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Reviewability of Arbitrary and Capricious Actions of Liquor Control Board

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REVIEWABILITY OF ARBITRARY AND CAPRICIOUS ACTIONS OF LIQUOR CONTROL BOARD

In June 1962, plaintiff applied to the State Liquor Control Board for change of location of his tavern license. Plaintiff proposed to move his tavern business around the corner and across the street from its former location. The Board investigated the proposed move, and, after careful consideration, notified the plaintiff of the Board's approval.[1] In reliance on this notice of approval, plaintiff spent his life's savings acquiring, remodeling, and equipping the new location. Thereafter, without a formal hearing, the Board informed the plaintiff that approval of the proposed move had been withdrawn.[2] The plaintiff sought a writ of mandamus directed to the Board to compel effectuation of the change of location, or to show cause why it should not do so. The trial court concluded that, according to applicable statutory provisions, it did not have jurisdiction to review actions of the Board. On appeal, a divided court reversed.[3] *Held:* If the action of the Washington State Liquor Control Board in revoking prior approval of a change in license location is arbitrary and capricious, the superior

[1] The Board sent the plaintiff the following notice:

> After careful consideration the Board has approved your application for change of location from 3210 West McGraw Street to 2410 32nd West. This approval is subject to arranging the new premises as per sketch submitted, and proper equipping of the same.
>
> Please notify this office or your inspector when these new premises are ready for occupancy, in order that the necessary reinspection may be made.

66 Wash. Dec. 2d 126, 128, 401 P.2d 635, 636 (1965).

[2] On Oct. 19, 1962, the Board wrote the plaintiff that they had received substantial objections to the relocation of the tavern, and that the commitment previously given by the Board was to be held in abeyance until further notice. At the instigation of the Board, a meeting of approximately 22 protestants was held Dec. 12, 1962, at the Board's offices in Seattle. The plaintiff and his supporters were neither invited to, nor informed of, the meeting. *Id.* at 129, 401 P.2d at 637.

[3] Chief Justice Rosellini wrote the opinion for the majority, which was concurred in by Judges Finley, Ott, Hunter, Hamilton, and Hale. Judge Weaver wrote the dissenting opinion, and was joined by the Judges Hill and Donworth. The dissenting opinion reasoned that the sole question to be determined was whether the superior court had jurisdiction to review the Board's actions, and concluded that there was no jurisdiction. The dissent stated that the legislative policy against review was clear, and that the majority opinion had the effect of declaring the prohibitory statute unconstitutional without having the issue properly presented. In addition, the dissent concluded that the Administrative Procedure Act did not apply because the case was a "pending proceeding" when the amendment to the Administrative Procedure Act, removing the exclusion of the Board from its coverage, became effective.

court has jurisdiction to review and set aside the decision. *State ex rel. Shannon v. Sponburgh*, 66 Wash. Dec. 2d 126, 401 P.2d 635 (1965).

The Washington court has held that the manner and extent of regulation of the sale of alcoholic beverages rests in the legislative judgment of the state and is a matter of legislative policy.[4] It has been the declared legislative policy of Washington that control and sale of alcoholic beverages is governed solely under the police power of the state.[5] The Washington court has ruled that the police power of the state is plenary in regard to intoxicating liquor.[6] The Washington legislature has vested administration of the state liquor laws in the Liquor Control Board[7] and has stated that the Board may, in its discretion, grant or refuse any application for a license,[8] and may, in its discretion and with or without a hearing, suspend or cancel any license.[9] The legislature has further declared that the decisions of the Board are final and not subject to judicial review.[10] As originally enacted, the Administrative Procedures Act[11] specifically stated that its provisions did not apply to the Liquor Control Board.[12] In 1963, the APA was amended to remove the exclusion of the Board. The APA provides that acts inconsistent with its provisions are repealed, but such repeals are not to affect pending proceedings.[13] Since the principal case arose from incidents occurring in 1962, it was probably a "pending proceeding" within the statutory language.[14] Thus, the court in the principal case was faced with a conflict between statutory provisions and case law that denied jurisdiction on the one hand, and considerations of equity and justice that supported judicial review on the other.

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[4] Ajax v. Gregory, 177 Wash. 465, 32 P.2d 560 (1934).
[5] WASH. REV. CODE § 66.08.010 (1961).
[6] Derby Club v. Becket, 41 Wn. 2d 869, 873, 252 P.2d 259, 260 (1953).
[7] WASH. REV. CODE § 66.08.020 (1961).
[8] WASH. REV. CODE § 66.24.010(2) (1961).
[9] WASH. REV. CODE § 66.24.010(3) (1961).
[10] WASH. REV. CODE § 66.08.150 (1961), provides:

> Save as in this title otherwise provided the action, order or decision of the board as to any permit or license shall be final and shall not be reviewed or restrained by injunction, prohibition or other process or proceeding in any court or be removed by certiorari or otherwise into any court.

[11] WASH. REV. CODE ch. 34.04 (1959) (hereinafter cited as APA).
[12] Wash. Sess. Laws 1959, ch. 234 § 15, at 1088.
[13] WASH. REV. CODE § 34.04.910 (1959).
[14] It is arguable that the "pending proceedings" provision refers to proceedings before passage of the APA, and that the 1963 amendment should be applied retroactively. The Washington court has stated that "a statute is remedial and has a retroactive application when it relates to practice, *procedure*, or remedies, and does not affect a substantive or vested right." Tellier v. Edwards, 56 Wn. 2d 652, 653, 354 P.2d 925, 926 (1960).

In the principal case, the court reviewed the statutory powers of the Board and acknowledged the apparent exclusionary provision regarding judicial review. The court considered the 1963 amendment to the APA to be indicative of a changing legislative policy, giving recognition to the efficacy of judicial review in a proper case. The court stated, however, that it need not rest its decision on the applicability of the amendment. The court noted that it had previously held that it possessed constitutional power to review acts of public officials which are alleged to be arbitrary and capricious, and that this power cannot be abridged by the legislature.[15] The court reasoned that it would be difficult to imagine an act of an administrative agency more arbitrary and capricious than the act of the Board in reversing its prior decision after it had been relied upon, without a justifiable legal basis of illegality, irregularity, or fraud.[16] The court stated that the doctrine of equitable estoppel is properly applicable in such a case to prevent grave injustice.

The court's decision, finding jurisdiction in the superior court to review the Board's action if arbitrary and capricious, was a significant change in the scope of judicial review of administrative agencies. Prior to the decision in the principal case, there had not been an instance of judicial review of the Liquor Control Board's actions.[17] The statute prohibiting judicial review of the Board's actions is quite specific,[18] and its constitutionality was not challenged by the plaintiff.[19] Though the court did not declare the statutory prohibition unconstitutional, the practical effect of the decision may be very close to denying validity.[20] The court concluded that it had a constitutional power to review acts of public officials which are alleged to be arbitrary and

[15] State *ex rel.* Cosmopolis Consol. School Dist. v. Bruno, 59 Wn. 2d 366, 367 P.2d 995 (1962), 38 WASH. L. REV. 249 (1963).

[16] In People *ex rel.* Finnegan v. McBride, 226 N.Y. 252, 123 N.E. 374 (1919), the court stated that corrections in administrative decisions may be made when the determination resulted from "illegality," "irregularity," or "fraud." The court in the principal case noted the rule in *McBride*, and stated that no claim of "illegality," "irregularity," or "fraud" was made in the principal case. 66 Wash. Dec. 2d at 133, 401 P.2d at 639.

[17] In State *ex. rel.* Stone v. Wright, No. 29468, an application for writ of certiorari to review the trial court's refusal to entertain a review of the Board's cancellation of a liquor license was denied without opinion.

[18] WASH. REV. CODE § 66.08.150 (1961).

[19] The constitutional question was presented in an amicus curiae brief. However, in the opinion of the dissenting justices, since the issue was not presented to the trial court, it could not be considered on appeal. 66 Wash. Dec. 2d at 135 n.1, 401 P.2d at 641 n.1. However, the constitutionality of the Liquor Act was upheld in Ajax v. Gregory, 177 Wash. 465, 32 P.2d 560 (1934).

[20] Judge Weaver, in his dissent, concludes that the effect of the majority opinion is to hold the statute unconstitutional. 66 Wash. Dec. 2d at 136, 401 P.2d at 641.

capricious, and that this power cannot be abridged by the legislature, citing *State ex rel. Cosmopolis Consol. School Dist. v. Bruno*[21] as authority.

Cosmopolis is not the best authority, as there was a considerable factual difference between it and the principal case. In *Cosmopolis*, the legislature had made no provision regarding judicial review of the agency's actions; however, the court stated that specific statutory authority to review the agency's action was not necessary, because the right to review was guaranteed by article 4, sections 1 and 6 of the state constitution. In the principal case, the court adopted the language in *Cosmopolis* and extended the rule to a case involving a specific statutory prohibiton of review. Thus, the court in the principal case said, in effect, that the absolute prohibition of judicial review is unconstitutional as being a restriction on the constitutionally delegated power of review given to the courts. Had the issue of constitutionality been properly raised in the principal case, it is possible that the court would have directly declared the statute invalid.[22]

Though *Cosmopolis* is not strong authority for the decision in the principal case, there is greater support for judicial review in the principal case than in *Cosmopolis*. In *Cosmopolis*, the action reviewed was not determined to be judicial in nature.[23] However, licensing has an obvious quasi-judicial character when it involves determination of qualifications of, and satisfaction of requirements by, an individual applicant.

Regardless of the Washington precedent, the decision of the court in the principal case to allow review was sound. A limited judicial review strengthens the administrative process.[24] A complete disregard of the courts may violate the "cardinal principle" that functions should be allocated between courts and agencies on the basis of the comparative qualifications of each.[25] A review which is limited to areas of

[21] 59 Wn. 2d 366, 367 P.2d 995 (1962). It is interesting to note that the writer of the majority opinion in the principal case, Chief Justice Rosellini, dissented in *Cosmopolis*.

[22] Possibly the decision in the principal case is well described by a statement from the United States Supreme Court in Monongahela Bridge Co. v. United States, 216 U.S. 177, 195 (1910):

> [T]he courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of essential rights of property.

[23] See 38 WASH. L. REV. 249 (1963).

[24] 4 DAVIS, ADMINISTRATIVE LAW 112 (1958). See Peck, *The Scope of Judicial Review of Administrative Actions in Washington*, 33 WASH. L. REV. 55 (1958).

[25] 4 DAVIS, *op. cit. supra* note 24, at 113.

judicial expertise, such as determination of constitutional issues and limits of fair procedure, can be only helpful in accomplishing administrative objectives.[26] Certain types of decisions, such as whether liquor should be sold, at what times, and on what days, are legislative-type decisions, and, being of general applicability, are best left to resolution by the legislature or the Board. However, the question whether a particular individual is entitled to sell liquor in a particular location is more a judicial-type decision. In regard to the latter, the courts can effectively perform their historic function in ensuring that general judicial and equitable principles are properly applied to specific cases. The check upon administrative authority is desirable for the same reasons that an appellate court's check on a trial court is desirable.[27] The importance of this "checking" function is especially significant when there is little administrative check on initial action. Carrying the absolute statutory prohibition of review to its logical extreme would prevent judicial review of even the most flagrant and arbitrary actions. Such a result conflicts with traditional concepts of justice and fairness. As one commentator has stated:

> This view that those who engage in the alcoholic beverage trade have no claim to procedural fairness is, of course, supported by decisions holding that the business is one with such potential evil consequences that it is subject to regulation without limitation of procedural due process [citing cases]. On the other hand, the vesting of autocratic and authoritarian control in any governmental agency must give pause to one committed to the proposition that judicial review plays an important part in maintaining our democracy.[28]

In addition, the possibility of high profits and the danger of strict governmental limitations create a fertile breeding ground for the temptation of graft, corruption, and other abuses of governmental office.[29] The public has a right to expect its officers to observe prescribed standards and to make adjudication on the basis of merit, and judicial review can aid the realization of this expectation.

It may be valuable to speculate on the applicablilty of the APA provisions to the Board in a factual situation similar to the principal case arising after the 1963 amendment became effective. The only logical

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[26] *Ibid.*
[27] *Ibid.*
[28] Peck, *Washington Legislation, 1957, Administrative Law,* 32 WASH. L. REV. 181, 182 n.4. See generally, JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 18-20 (1965).
[29] Hornsby v. Allen, 326 F.2d 605, 609 (5th Cir. 1964).

interpretation to be given to the enactment of the amendment, removing the exclusion of the Board, is that the legislature intended to include the Board within the provisions of the APA. The APA does not specifically overrule any of the liquor laws; however, the act does state that all inconsistent provisions of other acts are repealed. In addition, it appears that the intent of the legislature in originally enacting the APA was to assign to the administrative agencies and to the courts those functions for which each was best suited. The courts were given the task of serving as a check on the constitutionality and procedural fairness of administrative actions.[30] The obvious conclusion is that the legislature sought to provide judicial review of the Board's actions.

Despite the legislative intent, the provisions of the APA relating to procedure in contested cases, and governing judicial review of the decisions in contested cases, probably do not apply to the Liquor Control Board.[31] These provisions only apply to contested cases, and a "contested case" is defined by the APA as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."[32] The actions of the Board, of the type in the principal case, do not come within this definition, since the licensee's privilege of transferring his liquor license to a new location[33] is not required by law[34] or constitutional right[35] to be determined after an agency hearing.[36]

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[30] See WASH. REV. CODE § 34.04.130 (1959).

[31] However, the provisions of the APA governing rule-making presently apply to the Board. The intent of the legislature was to remove the exclusion of the Board from the Act's provisions, and in the rule-making provisions there is no qualifying requirement that may continue to exclude the Board from the Act's requirements as there is in regard to the judicial review provisions. The Board has acted in pursuance of the APA rule-making requirements. See WASHINGTON STATE LIQUOR CONTROL BOARD, REVISED RULES AND REGULATIONS (1964).

[32] WASH. REV. CODE § 34.04.010 (1959).

[33] Written consent must be obtained from the Board before a license may be transferred to a new location, WASHINGTON STATE LIQUOR CONTROL BOARD, REVISED RULES AND REGULATIONS, tit. 1 § 10 (1964), which consent is subject to the discretion of the Board. WASH. REV. CODE § 66.24.010(2), (3) (1961).

[34] On the contrary, the provisions of the liquor laws were amended in 1935 to remove the requirement that the Board's discretion be exercised only after a hearing. Wash. Sess. Laws 1935, ch. 174, § 3, at 610.

[35] See Randles v. Washington State Liquor Control Bd., 33 Wn. 2d 688, 694, 206 P.2d 1209, 1213 (1949).

[36] Though it appears that these provisions of the APA do not presently apply to the Board, the Board may consider itself bound by this part of the Act. In the WASHINGTON STATE LIQUOR CONTROL BOARD REVISED RULES AND REGULATIONS tit. 14 § .08.080 (1964), provision is made for a hearing in contested cases. The new detailed hearing provisions seem to indicate that the Board may consider at least some of its decisions to be contested cases.

The Washington court could, and there is considerable support for the argument that it should, give effect to the legislative intent by stating that there is a constitutional right to a hearing in liquor license cases. Previously, the court has held that there is no constitutional or natural "right" to sell liquor, and that the "privilege" of dispensing liquor may be given to some and denied to others.[37] Based on the conclusion that the sale of liquor is a "privilege," state law has denied procedural fairness in liquor license cases.[38] However, this approach has been severely criticized. As Professor Davis states:

> [N]o court explains why procedural fairness should be denied to those whose business can be constitutionally prohibited. The courts often seem tacitly to reason that because sale of liquor may be prohibited, therefore an individual seller of liquor may be unfairly treated. Such reasoning is palpably fallacious. If selling liquor is unlawful, the state does not license it; no procedural unfairness is involved in general legislation making the sale of liquor unlawful. But if the state or other governmental unit has issued a license to the seller then the business is lawful, and a seller who has made his investment and developed his business should be entitled to fair treatment.[39]

Whether characterized as a right or privilege, if the interest involved is important, it should be protected.[40] It is clear that a liquor license is important; witness the substantial investments made in restaurants, the financial success of which depends largely upon their having a liquor license. Further, the privilege-right distinction is no longer generally accepted as determinative of whether due process does or does not control administrative action.[41] One who has no "right" to sell liquor because the state may prohibit the sale altogether, may nevertheless have a "right" to fair treatment when state officers grant, deny, suspend, or revoke liquor licenses.[42] This concept has been adopted by other states.[43]

Though the Washington court may not declare that there is a con-

[37] The court designated liquor licenses as "privileges" rather than "property" in Arndt v. Manville, 53 Wn. 2d 305, 333 P.2d 667 (1958); Randles v. Washington State Liquor Control Bd., 33 Wn. 2d 688, 206 P.2d 1209 (1949).

[38] See WASH. REV. CODE §§ 66.24.010(3), 66.08.150 (1961).

[39] 1 DAVIS, ADMINISTRATIVE LAW 498 (1958).

[40] In Ledgering v. State, 63 Wn. 2d 94, 103, 385 P.2d 522, 528 (1963), the court stated that, "inhering in possession of a motor vehicle operator's license, whether such be denominated a privilege or a right, was an interest of sufficient value that due process of law required a full hearing at some stage of a deprivation proceeding."

[41] See Schware v. Board of Bar Examiners, 353 U.S. 232, 239 n.5 (1957); Weiman v. Updegraff, 344 U.S. 183, 191-92 (1952).

[42] 1 DAVIS, *op. cit. supra* note 39, at 456.

[43] See Irvine v. State Bd. of Equalization, 40 Cal. App. 2d 280, 104 P.2d 847, 850 (1940).

stitutional right to a hearing, it is quite probable that there is such a federal constitutional right. In *Hornsby v. Allen*,[44] a federal court of appeals stated that denial of an application for a liquor license was not a legislative act, but rather licensing was an adjudicative process. The court in *Hornsby* reasoned that, since licensing consists of determination of factual issues and the application of legal criteria to them —a judicial act—the fundamental requirements of due process are applicable. As indicated by the court in *Hornsby,* due process in administrative proceedings requires conformity to fair practices of Anglo-Saxon jurisprudence,[45] which is usually equated with adequate notice and a fair hearing.[46] The court in *Hornsby* concluded that, although strict adherence to the common law rules of evidence at the hearing is not required,[47] the parties must generally be allowed an opportunity to know the claims of the opposing party, to present evidence to support their contentions,[48] and to cross-examine witnesses for the other side.[49] Responding to the argument that, since Georgia had classified liquor licenses as privileges, the licensing authority has an unreviewable discretion to grant or deny licenses, the court in *Hornsby* stated that merely calling a liquor license a privilege did not free the authorities from due process requirements in licensing and allow them to exercise an uncontrolled discretion. According to *Hornsby*, denial of procedural due process in licensing is a violation of the applicant's fourteenth amendment rights. Consequently, it is possible to argue that there is a constitutional right to a hearing in Washington liquor license cases, and thus all of the provisions of the APA should apply to the Liquor Control Board.

There is a third method of fully including the Board's activities within the APA. Since it seems logical that the legislative intent in passing the 1963 amendment was to include the Liquor Control Board within the APA, it is reasonable to expect additional legislation providing unambiguous applicability. The defect in the present form of the APA could be easily remedied through a change in the definition of "contested case" to include license cases, or through the enactment of a statutory requirement for hearings in liquor license cases, thus bringing the Board's licensing actions within the present definition of

[44] 326 F.2d 605 (5th Cir. 1964).
[45] See Tadano v. Manney, 160 F.2d 665, 667 (9th Cir. 1947).
[46] See Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941).
[47] See Crowell v. Benson, 285 U.S. 22 (1932).
[48] Morgan v. United States, 304 U.S. 1 (1938).
[49] Reilly v. Pinkers, 338 U.S. 269 (1949).

a "contested case." Since the two former methods would require the bringing of a suit to determine whether the APA applies to the Board, doubt can best be resolved by the legislature acting to bring the actions of the Liquor Control Board unambiguously within the provisions of the APA.

CONSTITUTIONALITY OF CIVIL INSPECTION WITHOUT WARRANT OR PROBABLE CAUSE

The Seattle Municipal Code requires intermittent inspections by the fire chief of nonresidential buildings for the purpose of discovering and correcting fire hazards.[1] Pursuant to the Code, an inspector, without a search warrant and without cause to believe that a fire hazard existed, sought entry into defendant's locked warehouse. Upon his refusal to allow entrance, defendant was tried and convicted for failing to submit to a fire inspection.[2] On appeal, the conviction was affirmed. *Held:* The fourth amendment's prohibition of unreasonable search and seizure is not violated by a conviction for refusal to permit entrance into a commercial building for purposes of a fire inspection authorized by a municipal ordinance, even though the inspector does not have a search warrant or probable cause to believe that a fire hazard exists. *City of Seattle v. See*, 67 Wash. Dec. 2d 465, 408 P.2d 262 (1965).

The adage that prevention is better than cure has prompted municipalities to employ building inspections to detect and minimize hazards created by increased urbanization. That such a practice may raise fourth amendment questions concerning rights of privacy is well illustrated by the United States Supreme Court's divided attitude toward the status of these inspections.[3] The principal case represents the first consideration in Washington of this conflict between public de-

[1] SEATTLE, WASH., MUNICIPAL CODE § 8.01.050 (1959).

[2] SEATTLE, WASH., MUNICIPAL CODE § 8.01.050 (1959) provides that the fire chief may enter all buildings, other than residences, for the purpose of inspections. Section 8.01.140 provides that anyone who fails to comply with any provision of the fire code shall be subject to certain criminal penalties. While no provision expressly requires a building owner to permit an inspector's entry, the case proceeded on that assumption. For a contrary ruling on this question, see City of St. Louis v. Evans, 337 S.W.2d 948 (Mo. 1960).

[3] Frank v. Maryland, 359 U.S. 360 (1959), was a 5-4 decision, while Ohio *ex rel.* Eaton v. Price, 360 U.S. 246 (1959), was affirmed by an equally divided court. It has been frequently suggested that personnel changes on the Court would result in contrary decisions if those cases were now presented. See, *e.g.*, Comment, 11 VILL. L. REV. 357, 368-69 (1966).