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

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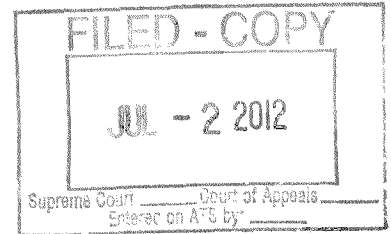
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IN THE SUPREME COURT OF THE STATE OF IDAHO

BV BEVERAGE COMPANY, LLC,)
an Idaho limited liability company,) DOCKET NO. 39690-2012
)
Appellant/Petitioner,) District Court No. CV-2011-6351
)
v.)
)
IDAHO STATE POLICE,)
ALCOHOL BEVERAGE CONTROL,)
)
Respondent.)



RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada

Honorable Mike Wetherell, District Judge, presiding.

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I. NATURE OF THE CASE

In dispute is Liquor License Number 4314. The initial owner was Donna Rice. She sold the license to BV Beverage ("BV") in the fall of 2007. In the fall of 2007, BV turned around and leased the license to Iggy's of Idaho Falls ("Iggy's"). Iggy's was the licensee for a period of approximately three (3) years. In January 2010, Iggy's closed its doors and was failing to further exercise the use of the license. BV failed to retrieve its license back from Iggy's at this time. Alcohol Beverage Control sent a notice to Iggy's that it was going to revoke the license if Iggy's could not place the license back into actual use within a certain period of time. The notice came back to ABC as undeliverable. BV contacted ABC sometime after this to let ABC know it was working on a deal to transfer the license to another lessee.

Unbeknownst to ABC, on September 29, 2010, BV received by fax from Iggy's, a Release of Interest and Right of Renewal document, releasing Iggy's interest as the licensee back to BV. On October 1, 2010, this license was due to expire, but a grace period was still in effect. On October 31, 2010, a final drop-dead date for renewal by Iggy's (the last known licensee to ABC) was looming. This date came and went and neither Iggy's, nor BV submitted an application for renewal for this liquor license.

On January 7, 2011, BV submitted the renewal application to ABC, along with the transfer application to move the license from Iggy's over to an entity called Screamin Hot Concepts. On January 11, 2011, ABC rejected BV's application(s) because the license had expired by operation of law.

BV filed a Petition for Judicial Review, taking the position that the agency's rejection of BV's application for renewal affected them as an aggrieved party thereby creating an avenue that it could seek review of. BV requested for relief, asking the district court to find that a third-party lessor has a protected property interest in a liquor license to the extent that a lessor should receive notice of renewal of a liquor license. BV based its claim on an assertion that the statutes and regulations that ABC applies against a licensee, are unconstitutional or constitutionally deficient to include third-party lessors. In essence, BV sought and continues to seek to be placed in the same shoes as a licensee.

ABC disagrees with BV's claims and sought a dismissal of BV's Petition for Judicial Relief based upon this Court's rulings of long standing; that a liquor licensee's use, in exercising the privileges of a liquor license does not equate to a property right. The district court in error, ruled against ABC on two issues and in favor of ABC on the merits of the underlying action.

Although somewhat unclear, the district court sided with BV and ruled (among other things) though incorrectly, 1) a third-party lessor (or liquor license owner) has either a right to renew a liquor license, and/or right to be regulated by ABC through notice of the right to renew a liquor license.

BV now appeals the district court's decision dismissing its Petition for Judicial Review because the district court ruled correctly that BV had actual notice of the expiration date of Liquor License Number 4314 and therefore BV lost on the merits.

II. FACTUAL AND PROCEDURAL BACKGROUND

ABC handles over six-thousand five hundred (6,500) various alcohol beverage licenses in a given year. R. p. 292. ABC has an automated database that generates renewal notices to alcohol beverage licensees, notifying them that their license is due to be renewed in accordance with IDAPA 11.05.01.011.03. *Id.* In compliance with IDAHO CODE § 23-908(1), these notices are sent to ABC's licensees approximately sixty (60) days from the first date of expiration. *Id.*

Licensees are actually given a total of almost ninety (90) days to renew their license before the last date of expiration. These notices are sent to the licensee's last known address, given by them to ABC. *Id.* ABC has two (2) staff positions to process these renewal applications statewide, which includes conducting the majority of the investigations for new applications and renewals. *Id.* These same staff members are also expected to field alcohol beverage licensing questions from the general public and licensees, through phone calls (which are in excess of 50 per day), emails and in person at the ABC Office. *Id.* at 293. They also assist in the development of ABC policy and procedure; and are also required to appear on a regular basis in legal actions. *Id.*

ABC renews alcohol beverage licenses (including liquor, beer and wine) according to IDAHO CODE § 23-908(1), and may be subject to approval as provided by IDAHO CODE §§ 23-905, 23-907 and 23-1010. R. p. 246. The only person lawfully allowed to exercise the privilege of holding an alcohol beverage license is the licensee. *Id.* The privilege to renew a license is also held exclusively by the licensee according to law. *Id.*

The renewal of all alcohol beverage licenses, located in Idaho Falls, Idaho (Bonneville

County), are due for renewal by October 1 of each year according to IDAPA Rule 11.05.01.11.03. *Id.* at 247. ABC is not authorized by law to notify third-party lessors of renewal dates. *Id.* On the other hand, IDAHO CODE § 23-908(5), along with IDAPA Rule 11.05.01.12 deals strictly with how an alcohol beverage license transfer is to take place. *Id.* Even though a renewal and a transfer may occur concurrently, the statutory provisions for each action are separate and apart from one another and both must be complied with. *Id.* The law does not provide for an exception of additional time for renewal in instances where transfers are occurring. *Id.* ABC has received favorable rulings, in three recent opinions, regarding the renewal issue similar to this one. *Id.*

In those opinions, a hearing officer or a court has ruled that the director is without authority to prolong the renewal period of an alcohol beverage license past the statutory thirty-one (31) day grace period and that a contested case hearing is not required in these types of cases. *See, Cheerleaders Sports Bar and Grill, Inc. v State of Idaho, Department of Idaho State Police*, Memorandum Decision and Order. R. pp.60-68. *See also, Sagebrush Inn, Inc. v. Idaho State Police, Bureau of Alcohol Beverage Control*, Order Dismissing Amended Petition for Judicial Review and Request for Stay, R. pp. 250-260; *Ronald Abraham, v. Idaho State Police, Alcohol Beverage Control*, Finding of Fact, Conclusions of Law and Preliminary Order, R. pp. 278-290; and Director's Final Order R. pp. 261-277.

While some forms are provided online, ABC does not make the renewal form available in this forum. R. p. 293. This is due to the fact that licensees have been known to misappropriate and manipulate this form to reflect an inaccurate business profile of the licensee. *Id.* This type

of activity requires increased oversight by ABC personnel when renewal applications are being submitted. *Id.*

According to IDAHO CODE § 23-908(2), ABC must investigate the transferee and if the transferee meets the qualifications of holding an alcohol beverage license, then ABC can issue said license to a transferee. *Id.* and R. p. 247. This statute does not provide ABC with the authority to approve any lease agreements between a lessor and lessee. R. p. 247. Nor does ABC engage in such approval. *Id.*

On October 17, 2007, BV transferred Alcohol Beverage License Number 4314 to Iggy's Idaho Falls, Inc. (Iggy's). R. p. 293. and pp. 24-30. Said transfer was completed through Alcohol Beverage Control (ABC), after Iggy's submitted its application materials and fees, and passed the necessary background check(s) to become qualified to hold the privileges of the license. R. p. 293 and R. pp. 23-46. Included in this paperwork, was BV's letter indicating that it was aware of the expiration of this license and wanted to ensure that renewal occurred and the license was issued. R. p. 293, and 299-300.

Thereafter, as the licensee, Iggy's was solely responsible to renew its license according to IDAHO CODE § 23-908(1) with ABC, which it did for the years 2008, 2009 and 2010. *Id.* at 293-294.

On January 8, 2010, ABC learned that Iggy's was no longer using its alcohol beverage license because Iggy's had gone out of business. *Id.* 294. A letter was sent to Iggy's stating it would be given 90 days to place its license back into use. *Id.* and R. pp. 47-48.

On August 4, 2010, ABC received the return of Iggy's alcohol beverage license renewal

application (for the licensing year of 2011). *Id.* and R. pp. 49-52. There was no forwarding address given. *Id.* at p. 50.

On August 20, 2010, ABC filed a complaint to revoke Iggy's license because it was no longer exercising the privilege of the license as required. R. p. 247. The revocation proceeding was for Iggy's non-use of its license. *Id.* It was not a proceeding against Iggy's for non-renewal. *Id.*

On September 29, 2010, Iggy's released its interest in its alcohol beverage license back to BV. R. p. 295, and R. pp. 53-57. However, BV waited almost four (4) months to notify ABC that BV was in possession of this document at the time. *Id.* To ABC's knowledge, Iggy's was still in possession of the alcohol beverage license. *Id. See also,* R. 90-112.

On September 30, 2010, Iggy's Alcohol Beverage License Number 4314 expired. R. p. 248.

On October 31, 2010, the thirty-one (31) day grace period that applied to Iggy's Alcohol Beverage License Number 4314, during which the license could have been renewed, also lapsed. *Id.*

On January 7, 2011, BV attempted to renew and transfer (the expired license) back to itself from Iggy's and then to a national restaurant chain called Screamin Hot Concepts, LLC. R. p. 295, and R. pp. 53-57. Included in these application materials was a faxed copy of the Affidavit (of) Release of License from Iggy's Idaho Falls to BV Beverage Company, LLC. *Id.* The posted date and times of the fax shown on this document, indicates it was sent by Iggy's and received by BV's attorney on the same day, September 29, 2010. *Id.* The day before the license

was first due to expire. *Id.*

On January 10, 2011, BV's application materials were returned to BV because Iggy's Alcohol Beverage License Number 4314 had expired and the grace period had also lapsed. *Id.* and Agency R. p. 59.

Because Iggy's alcohol beverage license expired by operation of law, neither formal nor informal proceedings as provided by the Idaho Administrative Procedures Act, were warranted. R. p. 248.

On or about March 31, 2011, BV filed a petition for judicial review. R. pp. 4-7.

On April 26, 2011, BV was able to transfer another alcohol beverage license it held, through The Hard Hat Steakhouse, to itself and then to the national restaurant chain, Screamin Hot Concepts, dba Buffalo Wild Wings. R. p. 296. ABC records show the next person on the priority waiting list to be offered an alcohol beverage license is Daniel Fuchs. *Id.* and R. p. 311.

On May 25, 2011, the agency record was filed with this Court. R. pp. 69-70.

On May 27, 2011, BV filed a Motion for Order Staying Agency Action, along with a supporting Memorandum and Affidavit of Courtney Liddiard. R. pp. 71-75 and 129-143.

BV also filed a Motion to Augment the Record. R. pp. 71-75. Included in BV's Exhibits 5 and 6 was email correspondence between the parties' respective attorneys. R. pp. 90-96 and 106-112. The issue of renewal or an extension of the renewal deadline was never discussed. *Id.* In fact, there was no further correspondence between the parties from September 29, 2010 through January 13, 2011 even though ABC's attorney was assured that it would be kept apprised of the status of the transfers taking place. *See*, R. pp. 90-96, email from Rebecca

Rainey to Cheryl Meade, dated September 29, 2010, and following email dated pp. 110-111.

On June 29, 2011, BV filed its Opening Brief with the district Court. R. pp. 155-186.

On July 28, 2011, ABC filed its Responsive Brief with the district Court. R. pp. 244-309.

On August 18, 2011, BV filed its Reply Brief with the district Court. R. pp. 314-333.

On November 15, 2011, the district court entered an order dismissing BV's Petition for Judicial Review. R. pp. 338-344.

On December 6, 2011, BV filed a Petition for Reconsideration with the district court. R. p. 345.

On December 20, 2011, BV filed its brief in support of Petition for Reconsideration with the district Court. R. pp. 348-353.

On January 17, 2012, the district court entered its order denying BV's Petition for Reconsideration. R. pp. 354-355.

On February 14, 2012, BV filed a Notice of Appeal of the district court's decision. R. pp. 356-359.

III. ALTERNATIVE ISSUES ON APPEAL

A. Does a party, who in essence claims a portion of a statute to be unconstitutional or constitutionally deficient, because it allegedly deprives a lessor of a liquor license of due process, have the burden of proving the statute unconstitutional?

B. Does ABC have the statutory authority to act outside the scope of IDAHO CODE § 23-908, and its contemporaneous rules, by recognizing that someone other than the liquor licensee is able to exercise the privileges associated with a liquor license, including the right to renew?

C. Did the District Court correctly rule, based upon by BV's own failure to timely

submit the “Release of Interest and Right of Renewal form” that the 31-day grace-period for renewal expired, and because the liquor license was lost through operation of law and there was no agency action taken by ABC?

IV. STANDARD OF REVIEW

Generally, “[w]here a district court acts in its appellate capacity pursuant to the Idaho Administrative Procedure Act (IDAPA), this Court reviews the agency record independently of the district court’s decision.” *Cooper v. Bd. of Prof’l Discipline of Idaho State Bd. of Med.*, 134 Idaho 449, 454, 4 P.3d 561, 566 (2000) (citations omitted). In this case, however, the agency was unable to consider the constitutionality of IDAHO CODE § 23-908, because “[p]assing on the constitutionality of statutory enactments, even enactments with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 [2 L.Ed. 60 (1803)].” *Miles v. Idaho Power Co.*, 116 Idaho 635, 640, 778 P.2d 757, 762 (1989) (citations omitted). Therefore, we directly review the district court’s decision regarding the constitutionality of IDAHO CODE § 23-615.

The constitutionality of a statute is a question of law. The party challenging a statute on constitutional grounds bears the burden of establishing the statute is unconstitutional and “must overcome a strong presumption of validity.” *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990).

This Court exercises free review over the trial court’s conclusions of law to determine if the trial court correctly stated the principles of law and if the legal conclusions are supported by the facts as found. The Court is “free to draw its own conclusions from the facts presented.” *Kootenai Elec. Co-op. v. Washington Water Power Co.*, 127 Idaho 432, 435, 901 P.2d 1333,

1336 (1995). *BHA Invs., Inc. v. State*, 138 Idaho 348, 351, 63 P.3d 474, 477 (2003) (citations omitted). Appellate courts are obligated to seek an interpretation of a statute that upholds its constitutionality. *State v. Newman*, 108 Idaho 5, 13, n. 12, 696 P.2d 856, 864 n. 12 (1985). “The Court will defer to the agency’s findings of fact unless those findings are clearly erroneous and unsupported by evidence in the record.” *Cooper*, 134 Idaho at 454, 4 P.3d at 566. “This Court may not substitute its judgment for that of the agency as to the weight of the evidence on factual matters. IDAHO CODE § 67-5279 (1).” *Id.*

A strong presumption of validity favors an agency’s actions. The agency’s action may be set aside, however, if the agency’s findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the agency’s statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence on the record as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. IDAHO CODE § 67-5279(3). In addition, this Court will affirm an agency action unless a substantial right of the appellant has been prejudiced. IDAHO CODE § 67-5279(4).

V. ARGUMENT AND ANALYSIS

A. Does a party, who in essence claims a portion of a statute to be unconstitutional or constitutionally deficient, because it allegedly deprives a third-party lessor of due process, have the burden of proving the statute unconstitutional?

BV alleges that when the district court found there was no due process violation, that the court improperly shifted the burden onto BV to prove its claim, as a third-party lessor, that the statutes and rules guiding liquor license renewal were either unconstitutional or constitutionally

deficient. Appellant's Brief, p. 6.

"The general rule is that the party challenging a statute on constitutional grounds "must overcome a strong presumption of validity." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999), *citing State v. Avelar*, 129 Idaho 700, 703, 931 P.2d 1218, 1221 (1997); *see also Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990).

BV essentially claims that ABC infringed upon or violated BV's procedural due process when ABC failed to give notice to BV of the privilege to renew Liquor License Number 4314. The due process clause of the Fourteenth Amendment "prohibits deprivation of life, liberty, or property without 'fundamental fairness' through governmental conduct that offends the community's sense of justice, decency and fair play." *Maresh v. State of Idaho Dep't of Health and Welfare*, 132 Idaho 221, 225-26, 970 P.2d 14, 19-20 (1998) *citing Moran v. Burbine*, 475 U.S. 412, 432-34, 106 S. Ct. 1135, 1146-47, 89 L.Ed.2d 410, 428-29 (1986). Procedural due process pertains to the minimal requirements of notice and hearing, if the deprivation of a significant life, liberty, or property interest could occur.

A deprivation of property encompasses claims where there is a legitimate claim or entitlement to the asserted benefit under either state or federal law. *See Id. citing Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705, 33 L.Ed.2d 548, 556 (1972). The minimal requirements are that "there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when the defendant is provided with notice and an opportunity to be heard." *Aberdeen-Springfield Canal Co.*, 133 Idaho at 91, 982 P.2d at 926, *citing State v. Rhoades*, 121

Idaho 63, 72, 822 P.2d 960, 969 (1991); *see also* A.E. “Ed” Fridenstine v. Idaho Dep’t of Administration, 133 Idaho 188, 983 P.2d 842 (1999).

This Court has stated

To determine whether an individual’s due process rights under the Fourteenth Amendment have been violated, courts must engage in a two-step analysis. The Court must first decide whether the individual’s threatened interest is a liberty or property interest under the Fourteenth Amendment. *See Maresh*, 132 Idaho at 226, 970 P.2d at 19, *citing Schevers v. State*, 129 Idaho 573, 575, 930 P.2d 603, 605 (1996) (citations omitted); *see also True v. Dep’t of Health and Welfare*, 103 Idaho 151, 645 P.2d 891 (1982), *citing Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). [Then] Only after a court finds a liberty or property interest will it reach the next step of analysis in which it determines what process is due. *See Maresh*, 132 Idaho at 226, 970 P.2d at 19, *citing Schevers* 129 Idaho at 575, 930 P.2d at 605.

Moreover, this Court has also stated, the “determination of whether a property interest exists can be determined only by an examination of the particular statute, rule or ordinance in question.” *See Ferguson v. Board of Trustees of Bonner County Sch.*, 98 Idaho 359, 564 P.2d 971, 975 (1977), *citing Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L.Ed.2d 684 (1976) (“Determination of whether a particular right or privilege is a property interest is a matter of state law.”). The existence of a liberty or property interest depends on the “construction of the relevant statutes,” and the “nature of the interest at stake.” *Maresh*, 132 Idaho at 226, 970 P.2d at 19, *citing True*, 103 Idaho at 154, 645 P.2d 891 (citations omitted). The procedural protection of property guaranteed by the Fourteenth Amendment “is a safeguard of the security of interests that a person has already acquired in specific benefits.” *Maresh*, 132 Idaho at 226, 970 P.2d at 19, *citing Roth*, 408 U.S. at 576, 92 S. Ct. at 2708, 33 L.Ed.2d at 560.

In this case, BV claims it holds a sufficient property interest in Liquor License Number 4314 that would require procedural due process protections. BV's argument is unpersuasive in light of this Court's long history of rulings that no property right attaches to a liquor license.

Beginning with the United States Constitution, which states in relevant part that "[t]he transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

Likewise, the Idaho Constitution states in relevant part that "the legislature of the state of Idaho shall have full power and authority to permit, control and regulate or prohibit the manufacture, sale, keeping for sale, and transportation for sale, of intoxicating liquors for beverage purposes." Idaho Const. art. III, § 26. Since this section in Idaho's constitution gives "the Legislature full power and authority to regulate intoxicating liquor for beverage purposes, the judicial department of the State may not deprive it of such power." *See, Taylor v. State*, 62 Idaho 212, 219, 109 P.2d 879, 881 (1941).

BV's assertion that it has a protected property right or interest in the business of selling alcohol gives rise to such a deprivation and would, if given effect, violate both the United States and Idaho constitutions.

This Court has long held

Instead of a protected property right, [a] liquor license is simply the grant or permission under governmental authority to the licensee to engage in the business of selling liquor. Such a license is a temporary permit to do that which would otherwise be unlawful; it is a privilege rather than a natural right and is personal to the licensee; it is neither a right of property

nor a contract, or a contract right. *BHA Invs., Inc.*, 138 Idaho at 354-55, 63 P.3d at 480-81 (quoting *Nampa Lodge No. 1389, Benev. and P.O. of E. of U.S. v. Smylie*, 71 Idaho 212, 215-16, 229 P.2d 991, 993 (1951)). “[T]hus one who procures a state ... license takes it subject to the provisions of the statute under which the license is granted.” *Nampa Lodge*, 71 Idaho at 216, 229 P.2d at 993.

The public policy reasons for such regulation is found in IDAHO CODE § 23-102. It states:

This act is passed in the exercise of the police power of the state. It is not designed to abridge the personal privilege of a responsible adult to consume alcoholic liquor as a beverage, except in cases of the abuse of that privilege to the detriment of others. The public interest requires that traffic in alcoholic liquor be regulated and controlled by the state, through the medium of a state liquor division vested with exclusive authority to import and sell such liquor, with certain exceptions, which are subject to its regulation.

This Court has similarly recognized that “the selling of intoxicating liquor is a proper subject for control and regulation under the police power.” *Gartland v. Talbott*, 72 Idaho 125, 131, 237 P.2d 1067, 1070 (1951). In other words, “[i]t is ... universally accepted that no one has an inherent or constitutional right to engage in the business of selling or dealing in intoxicating liquors.” *Id.*

BV’s argument that ABC’s licensing of alcoholic beverages is merely ministerial misses the mark. Appellant’s Brief p. 13, section 2(b.). BV fails to recognize that licensing requirements go hand-in-hand with the actual privilege to sell alcohol. Without proper approval, vis-à-vis the state’s police powers, a license to sell alcohol will not be granted nor can any such sales be made legally.

As noted above, IDAHO CODE § 23-908, places restrictions upon how a licensee may renew a liquor license. It does not address how a third-party lessor may do this since a third-

party lessor is not the person or entity approved to engage in the actual sale of alcohol. The symbiotic relationship between the licensing and sale of alcoholic beverages is further found in IDAHO CODE §§ 23-905 and 23-907. It provides, among other things and in relevant part, that an applicant wishing to become a licensee must submit to an investigation. This investigation includes a background check and fingerprinting. The third-party lessor is not subject to these same statutory requirements.

The clear reason for such requirements was presented in a similar case involving another third-party lessor, who had also leased its liquor license to a lessee. In *Uptick Corp. v. Ahlin*, 103 Idaho 364, 368-369, 647 P. 2d 1236, 1240-1241 (1982), the Court stated,

Only after investigation of the applicant and a determination that the contents of the application are true, that the applicant is qualified and that the premises are suitable, may the director, in his discretion, issue a license. I.C. § 23-907. This application procedure and the procedure to be followed in transferring liquor licenses, *see* I.C. § 23-908, makes it clear that the legislature painstakingly attempted to ensure that the department have complete control over who may own a liquor license, and that only persons who could be depended upon to advance the policies of the act were entitled to a license.

If one looks at the overall scheme of the Idaho Liquor Act found in Title 23, all responsibilities, to comply with the laws and regulations of the sale of alcohol, fall squarely on the shoulders of a licensee. There is even a statute that directly affects whether or not a licensee (not a third-party lessor) may continue to engage in business as a retail seller of alcohol. Such a directive is found in IDAHO CODE § 23-933, which states in relevant part that:

- (1) The director may suspend, revoke, or refuse to renew a license issued pursuant to the terms of this chapter for any violation of or failure to comply with the provisions of this chapter or rules and

regulations promulgated by the director or the state tax commission pursuant to the terms and conditions of this chapter.

It is clear, when the State grants a licensee the privilege of selling alcohol, it is the licensee that must accept the limitations on that privilege as set out in IDAHO CODE § 23-908, and not the third-party lessor.

BV's claim that it possesses a property interest that gives rise to due process is unpersuasive and is insufficient as to impose protections of the Fourteenth Amendment. ABC respectfully requests this Court to rule that a lessor of a liquor license, who in essence claims a portion of a statute to be unconstitutional or constitutionally deficient, because it allegedly deprives it of due process, has the burden of proving as much.

B. Does ABC have the statutory authority to act outside the scope of IDAHO CODE § 23-908, and its contemporaneous rules, by recognizing that someone other than the liquor licensee is able to exercise the privileges associated with a liquor license, including the right to renew?

The answer to this question is plain and simple, no. This is because IDAHO CODE § 23-908 is plainly written to indicate who must comply with the law. It states in relevant part,

[N]o person **except the licensee** therein named except as herein otherwise provided, shall exercise any of the privileges granted thereunder... **any licensee holding a valid license who fails to file an application for renewal** of his current license on or before the first day of the designated renewal month shall have a grace period of an additional thirty-one (31) days in which to file an application for renewal of the license. [Emphasis added]

BV essentially argues that when the legislature passed a law allowing for the transfer of a liquor license, that an implied third-party property right or interest was created in that license by

the state. Appellant's Brief p. 9, Section 2.(a.). BV argued this same point below, and the district court agreed, that BV as a third-party had some form of property interest in a liquor license because of a third-party lessor's statutory ability to transfer a liquor license to a lessee. R. pp. 343-344.

However, the district court and BV's interpretation incorrectly ignores the unambiguous legislative mandates that, it is the licensee's sole duty to renew its liquor license pursuant to IDAHO CODE § 23-908(1). Had the legislature expressly intended for a third-party lessor to have such a property interest in a license renewal, the legislature would have expressly amended this statute accordingly. However, IDAHO CODE § 23-908(1) is expressly silent on this issue.

This Court has stated, where a statute has been amended, the legislature has not created the new law in a vacuum. *See, Nampa Lodge 1389, Benev. and P.O.E. of U.S. v. Smylie*, at 219, stating , it is generally presumed that the legislature in the enactment of a statute consulted earlier acts on the same subject matter and this is so even though the earlier statutes have expired or have been repealed. 50 Am. Jur. Sec. 354, p. 356.

Moreover, this Court has consistently held,

If the statutory language is clear and unambiguous, the court need merely apply the statute without engaging in any statutory construction. *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 404, 913 P.2d 1168, 1174 (1996); *State v. Mccoy*, 128 Idaho 362, 365, 913 P.2d 578, 581 (1996); *Kootenai Elec. Co-op. v. Washington Water Power Co.*, 127 Idaho 432, 435, 901 P.2d 1333, 1336 (1995); *Ada County Assessor v. Roman Catholic Diocese of Boise*, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993); *Ottesen on Behalf of Edwards v. Board of Comm'rs of Madison County*, 107 Idaho 1099, 1100, 695 P.2d 1238, 1239 (1985). Statutory interpretation begins with the words of the statute, giving the language its plain, obvious, and rational meanings. *Wolfe*, 128 Idaho at 404, 913 P.2d at 1174; *See Grand Canyon*

Dories v. Idaho State Tax Comm'n, 124 Idaho 1, 5, 855 p.2d 462, 466 (1993); *Nelson By and Through Nelson v. City of Rupert*, 128 Idaho 199, 201, 911 P.2d 1111, 1113 (1996).

In this instance, no statutory construction is required to determine if actual notice of renewal is due to a lessor. There is also no hint of implication of notice allegedly due to a lessor.

The very nature of the Title 23's statutory scheme and its language provides an unambiguous picture that only a licensee is to be regulated by ABC (not a lessor). If this Court were to rule that a third-party lessor was also within ABC's scope of regulation, such a ruling would create an absurd result and would also amount to something other than properly enacted legislation.

BV may assert that there is some significance in the fact that *Uptick v. Ahlin* was decided before the actual statutory allowance of a transfer of a liquor license was passed. Such an assertion is still immaterial when one views the underlying facts of *Uptick*. Like this instant case, the *Uptick* Court acknowledged the fact that transfers were also occurring at the time as between a third-party lessor and a lessee. In spite of this fact, the Court still held that any remedy sought by a lessor against the state, was nonexistent. *Uptick* at 370.

The holding in *Uptick*, is still valid case law today, for many statutory and practical reasons. See, R. pp. 245-248 and 291-296. ABC respectfully requests this Court to apply the reasoning it set forth in *Uptick v. Ahlin*, 103 Idaho at 369, in this appeal. Therein this Court held

[T]he personal nature of the privilege to sell liquor by the drink can most clearly be seen upon reading I.C. § 23-908, which states in pertinent part that, "(e)very license issued under the provisions of this act is separate and distinct and no person except the licensee therein named except as herein otherwise provided shall exercise any of the privileges granted

thereunder.” (Emphasis added.) The right to renew is included among the privileges appurtenant to a liquor license and is a privilege which is to be exercised exclusively by the named licensee. To hold otherwise would enable persons who have not subjected themselves to the scrutiny and approval of the director of the Department of Law Enforcement to acquire an interest in a license and circumvent the policy of the act that only qualified persons own licenses and exercise rights thereunder.

While BV was the licensee for a very short period of time during BV’s initial transfer of this license from Donna Rice to itself, R. pp. 299-300. BV, upon applying for Liquor License Number 4314, almost immediately turned around and leased the license to Iggy’s of Idaho Falls (the lessee). R. at 24-46. In reality, it was Iggy’s that actually exercised the privilege to sell liquor as the licensee of Liquor License Number 4314 for a number of years and not BV. *Id.* Like the Ahlins in *Uptick*, BV was an entity that did not actually engage in the business to exercise the privileges of Liquor License Number 4314, as a licensee. R. pp. 291-296, 299-300.

Based upon the foregoing, ABC respectfully urges this Court to overrule the district court’s holding and apply the holding of *Uptick*, to this case, a holding that states:

The trial court erred in creating the equitable right, or so-called “premises interest” in the Ahlins, in direct contravention to I.C. § 23-908 which provides that no person other than the named licensee shall be entitled to exercise any rights granted with the license. In light of I.C. § 23-908, we hold that rights under a liquor license are inseverable parts of a complete interest and that a “premises interest” may not be created in a person other than the named licensee in contravention to statutory policy.

C. Did the District Court correctly rule, based upon by BV’s own failure to timely submit the “Release of Interest and Right of Renewal form” that the 31-day grace-period for renewal expired, and because the liquor license was lost through operation of law and there was no agency action taken by ABC?

The Idaho Administrative Procedures Act, Title 67, Chapter 52, Idaho Code governs the

judicial review of contested cases for the actions of Idaho's administrative agencies. As ABC argued before the district court, BV rests its appeal before this Court on IDAHO CODE § 67-5279 of the Idaho Administrative Procedures Act.

However, before BV can even bring such an appeal, it must show that an agency action took place. It is undisputed that the Idaho State Police and its sub-agency ABC is an agency as defined in the Administrative Procedure Act. IDAHO CODE § 67-5201(2). The real dispute in this case is whether or not the rejection of BV's renewal application was an "action" pursuant to the provisions of the Administrative Procedure Act.

An agency action is defined as:

- (a) the whole or part of a rule or order;
- (b) the failure to issue a rule or order; or
- (c) an agency's performance of, or failure to perform, any duty placed on it by law.

IDAHO CODE § 67-5201(3).

According to the APA, it appears that agencies and licensees are required to engage in contested case proceedings with regard to licenses. *See* IDAHO CODE § 67-5254. Such a requirement raises an interesting point before this Court. By its own assertions, that it be placed in the same shoes as a licensee, BV failed to timely renew the license at issue. BV's claim now, actually subjects itself to the requirements of IDAHO CODE § 67-5254.

"The APA specifically prohibits an agency from adversely affecting many types of licenses without giving [a] licensee[] notice and an opportunity for a contested case. The

statutory prohibition applies only to licenses of a continuing nature; *it does not apply to licenses that expire by their own terms at the end of a specified period.*” Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedures Act: A Primer for the Practitioner*, 30 Idaho L. Review 273, 332 (1993/1994) (internal citations omitted), (emphasis added).

Furthermore, IDAHO CODE § 67-5254, requires a licensee to comply with a timely renewal prior to seeking relief. Even the simple definition of the word expire, supports ABC’s argument, that it did not engage in a proceeding the may result in the issuance of an order. Black’s Law Dictionary defines the word expire as “[c]essation; termination from mere lapse of time ... while cancellation refers to termination...by [an] act of either or both parties.”

Furthermore, this Court has held, “[e]very decision made by an agency does not constitute an order or agency action as defined in the APA. *Hoppe v. Nichols*, 100 Idaho 133, 594 P.2d 643 (1979); Attorney General Opinion No. 88-9. Some of those decisions even affect the lives of citizens of the State of Idaho. According to the definition of “agency action” the only circumstances in which the Agency must provide a contested case proceeding are those which there is a duty placed on it by law to make a determination about an individual’s legal rights or interests.

If agency action has been taken as defined in IDAHO CODE § 67-5201(3), whether *or not* an agency must provide a contested case hearing is predicated upon whether or not an enumerated right is affected. *See*, Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A-Primer for the Practitioner*, 30 Idaho L. Rev. at 313. (emphasis added).

The long history of Idaho's case law clearly provides, a liquor licensee has no property right or interest in a liquor license. Certainly, BV as a third-party lessor cannot have more of a property interest in a liquor license than a licensee. *Cf. Fuchs v. State, Dept. of Idaho State Police, Bureau of Alcohol Beverage Control*, 152 Idaho 626, 272 P.3d 1257, 1261 (2012), holding that an applicant on a priority waiting list for an alcohol beverage license does not have protectable property interest.

ABC's rejection of BV's application to renew (what constituted an expired liquor license and thereby transfer) does not affect an enumerated right as set forth in IDAHO CODE § 23-908(1), because only a licensee is allowed to renew a liquor license.

What is important for this Court to take note of are the following facts: 1) BV had received, on September 29, 2011, the Affidavit of Release of License, transferring Iggy's interest back to BV; 2) BV received this document prior to the drop-dead expiration date of this license of October 31, 2011; 3) BV failed to file this document with ABC prior to the expiration of this license; 4) Had BV filed this document with ABC prior to this statutory deadline, ABC would have recognized BV as the licensee and renewal could have been made timely. R. p. 57. BV admitted that it is not the licensee, but a third-party lessor in this instance. *See*, R. p. 164. BV also admitted that Iggy's alcohol beverage license expired. *Id.* at 165.

As it turned out, the letter from ABC rejecting BV's application to renew and transfer was merely to inform BV of the license's expiration, and BV's inability to revive the license. R. p. 59. Such a letter does not constitute an agency action.

The district court agreed in its opinion when it found, that ABC took no action that was

reviewable. The district court rested its opinion on currently written law. Idaho Code provides that, "[a] all licenses shall expire at 1:00 o'clock a.m. on the first day of the renewal month" IDAHO CODE § 23-908(1). Thereafter, a licensee "holding a valid license who fails to file an application for renewal of his current license on or before the first day of the designated renewal month shall have a grace period of an additional thirty-one (31) days in which to file an application for renewal of the license." *Id.*

Thus, liquor licenses expire by operation of the law, and ABC has no duties to perform in relation to the expiration of a license, except to process applications for renewal. Because ABC had no duty to perform, the expiration of a liquor license is not an agency action within the meaning of the Idaho Administrative Procedures Act, and therefore, under the facts of this case, the expiration is not reviewable.

The facts of this case upon which the district court rested its decision cannot be ignored, as BV wishes this Court to do. The district court stated,

BV Beverage had actual notice of the expiration date of Liquor License Number 4314. BV presented no evidence that it ever wrote a letter or picked up the phone to inquire about the renewal status of this liquor license. Consequently the Court could not find even if it had denied ABC's motion to dismiss that BV's due process rights had been violated since BV had actual notice that the liquor license at issue would expire and failed to seek an opportunity to be heard before the agency.

R. p. 343.

VI. CONCLUSION

Based on the foregoing, ABC respectfully requests that this Court to rule:

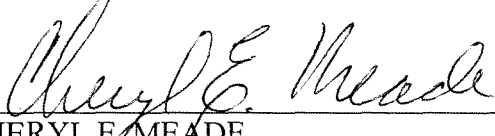
That a party, who in essence claims a portion of a statute to be unconstitutional or constitutionally deficient, because it allegedly deprives a lessor of a liquor license due process, has the burden of proving the statute unconstitutional?

That ABC cannot act outside its statutory authority found in IDAHO CODE § 23-908, and its contemporaneous rules, by recognizing that someone other than the liquor licensee is able to exercise the privileges associated with a liquor license, including the right to renew.

That the District Court correctly rule, based upon by BV's own failure to timely submit the "Release of Interest and Right of Renewal form" that the 31-day grace-period for renewal expired, and because the liquor license was lost through operation of law and there was no agency action taken by ABC?

Dated this 2nd day of July 2012.

OFFICE OF THE ATTORNEY GENERAL
STATE OF IDAHO



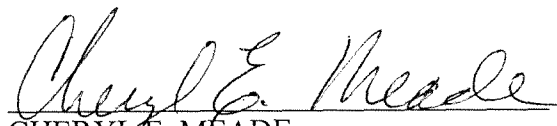
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DEPUTY ATTORNEY GENERAL
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July 2012, I caused to be served a true and correct copy of the foregoing RESPONDENT'S BRIEF in the above-referenced matter by United States Mail, Postage paid, and addressed to the following:

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