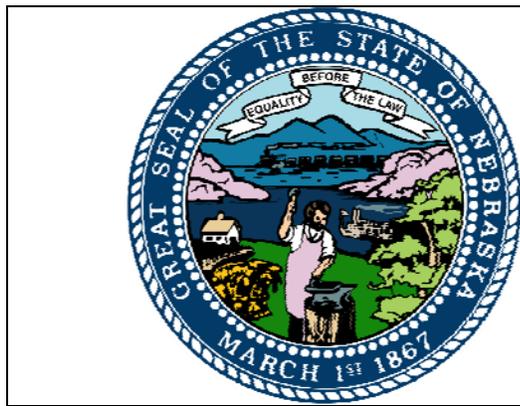


**Whiteclay Beer Store Closing Appellate Briefs
All Briefs. All Parties.**

Nebraska Supreme Court

**Kozal et al v. Nebraska Liquor Control Commission
S-17-00441**



**End of Legal Bridge
from Shameful Past to Brighter Future**

Domina Law Group pc llc proud proudly provided pro bono services to Citizens of Sheridan County, Nebraska who agreed to formally Protest renewal of four liquor licenses authorizing off premises sale of about 3.5-4.0 million cans of beer per year out of the border hamlet of **Whiteclay**.

Whiteclay liquor sales have been a black mark of shame on Nebraska's history for more than a century. As a result of an April 2017 hearing before Nebraska's governing agency, the Liquor Control Commission, the licensees were denied the privilege of renewal, and put out of business.

Inadequate law enforcement, rampant crime, and Ongoing contributions to criminal activity in Whiteclay's bordering community, Pine Ridge SD with a Native American Reservation population of 40,000 persons, were all proven as a result of the Citizens' case, presented by **Dave Domina** on their behalf.

The Beer Stores appealed. All appellate Briefs filed by the Nebraska Attorney General's Office, the Beer Stores and **Domina Law Group pc llc** for the Citizen Protestants, follow. The Briefs can be accessed with the bookmarks to the left.

S-17-441

IN THE NEBRASKA SUPREME COURT

STUART KOZAL, d/b/a JUMPIN EAGLE INN, et al.,

Petitioners-Appellees,

v.

NEBRASKA LIQUOR CONTROL COMMISSION,

Respondent-Appellant,

and

**ABRAM NEUMANN, LORI HANKINSON, BARB and DAVID
VANCIL, (“Citizen Protestants”),**

Appellants.

**Appeal from the District Court of Lancaster County, Nebraska
Andrew Jacobsen, District Judge**

**BRIEF OF APPELLANT,
NEBRASKA LIQUOR CONTROL COMMISSION**

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Table of Contents

Table of Authorities	ii
Jurisdiction.....	1
Statement of the Case	2
A. Nature of the Case.....	2
B. Issues before the District Court.....	3
C. How Issues Were Decided in the District Court.....	2
D. Scope of Review.....	3
Assignments of Error.....	4
Propositions of Law	4
Statement of Facts.....	6
Summary of Argument	15
Argument.....	17
A. Assignment of Error 1: Court did not have jurisdiction.....	17
B. Assignment of Error 2: District Court erred by applying incorrect standard of review	22
C. Assignment of Error 3: District Court erred in vacating Commission’s order by erroneously concluding the Commission acted beyond its legal authority	25
Conclusion.....	28
Certificate of Service	29

TABLE OF AUTHORITIES

CASES

<i>Bell Fed. Credit Union v. Christianson</i> , 237 Neb. 519, 466 N.W.2d 546 (1991)	25
<i>Conroy v. Keith Cty. Bd. Of Equalization</i> , 288 Neb. 196, 846 N.W.2d 634 (2014)	5
<i>In re Estate of Evertson</i> , 295 Neb. 301, 889 N.W.2d 73 (2016)	5, 17
<i>Langvardt v. Horton</i> , 254 Neb. 878, 581 N.W.2d 60 (1998)	5, 23
<i>Law Offices of Ronald J. Palagi v. Dolan</i> , 251 Neb. 457, 558 N.W.2d 303 (1997)	6, 24
<i>Mauer v. Weaver</i> , 213 Neb. 157, 328 N.W.2d 747 (1982)	3, 7
<i>Med. Creek LLC v. Middle Republican Nat. Res. Dist.</i> , 296 Neb. 1, 892 N.W.2d 74 (2017)	6, 24
<i>Nebraska Dep't of Health & Human Servs. v. Weekley</i> , 274 Neb. 516, 741 N.W.2d 658 (2007)	5, 17, 22
<i>Shaffer v. Nebraska Dep't of Health & Human Servs.</i> , 289 Neb. 740, 857 N.W.2d 313 (2014)	3-4, 18, 21
<i>Stewardt v. Nebraska Department of Revenue</i> , 294 Neb. 1010, 885 N.W.2d 723 (2016)	6, 26-27
<i>Woodward v. Lahm</i> , 295 Neb. 698, 890 N.W.2d 493 (2017)	4, 17
<i>Zwygart v. State Bd. Of Pub. Accountancy</i> , 270 Neb. 41, 699 N.W.2d 362 (2005)	25

STATUTES

Neb. Rev. Stat. § 25-1912 (Reissue 2008)..... 1

Neb. Rev. Stat. § 53-101.05 (Reissue 2010)..... 27

Neb. Rev. Stat. § 53-124(9) (Reissue 2010) 7

Neb. Rev. Stat. § 53-133 (Reissue 2010)..... 9, 19

Neb. Rev. Stat. § 53-133(1)(b) (Reissue 2010)..... 20

Neb. Rev. Stat. § 53-135 (Reissue 2010)..... 26

Neb. Rev. Stat. § 53-135.02 (Reissue 2010)..... 26

Neb. Rev. Stat. § 53-1,115(1) (Reissue 2010) 20

Neb. Rev. Stat. § 53-1,115(4) (Reissue 2010) 19

Neb. Rev. Stat. § 53-1,116 (Reissue 2010)..... 18

Neb. Rev. Stat. § 84-917(2) (Reissue 2014) 2

Neb. Rev. Stat. § 84-917(2)(a-b) (Reissue 2014)..... 19

Neb. Rev. Stat. § 84-917(4) (Reissue 2014) 2, 7, 23

Neb. Rev. Stat. § 84-917(5)(a) (Reissue 2014)..... 23, 25

Neb. Rev. Stat. § 84-918 (Reissue 2014)..... 1

Jurisdiction

This is an appeal under the Nebraska Administrative Procedure Act (“APA”) from a judgment by the District Court of Lancaster County vacating the order of the Nebraska Liquor Control Commission (“Commission”) and remanding to the Commission with directions to renew the liquor licenses of the four Appellees, Stuart Kozal, d/b/a Jumping Eagle Inn, et al. (collectively “Beer Stores”). Because the district court lacked jurisdiction to enter its judgment, the Commission seeks the vacating of the district court judgment and remand with directions to dismiss the Beers Stores’ APA petition with prejudice for the reasons stated in the Argument section of this brief in support of the first assignment of error.

This Court has jurisdiction over this appeal. Neb. Rev. Stat. § 84-918 provides for appeals from district court final orders or judgments in APA cases “in the manner provided by law for appeals in civil cases.” Neb. Rev. Stat. § 25-1912 provides for appeals in civil cases by filing a notice of appeal and paying the appeal docket fee within thirty days of entry of the district court judgment. The district court’s final order that is the subject of this appeal was file-stamped by the clerk of the district court on April 27, 2017. (T18) The Commission perfected this appeal by timely filing its notice of appeal and paying the appeal docket fee on April 27, 2017.

Statement of the Case

A. Nature of the Case

This is an appeal from a district court judgment under the Nebraska Administrative Procedure Act.

B. Issues in the District Court

After a hearing before the district court on a motion to stay filed by the appellee Beer Stores during the pendency of APA district court review proceeding, the district court concluded that the issue was not whether the Beer Stores should be granted a stay of the Commission's final agency order. Rather, the district court concluded, *sua sponte*, that the issue was whether the Commission's final order was "void on its face" and should be vacated.

(T19)

C. How the Issues Were Decided in the District Court

The district court entered a seven-page order that concluded and ordered as follows:

- The Commission's order denying liquor licenses to the appellee Beer Stores was arbitrary, unreasonable, exceeded statutory authority, and was contrary to law.
- The Commission's order was vacated.
- The Commission was ordered to allow the Beer Stores to renew their liquor licenses upon application by the online process.
- The district court stated that its findings and conclusions were made "[a]fter a *de novo* review and making independent findings of facts . . . based on the face of the [Commission's] order". (T19) (Emphasis added.)

(T18-24)

The district court's judgment was entered without the district court reviewing or having the benefit of the official record of the Commission's hearing, even though nearly a full month remained for the agency hearing record to be prepared and filed with the district court as provided by Neb. Rev. Stat. § 84-917(4). After the district court entered its judgment, the 10 volume bill of exceptions and one volume transcript of the agency's official record were filed with the district court. The Commission's official record will be submitted to this Court for its review in accordance with *Maner v. Weaver*, 213 Neb. 157, 163-163, 328 N.W.2d 747 (1982) (agency hearing record must be reviewed by the court and is considered as being before the court without the need for it to be formally offered in evidence in the district court).

The district court's judgment was also entered despite the fact that all parties of record in the Commission's hearing proceedings were not made parties in the APA district court petition filed by the appellee Beer Stores. Nebraska Rev. Stat. § 84-917(2) requires all parties of record in the agency's proceedings to be made parties to the district court proceedings for review for the Commission's order. Citizen Protestants Abram Neumann, Lori Hankinson, Barb and David Vancil, all of whom were parties in the Commission's proceedings, were not made parties in the district court proceedings. The Citizen Protestants have filed their own timely appeal to this Court from the district judgment.

D. Standards of Review

When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower court. *Shaffer v. Nebraska Dep't of Health & Human Servs.*, 289 Neb. 740, 857 N.W.2d 313 (2014).

The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

Assignments of Error

1. The district court erred by entering a judgment without jurisdiction.
2. The district court erred by applying an incorrect standard of review.
3. The District Court erred in vacating the Liquor Control Commission's order by erroneously concluding that the Commission acted beyond its legal authority.

Propositions of Law

I.

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

Woodward v. Lahm, 295 Neb. 698, 890 N.W.2d 493 (2017).

II.

Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.

Nebraska Dep't of Health & Human Servs. v. Weekley, 274 Neb. 516, 741 N.W.2d 658 (2007).

III.

The Supreme Court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order, to vacate a void order, and, if necessary, to remand the cause with appropriate directions.

In re Estate of Evertson, 295 Neb. 301, 889 N.W.2d 73 (2016)

Conroy v. Keith Cty. Bd. of Equalization, 288 Neb. 196, 846 N.W.2d 634 (2014).

IV.

Under the Administrative Appeal Act, district courts have only one standard of review for contested cases, which review shall be conducted by the court without a jury *de novo* on the record of the agency.

Langvardt v. Horton, 254 Neb. 878, 581 N.W.2d 60 (1998).

V.

The use of an incorrect standard of review by the district court in an Administrative Appeal Act proceeding is plain error and requires the appellate court to remand the cause to the district court. It is a logical impossibility for an appellate court to review

the district court judgment for errors appearing on the record if the district court incorrectly limited its review and, thus, failed to make factual determinations, as it must under a de novo on the record review. The district court's and an appellate court's standards of review are interdependent.

Med. Creek LLC v. Middle Republican Nat. Res. Dist., 296 Neb. 1, 892 N.W.2d 74 (2017).

Law Offices of Ronald J. Palagi v. Dolan, 251 Neb. 457, 558 N.W.2d 303 (1997).

VI.

Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to an interpretation to ascertain the meaning of words which are plain, direct, and unambiguous.

Stewart v. Nebraska Department of Revenue, 294 Neb. 1010, 885 N.W.2d 723 (2016).

Statement of Facts

Liquor Control Commission Hearing Record

A preliminary explanation should assist the Court's understanding of the Commission's hearing record and citations to the record. An agency contested hearing was held before the Nebraska Liquor Control Commission on April 6, 2017, regarding the applications of Arrowhead Inn, Inc. dba Arrowhead Inn, Stuart Kozal dba Jumping Eagle Inn, Clay Brehmer and Daniel Brehmer dba State Line Liquor, and Sanford Holding LLC dba D & S Pioneer Service (collectively, the "Beer Stores") for Class "B" (Off-sale beer) licenses in Whiteclay, Nebraska, for the license year from May 1, 2017, through April 30, 2018. (Commission Transcript pp. 193-200, same as this Court's transcript @ T5-12). The Commission heard testimony from 16 witnesses and reviewed 62 exhibits related to these applications (*Id.*, T6-8).

The Commission's official hearing record, certified by the Commission pursuant to Neb. Rev. Stat. §. 84-917(4), includes the evidentiary and procedural record of the foregoing proceedings held before the agency related to these applications. The Commission's official record will be submitted to this Court for its review in accordance with *Mauer v. Weaver*, 213 Neb. 157, 163-163, 328 N.W.2d 747 (1982) (agency hearing record must be reviewed by the court and is considered as being before the court without the need for it to be formally offered in evidence in the district court).

In an effort to comply with the Supreme Court's rules on briefs and to avoid confusion, the references to exhibits and testimony in the agency record in this brief will cite directly to the Commission's hearing record. The Commission's file related to each application filed by the licensees was received in evidence as Exhibits 1, 2, 3 and 4, respectively. Because each of those exhibits contain mainly duplicate or identical documents, references to those documents will be to Exhibit "1" only, unless otherwise noted.

Liquor Control Commission Hearing Procedure

A preliminary explanation of the "long-form" liquor licensing process should assist the Court in understanding the facts. In early 2016, the Beer Stores in Whiteclay automatically renewed their Class "B" licenses for the upcoming license year (E1, 10; E2, 12; E3,12; E4, 11). The license year for Class "B" liquor licenses is May 1 through April 30. See, Neb. Rev. Stat. §53-124(9) (Reissue 2010). During its November 1, 2016, public meeting (E175, 10), the Commission was provided with information that law enforcement in Whiteclay may not be adequate. Specifically, the Commission was presented with Sheridan County Sheriff call logs for April 2016, information from the Nebraska State Patrol regarding hours spent in Whiteclay

in previous years, and a transcript of testimony given by Sheridan County Commissioner Jack Anderson before the General Affairs Committee of the Nebraska Legislature on October 11, 2016 (Commission Transcript 1-8). Commissioner Anderson had testified that Sheridan County “absolutely [did] not” have adequate resources to provide law enforcement in Whiteclay. (E1, 193). Upon considering the information in conjunction with the Commission’s regulatory duties and authority, the Commission directed the Beer Stores to file a “long-form” application in lieu of automatic renewal for the license year beginning May 2017 (Commission Transcript 1-8). The Commission noted that there was a question of the adequacy of existing law enforcement (Commission Transcript 1-8).

The Beer Stores complied with the Commission and filed the applications (E1, 14; E2, 13; E3, 14; E4,12). After the applications were filed, the Commission’s normal license application process followed. The license applications were sent by the Commission to the local governing body, the Sheridan County Board, so that the county could weigh in on the applications if it chose to do so.

The Sheridan County Board of Commissioners held a public hearing on January 5, 2017 (E1, 50-52). At this hearing, 35 individuals testified in opposition to the renewal of the liquor licenses, citing a variety of concerns occurring in Whiteclay related to the sale of alcohol (401:15-402:4). Regardless of the considerable community opposition, the County Board voted to recommend approval of liquor licenses for the Beer Stores and submitted its recommendations to the Commission. The County Board’s recommendation was made without the benefit of any testimony from the county sheriff or any other evidence regarding the actual law enforcement/resources dedicated to Whiteclay. (351:21-23; 402:5-14; 405:4-16).

The Commission next received 14 written citizen protests in opposition to the licenses (E1, 77-111). The nature of the protests alleged lack of adequate law enforcement, public intoxication, public health and safety issues, and the sale of alcohol contributing to problems on the neighboring Pine Ridge Reservation. (*Id.*) Citizen protests require a contested Commission hearing under Neb. Rev. Stat. § 53-133. Because of the citizen protests, as well as the prior November public meeting material about inadequate law enforcement, the Commission scheduled a contested hearing on the Beer Stores' license applications for March 7, 2017, which hearing was subsequently continued to April 6, 2017. (E1, 2; E1, 5-6)

Prior to the contested hearing on April 6, 2017, numerous pre-hearing motions were filed by the Citizen Protestants and the Beer Stores, all of which were considered and ruled on by the Hearing Officer (Commission Transcript, pp. 111-192). The Liquor Commission scheduled a special hearing on April 19, 2017 to deliberate and vote on the applications. An Order was entered on April 24, 2017, denying the applications (Commission Transcript, pp. 193-200, same as this Court's transcript @ T5-12).

Evidence at the Commission's Contested Hearing

The Citizen Protestants who have appealed to this Court all personally appeared and participated in the hearing by their attorney of record presenting evidence, examining and cross-examining witnesses, entering into stipulations, and making arguments. The Commission's Hearing Officer referred to and treated the Citizen Protestants as "parties". (Commission BOE, Vol I, p14:10-22:22; Commission BOE, *passim*)

Also testifying on behalf of the Citizen Protestants were Judi Gaiaschkibos (Executive Director of the Nebraska Indian Affairs Commission), Tatewin Means (Attorney General of

the Ogallala Sioux Tribe), John Miasch (former Assistant Attorney General for the Oklahoma Attorney General's Office), and James Jones (Law Enforcement Officer, National Liquor Law Enforcement Association). The Commission additionally heard testimony from Major Kyle Otte of the Nebraska State Patrol, Investigator Rob Jackson of the Nebraska State Patrol, Sheridan County Sheriff Terry Robbins, Sheridan County Commissioner James Krotz, and Licensees Clay Brehmer, Steve Sanford, Stuart Kozal, and Jason Schwarting. Finally, a number of exhibits were received. A summary of the evidence before the Commission follows.

Life in Whiteclay with the Liquor Licenses

Whiteclay has a population of nine residents and is located within short walking distance of the Pine Ridge Indian Reservation in South Dakota. (87:24-88:2; 39:20-40:4) Alcohol is illegal on the Reservation. (46:15-18)

The Beer Stores have collectively held off-sale, beer only liquor licenses in Whiteclay, Stuart Kozal has held his license since 1987 (E2, 10); Jason Schwarting since 2006 (E1, 9); Clay Brehmer and Daniel Brehmer since 2001 (E3, 10); and Sanford Holdings LLC since 2008 (E4, 10). Combined, the Beer Stores received and sold 331,416 gallons of beer from wholesalers in the one-year period from July 1, 2015 through June 30, 2016. (E143, 1)

Abram Neumann, a Whiteclay citizen resident protesting issuance of the licenses, testified about his observations of alcohol consumption and activity on the streets of Whiteclay. Neumann has lived in Whiteclay for two years. (77:16-19) As part of his job with the Lakota Hope Ministry, Neumann works the streets to help individuals who are sometimes referred to as "the street people". (78:9-12; 79:17-19) Neumann testified that these individuals hang out in the streets and consume alcohol from the Beer Stores, beginning in the morning

hours, and that many drink to the point of passing out. (84:4-10; 79:23-80:3; 92:16-93:1; 115:11-23) Neumann has observed many individuals intoxicated on the streets (84:24-85:3). He has observed individuals drinking open containers of alcohol on the streets and in vehicles. He recounted the sale of liquor to a visibly intoxicated individual by an employee at Jumping Eagle Inn. (95:15-97:20). Neumann has observed so many other liquor sales to so many other visibly intoxicated individuals that he couldn't estimate how many. (109:13-19; 114:4-11) Neumann has also observed "daily" urination and defecation occurring on Whiteclay's streets. (109:25-110:14)

Neumann has needed to intervene in fights and has provided assistance to individuals who have been in fights or injured themselves while intoxicated. (84:13-20) Neumann has seen violence in the streets, which violence increases as the day progresses to the point that it is dangerous to be on the streets at night. (85:7-21; 96:5-17) His experiences on the streets of Whiteclay are what he described as common. (100:7-14)

Neumann testified that law enforcement appears in Whiteclay about once a week. (85:22-86:5) When Neumann called for law enforcement assistance, he has received delayed responses, if at all. (86:15-87:11; 114:21) He experienced one incident when he was in danger himself and called 911, but the response from law enforcement was too delayed for any immediate assistance. (86:23-87:11)

Bruce BonFleur, a resident of Whiteclay, also testified. BonFleur is the director of Lakota Hope Ministry and has lived in Whiteclay for seven years. (165:20-25) He has ministered on the streets of Whiteclay for over 13 years. (165:22-23) BonFleur has observed intoxicated individuals on the streets of Whiteclay "thousands" of times. (178:15-19) In his

view, nearly everyone on the street is intoxicated. (180:1-3) He has observed individuals passed out from intoxication. (180:3-7) He observes open containers of alcohol on public property “all of the time,” and “dozens and dozens a day”. (180:8-18) He has seen fights (180:21), public urination and defecation (185:7-11), empty cans of beer on the streets. (197:5-19) Response times from law enforcement are delayed due to the size of the county. (182:15-24) Sometimes he would see law enforcement three to five times per week, others once or twice. (183:12-184:6) BonFleur has not observed regular law enforcement patrols in Whiteclay. (184:7-10)

BonFleur is a member of the Governor’s Task Force related to issues surrounding Whiteclay. (166:5-8) BonFleur advised that the number one recommendation coming out of the task force was additional law enforcement. (169:14-16)

Marsha BonFleur has lived in Sheridan County for 14 years and Whiteclay for seven of those years. (200:12-14) She once heard a woman screaming then witnessed her “staggering” up the dirt road outside of Jumping Eagle Inn, being followed by six men who were laughing and yelling sexual insults at the woman. (200:22-201:5) The woman told Ms. BonFleur that she had been gang raped. (201:14-16) When Ms. BonFleur asked if she could call the Sheriff, the woman refused, saying that it would take too long for them to arrive, and “they wouldn’t do anything anyway”. (201:16-19)

Ms. BonFleur witnessed another woman passed out on the edge of the road near the Pioneer beer store, with her jeans down around her ankles and her underwear below her knees. (201:22-202:2) People were walking by the woman as Ms. BonFleur went to her aid. (202:2-5) On yet another occasion, Ms. BonFleur observed a woman lying in the parking lot of State

Line Liquor, screaming “just let me die”. (203:5-9) Nobody from State Line or any other business came out to see what was wrong. (203:9-11)

Like Mr. Neumann and Mr. BonFleur, Ms. BonFleur has also observed consumption of alcohol on the public streets, “every day, 365 days a year”. (204:3-5) She has witnessed fights, sometimes with weapons. (204:6-8) She has witnessed people driving while intoxicated (204:11) She has witnessed loitering, panhandling, urinating, defecating, vomiting, and people having sex. (206:19-21) She has witnessed Sheridan County law enforcement drive past people who are passed out on the street. (204:17-19) It is Ms. BonFleur’s view that the activity occurring on the streets of Whiteclay would not be tolerated in any other community in Sheridan County, or anywhere else. (204:8-10)

Sheriff Terry Robbins, Sheridan County Sheriff, testified regarding his resources and law enforcement presence in Whiteclay. Sheridan County is approximately 36 miles wide and 69 miles long. (352:13-16) Sheriff Robbins testified that patrolling this geographical area is a challenge as he testified to the declining number of deputy sheriffs in the county. (352:17-20) He currently has one chief deputy and three other deputies for the county. (306:21-23) He had five deputies in 2015. (308:7-8) In the early 80s, the Sheriff’s Office had eight deputies. (304:16-18)

Sheriff Robbins has generally been unable to keep a full staff of deputies due to the pay and the rural nature of his county. (305:16-24) The county increased his budget to allow him to hire another deputy in 2017 - if he can find one. (308:15-19)

Since the Sheriff's Office is in Rushville, response times to Whiteclay are generally 20 minutes if the speed limit is followed. (311:5-9). Summaries of sheriff call logs show response times are typically longer than 20 minutes. ((E147, E152)

Sheriff Robbins has not kept a record of the time he and his deputies have spent in or responding to Whiteclay prior to November, 2016. (312:6-9; 324:23-325:2; 365:15-20) The log shows that sheriff's officers have 56 total hours per month for all purposes from November 2016 through January 2017. (E155, 6-10) By contrast, Sheriff Robbins testified that he has dedicated enforcement in Rushville - because Rushville pays for law enforcement protection. (321:1-5)

When Sheriff Robbins sees individuals in possession or consuming alcohol on public property in Whiteclay, he makes them "pour it out". (354:19-355:3) Sheriff Robbins has observed individuals passed out on the street from the consumption of alcohol (359:11-23). When he or his deputies go to Whiteclay during later hours, they expect to find individuals who "had had too much to drink, either passed out or went to sleep or whatever—get them up; see if they need medical attention" or try to get them home. (313:18-314:3) He observes empty cans of beer on public streets or private property throughout the day, when he is there. (360:2-22)

From 2002 to 2015, the Nebraska State Patrol documented an average of 256 hours per year that the Patrol provided assistance in to Whiteclay, Nebraska. (E177) These hours were generally spent assisting local law enforcement, civil disorder, security at protests, and some routine patrol. (*Id.*) According to their records, the Patrol spent 55 to 56 total hours in Whiteclay in 2015. (229:6-8) Non-investigative services hours increased to 376 in 2016, partly

funded by a temporary grant to address public safety concerns “in and around” Whiteclay. (E177) During the increase in hours, Patrol had a limited six week period of enforcement efforts that resulted in 66 arrests, 13 for open containers and drinking on public property, and others for driving under the influence of alcohol and drug violations. (*Id.*)

Investigator Rob Jackson is the Nebraska State Patrol investigator assigned to liquor law enforcement in the Troop area encompassing Whiteclay. (259:9-11; 260:6-9) His territory, for one officer, is 276 liquor licenses spanning 11 counties. (267:9-23) His duties include enforcing liquor regulations, conducting alcohol and tobacco compliance checks, and following up on complaints received against a liquor establishment. (259:15-20). He does not have regular patrol hours in Whiteclay (280:7-10). Spread so thin, Investigator Jackson does his job by attempting to conduct one liquor license premise inspection and one sale to minor compliance check per year. (260:12-18). But, in general, he relies on local law enforcement to conduct its own oversight of liquor licenses to make sure that liquor laws, such as sales to visibly intoxicated, sales after hours and disturbances, are being complied with by licensees. (293:14-294:4)

Summary of Argument

The district court’s judgment was entered without jurisdiction because the appellee Beer Stores failed to include in their district court APA appeal all parties of record from the Commission’s contested case hearing. The Administrative Appeal Act requires all parties of record in the agency proceeding to be named as parties in the district court APA appeal

proceedings. By this Court's case law, this Court must reverse and direct the district court to dismiss the case.

Assuming solely for the sake of argument that the district court had jurisdiction, the district court applied the incorrect standard of review by failing to conduct the required "de novo on the record" review of the Commission's official record of the case. This Court has consistently reversed, by plain error, when a district court applies the wrong standard of district court review in APA appeals.

Finally, assuming solely for the sake of argument that the district court had jurisdiction and applied the correct standard of APA review, the district court erred by concluding that the Commission acted beyond its legal authority by denying liquor licenses to the appellee Beer Stores. The Nebraska Liquor Control Act requires the Act to be "liberally construed" to for the public "health, safety, and welfare", including "temperance in the consumption of alcoholic liquor . . . by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor." The plain and ordinary meaning of the Act provides that liquor licenses are a privilege, not a vested right, and that the Commission "may at any time" require licensees to submit an application. The Act also provides, in plain language, that liquor licenses may be denied by the Commission when not "required by the present or future public convenience and necessity" and upon consideration of the "adequacy of law enforcement". The Commission made both of the latter conclusions after a contested hearing.

The Commission's hearing record showed a massive volume of liquor distribution by the Beer Stores without adequate law enforcement with a corresponding epidemic pattern of alcohol related criminal activity and intoxication that would have been impressive in Chicago

in the Roaring Twenties. But, this all had been occurring in Whiteclay, Nebraska, population 9. The Commission carried out its public regulatory responsibility within its statutory authority to deny liquor licenses to the Beer Stores.

Argument

A. Assignment of Error 1: District Court did not have jurisdiction.

There are some basic jurisdictional principles when reviewing a final judgment entered by a district court in an Administrative Procedure Act appeal when there is the issue of whether the district court acted without jurisdiction. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Woodward v. Labm*, 295 Neb. 698, 890 N.W.2d 493 (2017). Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute. *Nebraska Dep't of Health & Human Servs. v. Weekley*, 274 Neb. 516, 741 N.W.2d 658 (2007). The Supreme Court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order, to vacate a void order, and, if necessary, to remand the cause with appropriate directions. *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016); *Conroy v. Keith Cty. Bd. of Equalization*, 288 Neb. 196, 846 N.W.2d 634 (2014).

The failure of the appellee Beer Stores to include the Citizen Protestants Abram Neumann, Lori Hankinson, Barb and David Vancil as parties to the district court Administrative Procedure Act appeal deprived the district court of jurisdiction. Generally, the presence of necessary parties to a suit is a jurisdictional matter that cannot be waived by the

parties; it is the duty of the plaintiff to join all persons who have or claim any interest that would be affected by the judgment. *Shaffer v. Nebraska Dep't of Health & Human Servs.*, 289 Neb. 740, 857 N.W.2d 313 (2014). The omission from a district court APA proceeding of a party of record in the administrative agency contested case means a district court does not have jurisdiction to review the administrative agency decision. See, *Shaffer v. Nebraska Dep't of Health & Human Servs.*, *supra* (district court judgment vacated for lack of jurisdiction because the APA petitioner failed to include in the district court APA proceeding all who were parties of record in the agency hearing proceeding).

Section 53-1,116 of the Nebraska Liquor Control Act requires that appeals from orders of the Liquor Commission denying or refusing to renew liquor licenses shall be in accordance with the Administrative Procedure Act:

Any order or decision of the commission granting, denying, suspending, canceling, revoking, or renewing or refusing to suspend, cancel, revoke, or renew a license, special designated permit, or permit for the sale of alcoholic liquor, including beer, may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act.

Neb. Rev. Stat. § 53-1,116 (Reissue 2010).

The Administrative Procedure Act requires that in district court proceedings for judicial review of a final decision by an administrative agency in a contested case,

Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final

decision by the agency. *All parties of record shall be made parties to the proceedings for review.* . . .

A petition for review shall set forth: . . . (iii) identification of the final decision at issue together with a duplicate copy of the final decision; (iv) identification of the parties in the contested case that led to the final decision; . . .

Neb. Rev. Stat. § 84-917(2)(a)-(b) (Reissue 2014) (Emphasis added).

As explained below, individuals in the local community have an important role in Nebraska’s statutory scheme for liquor licensing and Commission hearings on liquor licenses, including the power to initiate and participate as parties in the licensing hearing process. In this case, the Citizen Protestants were instrumental in initiating the hearing process and were “parties of record” at the Commission hearing.

Section 53-1,115(4) of the Nebraska Liquor Control Act provides the following explanation of who is a party of record for proceedings before the Commission:

[P]arty of record means:

(a) In the case of an administrative proceeding before the commission on the application for a retail . . . license:

(i) The applicant;

(ii) *Each individual protesting the issuance of such license pursuant to subdivision (1)(b) of section 53-133;*

(iii) The local governing body if it is entering an appearance to protest the issuance of the license or if it is requesting a hearing pursuant to subdivision (1)(c) of section 53-133; and

(iv) The commission.

(Emphasis added.)

Neb. Rev. Stat. § 53-133(1)(b) provides for agency hearings involving individuals protesting issuance of a license as follows:

(1) The commission shall set for hearing before it any application for a retail license . . . relative to which it has received:

...

(b) . . . objections in writing by not less than three persons residing within such city, village, or county, protesting the issuance of the license

(2) Hearings upon such applications shall be in the following manner: Notice indicating the time and place of such hearing shall be mailed or electronically delivered to the applicant, the local governing body, each individual protesting a license pursuant to subdivision (1)(b) of this section

The Commission’s order that was attached to the Beers Stores’ APA petition reflects that the Citizen Protestants were parties to the Commission’s contested hearing proceedings. The order stated that the “hearing was held due to the existence of citizen protests and further to determine whether there is adequate law enforcement in Whiteclay.” (T5) The Commission’s order listed the names of the Citizen Protestants, all of whom were present at the hearing and represented by their attorney Dave Domina. (T5) The Certificate of Service for the order shows it was served on Attorney Dave Domina, which service was required to comply with the requirement of Section § 53-1,115(1), quoted above, for service upon the attorney of record for each party of record to the Commission hearing proceeding. (T12)

Significantly, the ten volume bill of exceptions and separate transcript for the Commission's hearing reflects that the Citizen Protestants were parties of record. The Citizen Protestants all personally appeared and participated in the hearing by their attorney of record presenting evidence, examining and cross-examining witnesses, entering into stipulations (Commission BOE, Vol II, pp388:19-389:1), and making arguments. (*Passim*, Commission BOE; See also Commission BOE Index and Appearances @ Vol. I, pp1-2; Commission Transcript, items 14-17@p23,appearance of counsel) The Commission's Hearing Officer referred to and treated the Citizen Protestants as "parties". (Commission BOE,p14:10-22:22) All of the foregoing matters were held to be determining factors in *Shaffer v. Nebraska Dep't of Health & Human Servs.*, *supra*, that established "party of record" status in an agency hearing. In *Shaffer*, the same determining factors meant the district court did not have jurisdiction because a party of record in the agency hearing was not named as a party by the petitioner in the district court APA appeal.

Additionally, the Commission hearing record shows the following pre-hearing proceedings:

- Motions to consolidate all of the Beer Store applicants' hearings were filed by counsel for the Citizen Protestants, which motions were sustained by the Hearing Officer; (Commission Transcript, pp112-120)
- Witness and exhibit lists were filed by counsel for the Citizen Protestants; (Commission Transcript, pp24-110)
- Motions were filed by the Beer Stores' counsel challenging the status of some of the individual protestors as parties; (Commission Transcript,pp157-165)

- The Commission specifically ruled on the issue of which individuals who protested the Beer Stores' license applications were and were not parties. (Commission Transcript, pp190-192 and p191)
- The Commission ruled that the same people who are now the Citizen Protestants in this Court were parties of record for the Commission hearing. (*Id.*, p191; Commission BOE, p14:10-22:12)

The fact that the Beer Stores chose to eliminate the Citizen Protestants from the district court APA appeal so that they could not be heard was an error that deprived the district court of jurisdiction.

The Beer Stores never corrected their error of failing to include the Citizen Protestants as parties prior to the expiration of the 30 day deadline to file an APA petition, which makes it a fatal error that should result in the dismissal of the Beer Stores' APA proceeding upon remand. This is because the Beer Stores did not comply with the jurisdictional requirement of seeking APA review of the Commission's order in the mode and manner and within the time provided by statute. See, *Nebraska Dep't of Health & Human Servs. v. Weekley, supra.*

B. Assignment of Error 2: District Court erred by applying incorrect standard of review.

This appeal presents itself to the Supreme Court in the remarkable posture of a district court reversing an agency's final decision without the district court ever reviewing the agency's official hearing record. This is because the district court applied the incorrect standard of review by a district court in an APA proceeding.

The correct standard of review is statutory, mandatory, and has been cited consistently by this Court in APA appeals from district court judgments reviewing final agency decisions. Nearly 20 years ago, *Langvardt v. Horton*, 254 Neb. 878, 891, 581 N.W.2d 60, 69 (1998), held that “[u]nder the APA, district courts have only one standard of review for contested cases” which “review shall be conducted by the court without a jury *de novo* on the record of the agency.” Section 84-917(5)(a) of the APA states the district court standard of review as follows:

When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, *the review shall be conducted by the court without a jury de novo on the record of the agency.*

(Emphasis added.)

By contrast, the district court’s order specifically stated that the district court applied the following standard of review:

After a *de novo review* and making independent findings of facts, *based on the face of the NLCC’s order*, the NLCC’s action was arbitrary and capricious. The court finds, under the facts and circumstances of this case, Petitioners are entitled to relief and that a stay would not prevent the unlawful cancelation of Petitioners’ licenses. The NLCC’s decision is vacated and remanded with directions

(T19) (Emphasis added.)

Section 84-917(4) requires an administrative agency to prepare and transmit to the district court “a certified copy of the official record of the proceedings had before the agency” within thirty days of being served with the district court APA petition. The same statute

requires the official record to include all agency notices, pleadings, motions, preliminary and final orders, and a transcribed record of the agency hearing that includes all evidence and exhibits. The Commission's order was entered on April 24, 2017. (T6-12) The Beer Stores' petition for review was filed in the district court on April 25, 2017. (T1) The district court's order vacating and reversing the Commission's order was entered on April 27, 2017. (T18) The district court's file stamp shows that the Commission's official record was prepared, certified, and filed with the district court after the district court's order. Necessarily, the district court failed to conduct the mandatory "on the record" review of the Commission's official record before reversing the Commission's final order.

Without the need for an appellant to even assign error, this Court has consistently reversed district courts by plain error when district courts have used an incorrect standard of review in APA appeals. *Med. Creek LLC v. Middle Republican Nat. Res. Dist.*, 296 Neb. 1, 8–9, 892 N.W.2d 74, 80 (2017), explained the rationale for plain error in such circumstances:

The use of an incorrect standard of review in this situation is plain error and requires us to remand the cause to the district court. . . . A trial court's use of the wrong standard affects our review:

“It is a logical impossibility for this court to review the district court judgment for errors appearing on the record if the district court incorrectly limited its review and, thus, failed to make factual determinations, as it must under a de novo on the record review. The district court's and this court's standards of review are interdependent.” [*quoting Law Offices of Ronald J. Palagi v.*

Dolan, 251 Neb. 457, 460, 558 N.W.2d 303, 305 (1997), which in turn quoted from *Bell Fed. Credit Union v. Christianson*, 237 Neb. 519, 466 N.W.2d 546 (1991).]

See also, *Znygart v. State Bd. of Pub. Accountancy*, 270 Neb. 41, 46, 699 N.W.2d 362, 366–67 (2005) (Plain error applied to reverse and remand to the district court because, “The district court erroneously limited its review, even though it was required to conduct a de novo review of the record pursuant to § 84-917(5)(a).”)

If jurisdiction somehow existed for the district court’s judgment, this Court cannot carry out its standard of review when the district court erred by using the incorrect district court standard of review.

C. Assignment of Error 3: District Court erred in vacating Commission’s order by erroneously concluding the Commission acted beyond its legal authority.

District Court’s Order

The district court’s order made the following conclusions that can be characterized as the district court concluding that the Commission acted beyond its legal authority:

- The Commission’s “decision is in violation of the Petitioners’ clearly established constitutionally protected interests in obtaining automatic renewal of their existing licenses.” (T20)
- The Commission’s requirement for the Beer Stores “to submit long-form applications” was “in contravention” of the Beer Stores’ “renewal privilege as licensees.” (T20)

- The Commission decision denying the Beer Stores “long-form applications” was made “on statutory factors which, as a matter of law, cannot be applied to current license holders.” (T20)

The above conclusions by the district court were the foundational basis for the district court vacating the Commission’s order. The district court’s conclusions were erroneous.

Commission’s Statutory Authority

Neb. Rev. Stat. § 53-135.02 (Reissue 2010) provides that a licensee “may renew” its license at the expiration of its term “in the manner set forth in 53-135” if the licensee “is then qualified to receive a license and the premises for which such renewal license is sought are the same premises licensed under the license to be renewed and are suitable for such purpose.” The statute goes on to say that renewal is a privilege, however: “The renewal privilege provided for in this section 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.” *Id.*

Neb. Rev. Stat. § 53-135 (Reissue 2010) outlines a process for automatic renewal, but only if the Commission does not require a licensee to submit an application. That section states: “The commission may at any time require a licensee to submit an application, and the commission shall at any time require a licensee to submit an application if requested in writing to do so by the local governing body.” *Id.*

It is a long-held tenet of statutory construction that statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to an interpretation to ascertain the meaning of words which are plain, direct, and unambiguous. See, e.g., *Stewart v.*

Nebraska Department of Revenue, 294 Neb. 1010, 885 N.W.2d 723 (2016). The language of the above statutes is clear and unambiguous. The Commission retained the authority “at any time” to require the Beer Store licensees to submit an application for a license and did so.

Additionally, § 53-101.05 states the overall principle controlling the construction of the above statutes:

The Nebraska Liquor Control Act shall be liberally construed to the end that the health, safety, and welfare of the people of the State of Nebraska are protected and temperance in the consumption of alcoholic liquor is fostered and promoted by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor.

The Commission’s three pages of findings and conclusions from an extensive hearing record literally leap off the page. (T9-11) The Commission would have been derelict in its duty to protect the public “health, safety, and welfare” in the “sound and careful control . . . of the . . . sale and distribution of alcoholic liquor” by renewing the four licensees of the Beer Stores so that they could continue selling over 330,000 gallons of alcohol a year in an unincorporated village of nine people with no adequate law enforcement when the Commission was presented with evidence of an epidemic pattern of alcohol related criminal activity and public intoxication that should be an embarrassment to the State of Nebraska. The Commission’s findings and conclusions were well within the Commission’s statutory authority, as provided by Neb. Rev. Stat. §§ 53-132(2)(d) and 53-132(3)(f), to deny liquor licenses to the Beer Stores upon consideration of the “adequacy of existing law enforcement”

and when the licenses are not “required by the present or future public convenience and necessity”. (T11)

Conclusion

This Court should vacate the district court’s judgment and remand with directions to dismiss the Beers Stores’ APA petition with prejudice because the district court lacked jurisdiction.

In the event this Court concludes that the district court had jurisdiction, the district court’s judgment should be reversed and remanded with directions for the district court to review the Commission’s decision de novo on the official record of agency.

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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**

**Answer Brief &
Cross Appeal Opening Brief
of Neuman et al., Citizen Protestants**

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Table of Contents
CITIZENS' ANSWER BRIEF

Jurisdictional Statement1

Statement of the Case2

A. Nature of the Case2

B. Issues Actually Presented Below3

C. How the Issues Were Decided3

Standard of Review3

Propositions of Law4

Statement of Facts4

Summary of Argument4

Argument.....4

Conclusion6

CROSS APPEAL BRIEF

Jurisdiction; Statement of the Case; Standard of Review6

Assignments of Errors.....6

Propositions of Law7

Statement of the Facts8

Proven Facts10

Summary of Argument17

Argument.....18

Error 1: The District Court Erred When It Exercised.....18

Jurisdiction Without All Necessary Parties Before It.....18

**Error 2: The District Court Erred When It Purported to Issue a Final Judgment
without Notice and a Hearing on The Merits.23**

**Error 3: The District Court Erred When It Purported to Decide the Case Without the
Agency Record or Case Merits Before It.25**

**Error 4: The District Court Erred When It Held the NLCC Acted Beyond the Scope of
Its Authority to Require Submission of a Special Form, and Conduct a Hearing on the
Applications for License Renewal.....27**

Conclusion34

Table of Authorities

Cases

<i>21 West Lancaster Corp. v. Main Line Restaurant, Inc.</i> , 790 F2d 354 (3d Cir 1986)	29
<i>JCB Enters, Inc. v. Nebraska Liquor Control Comm'n</i> , 275 Neb (2008)	21
<i>Albertson's, Inc. v. City of Sheridan</i> , 33 P3d 161 (Wyo 2001)	29
<i>American Nat'l Bank v. Medved</i> , 281 Neb 799 (2011)	18, 19
<i>Application of Jantzen</i> , 245 Neb 81 (1994)	26
<i>Bargmann v. Soll Oil Co.</i> , 253 Neb 1018 (1998)	33
<i>Bd. of Liquor License Comm'rs v. Kougl</i> , 154 A3d 640 (Md App 2017)	28
<i>Beatrice Manor v Dept of Health</i> , 219 Neb 141 (1985)	5, 17, 22
<i>Benitez v. Rasmussen</i> , 261 Neb 806 (2001)	26
<i>Betterman v. State Dep't Motor Vehicles</i> , 273 Neb 178 (2007)	19
<i>Blakely v. Lancaster Cty</i> , 284 Neb 659 (2012)	4
<i>Bonge v. Cty of Madison</i> , 253 Neb 903 (1998)	26
<i>Bosselman, Inc. v. State</i> , 230 Neb 471 (1998)	33
<i>BPNC, Inc. v Taft</i> , 147 Fed Appx 525 (6th Cir 2005)	32
<i>Carlson v. Allianz Versicherungs-Aktiengesellschaft</i> , 287 Neb 628 (2014)	20
<i>Central Part Pharmacy, Inc. v. Nebraska Liquor Control Comm'n</i> , 216 Neb 676 (1984)	21
<i>City of Omaha v. C.A. Howell, Inc.</i> , 20 Neb App 711 (2013)	24
<i>Clark v. Wright</i> , 6 Neb 413 (1877)	26
<i>Cox Nebraska Telecom, LLC v. Qwest Corp</i> , 268 Neb 676 (2004)	21
<i>Crabtree v. State</i> , 479 NE2d 70 (Ind App 1985)	32
<i>Doe v. Bd. of Regents</i> , 280 Neb 492 (2010)	26
<i>Douglas Cty v. Archie</i> , 295 Neb 674 (2017)	25
<i>Dunn v. Daub</i> , 259 Neb 559 (2000)	19
<i>Essman v. Nebraska Law Enf't Training Ctr</i> , 252 Neb 347 (1997)	3, 22
<i>Fleming v. Civil Serv Comm'n of Douglas Cty.</i> , 280 Neb 1014 (2011)	4, 25
<i>Foster v. Bryan LG Medical Ctr East</i> , 272 Neb 918 (2007)	26
<i>Grand Island Latin Club, Inc. v. Nebraska Liquor Control Comm'n</i> , 251 Neb 61 (1996)	30
<i>In re Adoption of Chase T</i> , 295 Neb 390 (2016)	25
<i>In re Lanbie's Estate</i> , 178 Neb 506 (1965)	25, 26
<i>Kaapa Ethanol v. Bd. of Supervisors</i> , 285 Neb 112 (2013)	4
<i>Kopecky v. Nat'l Farms Inc.</i> , 244 Neb 846 (1994)	33
<i>Lariat Club, Inc. v. Nebraska Liquor Control Comm'n</i> , 267 Neb 179 (2004)	26
<i>Las Fuentes, Inc. v. City of Chicago</i> , 7 NE3d 750 (Ill App 2014)	29
<i>LB 344 (Laws 1991)</i>	30, 32
<i>Los Alamos Study Group v. US Dept of Energy</i> , 794 F Supp 2d 1216 (D NM 2011)	26
<i>Marsh & Marsh v. Carmichael</i> , 136 Neb 797 (1939)	33
<i>Maurer v. Weaver</i> , 213 Neb 157 (1982)	26
<i>McDougle v. State ex rel Bruning</i> , 289 Neb 19 (2014)	2, 18, 21, 22
<i>Medicine Creek LLC v. Middle Republican NRD</i> , 296 Neb 1 (2017)	25
<i>Morris-Schindler, LLC v. City & Cty of Denver</i> , 251 P3d 1076 (Colo App 2010)	30
<i>Nebraska Dept of Corr Svcs v. Carroll</i> , 227 Neb 307 (1986)	26
<i>Nebraska Dept. of Health & Human Servs. v. Weekley</i> , 274 Neb 516 (2007)	7, 22

<i>Orchard to Hill Neighborhood Assn v. Orchard Hill Merchantile, LLC</i> , 274 Neb 154 (2007).....	30
<i>O’Neal v. State</i> , 290 Neb 943 (2015)	3
<i>Point Proven, LLC v. City of Monroe</i> , 214 So3d 912 (La App 2017).....	30
<i>Pump & Pantry, Inc., v. City of Grand Island</i> , 233 Neb 191 (1989)	30
<i>Purdie v. Nebraska Dept of Corr Servs</i> , 292 Neb 524 (2016).....	3, 7
<i>Rental Prop Owners Ass’n v. City of Grand Rapids</i> , 566 NW2d 514 (Mich 1997).....	32
<i>Rocky Mountain Rogues, Inc. v. Town of Alpine</i> , 357 Fed Appx 887 (10th Cir 2010)	29
<i>Sanders v. Frakes</i> , 295 Neb 374 (2016)	2, 5, 8, 23
<i>Senor Iguana’s v Idaho State Police Bureau of Alcoholic Beverage Control</i> , 371 P3d 344 (Idaho 2016).....	29
<i>Shaffer v. Nebraska Dept HHS</i> , 289 Neb 740 (2014).....	2, 6, 7, 8, 17, 18, 19, 21, 22
<i>State ex rel Dep’t of Ins v. Countrywide Truck Ins Agency, Inc.</i> , 294 Neb 400 (2016).....	2, 5, 6, 8, 11, 12, 13, 18
<i>State ex rel Smith v. Nebraska Liquor Control Comm’n</i> , 152 Neb 676 (1950).....	20, 21
<i>State ex rel Spire v. Strawberries, Inc.</i> , 239 Neb 1 (1991).....	33
<i>State v Hausmann</i> , 277 Neb 819 (2009).....	5, 7, 17, 19
<i>State v. Adams</i> , 355 So2d 917 (La 1978)	28
<i>State v. Thieszen</i> , 295 Neb 293 (2016)	18
<i>Statutes</i>	
<i>Neb Rev Stat § 25-21,159</i>	20
<i>Neb Rev Stat § 53-1,115(4)(a)(ii)</i>	1, 2, 3, 7, 19, 20, 23
<i>Neb Rev Stat § 53-1,116</i>	7, 19
<i>Neb Rev Stat § 53-116</i>	27, 33
<i>Neb Rev Stat § 53-117</i>	28
<i>Neb Rev Stat § 53-129</i>	21
<i>Neb Rev Stat § 53-133</i>	7, 19
<i>Neb Rev Stat § 53-133(2) & § 53-1,115(4)(a)(ii)</i>	8, 17, 20, 22
<i>Neb Rev Stat § 53-135</i>	29, 30
<i>Neb Rev Stat § 53-135.01</i>	29
<i>Neb Rev Stat § 53-135.02</i>	29, 30, 32
<i>Neb Rev Stat § 53-190 & 53-198</i>	33
<i>Neb Rev Stat § 84-915.01 & § 84-917(4)</i>	5, 17
<i>Neb Rev Stat § 84-917</i>	1, 20, 27
<i>Neb Rev Stat § 84-917(2)(a)</i>	1
<i>Neb Rev Stat § 84-917(2)(a)(i)</i>	2, 7, 21, 23
<i>Neb Rev Stat § 84-917(2)(b)</i>	7, 19, 22
<i>Neb Rev Stat § 84-918</i>	1, 7, 19
<i>Neb Rev Stat § 84-918 (1) & (3)</i>	7, 8, 17, 19, 22
<i>Other Authorities</i>	
45 Am Jur2d <i>Intoxicating Liquors</i> § 88.....	32
45 Am Jur2d <i>Intoxicating Liquors</i> § 89.....	32
45 Am Jur2d <i>Intoxicating Liquors</i> § 139 (Westlaw updated Feb 2017)	28
61B Am Jur2d <i>Pollution Control</i> § 115 (WL Updated June 2017).....	26
9 McQuillin <i>Municipal Corporations</i> § 26:118 (3d Ed WL Updated March 2017)	30
<i>Grant or Renewal of Liquor License as Affected by Fact that Applicant</i> <i>Held Such License in the Past</i> , 2 ALR2d 1239	32

John Stuart Mill, <i>On Liberty</i> Ch 3 (1859).....	33
<i>Power to Limit Number of Intoxicating Liquor Licenses</i> , 163 ALR 581 (orig. 1946, Westlaw, updated weekly)	28

CITIZEN APPELLEES' ANSWER BRIEF

Jurisdictional Statement

1. The district court lacked subject matter jurisdiction to issue its April 27, 2017, Final Order (T18) purporting to reverse the Nebraska Liquor Control Commission (“NLCC”). This appeal is governed by the *Administrative Procedures Act (APA)*, *Neb Rev Stat* § 84-918. Jurisdiction was absent below, and is absent here, because:

1.1. The Citizen Protestants (“Citizens”) and others not present in district court, were necessary parties in the *APA* contested case before the NLCC. *Neb Rev Stat* §§ 53-1,115(4)(a)(ii); 53-133(2). “Contested case” is defined by *Neb Rev Stat* § 84-917. They were not named in the Appellee Beer Stores’ Petition for Review. (T1).

1.2. No summonses were served on the Citizens within 30 days of the appeal. Therefore, all parties to the contested case before the NLCC were not parties in court below. No Citizen Protestant was in court when the case was decided below. Without them, jurisdiction was absent. *Neb Rev Stat* § 84-917(2)(a). Since the district court lacked jurisdiction, this Court also lacks it.

1.3. The Administrative Record was not before the district court when it ruled.

2. Core dates for purposes of this Jurisdictional Statement, all in 2017, are:

April 24 The NLCC issued and filed its Final Order. (T5).

April 25 Beer Stores filed their Petition for Review in district court; Citizens are not parties and are not summoned. (T1).

April 26 Hearing held on Motion for a Stay, not on the merits. (T13-15). Notice given to “all interested parties” but served only the Attorney General’s Office as counsel for NLCC. (T15-17). No appearances by Citizens.

April 27 Final Judgment on merits reversing NLCC. (T18).

April 27 NLCC appealed to Nebraska Supreme Court. (Supp T1).

May 25 Thirty days to petition for review of NLCC Final Order & serve summons expired. No Citizens named in Petition for Review; none served.

May 26 Citizens (some but not all of them) filed to raise jurisdiction. (Supp T3).

May 30 (Tuesday after Memorial Day) time to appeal court judgment expired.

July 5 Ten volume Administrative Record 1st reached district court.

3. If necessary parties are absent, the district court, as an intermediate appellate court, lacks subject matter jurisdiction to proceed. *Shaffer v. Nebraska Dept HHS*, 289 Neb 740 (2014); *McDougle v. State ex rel Bruning*, 289 Neb 19 (2014). A judgment is void, and not merely voidable, if the court rendering it lacked jurisdiction, or lacked a legal basis for the judgment. A void judgment has no legal effect. *Sanders v. Frakes*, 295 Neb 374, 382–83 (2016). This Court cannot acquire jurisdiction where the district court did not have it. *State ex rel Dep’t of Ins v. Countrywide Truck Ins Agency, Inc.*, 294 Neb 400, 405 (2016).

Statement of the Case

A. Nature of the Case

4. The Citizen Appellees & Cross-Appellants are among a group of Sheridan County residents who filed written protests to contest the applications of each Beer Store to renew its Class B Beer Only Off-Sale liquor licenses. (T5-6) (E1-4, 31 VIII) The NLCC conducted trial of the “contested case” arising from the applications and protests. The Citizens were necessary parties to the case, and necessary parties to any appeal from the agency’s Final Order. *Neb Rev Stat* §§ 53-1,115(4)(a)(ii); 53-133(2); *Neb Rev Stat* § 84-917(2)(a)(i). The Citizens were never identified as parties in the district court; the Beer Stores did not name them in their Petition for

Review. (T1). The district court did not hear them. (T18). No summonses were issued to, or served upon them. The acts of filing the petition for review and the serving summons on all necessary parties are the two steps necessary to establish jurisdiction under the *APA*. *Essman v. Nebraska Law Enf't Training Ctr*, 252 Neb 347 (1997).

5. The Citizens appealed to raise the jurisdiction issues before this Court.

B. Issues Actually Presented Below

6. The sole issue presented below was: Shall the district court issue an Order staying the April 24, 2017 judgment of the NLCC pending the outcome of judicial review?

C. How the Issues Were Decided

7. The district court did not decide the stay issue presented to it. (T18). And it made no decision about its own jurisdiction. (T18). Without all parties before it, and without the Administrative Record, the district court issued a Final Judgment on the merits in favor of the Beer Stores. The lower court's Final Order remanded the license applications to the NLCC, declaring its decision was "void as a matter of law because the NLCC failed to make the necessary showing that [beer licensees] were not entitled to their renewal privilege". (T20). The NLCC appealed the same day the Judgment was entered. The Citizens appealed 29 days later.

Standard of Review

8. Jurisdiction is challenged. The facts are not in dispute. This Court decides jurisdiction as a matter of law. *O'Neal v. State*, 290 Neb 943 (2015). This appeal is from a contested administrative case. *Neb Rev Stat* §§ 53-1,115(4)(a)(ii); 53-133(2); *Neb Rev Stat* § 84-917(2)(a)(i); *Purdie v. Nebraska Dept of Corr Servs*, 292 Neb 524, 529 (2016). In appeals from contested administrative cases where jurisdiction is challenged and where the facts are not in dispute, jurisdiction is decided as a matter of law. *Id.*

9. Generally, 3 rules cover the standard of review for APA appeals: **1st**, both the district court and this Court must review for jurisdiction and sufficiency of evidence. *Kaapa Ethanol v. Bd. of Supervisors*, 285 Neb 112 (2013). **2nd**, the reviewing Court is restricted to the record before the Administrative Agency and does not reweigh evidence or make independent findings of fact. *Blakely v. Lancaster Cty*, 284 Neb 659 (2012). This second rule is of no consequence here because the Administrative Record had not reached the district court when it ruled. **3rd**, a procedural due process review presents a question of law upon which an appellate court is obligated to reach a conclusion independent of the court below. *Fleming v. Civil Serv Comm'n of Douglas Cty.*, 280 Neb 1014 (2011).

Propositions of Law

10. Propositions of law appear in the Cross Appeal Opening Brief below.

Statement of Facts

11. The Citizen Appellees accept Appellant NLCC's Statement of the Facts. They respectfully expand on those facts in their Cross-Appeal below

Summary of Argument

12. The district court lacked jurisdiction. And, even if it had it, judicial discretion was abused by its decision, and the wrong method of review was used. Additional Summary appears in the Opening Brief on Cross Appeal below. No Citizen, no Record, No Notice, No Merits before it. Yet the district court issued a dispositive ruling. It lacked jurisdiction and issued a void Judgment. Reversal and dismissal of the Beer Stores' Appeals is requested.

Argument

13. Appellant NLCC's Assigned Errors all have merit. The Citizens concur with the NLCC and argue that the district court lacked jurisdiction and issued a void judgment. The

Citizens were not included so the Beer Stores' Petition for Review was jurisdictionally flawed and the time to appeal has now expired. Reversal of the district court and vacation of its Final Judgment are the proper results. The NLCC's Judgment then stands.

14. The district court's April 27, 2017 Final Judgment was rendered without necessary parties before the court. Absence of necessary parties is a jurisdictional defect. Since the lower court lacked jurisdiction, its Final Judgment is void. *State v Hausmann*, 277 Neb 819 (2009). This Final Judgment was also rendered without the agency's Administrative Record; the Record did not reach the district court until July 5, 2017. It is void for that additional reason. *Neb Rev Stat* § 84-915.01 & § 84-917(4).

15. Necessary parties must be joined in appeals from rule-making orders by agencies. *Beatrice Manor v Dept of Health*, 219 Neb 141 (1985). This did not occur here. Instead, the NLCC decided the contested case on April 24. The Beer Stores Petitioned for Review on April 25 but did not name or serve the Citizens. The district court issued a Final Judgment on April 27 without a) the Citizens, b) the Administrative Record, or c) the merits, before it. Thirty-one days after the NLCC ruled, 29 days after the district court ruled, and 1 day after the time for the Beer Stores to name and serve the Citizens expired, some, but not all, of the Citizens appealed to this Court to raise the jurisdiction issue. (Supp T3).

16. A judgment is void, and not merely voidable, if the court rendering it lacked jurisdiction or otherwise lacked a legal basis for the judgment. A void judgment is of no legal effect. *Sanders* at 382–83. The Supreme Court cannot acquire jurisdiction where the district court did not have it. *State ex rel Dep't of Ins v. Countrywide Truck Ins Agency, Inc.*, 294 Neb 400, 405 (2016). The appealed Judgment was rendered without jurisdiction and before any

appeal named the citizens who protested. The time to appeal from the NLCC has passed. Remand cannot “fix” anything.

17. 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. *Shaffer v. Nebraska Dep't of Health & Human Servs*, 289 Neb 740, 748 (2014). In this case, the district court acted without all necessary parties, without the merits of the case, without the record required to be reviewed, yet it tried to do its appellate work on the merits. It acted in excess of its jurisdiction and also arbitrarily. Its palpable errors require reversal. And, where the district court lacks jurisdiction, so does this Court in an APA appeal. *State ex rel Dep't of Ins v. Countrywide Truck Ins Agency, Inc.*, 294 Neb 400, 405 (2016).

Conclusion

18. Reversal and dismissal of the Beer Stores' Appeals is requested. Costs are also sought. The Cross-Appeal further extends these conclusions.

CROSS APPEAL

Jurisdiction; Statement of the Case; Standard of Review

19. See Answer Brief above.

Assignments of Error

Error 1: The district court erred when it exercised jurisdiction without all necessary parties before it.

Error 2: The district court erred when it exercised jurisdiction and purported to issue a ruling on the merits without notice of a hearing on the merits.

Error 3: The district court erred when it purported to decide the *APA* case before it without the Administrative Record or case merits before it.

Error 4: The district court erred when it held the NLCC acted beyond its authority to require submission of a “long-form”, and hold a hearing on the applications of the Beer Stores to renew their Class B Off-Sale Beer licenses at Whiteclay, Nebraska.

Propositions of Law

20. Citizens who formally file protests of liquor license renewal applications are necessary parties to the contested case in which there protests are filed. *Neb Rev Stat* §§ 53-1,115(4)(a)(ii); 53-133(2). *Neb Rev Stat* § 84-917(2)(a)(i); *Neb Rev Stat* § 84-918 (1) & (3).

21. Parties to contested cases before an agency are necessary parties who must be joined on appeal under the *APA*. *Neb Rev Stat* § 53-1,115(4)(a)(ii) & § 53-133(2). *State v. Hausmann*, 277 Neb 819 (2009).

22. Proceedings under the *Nebraska Liquor Control Act* that involve renewal of liquor licenses following citizen protests are “contested cases”. *Neb Rev Stat* § 53-133. The sole procedure applicable is at *Neb Rev Stat* § 53-1,116, and the *APA*, *Neb Rev Stat* § 84-918.

23. Statutory requirements for an *APA* Petition for Review require that the petitioner, the agency, and the final decision all be identified, the final decision be attached, the parties be identified, venue be demonstrated, the reasons for asserting a right to relief be stated, and the specific relief be identified. *Neb Rev Stat* § 84-917(2)(b).

24. Where a district court has authority to review action of an administrative agency, the court may acquire jurisdiction only if the review is sought in the manner, and within the time provided by statute. *Nebraska Dept. of Health & Human Servs. v. Weekley*, 274 Neb 516 (2007).

25. Failures to name necessary parties on appeal under the *APA*, and to serve them with summonses on a timely basis, are jurisdictional defects. *Purdie v. Nebraska Dept of Corr Servs*, 292 Neb 524, 529 (2016). *Shaffer v. Nebraska Dept HHS*, 289 Neb 740 (2014).

26. Parties aggrieved by a ruling in an administrative law contested case, and were not included in an appeal but are aggrieved by action in district court, have a right to appeal the court decision under *Neb Rev Stat* § 84-918(1) & (3). *Neb Rev Stat* § 53-133(2) & § 53-1,115(4)(a)(ii). *Shaffer v. Nebraska Dept HHS*, 289 Neb 740 (2014).

27. A judgment is void, and not merely voidable, if the court rendering it lacked either jurisdiction, or a legal basis for the judgment. A void judgment is of no legal effect. *Sanders v. Frakes*, 295 Neb 374, 382–83 (2016).

28. The Supreme Court cannot acquire jurisdiction where the district court did not have it. *State ex rel Dep't of Ins v. Countrywide Truck Ins Agency*, 294 Neb 400, 405 (2016).

Statement of the Facts

29. Abram Neumann, Lori Hankinson, Barb Vancil, and David Vancil (“Citizens”) appeal as aggrieved parties from the Final Judgment of the district court entered April 27, 2017. They are among the Sheridan County Citizens who protested Appellees’ liquor license renewal applications. (T5-6) (E1-4). The Final Judgment reversed the Nebraska Liquor Control Commission (“NLCC”) denial of 4 Class B Beer Only Off-Sale liquor licenses to 4 licensees operating in Whiteclay (pop. 9 persons). The Beer Stores sold more than 3.5 million cans of beer annually (E143, 127, VIII); nearly all sales were to residents of the Oglala Lakota Nation at Pine Ridge, South Dakota. The reservation and its Justice Center are about 200 meters from the Applicants. (AG Means 39:17-40:4 VI).

30. The district court received the Beer Stores’ “Petition on Appeal” on April 25, the day after the NLCC ruled to deny renewal of their liquor licenses. (T1). It scheduled a hearing on an Application to Stay the NLCC decision, and heard the Stay request on April 26. The next day, the district court reversed the NLCC on the merits. When the district court ruled, a) the Citizens

were not before it as they were never named by the Beer Stores in the “Petition on Appeal”, were not served with summonses, and did not appear voluntarily, b) the parties had not Answered, c) the merits were not presented, d) the Agency Record was not prepared or transmitted to the district court or placed in evidence, e) no notice was given that the merits would be taken up, and f) it lacked jurisdiction to take up the merits.

31. Though the Citizens were parties to the NLCC agency contested case, they were neither named by the Beer Stores as parties in the Petition for Review in district court (T1), nor served with summonses within 30 days of the NLCC’s Final Order. After the time for appeal from the Agency expired without the Citizens being named or served, some but not all of the Citizens appealed to this Court to contest jurisdiction. (Supp T3).

32. The Citizens, all of whom are residents of Sheridan County where Whiteclay is located, protested the liquor license renewal applications of the Petitioners as prescribed by law. (E1 pp 77-83; 90-91) They presented evidence, some of them testified, they filed prehearing motions, witness and exhibit lists, and otherwise fully participated in the NLCC case. (T18, NLCC decision). The Citizens are named in the NLCC Order. (T18).

33. The relevant dates, all in 2017, are as follows:

Prior to Jan 1	Citizens become parties to the contested case.
April 6	NLCC held trial involving presentation of witnesses and exhibits. Citizen Protestants participated as parties to the contested case. (T5 NLCC Final Order).
April 24	NLCC issued its Final Order denying the applications of the Beer Stores to renew their off-sale beer licenses at 4 stores in Whiteclay, Sheridan County, Nebraska (pop. 9 persons). (T5 NLCC Final Order).
April 25	Store owners filed Petition on Appeal in district court, naming only NLCC as a

	party. (T1). No summons issued or served on Citizens. (T1-12).
April 26	Stay hearing held. Citizens not notified or present. No notice given that merits would be taken up. (T15-16; T26).
April 27	District court "Order" constituting a Final Judgment entered. (T18). Agency Record not filed. Necessary parties absent.
April 27	State Appellants appealed to this Court & requested Agency Record. (Supp T1).
May 25	Time to Petition for Review of NLCC passes. No Petition filed in which the Citizens are named as parties. No summonses served on the Citizens.
May 26	Citizens file Notice of Appeal to raise jurisdiction issue here. (Supp T3).
July 5	Administrative Record reached district court.

Proven Facts

These are the merits-based facts proven during the contested hearing of April 7, 2016:

34. Sheridan County, Nebraska's declining population is no more than 5,220 persons. (E139, 126, VIII, Census data; E140, 126, VIII). Whiteclay is unincorporated and without defined boundaries. (I, 188:12-190:25) Its census is 9 persons. (I, 87:12-94:2) Whiteclay, an unincorporated community, consists of approximately 15 buildings. (E141, 83; E 142, 83 VIII; I, and Clay Brehmer, 428:1-25) Three of the citizens (Neumann and Mr. & Mrs. BonFleur) protested the Beer Store applications. (E1 pp 77-83; 90-9I VIII; I, 164:19-24; I, 200:6-208:22; I, 77:13-20) Mr. Neumann is a Cross-Appellant; the BonFleurs are not. Mr. Neumann studies at Oglala Lakota College but is not a tribal member. (I, 77:24-78:7).

35. Two of Whiteclay's 9 citizens consume beer, estimated at 100 or fewer cans of beer per year -- 2 per week. (Neumann, I, 87:12-94:2) The others do not. There is no contrary testimony. The Beer Stores appear in photographs. (E6, 81, 83, VIII; E38, 81, 83 VIII; E42, 81,

83 VIII; E102, 81, 83 VIII). There is no evidence of any sales of beer by any of the Applicants to Nebraska residents.

36. The Pine Ridge Reservation, home of the Oglala Sioux Tribe, lies north of Sheridan County, and just a few hundred feet north of the Applicants' businesses. (E32, 451, VIII; E38). Forty Thousand persons live there as proven by Oglala Lakota Attorney General Tatewin Means. (I 33:5-37:22; 38:25-62:17; 68:25-76:4). The largest city on the Reservation is Pine Ridge. The reservation covers parts of several counties and all of Oglala Lakota County. *Id.*

37. Substantially all beer sales by the Applicants are to a) Tribal members who drive south on Highway 87 from the Pine Ridge Reservation a few hundred feet across the border to Whiteclay, buy beer, and either deliver it to street people living on the street of Whiteclay, or turn around and drive it back to Pine Ridge, or b) street persons who are Tribal members who drink on the street in Whiteclay. Transportation of beer from Applicants to the Reservation occurs hundreds of times daily. Every time beer is driven into South Dakota from White Clay a crime is committed*every time.* (*Id.*; I, 77:16-110:14; I, 198:14-23). While enforcement of Tribal law is not a charge of the NLCC, prevention of crime is within its duties. (I, 33:5-37:22; 38:25-62:17; 68:25-76:4).

38. Alcohol-related crimes, including driving while intoxicated, public intoxication and illegal possession of beer are prosecuted on the Oglala Lakota Reservation. When they occur on the Reservation and involve Tribal members, they are within the exclusive criminal jurisdiction of the Tribe and Tribal courts. (AG Means, I, 33:5-37:22; 38:25-62:17; 68:25-76:4; Bruce BonFleur, I, 175:3-180:18; Marsha BonFleur, I, 200:6-208:22).

39. The most concentrated location of criminal offenses on the Reservation is in the short stretch of highway from Whiteclay to the south edge of Pine Ridge. (Means, I, 33:5-37:22;

38:25-62:17; 68:25-76:4). The intoxicants involved in the crimes prosecuted on the road immediately north of Whiteclay are purchased at the Beer Stores. *Id.* A place called “Camp Justice” is located just across the state line into South Dakota. It is where persons who commit crimes in Whiteclay often congregate. The place came about originally as a site of protests against unsolved murders in Whiteclay. (I, 56:2-60:8).

40. The sale and possession of all alcohol, including beer, is illegal in Oglala Lakota County, and throughout the 2 million acre Pine Ridge Reservation. *Id.* These are also criminal acts on the Reservation: Public intoxication; Vagrancy; Indecent Exposure; Assault; Sexual Assault; Human Trafficking; & Homicide. (AG Means *Id.*; Marsha BonFleur, I, 200:6-208:22).

41. Whiteclay’s beer sellers promote lawlessness, and harboring of fugitives sought by prosecuting authorities in South Dakota. (AG Means, I, 33:5-37:22; 38:25-62:17; 68:25-76:4). Law enforcement deficiencies in White Clay, and of liquor laws, are the #1 problem of the area. This was the conclusion of a task force appointed by Nebraska’s Governor to study the problem. (E180, 170-171 VIII). Nearly every person on the street in Whiteclay is in some state of constant intoxication. The area is littered daily with at least hundreds beer cans. (I, 175:3-180:18). Crime occurs throughout the day. Health and welfare are compromised by public urination and defecation by intoxicated persons. (I, 78:8-110:14; 185:7-186:1; 189:9-18).

42. Nebraska public policy, including the mission of its Commission on Indian Affairs (CIA), recognizes that indigenous people suffer disproportionately from alcoholism and alcohol-related illnesses. Nebraska commits resources to combat these problems. The CIA is responsible for this policy. (Director Gaiashkibos, I, 117:19-120:7).

43. Nebraska’s public policy discourages the sale of alcohol to a population of Native American persons known to suffer from alcohol ailments. *Id.* The Oglala Sioux are served by the

Nebraska CIA. This includes CIA work to implement policy directives to curb alcoholism and promote temperance among native persons. *Id.*

44. The Oglala Sioux of the Pine Ridge Reservation are entitled to have, and do have, an *ex officio* Commissioner of the CIA for the purpose of representing the Tribe's members in connection with matters affecting the public policy of Nebraska concerning temperance in alcohol consumption among Native Americans. (I, 119:3-24). Alcohol is the #1 criminal problem of law enforcement in Oglala Lakota County and on the Reservation. (Means I, 33:5-37:22; 38:25-62:17; 68:25-76:4).

45. The overwhelming and predominant source of illegal alcohol, causing law enforcement problems within a few hundred feet of the Applicants, is alcohol sold by the Applicants and transported across the state line. *Id.* The alcohol-related problems at Whiteclay are so rampant that the Oglala Tribe constructed its new law enforcement center, the location of its court and its jail facilities, within 200 meters of Whiteclay. *Id.*

46. It is common for intoxicated persons found on the short stretch of highway north of Whiteclay to be taken directly to the jail within 200 meters of Whiteclay. It is often observed that upon discharge from jail, inmates walk directly to Whiteclay for more beer. (E141, 83 VIII; E142, 83 VIII). They know they can get beer in Whiteclay. They are debauched by the Nebraska-licensed Beer Stores.

47. The street in Whiteclay is dangerous and becomes increasingly dangerous throughout the day. The danger index rises as persons on the street become more intoxicated during the day and evening. (Neumann, I, 78:21-100:15). Dangers on the street include these forms of criminal conduct, observed by Mr. Neumann and Mr. & Mrs. BonFleur: stabbing and use of knives; assault with firearms by drawing, threatening & firing; sexual assault, including

gang rape and single perpetrator rape; human trafficking and human sex trafficking; public fighting and assault; and, public urination and defecation. The list includes the rankest of human behavior. The latter health issue is so extreme that it has driven citizens from buildings they occupy. (*Id.*; I, 200:6-208:22; 171:24-180:18; 194:19-190:25; E179, 207,208 VIII; E180).

48. Beer sale figures at Whiteclay are at staggering, uniquely high levels. At Whiteclay for the 1 year ending June 30, 2016, beer sales compared with these communities:

Community	Population	Volume in Gallons (128 oz/gal)	Volume in 12 oz Cans
Chadron	5,821	100,015	1,066,827
Gordon	1,612	141,521	1,509,557
Valentine	2,737	149,179	1,591,243
Whiteclay	9	331,416	3,535,104

(E143) (E143 notes 12.8 cans (12 oz) per gallon.) Whiteclay sales total 85% of sales in the 3 County Seat cities to the east and west of Whiteclay on the Nebraska-South Dakota border. This tends to prove that the Whiteclay beer consuming population is *not* mobile or likely to seek beer to the south 20 or more miles from Pine Ridge. Traffic data does not show dangers on Nebraska roads to the south. (E144, 128 VIII) The law enforcement data discloses the history of law enforcement calls to Whiteclay. (E147-153, 130,132 VIII). The record also discloses State Patrol data and testimony from a legislative committee on law enforcement issues. (E176, 28, 30 VIII; E177, 28, 30 VIII). It shows law enforcement deficiencies in Sheridan County.

49. Despite the fact that compliance examinations, including tests for sale to minors, occur only about annually, most of the Beer Stores have failed those tests at least once in the isolated setting in which they occur. This is true *even though* the minors engaged by the liquor

law enforcement agent were Caucasians and not Native Americans, and sales to Caucasians by the Beer Stores are rare. (Officer Rob Jackson, II, 266-288).

50. There is no evidence of any *Liquor Act* arrests by any member of the Nebraska State Patrol on regular or special patrol at Whiteclay. (NSP Major Otte, Area Troop Commander. I 224:5-225:13; E177) (There is evidence of isolated DWI offenses on Highway 87 between Rushville and Whiteclay. *Id.*). Nebraska's State Patrol's Troop Commander for the Area did not know who served as sheriff of Oglala Lakota County, South Dakota, or Police Chief of the Tribal Police Force. (I, 242:1-16). The Sheriff of Sheridan County admitted that his Department has made no *Liquor Act* arrests during years 2014, 2015, and 2016. (II, 400-408). He did not know key law enforcement counterparts in South Dakota either.

51. Nebraska law enforcement is inadequate in that it does not collaborate with the professional law enforcement force or prosecutor at Pine Ridge. In five (5) years of service as Attorney General, there has been *no collaboration* between Nebraska law enforcement and Oglala Sioux law enforcement. (AG Means, I, 45:1-55:14). No evidence of collaboration to enforce the law was adduced by the Applicants or offered by the Sheridan County Sheriff or State Patrol. This stark deficiency promotes and facilitates lawlessness. *Id.*

52. Sheriff Robbins of Sheridan County, Major Otte of the State Patrol, and Officer Johnson of Liquor enforcement were all unable to name (a) the Sheriff of Oglala Lakota County; (b) the Police Chief of the Oglala Sioux or Pine Ridge; or (c) the Chief Law Enforcement Officer of the Oglala Sioux, AG Means. (II, 325-366). This is compelling circumstantial evidence. It proves indifference. "Indifference, to me, is the epitome of evil." Elie Weisel.

53. There is no proof of any convenience to Nebraskans from operations of the licensees. Sheridan County found it necessary to double its law enforcement budget as of 2016,

and the only evidence of any increase in law enforcement activity by the Sheriff's Department is the result of an alleged increase in patrolling at Whiteclay. (Krotz, II, 399-408).

54. A single State Patrol officer is responsible for enforcement of the *Liquor Control Act* in the Panhandle, including Sheridan County. This person is Officer Jackson. He is responsible for 276 establishments, stretched out over the entire geography of 11 counties, and stretching from Colorado to South Dakota, and from the Wyoming border to the Sheridan-Cherry county line. This area consists of approximately 14,200 square miles and about 18.5% of the State's total land. This compares with a national average of no more than 250 establishments in closely concentrated urban areas as explained by National Association of Liquor Law Enforcement Officers President, James Jones. (I, 138:25-152:24; E144, p2).

55. There is uncontradicted testimony that victims of rape and other assaults at Whiteclay do not call Nebraska law enforcement because either "no one will come" or "they won't do anything anyway". (I, 78:21-100:15; 200:6-208:22; 171:24-180:18; 194:19-190:25; E179; E180). No evidence was presented of a single investigative effort by any Nebraska law enforcement agency of any suspect for any crime committed at Whiteclay conducted at any location outside of Whiteclay, at any time. This includes the offense of murder.

56. No Nebraska necessity for any 1 of the 4 liquor licenses was proven. There is no proof of any demand for beer by Nebraskans need, met by the Applicants to furnish beer to Nebraskans, and no proof of any benefit to Nebraskans from the business activities of the Beer Stores. Despite having the floor for nearly 7 hours to prove their case, the Beer Stores failed to adduce proof of a single sale of a single can of beer to a single Nebraskan. Three Whiteclay residents drink no alcohol and testified as protestants. No resident testified for the Beer Stores and no resident was identified as a Beer Store customer.

57. Testimony of the Beer Stores operators established only that (a) they have met bare minimum requirements for licensure, and (b) they claim nothing has changed with their stores. All Beer Stores concede they “shoo” intoxicated Native Americans off their premises to the next property to avoid liquor violations, but do not deny that the persons “shooed” away are human beings there because of the sales they make. (II, 412:429; 438-453; 456-469;475-484).

Summary of Argument

58. The district court’s April 27, 2017 Final Judgment was rendered without necessary parties before the court. Absence of necessary parties is a jurisdictional defect. Since the lower court lacked jurisdiction, its Final Judgment is void. *State v. Hausmann*, 277 Neb 819 (2009). This Final Judgment was also rendered without the agency’s Administrative Record; the Record did not reach the district court until July 5, 2017. (*Neb Rev Stat* § 84-915.01 & § 84-917(4)). It is void for that additional reason.

59. Necessary parties must be joined in appeals from rule-making orders by agencies. *Beatrice Manor v. Dept of Health*, 219 Neb 141 (1985). The district court issued a Final Judgment on April 27 without either the Citizens or the Administrative Record, or the merits, before it. Thirty-one days after the NLCC ruled and 1 day after the time for the Beer Stores to name and serve the Citizens expired, but 1 day (extended by a holiday weekend) before the 30 days to appeal the district court ruling expired, the Citizens appealed to this Court to raise the jurisdiction issue. (Supp T3).

60. The Citizens are aggrieved by the district court’s improvident decision. Aggrieved parties may appeal adverse decisions in *APA* cases even where they did not participate in the district court review. *Schaeffer v. Nebraska DHHS*, 289 Neb 740 (2014). They have a right to appeal under *Neb Rev Stat* § 84-918(1) & (3). *Neb Rev Stat* § 53-133(2) & § 53-1,115(4)(a)(ii). If

necessary parties are absent, the district court, as an intermediate appellate court, lacks subject matter jurisdiction to proceed. *Schaeffer v. Nebraska DHHS*, 289 Neb 740 (2014); *McDougle v. State ex rel Bruning*, 289 Neb 19 (2014).

61. A judgment is void, and not merely voidable, if the court rendering it lacked jurisdiction or otherwise lacked a legal basis for the judgment. A void judgment is of no legal effect. The Supreme Court cannot acquire jurisdiction where the district court did not have it. *State ex rel Dep't of Ins v. Countrywide Truck Ins Agency, Inc.*, 294 Neb 400, 405 (2016). The time to appeal from the NLCC has passed. Remand for more proceedings cannot “fix” anything.

62. 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. *Shaffer v. Nebraska Dep't of Health & Human Servs*, 289 Neb 740, 748 (2014). In this case, the district court acted without all necessary parties, without the merits of the case, without the record to be reviewed. Yet it tried to do appellate work on the merits. It acted in excess of its jurisdiction and also arbitrarily. Its palpable errors require reversal. Had it read the record, the district court would have known a plethora of evidence sustains the NLCC’s nonrenewal decisions.

Argument

Error 1: The District Court Erred When It Exercised

Jurisdiction Without All Necessary Parties Before It.

63. A court’s first responsibility is to determine its jurisdiction to act. *State v. Thieszen*, 295 Neb 293 (2016). This includes assuring that all necessary and indispensable parties are present before the court acts. An indispensable or necessary party is one whose interest in the subject matter is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or where failure to address the interest of the indispensable party would leave the matter

concluded in court on terms that may be inconsistent with equity and good conscience. *American Nat'l Bank v. Medved*, 281 Neb 799 (2011). The presence of necessary parties is a jurisdictional requirement that cannot be waived; it is the plaintiff's duty to join all persons who have or claim any interest that would be affected by the judgment. *Shaffer v. Nebraska Dept. of Health & Human Servs.*, 289 Neb 740 (2014). If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy. *Medved, supra*. "Necessary" and "indispensable" parties are not distinguished for jurisdictional purposes. *Dunn v. Daub*, 259 Neb 559, 563 (2000).

64. Proceedings under the *Nebraska Liquor Control Act* that involve the renewal of liquor licenses following Citizen Protests are "contested cases". *Neb Rev Stat* § 53-133. The sole appellate procedure is at *Neb Rev Stat* § 53-1,116, and the *APA*, *Neb Rev Stat* § 84-918.

65. Statutory requirements for an *APA* Petition for Review command that the petitioner, the agency, and the final decision all be identified, the final decision be attached, the parties be identified, venue be demonstrated, the reasons for asserting a right to relief be stated, and the specific relief be identified. *Neb Rev Stat* § 84-917(2)(b). In reviewing final orders under the *APA*, the district court functions not as a trial court, but as an intermediate court of appeals. *Betterman v. State Dep't Motor Vehicles*, 273 Neb 178, 187 (2007).

66. Parties to contested cases before an agency are necessary parties who must be joined on appeal. *Neb Rev Stat* § 53-1,115(4)(a)(ii) & § 53-133(2). Necessary parties must be joined in appeals from orders by agencies. *State v Hausmann*, 277 Neb 819 (2009). Citizens who protest liquor license renewals are necessary parties. The district court ruling was contrary to their position before the NLCC. The Citizens are aggrieved parties with a right to appeal and to be participants in any appeal from the agency order. *Neb Rev Stat* § 84-918 (1) & (3).

67. In this case, the necessary parties are identified on the face of the NLCC Order of April 24, i.e., the Order appealed to district court. (T5). This Agency Order discloses that Citizens of Sheridan County protested the Beer Stores' liquor licenses, but were not before the court when the Final Judgment was rendered and filed. This is a jurisdictional defect in *APA* cases, *Schaffer v DHHS, supra*, and declaratory judgment cases. *Carlson v. Allianz Versicherungs-Aktiengesellschaft*, 287 Neb 628, 638 (2014). *Neb Rev Stat* § 25-21,159.

68. The role of the Citizen Protestants as parties is statutory under the *Liquor Control Act*. "Contested case" is defined by *Neb Rev Stat* § 84-917. Each citizen who protests is a party to a contested case before the NLCC. *Neb Rev Stat* § 53-1,115(4)(a)(ii); and § 53-132. *State ex rel Smith v. Nebraska Liquor Control Comm'n*, 152 Neb 676 (1950). *Section 53-1,115(4)(a)(ii)* provides:

For purposes of this section, party of record means:

(a) In the case of an administrative proceeding before the commission on the application for a retail...license:

(i) The applicant;

(ii) *Each individual protesting the issuance of such license* pursuant to subdivision (1)(b) of section 53-133....

Id. (Emphasis added.) *Neb Rev Stat* § 53-133(2) provides:

(2) Hearings upon such applications shall be in the following manner:

Notice indicating the time and place of such hearing shall be mailed or electronically delivered to ... *each individual protesting a license* pursuant to subdivision (1)(b) of this section... at least 15 days prior to such hearing. The notice shall state that the commission will receive evidence for the purpose of determining whether to approve or deny the application. ... The commission may

receive evidence.... The commission shall not use electronic delivery with respect to an applicant, a protestor, or a church under this section without the consent of the recipient to electronic delivery.

Id. (Emphasis added.)

69. Jurisdiction was not raised when the district court heard the Beer Stores' Application for a Stay of the NLCC Order. The Citizens were not present to raise it. Jurisdiction is an indispensable inquiry; without it, a court may do nothing whatsoever. A district court hearing an *APA* appeal must, *on its own and without prompting*, first determine its jurisdiction to act. *Cox Nebraska Telecom, LLC v. Qwest Corp*, 268 Neb 676 (2004).

70. The court below failed to determine its own jurisdiction though it was obvious that fewer than all parties to the contested administrative case were before it, and though it was apparent the citizen parties had not been summoned or notified.

71. When an agency like the NLCC acts in a quasi-judicial capacity, as it did during the hearing on April 6, all parties of record must be parties to proceedings for appellate review, and are entitled to participate in the appeal. *Neb Rev Stat* § 84-917(2)(a)(i). *Shaffer* at 748, citing *McDougle v. State ex rel Bruning*, 289 Neb 19 (2014). NLCC decisions are required to be based on evidence adduced during proceedings involved in contested cases. *JCB Enters, Inc. v. Nebraska Liquor Control Comm'n*, 275 Neb 979 (2008). Only a party who will be aggrieved by a decision of the NLCC and who is a party of record is a party to the contested case has standing to appear before the Commission or to appeal. *Neb Rev Stat* § 53-129; *Central Part Pharmacy, Inc. v. Nebraska Liquor Control Comm'n*, 216 Neb 676 (1984).

72. The statutory procedure for appealing from NLCC to district court was not followed. The law commands that an *APA* Petition for Review identify the petitioner, the agency,

and final decision, and the final decision be attached, the parties be identified, venue be demonstrated, the Petitioner's reasons for asserting a right to relief he stated, and the specific requested relief be identified. *Neb Rev Stat* § 84-917(2)(b). These rules are unbending.

73. Where a district court has statutory authority to review an action of an administrative agency, the court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute. *Nebraska Dept. of Health & Human Servs. v. Weekley*, 274 Neb 516 (2007); *Essman v. Nebraska Law Enf't Training Ctr*, 252 Neb 347 (1997). Here statutes define parties, appeal times, and the record to be reviewed.

74. Necessary parties must be joined in appeals from rule-making orders by agencies. *Shaffer v. Nebraska Dept. of Health & Human Servs.*, 289 Neb 740 (2014); *Beatrice Manor v Dept of Health*, 219 Neb 141 (1985). This did not occur here. Instead, the NLCC decided the contested case on April 24. The Beer Stores appealed on April 25 but did not name or serve the Citizens. The district court issued a Final Judgment on April 27 without either the Citizens or the Administrative Record, or the merits, before it.

75. Even though they were not before the district court, the Citizens are aggrieved by the district court's improvident decision. This Court held that aggrieved parties may appeal adverse district court decisions in *APA* cases even where they did not participate in the district court review. *Schaeffer v. Nebraska DHHS*, 289 Neb 740 (2014). For this reason they have a right to appeal the decision below under *Neb Rev Stat* § 84-918(1) & (3). *Neb Rev Stat* § 53-133(2) & § 53-1,115(4)(a)(ii). If necessary parties are absent, the district court, as an intermediate appellate court, lacks subject matter jurisdiction to proceed. *Schaeffer, supra*; *McDougle v. State ex rel Bruning*, 289 Neb 19 (2014).

76. The Final Judgment (T18) of the district court purports to have impacted the rights of the Citizens by reversing the NLCC's decision. The Citizens have a vested statutory interest and participated in proceedings there. *Neb Rev Stat* § 53-1,115(4)(a)(ii) & § 53-133(2); *Neb Rev Stat* § 84-917(2)(a)(i).

77. This Court's precedent is unequivocal: a judgment is void, and not merely voidable, if the court rendering it lacked personal or subject matter jurisdiction or otherwise lacked a legal basis for the judgment. A void judgment is of no legal effect. *Sanders v. Frakes*, 295 Neb 374, 382–83 (2016). Equally unequivocally, the Supreme Court cannot acquire jurisdiction where the district court did not have it. *Countrywide* at 405.

78. Without the Citizens before it or summoned, and with other citizen protestants also absent, the district court, sitting as an intermediate appellate court, lacked jurisdiction to act. Its Final Order is null and void. The time to appeal from the NLCC has passed. Remand cannot "fix" anything. This Court lacks jurisdiction just as the court below lacked it. There is no patchwork magic available to remedy this problem. Reversal and dismissal are requested.

Error 2: The District Court Erred When It Purported to Issue a Final Judgment without Notice and a Hearing on The Merits.

79. A hearing was scheduled on the Beer Stores' Motion for a stay to prevent enforcement of the NLCC Final Order just 2 days after the appeal to district court was taken. The hearing was set for, and conducted on, April 26, 2017. (T15). Only the Deputy Attorney General responsible for representation of the NLCC and counsel for the Beer Stores appeared. Notice of the hearing on the request for a stay was given only to the Commission and its Executive Director through the Assistant Attorney General. (T15).

80. The court heard the Beer Stores' and the Commission's lawyers on April 26, 2017. No notice of the hearing was given to the Citizen Protestants. (T15-16). The hearing was on the Beer Stores' request for a stay, not the merits of the case. (T15). The next day, the Court issued its Final Judgment reversing the Commission and disposing of the case on the merits. (T18). The merits of the NLCC decision were not before the district court on April 26. The Administrative Record was not yet received; there was nothing at the courthouse for the district court to review. The hearing was on a stay motion, not the review of the administrative record or merits. And no notice was given to the Citizens. Yet, the district court made a case-dispositive ruling. "The cart got ahead of the horse." Cicero - *On Friendship* (106 BC - 43 BC).

81. There is no evidence that the Beer Stores or the court gave notice to anyone that the merits of the NLCC ruling would be taken up by the court on April 26, 2017, before the administrative record reached it. (T15). Where parties who are essential to a proceeding are not before the district court, a decision on the merits is premature. *City of Omaha v. C.A. Howell, Inc.*, 20 Neb App 711 (2013). In this case, the merits were reached prematurely. The district court ruled without (a) the administrative record, (b) necessary parties, and (c) without notice to the parties that the merits would be taken up.

82. This 2nd Assigned error has independent merit. Even if all parties had been present, and even if the administrative record had been before the court, there was no notice that the court would decide the case on its merits when it took up and heard only a Motion to Stay the NLCC's Final Order refusing to renew the Beer Stores' licenses to sell alcohol.

Error 3: The District Court Erred When It Purported to Decide the Case Without the Agency Record or Case Merits Before It.

83. The agency record of proceedings is indispensable to the role of the district court as an intermediate appellate court. If the record is not before the court, the merits of the case cannot be present before it, and a decision is impossible. It is the duty of the court to review the decision of the agency on the record to determine whether the agency “acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.” *Douglas Cty v. Archie*, 295 Neb 674, 687 (2017). NLCC decisions are required to be based on evidence adduced during proceedings involved in contested cases. Only the Agency Record, and no other evidence, may be reviewed or considered. *Medicine Creek LLC v. Middle Republican NRD*, 296 Neb 1, *8 (2017).

The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Fleming v. Civil Serv. Comm’n of Douglas Cty.*, 280 Neb 1014 (2011). *The reviewing court in an error proceeding.* The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh the evidence or make independent findings of fact. *Id.*

An administrative agency decision must not be arbitrary and capricious. Agency action is “arbitrary and capricious” if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.

Douglas Cty at 687-88.

84. Where a matter is required to be accomplished before a Court can consider the merits, the Court is powerless to proceed to the merits until the condition prerequisite to their consideration is fulfilled. *In re Adoption of Chase T*, 295 Neb 390, 397-98 (2016)(consents required before court could entertain merits of issue in adoption proceedings). The presence of the Administrative Record before the district court is jurisdictional to review on the merits. *Cf.*, *In re Lanbie's Estate*, 178 Neb 506, 508 (1965)(ruling on claim not mature because administrative steps not completed in estate proceeding). Appellate courts do not consider matters on the merits where all issues are not before them. *Cf.*, *Foster v. Bryan LG Medical Ctr East*, 272 Neb 918 (2007)(fee dispute not decided below. Premature to consider appeal without a decision). See also *Bonge v. Cty of Madison*, 253 Neb 903 (1998)(judgment on merits premature in inverse condemnation suit due to lack of decision on administrative matter).

85. The merits simply are not ripe where the administrative record is incomplete or has not reached the appellate court. *In re Lanbie's Estate, supra. See*, 61B Am Jur 2d *Pollution Control* § 115 (WL Updated June 2017), citing *Los Alamos Study Group v. US Dept of Energy*, 794 F Supp 2d 1216 (D NM 2011).

86. An agency's judgment must be based on a factual foundation and give due consideration to all essential elements involved. *In re Application of Jantzen*, 245 Neb 81 (1994). The NLCC is an agency. *Lariat Club, Inc. v. Nebraska Liquor Control Comm'n*, 267 Neb 179, 182 (2004). Unless there is affirmative evidence to the contrary, a reviewing court will presume an agency duly considered all evidence before it. *Benitez v. Rasmussen*, 261 Neb 806 (2001). The Administrative Record is essential to the review process. A court can review only what is before it. *Nebraska Dept of Corr Svcs v. Carroll*, 227 Neb 307, 309 (1986). This rule has never been doubted. *Clark v. Wright*, 6 Neb 413 (1877) (Transcript did not identify papers as from any

court anywhere; Supreme Court would not presume they were.) *Doe v. Bd. of Regents*, 280 Neb 492 (2010) (review to determine if process was served).

87. The Administrative Record was filed in district court on July 5, 2017. Though the district court did not have the Administrative Record in April, it has been, or is being, transmitted to this Court in July. The Administrative Record does not need to have been part of the district court bill of exceptions for this Court to receive, and examine it for jurisdictional issues. *Maurer v. Weaver*, 213 Neb 157, 163–64 (1982) held:

We therefore hold that where appeals are taken from an administrative agency to the district court, pursuant to the provisions of § 84-917, the certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence.

88. The July 5, 2017, filing date when the Record reached the district court confirms it was not before that court when it issued its Judgment. It was an error to take up the merits without the Record. Like the 1st and 2nd ones, the 3rd Assigned Error has merit.

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

89. This 4th Assigned Error is dependent on the Administrative Record, which was never reviewed by the district court. It is presented to make clear the strong evidence before the NLCC to support its decision. It needs to be decided only in the event this Court does not decide in Citizens' favor based on the first 3 Assigned Errors. Those Errors are not waived by this alternative argument.

90. Four applicants for renewal of Class B off-sale beer licenses seek to renew their privileges to sell alcohol in the state of Nebraska at retail. The Nebraska Liquor Control Commission has subject matter jurisdiction over all such proceedings. The judicial branch of government does not. The NLCC has this jurisdiction:

The power to regulate all the control of the manufacturer, distribution, sale, and traffic of alcoholic liquor, except as specifically delegated in the Nebraska Liquor Control Act, is vested exclusively in the Commission.

Neb Rev Stat § 53-116.

91. The NLCC implements this power, in part, by wielding its power to investigate and to suspend, cancel or revoke licenses. § 53-116.01. The Commission also has the following powers, functions and duties:

(1) To receive applications for and to issue licenses to and suspend, cancel, and revoke licenses . . . in accordance with the Nebraska Liquor Control Act.

(3) To call upon other administrative departments of the state, county and municipal governments, county sheriffs, city police departments, village marshals, peace officers, and prosecuting officers for such information and assistance as the Commission deems necessary.... The Commission *shall* enter into an agreement with the Nebraska State Patrol in which the Nebraska State Patrol shall hire 6 new patrol officers and, from the entire Nebraska State Patrol, shall designate a minimum of 6 patrol officers who will spend a majority of their time in administration and enforcement of the Nebraska Liquor Control Act.

Neb Rev Stat § 53-117 (selected portions).

92. The holder of a liquor license is *not entitled* as a matter of right to renewal of the license upon its expiration. This is the general rule. 45 Am Jur2d *Intoxicating Liquors* § 139 (Westlaw updated Feb 2017). Liquor Control Commissions are empowered to limit the number of licensees and their locations. *J.B.Glen, Power to Limit Number of Intoxicating Liquor Licenses*, 163 ALR 581 (*orig.* 1946, Westlaw, updated weekly) (citing 7 Nebraska decisions for this proposition).

93. “[A] liquor license is a privilege, and in the Liquor Board has the power to circumscribe that privilege as ‘deemed necessary to prevent [its] abuse.’” *Bd. of Liquor License Comm’rs v. Kougl*, 154 A3d 640, 649 (Md App 2017). See also, *State v. Adams*, 355 So2d 917, 922 (La 1978) (pardon of criminal restores rights and privileges including privilege of holding a liquor license). The privilege to renew a liquor license may be lost by noncompliance with the law. *Senor Iguana’s v Idaho State Police Bureau of Alcoholic Beverage Control*, 371 P3d 344, 347 (Idaho 2016). If a liquor license were a property right, it could be subjected to liens. But, it is not and attempts to impose security interests or liens on licenses are not valid. *21 West Lancaster Corp. v. Main Line Restaurant, Inc.*, 790 F2d 354 (3d Cir 1986).

94. The powers of the NLCC include renewing licenses. This *may* occur automatically without formal application in certain circumstances. *Neb Rev Stat* § 53-135. But, there is no right to automatic renewal. Written protests of renewal are permitted by *Neb Rev Stat* § 53-135.01. And the law is clear that there is no vested right to renewals of a license:

Any licensee may renew his, her or its license at the expiration thereof in the manner set forth in section 53-135 if the licensee is then qualified to receive a license and the premises for which such renewal license is sought are the same premises licensed under the license to be renewed and are suitable for such purpose. ***The renewal privilege provided for in this***

section 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). Nebraska’s statute is consistent with the law in general. “A liquor license is a mere privilege, which is at all times in the control of the legislature.” *Rocky Mountain Rogues, Inc. v. Town of Alpine*, 357 Fed Appx 887, 895 (10th Cir 2010), quoting, *Albertson’s, Inc. v. City of Sheridan*, 33 P3d 161, 168 (Wyo 2001). *Las Fuentes, Inc. v. City of Chicago*, 7 NE3d 750, 755 (Ill App 2014) (holding “There is no vested interest... in the renewal of a liquor license, thus nonrenewal of a license, or the denial of a new license, is not subject to due process.”). As a leading treatise puts it,” Without doubt, a license can be revoked on notice and after hearing for a sufficient cause. Frequently, notice and hearing may be requisite. Charges, notice and hearing may be required by an ordinance before revocation of certain licenses or the nonrenewal of a license. 9 McQuillin *Municipal Corporations* § 26:118 (3d Ed WL Updated March 2017).

95. In Nebraska, a liquor licensee may be entitled to due process of law and hearing on a liquor license renewal application, but there is no automatic right of renewal. *Neb Rev Stat* §53-135.02; *Orchard to Hill Neighborhood Assn v. Orchard Hill Merchantile, LLC*, 274 Neb 154 (2007). Here, the licensees got due process at the extended hearing before the NLCC in the contest case. Where the evidence proves grounds for nonrenewal such as absence of need, or unlawful operations, or a sales establishment’s status as a nuisance, nonrenewal after a hearing is proper. *Point Proven, LLC v. City of Monroe*, 214 So3d 912 (La App 2017); *Senor Iguana’s* at 347; *Morris-Schindler, LLC v. City & Cty of Denver*, 251 P3d 1076 (Colo App 2010).

96. The NLCC may require a long form application to renew a license when there is evidence that a licensee fails to meet a renewal requirement of § 53-135. *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Comm’n*, 251 Neb 61 (1996). Here, there were indications of law

enforcement insufficiencies. While the applicant seeking renewal has no vested right, generally, the licensee is entitled to renewal if the requirements for renewal are met, *unless* the Commission makes a decision to reduce the number of licenses issued under its jurisdiction. Compare, *Pump & Pantry, Inc., v. City of Grand Island*, 233 Neb 191 (1989) with the current language of § 53-135.02. It was amended in 1991 by LB 334 § 42. The amendment was coupled with declarations of legislative purposes, including a new legislative articulation of the purposes of the *Liquor Control Act*. In LB 344 (Laws 1991), the Legislature expressed the policy of Nebraska as follows in § 53-101.01:

- (1) It is hereby declared to be the policy of the legislature to:
 - (a) Regulate, restrict, license, or prohibit the manufacture, distribution, sale and traffic of alcoholic liquor and regulate the transportation or importation of alcoholic liquor into the state;
 - (b) Promote the public interest of liberal construction of the Nebraska Liquor Control Act to remedy the abuses inherent in the traffic of alcoholic liquor;
 - (d) Encourage temperance and restrict the consumption of alcoholic liquor; and
 - (e) Promote the health, safety and welfare of the people of the state of Nebraska by (i) sound, careful control and regulation of the manufacture, distribution and sale of alcoholic liquor, (ii) empowering local government bodies to enact police regulations . . . (v) authorizing the commission to regulate and control the manufacture, distribution, sale, and traffic of alcoholic liquor consistent with the act . . . and (vii) authorizing the Commission to approve and deny retail licenses pursuant to the Act.
- (2) The legislature hereby declares that the business of retailing alcoholic liquor is a business affected with the public health, safety and welfare such that it must be regulated locally. The legislature hereby acknowledges that there is general concern

among the citizens of the state of Nebraska regarding: (a) the increasing number of individuals driving while under the influence of alcoholic liquor, (b) the widespread abuse of alcoholic liquor; . . . (d) the inability of law enforcement alone to curb the abuse of alcoholic liquor.

(3) It is the declared policy of the state of Nebraska that it is necessary to regulate and control the manufacture, sale and distribution of alcoholic liquor within the state for the purpose of fostering temperance in consumption and respect for and obedience to the law.

97. LB 344 § 42 (§ 53-101.01) expressly declared that there shall be no vested right to renewal of a liquor license. This provision is in the law today at § 53-135.02. In this case, the NLCC decided the correct number of licensees for the 9 residents of Whiteclay was no licenses (-0-). It reduced the number of licensees in Sheridan County by 4 when the county's population was dwindling, and in the face of evidence that the Beer Stores were acting irresponsibly and often unlawfully. It also reduced the number of licensees based on evidence that virtually every Beer Stores sale contributed to intoxication of previously intoxicated persons, or led to a violation of the law when customers crossed the state line into South Dakota's Oglala Lakota County where possession of alcohol is illegal. *Id.* The NLCC had abundant proof of law enforcement deficiencies.

98. "A liquor license is not a contract between the government and the licensee, but rather is a privilege which may be revoked." 45 Am Jur2d *Intoxicating Liquors* § 88 (WL updated weekly). There is no right to have one or more liquor licenses in an area populated by 9 persons, at least 3 of whom do not drink alcohol. "Although there appears to be an authority to the contrary, a license to sell intoxicating liquor is not a property in any constitutional sense." 45 Am Jur2d *Intoxicating Liquors* § 89, citing *BPNC, Inc. v Taft*, 147 Fed Appx 525 (6th Cir 2005). And, there is

no constitutional right to renew a liquor license used to sell beverages to intoxicated persons, or to facilitate violations of law in a sister state. *E.H. Schopler, Grant or Renewal of Liquor License as Affected by Fact that Applicant Held Such License in the Past*, 2 ALR2d 1239 at § 3A (Orig 1948, WL updated weekly). The “rights” of the Beer Stores to renewal go no farther than the statutes governing renewal. *Id.* at §§ 3 & 5. There, is “no constitutional right to violate the law”. *Rental Prop Owners Ass’n v. City of Grand Rapids*, 566 NW2d 514, 522 (Mich 1997); *Crabtree v. State*, 479 NE2d 70 (Ind App 1985).

99. This Court consistently holds that a license “to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or even a suppression of the traffic do not deprive persons of property without due process of law . . .” where licenses are not renewed. This language appeared in this Court’s decisions originating at least as early as *Marsh & Marsh v. Carmichael*, 136 Neb 797, 801-02 (1939), and continued to be repeated until at least as recently as *Bosselman, Inc. v. State*, 230 Neb 471, 474 (1998).

100. The NLCC, and not the courts, make license renewal decisions. *Neb Rev Stat* §§ 53-116 & 117. The courts review for due process compliance under the *Administrative Procedures Act*. The NLCC must consider whether the premises, because of the manner in which they are operated, or their location, or the population they serve if it is vulnerable, may become “common nuisances” required to “be abated”. *Neb Rev Stat* §§ 53-190 & 53-198.

101. While a business might operate and not be a nuisance in 1 location, in another location, serving a different populace, it may be a nuisance. This is consistent with nuisance tort jurisprudence. *Kopecky v. Nat’l Farms Inc.*, 244 Neb 846 (1994) (livestock); *Bargmann v. Soll Oil Co.*, 253 Neb 1018 (1998) (petroleum contamination); *State ex rel Spire v. Strawberries, Inc.*,

239 Neb 1 (1991) (gaming devices). The Beer Stores' have no "license" to become public nuisances. Yet, they did. And, so they must be closed. John Stuart Mill, *On Liberty* Ch 3 (1859).

102. The NLCC makes decisions about whether a liquor licensee becomes a public nuisance, no longer serves the public interest, or should be discontinued. The NLCC decides whether the evidence establishes that a license should no longer exist. In this case, the Administrative Record contains dramatic evidence of the public nuisance nature of the Applicants' operations. The evidence was sufficient for the NLCC to deny renewal of each license. A Nebraska farmer with a crop in the fall as abundant as the evidence for nonrenewal would feel good about his year's work.

103. The Administrative Record reveals that the NLCC did not act arbitrarily, did not exceed its statutory authority, and reached decisions grounded in compelling evidence.

Conclusion

104. The district court acted without necessary parties having been named or served, without the Administrative Record, and without giving notice of its intention to take up the merits. It erred on all 3 counts. And, even if the Citizens are wrong in their first 3 Assigned Errors, the record amply sustains the NLCC's Judgment. The district court acted arbitrarily. Reversal and dismissal of the Beer Stores' Appeals is requested.

July 12, 2017.

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I hereby certify that on the 12th day of July, 2017, I electronically filed the foregoing Citizen Appellees' Answer Brief and Opening Brief on Cross Appeal using the e-filing system, which sent notification of such filing to the following attorneys of record and by emailing the Brief to:

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S-17-441

IN THE NEBRASKA SUPREME COURT

STUART KOZAL, d/b/a JUMPING EAGLE INN, et al.,

Petitioners-Appellees,

v.

NEBRASKA LIQUOR CONTROL COMMISSION,

Respondent-Appellant,

And

**ABRAM NEUMANN, LORI HANKINSON, BARB and DAVID VANCIL,
("Citizen Protestants"),**

Appellants.

BRIEF OF APPELLEES

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TABLE OF CONTENTS

Statement of the Case	1
A. Nature of the Case.....	1
B. Issues Actually Tried to the Court Below	1
C. How the Issues Were Decided	1
D. Scope of Review	1
Propositions of Law	2
Statement of Facts.....	4
Argument	9
Conclusion	25
Certificate of Service	26

TABLE OF AUTHORITIES

CASES

<i>Bosselman, Inc. v. State</i> , 230 Neb. 471, 432 N.W.2 nd 226 (1988).....	2, 9
<i>CenTra, Inc. v. Chandler Ins. Co.</i> , <u>248 Neb. 844, 540 N.W.2d 318</u> (1995)	4, 16, 24
<i>Chrysler Corp. v. Lee Janssen Motor Co.</i> , <u>248 Neb. 281, 534 N.W.2d 568</u> (1995)	4, 16, 25
<i>Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission</i> , 251 Neb. 61, 554 N.W. 2d 778 (1996)	2, 3, 4, 9, 12, 13, 14, 15, 16, 24
<i>Hoshor v. Hoshor</i> , 254 Neb. 743, 580 N.W.2d 516 (1998)	23, 24
<i>Olson v. City of Omaha</i> 232 Neb. 428, 441 N.W.2d 149 (1989)	4, 23
<i>Pump & Pantry, Inc. v. City of Grand Island</i> , 233 Neb. 191, 444 N.W. 2d. 312 (1989)	2, 3, 9, 11, 12, 13, 19
<i>Trolson v. Board of Ed. of Sch. Dist. of Blair</i> 229 Neb. 37, 424 N.W.2d 881 (1988)	4, 23
<i>Wadman v. City of Omaha</i> , 231 Neb. 819, 438 N.W.2d 749 (1989)	4, 23

STATUTES

NEB. REV. STAT. § 24-204 (Reissue 2008)1

NEB. REV. STAT. § 25-1911 (Reissue 2008)1

NEB. REV. STAT. § 25-1912 (Reissue 2008)1

NEB. REV. STAT. § 53-101.0122

NEB. REV. STAT. § 53-116.0121

NEB. REV. STAT. § 53-117.08 (Reissue 1993)21

NEB. REV. STAT. § 53-1252

NEB. REV. STAT. § 53-1327, 21, 25

NEB. REV. STAT. § 53-132(2).....3, 4, 13, 14, 15, 16

NEB. REV. STAT. § 53-132(3).....16, 20, 21

NEB. REV. STAT. § 53-132(3)(g).....15

NEB. REV. STAT. § 53-1337, 18

NEB. REV. STAT. § 53-1352, 3, 10, 13, 14, 20, 24

NEB. REV. STAT. § 53-135.0118

NEB. REV. STAT. § 53-135.022, 3, 9, 13, 14, 19

NEB. REV. STAT. 53-150 (now codified at Neb. Rev. Stat. 53-132.02).....2, 3, 10, 11, 12

NEB. REV. STAT. § 53-1,115(4)(a-c).....2, 17, 18

NEB. REV. STAT. § 84-917(5)(b)(i)24

STATEMENT OF JURISDICTION

Appellant perfected this appeal from an Order of the Lancaster District Court dated May 18, 2016, entering a verdict in favor of April 27th, 2017. Jurisdiction to hear this appeal is conferred on this Court by NEB. REV. STAT. §§ 24-204 (Reissue 2008), 25-1911 (Reissue 2008), and 25-1912 (Reissue 2008).

The Notice of Appeal herein was filed on April 27th, 2017. The Praecipe for Transcript and Praecipe for Bill of Exceptions were filed on the same day. The district court's order of April 27, 2017 adjudicated the rights and liabilities of all remaining parties and all remaining issues to this action.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Appellees accept the statement of the case provided by Appellant Nebraska Liquor Control Commission.

B. ISSUES ACTUALLY TRIED TO THE COURT BELOW

The issue tried to the court below was whether or not Appellees were entitled to a stay of the order of the Nebraska Liquor Control Commission.

C. HOW THE ISSUES WERE DECIDED

The trial court determined the decision of the Nebraska Liquor Control Commission was void as a matter of law, vacated the decision of the Nebraska Liquor Control commission and ordered the Commission to not interfere with Appellees renewal application process.

D. SCOPE OF REVIEW

Appellees accept the statement of the case provided by Appellant Nebraska Liquor Control Commission.

PROPOSITIONS OF LAW

1. For purposes of the Nebraska Liquor Control Act party of record means:
 - (a) In the case of an administrative proceeding before the commission on the application for a retail, craft brewery or microdistillery 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)(a)
2. Current licensees have a right or benefit of a “renewal privilege” and a constitutionally protected interest in obtaining renewal of the existing license. *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission*, 251 Neb. 61, 554 N.W. 2d 778 (1996); *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W. 2d. 312 (1989); *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2nd 226 (1988).
3. The relevant statutes regarding the renewal of an existing license are Neb. Rev. Stat. 53-150 (now codified at Neb. Rev. Stat. 53-132.02) and Neb. Rev. Stat. 53-135.

Pump & Pantry, Inc. v. City of Grand Island, 233 Neb. 191, 444 N.W. 2d. 312 (1989)
4. Any licensee may renew his, her, or its license at the expiration thereof in the manner set forth in section 53-135 if the licensee is then qualified to receive a license and the premises for which such renewal license is sought are the same premises licensed under the license to be renewed and are suitable for such purpose.

Neb. Rev. Stat. 53-135.02
5. A licensee is entitled to renewal of a license if the licensee is qualified to hold a license as defined by Neb. Rev. Stat. 53-125; the premises for which the renewal is sought is the same premises designated in the initial license and the premises remain suitable for

the sale of alcohol. *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W. 2d. 312 (1989).

6. A retail license issued by the commission may be automatically renewed by the commission without formal application upon payment of the renewal fee and license fee if payable to the commission prior to or within thirty days after the expiration of the license. The payment shall be an affirmative representation and certification by the licensee that all answers contained in an application, if submitted, would be the same in all material respects as the answers contained in the last previous application.

Neb. Rev. Stat. 53-135

7. The phrase “renewal privilege” means a “right or benefit granted in favor of a licensee seeking an extension or continuation of a previously issued license.” *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W. 2d. 312 (1989)
8. Neb. Rev. Stat. 53-150 (now 53-135.02) does not require the licensee to satisfy additional requirements for the issuance of a renewal license. *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W. 2d. 312 (1989)
9. Without a showing by Commission that a licensee did not meet one of the renewal requirements set forth in §§53-135 and 53-135.02 (Reissue 1993) the Commission could not demand *the* licensee submit a long form application. *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission*, 251 Neb. 61, 554 N.W. 2d 778 (1996)
10. § 53-132(2) “clearly describes the general standards by which an initial applicant is to be judged to be fit to obtain a liquor license...” *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission*, 251 Neb. 61, 554 N.W. 2d 778 (1996)

11. §53-132(2) is not a rule or regulation which can be violated by a current licensee and thus cannot form the basis for cancellation, or more appropriately, non-renewal of an existing license. *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission*, 251 Neb. 61, 554 N.W. 2d 778 (1996)
12. In an error proceeding to review an administrative agency decision, it is incumbent upon both the district court and the Supreme Court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction. *Olson v. City of Omaha*, 232 Neb. 428, 441 N.W.2d 149 (1989); *Wadman v. City of Omaha*, 231 Neb. 819, 438 N.W.2d 749 (1989); *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988).
13. Administrative bodies have only that power and authority specifically conferred upon them by statute or by construction. *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995); *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995)

STATEMENT OF FACTS

Appellees Qualify for Renewal of an Existing License

Appellees each hold a liquor license issued by the Nebraska Liquor Control Commission (NLCC). Clay and Daniel Brehmer operate a business known as State Line Liquor. The initial license was issued on November 6, 2002 and renewed every year through March 8, 2016. (T1-2) Steve and Doug Sanford are the members of Sanford Holding, LLC and operate a business known as D&S Pioneer Service. The initial license for Sanford Holding, LLC was issued on August 5, 2008 and renewed every year through February 19, 2016. (T2) Arrowhead Inn, Inc. operates a

business known as Arrowhead Inn. Jason Schwarting is the president. The initial license for Arrowhead Inn was issued on May 15, 2006 and renewed every year through February 22, 2016. (T1) Stuart Kozal operates a business known as Jumping Eagle Inn. The initial license for Stuart Kozal was issued on or about February 16, 1982 and renewed every year through February 26, 2016. (T1) Each of the Retailer's liquor licenses expired on April 30, 2017.

The undisputed facts from the hearing before the commission were that each retailer sought renewal of an existing license and:

1. Each retailer remains qualified to hold a liquor license;
2. Each retailer seeks renewal for the same premises; and
3. Each premises remains suitable for the sale of alcohol.

(413:3-416:11; 438:17-441:16; 457:4-459:15; 475:12-477:11)

No facts were presented and no findings were made otherwise. (T22) Each Retailer has attempted to renew their license online as has been done in the past but were denied. (416:18-417:2; 441:17-442:4; 460:2-6; 477:19-23)

**The Commission Failed to Distinguish
Between a New Application and a Renewal.**

On November 1, 2016 the NLCC met for consideration of a motion made by Commissioner Bailey and "upon the recommendation by staff" of the Commission to require each Retailer to submit a new or "long form" application in lieu of automatic renewal. The resulting order for each Retailer states:

1. The Commission reviewed one month of calls logs from the Sheridan County Sheriff's office, an e-mail from the Nebraska State Patrol and the "testimony" of Sheridan County Commissioner Jack Anderson;

2. The evidence received showed that each licensee may not meet all requirements for “automatic renewal” of the license.
3. The specific “requirement” not met was the adequacy of law enforcement; and
4. Each Appellee was ordered to submit a “long form” application.

(E185-188,1-2:258,Vol. X)

The November 1st, 2016 order did not make any finding that either:

1. Any Appellee is no longer qualified to hold a liquor license;
2. That any Appellee had or was going to seek a license for a different premises; or
3. The Appellee’s premises were no longer suitable for the sale of alcohol.

The hearing on November 1st, 2016 and subsequent order were not in response to any request to renew a liquor license by any Retailer. Prior to Commissioner Bailey’s motion and the presentation of evidence to the NLCC none of Appellees were notified of the motion or the date and time at which such motion was to be considered. (417:9-24; 442:5-23; 460:9-25; 478:2-24)

On November 2nd, 2016 commission entered an order on each license of “Do not renew”. (E1,11:31, Vol. III Part A; E2,12:31,Vol. IV Part A; E3,13:31,Vol. V Part A; E4,11:31, Vol. VI Part A) Under protest Appellees completed a “long form” application as ordered by the commission. (E1,30-49:31, Vol. III Part A; E2,13-40:31,Vol. IV Part A; E3,14-43:31,Vol. V Part A; E4,15-64:31, Vol. VI Part A) Rather than treating the application as one for renewal the Commission began the process of completing the steps of a new application. This is demonstrated by multiple facts within the record.

The first page of each retailer’s “show cause” is a form which calls for the disposition to be either “grant license” or “deny license”. (E1,1:31Vol. III Part A; E2,1:31,Vol. IV Part A; E3,1:31,Vol. V Part A; E4,1:31, Vol. VI Part A) In addition, the protests accepted by the

Commission are entitled “REQUEST TO FILE CITIZEN PROTEST AGAINST NEW APPLICATION”. (E1,77-78:31 Vol. III Part A)

On various dates in December the Commission sent notices to Sheridan County regarding each retailer. The notices from the Commission, which are marked as Exhibits 193 -196, state:

PER §53-133, THE LIQUOR CONTROL COMMISSION SHALL SET FOR HEARING ANY APPLICATION WHEREIN:

1. There is a recommendation of denial from the local governing body.
2. A citizen’s protest; or
3. Statutory problems that the Commission discovers.

(E193-196,1:258,Vol. X)

Neb. Rev. Stat. §53-133 makes no mention of “statutory problems the Commission discovers”. Further, §53-133 is tied directly to §53-132 which this court has held governs the issuance of new licenses, not renewal of licenses. Finally, on or about January 25, 2017 the Nebraska Liquor Control Commission sent each Appellee a letter noticing each application for hearing. The letters direct each Retailer to offer testimony to the following issues:

1. Due to a citizen’s protest having been filed against an application; and
2. Due to an order to show cause whether or not there is adequate law enforcement.

(E189-192,1:258,Vol. X)

In addition, the notice directed each Retailer to “come prepared to testify to §53-132(2), (a), (b), (c) and (d) of the Nebraska Statutes”. As noted, Neb. Rev. Stat. §53-132 relates only to apply only to new applications, not renewals. At the time of the hearing before the commission the hearing officer specifically limited testimony and evidence to the issue of adequate law enforcement stating, “Therefore, this Commission is looking at the issue of whether there is

adequate law enforcement in the unincorporated village of Whiteclay to – for the reissuance of these licenses. And so with that admonishment, that’s what we’re limited to is – is there adequate law enforcement...” (18:7-12)

Approval by Sheridan County and Results of Inspections

On January 5, 2017 the Sheridan County Commissioners held hearings regarding a recommendation of approval or denial of Appellees’ licenses. Thereafter, the Sheridan County Board of Commissioners signed Resolutions recommending that the applications be approved. (E197-200,1:258,Vol. X)

In December of 2016 the Nebraska State Patrol investigator assigned to the Liquor Control Commission completed an investigation related to the Retailer’s applications. The investigator, Rob Jackson, prepared a report for submission to the Nebraska Liquor Control Commission. For each Appellee, Investigator Jackson determined that each met the requirements to be issued a liquor license. (E181-184,1:258,Vol. X)

The Department of Agriculture issued a Food Inspection Report which determined that each of Appellee’s premises met the requirements for issuance of a license. (E168,23-25:22,Vol. IX; E169,22-24:22, Vol. IX; E170,24-26:22,Vol. IX; E172,28-30:22,Vol. IX)

The State Fire Marshall inspected each of Appellee’s premises. The Fire Marshall issued a report which determined that each premises meets the requirements for issuance of a license. (E168,27:22,Vol. IX; E169,25:22, Vol. IX; E171,29:22,Vol. IX; E172,31:22,Vol. IX)

ARGUMENT

The Commission did not have jurisdiction over this matter,

Before examining whether or the district court had jurisdiction it is appropriate to determine whether or not the Commission had jurisdiction to take the action it did. An examination of that question requires a review of the distinction between the issuance of a new license and the renewal of an existing license. There is no question the statutory scheme of the Nebraska Liquor Control Act and this Court's rulings distinguish between applications for NEW licenses versus the renewal of EXISTING licenses. The requirements for renewal of a license are far different from the requirements for issuance of a new license.

Appellees are the owners of an existing liquor license. As such, Appellees have the benefit of a "renewal privilege". *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission*, 251 Neb. 61, 554 N.W. 2d 778 (1996); *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W. 2d. 312 (1989). Moreover, the renewal privilege provides Appellees with a constitutionally protected interest in obtaining renewal of an existing license. *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988),

The *Latin Club* and *Pump and Pantry* cases are controlling and dispositive with regard to the issue of new versus existing licenses. In *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W. 2d. 312 (1989) licensees sought a declaratory judgment that each was entitled to renewal of their license. The Lancaster County District Court granted summary judgment in favor of the licensees and found:

1. The licensees were qualified to receive a license;
2. The premises sought to be licensed were the same premises for which the licenses were issued; and
3. The premises were suitable for the sale of alcohol.

One of the Defendants appealed the decision of the District Court. This Court affirmed the decision of the District Court.

The sole issue considered by this Court was the requirements which a liquor licensee must satisfy in order to take advantage of the renewal privilege. This Court reviewed the statutory scheme for issuance of a new license versus the renewal of an existing license. **It determined that the only relevant statutes regarding the renewal of an existing license are *Neb. Rev. Stat. 53-150 (now codified at Neb. Rev. Stat. 53-135.02) and Neb. Rev. Stat. 53-135.*** These statutes have not substantially changed since the *Pump & Pantry* decision.

Neb. Rev. Stat. 53-135.02 provides:

Any licensee may renew his, her, or its license at the expiration thereof in the manner set forth in section 53-135 if the licensee is then qualified to receive a license and the premises for which such renewal license is sought are the same premises licensed under the license to be renewed and are suitable for such purpose. The renewal privilege provided for in this section 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 provides:

A retail license issued by the commission and outstanding may be automatically renewed by the commission without formal application upon payment of the renewal fee and license fee if payable to the commission prior to or within thirty days after the expiration of the license. The payment shall be an affirmative representation and certification by the licensee that all answers contained in an application, if submitted, would be the same in all material respects as the answers contained in the last previous application. The commission may at

any time require a licensee to submit an application, and the commission shall at any time require a licensee to submit an application if requested in writing to do so by the local governing body.

If a licensee files an application form in triplicate original upon seeking renewal of his or her license, the application shall be processed as set forth in section 53-131.

As part of its review this Court considered the legislative history of the Liquor Control Act. The official "Explanation" contained in the legislative history of 1959 Neb. Laws, L.B. 487, which established the renewal privilege existing today, contains the following:

Although the license renewal feature of the bill constitutes the most extensive change from the existing Act, when we look through form to the substance it is readily perceived that the end result as to which licenses will be renewed will remain virtually unaffected. It is a fact that under the present law renewal applications which indicate no change in circumstances affecting the license are approved as a matter of course, after passing them through the ritualized procedures. **As a practical matter, it is only where the application of the licensee discloses altered circumstances that the exercise of judgment is required.** (Emphasis added)

This Court held that §53-150 (now §53-135.02) “**does not require the licensee to satisfy additional requirements for the issuance of a renewal license**”. *Pump & Pantry, Inc. v. City of*

Grand Island, 233 Neb at 198. In the words of the Court, “**a licensee is entitled to renewal of a license, that is continuation of the existing license, if at the time for renewal of the license the licensee meets the requirements which existed when the license to be renewed was initially issued**”. *Id.* at 197

The City of Grand Island argued that the renewal privilege granted by statute merely allowed the retailer to reapply for a new license which would only be granted if the retailer demonstrated compliance with the requirements governing issuance of a new license. This argument was resoundingly rejected by the Supreme Court. “The City’s interpretation of §53-150 would nullify the “renewal privilege” established by §53-150 and would place renewal applicants on the same footing with first time applicants for a liquor license.” *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb at 197. Instead, the court held that a licensee is entitled to renewal of a license if the licensee is qualified to hold a license; the premises for which the renewal is sought is the same premises designated in the initial license and the premises remain suitable for the sale of alcohol. *Id.* at 198.

In *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission*, 251 Neb. 61, 554 N.W. 2d 778 (1996) the Grand Island Latin Club (the Club) applied for renewal of a liquor license. The Commission denied the application. The Club appealed the Commission’s decision to the Lancaster County District Court which reversed the decision. The Commission appealed. The Nebraska Supreme Court affirmed the decision of the district court.

The Club had a liquor license for approximately 30 years prior to being denied renewal. Despite a relatively clean record the Grand Island City Council objected to renewal of the license and took the position that the Club should file a long form application. The Commission ordered

the Club to file a long form application and show cause why its license should not be suspended, canceled or revoked.

The Club filed the long form application. The Grand Island City Council recommended the application be denied. The Council based its recommendation upon citizen protests and a finding that the Club was not compatible with the neighborhood. The Commission scheduled a show cause hearing and subsequently issued an order denying the Club's license. By the time of hearing the only issue before the Commission was whether or not circumstances had changed from the time of initial issuance of the license. The Commission denied renewal of the Club's license.

As in *Pump & Pantry* this Court reviewed the applicable statutory scheme consisting of *Neb. Rev. Stat. 53-135* and (by then) *Neb. Rev. Stat. 53-135.02*. The Court reiterated its distinction between renewal of a license and a new application. Speaking of its *Pump and Pantry* decision, the court stated, "We concluded that the legislative history and the language of §§ 53-135 and 53-150 disclosed a legislative intent to codify a practice of approving an application for continuation of an existing liquor license **in the absence of a change of circumstances indicated on the licensee's renewal application.**" After doing so the court held that "without a showing by the City of Grand Island or the Commission that the Latin Club did not meet one of the renewal requirements set forth in §§53-135 and 53-135.02 (Reissue 1993) the Commission could not demand that the Latin Club submit a long form application". *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission*, 251 Neb. at 66.

The Supreme Court also considered the Commission's order to show cause which required the licensee to show whether it met the requirements of *Neb. Rev. Stat. §53-132(2)*. Prior to determining if the requirements of the statute were met, the Court examined the issue of whether §53-132 provided an appropriate basis for cancellation of a license. The Court held that § 53-

132(2) “clearly describes the general standards by which an initial applicant is to be judged to be fit to obtain a liquor license...” *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission*, 251 Neb. at 68. As such, the court concluded, §53-132(2) is not a rule or regulation which can be violated by a current licensee and thus cannot form the basis for cancellation, or more appropriately, non-renewal of an existing license. *Id.*

One thing that is plainly clear from a review of the proceedings before the commission, the applicable statutes, legislative history and case law, that is the commission far exceeded its authority in its zeal to terminate the existing licenses of Appellees. The commission simply turned every step of the process on its ear beginning with the November 2nd, 2016 order requiring Appellees to submit a long form application. The “hearing” on which that order was based was conducted without notice to Appellees, without Appellees having the opportunity to present or even object to “evidence” received by the commission. The order makes clear that Commissioner Bailey made a motion and the staff made a recommendation that Appellees be required to submit a long form application. This took place in November, six months prior to the expiration of Appellees existing licenses. Further, and perhaps most importantly, the commission’s action was not done in response to any application filed by Appellees.

As noted above this court has held that the legislative history and the language of §§ 53-135 and 53-135.02 disclose a legislative intent to codify a practice of approving an application for continuation of an existing liquor license **in the absence of a change of circumstances indicated on the licensee's renewal application.** *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission*, 251 Neb. at 66. Without a showing of a change of circumstances on the renewal application, the commission **cannot** demand that Appellees submit a long form application.

A licensee would not qualify for renewal if, and only if, there is a change of circumstances noted on the renewal application which would indicate the licensee is no longer qualified to receive a license, the premises for which the license is sought is different from the premises for which the license was originally issued or the premises are not suitable for the sale of alcohol. In this case there was absolutely no showing by the commission that any renewal application showed a change of circumstances for any Appellee. Indeed, there was no showing of a change of circumstances on a renewal application because no applications were submitted prior to the order to file the long form applications. The commission lacked any authority to order Appellees to submit long form applications.

The commission doubled down on its blatant disregard for the rulings of this court when it issued a show cause order requiring Appellees to offer evidence, “Due to an Order to Show Cause whether or not there is adequate law enforcement”. (E189-192,1:258,Vol. X) At the time of hearing, the hearing officer expressly limited the issue to the adequacy of law enforcement in Whiteclay. In its decision the commission expressly relied on the provisions of 53-132(2) and (3) to deny Appellees the ability to renew their licenses. (T11)

The only mention in the Liquor Control Act of “adequate law enforcement” is found at *Neb. Rev. Stat. 53-132(3)(g)*. Of course, this court has already held that that § 53-132(2) “clearly describes the general standards by which an initial applicant is to be judged to be fit to obtain a liquor license...” *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission*, 251 Neb. at 68. As such, §53-132(2) is not a rule or regulation which can be violated by a current licensee and thus cannot form the basis for cancellation, or more appropriately, non-renewal of an existing license. *Id.*

While this court has not made the same express holding regarding §53-132(3), the provisions of the statute tie it directly to §53-132(2). §53-132(3) provides, “In making its determination pursuant to subsection (2) of this the commission shall consider...” §53-132(2) and §53-132(3) are undeniably to be read in conjunction with one another and cannot be considered separately. §53-132(3) cannot be a rule or regulation a current license may be called upon to address for any reason. The commission lacked authority to compel testimony regarding the adequacy of law enforcement.

Administrative bodies have only that power and authority specifically conferred upon them by statute or by construction. *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995); *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995). The only authority conferred upon the commission with regard to renewal of licensees is to issue the renewal **in the absence of a change of circumstances indicated on the licensee's renewal application.** *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Commission*, 251 Neb. at 66.

On or before November 2nd, 2016 Appellees had not attempted to renew their licenses for 2017-2018. Instead, the Commission took matters into its own hands but while doing so failed to consider the only factors that are relevant to renewal of a license: Whether the licensee is qualified to hold a license; whether the premises for which the renewal is sought is the same premises designated in the initial license and whether the premises remain suitable for the sale of alcohol. There is no evidence that any of these factors have changed. The commission lacked jurisdiction to take any action beyond its statutory authority. It cannot confer jurisdiction upon itself by ignoring its statutory limitations and the rulings of this court. The district court correctly determined that its decision was void as a matter of law.

**If the commission had jurisdiction,
the district court had jurisdiction**

The citizen protestants are not parties to this case and, as such the district court properly exercised jurisdiction over this proceeding. The protestants base their argument on *Neb. Rev. Stat.* 53-1,115(4)(a)(ii). However, in so doing the protestants choose to ignore the full, complete and plain language of the statute.

For purposes of the Nebraska Liquor Control Act party of record means: In the case of an administrative proceeding before the commission **on the application** for a retail, craft brewery or microdistillery license...Each individual protesting the **issuance of such license** pursuant to subdivision (1)(b) of Section 53-133". *Neb. Rev. Stat.* 53-1,115(4)(a) When read in its entirety it is plain that *Neb. Rev. Stat.* 53-1,115(4)(a)(ii) relates to the application for an issuance of a new license not the renewal of an existing license. The failure to distinguish between the issuance of a new licenses versus renewal of an existing license has been caused by the commission's blatant disregard of statutes and the rulings of this court.

As discussed above, the Liquor Control Act and the rulings of this court make clear distinctions between the issuance of a license versus the renewal of a license. §53-1,115(4)(a)(ii) is no different, in that it too, differentiates between issuance and renewal. §53-1,115(4)(a)(ii) contains several references which clearly demonstrate its governance of cases involving applications for a new license and not those for renewal of an existing license.

First, §53-1,115(4)(a) provides quite clearly that it is applicable only to those proceedings on the application for a license. This fact is made all that more evident by §53-1,115(4)(c) which describes the parties of record for administrative proceedings before the commission to suspend, cancel or revoke a retail...license.

Second, §53-1,115(4)(a)(ii) describes the protestants as the “protesting the issuance” of a license. Obviously, this was not a case regarding the issuance of a license.

Finally, §53-1,115(4)(a)(ii) describes those protesting pursuant to Neb. Rev. Stat. 53-133. Protests made pursuant to §53-133 are protests made to the application for and issuance of a new license. The proper statutory authority for protests of a renewal of a license is found at §53-135.01 which includes provisions for protests related to the renewal of a license. *See*, §53-135.01. It is notable, however, that protestors to the renewal of a license are not parties of record. §53-1,115(4)(c)

The only reasonable interpretation of §53-1,115(4)(a)(ii) is that it applies only to the protest made to the issuance of a new license. In proceedings regarding the cancellation, revocation or non-renewal of a license the only parties of record are the licensee and the commission.

Appellees are entitled to renew their licenses

Appellees are entitled to renewal of their licenses for three reasons. First, each Appellee qualifies for renewal of their license. Second, the adequacy of law enforcement is not a consideration for renewal of a license. Finally, even if it is proper to consider the adequacy of law enforcement it is clear that law enforcement remains the same or even greater in Whiteclay than in years past.

Appellees Qualify for Renewal of Their Licenses

The *Latin Club* and *Pump and Pantry* cases are controlling and dispositive in this matter. Those cases set for the only factors to be considered for renewal of a license:

1. The licensee remains qualified to receive a license;
2. The premises sought to be licensed are the same premises for which the licenses were issued; and

3. The premises are suitable for the sale of alcohol.

As held by this, §53-135.02 “**does not require the licensee to satisfy additional requirements for the issuance of a renewal license**”. *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb at 198.

In this case there has been no showing by the Commission or Protestors that any of these circumstances had changed. Witnesses, including protestors, acknowledged that Appellees remain qualified to hold a license, the premises are the same and the premises remain suitable for the sale of alcohol. Indeed, all government agencies involved have either recommended renewal of the licenses (Sheridan County), found that Appellees meet the requirement for issuance of a license (Nebraska State Patrol) or provided no evidence the premises are not fit for the sale of alcohol (Department of Agriculture, State Fire Marshall’s office and Nebraska State Patrol).

Adequacy of Law Enforcement is not a Proper Consideration

As discussed above, the November 2nd, 2016 Orders of the Commission provided that:

1. The Commission received evidence and testimony of a Sheridan County commissioner;
2. The evidence received showed that each licensee may not meet all requirements for automatic renewal of the license.
3. The specific requirement not met was the adequacy of law enforcement; and
4. Each Appellee was ordered to submit a “long form” application.

The orders to Appellees do not set forth any evidence or conclusions regarding whether or not the licensee is qualified to hold a license; whether the premises for which the renewal is sought is the same premises designated in the initial license or whether the premises remain suitable for the sale of alcohol. The order also does not allege a violation of a provision of the Act, a regulation

adopted pursuant to the Act, or a lawful ordinance of a local governing body. Rather, the order only describes concerns about the “adequacy of existing law enforcement.”

It is quite obvious that adequacy of law enforcement is not an issue contemplated by §§ 53-135 and 53-135.02. The only mention of adequacy of law enforcement is found in § 53-132(3) which provides:

In making its determination pursuant to subsection (2) of this section the commission shall consider:

- (a) The recommendation of the local governing body;
- (b) The existence of a citizens' protest made in accordance with section 53-133;
- (c) The existing population of the city, village, or county and its projected growth;
- (d) The nature of the neighborhood or community of the location of the proposed licensed premises;
- (e) The existence or absence of other retail licenses, craft brewery licenses, or microdistillery licenses with similar privileges within the neighborhood or community of the location of the proposed licensed premises and whether as evidenced by substantive, corroborative documentation, the issuance of such license would result in or add to an undue concentration of licenses with similar privileges and, as a result, require the use of additional law enforcement
- (f) The existing motor vehicle and pedestrian traffic flow in the vicinity of the proposed licensed premises;
- (g) The adequacy of existing law enforcement;
- (h) Zoning restrictions;

- (i) The sanitation or sanitary conditions on or about the proposed licensed premises;
and
- (j) Whether the type of business or activity proposed to be operated in conjunction with the proposed license is and will be consistent with the public interest.

As discussed above it is plain from the reading of §53-132(3) that it and the consideration of the adequacy of law enforcement is an issue for initial applicants only. No contortion of the statutes and law can somehow make the adequacy of law enforcement a proper consideration for renewal of license. The provisions of §53-132 have been held by this to apply only to the application for an initial license. The Legislature has not seen fit to change the statutes relied upon by the Supreme Court in reaching its decision. The only authority of the Commission to cancel a license remains as set forth in Neb. Rev. Stat. §§ 53-116.01 and 53-117.08 (Reissue 1993). These sections give the Commission authority to revoke, cancel, or suspend a liquor license only where, after a proper hearing, the licensee has been found to have **violated a provision of the Act, a regulation adopted pursuant to the Act, or a lawful ordinance of a local governing body**. The Commission did not allege or provide notice of hearing related to violations of the Act. Accordingly, this Commission has no authority to not renew the Retailer's licenses.

C. There is No Evidence Law Enforcement has Changed

If adequacy of law enforcement was a proper issue and it could provide a basis for non-renewal, the legislative history and Supreme Court rulings make clear the only proper issue is whether or not there has been a change of circumstances since the issuance of an initial license. No evidence was presented that the circumstances regarding law enforcement in Whiteclay have changed in decades.

The commission issued licenses in Whiteclay in 1982, 2002, 2006 and 2008. By statute, the commission was required to consider the adequacy of law enforcement upon each application for a license. On each occasion the commission determined law enforcement was in fact adequate and issued the license. The only possible question is whether or not law enforcement has changed since 2008 when the commission deemed it adequate at that time. Each of the Protestors, each of Appellees, Major Otte, Sheriff Robbins and Commissioner Krotz all testified that level of law enforcement and the issues of surrounding “street people” have remained unchanged for decades. The notable exception was 2016 during which it was widely agreed that law enforcement in Whiteclay had **increased**, dramatically so for the Nebraska State Patrol.

Mr. Neumann, Mr. BonFluer and Mrs. BonFluer testified that the problems they claim to have observed have been unchanged since 2000. Each also testified the level of law enforcement has been unchanged since 2000 with the exception of 2016 during which they observed the State Patrol in Whiteclay more often. Major Otte, Sheriff Robbins and Commissioner Krotz testified that law enforcement in Whiteclay has been unchanged since 2000 with the exception of 2016 during which they observed the State Patrol in Whiteclay more often. Investigator Jackson treats Appellees in the same manner as all other retailers under his jurisdiction. The Sheridan County Sheriff’s Office presently has one more deputy than it did in 2016 and a more than adequate budget to supply the office with all the equipment, tools, resources and people it needs to enforce the laws in Sheridan County.

The purpose of the commission is to regulate the sale of alcohol and to do so without unjust discrimination. *Neb. Rev. Stat.* §53-101.01 No one, not the protestors, law enforcement or the commission, can point to a single fact which indicates law enforcement has changed for the worse

in Whiteclay. If the commission's decision was made without discrimination, the result would have been the renewal of Appellee's licenses.

The district court properly vacated the decision of the commission

In an error proceeding to review an administrative agency decision, it is incumbent upon both the district court and the Supreme Court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction. *Olson v. City of Omaha*, 232 Neb. 428, 441 N.W.2d 149 (1989); *Wadman v. City of Omaha*, 231 Neb. 819, 438 N.W.2d 749 (1989); *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988).

Subject matter jurisdiction is a question of law for the court. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998).

Appellant's argue the district court erred in not utilizing the proper standard of review and by not considering the entire record of the agency. However, it is mandatory that the district court examine the **decision** of the commission to determine if the agency acted within its jurisdiction. In this case the decision of the commission sets forth on its face that the commission exceeded its authority and lacked jurisdiction to even conduct the hearing.

In an error proceeding to review an administrative agency decision, it is incumbent upon both the district court and the Supreme Court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction. *Olson v. City of Omaha*, 232 Neb. 428, 441 N.W.2d 149 (1989); *Wadman v. City of Omaha*, 231 Neb. 819, 438 N.W.2d 749 (1989); *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988).

Subject matter jurisdiction is a question of law for the court. A jurisdictional question which does

not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998).

The Administrative Procedure Act provides the court the leeway to act in manner in which justice might be served. *Neb. Rev. Stat.* 84-917(5)(b)(i) states “If the court determines that the interest of justice would be served by the resolution of any other issue not raised before the agency, the court may remand the case to the agency for further proceedings.” The issues of the commissions power and authority to conduct the hearing were raised before the agency on Appellee’s motion to dismiss (E1, 227-230:31, Vol III Part B) and renewed at the time of hearing (18:15). The commission overruled the motion both at hearing on the motion and at the time of the administrative hearing.

The district court correctly determined that the face of the commission’s order revealed the complete lack of jurisdiction of the commission. As noted both above and by the district court, the commission failed to make any findings, either based on a non-existent renewal application or upon any other evidence, that Appellees did not meet the limited criteria for renewal of existing licenses. In the absence of such a finding the commission lacked the power, authority and jurisdiction to order submission of the long form application.

Appellants argue that *Neb. Rev. Stat.* 53-135 for the proposition that the commission may order submission of a long form application at any time. This completely ignores the holding of this court in *Grand Island Latin Club*, 251 Neb. at 66, 554 N.W.2nd at 781. The commission’s authority is not only limited by statutory authority but also by the construction of those statutes by this court. Administrative bodies have only that power and authority specifically conferred upon them by statute or by construction. *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d

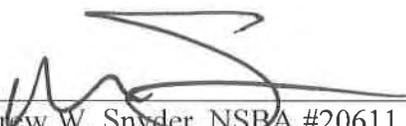
318 (1995); *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995)

The commission's decision directly cites as reasons for its decision §53-132(2) and (3). As discussed above, this court has already held §53-132 apply only to the issuance of new licenses and cannot form the basis for cancelation, revocation or non-renewal of a license. Given the commission's open and unashamed flaunting of the rulings of this court, what could have review of the entire record possibly added to the equation? Surely, in the face of blatant disregard of statutory authority, court's do not have to encourage and require a month's long proceeding merely for formality. Where the decision of the commission is arbitrary and contrary to law and made without any lawful authority, there is no need to delay correction of an unjust proceeding conducted without any lawful authority.

CONCLUSION

For the reasons set forth above Appellees request an order of this court affirming the decision of the district court.

**STUART KOZAL, d/b/a JUMPING EAGLE INN;
ARROWHEAD INN, INC., d/b/a ARROWHEAD
INN; CLAY BREHMER and DANIEL BREHMER,
d/b/a STATE LINE LIQUOR and SANFORD
HOLDING, LLC, d/b/a D & S PIONEER SERVICE,
Petitioners/Appellees**

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CERTIFICATE OF SERVICE

STATE OF NEBRASKA)
)ss,
COUNTY OF SCOTTS BLUFF)

Andrew W. Snyder, being first duly sworn on oath, states as follows:

- 1. That he is the attorney for Petitioners/Appellees in the above-captioned matter.
2. That on the 31 day of July, 2017 he electronically filed the foregoing Brief of Appellees using the e-filing system, which sent notification of such filing to the following attorneys of record and by e-mailing the Brief of Appellees to:

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SUBSCRIBED AND SWORN to before me this 31st day of July, 2017.



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Certificate of Service

I hereby certify that on Monday, July 31, 2017 I provided a true and correct copy of this *Brief of Appellees Arrowhead/Kozal* to the following:

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S-17-441

IN THE NEBRASKA SUPREME COURT

STUART KOZAL, d/b/a JUMPIN EAGLE INN, et al.,

Petitioners-Appellees,

v.

NEBRASKA LIQUOR CONTROL COMMISSION,

Respondent-Appellant,

and

**ABRAM NEUMANN, LORI HANKINSON, BARB and
DAVID VANCIL, (“Citizen Protestants”),**

Appellants.

**Appeal from the District Court of Lancaster County, Nebraska
Andrew Jacobsen, District Judge**

**REPLY BRIEF OF APPELLANT,
NEBRASKA LIQUOR CONTROL COMMISSION**

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Table of Contents

Table of Authorities	ii
Jurisdiction.....	1
Statement of the Case and Statement of Facts	2
Propositions of Law	3
Summary of Reply Brief Argument.....	3
Argument.....	4
A. Assignment of Error 1: District Court did not have jurisdiction	4
B. Assignment of Error 2: District Court erred by applying incorrect standard of review.....	6
C. Assignment of Error 3: District Court erred in vacating Commission’s order by erroneously concluding the Commission acted beyond its legal authority	8
Conclusion.....	18
Certificate of Service	19

Table of Authorities

CASES

<i>Big John’s Billiards, Inc. v. State</i> , 288 Neb. 938, 852 N.W.2d 727 (2014)	11, 12
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972).....	11
<i>Bosselman, Inc. v. State</i> , 230 Neb. 471, 432 N.W.2d 226 (1988)	5, 8-11, 14
<i>Centra, Inc. v. Chandler Insurance Co.</i> , 248 Neb. 844, 540 N.W.2d 318 (1995)	16
<i>Concordia Teachers College v. Nebraska Dep’t of Labor</i> , 252 Neb. 504, 563 N.W.2d 345 (1997)	1, 2
<i>Dinuzzo v. State</i> , 85 Neb. 351 (1909)	13
<i>Donovan v. Union Pac. R. Co.</i> , 104 Neb. 364, 177 N.W. 159 (1920)	3, 18
<i>Gas ‘N Shop v. Nebraska Liquor Control Comm.</i> , 229 Neb. 530, 427 N.W.2d 784 (1988)	13
<i>Grand Island Latin Club, Inc. v. Nebraska Liquor Control Comm’n</i> , 251 Neb. 61, 554 N.W.2d 778 (1996)	5, 8-10, 14-15
<i>In re Reinstatement of Navrkal</i> , 270 Neb. 391, 703 N.W.2d 247 (2005)	12
<i>J.S. v. Grand Island Public Schools</i> , 297 Neb. 347 (July 28, 2017).....	1, 2
<i>Marsh & Marsh v. Carmichael</i> , 136 Neb. 797, 287 N.W. 616 (1939)	13
<i>Martin v. State</i> , 23 Neb. 371 (1888)	13
<i>Pump & Pantry, Inc. v. City of Grand Island</i> , 233 Neb. 191, 444 N.W.2d 312 (1989)	5, 8-9, 14

<i>State v. Hinze</i> , 232 Neb. 550, 441 N.W.2d 593 (1989)	12
<i>State ex rel. Carlson v. Hatfield</i> , 183 Neb. 157, 158 N.W.2d 612 (1968)	17
<i>State ex rel. Counsel for Discipline of Neb. Supreme Court v. Crawford</i> , 285 Neb. 321, 827 N.W.2d 214 (2013)	12

STATUTES

<u>Neb. Rev. Stat. § 25-510.02</u>	2
<u>Neb. Rev. Stat. § 53-101.05</u>	16
<u>Neb. Rev. Stat. § 53-116</u>	17
<u>Neb. Rev. Stat. § 53-116.01</u>	15
<u>Neb. Rev. Stat. § 53-117.08</u>	15
<u>Neb. Rev. Stat. § 53-132(2)</u>	15
<u>Neb. Rev. Stat. § 53-132(a)(b)(c)</u>	15
<u>Neb. Rev. Stat. § 53-135.02</u>	3, 13-14
<u>Neb. Rev. Stat. § 84-917(2)(a)</u>	1
<u>Neb. Rev. Stat. § 84-917(5)(a)</u>	7
<u>Neb. Rev. Stat. § 84-917(5)(b)(i)</u>	6-7
<u>Neb. Rev. Stat. § 84-917(5)(b)(ii)</u>	7

Jurisdiction

There is a second jurisdictional defect in addition to the defect argued in support of assignment of error 1 in the appellant Commission's initial brief. This second jurisdictional defect is apparent by this Court's recent opinion in *J.S. v. Grand Island Public Schools*, 297 Neb. 347 (July 28, 2017), which was issued over two weeks after the filing of the Commission's initial brief. The Statement of Jurisdiction in the Beer Stores' brief notably fails to explain how the district court acquired jurisdiction when the Beer Stores failed to do what *J.S. v. Grand Island Public Schools* held was required for the district court to have jurisdiction, namely, serve a copy of the district court petition and summons on the Commission as required by § 84-917(2)(a):

Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. . . . Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action.

J.S. v. Grand Island Public Schools relied upon *Concordia Teachers Coll. v. Nebraska Dep't of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997). The administrative agency defendant in *Concordia Teachers College* was a state agency, rather than the local school board defendant in *J.S. v. Grand Island Public Schools*. As stated in *Concordia Teachers College*, service of a summons

on a state agency is “by leaving the summons at the office of the Attorney General” as required by Neb. Rev. Stat. § 25–510.02. *Concordia Teachers College* held that “when § 25–510.02 applies, as it does in the present case, a summons must be served on the Attorney General in order to institute judicial review under the APA.” Both *Concordia Teachers College* and the recent case of *J.S. v. Grand Island Public Schools* cases held that the failure to serve a copy of the petition and summons meant that the district court did not acquire subject matter jurisdiction.

The appellee Beer Stores did not file a praecipe for service of summons on anyone and necessarily never perfected service of process on anyone within 30 days of the filing of their APA petition. Thus, the district court never had subject matter jurisdiction to enter the order that is the subject of this appeal because of this second jurisdictional defect, which is in addition to the jurisdictional defect of the Beer Stores having failed to include in their district court appeal all parties of record in the Commission’s contested case.

Statement of the Case and Statement of Facts

The Commission reaffirms the Statement of the Case and Statement of Facts in its initial brief. The Commission also concurs and adopts by reference the Statement of Facts in the Citizen Protestants’ Reply Brief.

Propositions of Law

I.

The Liquor Control Act's renewal privilege 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.

II.

Lapse of time cannot establish a right to maintain a public nuisance.

Donovan v. Union Pac. R. Co., 104 Neb. 364, 177 N.W. 159 (1920).

Summary of Reply Brief Argument

The Jurisdiction section of this brief points out a second fatal problem that prevented the district court from having subject matter jurisdiction in addition to the first jurisdictional problem of not including all parties that was addressed in the Commission's initial brief. Because of this Court's order for supplemental briefing, the Commission's supplemental brief will address the jurisdictional issue of the Citizen Protestants being parties and having standing as related to the interplay between the Liquor Control Act and the Administrative Procedure Act.

The Beer Stores argument in their brief that "The Administrative Procedure Act provides the court with leeway to act in [the] manner in which

justice might be served” is misplaced for four reasons as explained in the reply to Assignment of Error 2.

The trio of Nebraska Supreme Court decisions relied on by the district court and the Beer Stores in their brief are analyzed and distinguished as not being applicable to this case in the Commission’s reply to Assignment of Error 3. In the context of license renewal, by statute the Beer Stores has no vested right to renew their licenses when the Commission decreased the number of liquor licenses in Whiteclay. Based on the evidence and the required liberal construction of the Liquor Control Act, the Commission properly exercised its authority by decreasing the number of licenses in Whiteclay, population 7, from four licenses to none.

Argument

A. Assignment of Error 1: District Court did not have jurisdiction.

The Commission reaffirms its argument in its initial brief and also incorporates the Jurisdiction section at the beginning of this brief -- which points out a second additional fatal jurisdictional flaw concerning the district court’s lack of subject matter jurisdiction. In view of this Court’s order for supplemental briefing on the jurisdictional issue involving the interplay between the Liquor Control Act and the Administrative Procedure Act, the

Commission will address those issues related to its first assignment of error in its supplemental brief.

The Beer Stores make a misplaced argument in their brief that any error by the Commission in its final order was one of jurisdiction. Even the district court was not so bold as to conclude that the Commission's alleged error was one of jurisdiction by denying the Beer Stores' licenses after the expiration of their current ones. The Beers Stores primarily rely upon this Court's three previous decisions in *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988); *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989); and *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Comm'n*, 251 Neb. 61, 554 N.W.2d 778 (1996). (Appellee's brief: *Passim* and Table of Authorities) None of those cases held that the Commission did not have jurisdiction. This is not a case in which the Banking Department or some agency other than the Liquor Commission entered an order concerning liquor licenses.

Rather, the three Supreme Court cases concerned errors by the Commission in the exercise of its licensing authority. The three Supreme Court cases are analyzed further in this brief in the reply argument for the third assignment of error.

B. Assignment of Error 2: District Court erred by applying incorrect standard of review.

The Beer Stores seek to avoid the district court's error in failing to apply a de novo on the record standard of review of the Commission's official hearing record. The Beer Stores argument is that "The Administrative Procedure Act provides the court with leeway to act in [the] manner in which justice might be served." (Appellee's brief,p24) The Beer Store's "leeway argument" is that Section 84-917(5)(b)(i) of the Administrative Procedure Act states that, "If the court determines that the interest of justice would be served by the resolution of any other issue not raised before the agency, the court may remand the case to the agency for further proceedings." (Appellee's brief,p24) The "leeway argument" proceeds on the theory that the district court did not need to review the record of the Commission's proceedings because the Commission's order was sufficient for the district court's review. The Beer Stores' argument is misplaced for four reasons.

First, as acknowledged in the Beer Stores' brief, "The issues of the Commission's power and authority to conduct the hearing were raised before the agency [by the Beer Stores]." (Appellee's brief,p24) The above statute Section 84-917(5)(b)(i) concerns remand only for resolution of issues not raised before the agency, not a remand for resolution of issues that were raised and decided by the agency.

Second, the above statute concerns the district court's remedies *after* applying the correct de novo on the record standard of review. The statute does not modify the district court's standard of review or allow the district court to skip past its obligation to conduct a de novo standard of review before deciding whether to order a remand.

Third, the statutory subsection following the above statute Section 84-917(5)(b)(i) (relied upon by the Beer Stores) provides that, after a district court remand for further proceedings to resolve an issue not raised before the agency, "The agency shall affirm, modify, or reverse its findings and decision in the case by *reason of the additional proceedings* and shall file the decision following remand with the reviewing court." Neb. Rev. Stat. § 84-917(b)(ii) (Emphasis added). The district court's order did not order a remand for additional proceedings for the Commission to consider an issue not previously raised. Rather, the district court vacated the Commission's order without first conducting the required de novo on the record standard of review. (T27)

Fourth, and most important, Section 84-917(5)(a) and the long history of this Court's repeated and consistent propositions of law, cited in the Commission's initial brief, required the district court to conduct a de novo on the record review of the agency's official hearing record. The latter statute states, "When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the review shall be conducted by the

court without a jury de novo on the record of the agency.” The statute is unambiguous and does not allow the district court any “leeway” to apply a different standard of review. The district court failed to conduct the required standard of review, which failure would be plain error, even if not assigned as error, per the numerous case precedents cited in the Commission’s initial brief.

C. Assignment of Error 3: District Court erred in vacating Commission’s order by erroneously concluding the Commission acted beyond its legal authority.

Introduction

The Commission’s reply argument on the third assignment of error analyzes the three Supreme Court cases relied on by the district court and which are also relied upon by the Beer Stores. (DCt order@T24; Appellee’s brief@Table of Authorities) The three cases are *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988); *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989); and *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Comm’n*, 251 Neb. 61, 554 N.W.2d 778 (1996) (collectively “Supreme Court Trio”).

Background of the Supreme Court Trio

The three cases all involved the issue of whether cities or the State Commission controlled the issuance and renewal of liquor licenses in Nebraska.

Bosselman, held that statutes granting local governments the authority to make binding liquor license recommendations to the Commission were an unconstitutional delegation of legislative authority.

Pump & Pantry, on the heels of the *Bosselman* decision, involved the authority of a city to enact ordinances that affected existing licensees, namely convenience stores, from being able to renew liquor licenses because of newly enacted ordinances requiring premises where alcohol was sold to be “separate and distinct from any other business activity”. This latter effort of local governments to control the Commission’s liquor licensing authority also failed in a declaratory judgment action in which the Supreme Court noted that “the Commission had not taken any action ‘decreasing the number of licenses to be issued within its jurisdiction.’ ” The Commission, the Attorney General’s Office, and the liquor retailers were allied together in opposing the City of Grand Island, as the sole appellant, in the City’s effort to control State liquor license renewals by newly enacted city ordinances. The Commission and liquor licensees prevailed as the City of Grand Island lost their effort to control liquor licenses renewals by enacting new onerous structural ordinances that adversely affected the ability of liquor licensees to renew licenses.

Grand Island Latin Club involved the City of Grand Island again attempting to control liquor licensing by objecting to the renewal of the Latin Club’s “automatic renewal” of its license – after the Commission had already

renewed the license. After a Commission hearing, the Commission “cancelled” the Latin Club’s license that had already been renewed despite the fact that there was no evidence that the Latin Club had committed any Liquor Act violations. The facts stated in *Grand Island Latin Club* included that, “the Latin Club has not been cited with any violation relating to its liquor license” since 1980, nearly fourteen years prior to the Commission decision to cancel the already renewed license. The judgment of the district court reversing the Commission’s cancellation decision was affirmed.

Bosselman, Inc. v. State

Bosselman was a declaratory judgment action by several liquor license retailers challenging the constitutionality of recently enacted statutes which gave local governing bodies the unrestricted authority to make binding recommendations to the Commission concerning the approval or denial of liquor licenses. The case involved a challenge to the liquor retailers “standing” to bring the suit on the grounds that the liquor retailers had no legal protectable interest in the suit. Citing various cases from the United States Supreme Court and other jurisdictions, *Bosselman* concluded that the liquor retailers had standing on the grounds of *procedural*, not substantive, constitutional due process. *Bosselman*, after resolving the standing issue in favor of the liquor retailers, determined that the challenged statutes were an

unconstitutional delegation of legislative authority. Thus, the legislative attempt of cities to control and determine State liquor licensing failed.

The primary case that appeared to be relied on by *Bosselman* on the standing issue was *Board of Regents v. Roth*, 408 U.S. 564 (1972), which involved the issue of whether an university professor was entitled to procedural due process in the form of hearing and notice of grounds for nonrenewal of his employment contract. *Bosselman* stated, in reliance on *Roth*, that “characterizing an interest as a privilege as distinguished from a right is no longer useful for the purpose of determining whether *procedural due process* protections apply to the interest.” *Bosselman*, 230 Neb. at 474. (Emphasis added.)

Bosselman went on to include the following quotation from *Roth*:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. [*Roth*, 408 U.S. at 577.] *Bosselman*, 230 Neb. at 474-75.

After *Bosselman*, there have been recent cases concerning the legislative creation, definition, and dimension of property rights by state laws, including the concept of whether a property right has been vested by the Legislature. *Big*

John's Billiards, Inc. v. State, 288 Neb. 938, 954–55, 852 N.W.2d 727, 741, (2014):

The type of right that “‘vests’” can be described generally as “‘an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice.’” [. . .] With respect to property, a right is considered to be “‘vested’” if it involves “‘an immediate fixed right of present or future enjoyment and an immediate right of present enjoyment, or a present fixed right of future enjoyment.’” [. . .] A vested right can be created by statute. But it is presumed that a statutory scheme is not intended to create vested rights, and a party claiming otherwise must overcome that presumption.

In re Reinstatement of Navrkal, 270 Neb. 391, 703 N.W.2d 247 (2005), cited *State v. Hinze*, 232 Neb. 550, 441 N.W.2d 593 (1989), with approval for the proposition there exists no vested right to a license to practice medicine; rather, which license is only a conditional right subordinate to police power of State to protect and preserve public health. *State ex rel. Counsel for Discipline of Neb. Supreme Court v. Crawford*, 285 Neb. 321, 827 N.W.2d 214 (2013), stated a similar concept that a license to practice law confers no vested right, but is a conditional privilege.

The latter cases are consistent with what had been longstanding authority in Nebraska, namely that, “There is no vested right in a license to

sell intoxicating liquors, which the state may not take away at pleasure.” *Marsh & Marsh v. Carmichael*, 136 Neb. 797, 287 N.W. 616, 619 (1939); *Dinuzzo v. State*, 85 Neb. 351; *Martin v. State*, 23 Neb. 371. See also, *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 229 Neb. 530, 427 N.W.2d 784 (1988).

The above judicial recognition that the Legislature can create and define vested rights necessarily includes the opposite proposition – the Legislature can state what is not a vested right. In this regard, the Legislature has spoken regarding the renewal of liquor licenses:

The renewal privilege provided for in this section 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.

In the case of the Beer Stores, the Commission did not revoke, cancel, or rescind their licenses. The Commission did deny renewal of their licenses by decreasing the number of liquor licenses in Whiteclay from four to none at the expiration of their licenses for “public health and safety concerns raised by the evidence in this matter” and because of “inadequacy of law enforcement”. (T11) The Commission did so after affording the Beer Stores the constitutional due process procedure of notice, a hearing, the opportunity to present evidence and be heard, and the opportunity to cross examine witnesses.

In sum, *Bosselman* does not support the Beer Stores. They were not denied constitutional procedural due process, but rather, were given their procedural due process. As provided by statute, the Legislature defined license renewal as not being a vested right, particularly when the Commission determines to decrease the number of liquor licenses -- as it did in this case for its liquor licensing jurisdiction over Whiteclay.

Pump & Pantry, Inc. v. City of Grand Island

As previously stated, *Pump & Pantry* can be distinguished, and easily so, because, “In reference to the licensees involved in this appeal, the commission had not taken any action ‘decreasing the number of licenses to be issued within its jurisdiction.’ ” *Pump & Pantry, Inc.*, 233 Neb. at 194. The statutory construction employed by *Pump & Pantry* for renewal of a liquor license does not apply when the Commission decreased the number of liquor licenses in Whiteclay. There was no vested right to license renewal in the face of the Commission decreasing the number of licenses in Whiteclay by eliminating all of them. See, Neb. Rev. Stat. § 53-135.02.

Grand Island Latin Club, Inc.

Grand Island Latin Club, Inc. v. Nebraska Liquor Control Comm'n, *supra*, can be distinguished because the Commission cancelled a license it had already renewed when there was no evidence that the liquor licensee had

committed any violations of the Liquor Control Act that would permit revocation or cancellation of a license.

Grand Island Latin Club stated as follows:

The Latin Club has possessed a liquor license for approximately 30 years. Other than one citation in 1975 for selling liquor to nonmembers and another in 1980 for serving after hours, the Latin Club has not been cited with any violation relating to its liquor license.

...

Section 53-132(2) clearly describes the general standards by which initial applicants are judged to be fit to obtain a liquor license and to follow the rules and regulations that bear on license holders. *This statute, however, is not itself a rule or regulation which can be violated by a current licensee and subject the licensee to cancellation* under the power given to the Commission by §§ 53-116.01 and 53-117.08. *We therefore conclude that the Commission could not cancel the Latin Club's liquor license* under the provisions of § 53-132(2)(a), (b), and (c).

Grand Island Latin Club, Inc., 251 Neb. at 68. (Emphasis added.)

The Commission's Order did not cancel the Beers Stores' existing liquor licenses. Rather, it ordered that their licenses would not be renewed after their current licenses expired. (T11)

Final Comments

The Beer Stores' brief cites *Centra, Inc. v. Chandler Insurance Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995), for the proposition that administrative agencies have only that authority specifically conferred by statute. The appellees did not include the entire proposition of law, which is that the statutory authority includes a "construction necessary to achieve the purpose of the relevant act." *Id.*, 248 Neb. at 855. And, "[in] construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose." *Id.* at 856, 540 N.W.2d at 328.

The Commission's statutory authority to decrease the number of licenses in Whiteclay was based on the evidence presented at the Commission hearing. The foregoing construction of the Commission's authority is also consistent with the provisions of Section § 53-101.05 concerning the liberal construction and purposes of the Liquor Control Act:

The Nebraska Liquor Control Act shall be liberally construed to the end that the health, safety, and welfare of the people of the State of Nebraska are protected and temperance in the consumption of alcoholic

liquor is fostered and promoted by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor.

There was nothing going on in Whiteclay resembling “temperance in the consumption of alcohol” to protect the “health, safety, and welfare” of the people. The Legislature has provided that “the power to regulate all phases of the control of the manufacture, distribution, sale and traffic of alcoholic liquor, except as has been specifically delegated in the Liquor Control Act, is vested exclusively in the commission.” Neb. Rev. Stat. § 53-116.

To the extent that the Beer Stores appear to argue that they should have been allowed to renew their licenses because there has been no change of circumstances or change in the level of law enforcement for a number of years, this argument is unimpressive. (Appellee’s brief, pp21-22) The Beer Stores argument is nothing more than an argument that, because it has been going on for a while, the Commission, the district court, and this Court should ignore the evidence of the appalling situation in Whiteclay arising from the sea of liquor flowing out of the Beer Stores.

The operation and maintenance of a business which serves as a gathering place for hoodlums and other disorderly persons is a public nuisance. *State ex rel. Carlson v. Hatfield*, 183 Neb. 157, 158 N.W.2d 612 (1968) (Supreme Court reversed and remanded to district court with directions to enter an injunction to enjoin operation of business as a public nuisance.).

“Lapse of time cannot establish a right to maintain a public nuisance.”

Donovan v. Union Pac. R. Co., 104 Neb. 364, 177 N.W. 159, 160 (1920).

Conclusion

The Commission renews its request for relief as stated in the Conclusion of its initial brief.

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Appellant,

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Certificate of Service

I hereby certify that on Monday, August 07, 2017 I provided a true and correct copy of this *Reply Brief of Appt Liquor Commission* to the following:

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S-17-441

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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

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S-17-441

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Andrew Jacobsen, Judge**

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Table of Contents

Jurisdictional Statement	1
Statement of the Case	1
Standard of Review	1
Propositions of Law	1
Statement of Facts	2
Argument	4
Error 1: Jurisdiction was Exercised Without All Necessary Parties Before the District Court.	4
Error 2: The District Court Erred by Issuing a Final Judgment Without Notice of a Hearing on the Merits.	8
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.	8
Conclusion	9

Table of Authorities

Cases

<i>Bosselman, Inc. v. State</i> , 230 Neb 471 (1998)	8, 9
<i>Grand Island Latin Club, Inc. v. Nebraska Liquor Control Com'n</i> , 251 Neb 61 (1996)	5, 6
<i>J.S. v. Grand Island Public Schools</i> , 297 Neb 347 *1*3 (7.28.2017)	1, 2, 4
<i>JCB Enterprises, Inc., v. Nebraska Liq. Control Com'n</i> , 275 Neb 797 (2008)	7
<i>Landrum v. City of Omaha</i> , 297 Neb. 165 (2017)	1
<i>Marsh & Marsh v. Carmichael</i> , 136 Neb 797 (1939)	8
<i>Orchard Hill Neighborhood Ass'n, v. Orchard Hill Mercantile, LLC</i> , 274 Neb 154 (2007)	9
<i>Pump & Pantry, Inc., v. City of Grand Island</i> , 233 Neb 191 (1989)	7
<i>Sanders v. Frakes</i> , 295 Neb 374 (2016)	1
<i>Schwarting v., Nebraska Liq. Control Com'n</i> , 271 Neb 346 (2006)	6
<i>Shaffer v. Nebraska Dept HHS</i> , 289 Neb 740 (2014)	1, 2, 4

Statutes

<i>Neb Rev Stat</i> § 53-116	7, 9
<i>Neb Rev Stat</i> § 53-117.08	7
<i>Neb Rev Stat</i> § 53-133	4
<i>Neb Rev Stat</i> § 53-135	7, 8
<i>Neb Rev Stat</i> § 53-135.01	7
<i>Neb Rev Stat</i> § 53-135.02	7, 8, 9
<i>Neb Rev Stat</i> § 53-1,115	4, 5
<i>Neb Rev Stat</i> § 53-1,116	5

Regulations

237 <i>Neb Admin Code</i> § 6-019.01	7
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Other Authorities

9A <i>McQuillin Municipal Corporations</i> § 26:215	9
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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.

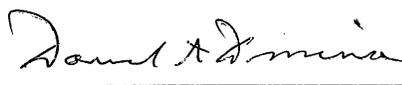
Conclusion

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.

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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:

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August 4, 2017

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IN CASE OF: S-17-000441, Kozal v. Nebraska Liquor Control Commission

The following filing: Stipulation Expand/Set Order Oral Arg.

Filed on 07/13/17

Filed by appellee Abram Neumann

Has been reviewed by the court and the following order entered:

Stipulation to expand oral arguments sustained. Oral argument expanded to 20 minutes per side to be divided as set out in the stipulation of the parties.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals



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August 4, 2017

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IN CASE OF: S-17-000441, Kozal v. Nebraska Liquor Control Commission

The following internal procedural submission: By order of the Court re Suppl. Briefs
Submitted on 08/04/17

Has been reviewed by the court and the following order entered:

On the Court's own motion, all counsel are ordered to submit simultaneous supplemental briefs not to exceed 15 pages on or before August 18, 2017. See order.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals

IN THE SUPREME COURT OF NEBRASKA

Stuart Kozal et al.)	No. S-17-441
)	
Appellees,)	
)	
v.)	ORDER
)	
Nebraska Liquor Control)	
Commission,)	
)	
Appellant.)	

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 NEBRASKA SUPREME COURT
 COURT APPEALS

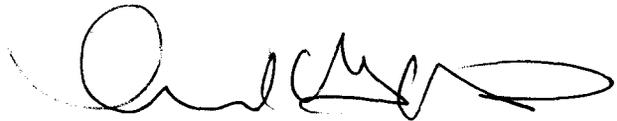
On the Court's own motion, all counsel are ordered to submit simultaneous supplemental briefs addressing:

1. The interplay of the statutory provisions of the Nebraska Liquor Control Act and the Administrative Procedure Act regarding parties of record, and
2. The jurisdictional prerequisites of standing of the individuals who protested the issuance of the license, for purposes of judicial review under the Administrative Procedure Act and subsequent appeal therefrom.

The parties' simultaneous supplemental briefs are due 14 days from the date of this order. The supplemental briefs shall not exceed 15 pages in length.

Dated this 4 th day of August, 2017.

BY THE COURT:



Michael G. Heavican
 Chief Justice



000089581NSC

CERTIFICATE OF SERVICE

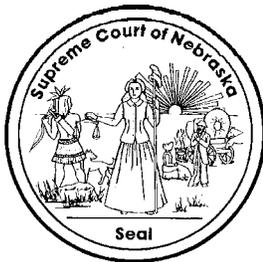
On August 4, 2017 the preceding notice was sent to the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or E-mail:

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Terri A. Brown
Clerk

In the Nebraska Supreme Court

**Stuart Kozal, d/b/a/ Jumping
Eagle Inn, et al.,**

Appellees,

v.

Nebraska Liquor Control Commission,

Appellant,

and

**Abram Neumann, et al.,
Citizen Protestants and Additional
Appellants, aligned as appellees by
Neb Ct R App P § 2-101(C)**

Case No. S-17-441

**Citizens' Consent to Filing of
Amici Curiae Brief**

The Cross-Appellant Citizen Protestants do not object to the filing of an *Amici Curiae* Brief by Legal Aid of Nebraska (Legal Aid) and Nebraska Appleseed Center for Law in the Public Interest (Nebraska Appleseed).

August 9, 2017.

Citizen Protestants, Cross-Appellants,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2017, I electronically filed the foregoing Citizens' Consent to Filing of Amici Curiae Brief using the e-filing system, which sent notification of such filing to the following attorneys of record and by emailing the Brief to:

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Certificate of Service

I hereby certify that on Wednesday, August 09, 2017 I provided a true and correct copy of this *NE Liquor Consent to Amici Curiae Brief* to the following:

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Signature: /s/ James Smith (15476)

THE SUPREME COURT OF THE STATE OF NEBRASKA

STUART KOZAL, d/b/a JUMPIN EAGLE INN, et al., Petitioners – Appellees,

v.

NEBRASKA LIQOUR CONTROL COMMISSION, Respondent - Appellant,

and

ABRAM NEUMANN, LORI HANKINSON, BARB and DAVID VANCIL,

(“Citizen Protestants”), Cross-Appellants.

APPEAL FROM THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA
Honorable Andrew Jacobsen, District Judge

**MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF
APPELLANT AND CITIZEN PROTESTANTS**

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000089874NSC

Pursuant to Neb. Ct. R. App. P. § 2-106 and § 2-109(A)(4), Legal Aid of Nebraska and the Nebraska Appleseed Center for Law in the Public Interest MOVE THIS Nebraska Supreme Court for leave to file an *amicus curiae* brief in support of the Appellant's and Citizen Protestants' appeal to this Court. The bases for this Motion and Statement of Interest are as follows:

LEGAL AID OF NEBRASKA

1. Legal Aid of Nebraska (Legal Aid) is a not-for-profit law firm providing free civil legal assistance to low-income Nebraskans for over 50 years. The mission of Legal Aid is to promote justice, dignity, hope, and self-sufficiency through quality civil legal aid to those who have nowhere else to turn.
2. Legal Aid has a Native American Program that provides advice, brief service and representation to Native Americans in tribal, federal and state courts. Over 16,000 Native Americans live in Nebraska, according to 2015 U.S. Census Bureau estimates. In 2016, Legal Aid's Native American Program closed approximately 350 cases providing legal assistance. Over a five year period, from January 2012 through December 2016, Legal Aid's Native American Program closed approximately 1900 cases providing advice, brief services, extensive services or representation.
3. Legal Aid's Native American Program is a statewide program that currently has 4 full-time attorneys, including one located in Western Nebraska, one in Northeast Nebraska and two in Omaha, Nebraska. Several South Dakota reservations border Nebraska, including the Pine Ridge Reservation. In our experience Native American people may travel between reservations and non-reservation towns in South Dakota and Nebraska, as they often have relatives, friends or other opportunities to relocate. One of the Native American Program's

focus is addressing issues of abuse and violence to Native Americans, including those impacted by the situations, including the sale of alcohol, in Whiteclay.

4. Legal Aid of Nebraska is seeking to appear in this case because it presents issues specifically affecting Native Americans and is interested in the outcome of this case because this Court's decision will have a significant impact on many Native Americans, including those served by Legal Aid.

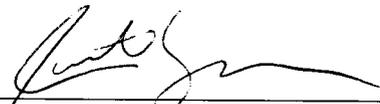
NEBRASKA APPLESEED

5. The Nebraska Appleseed Center for Law in the Public Interest (Nebraska Appleseed) is a nonprofit organization based in Lincoln, Nebraska that fights for justice and opportunity for all Nebraskans. Nebraska Appleseed has more than twenty years of experience in litigation and advocacy regarding issues affecting underrepresented groups and has done a significant amount of work to investigate and address the variety of systemic issues affecting these groups in Nebraska. Nebraska Appleseed's goal is to ensure that children and families in Nebraska have a viable pathway out of poverty, have an opportunity to succeed in their respective lives, and have equal access to justice in their community. The continued prohibition of the sale of alcohol in Whiteclay, Nebraska will further these goals.

Given their collective experience and expertise, the proposed *amici curiae* parties would like to provide information as to how the sale of liquor in Whiteclay has created public health, safety and welfare issues that greatly impact Native Americans. Legal Aid and Nebraska Appleseed seek to participate in this case to urge this Court to reverse the District Court's decision and reinstate the decision of the Nebraska Liquor Control Commission. The original plus one copy of the brief *amici curiae* seek leave to file is attached to this Motion and incorporated by reference herein. *Amici curiae* request this Court grant leave to file said brief.

DATED this 8th day of August, 2017.

Respectfully submitted,

By: 

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AFFIDAVIT OF SERVICE

STATE OF NEBRASKA)
)ss
COUNTY OF DOUGLAS)

Jonathan Seagrass, being duly sworn on oath, states as follows:

1. That he is an attorney with Legal Aid of Nebraska.
2. That on August 9, 2017, he caused to be mailed copies of the Motion for Leave to File

Amicus Curiae Brief and its attachments to:

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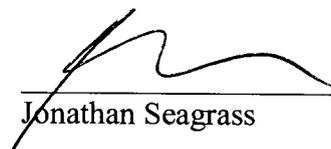
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FURTHER AFFIANT SAITH NAUGHT.

DATED this 9th day of August, 2017.

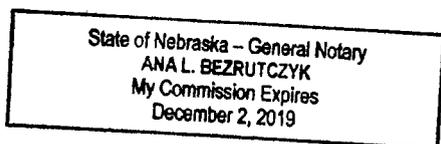


Jonathan Seagrass

SUBSCRIBED and SWORN before me this 9 day of August, 2017.



Notary Public



FILED

AUG 09 2017

S-17-441

NEBRASKA SUPREME COURT
COURT APPEALS

THE SUPREME COURT OF THE STATE OF NEBRASKA

STUART KOZAL, d/b/a JUMPIN EAGLE INN, et al., Petitioners – Appellees,

v.

NEBRASKA LIQOUR CONTROL COMMISSION, Respondent - Appellant,

and

ABRAM NEUMANN, LORI HANKINSON, BARB and DAVID VANCIL,

(“Citizen Protestants”), Cross-Appellants.

APPEAL FROM THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA
Honorable Andrew Jacobsen, District Judge

**BRIEF OF *AMICI CURIAE* LEGAL AID OF NEBRASKA AND
NEBRASKA APPLESEED CENTER FOR LAW IN THE PUBLIC INTEREST**

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST..... 1

STATEMENT OF THE CASE1

PROPOSITIONS OF LAW1

STATEMENT OF FACTS2

SUMMARY OF ARGUMENT3

ARGUMENT.....4

I. The sale of alcohol by the Appellee Beer Stores directly results in significant public health, welfare, and safety hazards.4

II. The Nebraska Liquor Control Commission’s post-hearing order to not renew Appellee Beer Stores’ liquor licenses was supported by sufficient facts pursuant to law. 11

III. Since the Nebraska Liquor Control Commission’s order Whiteclay has been transformed for the better. 13

CONCLUSION..... 14

AFFIDAVIT OF SERVICE16

TABLE OF AUTHORITIES

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Farmers Coop. v. State, 296 Neb. 347 (2017)2, 12

Grand Island Latin Club, Inc. v. Nebraska Liquor Control Com'm,
251 Neb. 61 (1996).....1, 2, 3, 9, 12

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NEB. REV. STAT. § 23-106 10

NEB. REV. STAT. § 23-901 et seq.....10

NEB. REV. STAT. § 23-1704.04 10

NEB. REV. STAT. § 53-101.052, 9

NEB. REV. STAT. § 53-116 1, 9

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STATEMENT OF INTEREST

Amici curiae Legal Aid of Nebraska (Legal Aid) and Nebraska Appleseed Center for Law in the Public Interest (Nebraska Appleseed) incorporate their Motion for Leave to file *Amicus Curiae* brief.

STATEMENT OF THE CASE

Amici curiae, Legal Aid and Nebraska Appleseed, accept and adopt Appellant Nebraska Liquor Control Commission and Citizen Protestants' Statements of the Case. Furthermore, *amici* support all of the Nebraska Liquor Control Commission's and Citizen Protestants' assignments of error, the arguments made on behalf of their assignments of error, and the relief requested as a result.

PROPOSITIONS OF LAW

1. The power to regulate all phases of the manufacture, distribution, sale, and traffic of alcoholic liquor is vested with the Nebraska Liquor Control Commission (NLCC). NEB. REV. STAT. § 53-116.
2. Retail licenses granted by the NLCC may be automatically renewed by the NLCC without formal application upon payment of the necessary fees within a timeframe set forth by statute, however, the NLCC may at any time require a licensee to submit an application. NEB. REV. STAT. § 53-135.
3. This Court has held that a liquor license should be renewed absent a change in circumstances described in § 53-135.02. Grand Island Latin Club, Inc. v. Nebraska Liquor Control Com'n, 251 Neb. 61, 66 (1996).
4. If the NLCC makes a showing that a licensee does not meet one of the renewal factors in §§ 53-135 and 53-135.02, it can require a licensee to complete the long-form

application process. Grand Island Latin Club, Inc. v. Nebraska Liquor Control Com'n, 251 Neb. 61, 66 (1996).

5. The NLCA “shall be liberally construed to the end that the health, safety, and welfare of the people of the State of Nebraska are protected and temperance in the consumption of alcoholic liquor is fostered and promoted by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor.” NEB. REV. STAT. § 53-101.05.

6. The NLCC can require licensees to complete long-form applications if the NLCC makes a showing that a change in circumstances may have occurred causing the licensee to no longer: be qualified to receive a license, to have premises now different from those previously licensed, or to have premises not suitable for the sale of alcohol. Grand Island Latin Club 251 Neb. 61, 66 (1996); Pump & Pantry, Inc. v. City of Grand Island, 233 Neb. 191, 198 (1989).

7. Courts must determine and give effect to the purpose and intent of the legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. State v. Beitel, 296 Neb. 781, 787 (2017); Farmers Coop. v. State, 296 Neb. 347, 354 (2017).

8. “The renewal privilege provided for in this section 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.

STATEMENT OF FACTS

Amici curiae Legal Aid and Nebraska Appleseed accept and adopt the Nebraska Liquor Control Commission and Citizen Protestants’ Statements of Facts.

SUMMARY OF ARGUMENT

A tremendous amount of alcohol is sold by Appellee Beer Stores in Whiteclay, within walking distance of the Pine Ridge Reservation, where the Oglala Sioux Tribe (OST) has banned all sale and possession of alcohol. OST has banned alcohol due to the extraordinary costs it has on all facets of life on the Pine Ridge Reservation and in Whiteclay, among which includes fetal alcohol syndrome. In response to growing concerns about public health, welfare, and safety hazards caused by alcohol sales in Whiteclay, the Governor and Legislature of Nebraska took action in 2016 to address those concerns.

Throughout 2016, the Nebraska Liquor Control Commission (NLCC) received mounting evidence of the public health, welfare, and safety concerns caused by alcohol sales in Whiteclay. This Court held in Grand Island Latin Club, *supra*, that the NLCC can require licensees to complete long-form applications if the NLCC makes a showing that a change in circumstances may have occurred causing the licensee to no longer be qualified to receive a license, to have premises now different from those previously licensed, or to have premises not suitable for the sale of alcohol. The information presented to the NLCC throughout 2016 constituted a sufficient showing that the Beer Stores' liquor licenses were not eligible for renewal under Nebraska law. Therefore, the NLCC acted within its authority to require the Appellees to submit long-form applications.

Additionally, the overwhelming evidence presented at the evidentiary hearing in April 2017 showed the Beer Stores were not qualified to hold liquor licenses, their premises were no longer the same as the premises previously licensed, and the premises

were not suitable to sell alcohol. Therefore, the NLCC's order denying the Beer Stores' applications for license renewal was justified. The NLCC's decision was further justified because of Sheridan County's decreasing population and its authority to at any time reduce the number of licenses within its jurisdiction.

Since the NLCC's order denying Appellee Beer Stores' long-form applications, Whiteclay has been transformed for the better. Any decision contrary to the NLCC's actions in this case would subject Whiteclay and the surrounding area to further harm.

ARGUMENT

I. The sale of alcohol by the Appellee Beer Stores directly results in significant public health, welfare, and safety hazards.

Whiteclay, Nebraska is awash in alcohol, and the Beer Stores are the only places in Whiteclay to get it. In 2016, the Beer Stores sold 331,416 gallons of beer - which equals 3,535,104 twelve ounce cans - in an unincorporated community of only eight residents. (E143). This is equivalent to selling 441,888 twelve ounce cans of alcohol *per resident* in Whiteclay. The eight residents of Whiteclay cannot possibly buy or consume that amount of alcohol, and they do not. (I, 77:24-78:7). Almost all of the alcohol is sold to Native Americans from the Pine Ridge Indian Reservation. (I, 49:19-22; 51:15-21; 77:16-80:18; 198:14-23). The Beer Stores are able sell this alcohol because they have been granted liquor licenses by the Nebraska Liquor Control Commission (NLCC) pursuant to the Nebraska Liquor Control Act (NLCA), Neb. Rev. Stat. §§ 53-101 et seq.

Whiteclay is mere steps away from the Pine Ridge Reservation, which is home to the Oglala Sioux Tribe. (39:24-40:1). The Oglala Sioux Tribe has banned the sale, transportation, and possession of alcohol in its territory because of the violence, suicide,

domestic abuse, sexual assault, disease, and fetal alcohol syndrome it causes among its members, and the economic, emotional, spiritual, and physical costs that result. (I, 46:6-23; 49:6-51:21); Executive Committee of the Oglala Sioux Tribe, Resolution No. 17-45XB, Mar. 29, 2017 (found at E178 – offered but not received).

Among these costs are those caused by fetal alcohol syndrome (FAS), which is caused when alcohol is consumed by pregnant women. When alcohol is consumed during pregnancy the alcohol passes from mother to child and deprives the child of oxygen. U.S. Dep't of Health & Human Services Centers For Disease Control and Prevention, Fetal Alcohol Spectrum Disorders, June 6, 2017, <https://www.cdc.gov/ncbddd/fasd/data.html> (last visited Aug. 8, 2017). This results in irreversible, lifelong mental and physical disabilities, including: facial deformities; heart defects; small head and brain size; underdeveloped organs; poor memory, coordination, and judgment; and seizures. Id. Each child born with FAS is estimated to require two million dollars in care over his or her life. Id. The known national average for FAS is .2 to 1.5 infants per 1,000 live births, yet it is detected in one out of four children born on the Pine Ridge Indian Reservation. Id.; Joe Duggan, Plan for task force on Whiteclay wins backing, Omaha World Herald, Feb. 3, 2017, at 1B. Given the amount of alcohol sold and proximity to Pine Ridge, it is reasonable to infer many or most of the children born with FAS are affected by alcohol sold by the Beer Stores.

The effect of alcohol sales by the Beer Stores in Whiteclay prompted action of the Governor and Legislature in 2016, which were highlighted by public and media reports. These actions illuminated the public health, welfare, and safety hazards caused by the Beer Stores to the public and the NLCC. Specifically, the Governor created a committee

to address the circumstances and problems existing in Whiteclay, and a Legislative Resolution was made to conduct an interim study to examine the sale of alcohol in Whiteclay and the need for additional funding for law enforcement. Paul Hammel, Whiteclay plan gives some 'a lot of hope' for improvements, Omaha World Herald, Aug. 10, 2016, at 1A; L.R. 567, 104th Leg. 2nd Sess. (Neb. 2016).

In June 2016, the Governor's committee prepared recommendations to address problems in Whiteclay, including the effects of alcohol sales. Hammel, Whiteclay plan gives some 'a lot of hope' for improvements, *supra*. The recommendations included (1) funding additional law enforcement, (2) creating an alcohol detox center, (3) removing dilapidated buildings, (4) establishing a Whiteclay economic development plan, (5) changing laws to prohibit public urination, loitering, and panhandling, and (6) improving Nebraska's relationship with the Oglala Sioux Tribe. *Id.*

On October 11, 2016, the General Affairs Committee of the Nebraska Legislature held a public hearing concerning LR 567. L.R. 567, 104th Leg. 2nd Sess., Hearing Transcript, <http://www.nebraskalegislature.gov/FloorDocs/104/PDF/Transcripts/General/2016-10-11.pdf> (last visited Aug. 8, 2017). The Committee heard testimony from 27 witnesses, who collectively spoke in exhaustive detail how the Beer Stores export misery to Native Americans in Whiteclay and the Pine Ridge Indian Reservation. *Id.* None of the witnesses said the Beer Stores should keep their liquor licenses. *Id.* At least 17 expressly asked the Beer Stores to be closed. *Id.*

Among the witnesses was Brian Brewer, past president of the Oglala Sioux Tribe. *Id.*, at 17-25. President Brewer testified the effects alcohol sales were having on his Tribe

were getting worse, particularly in their ability to meet the medical needs of the large number of children born on the reservation with FAS. Id. President Brewer's testimony about the worsened condition in Whiteclay and Pine Ridge was echoed by Nora Boesum, who, with her husband, has fostered over 150 children, many born on the Pine Ridge Indian Reservation. Id., at 26-30. Ms. Boesum testified she and her husband were seeing greater and greater damage to children due to alcoholism caused by alcohol sales in Whiteclay. Id., at 26. Sheridan County Commissioner Jack Anderson testified that Sheridan County lacks law enforcement in Whiteclay, lacks funding for law enforcement, and said Sheridan County needs any help they can get. Id., at 72-75.

The public health, welfare, and safety hazards caused by the Beer Stores in Whiteclay were increasingly made known to the NLCC in the months leading up to its order on November 1, 2016, requiring the Beer Stores to complete long-form licenses. First, the NLCC was aware the actions the Governor and Legislature were taking to address these hazards. In August 2016, the NLCC received the recommendations of the Governor's Task Force. Hammel, Whiteclay plan gives some 'a lot of hope' for improvements, supra. At its November 1, 2016 public hearing, the NLCC made clear it was aware of and considered the public hearing testimony related to LR 567 when it considered Commissioner Anderson's testimony. (Commission Transcript 1-8).

In addition, between June and November 2016, concerned citizens were present at each of the NLCC's public meetings to discuss the public health, welfare, and safety hazards caused by the Beer Stores. Nebraska Liquor Control Commission, Public Meeting Agenda, (June 7, 2016; July 6, 2016; Aug. 9, 2016; Sept. 7, 2016; Oct. 12, 2016), accessible at <https://lcc.nebraska.gov/hearings>, (last visited July 27, 2017).

In June 2016, the NLCC was provided the April 2016 Sheridan County Sheriff's Department dispatch log, which indicated fires, drunk drivers, assaults using baseball bats and cars, and reckless driving all took place that month in Whiteclay. Grant Schulte, Critics cite violence in town near Indian reservation, The Associated Press, June 7, 2016, <http://www.washingtontimes.com/news/2016/jun/7/critics-highlight-violence-response-times-in-white/> (last visited Aug. 8, 2017).

In July 2016, the NLCC heard of a four year old girl with fetal alcohol syndrome "ravaged by seizures" because of alcohol sold to her mother. Lincoln businessman takes issues with Whiteclay to Nebraska Liquor Control Commission, KETV, July 6, 2016, <http://www.ketv.com/article/lincoln-businessman-takes-issues-with-whiteclay-to-nebraska-liquor-control-commission-1/7661227> (last visited Aug. 8, 2017). A concerned citizen affected by accounts of the girl implored the NLCC to take action to limit alcohol sales by the Beer Stores in Whiteclay. Id.

In September 2016, the NLCC learned a woman, Sherry Wounded Foot, died on August 17, 2016, from blunt force trauma to the head after being allegedly beaten in Whiteclay. Kevin Abourezk, Activists say Whiteclay should be shut down following woman's death, Lincoln Journal Star, Sept. 7, 2016, http://journalstar.com/news/state-and-regional/nebraska/activists-say-whiteclay-should-be-shut-down-following-woman-s/article_b1747d79-3f3c-5ce7-b78a-ca3ccfa22b5d.html (last visited Aug. 8, 2017).

On October 1, 2016, a Nebraska State Patrolman stopped an underage member of the Oglala Sioux Tribe, who admitted he purchased alcohol in Whiteclay at one of the Beer Stores. Paul Hammel, Store faces \$600 fine after selling beer to a 19-year old,

Omaha World Herald, Dec. 14, 2016, at 5A. The NLCC later initiated proceedings to sanction the store for violating the NLCA, indicating it was aware of this incident. Id.

Pursuant to the NLCA, the power to regulate all phases of the manufacture, distribution, sale, and traffic of alcoholic liquor is vested with the NLCC, unless otherwise stated. NEB. REV. STAT. § 53-116. Retail licenses granted by the NLCC may be automatically renewed by the NLCC without formal application upon payment of the necessary fees within the timeframe set forth by statute. See NEB. REV. STAT. § 53-135. However, the NLCC “may at any time” require an existing licensee to submit an application. Id.

This Court has held that a liquor license should be renewed absent a change in circumstances described in § 53-135.02. Grand Island Latin Club, Inc. v. Nebraska Liquor Control Com’n, 251 Neb. 61, 66 (1996). If the NLCC makes a showing that one or more of the renewal requirements - that the licensee is then qualified to receive a license, that the premises for which such renewal license is sought are the same premises designated in the initial license, or that the premises are suitable for the sale of alcohol - are not met, it can require a licensee to complete the long-form application process. Id. See also, NEB. REV. STAT. § 53-135.02.

These renewal requirements, like the rest of the NLCA, “shall be liberally construed to the end that the health, safety, and welfare of the people of the State of Nebraska are protected and temperance in the consumption of alcoholic liquor is fostered and promoted by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor.” NEB. REV. STAT. § 53-101.05. Liberally construing the renewal factors to protect the health, safety, and welfare of the people naturally

allows the NLCC to consider whether, due to a lack of law enforcement or other public health, welfare, and safety concerns, changes have occurred that cause a licensee to no longer be qualified to receive a license, cause premises previously licensed to have changed, or cause the premises to no longer be suitable for the sale of alcohol.

The record indicates that at the NLCC's public hearing on November 1, 2016, the NLCC was provided evidence relevant to the renewal of the Beer Stores' licenses, including: logs of calls to the Sheridan County Sheriff in April 2016; documents from the Nebraska State Patrol showing time spent in Whiteclay; and the testimony of Sheridan County Commissioner Jack Anderson before the General Affairs Committee of the Nebraska Legislature on October 11, 2016, that Sheridan County did not have adequate law enforcement in Whiteclay. (Brief of Appellant 7-8). Notably, Commissioner Anderson is one of three people with direct oversight of the county sheriff and control over the sheriff's budget. See, e.g., Neb. Rev. Stat. §§ 23-106 (county board manages county funds and business), 23-901 et seq. (county board sets county budget), 23-1704.04 (county board sets number of deputies and their compensation).

However, as shown above, between June and November 2016, the NLCC received a much larger set of information further indicating Whiteclay lacked adequate law enforcement, and demonstrating alcohol sales by the Beer Stores in Whiteclay were causing significant public health, welfare, and safety issues. All of this information was relevant to the whether the Beer Stores' liquor licenses should be renewed, particularly because it showed a change in circumstances occurred in 2016.

The NLCC had reason to believe at least one of the Beer Stores had committed specific violations of the NLCA, *in 2016*. The NLCC had reason to believe crime, fires,

drunk and reckless driving, violence, assaults with weapons, vehicles running people down, murder, and children profoundly and irreversibly ravaged by alcohol before they were born, were all occurring in Whiteclay because of alcohol sold by the Beer Stores, *in 2016*. The NLCC had reason to know two of the three branches of Nebraska's government were concerned about the circumstances in Whiteclay, had taken action with respect to Whiteclay, and were suggesting changes reflecting their urgent concerns, again, *in 2016*.

The NLCC can require licensees to complete long-form applications if the NLCC makes a showing that a change in circumstances may have occurred causing licensees to be no longer be qualified to receive a license, to have premises now different from those previously licensed, or to have premises not suitable for the sale of alcohol. Throughout 2016, the NLCC received increasing evidence a change in circumstance was occurring, which justified its action to require the Beer Stores to complete long-form applications. Therefore the NLCC's action to require the Beer Stores to file long-form applications was reasonable, consistent with Nebraska liquor law, and within its authority.

II. The Nebraska Liquor Control Commission's post hearing order to not renew Appellee Beer Stores' liquor licenses was supported by sufficient facts pursuant to law.

On April 6, 2017, after the Beer Stores completed long-form applications, and after both Sheridan County and its citizens were provided an opportunity to make recommendations and object, the NLCC held an evidentiary hearing to determine whether to approve or deny the Beer Stores' applications to renew their licenses. (Appellant's Brief, 8-9). As set out in the NLCC and Citizen Protestants' Briefs, an

overwhelming amount of evidence was presented at the hearing which justified the NLCC's post-hearing order to deny the Beer Stores' applications.

This Court has held, pursuant to what is now NEB. REV. STAT. § 53-135.02, licenses may be renewed if the holder is then qualified to have a license, the premises to be renewed is the same premises previously licensed, and the licensee's premises are suitable to sell alcohol. Pump & Pantry, Inc. v. City of Grand Island, 233 Neb. 191, 198 (1989); see also Grand Island Latin Club, 251 Neb. at 66. However, in Pump & Pantry and Grand Island Latin Club, the Court did not address the meaning of the second sentence of § 53-135.02, stating, "The renewal privilege provided for in this section 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

A fundamental rule of statutory analysis holds when reading a statute, courts must determine and give effect to the purpose and intent of the legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. State v. Beitel, 296 Neb. 781, 787 (2017); Farmers Coop. v. State, 296 Neb. 347, 354 (2017). By its language, § 53-135.02 says nothing shall *in any case* prevent the NLCC from decreasing the number of licenses issued in its jurisdiction.

In the case of the Beer Stores, the NLCC had reason to decrease the number of licenses in Sheridan County because its population had been steadily decreasing.

In 2000, Sheridan County had a population of 6,198. U.S. Census Bureau, DP-1. Profile of General Demographic Characteristics: 2000 – Sheridan County, Nebraska, Census 2000 Summary File 1 (SF 1) 100-Percent Data, Available at American Factfinder,

<https://factfinder.census.gov> (last visited Aug. 1, 2017). As of July 1, 2016, the most recent date for which data is available, Sheridan County's population has declined to 5,234, a 15.55 percent decrease since 2000. U.S. Census Bureau, PEPANNRES. Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2016, 2016 Population Estimates, available at American Factfinder, <https://factfinder.census.gov> (last visited Aug. 1, 2017).

As of August 1, 2017, the NLCC had records for 30 retail liquor licenses located in Sheridan County, including the Beer Stores' expired licenses. Nebraska Liquor Control Commission, Licensee Search, https://www.nebraska.gov/nlcc/license_search/licsearch.cgi (Select "Annual Licenses", category "Retail", and county "Sheridan", then follow "Submit"). In light of the decreasing population of Sheridan County, the NLCC's action to deny the Beer Stores' renewal applications is justified pursuant to its authority to decrease the number of licenses in Sheridan County.

III. Since the Nebraska Liquor Control Commission's order Whiteclay has been transformed for the better.

In April 2017, after the NLCC denied the Beer Stores' long-form applications, alcohol sales in Whiteclay ended. Paul Hammel, New business is sign of progress in town, Omaha World Herald, July 23, 2017, at 8B. It has been reported that most, if not all, of the street people have left. Id. The look of Whiteclay has improved. Id. Litter has reduced dramatically. Id. Renovations are underway to previously abandoned buildings. Id. Homes and new businesses are being built. Id.

An old church that once was a favorite gathering place to drink alcohol is being converted into a thrift store. Kimberly Greager, The ever changing face of Whiteclay, Native Sun News Today, Aug. 2, 2017, http://www.nativesunnews.today/news/2017-08-02/Top_News/The_ever_changing_face_of_Whiteclay.html (last visited Aug. 8, 2017). When asked how Whiteclay has changed since the Beer Stores closed, a tribal police officer said, “It’s been quiet!” Id. Residents of Whiteclay now feel safe to go for walks in their community, something that never happened when the Beer Stores were open. Id.

The changes that have happened in Whiteclay stand in stark contrast to what was happening in Whiteclay immediately prior to the NLCC’s order to not renew the Beer Stores’ liquor licenses. Whiteclay was plagued by public intoxication, drunk driving, lawlessness, violence, rape, murder, and fetal alcohol syndrome. On rare occasions, a simple act of government can cause much needed change, yet the NLCC’s order to require the Beer Stores complete long-form applications, and subsequent post-hearing decision to deny those applications has had an enormous effect. The NLCC’s actions were lawful, supported by the evidence, conducted in accordance with due process, and protect the health, safety, and welfare of the people of Nebraska.

CONCLUSION

Amici curiae respectfully joins the requests of the Appellant and Citizen Protestants, or alternatively, requests this Court vacate the district court’s judgment finding the NLCC lacked such authority to not renew Appellees’ liquor licenses, and remand with instructions to affirm the NLCC’s order.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEBRASKA)
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Jonathan Seagrass, being duly sworn on oath, states as follows:

1. That he is an attorney with Legal Aid of Nebraska.

2. That on August 9, 2017, he caused to be mailed copies of the Brief of
amici curiae to:

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FURTHER AFFIANT SAITH NAUGHT.

DATED this 9th day of August, 2017.



Jonathan Seagrass

SUBSCRIBED and SWORN before me this 9 day of August, 2017.

State of Nebraska - General Notary
ANA L. BEZRUTCYK
My Commission Expires
December 2, 2019



Notary Public

IN THE NEBRASKA SUPREME COURT

STUART KOZAL, d/b/a JUMPING EAGLE INN; ARROWHEAD INN, INC., d/b/a ARROWHEAD INN; CLAY BREHMER and DANIEL BREHMER, d/b/a STATE LINE LIQUOR and SANFORD HOLDINGS, LLC, d/b/a D & S PIONNER SERVICE	Case No. S-17-000441
Petitioners/Appellees,	
v.	OBJECTION TO FILING OF THE AMICUS CURIAE BRIEF BY LEGAL AID OF NEBRASKA and NEBRASKA APPLESEED CENTER FOR LAW IN THE PUBLIC INTEREST
NEBRASKA LIQUOR CONTROL COMMISSION,	
Respondent/Appellant,	
ABRAM NEUMANN, LORI HANKINSON, BARB and DAVID VANCIL,	
Appellants	

Appellees object to the filing of the Amicus Curiae Brief by Legal Aid of Nebraska and Nebraska Appleseed Center for Law in the Public Interest. In Support of this motion Appellees state as follows:

1. The contents of the proposed brief center largely around events both before November 1, 2016 and after the decision of the Nebraska Liquor Control Commission to not renew Appellees' licenses. Such information is not contained within the record or relevant to the issues before this Court.

2. The Amicus Curiae brief does not contain citations to law not already discussed in the briefs of the parties.

3. The issue before the Nebraska Liquor Control Commission was only whether or not adequate law enforcement existed in Whiteclay, Nebraska. The Nebraska Liquor

Control Commission did not have the authority to require an analysis of the adequacy of law enforcement with regard to an existing license. Further, the Nebraska Liquor Control Commission cannot address the public health concerns, including but not limited to fetal alcohol syndrome. As noted by the hearing officer

The area -- the issue of alcohol and its abuse and its problems on the Pine Ridge Indian Reservation in particular are very serious issues, and they are large in scope; so large in scope that they are actually outside the scope of the authority of this commission. Therefore, this Commission is looking at the issue of whether there is adequate law enforcement in the unincorporated village of Whiteclay. 2 -- for the reissuance of these licenses. And so, with that admonishment that's what we're limited to is -- is there adequate law enforcement because that's the -- the statutory duty and authority of the Commission. (18:2-13)

4. The Amicus Curiae brief was filed with this Court on August 9, 2017 without leave of the Court in contravention of Neb. Court Rules of App. Prac. § 2-109(4) and § 2-106. Argument in this matter is scheduled for August 29th, 2017.

5. Pursuant to Neb. Court Rules of App. Prac. § 2-106 the parties are allowed fourteen days to object to the presentation of an Amicus Curiae brief.

6. Consideration of the motion must occur within 20 days of the date of oral argument in contravention Neb. Court Rules of App. Prac. § 2-109(4).

Wherefore, Appellees object to the motion to file of the Amicus Curiae Brief by Legal Aid of Nebraska and Nebraska Appleseed Center for Law in the Public Interest

DATED: August 10, 2017.

**STUART KOZAL, d/b/a JUMPING EAGLE INN;
ARROWHEAD INN, INC., d/b/a ARROWHEAD INN;
CLAY BREHMER and DANIEL BREHMER, d/b/a
STATE LINE LIQUOR and SANFORD HOLDING, LLC,
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Petitioners/Appellees,**

By: /s/ Andrew W. Snyder

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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on the 10th day of August, 2017 he electronically filed the foregoing *Objection* using the e-filing system, which sent notification of such filing to the following attorneys of record and by e-mailing the *Objection* to:

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Certificate of Service

I hereby certify that on Thursday, August 10, 2017 I provided a true and correct copy of this *Objections of Appellee Kozal* to the following:

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IN CASE OF: S-17-000441, Kozal v. Nebraska Liquor Control Commission

The following internal procedural submission: By order of Court -Amicus Brief Stricken
Submitted on 08/16/17

Has been reviewed by the court and the following order entered:

By order of the Court, amicus curiae brief filed by Legal Aid of
Nebraska and Nebraska Appleseed on August 9, 2017, stricken.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals

S-17-441

IN THE NEBRASKA SUPREME COURT

STUART KOZAL, d/b/a JUMPIN EAGLE INN, et al.,

Petitioners-Appellees,

v.

NEBRASKA LIQUOR CONTROL COMMISSION,

Respondent-Appellant,

and

**ABRAM NEUMANN, LORI HANKINSON, BARB and
DAVID VANCIL, (“Citizen Protestants”),**

Appellants.

**Appeal from the District Court of Lancaster County, Nebraska
Andrew Jacobsen, District Judge**

**SUPPLEMENTAL BRIEF OF APPELLANT,
NEBRASKA LIQUOR CONTROL COMMISSION**

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Table of Contents

Table of Authorities	ii
Issues Addressed	1
1. Interplay of Liquor Control Act and Administrative Procedure Act regarding Parties of Record	4
2. Jurisdictional standing prerequisites of Citizen Protestants for Judicial review under the APA and the subsequent appeal to this Court.....	6
Conclusion.....	10
Certificate of Service	11

Table of Authorities

Cases

<i>Applied Underwriters, Inc. v. S.E.B. Servs. of New York, Inc.</i> , 297 Neb. 246, 898 N.W.2d 366 (2017)	6
<i>Blauvelt v. Beck</i> , 162 Neb. 576, 76 N.W.2d 738 (1956)	8
<i>Concordia Teachers College v. Nebraska Dep't of Labor</i> , 252 Neb. 504, 563 N.W.2d 345 (1997)	3
<i>Heckman v. Marchio</i> , 296 Neb. 458, 894 N.W.2d 296 (2017)	7
<i>In re Interest of LeVanta S.</i> , 295 Neb. 151, 887 N.W.2d 502 (2016)	8-9
<i>J.S. v. Grand Island Public Schools</i> , 297 Neb. 347 (July 28, 2017).....	3
<i>State ex rel. Funke v. Lancaster Cty.</i> , 110 Neb. 695, 194 N.W.2d 807 (1923)	9

Statutes

<u>Neb. Rev. Stat. § 25-510.02</u>	2, 3
<u>Neb. Rev. Stat. § 53-133(1)(b)</u>	5
<u>Neb. Rev. Stat. § 53-1,115(4)(a)(i)-(iv)</u>	5
<u>Neb. Rev. Stat. § 53-1,116</u>	1
<u>Neb. Rev. Stat. § 84-901(3)</u>	2
<u>Neb. Rev. Stat. § 84-917(1)</u>	1
<u>Neb. Rev. Stat. § 84-917(2)(a)(1)</u>	2, 5
<u>Neb. Rev. Stat. § 84-917(2)(a)</u>	1
<u>Neb. Rev. Stat. § 84-918(1)</u>	7, 9

Secondary Authorities

What's So Special About Special Proceedings? Making Sense Of Nebraska's Final Order Statute, 80 Neb. L. Rev. 239 (2001)	7
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Issues Addressed

The Court entered an order on August 4, 2017, ordering all counsel to submit supplemental briefs addressing the following two issues:

1. The interplay of the statutory provisions of the Nebraska Liquor Control Act and the Administrative Procedure Act regarding parties of record.
2. The jurisdictional prerequisites of standing of the individuals who protested the issuance of the license, for purposes of judicial review under the Administrative Appeal Act and subsequent appeal therefrom.

Issue 1: Interplay of Liquor Control Act and Administrative Procedure Act regarding Parties of Record.

Liquor Control Act and APA in District Court: Who Could Appeal

Section 53-1,116 of the Liquor Control Act provides that, “Any order or decision of the commission . . . denying . . . or refusing to . . . renew a license . . . may be appealed and the appeal shall be in accordance with the Administrative Procedure Act.”

Section 84-917(1) of the APA provides that, “Any person aggrieved by a final decision in a contested case . . . shall be entitled to judicial review under the Administrative Procedure Act.” Although the APA does not define a “person aggrieved”, the Commission concedes that the Beer Stores were

aggrieved persons. The proceedings before the Commission were also a “contested case”, as defined by Section 84-901(3), in that the Beer Stores’ “legal rights, duties, or privileges” were “determined after an agency hearing.” The Beer Stores, not the Commission or the Citizen Protestants, appealed the Commission’s decision to the district court. The Beer Stores had the authority and right to appeal by the interplay between the APA and the Liquor Control Act.

Liquor Control Act and APA in District Court: Subject Matter Jurisdiction

Section 84-917(2)(a)(1) of the APA specifies what a person seeking judicial review must do to perfect subject matter jurisdiction in the district court, which requires at least the following:

- 1) File a petition in the district court;
- 2) The petition must be filed within 30 days after service of the agency’s final decision;
- 3) “*All parties of record* shall be made parties to the proceedings for review”;
- 4) “Summons shall be served within thirty days of the filing of the petition in the manner provided for service in section 25-510.02.”

As explained in the Commission’s initial and reply briefs, the Beer Stores failed to do steps 3 and 4 prior to the district court’s order, which meant the district court did not have subject matter jurisdiction to enter its order.

Fatal to the district court's jurisdiction is that the Beer Stores failed to serve or even issue summons on the Commission by failing to serve the Attorney General at any time prior to the expiration of thirty days from the filing of the Petition, which fatal flaw is explained per the case authority cited in the Commission's Reply Brief Jurisdiction Section. Service of a summons on the Commission as a state agency is "by leaving the summons at the office of the Attorney General" as required by Neb. Rev. Stat. § 25-510.02. See also, *Concordia Teachers Coll. v. Nebraska Dep't of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997) (APA subject matter jurisdiction's requirement of service of a summons on a state agency is by leaving the summons at the office of the Attorney General).

Significant for purposes of the issue of whether to remand for further proceedings or whether to dismiss, the Beer Stores failed to do steps 3 and 4 prior to the expiration of 30 days after service of the agency's final decision. The Commission is filing a praecipe for another supplemental transcript which will confirm, by the district court clerk's certification, that the Beer Stores never filed an amended petition adding the Citizen Protestants as parties, nor issued or served summons on the Commission or Citizen Protestants, prior to the expiration of 30 days after service of the agency's final decision. See, *J.S. v. Grand Island Public Schools*, 297 Neb. 347 (July 28, 2017).

Step 3 depends upon the interplay between the Liquor Control Act and the APA concerning the meaning of “all parties of record”, which parties “shall be made parties to the proceedings for review”. The Beer Stores’ argument appears to be that although the Citizen Protestants were “parties of record” in the Commission’s hearing, the Commission erred in making them parties, and thus, the Citizen Protestants were not parties of record in the APA appeal to the district court. The Beer Stores’ argument is misplaced for two reasons. First, the APA requirement to include “all parties of record” has no context or meaning unless the phrase refers to all who the agency considered or determined were “parties of record” in the agency proceeding, regardless of whether the agency was correct in doing so. Second, the Citizen Protestants were properly parties of record anyhow in the Commission’s proceedings under the provisions of the Liquor Control Act.

Regarding the first reason, whether an agency is correct or not in making someone a “party of record” in the agency proceedings is not determined under the APA statute by the APA petitioner’s choice to eliminate someone to whom an agency granted party status in an agency proceeding. Although an agency’s error in granting party status could be the subject of review by the district court, the APA’s requirement means that the district court should at least be informed by the district court petition identifying who were “all parties of record” in the agency proceedings as determined by the agency’s decision. A

proper construction of APA section 84-917(2)(a)(i) does not give a district court petitioner the legal authority to overrule the agency's determination of who was a party in the agency's proceeding by doing what the Beer Stores did – eliminate those who were parties in the agency proceeding by failing to name them as parties in the APA petition to the district court.

Regarding the second reason, Sections 53-1,115(4)(a)(i)-(iv) and 53-133(1)(b) of the Liquor Control Act state who is considered a “party of record” “in the case of an administrative proceedings before the commission on the application for a retail license”. Per the language of the statutes, the parties of record include the license applicant, the Commission, and “each individual protesting the issuance of such license pursuant subdivision (1)(b) of section 53-133”. The latter subdivision defines the individual protesters having party status as being those persons who made “objections in writing” and who were “residing within such city, village”, provided there were “not less than three persons” so objecting.

It may seem remarkable to allow party status as full participants, rather than merely a right to be heard, to persons who object to potential governmental action on liquor license applications. But, the Legislature did so as a matter of public policy by statute. The Legislature necessarily concluded that it was a matter of public concern that those who live in a village or city

where liquor licenses may be issued should have a greater status and standing than merely having a right to be heard.

The Citizen Protestants were active and full participants in the Commission's hearing proceedings, as summarized in the Commission's initial brief. The interplay between the Liquor Control Act and the APA's subject matter jurisdiction requirements necessarily meant that the Citizen Protestants, having been parties of record in the Commission proceedings, were required to be made parties of record in the district court proceedings for judicial review of the Commission's final order.

Issue 2: Jurisdictional standing prerequisites of Citizen Protestants for judicial review under the APA and the subsequent appeal to this Court.

If issue 2 presumes the existence of a standing requirement for the district court's exercise of jurisdiction under the APA, such a requirement applies only to the Beer Stores, who were the only ones invoking the district court's jurisdiction under the APA. But, in order for the district court to have subject matter jurisdiction to consider the Beer Stores' appeal, the Beer Stores needed to comply with steps or elements 1 through 4 as outlined in the Commission's above argument on Issue Number 1. Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Applied Underwriters, Inc. v. S.E.B. Servs. of New*

York, Inc., 297 Neb. 246, 250, 898 N.W.2d 366, 371, 2017 WL 3091279 (2017). Simply put, neither the Commission nor the Citizen Protestants invoked the district court’s jurisdiction under the APA. Rather, the Beer Stores, who had standing to invoke the district court’s jurisdiction, failed to comply with the subject matter jurisdictional requirements of the APA.

The issue of who has standing to invoke this Court’s appellate jurisdiction is easily answered for the Commission’s appeal to this Court. Section 84-918(1) of the APA grants an “*aggrieved party*” (emphasis added) the right to appeal to this Court. Although the term “aggrieved party” is not defined by the APA, the Commission should qualify since the Commission was a party to both the agency and district court proceedings, and the Commission was aggrieved when the district court vacated the Commission’s order.

The issue of whether the Citizen Protestants have standing to appeal to this Court as an “aggrieved party” is less clear, depending on whether this Court adds a common law or judicial standing element to Section 84-918(1). If a standing requirement is added beyond being only an “aggrieved party”, the Court has judicially amended the Legislature’s sole statutory requirement. This Court does not have the authority to do so. Judicial legislation is proscribed by the Nebraska Constitution. See, *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017). “An appellate court has only the jurisdiction that the statutes give.” *Id.*, 296 Neb. at 464, quoting with approval, John P. Lenich,

What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute, 80 Neb. L. Rev. 239, 308 (2001).

The Citizen Protestants, as explained in the response to Issue 1, were parties of record in the Commission's proceedings and also should have been named as parties of record in the district court APA proceeding. The Legislature granted the Citizen Protestants full party status in the Commission proceedings, which necessarily included a right to be heard. The Beer Stores eliminated even the basic right of the Citizen Protestants to be heard in the district court along with the broader right as parties to participate. The English language would need to be turned upside down and inside out to conclude that the Citizen Protestants were not "aggrieved" in the district court by not being allowed to participate or even be heard.

Blauvelt v. Beck, 162 Neb. 576, 590–91, 76 N.W.2d 738, 748 (1956), stated:

The fundamental requisite of due process of law is the opportunity to be heard. The right to be heard has little reality or value unless one is informed that the matter is pending and he can choose for himself whether to appear or default, acquiesce or contest.

The concept of due process embodies the notion of fundamental fairness and defies precise definition; but the central meaning of procedural due process is clear that parties whose rights are to be affected are entitled to be heard. *In*

re Interest of LeVanta S., 295 Neb. 151, 887 N.W.2d 502 (2016). Clearly the right to be heard should not be denied. *State ex rel. Funke v. Lancaster Cty.*, 110 Neb. 635, 194 N.W. 807 (1923).

The Citizen Protestants were “aggrieved” by the district court’s order. Their right to be heard in the district court, as parties of record in Commission’s proceedings, was eliminated by the Beer Stores’ failure to comply with APA statutory jurisdictional requirements of making the Citizen Protestants parties. This Court should not reward the Beer Stores’ success, to date, in silencing the Citizen Protestants from being judicially heard. The Citizen Protestants were “aggrieved parties” and, as such, had the right to appeal to this Court as provided by Section 84-918(1). An additional common law standing hurdle is not part of the statute.

Conclusion

The Commission renews its request for relief as stated in the Conclusion of its initial brief.

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Appellant,

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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' Supplemental Court-Ordered Brief

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Table of Contents

Statement of Issues Assigned by Court for Supplemental Briefing	1
Propositions of Law	2
Statement of Facts	2
Request for Judicial Notice.....	3
Argument	3
I. Interplay: <i>Liquor Control Act & Administrative Procedure Act</i>	3
Both are Keyed by “ <i>Parties of Record</i> ”.	
II. Any Aggrieved Party Has Standing to Seek Judicial Review of An.....	7
NLCC Final Order in a Contested Case.	
Conclusion	11
Appendix.....	12

Table of Authorities

Cases

<i>Alisha C. v. Jeremy C.</i> , 283 Neb 340 (2012)	2, 10
<i>Anthony, Inc. v. City of Omaha</i> , 283 Neb 868 (2012)	2, 10
<i>Central Park Pharmacy, Inc. v. Nebraska Liquor Control Com'n</i> , 216 Neb 676 (1984)	10
<i>City of Omaha v. C.A. Howell, Inc.</i> , 20 Neb App 711 (2013)	11
<i>Concordia Teachers College v. Nebraska Dept of Labor</i> , 252 Neb 504 (1997)	10
<i>Grand Island Latin Club, Inc. v. Nebraska Liquor Control Com'n</i> , 251 Neb 61 (1996)	7
<i>Litowitz v. Growth Management Bd.</i> , 966 P.2d 422 (Wash App 1998)	9
<i>In re Klamm</i> , 82 Neb 379 (1908)	8
<i>In Re McDonald</i> , 87 Neb 618 (1910)	9
<i>J.S. v. Grand Island Pub Schools</i> , 297 Neb 347 (7.28.2017)	2, 11
<i>McDougle v. State ex rel. Bruning</i> , 289 Neb 19 (2014)	11
<i>Nebraska DHHS v. Weekley</i> , 274 Neb 516 (2007)	10
<i>Pump & Pantry, Inc., v. City of Grand Island</i> , 233 Neb 191 (1989)	5
<i>Riley v. State</i> , 244 Neb 250,258 (1993)	5
<i>Slack Nursing Home, Inc. v Nebraska DHHS</i> , 247 Neb 452 (1995)	7
<i>Shaffer v. Nebraska DHHS</i> , 289 Neb 740 (2014).	8, 9, 11
<i>State v. Loding</i> , 296 Neb 670 (2017)	2, 10

Statutes

<i>Neb Rev Stat</i> § 53-1,115	<i>Passim</i>
<i>Neb Rev Stat</i> § 53-1,115(4)(a)(ii).	1
<i>Neb Rev Stat</i> § 53-1,116	6, 7
<i>Neb Rev Stat</i> § 53-101.05	5, 10
<i>Neb Rev Stat</i> § 53-117.08	5
<i>Neb Rev Stat</i> § 53-132	5
<i>Neb Rev Stat</i> § 53-132 (2)(d)	9
<i>Neb Rev Stat</i> § 53-133	1, 5, 6, 7
<i>Neb Rev Stat</i> § 53-135	1, 5
<i>Neb Rev Stat</i> § 53-135.01	1, 5, 9
<i>Neb Rev Stat</i> § 53-135.02	5
<i>Neb Rev Stat</i> § 84-916	4
<i>Neb Rev Stat</i> § 84-917(2)	<i>Passim</i>
<i>Neb Rev Stat</i> § 84-918 (1)	9
<i>Neb Rev Stat</i> § 84-919	5

Regulations

237 <i>Neb Admin Code</i> § 6-019.01	5
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Other

Nebraska Appellate Practice & Procedure §7.2, <i>Appeals from Agencies Within APA</i> (2016)	9
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Statement of Issues Assigned by Court for Supplemental Briefing

1. What is the interplay of the *Nebraska Liquor Control Act* and the *Administrative Procedure Act* regarding “Parties of Record”?

Citizens’ Position: Written protests by citizens made these contested liquor license renewals become contested cases. *Neb Rev Stat* §§ 53-133 & 135 & 135.01. The *Liquor Control Act* and the *Administrative Procedure Act* both make citizen protestants “parties of record”. *Neb Rev Stat* § 53-1,115(4)(a)(ii). As “parties of record” citizen protestants fully participate in proceedings at the agency level and are necessary parties for the jurisdictional review protocol of the *APA* to be invoked. *Neb Rev Stat* § 84-917(2)(a)(i)(ii). Both the *Liquor Control Act* and the *APA* use the phrase “party[ies] of record” to describe necessary parties and those entitled to participate in agency, and agency administrative review, proceedings. Finally, before the district court the Citizens were also entitled to defend their “parties of record” status before the agency, and their presence was required for this jurisdictional reason.

2. What are the jurisdictional prerequisites of standing of the individuals who protested the issuance of the licenses for purposes of judicial review under the *APA* and subsequent appeal therefrom?

Citizens’ Position: Statutory standing is conferred upon individual citizens of an affected village, city or county who file written, timely protests of liquor license renewal applications. Standing is expressly conferred by *Neb Rev Stat* § 53-1,115(4)(a)(ii). Citizen protestants are “parties of record” in contested proceedings before the Nebraska Liquor Control Commission (“NLCC”). They are also “parties of record” who must be named in a Petition for Review and served with summonses within 30 days of its filing to invoke the district court’s jurisdiction to review an agency final order. *Neb Rev Stat* §84-917(2)(a)(i)(ii).

Propositions of Law

3. In contested proceedings before the Nebraska Liquor Control Commission (“NLCC”), 3 or more citizen protestants are *parties of record* to hearings on liquor license renewals. They adduce evidence, and fully participate. *Neb Rev Stat* § 53-1,115(4)(a)(ii).

4. All NLCC contested case *parties of record* must be named, and served with summonses within 30 days after a Petition for Review is filed, or jurisdiction for administrative review is not properly invoked under the *APA*. *Neb Rev Stat* §84-917(2)(a)(i)(ii).

5. Failure to seek review of agency action under the *APA*, by failing to name, or to serve a summons and a copy of the petition on a necessary party, are jurisdictional flaws. . *J.S. v. Grand Island Pub Schools*, 297 Neb 347 *1*3 (7.28.2017).

6. “[S]tatutes relating to the same subject are *in pari materia* and should be construed together....” *State v. Loding*, 296 Neb 670, 678 (2017) (citing *Alisha C. v. Jeremy C.*, 283 Neb 340 (2012)). The intent of the lawgiver is to be ascertained in interpreting statutes. *Anthony, Inc. v. City of Omaha*, 283 Neb 868, 887-88 (2012).

Statement of Facts

7. The Citizen Cross-Appellants, and several other Sheridan County citizens who are not before this Court, protested the Beer Stores’ liquor licenses renewal applications. (III, 77-111; IV, 60-94; V, 56-90; VI, 82-116). The Citizen Protestants appeared, filed pleadings, adduced evidence, and fully participated in the proceedings. These citizen protests and the Commission’s Show Cause Orders made contested case proceedings necessary. The Applicants were informed of the issue for consideration: adequacy of law enforcement. (II, 2) The matters proceeded to trial and to an NLCC decision to refuse renewal of all 4 Beer Store licenses.

8. As parties the Applicants, Commission and Citizens met pretrial deadlines and appeared with counsel for the agency hearing. They all adduced evidence, examined witnesses, and advocated their positions. The Citizen Protestants prevailed at the NLCC hearing. The Beer Stores applying for license renewals initiated proceedings in district court for judicial review. But, the Stores did not name the Citizen Protestants or serve them with summonses.

9. Not having appeared in district court, and more than 30 days after the NLCC's decision, the Citizen Appellants filed their own Notice of Appeal to this Court. They did so to raise jurisdictional issues here. On June 12, 2017, the Clerk of this Court filed the district court's supplemental transcript, confirming absence of 3 items requested by the Citizens' Praeipe for Supplemental Transcript. The Praeipe was not transmitted to this Court; it is needed to understand that the Supplemental Transcript confirms: 1) No praecipes for any summonses were filed by the Beer Stores; 2) No returns of summonses appear in the district court file; and, 3) the Agency Record had not reached the district court by June 8, 2017.

10. **Request for Judicial Notice.** This Court is asked to take judicial notice of the Citizen Protestants' Praeipe for Supplemental Transcript filed in district court on June 6, 2017. A copy is attached in the **Appendix** to this Brief. An additional Supplemental Transcript to include the Praeipe is requested.

Argument

I. Interplay: *Liquor Control Act & Administrative Procedure Act.*

Both are Keyed by "*Parties of Record*".

11. The *Liquor Control Act* and the *APA* both provide for the presence of "parties of record" to participate in proceedings. All *parties of record* must be named, and served with

summonses within 30 days after a Petition for Review is filed or administrative review is not properly invoked under the *APA*. *Neb Rev Stat* §84-917(2)(a)(i)(ii).

12. In contested proceedings before the NLCC, 3 or more citizen protestants are *parties of record* to hearings on liquor license renewals. They can adduce evidence and are entitled to full participation. *Neb Rev Stat* § 53-1,115(4)(a)(ii).

13. The Nebraska *Liquor Control Act* vests the NLCC with the power to require hearings and make a licensee show cause why a license should not be renewed. Citizens are permitted to protest renewal (but at least 3 citizens must do so); they become parties of record to a contested case. The *Liquor Act* is both substantive and procedural. After the NLCC decides a contested matter, review is by the Petition for Review process under the *APA*. A Petition for Review must include precise jurisdictional elements including “(iv) identification of the parties in the contested case that led to the final decision.” *Neb Rev Stat* § 84-917(2)(b). In this case, the Citizen Protestants are the “parties of record” as defined by the *Liquor Act* at § 53-1,115(4)(a)(ii). The Citizen Appellants were “not named in the Beer Stores’ Petition for Review.

14. The *APA* judicial review process provides a procedure; it does not create or alter substantive rights. “The *Administrative Procedure Act* is intended to constitute an independent act establishing minimum administrative procedure for all agencies.” *Neb Rev Stat* § 84-916. The *Liquor Control Act* assigns administration of the State’s Liquor Laws to the NLCC. The *Act*:

...shall be liberally construed to the end that the health, safety, and welfare of the people of the State of Nebraska are protected and temperance ...is ... promoted by ... regulation of the manufacture, sale, and distribution of alcoholic liquor.

Neb Rev Stat § 53-101.05. The *Liquor Act* is liberally interpreted. The *APA*, however, is strictly construed and applied. “Except as otherwise provided by law, the *Administrative Procedure Act*

establishes the exclusive means of judicial review of a final decision of any agency in a contested case.” *Neb Rev Stat* § 84-919. See, *Riley v. State*, 244 Neb 250,258 (1993).

15. The *Liquor Control Act* requires that notice be published to inform citizens that “...written protests to issuance of automatic renewal of [a liquor] license may be filed by any resident of the [city village or] county)...” *Neb Rev Stat* § 53-135.01. Section 53-133(1)(b) permits “not less than 3 persons residing within such...county” to protest a liquor license renewal within 45 days after the Commission receives the recommendation of the County Board or City Council as the case may be. Section 53-133(2) requires that notice of the hearing be given to “each individual protesting a license pursuant to [§5 3-133(1)(b)]”. Where protests are filed by 3 or more citizens a contested hearing is required. *Id.* Automatic renewal can only occur in the absence of such protests. *Neb Rev Stat* §53-132.

16. *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. In this case, protests by the Citizen Appellants and others made the contested liquor license renewals become contested cases. *Neb Rev Stat* § 53-133. So did the NLCC’s Director’s Objections. 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 the decision in *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb 191 (1989), provides this protocol.

17. Statutory standing is conferred by *Neb Rev Stat* § 53-1,115(4)(a)(ii) upon individuals who file protests and become citizen protestants against liquor license renewals:

(1) A copy of the ... order, or decision of the commission denying an application or suspending, canceling, or revoking a license or of any notice required by any proceeding before it, certified under the seal of the commission, shall be served upon each party of record to the proceeding before the commission. ...

(4) For purposes of this section, party of record means:

(a) In the case of an administrative proceeding before the commission on the application for a retail, craft brewery, or micro distillery 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).

18. The *Liquor Control Act* hands off appeals to the *APA*. *Neb Rev Stat* § 53-1,115(4) also provides: “. . . no appeal shall be allowed from any decision of the Commission except as provided in Section 53-1,116.” The *APA* provides the review procedure and scope of review, but not the substantive law by which the merits are judged.

Any order or decision of the commission granting, denying, suspending, canceling, revoking, or **renewing or refusing to** suspend, cancel, revoke, or **renew a license**, ... or permit for the sale of alcoholic liquor, including beer, may be appealed, and the appeal shall be in accordance with the *Administrative Procedure Act*.

Neb Rev Stat § 53-1,116 (emphasis added). On appeal before the district court citizen protestants are necessary parties who are entitled to defend their “parties of record” status before the agency even when, as here, that status is challenged by the license applicants.

19. 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. The next section of the *Liquor Act*, § 53-1,116, defines the appellate procedure by reference to the *APA*. Nothing in the *Act* or the *APA* suggests that a “party of record” under § 53-1,115(4) is not a necessary party for an *APA* review.

20. Prior to a request for administrative review of a Final Agency Order, the *Administrative Procedure Act* has no interplay with the *Liquor Control Act*. The *Liquor Act* defines the substantive issues, identifies and confers real party in interest, and standing, status. The statute controlling the Agency and its own Regulations lawfully enacted govern matters at the Agency level. *Slack Nursing Home, Inc. v. Nebraska DHHS*, 247 Neb 452 (1995).

21. The *Liquor Control Act* is not ambiguous. Citizens who protest liquor license renewals are “parties of record” in the contested case that follows. *Neb Rev Stat* § 53-1,115(4). It defines the necessary parties for review. The *APA*’s procedure for appellate review also uses the term “party of record”, eliminating all doubt that the Citizen Protestants are necessary parties. *Neb Rev Stat* § 84-917(2)(a)(i)(ii). Citizens are entitled to defend their “parties of record” status, and must be named as necessary parties for *APA* review.

II. Any Aggrieved Party Has Standing to Seek Judicial Review of An NLCC Final Order in a Contested Case.

22. 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. *Id.*

This requirement was met by the Citizen Appellants. Citizen protestants have been viewed as parties for more than a century. *In re Klamm*, 82 Neb 379 (1908).

23. After a properly rendered final decision, the procedure for review is supplied by the *APA*. The *APA*'s interplay at this point is that of a mandatory procedural pathway to judicial review of agency action concerning substantive legal issues defined by the *Liquor Control Act*. Parties with real interests or standing under the *Liquor Act* are not muted by the *APA* when an adversary files a Petition for Review.

24. The *APA* is clear about the steps that must be taken to invoke administrative review. "All parties of record shall be made parties to the proceeding for review... Summons shall be served within 30 days...." *Neb Rev Stat* § 84-917(2)(a)(i). The act of filing a Petition for Review "shall vest in a responding party of record the right to cross-appeal against any other party of record." Section 84-917(2)(a)(ii).

25. Having won their hard-fought battle for an Order denying the Beer Store license renewals, the Citizen Protestants have a real interest, and standing, in the administrative review processes. Though no *Liquor Control Act* case squarely addresses this issue, *Shaffer v. Nebraska DHHS*, *supra*, does so in connection with review of agency action by DHHS. The *Shaffer* case turns on weaker legal connections than those between the *Liquor Act* and the *APA*.

26. It might be argued that there are subtle differences between "real parties", and "parties of record" and "aggrieved parties". But for the *Liquor Act*'s purposes, "real parties" and "parties of record" are synonyms. And "necessary parties" for an *APA* Review includes all parties of record before the Agency. *Shaffer*, 289 Neb at 748. The Citizen Appellants are parties of record named in the Bill of Exceptions and persons who "were allowed to ... participate as a party in the agency proceeding". *Id.* at 751, quoting *Litowitz v. Growth Management Bd.*, 966

P.2d 422, 423 (Wash App 1998). The Citizens were active in pre-hearing proceedings, called and cross-examined witnesses at the NLCC hearing. This, along with *Neb Rev Stat* § 84-917(2), makes them necessary parties, who must be named to confer jurisdiction on the district court.

27. A liquor license applicant or renewal applicant must show it is the real party in interest, prove fitness, and prove present and future public convenience and necessity. *Neb Rev Stat* § 53-132 (2)(d). These are old requirements. See, *In Re McDonald*, 87 Neb 618 (1910). Citizen protestants must show only that they are citizens of the village, city or county where the licensee operates. *Neb Rev Stat* § 53-135.01. The Beer Stores contend this statute refers only to original licensure, and not to issuance of a license upon renewal. But, it does not so state. Section 53-1,115 refers to “any proceeding before” by the Commission, and “any rule, regulation, order, or decision of the Commission”.

28. “Aggrieved parties’ may seek appellate review of a district court’s order or judgment in an appeal from an administrative agency.” *Neb Rev Stat* § 84-918 (1). Citizen protestants who do not prevail may appeal as “aggrieved”. Nebraska Appellate Practice & Procedure §7.2, *Appeals from Agencies Within APA* (2016). “Aggrieved” is not a defined term, so it is treated as a matter of standing. *Shaffer v. Nebraska DHHS*, 289 Neb 740, 746 (2014).

Because the phrase “aggrieved party” is not defined by the *APA*, we have addressed the issue as a matter of standing. To have standing, a litigant must have a legal or equitable right, title, or interest in the subject matter of the controversy. The “party aggrieved” concept must be given a practical rather than hypertechnical meaning.

An appeal is generally available only to persons who were parties to the case below, although in a proper case a nonparty may be sufficiently interested in a judgment to permit him or her to take an appeal from it.

Id., 289 Neb at 746. One liquor licensee who opposes another’s transfer of a license to a location with a common shared wall with an objecting licensee is not aggrieved by the final decision in a contested case and has no standing to appeal. *Central Park Pharmacy, Inc. v. Nebraska Liquor Control Com’n*, 216 Neb 676 (1984). There is no statutory standing conferred on citizens who protest license *transfers*. But, this is not a case of a transferred license; it is a renewal case in which standing is expressly conferred on citizen protestants by a statutory provision of the *Liquor Control Act*. *Neb Rev Stat* § 53-1,115(4). This standing is consistent with the public interest purposes of the *Act*. *Neb Rev Stat* § 53-101.05 (quoted at ¶ 14 above).

29. The *APA*’s failure to define “aggrieved parties” strongly infers that where the agency over which the administrative review is sought, is governed by a statute that defines which parties have standing, the specific agency statute controls. “[S]tatutes relating to the same subject are *in pari materia* and should be construed together....” *State v. Loding*, 296 Neb 670, 678 (2017) (citing *Alisha C. v. Jeremy C.*, 283 Neb 340 (2012)). The intent of the lawgiver is to be ascertained in interpreting statutes. *Anthony, Inc. v. City of Omaha*, 283 Neb 868,887-88 (2012)(*Liquor Act* case citing stated policy of the *Act*).

30. Here, *the Liquor Control Act* expressly includes the Citizen Protestants as “parties of record”. Section 53-1,115(4). The same phrase is used in the *APA*’s mandatory procedure for invoking judicial review. *Neb Rev Stat* § 84-917(2). This statute has been found to be unambiguous, and its mandates to be unremitting. *Concordia Teachers College v. Nebraska Dept of Labor*, 252 Neb 504 (1997). See also, *Nebraska DHHS v. Weekley*, 274 Neb 516 (2007).

31. When the Beer Stores petitioned for administrative review, they were required to comply strictly with the *APA*. The Stores were required to name all parties of record in their Petition for Review, and to serve all of them with summonses. They did not do so and thereby

did not bring all necessary parties before the district court. The presence of all parties is a jurisdictional requirement of every APA review; it cannot be waived. Failure to seek review of agency action under the *APA*, by failing to name, and/or 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); *McDougle v. State ex rel. Bruning*, 289 Neb 19 (2014). The flaw cannot be cured by an amended filing. *City of Omaha v. C.A. Howell, Inc.*, 20 Neb App 711, 724 (2013).

32. The Beer Stores are parties who were “aggrieved” by the NLCC Final Order. They had standing to invoke administrative review under the *APA*. But, the Beer Stores were required to do so in the precise manner prescribed by the *APA*. This required naming all necessary parties in the Petition for Review, i.e., all “parties of record” and service of a summons on each within 30 days. *Neb Rev Stat §84-917(2)(i)*. These steps did not occur. Had the Citizen Protestants been named and served they would have a vested right to a cross-appeal “against any other party of record”. *Neb Rev Stat §84-917(2)(ii)*. The Citizen Protestants were necessary parties. *Shaffer, supra; McDougle, supra*.

Conclusion

33. Failure to name the Citizen Protestants in the Petition for Review and to serve them with summonses within 30 days of its filing constitute fatal flaws to the Beer Stores’ efforts to invoke the *Administrative Procedure Act*. They did not properly invoke the *APA*. The time to do so has now long since expired. The Beer Stores’ claim that the Citizen Protestants should not have been “parties of record” before the NLCC misses the mark. Even if this could be argued on its merits, the Citizens were entitled to defend their status before the Agency during

administrative review. Failure to name them denied them this right and underscores the jurisdictional flaw the the district court failed to observe.

34. The improvident Final Judgment of the district court rendered without all necessary parties before it, without the administrative record, and without notice of a hearing on the merits, is void. The Citizen Appellants request that it be vacated. This will leave in place the Final Order of the NLCC.

35. And, it will leave the White Clay Beer Stores closed, and will bring Nebraska to the optimistic end of a legal bridge between a shameful yesterday and a brighter tomorrow.

Citizen Protestants, Cross-Appellants,

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APPENDIX

Request for Judicial Notice. As stated in ¶10 above, Court is asked to take judicial notice of the Citizen Protestants' Praecipe for Supplemental Transcript filed in district court on June 6, 2017. A copy of the Praecipe appears on the following three pages and are part of this Appendix.

District Court, Lancaster County, Nebraska

Stuart Kozal, et al.,

Petitioners,

v.

**Nebraska Liquor Control Commission,
and Hobert Rupe, its executive director,**

Respondents.

Case No. CI 17-1559

**Citizen Protestants'
Praecipe for Supplemental Transcript**

To the Clerk of the Court:

The Citizens Protestants' identified below respectfully request this Court issue a Supplemental Transcript to the Clerk of the Nebraska Supreme Court for filing in Case No. S-17-441 in the Supreme Court, and include in the Supplemental Transcript:

1. All praecipes of requests for summonses, or a certification that no summonses were requested.
2. All returns of summonses, or a certification there are none.
3. The Agency record before the Court on April 27, 2017, or a certification that the Agency Record had not been received as of that date.
4. April 27, 2017 Notice of Appeal by Nebraska Liquor Control Commission.
5. May 26, 2017 Notice of Appeal by Abram Neumann, Lori Hankinson, Barb and David Vancil.
6. When received, and if received by the date of your preparation of the Supplemental Transcript requested by this Praecipe, the Agency Record with a certification of the date it was received.

June 6, 2017.

Barb & David Vancil, Lori Hankinson,
& Abram Neumann, Citizen Protestants,

By: David A. Domina

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On June 6, 2017, a copy of the foregoing was served by email to:

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Certificate of Service

I hereby certify that on Tuesday, June 06, 2017 I provided a true and correct copy of the Praecipe-Appeal Transcript to the following:

Nebraska Liquor Control Commission represented by Milissa Johnson-Wiles (Bar Number: 20725) service method: Electronic Service to milissa.johnsonwiles@nebraska.gov

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Signature: /s/ Domina,David,A (Bar Number: 11043)

CERTIFICATE OF SERVICE

I hereby certify that on the 18th 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:

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S-17-441

IN THE NEBRASKA SUPREME COURT

STUART KOZAL, d/b/a JUMPING EAGLE INN, et al.,

Petitioners-Appellees,

v.

NEBRASKA LIQUOR CONTROL COMMISSION,

Respondent-Appellant,

And

**ABRAM NEUMANN, LORI HANKINSON, BARB and DAVID VANCIL,
("Citizen Protestants"),**

Appellants.

SUPPLEMENTAL BRIEF OF APPELLEES

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TABLE OF CONTENTS

Table of Authorities	ii
Issues Addressed	1
The Interplay of the Statutory Provision of the Nebraska Liquor Control Act and the Administrative Procedure Act Regarding Parties of Record.....	1
The Jurisdictional Prerequisites of Standing of the Individuals Who Protested the Issuance of the License, for Purposes of Judicial Review Under the Administrative Appeal and Subsequent Appeal Therefrom	8
The Protestors are Not Parties.....	9
The Protestors are Not “Aggrieved”	11
Certificate of Service.....	16

TABLE OF AUTHORITIES

CASES

B & R Stores, Inc., v. Nebraska Liquor Control Comm.,
242 Neb. 763, 497 N.W.2d 654 (1993)..... 6

Best & Co., Inc., v. City of Omaha,
149 Neb. 868, 33 N.W.2d 150 14

CenTra, Inc. v. Chandler Ins. Co.,
248 Neb. 844, 540 N.W.2d 318 (1995)..... 10

Central Nebraska Public Power and Irr. Dist. V. North Platte Natural Resources Dist.
280 Neb. 533, 788 N.W.2d 252 9, 11, 13

Chrysler Corp. v. Lee Janssen Motor Co.,
248 Neb. 281, 534 N.W.2d 568 (1995)..... 10

City of Lincoln v. Nebraska Liquor Control Comm.,
9 Neb. App. 390, 612 N.W.2d 252 (2000)
rev'd on other grounds, 261 Neb. 783, 626 N.W.2d 518 (2001)..... 6

City of Omaha v. C.A. Howell, Inc.
20 Neb. App. 711, 719, 832 N.W.2d 30, 38 (2013)..... 3

City of Omaha v. Douglas County,
125 Neb. 640, 251 N.W. 262 14

Gas 'N Shop, Inc. v. Nebraska Liquor Control Comm.,
229 Neb. 530, 427 N.W.2d 784 (1988)..... 6

Gas 'N Shop, Inc. V. Nebraska Liquor Control Comm.,
241 Neb. 898, 492 N.W.2d 7 (1992)..... 6

Grand Island Club, Inc. v. Nebraska Liquor Control Comm.,
251 Neb. 61, 554 N.W.2d 778 (1996)..... 6

Harrigfeld v. Nebraska Liquor Control Comm.,
203 Neb. 741, 280 N.W.2d 61 (1979)..... 6

Hoesly v. State,
243 Neb. 304, 498 N.W.2d 571 (1993)..... 2, 4

In re Application of Metropolitan Util. Dist.,
270 Neb. 494, 704 N.W.2d 237 (2005)..... 9, 11

In re Interest of Nizigiyimana R.,
295 Neb. 324, 889 N.W.2d 362 (2016)..... 2, 4

<i>In re Valuation and Equalization of Urban and Rural Real Estate for 1965</i> , 180 Neb. 471, 143 N.W.2d 880 (1966).....	1
<i>Jessen v. DeFord</i> , 3 Neb. App. 940; 536 N.W.2d 68 (1995), Quoting, <i>Piper, Jaffray & Hopwood, Inc.</i> , 212 Neb. At 576, 324 N.W.2d at 663.....	14
<i>Joe & Al's IGA, Inc. v. Nebraska Liquor Control Comm.</i> , 203 Neb. 176, 277 N.W.2d 693 (1979).....	7
<i>Maack v. School Dist. Of Lincoln</i> , 241 Neb. 847, 491 N.W.2d 341 (1992).....	5
<i>McDougle v. State ex rel. Bruning</i> , 289 Neb. 19, 32, 853 N.W.2d 159, 169 (2014).....	4
<i>Nebraska Department of Health & Human Servs. V. Weekley</i> , 274 Neb. 516, 741 N.W.2d 658 (2007).....	1
<i>Noble v. City of Lincoln</i> , 158 Neb. 457, 63 N.W. 2d 475 (1954).....	14
<i>Professional Firefighters of Omaha v. City of Omaha</i> , 243 Neb. 166, 498 N.W.2d 325 (1993).....	2
<i>Rozmus v. Rozmus</i> , 257 Neb. 142, 595 N.W.2d 893 (1999).....	9
<i>Schaffer v. Nebraska Dept. of Health and Human Srvs</i> , 289 Neb. 740, 749-52, 857 N.W.2d 313, 321-23 (2014)	4
<i>Slansky v. Nebraska State Patrol</i> , 268 Neb. 360, 685 N.W.2d 335 (2004).....	1
<i>Sports Courts of Omaha v. Meginnis</i> , 242 Neb. 768, 497 N.W.2d 38 (1993).....	2, 5
<i>State v. Baltimore</i> , 242 Neb. 562, 495 N.W.2d 921 (1993).....	8, 11
<i>State ex rel. Randall v. Hall</i> , 125 Neb. 236, 249 N.W. 756	14
<i>Stoneman v. United Nebraska Bank</i> , 254 Neb. 477, 577 N.W.2d 271 (1998).....	11
<i>Universal Assurors Life Ins. Co. v. Hohnstein</i> , 243 Neb. 359, N.W.2d 811 (1993).....	2
<i>Ventura v. State</i> , 246 Neb. 116, 517 N.W.2d 368 (1994).....	9

<i>Warth v. Seldin</i> , 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)	8
<i>Whitmore v. Arkansas</i> , 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)	9

STATUTES

NEB. REV. STAT. § 53-135.01.....	10
NEB. REV. STAT. § 53-1,115 (Reissue 2010).....	4
NEB. REV. STAT. § 53-1,115(4).....	1
NEB. REV. STAT. § 53-1,115(4)(a)	3
NEB. REV. STAT. § 53-1,116.....	4
NEB. REV. STAT. § 84-901(1).....	1
NEB. REV. STAT. § 84-914 and 917	1
NEB. REV. STAT. § 84-916	1
NEB. REV. STAT. § 84-917	11
NEB. REV. STAT. § 84-917(2)(a)(i).....	2, 6, 7
NEB. REV. STAT. § 84-918(1).....	9

**THE INTERPLAY OF THE STATUTORY PROVISION OF THE NEBRASKA LIQUOR
CONTROL ACT AND THE ADMINISTRATIVE PROCEDURE ACT REGARDING
PARTIES OF RECORD**

The purpose of the Administrative Procedure Act is to establish a minimum administrative procedure for administrative agencies. *Neb. Rev. Stat.* §84—916; See also, *In re Valuation and Equalization of Urban and Rural Real Estate for 1965*, 180 Neb. 471, 143 N.W.2d 880 (1966). The act applies every commission or other administrative office which is authorized to make rules. *Neb. Rev. Stat.* §84—901(1). An administrative body has no power or authority other than that specifically conferred by statute or by construction. *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994).

While the phrases “parties of record” or “party of record” are utilized in the Act, they are not defined by the Act. See *Neb. Rev. Stat.* §84-914 and §84-917. However, the phrase “party of record” is defined for purposes of a hearing before the Liquor Commission. In a hearing before the commission related to issuance of a new license the parties of record are the applicant, each individual protesting the issuance of the license pursuant to subdivision (1)(b) of section 53-133, The local governing body if it is protesting the issuance of the license and the commission. In the case of an administrative proceeding before the commission to suspend, cancel, or revoke a license the only parties are the licensee and the commission. *Neb. Rev. Stat.* §53-1,115(4)

Because a district court’s authority to review the actions of an administrative agency is found in statute, a district court may exercise jurisdiction only if review is sought manner provided by statutes. *Nebraska Dept. of Health & Human Servs. v. Weekley*, 274 Neb. 516, 741 N.W.2d 658 (2007). Here the relevant statute provides in part as follows:

Proceedings for review shall be instituted by filing a petition in the district court... within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral fact-finding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record...

The court, in its discretion, may permit other interested persons to intervene.

Neb. Rev. Stat. § 84-917(2)(a)(i).

When confronted with a matter of statutory interpretation an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993); *Hoesly v. State*, 243 Neb. 304, 498 N.W.2d 571 (1993); *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993). In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Hoesly, supra*. If there is a conflict, the special provisions of a statute prevail over the general provisions in the same or other statutes. *Hoesly, supra*. See, also, *In re Interest of Nizigiyimana R.*, 295 Neb. 324, 889 N.W.2d 362 (2016); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

Here this Court may not simply consider the APA or the Liquor Control Act. Both must be considered for a proper definition of the parties of record. Consideration of both statutory schemes leads to one conclusion: the protestors are not parties of record.

The protestors rely heavily on the provisions of *Neb. Rev. Stat. § 53-1,115(4)(a)*. However, that language applies only to that particular section. (“**For purposes of this section**, party of record means...” §53-1,115) The statute does not extend to the remainder of the Liquor Control Act, for if it did, the legislature would have stated “**For purposes of this Act**, party of record means...”. Further, §53-1,115 does not purport to apply to an appeal of the commission’s decision and most certainly does not usurp the terms of the APA., as it relates to appeals from the decision of an administrative body. In fact, the Liquor Control Act requires that appeals from orders or decisions of the Commission be taken in accordance with the APA. *Neb. Rev. Stat. § 53-1,116* §53-1,115 does define parties of record for the hearing before the commission.

In the past the commission itself has relied on the provisions of *Neb. Rev. Stat. § 53-1,115* for the definition of the “party of record” in an appeal of a commission decision. *See City of Omaha v. C.A. Howell, Inc.*, 20 Neb. App. 711, 719, 832 N.W.2d 30, 38 (2013) (“The Commission argues that *Neb. Rev. Stat. § 53-1,115* (Reissue 2010) answers the question of whether it is a party of record in the instant [APA appeal].”). In reaching a decision about whether the commission was a proper party to the appeal, this court did not rely on the Liquor Control Act but instead relied upon *Neb. Rev. Stat. § 84-917(2)(a)(i)* and a determination about whether the commission was a neutral fact-finding body or an adversary.

Here, the question is not whether the commission is a proper party but whether protestors should be parties of record for purposes of a review of the commission’s decision to deny renewal of and effectively revoke Appellee’s licenses. The inclusion of citizen protestors as parties of record in an APA appeal is not supported by any provision within the APA. In fact, “nowhere in the relevant statutes does the Legislature define ‘parties of record’ for purposes of determining

necessary parties to a petition for review...” *McDougle v. State ex rel. Bruning*, 289 Neb. 19, 32, 853 N.W.2d 159, 169 (2014).

This Court has evaluated two factors for determining parties of record in an administrative appeal. First, the party must be a mandatory party of record as required by statute. Second, the party must participate and be treated as a party by the hearing officer. *Shaffer v. Nebraska Dept. of Health and Human Svcs*, 289 Neb. 740, 749-52, 857 N.W.2d 313, 321-23 (2014).

Shaffer was an APA appeal from a determination of the Department of Health and Human Services making Shaffer ineligible for specific Medicaid benefits. One of the issues in *Shaffer* was whether the managed care program, Coventry, was a party of record pursuant to the APA and, therefore, a necessary party to the appeal. This Court found that Coventry was a necessary party based on two factors. First, Coventry was required by federal law to be a party to the proceeding. That statutory requirement flowed through to the state proceedings based on Nebraska’s participation in the federal Medicaid program which requires Nebraska to comply with all applicable federal law and regulations. Second, this Court found Coventry was treated as a party by the hearing officer.

While *Shaffer* may provide some guidance, it is not controlling in this case. In *Shaffer* the statutory scheme mandated that Coventry be a party. Here, the statutory scheme specifically excludes the protestors as parties of record. The only statutory authority for the protestors to be considered parties at any stage of these proceedings is found at Neb. Rev. Stat. §53-1,115(4) This definition must control over the very general or non-existent provisions of the APA (If there is a conflict, the special provisions of a statute prevail over the general provisions in the same or other statutes. *Hoesly, supra*. See, also, *In re Interest of Nizigiyimana R.*, 295 Neb. 324, 889 N.W.2d

362 (2016); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992))

In §53-1,115(4) the legislature set forth three separate and distinct definitions of a party of record depending on the type of proceeding, two of which involve hearings before the commission. The first type of proceeding is an administrative proceeding before the commission on the application for a retail, craft brewery, or microdistillery license. In that instance, an individual protesting the issuance of a license is defined as a party of record.

The Liquor Control Act and the rulings of this Court make clear distinctions between the issuance of a license versus the renewal of a license. §53-1,115(4)(a) is no different, in that it too, differentiates between issuance and renewal of a license. §53-1,115(4)(a) contains several references which clearly demonstrate its governance of cases involving applications for a new license and not those for renewal of an existing license.

First, §53-1,115(4)(a) provides quite clearly that it is applicable only to those proceedings on the application for a license. This fact is made all that more evident by §53-1,115(4)(c) which describes the parties of record for administrative proceedings before the commission to suspend, cancel or revoke a retail...license. Second, §53-1,115(4)(a)(ii) describes the protestants as the “protesting the issuance” of a license. Obviously, this was not a case regarding the issuance of a license. Finally, §53-1,115(4)(a)(ii) describes those protesting pursuant to Neb. Rev. Stat. 53-133. Protests made pursuant to §53-133 are protests made to the application for and issuance of a new license. The proper statutory authority for protests of a renewal of a license is found at §53-135.01 which includes provisions for protests related to the renewal of a license. *See*, §53-135.01. It is notable, however, that protestors to the renewal of a license are not parties of record. §53-1,115(4)(c)

The second type of proceeding set forth by Neb. Rev. Stat. §53-1,115(4) is found in part (c). In the case of an administrative proceeding before the commission to suspend, cancel, or revoke a license the only parties of record are the licensee and the commission. That was certainly the case here. There is no reasonable argument this case was about issuance of a new license. The end result was the same as a cancelation or revocation. Legal business owners with appropriate licenses to do business were stripped of their ability to operate their businesses. If the protestors were not parties of record at the hearing before the commission pursuant to §53-1,115 they cannot be parties of record on appeal unless they seek to intervene in the appeal pursuant to *Neb. Rev. Stat.* § 84-917(2)(a)(i).

Nebraska case law is full of instances in which protestors were not treated as parties to the case. *See, Harrigfeld v. Nebraska Liquor Control Comm.*, 203 Neb. 741, 280 N.W.2d 61 (1979), and *B & R Stores, Inc. v. Nebraska Liquor Control Comm.*, 242 Neb. 763, 497 N.W.2d 654 (1993) (Citizen protestors were present and testified in front of the Commission, but not included as parties of record on appeal); In *Gas 'N Shop, Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 530, 427 N.W.2d 784 (1988); *Gas 'N Shop, Inc. v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 492 N.W.2d 7 (1992), *Grand Island Latin Club, Inc. v. Nebraska Liquor Control Comm.*, 251 Neb. 61, 554 N.W.2d 778 (1996) (Citizen protestors appeared at the city council meeting, but were not included as parties of record on appeal); *City of Lincoln v. Nebraska Liquor Control Comm.*, 9 Neb.App. 390, 612 N.W.2d 252 (2000) *rev'd on other grounds*, 261 Neb. 783, 626 N.W.2d 518 (2001) (Citizen protestors not included in appeal presence at hearings below, "The record before the planning commission included testimony from three individuals in opposition, three opposing letters, and a petition in opposition with more than 30 signatures.")

Perhaps most informative is *Joe & Al's IGA, Inc. v. Nebraska Liquor Control Comm.*, 203 Neb. 176, 277 N.W.2d 693 (1979), in which citizen protesters in proceedings below were not included initially as parties, but instead joined the appeal only later as intervenors. *Joe & Al's IGA*, 203 Neb. at 177. As noted above, in proceedings other than regarding the issuance of an initial license it is incumbent upon citizen protestor's to intervene in order to participate in an APA appeal. See *Neb. Rev. Stat.* § 84-917(2)(a)(i). Here the protestors did not avail themselves of the opportunity to intervene in the appeal before the district court.

The commission and protestors represented by Mr. Domina will argue that the protestors are proper parties to this proceeding. However, neither the commission nor the represented protestors treated all of the protestors in that manner. Protests were filed by thirteen individuals: Lori Hankinson, Bonita Bush, Arlene Wellnitz, Sherry Ann Rhoademer, Carla Perry, Bruce BonFleur, Marsha BonFleur, Abram Neumann, Becky Potmesil, Barbara Vancil, David Vancil Richard McKay and Robert, last name unknown. On February 21st, 2017 Mr. Domina entered his appearance for five protestors David and Barbara Vancil, Becky Potmesil, Bonita Bush and Lori Hankinson. He subsequently withdrew from the representation of Becky Potmesil. Prior Mr. Domina's appearance there is no record of the commission treating any protestor as a party. After that time, the commission only treated Mr. Domina's clients as parties.

Motions, including a motion to consolidate, motion to strike, motion to dismiss, two motions in limine and objections to various motions without the inclusion of any protestor except those represented by Mr. Domina. Hearings were held and various orders were entered by the commission including rulings upon the motions and objections. Not once was a protestor, other than those represented by Mr. Domina, notified of hearings, allowed to participate in hearings or given notice of the resulting order. The only indication in the record that a protestor other than

those represented by Mr. Domina received anything from the commission is the Order of April 24th, 2017 which indicates it was provided to Mr. and Mrs. BonFluer and Mr. Neumann.

The only protestors to testify at the hearing were Mr. Neumann, Mr. and Mrs. BonFleur and Mrs. Vancil. Only Barbara Vancil was represented by Mr. Domina, but she was not called as a witness during the protestors presentation of evidence. Mr. Neumann and Mr. and Mrs. BonFleur testified but were not represented by counsel and were not participants in any proceeding other than the trial. More importantly they were not afforded the opportunity to present other evidence besides their own testimony. It is quite clear that not even the commission itself considers protestors parties to its proceedings.

After consideration of the APA and the Liquor Control Act it is clear the protestors are not parties of record in this matter. Had the Protesters desired a voice within the appeal proceedings, an avenue to obtain such participation was available. They could have sought intervention as has been done and permitted in the past by decide not to avail themselves of that statutory option.

**THE JURISDICTIONAL PREREQUISITES OF STANDING OF THE INDIVIDUALS
WHO PROTESTED THE ISSUANCE OF THE LICENSE, FOR PURPOSES OF
JUDICIAL REVIEW UNDER THE ADMINISTRATIVE APPEAL AND SUBSEQUENT
APPEAL THEREROM**

Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993), citing *Whitmore v. Arkansas*, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself.

Id. And standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. See *id.*, citing *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) Thus, generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties. *Id.* See also, *Central Nebraska Public Power and Irr. Dist. v. North Platte Natural Resources Dist.* 280 Neb. 533, 788 N.W.2d 252

The APA provides that only an “aggrieved party” may seek appellate review of a district court's order or judgment in an appeal from an administrative agency. Neb. Rev. Stat. 84-918(1) The phrase “aggrieved party” is not defined by the APA but this court has held to have standing, a litigant must have a legal or equitable right, title, or interest in the subject matter of the controversy. *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005)

In addition, an appeal is generally available only to persons who were parties to the case below, although in a proper case a nonparty may be sufficiently interested in a judgment to permit him or her to take an appeal from it. *Rozmus v. Rozmus*, 257 Neb. 142, 595 N.W.2d 893 (1999). The “party aggrieved” concept must be given a practical rather than hypertechnical meaning. *In re Application of Metropolitan Util. Dist.*, *Supra.*

THE PROTESTORS ARE NOT PARTIES

In this case the protestors are not parties to the proceedings before the commission or on review pursuant to the APA. Two facts support this conclusion. First, the commission did not follow the proper statutory procedure for accepting and having hearing on protests against renewal of an existing license. Second, the Liquor Control Act does not include the protestors as parties to the proceedings before the commission.

Administrative bodies have only that power and authority specifically conferred upon them by statute or by construction. *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995); *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995). The only authority conferred upon the commission with regard to protests against renewal of existing licenses is found at *Neb. Rev. Stat. §53-135.01* which sets out the proper method for notice of renewal of an active license and the ability to protest such renewal. It directs the county clerk to publish notice of the automatic renewal right between January 10 and January 30 of each year and requires protests to be filed by February 10th. *Neb. Rev. Stat. §53-135.01*

No evidence was presented to the commission regarding a notice pursuant to the provision of §53-135.01 or protests filed pursuant to the statute. Instead the protestors filed protests against the issuance of a new license. The first page of each retailer's "show cause" is a form which calls for the disposition to be either "grant license" or "deny license". (E1,1:31 Vol. III Part A; E2,1:31, Vol. IV Part A; E3,1:31, Vol. V Part A; E4,1:31, Vol. VI Part A) The protests accepted by the Commission are entitled "REQUEST TO FILE CITIZEN PROTEST AGAINST NEW APPLICATION". (E1,77-78:31 Vol. III Part A) Those protests were filed pursuant to *Neb. Rev. Stat. §53-133*. §53-133 is tied directly to §53-132 which this court has held governs the issuance of new licenses, not renewal of licenses. The commission failed to follow the statutes and rules which provide it its only authority to act. In so doing, the commission allowed the filing of protests against a new application but received none pursuant to the provision of §53-135.01. Even if we ignore the fact that the commission accepted these protests in the absence of authority to do so, the fact still remains that the protestors are not parties by definition set forth in the Liquor Control Act. As discussed above, and without setting forth the argument again, protestors

are only parties of record pursuant to §53-1,115 in the situation involving an application for and protests against issuance of a license. The protestors were never proper parties to the case.

THE PROTESTORS ARE NOT “AGGREIVED”

In order to have standing the protestors must be “aggrieved”. *Neb. Rev. Stat.* 84-917; *See, Stoneman v. United Nebraska Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998) As previously noted, the phrase “aggrieved party” is not defined by the APA but this court has held to have standing, a litigant must have a legal or equitable right, title, or interest in the subject matter of the controversy. *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005) Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. *Central Nebraska Public Power and Irr. Dist. v. North Platte Nat. Res. Dist.*, 280 Neb. 533, 788 N.W.2d 252 (2010) Generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties. *Id.*

In order to demonstrate such a personal stake, a litigant first must clearly demonstrate that he or she has suffered an “ ‘ “injury in fact.” *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993) That injury must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical. *Id.* Further, the litigant must show that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision. *See also Central Nebraska Public Power and Irr. Dist. v. North Platte Nat. Res. Dist.*, 280 Neb. 533, 788 N.W.2d 252 (2010)

Only four of the thirteen protestors testified at the hearing before the commission, Mrs. Vancil, Mr. and Mrs BonFleur and Mr. Neumann. Mrs. Vancil testified that she runs a store in Hays Springs, Nebraska. (214:3-5) Her only complaint was that on one undefined occasion she was allegedly told by a dispatcher that "I'm sorry ma'am. All our officers are in Whiteclay." (215:1-2) Of course, Mrs. Vancil's complaint was made despite that fact that she is well aware the Sheridan County Sheriff's office does not service Hays Springs. (220:17-22) Mrs. Vancil claims to have seen "staggering" people "going in buying beer" (222:3-4) Mrs. Vancil did not go in any one of the Appellees' stores and did not call law enforcement. (222:14-19) Given that the only issue which was supposed to be evaluated by the commission was the adequacy of law enforcement in Whiteclay, a town 35 miles from Hays Springs, it can hardly be said that Mrs. Vancil injury in fact. She does not live or frequent Whiteclay; the town in which she lives in not serviced by the Sheridan County Sheriff's office and she has never called law enforcement for a matter in Whiteclay.

Mr. BonFleur testified that he ministers on the streets of Whiteclay. (165:23) Mr. BonFleur described very generally third parties as being intoxicated (179:2) and occasional fights. (182:21) He described decisions he has made to call the Sheriff or an ambulance for the benefit of a third party. (182:3-11) When he has called the authorities he has gotten a response. (182:14) Over a period of thirteen years, during at least 12 of which the Appellee's liquor licenses were either issued or renewed, Mr. BonFleur observed law enforcement in Whiteclay to be consistent. (192:12-21) Mr. BonFleur did not describe an injury to himself of any kind.

Mrs. BonFleur testified that she was a resident of Whiteclay for a total of seven years over two different time periods. (200:13-15) Her testimony focused on an individual whom Mrs. BonFleur thought needed assistance, but refused the assistance (200:22-201:20), a woman found

passed out on the street (201:22-202:12) and another woman whom she helped sit in the shade (203:5-17). Mrs. BonFleur testified to various other observations. Not once, however, did Mrs. BonFleur testify about any injury to herself, only to those of third parties.

Mr. Neumann testified that he lived in Whiteclay for almost two years. (77:19) On direct examination Mr. Neumann's testimony regarding certain events seemed very clear. On cross exam, however, Mr. Neumann testified he had not seen a knife fight (103:23) and did not report it to police (104:1); that he did not report an attempted assault with a vehicle to police (104:12); that he did not interact with, make any relevant observations about or call the police about an individual he insinuated was buying beer while intoxicated (104:13-105:9) and that at the time of an alleged "murder" at an unknown location Mr. Neumann was on a trip. (105:25) Mr. Neumann has never reported any one of the Appellees to law enforcement or the Liquor Commission for a violation of law, rule or regulation. (105:15-20) Like the others Mr. Neumann did not point to any specific personal injury due to an alleged lack of law enforcement.

In order to acquire standing a litigant first must **clearly demonstrate** that he or she has suffered an "injury in fact." that is qualitative, temporal, distinct, palpable, actual, imminent and which does not rest on the interests of third parties. It is quite obvious from the testimony of the protestors they each seek to protect the interests of third parties, not themselves. They have each placed themselves in a position to administer to and assist individuals who may have mental health issues, physical issues or addiction issues related to alcohol or drugs. None testified about a single actual injury to themselves.

In order to acquire standing a litigant must also show that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision. *See also Central Nebraska Public Power and Irr. Dist. v. North Platte Nat. Res. Dist.*, 280 Neb. 533, 788 N.W.2d

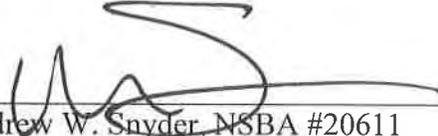
252 (2010) This requirement cannot be met simply because the protestors have not demonstrated an injury. Even if that is ignored none of the protestors who appeared at the hearing alleged behavior was tied in specific way to inadequate law enforcement or a specific Appellee. There was absolutely no testimony that not selling beer in Whiteclay would result in an overall reduction in crime, alcoholism or other problem facing the Native population. Nothing was presented to distinguish between the effect of societal issues, illegal drugs, beer from any Appellee or hard liquor which could not have come from the Appellees.

It has long been held that citizens are not qualified to intervene in matters of public interest that are prosecuted or defended for a governmental subdivision by its proper officials. *Noble v. City of Lincoln*, 158 Neb. 457, 63 N.W. 2nd 475 (1954); *Best & Co., Inc., v. City of Omaha*, 149 Neb. 868, 33 N.W.2d 150; *City of Omaha v. Douglas County*, 125 Neb. 640, 251 N.W. 262; *State ex rel. Randall v. Hall*, 125 Neb. 236, 249 N.W. 756. Public officers are always presumed, in the absence of any showing to the contrary, to be ready and willing to perform their duty; and until it is made to appear that they have refused to do so, or have neglected to act under circumstances rendering this equivalent to a refusal, there is no occasion for the intervention of the citizen for the protection of himself and others similarly situated.’ ”... *Jessen v. DeFord*, 3 Neb. App. 940; 536 N.W.2nd 68 (1995) Quoting, *Piper, Jaffray & Hopwood Inc.*, 212 Neb. at 576, 324 N.W.2d at 663. Nothing in this case suggests the Attorney General’s office was not doing the job it was supposed to do.

The protestors have failed to cite any law for their assertion that they are made parties to the administrative action merely by filing a protest to the issuance of a new application. Had the legislature seen fit to make protestors parties to a hearing regarding a renewal application, it could have done so. It did not. The protestors were not “aggrieved”, did not suffer an actual, personal

injury and did not demonstrate how they would personally benefit from a favorable decision. Finally, there is no question it is the duty of the commission to follow and enforce the Liquor Control Act and its regulations. Nothing was presented to show that the commission ignored its responsibility to do so. The presence of additional parties to do so is not necessary or favored under the law. The protestors do not have standing to participate in a review proceeding pursuant to the APA.

**STUART KOZAL, d/b/a JUMPING EAGLE INN;
ARROWHEAD INN, INC., d/b/a ARROWHEAD
INN; CLAY BREHMER and DANIEL BREHMER,
d/b/a STATE LINE LIQUOR and SANFORD
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CERTIFICATE OF SERVICE

STATE OF NEBRASKA)
)ss.
COUNTY OF SCOTTS BLUFF)

Andrew W. Snyder, being first duly sworn on oath, states as follows:

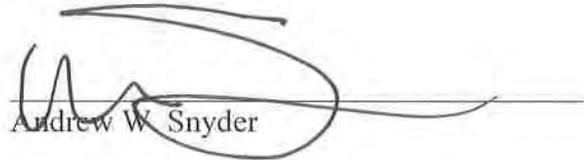
1. That he is the attorney for Petitioners/Appellees in the above-captioned matter.
2. That on the 18 day of August, 2017 he electronically filed the foregoing Brief of Appellees using the e-filing system, which sent notification of such filing to the following attorneys of record and by e-mailing the Brief of Appellees to:

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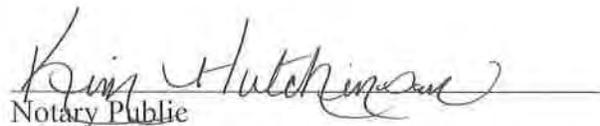
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FURTHER AFFIANT SAITH NOT.


Andrew W. Snyder

SUBSCRIBED AND SWORN to before me this 18th day of August, 2017.




Notary Public

Certificate of Service

I hereby certify that on Friday, August 18, 2017 I provided a true and correct copy of this *Supplemental Brief of Appellee* to the following:

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