WORD COUNT: 7958

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 OPENING 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 opening brief.[1]

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

A. Whether the Pueblo Liquor & Beer Licensing Board, (the "Board") exceeded its jurisdiction and/ or abused its discretion in Case #08-18660 (the "August 3, 2008 case" or "Case 1"), by determining Zippers violated provisions of the Colorado Liquor Code, when the determination is based exclusively on hearsay which contains no "indicia of reliability" and is not trustworthy.

B. Whether the Board exceeded its jurisdiction and/or abused its discretion in Case #08-26238 (the "November 8, 2008 case" or "Case 2"), by determining Zippers violated provisions of the Colorado Liquor Code, when the determination is based exclusively on hearsay which contains no "indicia of reliability" and is not trustworthy.

C. Whether the District Court erred by determining an adequate record of the Board's proceedings in Case 1 and Case 2 existed to allow for meaningful judicial review.

[1] Pages of the record included in the files of the district court clerk which were forwarded to the Court of Appeals will be cited by Transaction ID and CD Rom of the Electronic Record. The page pinpoint citations are based on pages on the CD Rom.

D. Whether the District Court erred in affirming the decisions of the Board in Case 1 and Case 2 when the determinations are based exclusively on hearsay which contains no "indicia of reliability" and is not trustworthy.

II. STATEMENT OF THE CASE

A. Nature of the Case

Zippers is a Colorado limited liability company which was issued a tavern liquor license; the establishment operates in downtown Pueblo, Colorado, at 326 S. Union Ave., Pueblo, Colorado. The Board is the local licensing authority under the Colorado Liquor Code with power to approve, deny, suspend and revoke Colorado liquor licenses located within the City of Pueblo.

This is an appeal from a district court ruling in relation to a petition Zippers filed under C.R.C.P. Rule 106 (a)(4), with respect to two orders of the Board: (a) an Order in the August 3, 2008 case, finding two violations of Regulation 47-918 of the Colorado Liquor Code, (Transaction ID: 23531625; CD Rom pgs. 5-6) and (b) an Order in Case 2, the November 8, 2008 case, finding one violation of Regulation 47-918 of the Colorado Liquor Code (Transaction ID: 23531625; CD Rom Pgs. 7-8).

In this appeal, Zippers asserts that the Board must be reversed because the Orders, i*nter alia*, (1) exceeds its jurisdiction and/ or abuses its discretion as the determination in Case 1 was based exclusively on hearsay which contained no

"indicia of reliability" and was not trustworthy; (2) exceeds its jurisdiction and/or abuses its discretion in as the determination in Case 2 was based exclusively on hearsay which contains no "indicia of reliability" and was not trustworthy. Zippers asserts that the trial court erred in affirming the Board's decisions in Case 1 and Case 2 since the determinations are based exclusively on hearsay which contains no "indicia of reliability" and is not trustworthy. Lastly Zippers asserts the trial court erred in determining an adequate record of the Board's proceedings in Case 1 and Case 2 existed to permit meaningful judicial review

B. **Statement of Facts Relevant to Issues Presented for Review**

1. Procedural Background.

On August 3, 2008 and again on November 8, 2008, City of Pueblo Police stopped individuals around Union Avenue, in Pueblo, Colorado, for possession of open containers of alcohol. The Board was notified by Pueblo Police that Zippers may have violated provisions of Colorado's Liquor Code on these two separate occasions, two cases were created, and Orders to Show Cause and hearings, were set in both cases. Transaction ID: 24206714, R. 1, I. 3, pg. 1 (Case 1) – CD Rom pgs. 46-48, and Transaction ID: 24206714, R. 2, I.3, pg. 1 (Case 2) – CD Rom pgs. 49-51.

On January 21, 2009, hearings were held in relation to Case 1 and Case 2. Zippers appeared and participated at the hearing *pro se*. The individuals in Case 1

and Case 2 who were stopped by police with open containers of alcohol, did not appear at the hearings. The statements from the individuals stopped with open containers in Case 1 and Case 2 about where the alcoholic beverages had been obtained was introduced into evidence entirely by way of the hearsay testimony of Officer Petkosek.

After the hearings in both cases occurred the Board issued findings that Zippers twice violated Regulation 47-918 of the Colorado Liquor Code in Case 1 (Transaction ID: 24206714, R. 1, I. 10, p. 1); CD Rom pgs. 50-6, and also violated Regulation 47-918 once in Case 2 (Transaction ID: 24206714, R. 2 ,I. 10, p. 1.) – CD Rom pgs. 7-8.

Pursuant to C.R.C.P. 106, Zippers sought review of the Board's determinations in both cases by filing Civil Action 09CV171. Transaction ID: 23531625; CD Rom pgs. 1-4. On July 21, 2009, the District Court entered an Order finding that "the Board did not exceed its jurisdiction or abuse its discretion" in either case. Transaction ID: 26207473.

2. Factual Background

I. The following facts were established at the January 21, 2009 hearings regarding Case 1:

(a) Zippers represented itself *pro se* at the hearing for Case 1.

Transaction ID: 25058597; CD Rom pg. 72, ll. 7-16; pg. 80, ll. 4-8;

(b) Vincent Petkosek is a police officer with the City of Pueblo. Transaction ID: 25058597; CD Rom pg. 76, ll. 20-22.

(c) Officer Petkosek is the only witness the called by the City to establish Zippers violated provisions of the Colorado Liquor Code. Transaction ID: 25058597; CD Rom pg. 73, ll. 23-25 - pg. 28, ll. 1-24.

(d) On August 3, 2008, at approximately 1:49 a.m., Officer Petkosek was on duty as a Pueblo Police, and present in the vicinity of Zippers, located at 326 S. Union Avenue, Pueblo, CO. Transaction ID: 25058597; CD Rom pg. 76, ll. 23-25 – pg. 77, ll. 1.

(e) Officer Petkosek observed two females and one male standing on the side of a building, in the south-side parking lot adjacent to Zippers. One female, Tiffany Rowe, had a beer in her hand. Next to the other female, Kasey Brown, was a beer. The male party, Seth Rendlet, as the officer approached the group, stepped in front of Ms. Brown and Ms. Rowe and told Officer Petkosek that the officer "did not see anything." Transaction ID: 25058597; CD Rom pg 77, ll. 8-25 – pg. 78, ll. 1-4; pg. 79, ll. 21-25, and pg. 124, ll. 1-10.

(f) Officer Petkosek did not witness Ms. Rowe or Ms. Brown actually leave the Zippers establishment with an open container of alcohol. Transaction ID: 250558597; CD Rom pg. 77, 11. 10-21.

(g) Officer Petkosek had not anticipated, and was not prepared to testify during the hearing for Case 1. He did not have the case report he generated in Case 1, he needed to be provided a copy of his report from the City Attorney, and a recess in the hearing was necessary to allow the officer review the report and prepare to testify. Transaction ID: 25058597; CD Rom pg 73, ll. 2-25 – pg. 74, ll. 1-12. Additionally, since the officer was unprepared to offer testimony in Case 1, he failed to bring the bottles he claims were taken from Ms. Rowe and Ms. Brown. Transaction ID: 25058597; CD Rom pg. 122, ll. 10-14.

(h) Even though the officer's testimony at the hearing for Case 1 was based on the report[2] the officer generated on August 3, 2008 (Case Report 08-018660), substantial aspects of his testimony differed materially from the contents of the Officer's 08-018660 report.[3] For example:

i. Report 08-018660 does not mention the presence of a pickup truck,

[2] If report 08-018660 is not a part of the record certified, that omission needs to be rectified and report 08-018660 must be supplemented and included in the record since the officer relied upon this report to prepare for, and during his testimony.

[3] Appellant does not highlight this to suggest that the Board weighed credibility of the officer incorrectly. This is not within the judicial review provided for under C.R.C.P. 106 (a)(4). Credibility determinations of witnesses and the weight to give the evidence presented at a liquor board hearing are decisions that lie with the local liquor licensing authority and not within the province of a reviewing court. DiManna v. Kalbin, 646 P.2d 403, 404 (Colo. Ct. App. 1982) (citing Goldy v. Henry, 443 P.2d 994 (Colo. 1968)). Rather, this information is highlighted because it demonstrates precisely why the circumstances of this case required the Board to engage in at least *some* analysis of the hearsay contained in the officer's testimony.

Transaction ID: 24206714 ,R. 1, I. 2 & 3, although during his testimony, the officer repeatedly testified about the existence of a pickup truck, Transaction ID: 25058597; CD Rom pg 77-78, ll. 8-25 – pg. 8, ll. 1-3; pg. 79, ll. 21-25; and pg. 124, ll. 10.

ii. Report 08-018660 mentions at time police approached, there were 2 girls standing and 1 male standing together on the side of a building, Transaction ID: 24206714, R. 1, I. 2 & 3, but in his testimony, the officer repeatedly testified that when he approached, only 2 females were standing and one male, Seth Rendlett, was actually sitting in nearby pickup truck with the door open, and actually stepped out of the truck and blocked the officer's line of sight after the officer began to approach. Transaction ID: 25058597; CD Rom pg. 77, ll. 8-25 – pg. 78, ll. 1-3; pg. 79, ll. 21-25; and pg. 124, ll. 10.

iii. Report 08-018660 nowhere mentions that Rowe "admitted" to the officer that Rowe did not want Brown to think Rowe was "ratting" on Brown, Transaction ID: 24206714, R. 1, I. 2 & 3; during his testimony, the officer testified that was what occurred. Transaction ID: 25058597; CD Rom pg. 79, ll. 8-14;

iv. Report 08-018660 indicates Rowe "nodded head yes but said 'I

don't know'", Transaction ID: 24206714, R. 1, I. 2 & 3, although during his testimony, the officer testified that Rowe "nodded head yes, saying "No she didn't" Transaction ID: 25058597; CD Rom pg. 79, ll. 11-13.

(i) At time Ms. Rowe and Ms. Brown provided statements to the officer they were both drunk. Transaction ID: 25058597; CD. Rom pg. 120, ll. 9-12.

(j) When first questioned by the officer Ms. Brown indicated that she "didn't know anything about [the beer], [that had been] on the wall." Transaction ID: 25058597; CD Rom pg. 77, ll. 19-24.

(k) When first questioned by the officer, Ms. Rowe denied that she had an open beer, but after Officer Petkosek told Ms. Rowe that he had seen her with a beer in her hand, Ms. Rowe then stated "I won't lie to you, I walked – I got it from inside Zippers." Transaction ID: 25058597; CD Rom pg. 77, ll. 25 – pg. 78, ll. 1-7.

(l) Subsequently, the officer again spoke with Ms. Rowe, and testified that Ms. Rowe "admitted" that Ms. Brown did take the beer out of Zippers, but, because Ms. Rowe and Ms. Brown were friends, Ms. Rowe indicated to the officer with a "nod of her head" (indicating yes) Ms. Brown did take the beer out of Zippers, while at the same time,

Ms. Rowe verbalized that "No, she didn't" meaning Ms. Brown did not take the beer out of Zippers. Transaction ID: 25058597; CD Rom pg. 79, ll. 8-13.

(m) The officer recognized that Ms. Brown had "lied" to him during his encounter with her, was "denying everything, and it—then talking with [Ms.] Rowe, she told me yes, but yelled, you know, she didn't." Transaction ID: 25058597; CD Rom pg. 12, ll. 3-6.

(n) It is not clear what happened to subpoenas issued to Ms. Rowe and Ms. Brown, the individuals in Case 1 who were issued citations for open containers by Pueblo Police. At the hearing, the City Attorney had no idea what the status of the subpoenas were or whether the subpoena's had been served. Transaction ID: 25058597; CD Rom pg. 74, ll. 1-2; pg. 75, ll. 8-18; pg. 125, ll. 3-9.

(o) At the hearing on January 21, 2009 for Case 1, during the testimony of the officer, certain hearsay evidence about where Ms. Rowe and Ms. Brown got the beer they were found to be in possession of, was introduced and admitted. Transaction ID: 25058597; CD Rom pg. 77, ll. 2 – pg. 79, ll. 14.

(p) Immediately after the close of the hearing, the Board, with no analysis whatsoever, began issuing a determination that with respect to Ms.

Rowe, Zippers had violated provisions of the Colorado Liquor Code. Transaction ID: 25058597; CD Rom pg. 128, ll. 18- pg. 130, ll. 10.

(q) Prior to the Board moving forward with a determination on Count 2, the Board's attorney interjected to the Board that this was a "novel little case"; the Asst. City Attorney advised the Board:

"[T]his is kind of a novel little case here because we didn't have any of the Subpoenaed witnesses, and I thought it might be a good time to review how to treat hearsay evidence, . . . [w]e have a lot of hearsay, . . . [b]ut when you have hearsay like this, just because it's admitted doesn't mean anything, its whether—you know, it's—it's still hearsay in the sense of its reliability. If you are going to base a decision solely based on the hearsay . . . you have to make sure it is sufficiently reliable and trustworthy . . . ." Transaction ID 25058597; CD Rom pg. 130, ll. 11-25 – pg. 131, ll. 1-5.

(r) Despite its counsel advising it to analyze the hearsay as required under Industrial Claims Appeals Office v. Flower Stop Marketing Corp., 782 P.2d 13, 18 (Colo. 1989)(en banc), the record reflects that no written or verbal analysis occurred at all, before the Board determined Zippers violated the Colorado Liquor Code on two separate counts. Transaction ID: 25058597; CD Rom pg 128, ll.

18- pg. 132, ll. 8 (Count 1); Transaction ID: 25058597; CD Rom pg. 132, ll. 9- 22 (Count 2).

(s) Without any discussion or analysis of the factors cited by the Asst. City Attorney, the Board simply determined Zippers violated the liquor code on two separate counts (as to Mrs. Rowe and Mrs. Brown). Transaction ID: 25058597; CD Rom pg. 131, 23-25 – pg. 132, ll. 1-22.

(t) In affirming the Board, the district court indicated that "[w]hile it is true that the Board did not engage in any discussion regarding the reliability of the officer's hearsay testimony or make any specific verbal or written findings regarding the same, it is a reasonable inference that [the Board] acted in accordance with the advice of their counsel." Transaction ID: 26207473, Order of district court, at pg. 3-4, ¶ 11.

(u) The district court's determination that "the record reflects that in each case the Board had attempted, without success, to subpoena the individual declarants" is not supported by the record. With respect to Case 1, the City was unsure about the status of subpoenas issued, or whether the subpoena's had been served upon the declarants.

Transaction ID: 25058597; CD Rom pg 74, ll. 1-2; pg. 75, ll. 8-18; pg. 125, ll. 3-9.

II. The following facts were established at the January 21, 2009 hearings regarding Case 2:

(a) Zippers appeared and represented itself *pro se*. Transaction ID: 25058597; CD Rom pg 74, ll. 2-8.

(b) Officer Vincent Petkosek is an officer with the Pueblo Police who was working on November 8, 2008. While on patrol, Officer Petkosek was driving southbound on Union Avenue in Pueblo, Colorado , when he observed two males walking north bound on Union. Officer Petkosek observed one of these individuals with a beer in his hand. Transaction ID: 25058597; CD Rom pg. 74, ll. 21-25.

(c) These individuals were later identified as Ryan Yazzie (who was in possession of an open container of alcohol) and his brother, Alfonso Yazzie. Transaction ID: 25058597; CD Rom pg. 75, ll. 3-5.

(d) Both of the Yazzie brothers advised Officer Petkosek that they were leaving Zippers when the officer stopped them and that Ryan Yazzie had gotten the beer Officer Petkosek found him in possession of, at Zippers. Transaction ID: 25058597; CD Rom pg. 75, ll. 2-15.

(e) At the time Officer Petkosek interacted with the Yazzie brothers, both were drunk. Ryan Yazzie was "visibly intoxicated, he was swaying from side to side just visibly drunk." Transaction ID: 25058597; CD Rom pg. 78, ll. 7-9; pg. 101, ll. 11-13, ll. 18-22. Alfonso Yazzie, "wasn't as drunk as the brother [.] Alfonso [Yazzie] wasn't as drunk as the other." Transaction ID: 25058597; CD Rom pg. 102, ll. 4-7.

(f) Neither one of the Yazzie brothers were present during the hearing. Transaction ID: 25058597; CD Rom pg. 72, ll. 7-12.

(g) The City of Pueblo issued subpoenas to Ryan Yazzie and Alfonso Yazzie and at the hearing, the City Clerk represented that these subpoenas had been served on the brothers the day prior to the January 21, 2009 hearing. However, the returns of service on the subpoenas had not yet been received by the City at the time of the hearing. The Clerk indicated that the returns on the subpoenas "were probably—in the messenger mail with deliver in the morning." Transaction ID: 25058597; CD Rom pg. 72, ll. 21-25 – p. 73, ll. 1-7.

(h) At the hearing for Case 2, during the testimony of Officer Petkosek, certain hearsay evidence about where Ryan Yazzie got the beer he was found to be in possession of, was introduced and admitted, including a videotape interaction between the officer and the Yazzie

brothers. Transaction ID: 25058597; CD Rom pg. 74, ll. 21-25 – pg. 79, ll. 1-21.

(i) In affirming the Board, the district court determined that "[w]hile it is true that the Board did not engage in any discussion regarding the reliability of the officer's hearsay testimony or make any specific verbal or written findings regarding the same, it is a reasonable inference that [the Board] acted in accordance with the advice of their counsel." Transaction ID: 26207473, Order of district court, at pg. 3-4, ¶ 11.

(j) With respect to the DVD of the interaction between the officer and the Yazzie brothers, that was played during the officer's testimony, the district court concluded that the DVD was "akin to a written and signed statement." Transaction ID: 26207473, pg. 3, ¶ 10.

III. SUMMARY OF THE ARGUMENT

While judicial review of an administrative agency determination is limited, judicial review does in fact exist. The Board's determinations in Case 1 and Case 2 are based exclusively on hearsay evidence which has not been scrutinized as to reliability, and therefore cannot constitute "competent evidence" supporting the Board's determinations. The record developed is wholly devoid of any verbal or written analysis for the Board's decision and fails to adequately apprise of the basis

for the Board's decision, thereby preventing meaningful judicial review. Without consideration of the hearsay at issue, the record does not contain the substantial evidence required to determine Zippers violated provisions of the Colorado Liquor Code in Cases 1 & 2. The determinations in Case 1 and Case 2 are an arbitrary and capricious exercise of the Board's authority and the Board's determinations in both cases must be overturned.

IV. ARGUMENT

A[4]. The Board exceeded its jurisdiction and/ or abused its discretion in Case #08-18660 (Case 1), by determining Zippers violated provisions of the Colorado Liquor Code, when the Board's determination is based exclusively on hearsay which contains no "indicia of reliability" and is not trustworthy.

1. Standard of review:[5]

"C.R.C.P. 106 (a)(4) provides for judicial review of a decision of an administrative body exercising judicial or quasi-judicial functions for the limited purpose of determining whether the body exceeded its jurisdiction or abused its discretion." Jayhawk Café v. Colorado Springs Liquor and Beer Licensing Board, 165 P.3d 821, 824 (Colo. App. 2006) (citing Widder v. Durango Sch. Dist. No. 9-R, 85 P.3d 518, 526 (Colo. 2004); see also Brass Monkey, Inc. v. Louisville City Council, 870 P.2d 636, 639 (Colo. App. 1994)(reviewing decision of local liquor

[4] The same arguments applicable to this issue (A) also apply to all other issues on appeal and are incorporated in its entirety as if fully set forth therein on all other issues.
[5] In this C.R.C.P. 106 (a)(4) matter, the same standard of review is applicable to all issues on appeal.

licensing authority under C.R.C.P. 106 (a)(4)). In C.R.C.P. 106(a)(4) cases, "appellate courts review the decision of the agency rather than the trial court's findings." Full Moon Saloon, Inc. v. City of Loveland, 111 P.3d 568, 571 (Colo. App. 2005). "Judicial review pursuant to C.R.C.P. 106(a)(4) permits the reviewing court to reverse . . . only if there is 'no competent evidence' to support the decision." Coleman v. Gormley, 748 P.2d 361, 364 (Colo. Ct. App. 1987). For purposes of judicial review of administrative decisions, competent evidence is the same as substantial evidence. Colorado Municipal League v. Mountain States Telephone & Telegraph Co., 759 P.2d 40 (Colo.1988). "[T]o set aside a decision by an administrative agency, the decision must be without substantial evidentiary support in the record." Costiphx Enterprises, Inc. v. City of Lakewood, 728 P.2d 358, 360 (Colo. App. 1986). The substantial evidence standard requires that there be more than merely "some evidence in some particulars" to support an administrative body's decision. Whelden v. Board of County Commissioners, 782 P.2d 853 (Colo.App.1989).

2. Argument:

Officer Petkosek's testimony, and the hearsay contained therein, is what the Board relied upon in determining Zippers violated provisions of the Colorado Liquor Code. During the hearing in Case 1, the respective statements from Ms. Rowe and Ms. Brown about where these individuals obtained the alcoholic beverages found

in their possession on August 3, 2008 was introduced into evidence entirely by way of the hearsay testimony of the officer. The officer was the only witness called by the City to establish Zippers violated provisions of the Colorado Liquor Code and without the officer's testimony, Zippers could not have been found to have violated the Colorado Liquor Code.

As the Board's decision was based on Officer Petkosek's testimony and the hearsay statements contained therein, meaningful judicial review requires the Board to have engaged in some analysis about the reliability of the hearsay statements contained in the officer's statements. Industrial Claims Appeals Office v. Flower Stop Marketing Corp., 782 P.2d 13, 18 (Colo. 1989) (en banc)(adopting 9 non-mandatory factors to review to determine whether hearsay bears the Kirke requirement of containing an "indicia of reliability" and is otherwise "reliable, trustworthy, and probative for the purposes of an administrative hearing."); Colorado Dept. of Revenue, Motor Vehicle Division v. Kirke, 743 P.2d 16, 22 (Colo. 1987)(en banc)(indicating the law requires hearsay evidence in an administrative proceeding to "bear satisfactory indicia of reliability.")[6]; As noted

[6] Hearings before a local liquor licensing authority board are administrative in nature, see DiManna v. Kalbin, 646 P.2d 403, 405 (Colo. App. 1982)(indicating that suspension and revocation proceedings before a liquor licensing authority are administrative in nature), and therefore, citation to other administrative proceedings, such as revocation hearings before the Colorado Department of Motor Vehicles, is appropriate. Moreover, cases reviewing liquor licensing board decisions and hearings routinely make citation to other administrative proceedings outside of the liquor licensing arena. See, e.g., id. at 404 (citing Goldy v. Henry, 443 P.2d 994 (Colo. 1968), a case addressing hearing before state banking board for proposition

by the district court, in this case, the Board's findings were made without any verbal or written discussion or analysis whatsoever and its determination fails to indicate what the basis of the decision was. Obviously the Board failed to engage in any analysis to determine whether the hearsay within the officer's testimony and report had any "indicia of reliability" and was "reliable, trustworthy, and probative", things the Flower Stop Marketing case requires. The Board was well on its way to finding violations occurred in relation to Ms. Rowe, even before being advised that the Board needed to consider whether the hearsay in the officer's testimony was sufficiently "reliable."

The need for the Board to analyze whether the hearsay offered by the officer was sufficiently reliable is particularly important here, where the officer was not originally prepared to testify in Case 1, the officer did not have his report or the actual beer bottles he claimed to have obtained from the declarants, the officer needed to take a recess in order to review his report and prepare to testify, and the officer's testimony differed substantially and materially from the contents of the report he used just moments before the hearing when preparing to testify. An even greater need for the Board to analyze the hearsay offered by the officer exists in this case considering that the statements of Ms. Rowe and Ms. Brown are

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that credibility determinations lie within the exclusive province of the administrative board)(en banc); see also Jayhawk Cafe, 165 P.3d at 824 (citing Widder, 85 P.3d at 526 (regarding what judicial review under C.R.C.P. 106 (a)(4) permits).

inconsistent, their positions flip flop, the officer recognized the declarants were drunk when he interacted with them, and the officer believed that Ms. Brown had "lied" to him. In a demonstration of further inconsistent conduct, according to the officer, in one of the last interactions he had with Ms. Rowe, on the one hand Ms. Rowe "nodded her head" to indicate "yes, Ms. Brown took beer from Zippers" , while at the same time verbalizing "no" to indicate Ms. Brown had not taken beer from Zippers.

In a C.R.C.P. 106(a)(4) proceeding, a reviewing court may consider, in determining the existence of an abuse of discretion, whether the administrative agency misconstrued or misapplied the applicable law. Cooper v. Civil Service Commission, 604 P.2d 1186, 1190 (Colo. Ct. App. 1979). Given the complete failure to analyze whether the hearsay relied upon had the requisite "indicia of reliability" and was otherwise trustworthy, the Board misconstrued or misapplied applicable Colorado law. This Court can consider this failure to follow applicable Colorado law and should readily determine that the Board abused its discretion. Id.

Without anything in the record showing the Board conducted the requisite analysis, this Court's review is unduly limited and this court must reverse the decision of the administrative agency. See Geer v. Presto, 313 P.2d 980, 981-82 (Colo. 1957)(stating in part, "[i]mperfection of the determination of an administrative board which leaves no avenue for the court to take in reviewing the

matter, and 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 apprise the parties and any reviewing tribunal of the basis of the [administrative agency's] decision"; "[t]he findings and conclusion of the licensing authority should not be too uncertain for judicial interpretation").

The district court "assumed" that the Board did engage in the requisite analysis under Flower Shop Marketing, as its attorney advised, even when the record unambiguously shows no such analysis occurred. Such an approach wholly makes meaningless, judicial review of an administrative agency. The district court's assumption was made even when, by the time the Board's attorney advised the Board of the need to analyze the hearsay presented, the Board was already partly through the process of determining Zippers had violated the Colorado Liquor Code. The district court's determination that "the record reflects that in each case the Board had attempted, without success, to subpoena the individual declarants", see Transaction ID: 26207473, at pg. 3, ¶ 10, is also not supported by the record. With respect to Case 1, it is not at all clear what the status of subpoenas to Ms. Rowe and Ms. Brown were. At the hearing, the City Attorney had no idea what the status of the subpoenas were or whether the subpoena's had been served.

Lastly, even where it is determined that the Board's decision might not have rested entirely on the hearsay presented, there still does not exist, "substantial" evidence/ "competent" evidence in the record that would justify the Board's determinations in Case 1. "Competent evidence is the same as substantial evidence", Colorado Municipal League v. Mountain States Telephone & Telegraph Co., 759 P.2d 40 (Colo.1988), and the substantial evidence standard requires that there be more than merely "some evidence in some particulars" to support an administrative body's decision. Whelden v. Board of County Commissioners, 782 P.2d 853 (Colo.App.1989).

Without consideration of the hearsay, in Cases 1 & 2, the only other evidence in the record is that citizens of Pueblo were stopped with open containers of alcohol in some proximity to Zippers. Other than the hearsay, there is no evidence to conclude the open containers of alcohol came from Zippers. To this extent, the instant cases then are akin to Costphx Enterprises, Inc. v. City of Lakewood, 728 P.2d 358 (Colo. App. 1986), where this court determined allegations of permitting professional gambling on a licensed liquor establishment were not supported by the evidence in the record. Id. at 360.

The Board's decision in Case 1constitutes an arbitrary and capricious exercise of the Board's discretion and the decision must be reversed.

B. Whether the Board exceeded its jurisdiction and/or abused its discretion in Case #08-26238 (Case 2), by determining Zippers violated provisions of the Colorado Liquor Code, when the Board's determination is based exclusively on hearsay which contains no "indicia of reliability" and is not trustworthy.

1. Standard of review:

The same standard of review applies to this issue as applied to the prior issue discussed.

2. Argument

Just as in the previous discussion regarding Case 1, here in Case 2, the individual stopped with an open container was not present at the hearing and where he obtained the alcohol was presented through the hearsay testimony of the officer. The record does not contain any sworn testimony or under oath statements of Mr. Ryan Yazzie or his brother, Alfonso Yazzie. Case 2 is therefore as "novel" a situation as the Asst. City Attorney discussed with the Board in relation to Case 1, outlined above. Nevertheless, the Asst. City Attorney failed to even advise the Board, in Case 2, of the need to analyze the hearsay evidence at issue to determine whether it contained an indicia of reliability or was otherwise trustworthy. Consequently, without any analysis, discussion, or review of the requirements under Flower Stop Marketing, the Board concluded Zippers violated the liquor code by permitting the removal of alcohol from its licensed establishment. The

only evidence that could be a basis for this finding comes from out of court statements made by Mr. Yazzie and his brother, as captured on videotape and testified to by the officer.

Without the officer's testimony and presentation of the videotape, there is no doubt that Zippers would not have been found to have violated the Colorado Liquor Code in Case 2.

As the Board's decision was based on the hearsay introduced through the officer's testimony, meaningful judicial review requires the Board to engage in some analysis about the reliability of the hearsay statements contained in the officer's testimony. Flower Stop Marketing Corp., 782 P.2d at 18; see also Kirke, 743 P.2d at 22.

In this instance, the Board failed to engage in any analysis whatsoever, and its attorney, in Case 2 completely failed to advise the Board to engage in such an analysis.

The failure of the Board to follow applicable Colorado law must be considered by this court, in determining whether the Board abused its discretion. Cooper, 604 P.2d at 1190. Given the complete failure to analyze whether the hearsay relied upon had the requisite "indicia of reliability" and was otherwise trustworthy, the Board misconstrued or misapplied applicable Colorado law and abused its discretion.

Without anything in the record showing the Board conducted the requisite analysis, this Court's review is unduly limited and this court must reverse the decision of the administrative agency. See Geer, 313 P.2d at 981-82 (stating in part, "[i]mperfection of the determination of an administrative board which leaves no avenue for the court to take in reviewing the matter, and 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 apprise the parties and any reviewing tribunal of the basis of the [administrative agency's] decision"; "[t]he findings and conclusion of the licensing authority should not be too uncertain for judicial interpretation").

The district court's determination that "the record reflects that in each case the Board had attempted, without success, to subpoena the individual declarants", see Transaction ID: 26207473, at pg. 3, ¶ 10, is not supported by the record. With respect to Case 2, the City was unsure about the status of subpoenas issued and served upon the declarants, since the declarants were believed to be construction workers in Pueblo on a temporary job basis. Transaction ID: 25058597; CD Rom pg. 79, ll. 16-17; pg. 76, ll. 21-25 – pg.77, ll. 1; pg. 100, ll. 9-17; pg. 103, ll. 8-24.

Lastly, even were it determined that the Board's decision might not have rested entirely on the hearsay presented, there still does not exist, "substantial" evidence/ "competent" evidence in the record that would justify the Board's

determination in Case 2. "Competent evidence is the same as substantial evidence", Colorado Municipal League, 759 P.2d 40 (Colo.1988), and the substantial evidence standard requires that there be more than merely "some evidence in some particulars" to support an administrative body's decision. Whelden v. Board of County Commissioners, 782 P.2d 853 (Colo.App.1989).

The Board's decision in Case 2constitutes an arbitrary and capricious exercise of the Board's discretion and the decision must be reversed.

C. Whether the District Court erred by determining an adequate record of the Board's proceedings in Case 1 and Case 2 existed to allow for meaningful judicial review.

1. Standard of review:

The same standard of review applies to this issue as applied to the prior two issues discussed.

2. Argument

The burden of explaining the basis for its decision, to allow for meaningful judicial review, is placed upon the administrative agency. Geer, 313 P.2d at 981-82. The failure to develop an adequate record to permit judicial review requires reversal of the administrative board's determination. Id. Without anything in the record showing the Board conducted the requisite analysis of the hearsay offered by the officer in Case 1 and Case 2, and without any indication of what the basis of

the Board's determinations were in Case 1 and Case 2, this Court's review is unduly limited and for that reason, this court must reverse the decision of the administrative agency. See id.

The significance of the deficiencies in the record established during the hearings for Case 1 and Case 2 are particularly striking when this appeal is contrasted with other Rule 106 (a)(4) appeals that have come before this court. For example, in Tilley v. Industrial Claim Appeals Office of State of Colo., 924 P.2d 1173, 1176(Colo. Ct. App. 1996), the Colorado Court of Appeals reviewed a case where hearsay was relied upon during the course of an administrative hearing. On review, the Court of Appeals specifically noted "the hearing officer expressly acknowledged that he was relying on hearsay evidence of the security guard and her supervisor. However, his decision reflects his consideration of relevant factors in assessing the reliability and trustworthiness of the hearsay evidence presented and admitted. From our review of the record, we perceive no reversible error in his conclusion that the hearsay evidence was reliable, trustworthy, and possessed probative value . . . ."). The Tilley decision additionally commented on how during the administrative hearing, consideration was specifically given to the absence of the hearsay declarant and whether the testimony should be relied upon. Id.

In stark contrast to Tilley, the records of both Case 1 & Case 2 reflect the Board during both cases doing absolutely nothing by way of engaging in the requisite analysis required under Flower Stop Marketing. This is in sharp contrast to the searching analysis engaged upon by the administrative agency in Tilley; the analysis engaged upon by the administrative agency in Tilley permitted the Court of Appeals to engage in meaningful judicial review. In the instant cases, the Board's failure to engage in any analysis prohibits meaningful judicial review into the basis for its determinations in Case 1 and Case 2.

Another striking contrast to Tilley is that in Tilley, the administrative agency actually articulated the basis for its determination, thereby permitting this court to ensure that the administrative agency followed applicable Colorado law. Id.; see also, e.g., Cooper, 604 P.2d at 1190 (indicating that in a C.R.C.P. 106(a)(4) proceeding, a reviewing court may consider, in determining the existence of an abuse of discretion, whether the administrative agency misconstrued or misapplied the applicable law.). In the instant cases here, other than "assuming" applicable Colorado law was followed as the district court was willing to do, there is no way to ensure the Board followed applicable Colorado law in making its determinations.

In further contrast to the Tilley proceedings, in the instant cases, in its order, the district court seemed to evaluate the Flower Stop Marketing factors on its own.

Transaction ID: 26207473, pg. 3, ¶ 10- both ¶ 11's.[7] Without any analysis from the Board on the Flower Stop Marketing factors which can be reviewed, a reviewing court is cannot engage in its own analysis of the Flower Stop Marketing factors. This approach results in the district court substituting its judgment for the judgment of the administrative agency whose actions are being reviewed in this C.R.C.P. 106 (a)(4) hearing. Such an approach goes well beyond the powers of judicial review afforded under C.R.C.P. 106 (a)(4) because credibility determinations of witnesses and what weight to give the evidence presented at a liquor board hearing are decisions that lie with the local liquor licensing authority and not within the province of a reviewing court. DiManna, 646 P.2d at 404 (citing Goldy v. Henry, 443 P.2d 994 (Colo. 1968).

The Board failed to articulate any basis for its decisions in Case 1 & 2, and the district court, and this court, is left to assume and speculate on the basis for the Board's determination. There is an inadequate record to review the Board's decision and for this reason, the Board's determinations in Case 1 & 2 must be reversed. Geer, 313 P.2d at 981-82.

Cases 1 & 2 are significantly different from the facts of Full Moon Saloon. Full Moon Saloon, Inc. v. City of Loveland, 111 P.3d 568 (Colo. App. 2005). Significantly, in Full Moon Saloon, the patron later determined to be underage and

[7] The district court's order actually contains a total of 13 paragraphs, however on pg. 3, 2 ¶ 11's appear.

intoxicated, which formed the basis for finding a violation of the Colorado Liquor Code, had actually been stopped by police "immediately after leaving the bar", and after a short conversation with the police, the police detected a strong order of alcohol on her breath. Full Moon Saloon, 111 P.3d at 571. In the instant Cases 1 & 2, none of the citizens stopped by police with open containers were actually seen leaving Zippers, which was the situation in Full Moon Saloon. The issues in Full Moon Saloon would be more on point to the issues presented in Cases 1 & 2, if the underage patron in Full Moon Saloon had not been confronted "immediately" after leaving the bar, but told the police she had been served drinks at the Full Moon Saloon. In Full Moon Saloon, there was no question where the underage patron had been illegally served drinks; in the instant Cases, where the patrons obtained the open containers was only established via hearsay, not by direct observation as occurred in Full Moon Saloon. Id.

Zippers recognizes that an administrative body's exercise of discretion must be upheld by a reviewing court "unless its decision is 'so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." Jayhawk Cafe, 165 P.3d at 824 (quoting Ross v. Fire & Police Pension Ass'n, 713 P.2d 1304, 1309 (Colo. 1986)). As previously indicated, in the absence of the unanalyzed hearsay offered during the officer's testimony , Zippers asserts

that the decisions in Cases 1 & 2 are "devoid of evidentiary support" and can only be explained as an "arbitrary and capricious exercise of authority." Id.

The decisions of the Board in Case 1 and Case 2 must be reversed since the determinations can only be explained as an "arbitrary and capricious exercise of authority." Id.

D. Whether the District Court erred in affirming the decisions of the Board in Case 1 and Case 2 when the Board's determinations are based exclusively on hearsay which contains no "indicia of reliability" and is not trustworthy.

1. Standard of review:

The same standard of review applies to this issue as applied to the prior two issues discussed.

2. Argument

To avoid a due process violation, hearsay evidence relied upon must be sufficiently reliable and trustworthy. Kirke, 743 P.2d at 21. Although rules of evidence may be somewhat more relaxed in an administrative proceeding, they cannot be so relaxed that due process of law and fundamental rights are disregarded. Puncec v. City and County of Denver, 475 P.2d 359 (Colo. App. 1970). While administrative hearings need not be overly strict or unduly rigid in matters of procedure, the relaxed procedure is not a license to violate fundamental

fairness requirements of due process. Nichols ex rel. Nichols v. DeStefano, 70 P.3d 505 (Colo. App. 2002).

Here, the Board failed to engage in any analysis whatsoever required under Colorado law, even after being advised by its attorney to do so. By so doing, the Board failed to follow applicable Colorado case law. The Board failed to articulate the basis for its determinations, and an inadequate record for review exists. Without the unanalyzed hearsay being presented through the officer, there is no other evidence in the record that would justify the Board's determinations. For all of these reasons, the Board's determinations in Cases 1 & 2 are arbitrary and capricious and must be reversed.

V. REQUEST FOR ATTORNEY'S FEES AND COSTS INCURRED ON APPEAL PURSUANT TO C.A.R. 39.5

Zippers is entitled to its costs, pursuant to C.R.S. § 13-16-111.

VI. CONCLUSION

While hearsay can form the basis for substantial evidence in the record under Colorado law, nevertheless, the law requires that such hearsay evidence "bear satisfactory indicia of reliability." Kirke, 743 P.2d at 22. Because under the circumstances of these particular cases, Case 1--#08-18660 and Case 2--#08-26238, the hearsay evidence the Board relies upon for its decisions do not "bear satisfactory indicia of reliability", and the Board failed to engage in any analysis as

to whether the hearsay was sufficiently reliable, the hearsay statements in both Case 1--#08-18660 & Case 2--#08-26238 cannot constitute competent, substantial or sufficient evidence in the record upon which to justify the Board's decisions. There is an inadequate record to provide meaningful judicial review, and even in the absence of the hearsay, the record does not contain evidence to support the Board's determinations in Cases 1 & 2. For these reasons, the Board's determinations in Cases 1 & 2 must be reversed.

VII. STATEMENT REGARDING ORAL ARGUMENT

Zippers requests oral argument.

Respectfully submitted this 25th day of January, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2010, a true and correct copy of the foregoing OPENING BRIEF was sent via LexisNexis addressed to the following:

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