unambiguous language of C.R.S. § 12-47-901(5)(a)(I). Such an interpretation would be improper as a matter of law. *See, e.g., Martinez v. Colorado Dept. of Human Services*, 97 P.3d 152, 157 (Colo. App. 2003) ("An administrative agency must comply strictly with its enabling statutes, and it has no authority to set aside or circumvent legislative mandates").

This conclusion is further supported by the holding in *Romero*. In *Romero*, the court interpreted the second sentence of the predecessor regulation that specifically set forth the "kind and type of identification." The *Romero* court italicized the language of the second sentence: "*shall be limited to the following,*" and did not italicize or interpret any language within the first sentence. *Id.* 540 P.2d at 1154. In reviewing the current Regulation 47-912.A., the second sentence contains the same italicized language as the predecessor regulation. The second sentence of Regulation 47-912.A., and not the first, sets forth the approved forms of identification. Therefore, in accordance with the holding in *Romero* and the current Regulation 47-912.A., the driver's license presented by Mr. Ondrish is a type of identification approved by the Department of Revenue and subject to the affirmative defense.

Put simply, the Colorado General Assembly has set forth its intent to protect a licensee from the intentional fraud of a minor, especially when, as here, the minor was 20 years old, entitled to vote, and deemed an adult for prison sentencing.[1] It is submitted that there is no escaping the conclusion that Mr. Ondrish intentionally presented a "fraudulent proof of age" to induce Marina Pointe in making the sales of alcohol. It is rudimentary that the Colorado Liquor Code and regulations were established to provide a licensee, such as Marina Pointe, with consistent standards and requirements. By circumventing and rendering meaningless the statutorily mandated affirmative defense, the Department of Revenue misconstrued and erroneously interpreted Regulation 47-912. The Department of Revenue's interpretation is improper as a matter of law.

D. The Department of Revenue Abused its Discretion by Revoking the Liquor License.

The court will review the sanction imposed by the Department of Revenue under the abuse of discretion standard. *Mr. Lucky's Inc. v. Dolan*, 591 P.2d 1021,

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[1] Most states have similar affirmative defenses in their liquor laws, and it is clear that fraud, even if perpetrated by a minor, is not tolerated. For instance, in Indiana, although a licensee did not have its liquor license suspended or revoked, the licensee was still entitled to sue a minor who presented a fraudulent proof of age to recover its expenses, including attorney's fees and costs that were incurred in the administrative action. *See Millenium Club v. Avila*, 809 N.E.2d 906 (Ind. Ct. App. 2004).

1024 (Colo. 1979). An abuse of discretion occurs when "a reasonable person, considering all of the evidence in the record, would fairly and honestly be compelled to reach a different conclusion." *Wildwood Child v. Dept. of Public Health*, 985 P.2d 654, 658 (Colo. App. 1999); *DiManna v. Kalbin*, 646 P.2d 403, 404 (Colo. App. 1982).

Here, assuming, *arguendo*, that Marina Pointe did not prove the statutorily mandated affirmative defense, the Department of Revenue abused its discretion by revoking the liquor license. Analysis of relevant case law illustrates that only continuous, intentional and deliberate conduct justifies the most severe sanction of revocation.

In *Chroma Corp. v. Campbell*, 619 P.2d 74, 78 (Colo. App. 1980), the court upheld the revocation of a liquor license when the licensee "intentionally" conceived and executed a plan whereby his customers would place dollar bills "in the crotch area" of his female servers, and his female servers danced in the nude to entertain the customers. The court found that "violations which are intentional and flagrant should, in our opinion, merit more serious sanctions." *Id.*

In *Brownlee v. State Department of Revenue*, 686 P.2d 1372 (Colo. App. 1984), the court found that the Department of Revenue's suspension of a liquor license for forty-five (45) days was reasonable when the licensee intentionally

allowed unlawful gambling for a two-week period of time. Similarly, in *Continental Liquor Company v. Kalbin*, 608 P.2d 353 (Colo. App. 1977), the court upheld the suspension of a liquor license for thirty (30) days when the president of a licensee intentionally fondled a minor on the premises of the licensed establishment.

Here, when considering the findings of fact and applicable law, it is submitted that Department of Revenue abused its discretion. First, Marina Pointe did not intentionally sell alcohol to a minor, but was induced to sell the alcohol by relying on a "fraudulent proof of age." It is submitted that there is no evidence to support the hearing officer's finding that the sale of alcohol, in reliance on Mr. Ondrish's intentional misrepresentations as contained in the Michigan driver's license, was a "flagrant violation." (Agency Record, Vol. I., Part A., p. 16).

Second, the Department of Revenue found that Marina Pointe failed "to retain and provide investigators with records of sales from the evening of July 12, 2006." (Agency Record, Vol. I., Part A., p. 16). This is not an aggravating factor. The witnesses called by Marina Pointe ***admitted*** that Marina Pointe sold two bottles of Barcardi Limon Rum to Mr. Ondrish on the evening of July 12, 2006. Thus, the records were not necessary to prove or substantiate any element of the alleged violation. Moreover, Marina Pointe's failure to maintain a back-up of the

cash register was not intentional, as Marina Pointe *first learned* of the problem during the investigation by the Department of Revenue. (Tr., p. 164, l. 16-18). Thus, the one time failure to maintain back-up documents does not give rise to revocation of the liquor license. *See Mr. Lucky's Inc. v. Dolan*, 591 P.2d 1021, 1024 (Colo. 1979) (Department of Revenue's suspension of a liquor license for ten (10) days was not an abuse of discretion where the licensee had repeatedly failed to file its corporate income taxes in a timely manner).

Third, it was uncontested that in the early morning hours of July 13, 2006, Mr. Ondrish was involved in a tragic single motor vehicle accident that resulted in his and another's death. However, there is no evidence whatsoever in the record to support the Department of Revenue's finding that Mr. Ondrish died "as a consequence of his being intoxicated." (Agency Record, Vol. I, Part A, p. 16). It is undisputed that no evidence was introduced at any time regarding Mr. Ondrish's blood alcohol content or the cause of the accident. In fact, the Department of Revenue admitted that "we're not here to prove causation of the accident." (Tr., p. 16, l. 21-22). Put simply, there was no evidence to prove a causal connection between the sale of alcohol and the tragic accident. Thus, a reasonable person, who fairly and honestly considers the record, cannot reach the conclusion that Mr. Ondrish died as a consequence of being intoxicated.

Moreover, it is submitted that what Mr. Ondrish did, or did not do, after he defrauded Marina Pointe has no relevance to the sanction. It is submitted that considering factors outside the control of Marina Pointe would be arbitrary and capricious. The Colorado Liquor Code prohibits a sale to a minor. The violation does not hinge on what, if anything, the minor did after the purchase.

Fourth, the Department of Revenue relied on several letters that were introduced into evidence from persons who were never called to testify at the hearing and who were not subject to cross-examination. (Agency Record, Vol. I, Part A., p. 16). It is respectfully submitted that the letters contain pure, unsupported hearsay and, as such, do not constitute evidence sufficient to justify the most severe sanction of revocation.

Fifth, it was uncontested that in 2002, four years earlier, Marina Pointe had a prior violation for the sale of alcohol to a minor. (Agency Record, Vol. I, Part A., p. 16). The violation occurred within weeks of Kevin Le's purchase of the liquor store, and the Jefferson County Liquor Authority suspended the liquor license for fifteen (15) days. (Tr., p. 138, l. 17-25, p. 139, l. 1-22). At that time, to prevent subsequent violations, Marina Pointe, ***voluntarily and on its own initiative***, required all employees to attend an alcohol Training for Intervention Procedures by Servers seminar offered through Anheuser Bush; posted additional signs in the

liquor store warning customers that it will check for identification; and, obtained an identification booklet from Anheuser Bush. (Tr., pp. 139-142). It is undisputed that after Marina Pointe voluntarily implemented the precautionary measures, it passed each and every subsequent compliance check for sale of alcohol to a minor that was conducted by the Jefferson County Liquor Authority. (Tr., p. 142, l. 8-16).

From December 2002 through June 2005, representatives of the Jefferson County Liquor Authority sent Marina Pointe seven (7) letters, commending Marina Pointe for its "high standard of professionalism," and that its "refusal to make the sale (to a minor) demonstrates the assertiveness, integrity and concern for the community" of its business and employees. (Agency Record, Vo. I., Part A., pp. 79-85). It is respectfully submitted that Marina Pointe's preventative measures to prevent the sale of alcohol to a minor, and the undisputed evidence of passing all subsequent compliance checks, further confirms that Marina Pointe did not intentionally or flagrantly sell alcohol to a minor.

Sixth, the revocation is inconsistent with the Department of Revenue's prior sanctions. At the hearing, Marina Pointe entered into evidence a stipulation between the Department of Revenue and another licensee regarding the licensee over-serving an intoxicated person and the person subsequently being involved in a

single motor vehicle accident that resulted in his death. (Agency Record, Vol. I., Part A., p. 111-126). Pursuant to the stipulation, the licensee's liquor license was actively suspended for sixty (60) days, with two (2) separate thirty (30) day suspension periods. *Id.* Although the over-service of an intoxicated person is not the same as the sale of alcohol to a minor, it is submitted that a licensee's conduct of continuously selling alcohol necessary to over-serve a person is substantially more egregious. The licensee's conduct is obviously continuous, intentional and deliberate, or at the very least, reckless, and is quite different than selling alcohol to a minor in reliance upon a fraudulent identification.

Finally, the Colorado General Assembly has granted the Department of Revenue with authority to make such rules and regulations as necessary for the proper regulation and control of the sale of alcohol and the enforcement of the Colorado Liquor Code. *See* C.R.S. § 12-47-202(b). In accordance with this authority and to provide consistent statewide guidelines, the Department of Revenue promulgated Regulation 47-604. In accordance with Regulation 47-604.D., the revocation of a liquor license is not recommended unless there are four (4) sales of alcohol to a minor within a two (2) year period. Moreover, Regulation 47-604.E, sets forth the mitigating or aggravating factors for a licensing authority to consider when imposing sanctions, which include:

1. Action taken by the licensee to prevent violations, i.e., training of servers.
2. Licensee's past history of success or failure with compliance checks.
3. Corrective action(s) taken by the licensee.
4. Prior violations/prior corrective action(s) and its effectiveness.
5. Willfulness or deliberateness of the violation.
6. Likelihood of recurrence of the violation.
7. Factors which might make the situation unique, such as:
    a. Prior notification letter to the licensee that a compliance check would be forthcoming.
    b. The dress or appearance of the underage operative, i.e., the operative was wearing a high school letter jacket.
8. Licensee or manager is the violator or has directed an employee or other individual to violate the law.

It is respectfully submitted that Regulation 47-604 should apply to any sale of alcohol to a minor. The elements constituting a sale of alcohol to a minor are identical whether the sale took place during a government compliance check, or if it occurred by a member of the public-at-large. The General Assembly's prohibition of selling alcohol to a minor does not hinge on whether the sale occurred during a compliance check or not. Instead, the prohibition is a statewide public policy.

Here, when viewing the evidence in conjunction with Regulation 47-604, it is submitted that there is no escaping the conclusion that the Department of Revenue abused its discretion by revoking the liquor license. This was not the fourth violation within two years; it was the first violation in four years.

Moreover, when applying the aggravating or mitigating elements to the facts of this case, it is clear that Marina Pointe implemented preventative measures, the measures worked as it passed each and every compliance check from 2002 to 2005, and the sale of alcohol to Mr. Ondrish was not willful or deliberate, but was made in reliance upon Mr. Ondrish's intentional misrepresentations.

For these reasons, Marina Pointe submits that when considering all the evidence adduced at the hearing, and the applicable law, a reasonable person would fairly and honestly be compelled to reach a different, less severe sanction than revocation of the liquor license. Agency discretion is not unbridled, and administrative action will be reversed by a court on appeal where the actions are arbitrary and capricious. *Southland Corporation v. City of Westminster*, 746 P.2d 1353 (Colo. App. 1987); *Webster v. Board of County Commissioners*, 539 P.2d 511 (Colo. App. 1975).

If the court finds that Marina Pointe failed to prove the affirmative defense, it is submitted that the court should reverse the revocation of the liquor license and remand the case for a less severe sanction.

CONCLUSION

The Department of Revenue's discretion is not unbridled and is subject to judicial review. The erroneous agency action must be overruled in favor of a judicial determination and declaration consistent with Colorado law.

Respectfully submitted this 18th day of September, 2007.

DILL DILL CARR STONBRAKER & HUTCHINGS, P.C.

By: _____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of September, 2007, a true and correct copy of the above and foregoing **OPENING BRIEF** was served via U.S. mail to the following:

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