

S-17-441

---

NEBRASKA SUPREME COURT

---

**Stuart Kozal, d/b/a Jumping Eagle Inn;  
Arrowhead Inn, Inc., d/b/a Arrowhead Inn;  
Clay Brehmer, d/b/a State Line Liquor; and  
Sanford Holding LLC, d/b/a D&S Pioneer Services**

**Plaintiffs – Appellees,**

**v.**

**Nebraska Liquor Control Commission and  
Hobert B. Rupe, Executive Director,**

**Defendant – Appellants,**

**Abram Neumann, Lori Hankinson, Barb & David Vancil,**

**Citizen Protestants –  
Additional Appellants-  
Aligned by Court as Appellees.**

---

**Appeal from District Court, Lancaster County  
Andrew Jacobsen, Judge**

---

**Citizen Cross-Appellants' Reply Brief**

David A Domina, #11043  
DominaLaw Group pc llo  
2425 S. 144<sup>th</sup> St., Omaha, NE 68144  
402-493-4100  
ddomina@dominalaw.com  
*Citizen Protestants' Lawyer*

## Table of Contents

<b>Jurisdictional Statement .....</b>	<b>1</b>
<b>Statement of the Case .....</b>	<b>1</b>
<b>Standard of Review .....</b>	<b>1</b>
<b>Propositions of Law .....</b>	<b>1</b>
<b>Statement of Facts .....</b>	<b>2</b>
<b>Argument.....</b>	<b>4</b>
<b>Error 1: Jurisdiction was Exercised Without All Necessary Parties     Before the District Court. ....</b>	<b>4</b>
<b>Error 2: The District Court Erred by Issuing a Final Judgment Without     Notice of a Hearing on the Merits.....</b>	<b>8</b>
<b>Error 4: The District Court Erred When It Held the NLCC Acted     Beyond its Authority to Require Submission of a Special Form,     and Conduct a Hearing on Applications for License Renewal. ....</b>	<b>8</b>
<b>Conclusion .....</b>	<b>9</b>

**Table of Authorities**

*Cases*

*Bosselman, Inc. v. State*, 230 Neb 471 (1998) ..... 8, 9

*Grand Island Latin Club, Inc. v. Nebraska Liquor Control Com’n*, 251 Neb 61 (1996) ..... 5, 6

*J.S. v. Grand Island Public Schools*, 297 Neb 347 \*1\*3 (7.28.2017) ..... 1, 2, 4

*JCB Enterprises, Inc., v. Nebraska Liq. Control Com’n*, 275 Neb 797 (2008) ..... 7

*Landrum v. City of Omaha*, 297 Neb. 165 (2017) ..... 1

*Marsh & Marsh v. Carmichael*, 136 Neb 797 (1939)..... 8

*Orchard Hill Neighborhood Ass’n, v. Orchard Hill Mercantile, LLC*, 274 Neb 154 (2007)..... 9

*Pump & Pantry, Inc., v. City of Grand Island*, 233 Neb 191 (1989)..... 7

*Sanders v. Frakes*, 295 Neb 374 (2016) ..... 1

*Schwarting v., Nebraska Liq. Control Com’n*, 271 Neb 346 (2006) ..... 6

*Shaffer v. Nebraska Dept HHS*, 289 Neb 740 (2014) ..... 1, 2, 4

*Statutes*

*Neb Rev Stat § 53-116*..... 7, 9

*Neb Rev Stat § 53-117.08*..... 7

*Neb Rev Stat § 53-133*..... 4

*Neb Rev Stat § 53-135*..... 7, 8

*Neb Rev Stat § 53-135.01*..... 7

*Neb Rev Stat § 53-135.02*..... 7, 8, 9

*Neb Rev Stat § 53-1,115*..... 4, 5

*Neb Rev Stat § 53-1,116*..... 5

*Regulations*

*237 Neb Admin Code § 6-019.01* ..... 7

*Other Authorities*

*9A McQuillin Municipal Corporations § 26:215*..... 9

## **Jurisdictional Statement**

1. The Beer Stores, as Appellees, assert jurisdiction but ignore the numerous jurisdictional flaws identified in the NLCC's Brief and the Citizens' Cross Appeal:

1.1. The Citizens were necessary parties but were not named in the Petition for Review. And no summonses were served upon them in this contested case.

1.2. No notice of a Hearing on the merits was given.

1.3. The administrative record was not before the district court.

2. If necessary parties or the administrative record are not before it, the district court lacks APA appellate review jurisdiction. *Shaffer v. Nebraska Dept HHS*, 289 Neb 740 (2014). A void judgment has no legal effect. *Sanders v. Frakes*, 295 Neb 374 (2016). This Court cannot acquire jurisdiction where the district court did not have it. *Landrum v. City of Omaha*, 297 Neb. 165 (2017).

## **Statement of the Case**

3. No issue is taken with the Citizens' Statement of the Case. They stand on it.

## **Standard of Review**

4. Jurisdictional issues not involving factual disputes are determined as a matter of law. A district court judgment in an APA case is reviewed for conformity with the law, competent supportive evidence, and for absence of arbitrariness or unreasonableness. *J.S. v. Grand Island Public Schools*, 297 Neb 347 \*1\*3 (7.28.2017).

## **Propositions of Law**

5. Subject matter jurisdiction presents issues of law which may be raised by any party at any time or by the court *sua sponte*, and the action taken without jurisdiction is void. *J.S. v. Grand Island Public Schools*, 297 Neb 347 \*1\*3 (7.28.2017).

6. Failure to seek review of agency action under the *Administrative Procedure Act*, by failing to serve a summons and a copy of the petition on a necessary party, are jurisdictional flaws. Where either occurs, the district court lacks jurisdiction and its contrary judgment is void. *J.S. v. Grand Island Public Schools*, 297 Neb 347 \*1\*3 (7.28.2017).

7. Unless all necessary parties, the merits of the case, and the essential record required to be reviewed are all before it, an appellate court cannot do its work and lacks jurisdiction. *Shaffer v. Nebraska Dept HHS*, 289 Neb 740, 748 (2014).

### **Statement of Facts**

8. The Citizens described proven merit-based facts for refusing to renew the Beer Stores' liquor licenses in ¶¶ 34-57 of their Cross-Appeal Brief. Summarized they are as follows, with the Beer Stores' counter-argument noted:

¶ 34. Declining Population. **Stores - No response.**

¶ 35. No evidence of any beer sales to any Nebraska residents. **Stores - No response.**

¶¶ 36-37. Nearly all beer sales are to Reservation residents or street people; so, nearly every beer sale is a crime of selling to an intoxicated person, or aiding and abetting by selling to someone with a known plan to drive a few feet into South Dakota where possession is illegal. **Stores - No response.**

¶¶ 38-39. The road from Whiteclay is the most criminal part of the Oglala Lakota Reservation. Crimes overwhelmingly involve alcohol. **Stores - No response.**

¶¶ 40-41. Whiteclay's beer sellers promote lawlessness and harbor fugitives.

**Stores - No response.**

Enforcement of liquor laws is the number one problem in the area as the Governor's Task Force concluded. **Stores - No response.**

¶¶ 42-43. Nebraska's public policy recognizes that indigenous people suffer from alcoholism and discourages sale to them. **Stores - No response.**

¶ 44. The Oglala Sioux are represented on Nebraska's policy making agency that is charged with protecting native Americans from alcoholism. **Stores - No response.**

¶ 45. The key source of illegal alcohol is from the Applicants. **Stores - No response.**

¶¶ 46-47. The jail 200 meters from Whiteclay treats persons debauched by alcohol from the Beer Stores. Whiteclay is dangerous because of beer sales. **Stores - No response.**

¶ 48. Whiteclay beer sales are staggering, uniquely high levels. **Stores - No response.**

¶ 49. Beer Stores regularly fail test sales to minors even though the State uses Caucasian, not Native American, undercover youth. **Stores - No response.**

¶ 50. No evidence of liquor arrests presented by State Patrol. **Stores - No response.**

¶¶ 50-52. Nebraska's local, state, and liquor law enforcement head for the area could not name a single South Dakota law enforcement counterpart. **Stores - No response.**

¶ 53. No proof of convenience or necessity for the Beer Stores to Nebraskans was presented by the Applicants. **Stores - No response.**

¶ 54. The single liquor law enforcement officer is overtaxed. **Stores - No response.**

¶ 55. Rape victims in Whiteclay do not call for Nebraska law enforcement authorities because "no one will come". **Stores - No response.**

¶ 56. There was no proof of any demand for beer by any Nebraskan from the Stores. No Nebraska witness supported the Beer Stores except the owners. **Stores - No response.**

¶ 57. The Applicants "shoo" intoxicated Native Americans off their premises to avoid liquor violations for intoxicants on them. **Stores - No response.**

9. Each, any, and all, these facts justify non-renewal of each Applicant's license.

## Argument

10. The Citizens' first 3 Assigned Errors rest on 3 distinct grounds for concluding the district court lacked subject matter jurisdiction: Absent parties; no notice of hearing the merits; action without Administrative Record. The logic of the Citizens' case is simple: No parties; no notice; no Record for review = No Jurisdiction. The appealed district court judgment is void.

### **Error 1: Jurisdiction was Exercised Without All Necessary Parties Before the District Court.**

11. The Citizens' first Assigned Error demonstrates they were necessary parties to any appeal to the district court from the NLCC's Final Order. This is an *APA* contested case. *Neb Rev Stat* § 53-133. The presence of all parties is a jurisdictional requirement that cannot be waived. The plaintiffs must join all parties and serve summonses. *Shaffer v. Nebraska Dept HHS*, 289 Neb 740 (2014). Failure to seek review of agency action under the *Administrative Procedure Act*, by failing to serve a summons and a copy of the petition on a necessary party, is a jurisdictional flaw. Where it occurs, the district court lacks jurisdiction and its contrary judgment is void. *J.S. v. Grand Island Public Schools*, 297 Neb 347 \*1\*3 (7.28.2017).

12. The Beer Stores nakedly assert, "The Citizen Protestants are not parties to this case and, as such, the district court properly exercised jurisdiction over this proceeding". What follows is the Beer Stores' argument about *Neb Rev Stat* § 53-1,115(4). It provides:

- (1) A copy of the rule, regulation, or decision of the Commission denying an application or suspending, cancelling or revoking a license or of any notice required by any proceeding before it. . . shall be served upon each party of record. . . .each party appearing before the Commission shall enter his or her appearance and indicate to the commission his or her address for service. . .

- (2) . . . no appeal shall be allowed from any decision of the Commission except as provided in Section 53-1,116.

\* \* \*

- (4) **For the purposes of this section, party of record means:**
- a. **In the case of an administrative proceeding before the Commission on an application for a retail. . . license:**
    - ii. **Each individual protesting the issuance of such license pursuant to subdivision (1)(b) of section 53-133.**

*Neb Rev Stat* § 53-1,115(4) (Emphasis added.) An application for renewal of a license is an application for a license. *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Com'n*, 251 Neb 61, 66 (1996) (NLCC can demand licensee seeking renewal “to submit a long-form application . . . to renew . . .”) The NLCC exercised this power in this case.

13. The appeal procedure in *Neb Rev Stat* § 53-1,116 requires that appeals “shall be in accordance with the *Administrative Procedure Act*”. Citizen protests pursuant to § 53-133(1)(b) require a hearing on “any application for a retail license”, and must consist of “objections in writing by not less than 3 persons residing within such . . . county”, protesting the license. This requirement was met by the Citizens.

14. The Beer Stores contend the statute refers only to original licensure, and not to issuance of a license upon renewal. But, it certainly does not so state. Section 53-1,115 repeatedly refers to “any proceeding before” by the Commission, and “any rule, regulation, order, or decision of the Commission”.

15. The proceedings in this care originated before the Commission. They involved renewal of liquor licenses. If the licenses were renewed, they would be reissued, i.e., the

applicants would review them receive a new license for a new term. The Beer Stores seem to concede that a renewal application is required and that a change in circumstances can justify a decision not to issue a renewed license. Aplee Br pp 13, 14, 16. The Beer Stores' mis-cite *Grand Island Latin Club, Inc., v. NLCC*, 251 Neb 61 (1996). It supports the Citizens.

16. The Beer Stores suggest the NLCC had no jurisdiction to act as it did. They see the “renewal privilege” of a liquor license as subject to a constitutional right making it impervious to removal by the government. The Stores blur “ownership” of an asset with “possession” of a privilege.

17. But, their blurring of concepts is without legal support. Liquor licensees, cosmetologists, chiropractors, nursing homes, hospitals, nurses, physicians, lawyers, and many others hold licenses that are essential to the conduct of a trade, business, or involvement in a profession. Once the license is granted, it is a privilege. It can be taken – with due process of law. A liquor license is a nontransferable personal privilege; can be taken if public interest is not served by its continuity. Liquor licenses may be extended if they serve present or future public convenience and necessity. In 2006 this Court observed:

The Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. . . . [t]he Commission, after administrative hearing, must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. . . .

*Schwarting v. Nebraska Liq. Control Com'n*, 271 Neb 346, 351 (2006). A licensee has a *right to be heard on renewal questions*, but not a right to license renewal. The NLCC is responsible to review the number and kind of licenses, fitness of licensees, and evolving factors impacting law

enforcement, public health, welfare, necessity, convenient, and advantage. In a particular area of growth more licenses may be required, while in another there should be fewer or none.

The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic of alcoholic liquor, except as specifically delegated in the Nebraska Liquor Control Act, is vested exclusively in the [Liquor Control] Commission. *Neb Rev Stat* § 53-116. The NLCC “has broad discretion in . . . deciding whether licenses should be suspended or revoked upon violations of the liquor law.

*JCB Enterprises, Inc. v. Nebraska Liq. Control Com’n*, 275 Neb 797, 807 (2008). It would be anomalous to the point of absurdity if NLCC could police licensees at any time *except* when license renewal time rolls around and yet be responsible for renewal.

18. *Neb Rev Stat* § 53-117.08 and 237 *Neb Admin Code* § 6-019.01, authorize the NLCC to require applications before renewals. The NLCC “may at any time require a licensee to submit an application, and . . . shall at any time require a licensee to submit an application if requested in writing to do so by the local governing body.” *Neb Rev Stat* § 53-135. NLCC did this here. While renewal *may* occur automatically, there is *no right* to automatic renewal. Written protests are permitted by *Neb Rev Stat* § 53-135.01. And, when protests are made, a “contested case” is initiated. NLCC may also start the process by requiring more information, a long-form application, or a hearing. *Neb Rev Stat* § 53-135.02, amended 2 years after this Court’s decision in *Pump & Pantry, Inc., v. City of Grand Island*, 233 Neb 191 (1989), expressly declares there is no vested right to renew a liquor license.

The renewal provision provided for in [*Neb Rev Stat* § 53-135] ***shall not be construed as a vested right*** which shall in any case prevent the commission from decreasing the number of licenses to be issued within its jurisdiction.

*Neb Rev Stat* § 53-135.02 (Emphasis added.) The statute is consistent with jurisprudence from across the country. See, Citizens’ Opening Brief on Cross-Appeal, p 30 ¶ 94 *et seq.*

19. Here, problems with law enforcement justify the Commission’s decision to require a long-form application for license renewal under § 53-135. Since at least 1939, this Court has consistently characterized a license to sell intoxicants as a privilege—at least inferring that due process is required if challenges are mounted at renewal time. *Marsh & Marsh v. Carmichael*, 136 Neb 797, 801-02 (1939); *Bosselman, Inc. v. State*, 230 Neb 471, 474 (1998).

20. The Stores contend the NLCC lacked jurisdiction to proceed. The statutes reveal the lack of merit in this position. The Stores ignore the fact they did not name the Citizens in their Petition for Review. The district court failed to observe this jurisdictional defect.

**Error 2: The District Court Erred by Issuing a Final Judgment Without Notice of a Hearing on the Merits.**

**Error 3: The District Court Erred When it Decided the Case Without the Agency Record It Was Statutorily Required to Review.**

21. The Beer Stores made **no responses** to these two Errors. They have merit.

**Error 4: The District Court Erred When It Held the NLCC Acted Beyond its Authority to Require Submission of a Special Form, and Conduct a Hearing on Applications for License Renewal.**

22. The Citizens noted in their Opening Brief on Cross-Appeal, p 27 ¶ 89, that this 4th Error needs to be decided only if the Beer Stores can survive all of the first 3 Assigned Errors. If the district court lacked jurisdiction, its judgment is void and the NLCC decision stands. The time for appeal expired with the Citizens unnamed by the Beer Stores in their Petition for Review and unserved with summonses.

23. The Beer Stores contend they have an absolute right to renew their liquor licenses. But, they ignore *Neb Rev Stat* §§ 53-116 & 53-117 (Citizens Op Br 90-91). They also fail to deal with the virtually universal rule that a liquor license is a privilege, and the licensee is entitled to a hearing and a chance for renewal, but not to automatic renewal as a matter of right.

Thus, while there is contrary authority, a liquor licensee's expectation of license renewal, particularly where coupled with a substantial investment in physical improvements in the business establishment, is deemed to constitute a property interest sufficient to entitle the licensee to due process protection.

9A McQuillin *Municipal Corporations* § 26:215 (3d ed 2-17), citing *Bosselman, Inc. v. State*, 230 Neb 471, 474 (1988) and cases nationwide.

24. The Citizens concede a liquor licensee is entitled to due process of a hearing upon a license renewal application, but maintain there is no automatic right of renewal. *Neb Rev Stat* § 53-135.02; *Orchard Hill Neighborhood Ass'n, v. Orchard Hill Mercantile, LLC*, 274 Neb 154 (2007)( right to take away a license at renewal time, but requiring due process).

25. Procedurally, the Beer Stores got their day in court. They adduced no evidence to justify license renewals and an overwhelming case was presented against them. As a responsible regulator, the NLCC decided against renewal. Its decision was laid on the pilings of a prodigious evidence bridge from the shameful past to the hopeful future.

### **Conclusion**

26. It was the duty of the Beer Stores to seek review of the NLCC's decision in the manner prescribed by the *Administrative Procedures Act* and the *Liquor Control Act*. They failed to do so. The court below acted without the agency record, and without notice or all necessary parties before it. No parties; no notice; no Record = No Jurisdiction. The district

court's judgment is void. Reversal and dismissal of the Beer Stores' appeals here, and Petitions for Review in the district court are requested.

27. Even if the Citizens are wrong in their first 3 Assigned Errors, the record amply sustains the NLCC's judgment. Remand for dismissal of the Beer Stores' Petition for review is requested. This will keep the Whiteclay Beer Stores closed.

Citizen Protestants, Cross-Appellants,

By: \_\_\_\_\_

David A. Domina, #11043  
Domina Law Group pc llo  
2425 S 144<sup>th</sup> St.  
Omaha NE 68144-3267  
402 493 4100  
ddomina@dominalaw.com

*Citizen Cross-Appellants' Lawyer*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of August, 2017, I electronically filed the foregoing Citizen Appellants' Reply Brief to Beer Stores' Answer Brief using the e-filing system, which sent notification of such filing to the following attorneys of record and by emailing the Brief to:

Andrew W. Snyder, Esq.  
Chaloupka, Holyoke, Snyder, Chaloupka &  
Longoria, PC LLO  
PO Box 2424  
Scottsbluff, NE 69361  
aws@chhsclaw.net

James D. Smith, Esq.  
Solicitor General of Nebraska  
Attorney General of Nebraska  
2115 State Capitol  
Lincoln, NE 68509  
James.Smith@nebraska.gov

Office of the Attorney General  
Attn: Milissa Johnson-Wiles, Esq.  
Assistant Attorney General  
2115 State Capitol  
Lincoln, NE 68509  
milissa.johnsonwiles@nebraska.gov

---

David A. Domina, #11043

**From:** Peggy Ryan  
**Sent:** Friday, August 04, 2017 2:00 PM  
**To:** 'aws@chhsclaw.net'; 'James.Smith@nebraska.gov'; milissa.johnsonwiles@nebraska.gov  
**Cc:** David Domina; Kim Weber  
**Subject:** Whiteclay, Our File No. 15-0214

August 4, 2017

Counsel:

1. Attached is the Citizen Appellants' Reply Brief to Beer Stores' Answer Brief which was efiled with the Clerk of the Supreme Court.
2. Should you encounter problems downloading or opening this document, please contact me at (402) 493-4100.

Respectfully,

Peggy J. Ryan  
Legal Secretary  
**DOMINALAW Group pc llc**  
[www.dominalaw.com](http://www.dominalaw.com)

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

[aws@chhsclaw.net](mailto:aws@chhsclaw.net)  
[James.Smith@nebraska.gov](mailto:James.Smith@nebraska.gov)  
[milissa.johnsonwiles@nebraska.gov](mailto:milissa.johnsonwiles@nebraska.gov)

Subject: Whiteclay, Our File No. 15-0214

**From:** Johnson-Wiles, Milissa [mailto:Milissa.JohnsonWiles@nebraska.gov]  
**Sent:** Friday, August 04, 2017 2:01 PM  
**To:** Peggy Ryan  
**Subject:** Automatic reply: Whiteclay, Our File No. 15-0214

I will be out of the office until Monday, August 14. If you need immediate assistance, please contact Jodi Turner-Faust at 402-471-6609.