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BV Beverage Co., LLC v. State Appellant's Reply 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,

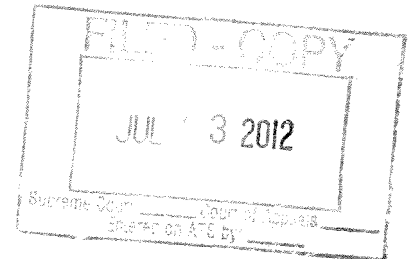
Petitioner-Appellant.

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 REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT.

HONORABLE MIKE WETHERELL, DISTRICT JUDGE PRESIDING.

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I. INTRODUCTION

This case is simply and solely about what due process procedures are due to an owner/lessor of an Idaho state liquor license so that it may protect its interest from expiring by operation of law. Contrary to the characterizations of this appeal presented by Respondent Idaho Alcohol Beverage Control (“ABC” or the “Agency”), appellant BV Beverage Company, LLC (“BV Beverage”) does not claim that Idaho Code Section 23-908 is unconstitutional, nor does it ask that the ABC be required to take actions that are expressly forbidden by Idaho Code Section 23-908.

Rather, BV Beverage simply submits to this Court that because the Idaho legislature has created a marketplace for the transfer of an interest in a liquor license by lease, and because the ABC requires the lessor/owner to pay a substantial fee for its interest in a liquor license and undergo the same background checks required of the licensee/lessee, the ABC is also required to put into place minimum due process procedures that allow an owner/lessor to protect its property right from expiring by operation of law.

Because it is undisputed that minimum due process protections are not available to owner/lessors, their property interests are subject to unconstitutional taking through expiration by operation of law. BV Beverage respectfully requests that this Court find that the failure to enact constitutionally adequate due process protections is an administrative act subject to judicial review and, further, to find that the lack of procedures subjected BV Beverage to an unconstitutional taking without due process of law.

II. ARGUMENT

A. THE AGENCY’S BRIEF IN OPPOSITION MISSTATES A NUMBER OF FACTS AND ARGUMENTS MATERIAL TO THE ISSUES PRESENTED ON APPEAL.

In its Respondent’s Brief, the Agency takes too much liberty with a number of facts that appear in the record and misconstrues and/or mischaracterizes a number of arguments presented by BV Beverage. By these factual misrepresentations and mischaracterization of the arguments presented, the Agency has submitted a brief that does not fairly meet the substance of the opening Appellate Brief filed by BV Beverage. Accordingly, BV Beverage respectfully requests this Court’s indulgence to address these matters one by one so that any confusion arising from them may be resolved.

1. **“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 in the licensee back to BV.” Resp. Br. at 1.**

The document BV Beverage received from Iggy’s was not a “Release of Interest and Right of Renewal.” Rather, it was an “Affidavit—Release of Interest.” R. p. 57. The Agency represents on its website that the “Affidavit—Release of Interest” is the form to be used when the original license is not available. Available at: <http://www.isp.idaho.gov/abc/>. *C.f.* R. p. 117 (letter from Cheryl Meade stating “These licenses themselves have an expiration date stamped in big letters on the front of them.”). The “Affidavit—Release of Interest” does not state whether license is current, nor does it purport to transfer the right to renew a license. *See, e.g.* R. p. 304. And, indeed, under the ABC’s procedure, “it is incumbent upon a licensee to continue its renewal until the time of transfer.” R. p. 117.

2. “In essence, BV sought and continues to seek to be placed in the same shoes as a licensee.” Resp. Br. at 2.

BV Beverage does not, and never has, asked that it be placed in the same shoes as a licensee. BV Beverage asserts that, by creating a marketplace for the transfer of a liquor license by lease, the Idaho legislature created divisible property rights in an Idaho state liquor license and that as the owner/lessor it should be allowed notice and opportunity to protect its interest in such liquor license in its own right. *See, e.g.* R. p. 183 (“[T]he Agency cannot treat lessors as complete strangers to the license and require the lessor to complete a transfer from the lessee back to the lessor as a precondition to allowing the lessor the right to renew. Without proper notice and opportunity to renew given to the lessor in its capacity as lessor, adverse actions taken against the lessee (even if they occur by operation of law) cannot impact the lessor’s property rights.”). *See, also*, R. p. 169-178.

Agreeing with BV Beverage’s arguments, the District Court concluded that lessors have a protectable property right in their owner/lessor’s interest in a liquor license. R. p. 342. (“Here, just as the examples cited to in *Roth*, the rights appurtenant to the possession of a liquor license are statutorily created. Among the rights created by the statute is the right to transfer a liquor license by lease. *See* I.C. § 23-908. Furthermore, liquor license owners have the right to renew their licenses. *Id.* The Idaho Code, therefore, creates in the owner of the liquor license an economic benefit that may not be revoked arbitrarily. Given the statutory scheme governing liquor licenses, the Court finds that the owner of a liquor license has a property interest in the license, and is therefore entitled to notice and the opportunity to be heard.”). Because owner/lessors are entitled to due process protections in their own right, BV Beverage is not asking to “step into the shoes” of a licensee. Instead it is asking to be afforded minimum due process protections in its own right.

3. **“The only person lawfully allowed to exercise the privilege of holding an alcohol beverage license is the licensee. The privilege to renew a license is also held exclusively by the licensee according to law.” Resp. Br. at 2 (citing to Idaho Code §§ 23-908(1), 23-907 and 23-1010, and R. p. 246).**

These two statements encompass the very questions to be resolved on this appeal. Placing them in the “factual and procedural” background section of the brief with citations to statutory authority as though they are well settled law misrepresents the state of the law in Idaho and misconstrues the issues to be decided on appeal.

4. **“ABC is not authorized by law to notify third-party lessors of renewal dates.” Resp. Br. at 4 (citing IDAPA Rule 11.05.01.11.03).**

This is the ABC’s interpretation of the statute, not a statement of existing law. Moreover, the authority cited is an administrative regulation promulgated by the ABC. The administrative regulation cited neither permits nor prohibits the ABC taking any affirmative steps regarding providing notice of renewal dates.

5. **“The law does not provide for an exception of additional time for renewal in instances where transfers are occurring. Resp. Br. at 4 (citing IDAPA Rule 11.05.01.12).**

While a technically correct statement of the law, this statement mischaracterizes the issue on appeal as BV Beverage has not asked that additional renewal time be given when transfers are occurring. Rather, BV Beverage argues that as an owner/lessor, it should have had the opportunity to renew without first undergoing a cumbersome transfer process. App. Br. at 3. For example of cumbersome transfer process required to renew license, *see, e.g.*, R. p. 299-309; *compare* R. p. 45-46 (regarding the BV/Iggy’s Transfer) *with* R. p. 54-56 (regarding the attempted BV/Screamin’ Hot transfer).

6. **“[Idaho Code § 23-908] 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.*” Resp. Br. at 5.**

The undisputed record evidence shows that the ABC does undertake review of a lease agreement between a lessor and lessee and extracts a substantial fee regarding an owner’s interest in a liquor license. When a liquor license is transferred pursuant to a lease, the ABC mandates that both the lessor/owner and the lessee/licensee submit full and complete transfer applications. *See* R. p. 302-303 (Liquor License Application for Transfer by Sale from Donna Ritz to BV Beverage Company, LLC) and R. p. 45-46 (Liquor License Application for Transfer by Lease from BV Beverage Company, LLC to Iggy’s Idaho Falls, Inc.). The required forms mandate that the liquor license lease agreement be submitted with the application. R. p. 46 (approximately half-way down the page provides “Liquor License: ___ Leased (Attached a copy of the valid lease) ___ Owned- Purchase Price _____.”)

7. **“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.” Resp. Br. at 6.**

BV Beverage did not attempt to renew the license at the time it attempted to transfer from Iggy’s back to itself and then to Screamin’ Hot Concepts. This is because BV Beverage had no actual knowledge that Iggy’s had not renewed the license until the transfer application was rejected. R. p. 59. At that time, BV Beverage questioned the ABC regarding why it did not receive notice that the license had not been renewed and/or opportunity to renew the same. R. p. 91-92. The ABC took the position that because BV Beverage had no interest in the license, it was not entitled to renew the license. R. p. 121 (“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. 103 Idaho 364 (1982). In the immediate case, the named licensee was Iggy's. Therefore, ABC's attempt to notify the licensee of the renewal requirement was properly made.").

8. **"BV's argument that ABC's licensing of alcoholic beverages is merely ministerial misses the mark." Resp. Br. at 14 (citing App. Br. at 13, section 2(b)).**

BV Beverage has never argued that licensing of alcoholic beverages is merely ministerial. To the contrary, BV Beverage has consistently noted that licensing is a police power but renewals, which occur as a matter of course, are not. R. at p. 324 ("When conducting background checks and other investigations associated with the processing of a transfer application the Agency is appropriately exercising its police power. However, when processing a renewal application, the Agency is simply completing a ministerial act or duty."); *see also* App. Br. at 13 ("Because renewal of a liquor license is a ministerial duty..."); *and* R. p. 178 ("The State does not exercise its police powers with respect to the **renewal** of a liquor license.") (emphasis added).

9. **"[Idaho Code §§ 23-905 and 907] provide[], 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." Resp. Br. at 15 (emphasis added).**

The statement that a third-party lessor is not subject to a background check and fingerprinting is false and directly contradicted by the record. R. p. 299 (Cover letter from BV Beverage to the ABC regarding owner/lessor interest in the license: "The \$102.00 check is remitted as payment of fees associated with the processing of fingerprints for Cortney Liddiard, Allen Ball, and Connie Ball") and R. p. 301 (Reply letter from ABC to BV Beverage: "Check #2009 in the amount of \$102.00 was received for the fingerprints for Cortney Liddiard, Allen

Ball, and Connie Ball. Allen Ball was already on file for another license, so the \$34.00 for his fingerprints was applied to the renewal fees”). Indeed, BV Beverage has consistently maintained that the investigation of owner/lessor applicants renders the rationale supporting *Uptick* unpersuasive. R. p. 166-169. However, the ABC refuses to meet the substance of this legal argument, as it continues to incorrectly represent that it does not conduct background checks and investigations on lessor/owners. Resp. Br. at 15 (“The third party lessor is not subject to these same statutory requirements”). If the ABC does not conduct background checks of lessor/owners, then Jamie Adams’ letter dated November 1, 2007, which represented that the ABC retained money from BV Beverage for the express purpose of processing fingerprint cards of Cortney Liddiard and Connie Ball, constitutes a fraud. R. p. 301.

10. **“Had BV filed this [Affidavit—Release of License] with ABC prior to this statutory deadline, ABC would have recognized BV as the licensee and renewal could have been made timely.” Resp. Br. at 22 (citing R. p. 57).**

This statement is not supported by any record evidence and ignores BV Beverage’s position that it should have been allowed to renew without first having to re-transfer the license. As discussed at paragraph 1, above, the form “Affidavit—Release of License” is a different form and serves a function different than that of a “Release of Liquor License and Transfer of Right of Renewal.” The former is used when the original license is not available and contains no information or representations regarding renewal rights. Accordingly, there is no record evidence regarding how BV Beverage could have renewed its owner/lessor’s interest in the liquor license without first submitting a full application to “re-transfer” the license back to itself.

B. THE DISTRICT COURT CORRECTLY RECOGNIZED THAT THE OWNER OF A LIQUOR LICENSE TRANSFERRED BY LEASE HAS A PROTECTABLE PROPERTY RIGHT IN RENEWING SUCH LIQUOR LICENSE.

In its continued claims that owner/lessors have no property rights in the liquor licenses for which they paid good and valuable consideration (both to the seller and to the state), the ABC ask this Court to reverse the District Court's decision that *Uptick* is not controlling under the facts of this case. However, because the District Court correctly recognized critical factors distinguishing this case from *Uptick* and, thereafter, undertook an appropriate analysis of property rights associated with a liquor license pursuant to current constitutional jurisprudence, the District Court was correct in that determination and it should be affirmed.

1. The facts of this case are materially distinguishable from *Uptick* and it is, therefore, not controlling in this matter.

The Agency's reliance on *Uptick* makes sense only if *Uptick* is unmoored from its factual and historical context. Specifically, that portion of *Uptick* which designates the right to renew as a privilege that must be restricted to the named licensee simply does not make sense in light of legislative and administrative changes that have occurred with respect to the statute:

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.**

Uptick at 369, 647 P.2d at 1241 (emphasis added). While this rationale may have held in the factual and historical context within which *Uptick* was decided, at the time *Uptick* was working its way through the judicial system, the Idaho State Legislature amended Idaho's liquor by the drink act and added Section 23-908(6), which specifically allowed for transfers of liquor license

by lease. In putting this amendment into place, the Agency requires lessor/owners to submit to the exact same background checks to which the licensee is subject. Accordingly, when one reviews closely the rationale behind this language it is clear (as the District Court recognized, R. p. 342-43) that *Uptick* does not control in this case because now the ABC **does** subject owner/lessors to its scrutiny, and it extracts a fee from them for doing so. See section A. 6. above and R. p. 45-46. BV Beverage holds its owner/lessor's interest in the state liquor license pursuant to this state sanctioned process and has undergone the Agency's review and approval. Accordingly, there is no legitimate basis to apply the *Uptick* rationale to disavow BV Beverage's property rights.

2. The Supreme Court of the United States' rejected the wooden distinction between privileges and property rights, thereby recognizing that property rights can attach to liquor licenses.

Not only has the factual rationale underlying the *Uptick* decision been undone by legislative amendment and subsequent administrative enforcement of such amendments, changes in constitutional jurisprudence also counsel against holding onto the rigid "liquor licenses as privileges" conclusion reached by the *Uptick* court. For many years, courts across the country held that the use of a state liquor license was a "privilege" to which no property rights could attach. See, e.g., *Uptick Corp. v. Ahlin*, 103 Idaho 364, 369-70, 647 P.2d 1236, 1241-42 (1982) (citing authority from Arizona, Delaware, Mississippi, Montana, and Wyoming). However, by the time *Uptick* was decided, the Supreme Court of the United States had "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). Accordingly, rather than relying on the wooden distinction between "rights" and "privileges" upon which the ABC insists, constitutional jurisprudence requires that courts

undertake a more studied analysis of the relationship at issue between the state and the party alleging a property right in a liquor licenses.

Relying on *Roth* in another context, the Idaho Supreme Court noted that property rights and their dimensions are “are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Viking Constr., Inc. v. Hayden Lake Irrigation. Dist.*, 149 Idaho 187, 198, 233 P.3d 118, 129 (2010) (quoting *Roth*, 408 U.S. at 577). Moreover, the Supreme Court of the United States has declared that *Roth* and *Perry v. Sindermann*, 408 U. S. 593 (1972), provide the appropriate framework to determine whether property rights can arise from a state liquor license. *City of Kenosha v. Bruno*, 412 U.S. 507, 515 (1973). Since this decision, courts in several of our sister states have begun to re-evaluate the rights/privilege distinction as it applies to a liquor license. *See, e.g. Manos v. City of Green Bay*, 372 F. Supp. 40, 48-49 (E.D. Wis. 1974) (recognizing that the holder of a liquor license had a protectable property interest in the right to renew a liquor license).

For instance, relying on the guidance of *Bruno* and the framework set forth in *Perry* and *Roth*, the Michigan Supreme Court, **reversed** its longstanding position that a liquor license was a “privilege” granted by the state that could not carry any property rights. *See, generally, Bundo v. City of Walled Lake*, 395 Mich. 679, 238 N.W.2d 154 (1976). Specifically, the Michigan Supreme Court considered the right of renewal (the property rights at issue in this appeal) and asked “whether the renewal of an existing liquor license ... involves a private ‘interest’ which is either ‘liberty’ or ‘property’ within the meaning of the due process clause of the United States and Michigan Constitutions.” *Id.* at 688, 238 N.W.2d at 158. Rejecting its prior holdings that a

liquor license was a “privilege” to which no property rights could attach, the Michigan Supreme Court made the following comments:

[D]efendant in this case has misplaced its reliance on those Michigan cases which have held that a liquor license is not a ‘property right’ because it is a ‘privilege granted by the state’. Whatever viability the ‘rights/privilege’ doctrine had in Michigan jurisprudence in the past, under the holdings of the United States Supreme Court the mere fact that an interest exists by the grace of the government no longer precludes that interest from being treated as a ‘property’ right. Those Michigan cases which have relied upon this doctrine in finding no property interests in liquor licenses no longer can be followed for this purpose.

Id., at 691-92, 238 N.W. 2d at 160.

The court then went on to consider that (i) license holders, having already been issued a license, have a reasonable expectation that a liquor license would be renewed; (ii) license holders invest substantial time and money in liquor licenses based on the reasonable expectation of renewal; and (iii) license holders could not get a new license quickly and easily if the license were lost. *Id.*, at 693-695, 238 N.W.2d at 160-61. Based on these factors, the court determined that the holder of a liquor license had a property interest in the right to renew and held that the right to renew was subject to constitutional due process safeguards. *Id.*

3. Where the state creates a marketplace for the transfer, exchange, sale, or lease of a license, the property rights associated with a liquor license may be held by one other than the named licensee.

The critical fact distinguishing this case from *Uptick* is that transfer of a liquor license by lease is now authorized by the state through a legislative amendment. Where the issue has been squarely presented, our sister courts consistently recognize that a state created marketplace for the transfer, exchange, sale, or lease of a license, gives rise to property rights to anyone holding an interest in a license pursuant to the state sanctioned transaction, which property rights are

entitled to constitutional protections. *See, e.g., State v. Saugen*, 283 Minn. 402, 405, 169 N.W.2d 37, 40 (1969) (noting that while a liquor license may be a privilege granted by the government, the ability to assign or transfer the license is a property right entitled to due compensation in eminent domain proceedings).

In *Saugen*, the Minnesota Supreme Court considered the value of a liquor license as it related to the “going concern value” of a business for purposes of eminent domain. The state argued that, because a liquor license was a privilege, no property rights could attach and, therefore, no compensation was due. *Id.*, at 405, 169 N.W.2d at 40. While observing that the several states differed as to whether a liquor license is properly characterized as property or a privilege, *vis-à-vis* third parties, the court noted:

This difference of opinion as to the legal nature of a liquor license is apparently due to the fact, not always recognized by the courts, that such license, while a mere privilege as far as the relation between the government and the licensee is concerned, nevertheless constitutes a definite economic asset of monetary value for its owner.

Id., at 405-06, 169 N.W.2d at 40 (quoting Annotation, 148 A.L.R. 492.). A state sanctioned marketplace for the transfer and exchange of a license gives rise to a constitutional duty to provide adequate protections for the property right thereby created:

It is submitted that wherever the legislature has made licenses assignable or transferable, and the transfer can be effected with the consent of the authorities to anyone qualifying under the statute, the property element of the license is sufficiently recognized to warrant its exposure to seizure by the creditors of the licensee.

Id., at 406, 169 N.W.2d at 40; *see also Boonstra v. City of Chicago*, 214 Ill. App.3d 379, 386-87, 574 N.E.2d 689, 694 (1991).

Accordingly, unless the state is acting within its “police power” for purposes of determining if an applicant is fit to exercise the privileges associated with the license, (i.e., use the license to operate a liquor by the drink establishment), the license must be treated as a property interest for all other purposes: “While it is true that liquor businesses are appropriately subject to more scrutiny and control than most businesses when the government is acting pursuant to its police power, they have the same rights as any other business when the government is not acting pursuant to such police power...” *Saugen.*, at 409, 169 N.W.2d at 42. (emphasis added).

The dual cases of *Barr v. Pontiac City Comm'n*, 90 Mich. App. 446, 282 N.W.2d 348 (Mich. App. 1979) and *Bunn v. Michigan Liquor Control Comm'n*, 125 Mich. App. 84, 335 N.W.2d 913 (Mich. App. 1983) specifically considered the property rights of persons other than the named licensee who hold an interest in a liquor license. In *Barr* the license owner sold his interest in land, a building, and the liquor license to Epps, but retained for himself a security interest in the license. 90 Mich. App. at 448-49, 282 N.W.2d at 349-50. When Barr applied to have the license transferred back to himself, the licensing authority disapproved the transfer and refused to grant Barr a due process hearing regarding its decision. *Id.* at 449, 282 N.W.2d at 449. The licensing authority maintained that Barr – holder of a “reversionary interest” in the license – was not entitled to a “due process hearing because he had no property right in the license renewal” and “at best [Barr] had a mere unilateral expectation as an applicant for a license.” *Id.* at 451, 282 N.W. 2d at 350.

Both the trial court and the Court of Appeals disagreed with the licensing authority’s decision, finding that the holder of a reversionary interest in a license has a greater property right than a new applicant: “While [Barr’s] interest in the license is not ‘title’ *per se*, it is a much

stronger interest than that of a new applicant or proposed transferee.” *Id.* at 453, 282 N.W.2d at 351; accord *Fuchs v. State*, 272 P.3d 1257, 1262 (2012) (holding that a place on the liquor license priority list is not a protectable property right). The court then held that Barr’s reversionary interest in the liquor license gave him a property interest in the renewal of the license and he was entitled to minimum due process protections. *Barr*, at 453, 282 N.W.2d at 351. Similarly, BV Beverage’s interest as an owner/lessor is greater than that of the priority waiting list applicant in *Fuchs* and, like the holder of the reversionary interest in *Barr*, BV Beverage is entitled to due process protections.

Relying on *Barr*’s recognition of property rights in one holding a security interest in a liquor license, the Michigan Court of Appeals held that the state cannot take adverse actions respecting the named licensee that would work to undermine the property rights of another holding an interest in that liquor license without proper due process safeguards. *Bunn*, 125 Mich. App. at 88, 335 N.W. 2d at 915.

In *Bunn*, Bunn sold his liquor license to Lawson and reserved the right to have the license transferred back to him in the event of default. *Id.*, at 87, 335 N.W.2d at 914. Lawson defaulted and Bunn attempted to foreclose on Lawson’s property, including the liquor license, and to have the license transferred back into his name. *Id.*, at 87-88, 335 N.W.2d at 915. While the court held that Bunn did not have a sufficient interest in the license to entitle him to due process notice of the adverse actions against Lawson,¹ *Id.*, at 92, 335 N.W.2d at 917, it went on to hold that the adverse actions against Lawson could not impact Bunn’s interest in the liquor license:

¹ The concurring opinion disagreed with the court’s conclusion that Bunn did not have sufficient interest in the liquor license to give him the right to notice of the adverse proceedings pending against Lawson, stating: “I would hold that [Bunn] did have a property right in the license in question sufficiently great so as to entitle him to notice of the hearing before the city council as well as the MLCC revocation proceeding involving Lawson’s liquor license. The giving of such notice would not present any undue burden, in that the MLCC is aware of the identity of persons

However, once [Bunn] foreclosed upon the property, he held a reasonable and legitimate claim of entitlement to the liquor licenses. The trial court in the foreclosure action provided in its judgment and order that plaintiff regain all of his liquor licenses from Lawson. We are of the opinion that Lawson's loss of the licenses should not affect plaintiff's legitimate claims to them.

Id. The court specifically noted that the State's approval of the contractual arrangement between Bunn and Lawson gave Bunn the legitimate expectation of retransfer of the license to him, should any problems arise with Lawson:

[B]ecause [Bunn's] sale of the business, including the underlying contractual arrangements, was approved by the MLCC, his expectation of retransfer, should any problems arise, was legitimate. As the Court noted in *Perry v. Sindermann, supra*, [a] person's interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit that he may invoke at a hearing." 408 U.S. 601.

Based on [Bunn's] legitimate understanding that his security arrangements were legitimate and recognized by the MLCC, [Bunn] is entitled to rudimentary due process as provided by the Court in *Barr v. Pontiac City Comm, supra*, p. 449.

Id. at 93, 335 N.W. 2d at 917. Likewise, in this case the Agency extracted a fee (in the amount of \$15,000.00) from BV Beverage and, with full knowledge of the contractual arrangement between BV Beverage as the owner/lessor and Iggy's as the licensee/lessee of the liquor license possessed, reviewed, and approved the transaction. BV Beverage therefore has a legitimate expectation of rudimentary due process rights.

having such interest in licensed establishments." *Bunn*, 125 Mich. App. at 95-96, 335 N.W.2d at 918 (E.A. Quinnell, J. concurring).

4. The legitimate expectation of the right to renew and the existence of a marketplace for the transfer of a liquor license by lease, give rise to a lessor's protectable property interest in the right to renew.

The State has created a marketplace for liquor licenses and it has a concurrent responsibility to extend due process protections to the property rights arising from such marketplace. Where the licensing authority creates a marketplace for licenses, the licenses become more than

just [a] mere personal permit [] granted by a governmental body to a person to pursue some occupation or carry on some business subject to regulation under the police power. Black's Law Dictionary 829 (5th ed. 1979). In a functional sense, the [] licenses embrace[] the essence of property in that they [are] securely and durably owned and marketable.

Boonstra v. City of Chicago, 214 Ill. App.3d 379, 386-87, 574 N.E.2d 689, 694 (1991). That is to say the privilege of use of a license regulated pursuant to the state's police powers may carry hallmarks of ownership and marketability that are subject to due process protections. Idaho state liquor licenses carry all of the characteristics of marketability and, because these characteristics are products of the state's licensing scheme, the state has the responsibility to ensure adequate procedural safeguards.

Idaho's Retail Sale of Liquor-by-the-Drink Act (the Act), I.C. §§ 23-901 *et seq.*, and the Rules Governing Alcohol Beverage Commission (the Rules), IDAPA 11.05.01 *et seq.*, create a legitimate expectation of renewal, create a marketplace for the sale and exchange of liquor licenses, and support BV Beverage's claimed property interest in the liquor license.

In Idaho, the State has created a legitimate expectation of renewal of all issued and outstanding liquor licenses because such licenses are renewed as a matter of course. I.C. § 23-908(1). Even if the Director has initiated revocation proceedings against the licensees, he must

still renew the license during the course of those proceedings. I.C. § 23-933(4). Like renewals, transfers are also approved as a matter of course, unless the transfer applicant does not qualify under the provisions of the Act. Licenses may be transferred by sale, in bankruptcy, through testate or intestate succession, and by lease. I.C. § 23-908(5)-(6).² Because the state allows for only a limited number of licenses, I.C. § 23-903, they are a valuable asset to every person who holds an interest in one. The State, by creating a legitimate expectation of renewal and sanctioning transfers, has created a very active marketplace for liquor licenses. The rationale of *Barr, Boonstra, Bruno, Bundo, Bunn, Perry, Roth* and *Saugen* can and should guide this Court's reasoned review of that portion of *Uptick* upon which the Agency relies to support its position and hold that in the face of (i) materially distinguishable facts and (ii) more developed constitutional jurisprudence, the Agency can no longer rely on *Uptick* to deprive lessor/owners of their property interest in liquor licenses.

5. The Agency's refusal to allow a lessor to renew a liquor license does not bear a substantial relation to the exercise of its police power and infringes on the lessor's fundamental property rights.

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), but even the Court in *Uptick* noted and recognized that a liquor license was a valuable, marketable asset. 103 Idaho 364, 365 n.1, 647 P.2d 1236, 1237 n.1 (1982). Accordingly, a

² Idaho Code Section 23-908(6) was added by the legislature at the time *Uptick Corp.* was making its way through the courts. The Legislature specifically noted that the State was missing out on a lot of "revenue generation" because license holders were leasing their liquor licenses and avoiding the 10% fee for selling liquor licenses. The state expressly acknowledged the value created by limiting the number of liquor licenses and creating an active leasing marketplace. It then sanctioned transfers by lease and added the 50% fee for the stated purpose of increasing state revenue. H.B. 98, Idaho Sess. Laws, Ch. 74, p. 108 (1981); Statement of Purpose & Fiscal Impact, RS 6291 (1981); State Affairs Committee Minutes, Jan. 27, 1981, Feb. 17, 1981, and Mar. 10, 1981. Attached as Appendix A for the Court's convenience.

distinction must be recognized: when the state is not acting pursuant to its police power, the holders of liquor licenses owners of state issued licenses have the same property rights as any other property owner. *State v. Saugen*, 283 Minn. 402, 409, 169 N.W.2d 37, 42 (1969).

Where the state's purported exercise of its "police powers" 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 State does not exercise its police powers with respect to the **renewal** of a liquor license. Once a person has been approved to own a liquor license, the Agency is required to approve the renewal application if it is timely and accompanied by the proper fee. I.C. § 23-908. Even if revocation proceedings are underway, the Agency must still approve renewal applications. I.C. § 23-933(4). Because BV Beverage has subjected itself to the Agency's application, review and approval process, the evils to be guarded against in *Uptick* do not exist.

Contrary to the Agency's representations, lessor/owners do submit to the ABC's review and approval process and BV Beverage did so with respect to the at-issue license. The Agency declared that BV Beverage was fit to own a liquor license and approved issuance of the license to BV Beverage and, contemporaneous with such approval, approved the transfer of that license by lease to a third party. R. p. 000023-46. Because the State has exercised its police power in

determining that BV Beverage is fit to own an interest in an Idaho State liquor license, the State can gain nothing more in the exercise of its police powers by denying BV Beverage the right to renew and otherwise protect the previously approved interest. Accordingly, the Agency's refusal to recognize BV Beverage's property rights in the license and refusal to allow BV Beverage to renew the license does not bear a "direct, real, and substantial relation to the public object sought to be accomplished." It is therefore unreasonable and should not be condoned.

C. THE DISTRICT COURT IMPROPERLY FOUND THAT BV BEVERAGE WAS REQUIRED TO TRY TO WORK AROUND AN UNCONSTITUTIONAL SYSTEM PRIOR TO ASSERTING THAT ITS DUE PROCESS RIGHTS WERE VIOLATED.

1. The established state system is unconstitutional because it does not give owner/lessors an opportunity to renew.

The State has created a marketplace for state liquor licenses so it cannot deprive the lessor of its property rights in its liquor license without the minimum protections and safeguards required by the due process clause of the Idaho Constitution and United States Constitution: notice and an opportunity to be heard. Under Idaho Code § 23-932, the Director of the Idaho State Police has the statutory duty "to prescribe forms to be used in the 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 must promulgate forms to be used in the renewal of liquor licenses.

In carrying out its statutory duty to make forms available for the renewal of a liquor license, the Agency sends renewal notices and applications for renewal to the named licensee only. Because the Agency does not recognize any property rights in the lessor of a liquor license, the Agency maintains that the lessor has no right to renew the license and does not provide renewal applications to lessors of liquor licenses. Likewise, the Agency does not notify

the owner of the liquor license if the lessee has failed to timely submit its renewal application. If a lessor wishes to renew the liquor license it 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 (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 lessor as a complete stranger to the license.

In this matter, the District Court held that because BV Beverage did not "pick up the phone" to inquire as to the renewal status of its license, then BV Beverage's due process rights could not have been violated. R. p. 343. This holding misses the critical constitutional inquiry to be made: i.e., whether adequate due process procedures were in place; not whether the party deprived of constitutional protections made enough of an effort to work around inadequate procedures.

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. Tellingly, the Supreme Court of the United States did not require the claimant in *Logan* to have "picked up the phone" to inquire as to the status of the investigation. Rather, the Court expressly noted that the system was inadequate and held that the taking, which occurred by operation of law following agency inaction, was unconstitutional.

The instant case is similar to *Logan* because both established state systems work to deprive an individual of property rights by operation of law as the result of agency inaction. 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). However, in order to renew a license, the renewal applicant must first receive a renewal application from the Agency. The Agency does not provide renewal application to lessors of liquor licenses. Accordingly, if the lessee fails to timely renew, the Agency then deems the lessor's interest expired by operation of law and without giving the lessor the opportunity to protect its rights.

The established state system created by the Agency creates an unconstitutional taking. As a matter of constitutional law, because the State has created a marketplace for the lease of liquor licenses, liquor license lessors have an interest in their respective liquor licenses that are subject to minimum due process protections. The Agency cannot, therefore, require lessors to rely exclusively on their lessees to timely renew. Likewise, the Agency cannot treat lessors as complete strangers to the license and require the lessor to complete a transfer from the lessee back to the lessor as a precondition to allowing the lessor the right to renew. Without proper notice and opportunity to renew given to the lessor in its capacity as lessor, adverse actions taken against the lessee (even if they occur by operation of law) cannot impact the lessor's property rights. The lessor must be afforded the opportunity to protect its own interest. The District Court erred by placing upon BV Beverage the duty to "pick up the phone" to work around the constitutionally inadequate system as a precondition to asserting the violation of its due process rights.

2. BV Beverage Does Not Claim that § 23-908 is unconstitutional; only that the ABC has given § 23-908 an unconstitutional interpretation and application.

Contrary to the ABC's contention, BV Beverage does not claim, and has not claimed at any point during this matter, that Idaho Code § 23-908 is unconstitutional. Rather, BV Beverage submitted below that Idaho Code § 23-908, by creating a marketplace for the transfer of a liquor license by lease, created a valuable, protectable property right in the owner/lessor's interest in a liquor license. R. p. 169-180. Through its interpretation of Idaho Code Section 23-908 and its refusal to allow owner/lessors the right to renew, the ABC is abridging an owner's valuable property rights without due process of law. The District Court agreed with this argument and held that such property right does exist and, further, that there were substantial problems with the ABC's renewal procedures. R. p. 342-43.

The ABC correctly notes that where a property right exists, the constitutional jurisprudence of both the United States of America and the State of Idaho provides

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.

Resp. Br. at 11 (citing *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); and *A.E. "Ed" Fridenstine v. Idaho Dep't of Administration*, 133 Idaho 188, 983 P.2d 842 (1999)). The Agency maintains, however, that it is not required to allow lessors the opportunity to renew liquor licenses because, under the Idaho Supreme Court's holding in *Uptick*, the right to renew a liquor license is a privilege which may only be exercised by the named licensee. *Uptick Corp. v. Ahlin*, 103 Idaho 364, 647 P.2d 1236 (1982). However, as discussed at length above, *Uptick* is not controlling and

the Agency is under a constitutional duty to create due process procedures that adequately protect the property interests of owner/lessors.

3. Providing owner/lessors with notice and an opportunity to renew is not inconsistent with Idaho Code § 23-908.

The ABC argues that Section 23-908 does not authorize it to allow the owner/lessor of a liquor license to renew such license. Resp. Br. at 16-19. However, the actual words of this statute do not mandate this conclusion. Moreover, adopting the ABC's interpretation would deprive BV Beverage of its interest in the license without due process protections, thereby giving rise to an unconstitutional interpretation of the statute.

The cardinal rule of statutory construction is that where a statute is plain, clear and unambiguous, this Court is constrained to follow that plain meaning and neither add to the statute nor take away by judicial construction. *Moon v. State Board of Land Commissioners*, 111 Idaho 389, 392, 724 P.2d 125, 128 (1986). Section 28-903(1) is not ambiguous. If a statute is ambiguous and the court is faced with two constructions of a statute, one of which would render it unconstitutional and one of which would not, this Court must adopt the construction that would uphold the statute. *Moon*, 111 Idaho at 392, 724 P.2d at 128. Because the actual words of Section 23-908 do not restrict the ABC from providing owner/lessors with the opportunity to renew a license and because that interpretation is constitutional it must be adopted.

In order to find a statutory prohibition against owner/lessors exercising the right to renew a license, this Court must read the words "only the licensee" into two sentences within the statute. However, where the legislature intended to refer to "only the licensee" it did so expressly. Conversely, where the passive voice is used no subject is specified.

The statute provides three material portions directly addressing renewals: two are in passive voice and one is in active voice. (Passive) "All licenses shall expire at 1:00 o'clock a.m.

on the first day of the renewal month which shall be determined by the director by administrative rule and shall be subject to annual renewal *upon proper application.*” I.C. § 23-908(1) (emphasis added). (Passive) “[r]enewal applications for liquor by the drink licensee accompanied by the required fee *must be filed* with the director on or before the first day of the designated renewal month.” I.C. § 23-908(1) (emphasis added). The passive voice used in these two sentences indicates that there are no restrictions regarding the proper actor.

However, when discussing the consequences of not timely filing a renewal application, the legislature specifically invokes an active voice, noting that consequences run to only the licensee—the only party exercising the privilege of engaging in the retail sale of alcohol:

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. *The licensee* shall not be permitted to sell and dispense liquor by the drink at retail during the thirty-one (31) day extended time period unless and until the license is renewed.

Idaho Code § 23-908(1) (emphasis added). The legislature specifically stated that if a *licensee* (i.e., the only party holding an interest in the liquor license who is authorized to engage in retail sale of liquor by the drink) fails to timely renew, the *licensee* can no longer engage in retail sale of liquor by the drink. In contrast to the passive sentences that do not identifying a particular subject (thereby indicating any person may file a renewal application and fee), this is the only sentence that directly addresses the licensee and specifically restricts privileges associated with use of a license. These portions of Section 28-903(1) show that the legislature knew how to (and did) indicate when the statute was to apply to only a licensee. Accordingly, the restrictive renewal procedures put in place by the ABC are not mandated by the statute.

The ABC’s interpretation also requires this Court to read into the statute a historical judicial gloss. ABC argues that the language of Idaho Code § 23-908, which provides... “no

person except the licensee therein named except as herein otherwise provide, shall exercise any of the privileges granted thereunder ..." (Resp. Br. at 16) –combined with dicta from *Uptick v. Ahlin* that provides that the privilege to renew a liquor license was exclusive to the named licensee (Resp. Br. at 18-19), means that the privilege of the right to renew is exclusive to the named licensee. However, the statute never expressly identified the right to renew as a privilege and, explained above, the rationale behind *Uptick* no longer controls and the statute does not mandate the reading suggested by *Uptick*. Accordingly, *Uptick* need not preclude this Court from giving the statute the constitutional interpretation offered by BV Beverage.

By removing this historical judicial gloss of *Uptick* and focusing, instead, on the actual words of the statute, this Court can give that statute a reading that protects the property rights of an owner lessor and gives the statute a constitutional interpretation. Accordingly, the interpretation offered by the ABC must be rejected.

4. The Agency's failure to enact constitutionally adequate procedures is a reviewable agency action.

In this matter, the District Court improperly held that because the license expired by operation of law, the Agency took no reviewable action. R. p. 341. However, the appealable error raised by BV Beverage is that the agency failed to enact constitutionally adequate procedures which BV Beverage could have used to prevent its owner/lessor's interest in the license from expiring by operation of law. App. Br. at 15-16. The ABC has not addressed this point of error, instead reiterating the District Court's holding. Resp. Br. at 23.

The record in this matter presents undisputed evidence that the ABC failed to put procedures in place whereby BV Beverage, as the owner/lessor of a liquor license, could have

renewed its interest in the license in its own right (i.e., without first processing a transfer of the license from Iggy's back to itself). R. p. 163 (citing R. p. 127-128).³ Under Idaho law, administrative action may be reviewed where such action was "(a) in violation of constitutional or statutory provisions" or "(c) made upon unlawful procedure." In this case, the alleged deprivation occurred as the result Agency's failure to enact constitutionally adequate procedures. The fact that the Agency's failures precluded BV Beverage from being able to protect its interest in the license from expiring by operation of law cannot preclude BV Beverage from redress for the harm caused by the agency inaction. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). BV Beverage respectfully requests that this Court hold that unconstitutional inaction is, indeed, reviewable and on such grounds reverse that portion of the District Court's decision holding that the Agency did not take any action that is reviewable.

III. CONCLUSION

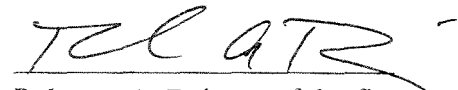
For the foregoing reasons, BV Beverage respectfully submits that the ABC has not presented any compelling argument or authority supporting the absence of lawful renewal procedures necessary to allow an owner/lessor of a liquor license to protect its valuable property rights in the same. Because no such procedure exists, the expiration by operation of law of BV Beverage's interest in its license without notice and opportunity to renew the same is unconstitutional and cannot be upheld. BV Beverage requests that the District Court's holding that this is not a reviewable agency action and the District Court's holding that BV Beverage's

³ In a letter rejecting BV Beverage's position that it should have had notice and opportunity to renew the license, without first having to transfer it back to itself from Iggy's, the ABC informed BV Beverage as follows: "ABC is not statutorily, nor required by regulation to give a notice of renewal to a licensee, much less an entity that is not the named licensee." And, further, that "It appears that BV Beverage failed, due to its own oversight, to exercise its option to repossess and transfer the license back to itself.... Had BV Beverage taken this step, BV Beverage would have known, long before Iggy's license expired, when the license was due to be renewed." R. p. 128.

due process rights were not violated be overturned and this matter be remanded to the District Court with instructions to enter a judgment reinstating the license to BV Beverage.

DATED this 23rd day of July, 2012.

RAINEY LAW OFFICE

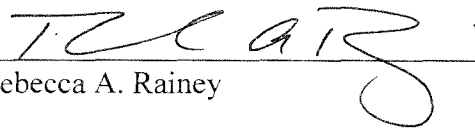

Rebecca A. Rainey, of the firm,
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 2012, I caused a true and correct copy of the foregoing **APPELLANT'S REPLY 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

Appendix A

CHAPTER 74
(H.B. No. 71)

AN ACT

RELATING TO ANNUAL FEES PAID TO THE PUBLIC UTILITIES COMMISSION; AMENDING SECTION 61-1001, IDAHO CODE, TO PROVIDE THAT ADMINISTRATIVE PERSONNEL COSTS OF THE IDAHO PUBLIC UTILITIES COMMISSION, OTHER THAN SALARIES AND RELATED PAYROLL EXPENSES OF COMMISSIONERS, BE PAID FROM FEES ASSESSED AGAINST UTILITIES, RAILROAD CORPORATIONS AND MOTOR CARRIERS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 61-1001, Idaho Code, be, and the same is hereby amended to read as follows:

61-1001. ANNUAL FEES PAYABLE TO COMMISSION BY PUBLIC UTILITIES AND MOTOR CARRIERS -- PURPOSE. Each public utility and each railroad corporation, subject to the jurisdiction of the commission, and subject to the provisions of this act, shall pay to the commission in each year, a special regulatory fee in such amount as the commission shall find and determine to be necessary, together with the amount of all other fees paid or payable to the commission by each such public utility and railroad corporation in the current calendar year, together with the fees collected by the commission from motor carriers under chapter 8, title 61, Idaho Code, to defray the amount to be expended by the commission for expenses in supervising and regulating the public utilities, railroad corporations and motor carriers subject to its jurisdiction ~~except for administrative--personnel--costs--which shall be provided from the general fund--For this purpose; administrative--personnel--costs--shall mean salaries and related payroll expenses for the commissioners; the secretary of the commission and administrator; and clerks and secretaries assigned to administration,~~ except for salaries and related payroll expenses for the commissioners.

Approved March 23, 1981.

CHAPTER 75
(H.B. No. 98)

AN ACT

RELATING TO LIQUOR BY THE DRINK LICENSES; AMENDING SECTION 23-908, IDAHO CODE, TO PROVIDE FOR A FEE FOR THE TRANSFER OF A LIQUOR BY THE DRINK LICENSE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 23-908, Idaho Code, be, and the same is hereby amended to read as follows:

23-908. FORM OF LICENSE -- AUTHORITY -- EXPIRATION -- LIMITATIONS. (1) Every license issued under this act shall set forth the name of the person to whom issued, the location by street and number, or other definite designation, of the premises, and such other information as the director shall deem necessary. If issued to a partnership, the names of the persons constituting such partnership shall be set forth. If issued to a corporation or association, the names of the principal officers and the governing board shall be set forth. Such license shall be signed by the licensee and prominently displayed in the place of business at all times. Every 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. All licenses shall expire at 1:00 o'clock A.M. on January 1st of the following year and shall be subject to renewal upon proper application. Renewal applications for liquor by the drink licenses accompanied by the required fee must be filed with the director on or before January 1st of the following year, provided, however, any licensee holding a valid license who fails to file an application for renewal of his current license on or before January 1st of the following year shall have a grace period of an additional thirty-one (31) days in which to file an application for renewal of his license and during which time he shall not be permitted to sell and dispense liquor by the drink at retail. No person shall be granted more than one (1) license in any city for any one (1) year; and no partnership, association or corporation holding a license under this act shall have as a member, officer or stockholder any person who has any financial interest of any kind in, or is a member of, another partnership or association or an officer of another corporation holding a license in the same city for the same year; provided that this section shall not prevent any person, firm or corporation, owning two (2) or more buildings on connected property in a city from making application for and receiving licenses permitting the sale of liquor by the drink in such building.

(2) An application to transfer any license issued pursuant to chapter 9, title 23, Idaho Code, shall be made to the director. Upon receipt of such an application, the director shall make the same investigation and determinations with respect to the transferee as are required by section 23-907, Idaho Code, and if the director shall determine that all of the conditions required of a licensee under chapter 9, title 23, Idaho Code, have been met by the proposed transferee, then the license shall be indorsed over to the proposed transferee by said licensee for the remainder of the period for which such license has been issued and the director shall note his approval thereof upon such license.

(3) Each new license issued on or after July 1, 1980, shall be placed into actual use by the original licensee at the time of issuance and remain in use for at least six (6) consecutive months or be forfeited to the state and be eligible for issue to another person by the director after compliance with the provisions of section 23-907, Idaho Code. Such license shall not be transferrable for a period of two (2) years from the date of original issuance, except as provided by subsections (4)(a), (b), (c), (d) or (e) of subsection (4) of this

section.

(4) The fee for transferring a liquor license shall be ten per cent (10%) of the purchase price of the liquor license or the cost of good will, whichever is greater; except no fee shall be collected in the following events:

(a) The transfer of a license between husband and wife in the event of a property division; or

(b) The transfer of a license to a receiver, trustee in bankruptcy or similar person or officer; or

(c) The transfer of a license to the heirs or personal representative of the estate in the event of the death of the licensee; or

(d) The transfer of a license arising out of the dissolution of a partnership where the license is transferred to one or more of the partners; or

(e) The transfer of a license within a family whether an individual, partnership or corporation.

(5) The fee for transferring a liquor license for other than a sale shall be fifty per cent (50%) of the per annum license fee set forth in section 23-904, Idaho Code; except no fee shall be collected for transfers as outlined in section 23-908, subsection (4)(a), (b), (c), (d), or (e), Idaho Code.

(6) The controlling interest in the stock ownership of a corporate licensee shall not be, directly or indirectly, sold, transferred, or hypothecated unless the licensee be a corporation, the stock of which is listed on a stock exchange in Idaho, or in the city of New York, state of New York, or which is required by law to file periodic reports with the securities and exchange commission. Provided, however, that in the event of the transfer of more than twenty-five per cent (25%) of the authorized and issued stock of the corporation, it shall create a rebuttable presumption that such transfer constitutes a transfer of the controlling interest of such corporation.

Approved March 23, 1981.

CHAPTER 76
(H.B. No. 99)

AN ACT

RELATING TO THE SALE OF KEG BEER; AMENDING CHAPTER 10, TITLE 23, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 23-1018, IDAHO CODE, TO REQUIRE THAT THE SELLER OF KEG BEER BE IDENTIFIED ON THE CONTAINER.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 10, Title 23, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 23-1018, Idaho Code, and to read as follows:

STATEMENT OF PURPOSE

RS 6291

Idaho law currently places certain restriction on the transfer and use of retail liquor licenses once those licenses are obtained from the State of Idaho. The proposed legislation will clarify the procedure utilized in the transfer of a liquor license in those cases where the license is being utilized. It does so by requiring that a transfer other than a sale shall be subject to a transfer fee of 50% of the annual license fee.

FISCAL IMPACT

This legislation will generate approximately \$26,000 to the General Account.

RS 6307 TRANSPORTING ALCOHOLIC BEVERAGES IN OPEN CONTAINER. Mr. Cade explained that this bill changes wording. As it now stands, the officer must see a person break the seal of container to find him guilty. This changes the wordage in 1947 bill to close this loophole. This does not apply to beer.

MOTION: Representative Paxman made a motion that RS 6307 be introduced, the motion was seconded by Rep. Braun. The motion carried.

RS 6309: PROHIBITS SALE OR DISPENSING OF WINE AT ANY UNLICENSED PREMISES. Mr. Cade explained that this relates to allowing consumption of liquor on premises to require liquor license. Mr. Cade asked permission to speak to RS 6309 and RS 6310 at same time as they are companion bills. Permission was granted. This bill would require that any place other than a private residence would be included in this law. This would require purchase also of city and county licenses in addition to state license.

MOTION: Representative Bunting made a motion to return RS 6309 to the sponsor. The motion was seconded by Rep. Lewis. The motion carried.

RS 6310: PROHIBITS SALE OR DISPENSING OF BEER AT ANY UNLICENSED PREMISES. Companion bill to RS 6309.

MOTION: A motion was made by Rep. Bunting and seconded by Rep. Lewis to return this bill to the sponsor. The motion carried.

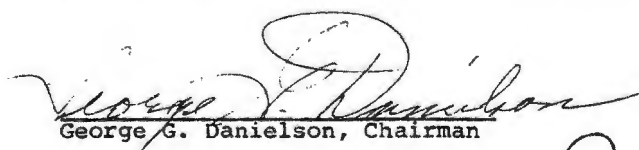
RS 6291 RELATES TO THE TRANSFER AND USE OF RETAIL LIQUOR LICENSES ONCE OBTAINED FROM THE STATE OF IDAHO. Mr. Cade pointed out that last year the legislature passed a transfer fee on the sale of liquor license at 10% of price. This legislation would require that a transfer other than sale shall be subject to a transfer fee of 50% of the annual license fee. Mr. Cade explained the license fee rates according to population and the total costs involved.


MOTION: A motion was made by Representative Hammond and seconded by Rep. Paxman to introduce RS 6291. The motion carried.

RS 6375: REPEALS IDAHO PLANNING AND ZONING ACT. Representative Fuller spoke in favor of this bill. He stated that the State Code takes right from property owner to use his land as he sees fit. He feels there are too many controls over private property owners. Mr. Fuller cited instances of problems he had dealt with in Los Angeles relating to zoning ordinances. He expressed fear of Idaho experiencing many of these problems. Mrs. Oliason also spoke to RS 6375. She mentioned several abuses she felt had taken place in Ada County.

MOTION: A motion to introduce was made by Representative Montgomery; the motion was seconded by Rep. Little. Rep. Montgomery stated that he thinks RS 6375 will generate discussion on matters of great concern to many constituents. Several other representatives expressed this same feeling. Rep. Higgins stated that he would oppose repeal but does not oppose change. Motion carried.


There being no further business, the meeting was adjourned at 11:25 a.m.

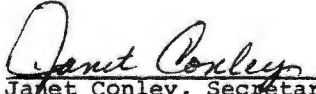

George G. Danielson, Chairman


Janet Conle

- MOTION: Rep. Little made a motion with Rep. Harris seconding to send HB 97 to the floor with a "do pass" recommendation. An amended motion was made by Rep. Chatburn and seconded by Rep. Little to draft a new bill. The Amended Motion Carried. A new bill will be drafted.
- HB 98: WOULD PROVIDE FOR A FEE FOR THE TRANSFER OF A LIQUOR BY THE DRINK LICENSE. Mr. Cade explained that liquor last year the legislature passed a transfer fee on the sale of liquor licenses at 10% of the license fee imposed by the state. HB 98 would require that a transfer other than sale shall be subject to a transfer fee of 50% of the annual license fee. Mr. Cade explained the license fee rates increase according to population.
- MOTION: Rep. McDermott made a motion to hold HB 98 for further study no second was made. Rep. Little made a motion to send HB 98 to the floor with a "do pass" recommendation. Rep. Chatburn seconded the motion. Rep. McDermott stated that she does not feel that a case is made to change the law. Rep. Lewis stated that he feels it will give the Dept. of Law Enforcement more control and would be in favor of the bill. The motion carried. Rep. Danielson will sponsor the bill.
- HB 99: IDENTIFICATION SYSTEM FOR KEG BEER. Mr. Cade stated that this is a companion bill to HB 97. The keg beer will be identified with a tag which will in turn identify the seller and buyer. There would be no cost of tags to seller and the records would be kept for one year.
- MOTION: Representative Bateman made a motion to send HB 99 to the floor with a "do pass" recommendation. Rep. Harris seconded the motion. Rep. Stoicheff indicated that keg licensing should be sufficient to help with problems. Rep. McDermott expressed concern of large amounts of paperwork for sellers and feels distributors try to assure they're not selling to minors. Rep. Bateman stated that HB 99 would be a good tool to help with the problem. The Motion carried. Rep. Bateman will sponsor the bill on the floor.

There being no further business, the meeting adjourned.


George G. Danielson, Chairman


Janet Conley, Secretary

agreements because Indian tribes are not included in the statute as a government or state agency.

N: Senator Twilegar moved and Senator Kiebert seconded this be sent out with a "do pass" recommendation. Motion carried.

N: Senator Risch moved and Senator Twilegar seconded the reappointment of Eugene Miller to the State Board of Education, be sent out with a "do confirm" recommendation. Motion carried.

ANNUAL FEES PAID TO THE PUBLIC UTILITIES COMMISSION.

Jim Fell, PUC, explained the legislation which would allow administrative personnel costs other than the salaries of the commissioners to be paid from fees assessed against utilities, railroad corporations and motor carriers.

ON: Senator Twilegar moved and Senator Steen seconded this be sent out with a "do pass" recommendation. Motion carried.

3 LIQUOR BY THE DRINK LICENSES.

Pat Riceci explained the legislation. He said since the passage of this legislation a problem has come up regarding the leasing of the license. A license is leased out and thus gets around the transfer fee.

ON: Senator Twilegar moved and Senator Risch seconded this be sent out with a "do pass" recommendation. Motion carried.

13 EXPENDITURES FOR COMMUNICATIONS & POSTAGE FOR STATE AGENCIES.

Mr. Luthy, Department of Administration, explained the legislation. He said they were experiencing a 30% increase in costs. This bill would give them the authority to pay their bills on time.

ON: Senator Risch moved and Senator Twilegar seconded this bill go out with a "do pass" recommendation. Motion carried.

7173 DISQUALIFICATIONS FROM JURY DUTY: OVER 70.

ION: Senator Steen moved and Senator Twilegar seconded this be sent for introduction. Motion carried.