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BV Beverage Co., LLC v. State Appellant's Brief Dckt. 39690

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BV BEVERAGE COMPANY, LLC, an Idaho
limited liability company,

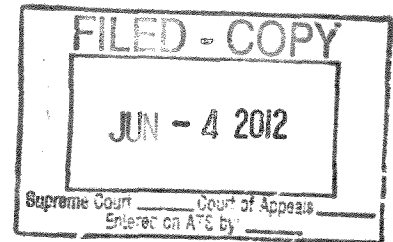
Petitioner-Appellant.

vs.

THE STATE OF IDAHO, DEPARTMENT
OF IDAHO STATE POLICE/ALCOHOL
BEVERAGE CONTROL, G. JERRY
RUSSELL, in his official capacity as Director
of the Idaho State Police,

Respondent.

Supreme Court No. 39690-2012



APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT.

HONORABLE MIKE WETHERELL, DISTRICT JUDGE PRESIDING.

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This case involves the expiration by operation of law of BV Beverage Company Inc.'s ("BV Beverage") owner/lessor's interest in an Idaho state liquor license. The Idaho Alcohol Beverage Control ("ABC" or the "Agency") takes the position that BV Beverage's interest in the license expired by operation of law because the lessee of the license ("Iggy's") failed to timely renew. BV Beverage argues the "expiration by operation of law" of its owner/lessor's interest in the liquor license is unconstitutional because the Agency improperly treats an owner/lessor of a liquor license as a stranger to the license and does not afford an owner/lessor the opportunity to renew its interest in a license. Expiration of the owner/lessor's interest in a liquor license without the opportunity to renew is a violation of BV Beverage's procedural due process rights.

B. Course of Proceedings on BV Beverage's Petition for Judicial Review and the ABC's Petition to Dismiss.

At the District Court, BV Beverage argued that as the owner/lessor of an Idaho state liquor license it had a constitutionally protected property right in the license and that this right necessarily encompassed the right to renew the license. BV Beverage then argued that the renewal procedures in place with the ABC do not afford an owner/lessor the opportunity to renew the license in its own right, but instead treat such owner/lessor as a stranger to the license by requiring it to re-transfer the license in order to exercise the right to renew.

The District Court, the Honorable Mike Wetherell presiding, agreed that BV Beverage had an interest in the liquor license and was entitled to due process protections. The District Court then ruled that because BV Beverage had notice of the expiration date of liquor licenses and presented no evidence that it took any affirmative action to discover whether the at-issue license had been renewed, BV Beverage's failure to seek the opportunity to renew its license

establishes that BV Beverage's due process rights were not violated. On this basis, the District Court denied BV Beverage's petition for judicial review on the merits. BV Beverage appeals that portion of the District Court's decision that shifted the onus of constitutional protections from the state having the duty to provide constitutional protections, placing it instead on the owner/lessor having the burden to preemptively identify and work within procedural shortfalls as a precondition to alleging constitutional inadequacies.

The proceedings at the District Court also involved the ABC's motion to dismiss. On its motion to dismiss, the ABC argued that (i) this was not a contested case and, therefore, not subject to judicial review, (ii) that BV Beverage was a "third-party lessor" and not an aggrieved person within the meaning of section 67-5270, and (iii) that there was no agency action for the District Court to review. Of these arguments, the District Court rejected the first two and agreed with the third. BV Beverage appeals from that portion of the District Court's order that holds that an agency's failure to enact constitutionally adequate safeguards is properly characterized as "inaction" that is not subject to judicial review.

C. Concise Statement of Facts

1. Overview of Idaho's Liquor Licensing Procedures

Idaho state liquor licenses are issued for terms of one-year. They are renewed as a matter of course if the applicant is in good standing and timely submits the renewal application and a proper fee. I.C. § 23-908.

It is the director's statutory duty to promulgate forms regarding liquor licensing procedures. I.C. § 23-932; IDAPA 11.05.01.00. This has been interpreted to include and does include the forms for renewing a liquor license. IDAPA 11.05.01.12. The director has delegated this statutory duty to the Agency. IDAPA 11.05.01.11.02.

Several of the forms are available on the Agency's website, which any member of the public may access at any time. *See* <http://www.isp.idaho.gov/abc/>. However, the renewal application is a customized form that is not available to anyone other than the named licensee. *See id.* The Agency mails the renewal applications to only the named licensee two months prior to the renewal deadline. *See* IDAPA 11.05.01.11.03. If someone other than a named licensee (including an owner/lessor) wishes to renew the license in conjunction with the transfer of a license, he must submit a transfer of the right to renew paperwork. IDAPA 11.05.01.12.03.

By law, Idaho state liquor licenses can be transferred by sale, lease, and other commercially recognized methods. I.C. § 23-908(5)-(6). When transferred by sale, the transferee must submit a bill of sale and pay a transfer fee of 10% of the purchase price. I.C. § 23-908(5). The transferor must also submit an application and undergo the scrutiny of the Director to determine the applicant's fitness to hold an Idaho state liquor license. I.C. § 23-908(2).

When a liquor license is transferred by lease, both the owner (lessor) and the licensee (lessee) must pay a transfer fee and submit an application. *See* http://www.isp.idaho.gov/abc/documents/LiquorLicenseApplication_000.pdf. The lessor and lessee must include with each application the lease agreement, which is to govern the lease arrangement respecting the liquor license. *Id.* The Agency must review and approve this lease agreement. *Id.*; I.C. § 23-908(2).

Notwithstanding the statutorily approved transfer by lease, once a license is issued pursuant to such lease, the Agency takes the position that the owner/lessor has no interest in the license vis-à-vis the state and that the state is not required to afford the owner of the license any safeguards and protections respecting its interest in the license. Rather, in order to be recognized

by the Agency, the owner/lessor of the license must submit a new transfer application and the requisite fee and have the license transferred back into its name. Until the license is transferred back to the owner/lessor, the Agency takes the position that the owner/lessor is not entitled to notice of any adverse actions taken against the license and is not entitled to receive an application to renew the license.

If the lessee fails to timely renew the license, the Agency takes the position that the license expired, by operation of law, as against both the lessor and lessee, and thereafter refuses to recognize any interest in the license. *See* R. Vol. I, pp. 58-68. Under this procedure, the property rights of the lessor have no constitutional protections and the lessor must rely exclusively on contract rights it holds with its lessee.

2. Facts specific to this case

BV Beverage owns liquor license number 4314 (the license). R. Vol. I, pp. 76-89; R. Vol. I, pp. 56-57. During its normal course of business, BV Beverage leased the license to Iggy's Idaho Falls, Inc. R. Vol. I, pp. 23-30. This lease was reviewed and approved by Defendant Idaho State Police/Alcohol Beverage Control, who then transferred license number 4314 to Iggy's. R. Vol. I, pp. 31-46.

On or about July 30, 2010, ABC sent Iggy's a renewal application for the license, but this was returned to ABC. R. Vol. I, pp. 49-52. ABC did not send a copy of this renewal application to BV Beverage. R. Vol. I, pp. 90-108.

On or about September 24, 2010, BV Beverage learned that the Agency had initiated revocation proceedings against Iggy's for Iggy's failure to keep the license in "actual use" as required by IDAPA 11.05.01.10.02. BV Beverage immediately contacted the Agency and

expressed concern that it had not been notified of the revocation proceedings. R. Vol. I, pp. 83-85.

BV Beverage then conducted a telephone conference with the Agency, who agreed to allow BV Beverage additional time to transfer the license to another lessee and further promised that it would not take any adverse action regarding the license during that time. R. Vol. I, pp. 86-89. The Agency also agreed that once the license had been transferred, it would dismiss the complaint for revocation. R. Vol. I, pp. 88-89. The Agency did not inform BV Beverage that the renewal paperwork sent to Iggy's had been returned as undeliverable (R. Vol. I, pp. 90-108), nor did it provide a renewal application to BV Beverage.

In reliance on the Agency's representations that BV Beverage could have an opportunity time to find a new lessee, BV beverage continued negotiating with another national restaurant chain as a potential lessee. R. Vol. I, pp. 90-115. It then submitted transfer application paperwork to the Agency on or about January 7, 2011. R. Vol. I, pp. 53-55. On or about January 10, 2011, the Agency rejected BV Beverage's transfer application on the grounds that the license had not been timely renewed and, therefore, expired by operation of law. R. Vol. I, pp. 58-68; R. Vol. I, pp. 86-115.

BV then began informal proceedings to resolve this matter. R. Vol. I, pp. 90-125. When it was unable to resolve the matter informally, BV Beverage filed a petition for judicial review.

II. ISSUES PRESENTED ON APPEAL

- A. Whether the District Court erred in finding that no due process violation occurred because the owner/lessor did not take affirmative steps to use the existing renewal procedures when it is undisputed that the Agency will not allow an owner/lessor to use existing renewal procedures.**
- B. Whether the District Court erred in dismissing the petition for judicial review on the grounds that the Agency was not under a legal duty to take any action before first determining whether the Agency should have been under a legal duty.**

III. STANDARD OF REVIEW

This Court reviews a district court's conclusions of law *de novo*. *Fuchs v. Idaho State Police*, ___ Idaho ___, ___, 272 P.3d 1257, 1260 (*6) (2012) (citing *Maresh v. State Dept. of Heath & Welfare ex rel Caballero*, 132 Idaho 221, 224, 970 P.2d 14, 17 (1998)). Additionally, "the constitutionality of a statute or administrative regulation is a question of law over which this Court exercises free review." *Id* (citing *Wanner v. State, Dept. of Transp.*, 150 Idaho 164, 167, 244 P.3d 1250, 1253 (2011); *Am. Falls Res. Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007)).

Thus, under a *de novo* standard: the [appellate] court shall affirm the agency's action unless the agency's decision was: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). In addition to proving one of the enumerated statutory grounds for overturning an agency action, the challenging party must also show prejudice to a substantial right. I.C. § 67-5279(4); *Laughy v. Idaho Dep't of Transp.*, 149 Idaho 867, 869-70, 243 P.3d 1055, 1057-58 (2010).

IV. ARGUMENT

A. The District Court's finding that no due process violation occurred improperly shifted the burden on BV Beverage, as owner/lessor of the liquor license, to take actions which would have been a nullity under the existing system.

Both the United States Constitution and the Idaho Constitution provide that the State shall not deprive "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; Idaho Const. art. 1, § 13. Determining procedural due process rights involves a two-step analysis: first, determining whether a governmental decision deprived an individual of a liberty or property interest within the meaning of the due process clause, and

second, if a liberty or property interest is implicated determining what process is due. *Thompson Creek Mining Co. v. Idaho Dep't of Water Res.*, 148 Idaho 200, 213, 220 P.3d 318, 331 (2009) (citing *State v. Rogers*, 144 Idaho 738, 740, 170 P.3d 881, 883 (2007) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976))).

After determining that BV Beverage did have a protectable property interest in the liquor license, the District Court did not determine what process was due. Rather, the District Court faulted BV Beverage for failing to seek out an opportunity to renew under existing procedures. However, it is undisputed that as an owner/lessor BV Beverage would not be allowed to renew under existing procedures. Accordingly, in its analysis, the District Court erred by shifting the duty of providing constitutional protections from the ABC and instead placing upon the owner/lessor the burden of taking actions which would have been a nullity under existing law.

Because it is the state's duty to provide due process protections, the District Court's failure to analyze the constitutional adequacy of the existing procedures regarding renewal of owner/lessor's interests in liquor licenses was error and the decision entered should be reversed.

- 1. Because the processes for renewal that are available to the licensee are not similarly available to an owner/lessor, BV Beverage's notice of such processes is irrelevant and the District Court's reliance on such notice was error.**

BV Beverage concedes that it had actual notice of the renewal dates of a liquor license. BV Beverage also concedes, as noted in the Order Dismissing Petition for Review, that it did not inquire as to the renewal status of its liquor license from either its lessee or the ABC. However, neither of these facts has bearing on the procedural due process analysis before this Court because neither speaks directly to constitutionally adequate notice that the Agency was required to give to BV Beverage.

Contrary to the District Court's observations, the notice element of the due process analysis is not notice of a procedure that someone else may invoke to protect their property rights. Rather, the notice required is notice of a procedure that the holder of the right (in this case, BV Beverage) could have taken to protect its own property right in the license. As noted by one court:

Notice without opportunity to be heard would be a vain thing. The office of notice is to afford an opportunity for a hearing, and the two must necessarily go together. There can be no due process of law without a fair and reasonable opportunity for a hearing on the matter in dispute.

Simpson v. Stanton, 193 S.E. 64, 67 (W. Va. 1937). The notice that BV Beverage may have had and upon which the District Court relied was notice of the renewal procedures and deadlines available to the lessee—not procedures that were available to BV Beverage, the owner/lessor. In the present matter, the gravamen of BV Beverage's claims is that owner/lessors of a liquor license are not given an opportunity to renew their interest in their liquor license. Because this opportunity does not exist, it is logically impossible for BV Beverage to have received notice of its right to exercise such non-existent opportunity.

Because BV Beverage, as owner/lessor, cannot utilize the existing renewal procedures, the fact that BV Beverage had notice of such procedures and deadlines is legally irrelevant. If the Agency did not afford BV Beverage the opportunity to renew the license in its own right, notice of the status of the license and the opportunity to renew that was available to its lessee (but not to BV Beverage) does not satisfy constitutional due process standards.

2. The District Court improperly required BV Beverage to show that it attempted to utilize the constitutionally inadequate procedures as a precondition for asserting that such procedures were constitutionally inadequate.

Following from its conclusion that BV Beverage had actual notice of renewal deadlines, the District Court faulted BV Beverage for failing to seek the opportunity to renew—a right that is available only to a lessee under existing procedures. It is undisputed that, as an owner/lessor, BV Beverage would have been denied the right to renew under existing procedures. Accordingly, the District Court’s decision places the burden on an owner/lessor to work within a constitutionally inadequate system as a pre-condition to challenging the constitutionality of such system.¹ Because the Agency has a constitutional duty to enact procedures that protect the property rights of all persons holding an interest in a liquor license, the District Court erred by shifting to BV Beverage the burden of attempting to accomplish something that could not be done pursuant to the existing system.

a. The ABC has a constitutional duty to provide owner/lessors of a liquor license with the opportunity to renew their interest in such license.

The Agency argues that it is not responsible for the expiration of BV Beverage’s liquor license because it took no affirmative action to cause such result. However, the constitutional violation alleged is that the Agency failed to take required action—implementing procedures that afford owner/lessor’s the opportunity to renew—that resulted in the expiration of BV Beverage’s liquor license.

¹ Under the District Court’s decision, the owner/lessor is trapped within an inescapable Catch-22 where the unconstitutional system will never be subject to judicial review. If the owner/lessor is injured by the constitutionally inadequate system, it is faulted for not trying to work within the inadequate system, and denied review of the constitutional inadequacies. If the owner/lessor meets the precondition of attempting to work within the constitutionally inadequate system and is successful, then the owner/lessor will not be aggrieved and will not have a ripe case upon which the system can be challenged.

The State has created a marketplace for the exchange of liquor licenses by lease. In so doing, it has created a real and valuable property right in an owner/lessor's interest in a state liquor license. Because the State has created this property right, it has a constitutional duty to provide minimum protections and safeguards required by the due process clause of the Idaho Constitution and United States Constitution before such property right can be taken—even if the taking occurs by operation of law. Accordingly, this Court must reject the ABC's argument that its failure to enact procedural safeguards is free from review because, at the end of the day, inaction resulted in the unconstitutional taking:

Each of our due process cases has recognized, either explicitly or implicitly, that because **“minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official actions.”** (citations omitted). Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: “While the legislature may elect not to confer a property interest, ... it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.... **[T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.”**

Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982) (emphasis added). Idaho's own due process jurisprudence recognizes the need for the same type of procedural safeguards:

Due process of law is not necessarily satisfied by any process which the legislature may by law provide, but by such process only as safeguards and protects the fundamental, constitutional rights of the citizen. Where the state confers a license upon an individual to practice a profession, trade or occupation, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.

Abrams v. Jones, 35 Idaho 532, 546, 207 P. 724, 727 (1922).

The Supreme Court of the United States explained in *Logan* that where the established state system itself deprives the claimant of his constitutional rights by operation of law, such system is unconstitutional. *Logan*, 455 U.S. at 432. In *Logan*, a state agency's failure to take action within the statutory timeframes caused a claimant to be deprived of his constitutional rights. *See, generally, id.* There, an employee had the right to file claim respecting employment discrimination, but under established state procedure, a pre-requisite to filing a claim was for the fair employment practices commission to initiate an investigation within 120 days of the incident. *Id.*, at 424. The commission failed to timely commence the investigation and then refused to allow the employee to file a claim. *Id.*, at 426. The trial court held that the commission's failure to timely institute the investigation deprived the claimant of the right to bring his claim as a matter of law. *Id.*, at 436. The Supreme Court of the United States disagreed and found that "it [was] the state system itself that destroys a complainant's property interest, by operation of law" and held the system to be unconstitutional. *Id.*, at 436-38.

The instant case is similar to *Logan*. Just as in *Logan*, the ABC has a system that deprives an owner/lessor of its property right in a liquor license by operation of law because the Agency has not created a system that owner/lessors may use to renew their license. Just as the claimant in *Logan* was required to rely exclusively on the commission to timely act to protect his rights, under Idaho's licensing scheme, an owner/lessor must rely exclusively on its lessee to timely act to protect the owner/lessor's rights.

Under the Act, all state liquor licenses shall expire by operation of law at 1:00 o'clock a.m. on the first day of the renewal month. I.C. § 23-908(1).² Under Idaho Code § 23-932, the Director of the Idaho State Police has the statutory duty "to prescribe forms to be used in the

² The statute provides for a 30-day grace period to submit late applications to renew, on the condition that liquor cannot be sold by the late filing renewal applicant until the renewed license is received.

administration of this act.” Idaho Code § 23-908(1) provides that those seeking to renew a license must submit a “proper application” and submit a “renewal application” and fee on a schedule set by the Director. Pursuant to these two sections, the Director is under a mandatory duty to promulgate forms to be used in the renewal of liquor licenses. In carrying out its statutory mandate, the Agency sends applications for renewal to only the named licensee; the Agency does not provide the opportunity to renew to an owner/lessor because the Agency takes the incorrect position that the owner/lessor has no property right to renew. Likewise, the Agency does not notify the owner/lessor if the lessee has failed to timely submit its renewal application.

If a lessee fails to renew a license and the owner/lessor wishes to renew, the owner/lessor must go through the same transfer application process as a person who holds no interest whatsoever in the license: It must submit a transfer application and fee (to recover the license back from the lessee) along with the lessee’s renewal application and an Authorization to Transfer and Assignment of Privilege to Renew. IDAPA 11.05.01.12.03. In effect, the Agency treats the owner/lessor as a complete stranger to the license.

Despite its constitutional obligation to create procedures for the renewal of a liquor license that protect the property rights of any party holding an interest in such license, the Agency has only created a procedure that protects the property rights of the named licensee, denying and/or ignoring the property rights of the owner/lessor. Accordingly, if the lessee fails to timely renew, the owner/lessor’s interest expires by operation of law without the owner/lessor having an opportunity to protect its rights. Agency inaction, the failure to create procedures that account for the owner/lessors rights, is the cause of the constitutional deprivation.

The established state system creates an unconstitutional taking through agency inaction. Neither requiring owner/lessors to rely exclusively on their lessees to timely renew nor treating

owner/lessors as complete strangers to the license and requiring them to complete a transfer from the lessee back to the owner/lessor as a precondition to allowing the owner/lessor the right to renew is a constitutionally adequate “work-around.” Moreover, there is no legal support for the proposition that if a claimant is able to maneuver within a constitutionally inadequate system, then all constitutional inadequacies should be forgiven. Without the opportunity to renew given to the owner/lessor in its capacity as owner/lessor, expiration as a matter of law for failure to timely renew constitutes an unconstitutional taking without due process. A constitutionally adequate system must give the owner/lessor an opportunity to protect its own interest and the system created by the Agency fails to satisfy this constitutional threshold.

b. Because renewal of a liquor license is a ministerial duty and not an exercise of police powers, owner/lessors must be afforded the right to renew a liquor license.

In this matter, the ABC argues that its failure to establish a procedure for renewal of an owner/lessor’s interest in a liquor license is a valid exercise of its police power. As between the licensee and the State in the exercise of its police power, a liquor license is a privilege. *See, e.g. Alcohol Bev. Control v. Boyd*, 148 Idaho 944, 947, 231 P.3d 1041, 1044 (2010). However, when the state is not acting pursuant to its police power, the owner/lessor of state issued licenses has the same property rights as any other licensee. *State v. Saugen*, 283 Minn. 402, 409, 169 N.W.2d 37, 42 (1969). Where the state’s purported exercise of its “police powers” are not reasonable and do not have “some direct, real and substantial relation to the public object sought to be accomplished” then “it is incumbent upon the judicial department to examine the [regulation] and determine whether or not the legislatures have overreached their prerogative and impinged the fundamental law.” *Rowe v. City of Pocatello*, 70 Idaho 343, 350, 218 P.2d 695, 699 (1950). “[I]f an individual has important interests which otherwise would be entitled to the protection of

procedural due process, he cannot be denied this constitutional safeguard because the business in which he is engaged happens to involve alcoholic beverages.” *Bundo v. City of Walled Lake*, 395 Mich. 679, 687, 238 N.W.2d 154, 157 (1976).

The Agency does not exercise any police powers in processing renewal paperwork—that act is simply a ministerial duty. A ministerial act is defined as:

That which is done under the authority of a superior; opposed to *judicial*. That which involves obedience to instructions, but demands no special discretion, judgment, or skill. [*Citations omitted*]. Official's duty is "ministerial" when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts. [*Citation omitted*].

Ausman v. State, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993) (quoting *Black's Law Dictionary* 899 (6th ed. 1990)). A ministerial duty is “[o]ne regarding which nothing is left to discretion—a simple and definite duty, imposed by law, and arising under conditions admitted or proved to exist.” *Id.* (quoting *Black's Law Dictionary* 899 (6th ed. 1990)). The hallmark of a ministerial act or duty is when the legislature directs that an act **shall** be done. *See e.g. Total Success Invs., LLC v. Ada County Highway Dist.*, 148 Idaho 688, 692, 227 P.3d 942, 946 (Idaho App. 2010) (noting that the sentence in I.C. § 40-2319(1) using **shall** imposes a ministerial duty).

The Agency has explained that the sending of renewal notices is an automated process. And, the Act makes it clear that processing renewal applications involves no discretion whatsoever. Idaho Code § 23-908(1) provides that renewals **shall** be granted if they are (i) timely and (ii) accompanied by the appropriate fee. Idaho Code § 23-933(4) provides that renewals **shall** be granted during a pending revocation proceeding. Because there is no discretion involved in the act of renewal, it is properly a ministerial duty and the ABC cannot point to exercise of its police powers as a justification for not affording owner/lessors the opportunity to renew.

In short, the Agency has no discretion with respect to renewals: It cannot deny a renewal that is timely and accompanied by the appropriate fee, and it cannot grant a renewal that is untimely or not accompanied by the appropriate fee. Because renewal of a liquor license is simply a ministerial act, the agency is not exercising its police powers by refusing to allow owner/lessors the opportunity to renew a liquor license.

B. The District Court erred in dismissing the petition for judicial review on the grounds that the Agency was not under a legal duty to take any action before first determining whether the Agency should have been under a legal duty.

The District Court dismissed BV Beverage's petition for judicial review on the grounds that Idaho law does not require the Agency to perform any duties allowing for an owner/lessor to renew its interest in a liquor license and, therefore, the Agency's inaction is not subject to judicial review under Idaho Code § 67-5201(3)(c). This conclusion is the result of circular reasoning, is not logically sound, and should be reversed.

The question presented by BV Beverage's appeal is whether the Agency had a legal obligation to enact constitutionally adequate procedures to allow the owner/lessor of a liquor license the opportunity to renew such license. Under Idaho Code § 67-5201(3)(c), the failure of the agency to perform a duty placed upon it by law is reviewable. As discussed above, Idaho's liquor licensing scheme places a duty on the Director (which duty is delegated to the Agency) to promulgate forms to be used in the issuance and renewal of a liquor license. BV Beverage asserts that the Agency's efforts in carrying out this duty are constitutionally inadequate because the Agency failed to establish renewal procedures that account for the renewal rights of an owner/lessor. Without first answering the question of whether the Agency had a legal obligation to enact constitutionally adequate procedures that account for the renewal rights of an owner/lessor, the District Court's conclusion that the Agency had no duties to perform is

circular. Moreover, under this circular logic, the inaction of an agency could never be reviewed for procedural inadequacies and constitutional deficiencies could never be redressed.


Because the District Court dismissed the appeal on the grounds that the Agency had no legal duties to perform without first determining whether the Agency's failure to perform certain duties was unconstitutional, the dismissal was in error and should be reversed.

V. CONCLUSION

For the foregoing reasons BV Beverage respectfully requests that this Court reverse the order of the District Court dismissing BV Beverage's petition for judicial review, and reverse that portion of the District Court's order holding that BV Beverage's due process rights were not violated, and remand this matter to the District Court with instruction to order the ABC to re-issue the license to BV Beverage.

DATED this 4th day of June, 2012.

RAINEY LAW OFFICE



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Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 2012, I caused a true and correct copy of the foregoing **APPELLANT'S BRIEF** to be served by the method indicated below, and addressed to the following:

Cheryl Meade
Idaho State Police/Alcohol Beverage Control
700 S. Stratford
Meridian, Idaho 83642
Attorney for Respondent

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile


Rebecca A. Rainey