7-14-2010

Fuchs v. State, Dept. of idaho State Police, Bureau of Alcohol Beverage Control Clerk's Record v. 2 Dckt. 37652

Vol 2 of 3

Volume 2

LAW CLERK

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

DANIEL FUCHS

Plaintiff/Appellant

and

STATE OF IDAHO, ISP

Defendant/Respondent

and

Appealed from the District Court of the FIFTH *Judicial District for the State of Idaho, in and for* TWIN FALLS *County*

Hon. G RICHARD BEVAN *District Judge*

BRIAN DONESLEY

Attorney X *for Appellant*

CHERYL MEADE

Attorney X *for Respondent*

FILED - COPY

Filed this JUL 14 2010 *day of* _____, 20__

_____ *Clerk*

Supreme Court ____ Court of Appeals ____

By _____ *Deputy*

37652

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, Petitioner/Appellant, vs STATE OF IDAHO, DEPARTMENT OF IDAHO STATE POLICE, BUREAU OF ALCOHOL BEVERAGE CONTROL, Respondent. DANIEL FUCHS, Plaintiff/Appellant, vs. STATE OF IDAHO, DEPARTMENT OF IDAHO STATE POLICE, BUREAU OF ALCOHOL BEVERAGE CONTROL, Defendant/Respondent.	SUPREME COURT 37652-2010 DISTRICT COURT NO. CV 09-4185 CV 09-3914

CLERK'S RECORD ON APPEAL
Volume 2

Appeal from the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of Twin Falls

HONORABLE G. RICHARD BEVAN
District Judge

BRIAN DONESLEY
Attorney at Law
548 North Avenue H
P. O. Box 419
Boise, ID 83701-0419

ATTORNEY FOR APPELLANT

CHERYL MEADE
Deputy Attorney General
Idaho State Police
700 S. Stratford Dr.
Meridian, ID 83642

ATTORNEY FOR RESPONDENT

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BRIAN DONESLEY ISB#2313
Attorney at Law
548 North Avenue H
Post Office Box 419
Boise, Idaho 83701-0419
Telephone (208) 343-3851
Facsimile (208) 343-4188

Attorney for Petitioner/Plaintiff
Daniel S. Fuchs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, **Petitioner,** **v.** **STATE OF IDAHO**, Department of Idaho State Police, Bureau of Alcohol Beverage Control, **Respondent.**	**CASE NO. CV 2009-3914** **(Consolidated with Case No. CV 2009-4185)** **AFFIDAVIT OF BRIAN DONESLEY**
DANIEL S. FUCHS, **Plaintiff,** **v.** **STATE OF IDAHO**, Department of Idaho State Police, Bureau of Alcohol Beverage Control, **Defendant.**	

STATE OF IDAHO)
)ss.
County of Ada)

BRIAN DONESLEY, being first duly sworn on oath, deposes and says:

1. Affiant is the attorney for the Plaintiff in the above-referenced action and has personal knowledge of the facts contained in this affidavit.

2. Attached as **Exhibit 1** is a true and correct copy of GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF LOCAL GOVERNMENTS UNDER THE LIQUOR CONTROL CODE, November 2000, published by the State of Michigan, Liquor Control Commission, Michigan Department of Consumer and Industry Services.

3. Further, your Affiant sayeth naught.

DATED this 20 day of November, 2009.

Brian Donesley
Attorney for Plaintiff

SUBSCRIBED AND SWORN to before me, this 20th day of November, 2009.

BARBI M. CROWELL NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at: Caldwell, Idaho
Commission expires: 11-16-2015

CERTIFICATE OF SERVICE

On this 20th day of November, 2009, I hereby certify that I served the above document on the addressee indicated, by delivering the same to the following party by method indicated below:

Cheryl Meade, Deputy A.G.
Idaho State Police
700 S. Stratford Drive
Meridian, ID 83642-6202

[ ] U.S. Mail
[ ] Hand-Delivered
[ ] Overnight Mail
[X] Facsimile (884-7228)

Barbi McCary Crowell

THE MICHIGAN LIQUOR CONTROL COMMISSION
&
LOCAL UNITS OF GOVERNMENT

A Guide to the Rights and Responsibilities of Local Governments under the Liquor Control Code

November, 2000

Michigan Department of Consumer and Industry Services (CIS)
John Engler, Governor
Kathleen M. Wilbur, Department Director
"Serving Michigan...Serving You"
www.cis.state.mi.us

EXHIBIT 1

10 212

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Preface

The hospitality industry in Michigan is a dynamic one that brings jobs and good will to our state and contributes to economic growth. Holding a license to sell alcoholic beverages is often considered an important component of being competitive and profitable within the industry.

Local units of government — cities, townships and villages — and the Michigan Liquor Control Commission (MLCC) work together in both the licensing process and in the enforcement of the state's liquor laws. Whether you are a city or village council member, a township board member or a local law enforcement official or officer, this guide is designed to help you understand how the licensing process works and your role in granting specific liquor licenses and permits. Additionally, when a local governmental unit is considering adopting a resolution objecting to the renewal of a license or requesting the MLCC to revoke a license, the unit should be aware of the documentation that must be submitted with the resolution. Finally, this guide explains the Commission's position on the responsibilities that local governments have for the enforcement of liquor laws. Obviously, the local government's attorney should be consulted about these matters.

We also provide Questions and Answers to show how the laws and rules are applied in real situations. It may be useful for you to refer to more complete language of the statute or court cases, so references have been provided. **MCL** refers to the Michigan Compiled Laws; **MAC** refers to the Michigan Administrative Code which contains the administrative rules promulgated by the MLCC.

The Commission believes that when local officials have a better understanding of their rights and responsibilities under the Liquor Control Code, our working relationship will be improved with you as well as with applicants and licensees. We must caution however, that this Guide is not intended to be a substitute for the Liquor Control Code and Administrative Rules, or for competent legal counsel.

We welcome your comments and suggestions for future editions of this Guide. Send them to the Commission's Lansing office at the address printed in the back cover. You are also invited to attend our semi annual public hearings where we receive comments from the public on the administration of the Liquor Control Code. The meeting dates are published on our web site at http://www.cis.state.mi.us/lcc

The Michigan Liquor Control Commission

November 2000

Licensing

This chapter, directed primarily to members of local government legislative bodies, provides information designed to answer the most commonly asked questions about the on-premises licensing process including types of licenses and the quota system for licenses to sell alcoholic beverages. It also describes the role of the local legislative body and local law enforcement officials in the licensing process.

On-premises Licenses

These licenses are issued to allow alcoholic beverages to be sold, served and consumed on the premises of the licensed business:

! Class C	This license allows the business to sell beer, wine, liquor and mixed spirit drink for consumption on the premises. MCL 436.1107(2)
! Club	This license enables a private club to sell beer, wine, liquor and mixed spirit drink to bona fide members only. MCL 436.1107(3)
! B Hotel	This license permits a hotel to sell beer, wine, liquor and mixed spirit drink for consumption on the premises and in the rooms of bona fide guests. MCL 436.1107(9)
! A Hotel	This license allows a hotel to sell only beer and wine for consumption on the premises and in the rooms of bona fide guests. MCL 436.1107(8)
! Tavern	This license enables a business to sell only beer and wine for consumption on the premises. MCL 436.1113(1)
! Brewpub	This license is issued in conjunction with an on-premises license and authorizes the licensee to manufacture and sell beer for consumption on the premises or for take-out. MCL 436.1105(11)
! Micro Brewer	This manufacturing license allows a business to sell beer produced on the premises to consumers for consumption on the premises or for take-out. MCL 436.1109(2)
! Wine Maker	This manufacturing license allows a business to sell wine produced on the premises in a restaurant for consumption on or off the premises.
! Special License	This license (often called a "24-hour license") allows a non-profit organization to sell beer, wine and/or liquor for consumption on the premises for a limited period of time. This includes wine auctions for charities. MCL 436.1111(10)
! Resorts	In the years permitted by law, the Commission can issue a limited number of Resort licenses for any of the on-premises classifications except Club and Special licenses, in addition to the quota established by law for these licenses. MCL 436.1531

An on-premises licensee often holds a Specially Designated Merchant (SDM) license to sell beer and wine for consumption off the premises, in conjunction with the on-premises license.

Summary of On-premises License Information

On-premises License Type:	Sell Beer?	Sell Wine?	Sell Liquor ?	Licensed to sell to:	Population Quota Applies?
Class C	Yes	Yes	Yes	General Public	Yes
Resort Class C	Yes	Yes	Yes	General Public	No
Club	Yes	Yes	Yes	Club Members	No
B-Hotel	Yes	Yes	Yes	General Public and in guest rooms	Yes
Resort B-Hotel	Yes	Yes	Yes	General Public and in guest rooms	No
A-Hotel	Yes	Yes	No	General Public and in guest rooms	Yes
Resort A-Hotel	Yes	Yes	No	General Public and in guest rooms	No
Tavern	Yes	Yes	No	General Public	Yes
Resort Tavern	Yes	Yes	No	General Public	No
Special License	Yes	Yes	Yes	General Public	No

Transferability of Escrowed Licenses

On-premises escrowed licenses issued under MCL 436.1531are available subject to local legislative approval under section 501(2) to an applicant whose proposed operation is located within any local governmental unit in a county with a population of under 500,000 or a county with a population of over 700,000 in which the escrowed license was located. If the local governmental unit within which the former licensee's premises were located spans more than 1 county, an escrowed license is available subject to local approval to an applicant whose proposed operation is located within any local governmental unit in *either county*.

If an escrowed license is activated within a local governmental unit other than that local governmental unit within which the escrowed license was originally issued, the Commission shall count that activated license against the local governmental unit originally issuing the license. The upgrading of a license resulting from a request under MCL 436.1531(1) involving the transfer of an escrowed license, shall be approved by the local governmental unit having jurisdiction.

The Quota System

A quota system exists for retail licenses in order to control the growth of licensed businesses selling alcohol beverages in the state. Simply put, quotas have been established by the Legislature based on a ratio of licenses to population. A change in the demographics of a municipality, whether an increase or decrease, can change the number of licenses available. There are no quota restrictions for Specially Designated Merchants (SDMs).

The population ratios the Commission uses are different for on-premises and off-premises licenses. For on-premises licenses, one license is granted for each 1,500 of population or **major** fraction thereof. For off-premises licenses (SDD), one license is granted for every 3,000 in population or **any** fraction thereof. Examples of the ratios are:

On-premises	
Population	*# of licenses*
1- 2,250	1
2,251- 3,750	2
3,751- 5,250	3
5,251	4 etc.

Off-premises	
Population	*# of licenses*
1-3,000	1
3,001- 6,000	2
6,001- 9,000	3
9,001-12,000	4 etc.

Local units of government have an important role to play in the issuing of quota licenses. For example, in the case of an on-premises license, approval is required from a local governmental unit with a population of less than 750,000. In the case of off-premises licenses, local approval is not required but the Commission requires license applicants to meet all appropriate local ordinances, including zoning requirements. There are exceptions to quotas when issuing certain types of licenses. For more detailed information see MCL 436.1531 and MCL 436.1533.

Any of the conditions below can change the number of licenses available within a local unit of government. The MLCC will notify the clerk of the legislative body if:

1. A special or regular census, or annexation, makes additional licenses available.
2. A canceled or revoked license creates an opening in the number of licenses available.
3. An applicant who is approved by the MLCC does not subsequently submit required documents and the license is not issued.
4. An approved applicant does not subsequently open the licensed business within one year of approval and fails to obtain required extensions.
5. The number of unissued but available licenses declines because the population decreases.

Filling Quota Openings

The legislative body of the local governmental unit has the responsibility of determining whether to fill the quota opening for on-premises licenses. If yes, and there are a number of applicants for the available license(s), then you must send the Commission a **resolution** as to which person was approved "above all others" for the available license(s). *Refer to the sample resolution at the end of this section.*

The Liquor Control Commission cannot approve an application for an on-premises license subject to the quota, without an approval resolution from the local legislative body. However, there is no statutory requirement that a local unit of government **must** approve any application or

authorize issuing **all** or **any** licenses available under the quota.
The applicants approved by the local legislative body will also go through the MLCC investigation process prior to consideration by the Commission for a license. This investigation is thorough and concentrates on the applicant's (including partnerships and corporations) qualifications for the license requested.

Waiving the SDD Quota

The Commission may waive the quota requirement if it has been filled and there is no existing SDD license issued within two miles of the proposed location measured along the nearest traffic route. MCL 436.1533

The Commission can also waive the quota requirement if **all** of the following conditions are met:

A. the city, township, or village has a population of less than 3,000 and
B. the only existing SDD license is held in conjunction with an on-premises A-Hotel or B-Hotel license, and
C. no other waivers have been granted in the local governmental unit. MAC R 436.1135(6)

On-premises Licenses Exempt from Quota Restrictions

Development District Authorities

A "development district" is any of the following (MCL 436.1521(9)) :

1. An authority district established under the tax increment finance authority act, 1980 PA 450, MCL 125.1801 to 125.1830.
2. An authority district established under the local development financing act, 1986 PA 281, MCL 125.2151 to 125.2174.
3. A downtown district established under 1975 PA 197, MCL 125.1651 to 125.1681.
4. A principal shopping district established under 1961 PA 120, MCL 125.981 to 125.987, before January 1, 1996.

Under MCL 436.1521 the Commission may issue up to 50 tavern or Class C licenses in addition to the number of licenses provided by quota, to persons or businesses that meet the following requirements:

A) The business is a full service restaurant, is open to the public, and prepares food on the premises.
B) The business is open for food service not less than 10 hours per day, 5 days a week.
C) At least 50% of the gross receipts of the business are derived from the sale of food for consumption on the premises. Food does not include beer or wine sales.
D) The business has dining facilities to seat not less than 25 persons.
E) The business is located in a development district with a population of not more than 50,000 in which the authority, after a public hearing, has found that the issuance of the license would prevent further deterioration within the development district and promote economic growth within the development district. The commission will not issue a license as outlined in section 521 unless the local unit of government within which the authority is located, after holding a public hearing, passes a resolution concurring on the findings of the authority.

Also, the Commission will not issue a license under section 521 if the local governmental unit within which the development district is located has not issued all appropriate on-premises licenses available under quota or if an appropriate on-premises escrowed license is readily available in any local unit of government in which the development district is located. The Commission shall not issue more than 2 licenses authorized under section 521 in any city or municipality with a population greater than 50,000. If an applicant's proposed location is within more than 1 development district, the applicant shall obtain the approval of both or all of the

applicable local units of government or development districts.

Resort Licenses

Resort licenses may be issued for Class C, Tavern, B-Hotel and A-Hotel classifications without regard to the quota only when it is deemed to be economically desirable and beneficial to the tourist industry. Resort licenses are subject to approval by the local legislative body and must meet the qualifications for both the type of regular license requested and as a Resort.

There are several types of on-premises resort licenses authorized under MCL 436.1531:

A. 550 on-premises resort licenses which are transferrable to any location in Michigan. All of these licenses have currently been issued, but their ownership and location is transferrable.

B. The Commission may issue not more than 10 additional licenses in years designated by statute to establishments whose business and operation is designed to attract and accommodate tourists and visitors to the resort area, whose primary purpose is not the sale of alcoholic liquor and whose capital investment in the licensed premises is at least $75,000. These licenses may be transferred from one owner to another but cannot be moved (location).

C. In addition to A and B above, up to 20 additional licenses for resort economic development may be issued to applicants who demonstrate that they meet the criteria above and have a minimum investment of $1,500,000. These licenses may be transferred from one owner to another but cannot be moved (location).

Other Licenses Not Subject to Quota

Public and County-owned airports, municipal civic centers or civic auditoriums, private, non-profit clubs and municipal golf courses are not subject to quota restrictions. A limited number of special purpose licenses are also available to well established non-profit organizations with university affiliation when the event is held on campus (art expos, outdoor festivals) and to National or International sporting events hosted by a city.

Publicly Owned Airports

An on-premises license may be issued by the Commission to the owner and/or lessee of buildings within a passenger terminal complex of a publicly-owned airport. The airport must be served by regularly scheduled commercial passenger airlines certified by the Federal Aviation Agency or the Civil Aeronautics Board to enplane and deplane passengers. These licenses are not transferrable. MCL 436.1507

County Airports

An on-premises license may be issued by the Commission to an establishment situated on property where there is an airport that is owned by the county or in which the county has an interest. MCL 436.1531(10)

Municipally Owned Golf Courses

An on-premises license may be issued by the Commission to a golf course open to the public and owned by a county, city, township or village situated in a county with a population of 1,000,000 or more. These licenses are not transferrable. MCL 436.1515

Municipal Civic Center or Civic Auditorium

On-premises licenses may be issued by the Commission to the governing or operating body of a municipal civic center or civic auditorium and/or one or more of its concessionaires for the service of alcoholic beverages at scheduled events. In order to obtain this type of license, the civic center or auditorium must be located within a city or township having a population of at least 9,500. The facility must be owned and operated as a municipal enterprise. Additionally, the local legislative body must authorize the governing body or its concessionaire to apply to the Commission for a license. These licenses may not be issued to an educational institution or a facility operated in connection with an educational institution and are not transferrable. MCL 436.1509

Club

A Club license enables a private club to sell beer, wine, liquor and mixed spirit drinks to bona fide members only. MCL 436.1537(d)

National or International Sporting Event Licenses

A maximum of 40 licenses may be issued for a period of not more than 30 days. The premises to be licensed must be in the central business district of a city having a population of 70,000 or more and the city must be the official host of the national or international sporting event. The governing body of the city must recommend the number of licenses to be issued in the theme area(s) and must provide a list of the applicants and locations with certification that premises to be licensed meet applicable state and local building, safety, and health laws and ordinances. MCL 436.1517

College/University (with Hospitality Program) Hotel and Conference Center Licenses

An on-premises license may be issued by the Commission to the governing board of a college or university operating a conference center for the sale of alcoholic beverages at regularly scheduled conference center activities only. The conference center, with certain exceptions, must have meeting rooms, banquet areas, social halls, overnight accommodations and related facilities for special activities scheduled by the college or university. MCL 436.1513

Permits

Banquet Facility Permits

Banquet Facility Permits are *extensions of on-premises licenses* for the purpose of serving alcoholic beverages at a facility used only for scheduled functions and events. This permit does not affect the quota for on-premises licenses even if issued in a governmental unit other than that in which the license is issued. Approval of the local legislative body in which the facility is located is required. MCL 436.1522

Special Activity Permits

The information on the following pages describes special activity permits which can be issued with the different types of retail liquor licenses. These activities may not be allowed on a licensed premises without having the appropriate special activity permit.

PERMIT TYPE	ISSUED TO	DESCRIPTION / ACTIVITY
Sunday Sales	On-Premises: Class C, Club, B-Hotel Off-Premises: SDD Resorts: Class C, B-Hotel, SDD	Allows Sunday sales of spirits between the hours of 12 noon and 12 midnight. Subject to these restrictions: ! Sunday sales must be legal in the local unit of government. ! Gross sales of spirits must be less than 50% of the gross sales of the entire business, including beer and wine.
Living Quarters	On-Premises: Class C, Tavern Off-Premises: SDD, SDM Resorts: Class C, Tavern, SDD, SDM	Allows living quarters to be directly connected to the licensed premises.
Direct Connection Authorization	All types of retail licenses	Required to connect the licensed business with any unlicensed area not under the direct control of the licensee.
After Hours Food	All On-Premises licenses including resorts	Allows the business to stay open for the sale of food between 2:30 a.m. and 7 a.m. Monday through Saturday or between 2:30 a.m. and noon on Sunday. The business must operate a full service kitchen. The licensee must specify the hours requested. Sales or consumption of any alcoholic beverages are not allowed during these hours. Approval of local law enforcement is required.
Dance	All On-Premises licenses including Resorts	Allows dancing by patrons. The dance floor must be at least 100 feet square, well defined, clearly marked, and un-obstructed when customer dancing is permitted. Approval of local police and legislative body is required in all other areas. Activities allowed by this permit may only be conducted during the legal hours for sale and consumption of alcoholic beverages.
Entertainment	All On-Premises licenses including Resorts	Allows dancing by employees or contract entertainers, or for monologues, dialogues, motion pictures, still slides, closed circuit television, contests, or other performances for public viewing. Does not allow dancing by patrons. Not required for orchestra playing, piano playing, or playing of other musical instruments, or for the showing of publicly broadcast television. Police and local legislative body approval is required except in Detroit where only police approval is required. Activities allowed by this permit may only be conducted during the legal hours for sale and consumption of alcoholic beverages.

PERMIT TYPE	ISSUED TO	DESCRIPTION / ACTIVITY
Topless Activity	All On-Premises licenses including Resorts	Allows entertainment or work related activity performed on the licensed premises in which the female breast area is exposed by any means including see-through clothing or body stockings. Except in Detroit, this permit must be approved by both the local law enforcement agency and governmental unit.
Golf	All On-Premises licenses including Resorts	Allows the licensed premises to be occupied for registering golfers before the legal hour of 7:00 a.m. on weekdays and between 2:30 a.m. and noon on Sunday. Alcoholic beverages cannot be sold or consumed on the premises during this period. Licensed premises must be adjacent to the golf course. Local police investigation and approval is also required.
Additional Bar	Class C, B-Hotel, Class C Resort, B-Hotel Resort	Required for each bar over one on the licensed premises at which customers may purchase alcoholic beverages.. Local law enforcement investigation and approval is also required. Additional Bar Permits are not required for A-Hotels, Clubs and Taverns.
Bowling	Bowling alleys with any On-Premises License	Allows bowling on the licensed premises before or after the legal hours. The licensee must specify the hours of operation. Alcoholic beverages may not be sold or consumed during these hours. Local law enforcement investigation and approval is also required.
Outdoor Service	All On-Premises Licensees including Resorts	Allows the sale and consumption of alcoholic beverages in a well-defined and marked area adjacent to the licensed premises. Local law enforcement investigation and approval is also required.
Ski	All On-Premises licensees including Resorts	Allows the licensed premises to be occupied for the registration of skiers before or after the legal hours. Alcoholic beverages may not be sold or consumed on the premises during the period of the permit.
Miscellaneous	Specific purpose permits may be issued for other types of unique circumstances (i.e. tennis or racquetball) which require the premises to be occupied at other than the legal hour. These requests are considered on an individual basis	

Local Approval

Legislative Body and Law Enforcement

In local governmental units with a population of less than 750,000, approval of the local legislative body is required for all on-premises licenses (both new and transfers) except Club and Special licenses. Approval of the local legislative body is also required for Dance, Entertainment, Topless Activity and Banquet Facility permits issued to licensees authorizing certain activities on the licensed premises. Approval and recommendation of the chief local law enforcement officer having jurisdiction is also part of the licensing process for all licenses and permits where only

police approval is required. MCL 436.1501 and 1916, and MAC R 436.1105(3).

The chart below shows which types of on-premises licenses and permits require local legislative body approval, and which require only local law enforcement investigation.

Summary of Local Approvals Required for On-premises Licenses and Permits:

*Type of On-premises **License**:*	*Local Legislative Approval?*	*Local Law Enforcement Investigation Required?*
Class C & Resort Class C	Yes - except Detroit[1]	Yes
Club	No[2]	Yes
B-Hotel and Resort B-Hotel	Yes - except Detroit[1]	Yes
A-Hotel and Resort A-Hotel	Yes - except Detroit[1]	Yes
Tavern and Resort Tavern	Yes - except Detroit[1]	Yes
Special (24-hour)	No - except on state military bases	Yes
*Type of On-premises **Permit**:*		
Specific Purpose Permit Food, Golf, Bowling, Ski[3]	No	Yes

*Type of On-premises **Permit**:*	*Local Legislative Approval?*	*Local Law Enforcement Investigation Required?*
Dance	Yes[2] - except in Detroit[1]	Yes
Entertainment	Yes[2] - except in Detroit[1]	Yes
Topless Activity	Yes[2] - except in Detroit[1]	Yes
Banquet Facility Permit	Yes - except in Detroit[1]	Yes
Additional Bar	No	Yes
Outdoor Service	No	Yes
Living Quarters	No	Yes
Direct Connection to Unlicensed premises	No	Yes

Sunday Sales Legal hours of sale on Sundays are from 12:00 noon until 2:00 a.m. of the next day, unless locally prohibited. [4] Individual governmental units may prohibit the sale of alcoholic liquor on Sundays by resolution or ordinance, but local approval is not needed specifically for a Sunday Sales permit. **By state law, beer and wine may be sold after 12:00 noon on Sunday without special authorization however, sales may be prohibited locally by referendum.**

1- Because of the number of licensed establishments in the city of Detroit, it has a specialized liquor investigation process which includes technical approvals for zoning and ordinance investigation. Therefore, the local legislative approval requirement has been waived for Detroit by MCL 436.1501.

2 - Although Club licenses do not require legislative body approval, local approval is needed for Dance, Entertainment and Topless Activity permits issued to Clubs. Clubs must meet all local zoning and code requirements. MCL 436.1916 and MAC R436.1105(3)

3 -Restaurants and similar establishments may receive permission from the MLCC to operate for a specific purpose (such as registering golfers) at other hours as long as all alcoholic beverages are sold only during legal hours. MAC R436.1437

4 - Any questions on local referenda for liquor sales should be referred to the Commission because of the complexity of the laws and relevant court cases.

Legislative Body Approval

When legislative body approval is required, contact the MLCC to obtain the necessary forms.

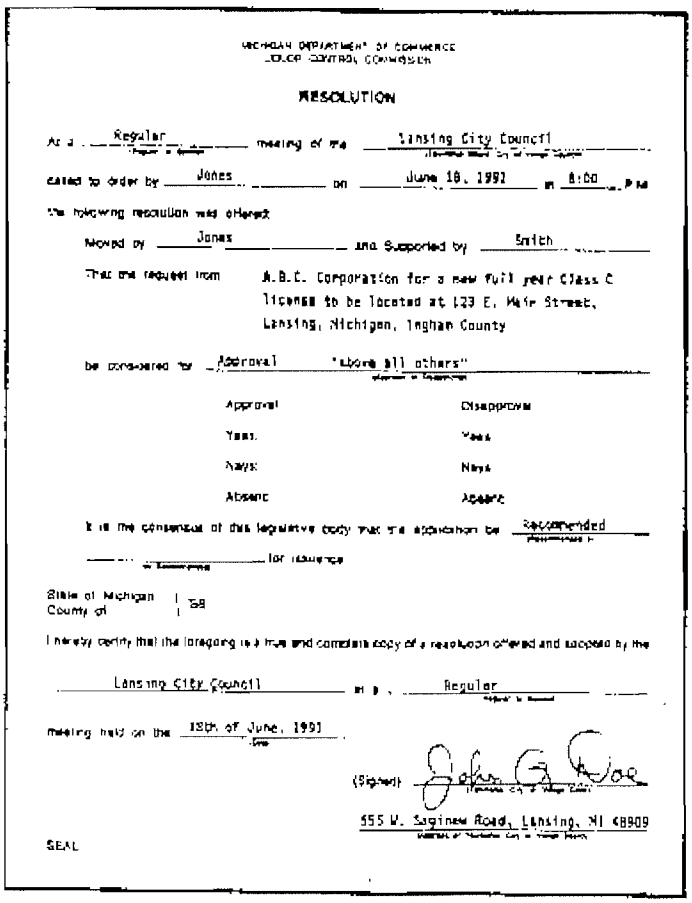
Sample of Approval Resolution:

The local legislative body must take action before the license application can be submitted to the Commission for consideration. **All applications for transfer of ownership or new permits, in particular, should receive immediate consideration by the local government so that the transaction is not unduly delayed.**

NOTE: The MLCC will not accept conditional approvals except for the case where a local legislative body is waiting for final approvals from building or health inspectors. If the local government has no other objections to the application then approval can be accomplished by having the local law enforcement approval made subject to final inspection(s). The MLCC can also make its approval subject to final inspection by local law enforcement officials, thereby avoiding delay of the licensing process caused by the local legislative body having to pass a second, unconditional approval resolution prior to the issuance of the liquor license.

Club Licenses

As a courtesy to local governmental units, the Commission will contact you when an application for a new club license is received. Public notice of the intent of the Commission to issue the club license must be given by the club through publication in a newspaper of general circulation within the local governmental unit jurisdiction at least 10 days before the license is issued. The courts have ruled that this public notice is required in lieu of approval of the local legislative body. **If you object to a club license application, you must notify the Commission of the reason for your objection <u>within 15 business days</u> after receiving our notice.** The reasons must be based upon the Commission's licensing qualification rules or based on violation of building codes, health codes or zoning ordinances (Refer to MAC R436.1105). Copies of relevant local codes or ordinances (and of violations and convictions) should also be sent to the MLCC with your objection.



MICHIGAN DEPARTMENT OF COMMERCE
LIQUOR CONTROL COMMISSION

RESOLUTION

At a Regular meeting of the Lansing City Council

called to order by Jones on June 18, 1992 at 8:00 P.M.

The following resolution was offered:

Moved by Jones and Supported by Smith

That the request from A.B.C. Corporation for a new full year Class C license to be located at 123 E. Main Street, Lansing, Michigan, Ingham County

be considered by Approval "above all others"

Approval	Disapproval
Yeas:	Yeas
Nays:	Nays
Absent	Absent

It is the consensus of this legislative body that the application be Recommended for issuance

State of Michigan } ss
County of }

I hereby certify that the foregoing is a true and complete copy of a resolution offered and accepted by the

Lansing City Council at a Regular

meeting held on the 18th of June, 1992

(Signed) John G. Doe

555 W. Saginaw Road, Lansing, MI 48909

SEAL

Ordinance Prohibiting Retail Sale of Alcoholic Beverages MCL 436.2109

In addition to the previously mentioned local and county options that may be exercised relative to the sale of alcoholic beverages, a city, township or village may adopt an ordinance

-PO 225

that prohibits all retail sales of alcoholic beverages within their borders. **This ordinance may only be adopted if there are no existing licenses issued within the local governmental unit for the retail sale of alcoholic beverages.** This includes licenses for the retail sale of alcoholic beverages for consumption both on and off the premises.

This ordinance must be submitted to the electorate at the next general or special election that is held. However, the election may not be less than 45 days after the adoption of the ordinance.

In the event the electorate affirms the ordinance, the Commission is prohibited from issuing a license for the retail sale of alcoholic beverages within that local governmental unit.

Local Liquor Law Enforcement MCL 436.1543

Local units of government - cities, townships and villages - which have a full-time police department or a full-time ordinance enforcement department, receive 55% of all retail liquor license and renewal fees for each retail liquor license located in the boundaries of the local governmental unit.

Townships and villages who contract for local law enforcement sometimes use the returnable license fees as partial payment for the contracted county services. The treasurer of the local unit of government is required to sign an affidavit, provided by the Commission, certifying that the funds are used for liquor law enforcement activities before the Commission can send the fees to the local unit.

The law enforcement agency is also responsible for completing the LC 1800 (applicant investigation) form, fingerprinting the license applicants, collecting the State Police fingerprinting fee and forwarding the form, card and fee to the MLCC for processing through the Michigan State Police. The State Police records are checked for Michigan criminal history. Local units of government may charge a separate fee for taking the fingerprints.

TEST YOURSELF: On-premises Retail Licenses

Q. There is an opening in the on-premises quota for our township. We have heard that a large restaurant is interested in a piece of prime property. Must we approve one of the applicants we currently have on file for the available license?

A. **No. The local governmental unit can decide when and if it wants to approve issuance of the available license. If you prefer to wait until a later time, you may.**

Q. Part of our township was annexed to the neighboring city. A liquor license was contained within the geographical boundary of what was annexed. Do we now have an opening in our quota?

A. **It depends on whether your township retained a sufficient population base to continue at the same quota. If your township was at its maximum number of licenses prior to the annexation, and if you have retained a sufficient number of people under the census to continue at the same number of licenses, then your township will have one additional license that can be issued. Additionally, the license that was in the geographical boundary annexed to the city will be counted as part of that city's quota licenses. If they were already at their quota, the license will still be counted for that local unit of government. The Commission cannot require that the number of licenses in that unit be reduced.**

Q. Do on-premises Taverns and A-Hotels (beer and wine) count as part of our city's quota?

A. **Yes. Even though these licensees may not sell spirits, by law they do count towards the**

quota. However, Club licenses in your city do NOT count toward the population-based quota of licensees.

Q. Our township board is willing to approve an applicant above all others for a new on-premises license upon the condition that the applicant plant trees on the property. This condition will be added to the approval resolution being submitted to the Commission. Will the resolution be accepted?

A. **No. Conditions on local approvals are private contractual agreements between the local governmental unit and the applicant. The recommendation by the community to the MLCC must be unqualified (except in the case of meeting health code or zoning/building requirements).**

Q. A proposed licensed location is within 500 feet of a church. Should our village consider the proximity of the church to the proposed licensed premises?

A. **It is the sole responsibility of the MLCC to make a determination regarding proximity to churches and schools. When it appears that a licensed location may be within the 500-foot limitation, Commission investigators will measure the distance. If the proposed location is within 500 feet of a church or school, the church or school will be notified (by certified mail) of their right to have a hearing to object to the proposed license location. If an objection is filed, a hearing will be held by the MLCC and the local governmental unit will be notified of the hearing date and location. If the church or school does not object to the proposed location, the Commission will proceed with the application process. The 500-foot rule does not apply to SDM (beer and wine) off-premises licensed businesses unless it is to be held in conjunction with an on-premises license.**

Licensing

Like the previous chapter, this section is directed primarily to members of local government legislative bodies and answers the most commonly asked questions about licensing — only now the focus is on **off-premises** licenses. This chapter will explain the types of off-premises licenses, the quota system, and the role of the local legislative body and the local law enforcement officials.

Off-premises Licenses

These licenses are issued for businesses such as party stores, supermarkets, convenience stores, and drug stores where alcoholic beverages are sold for consumption off the premises.

SDD **Specially Designated Distributor.** This license enables the licensee to sell packaged liquor (distilled spirits and mixed spirit drink only) for consumption off the licensed premises. MCL 436.1111(11)

SDM **Specially Designated Merchant.** This license enables the licensee to sell only beer and wine for consumption off the licensed premises and is not subject to quota restrictions. MCL 436.1111(12)

SDD Resort In the years permitted by statute, the Commission can also issue a limited number of off-premises SDD resort licenses in governmental units where the population is 50,000 or less, and where there are no SDD licenses available under the quota. MCL 436.1531(5)

Summary of Off-premises License Information:

Off-premises Licenses Type	-Alcoholic beverage sold- Beer?	Wine?	Liquor?	Licensed to sell to	Quota Applies
SDD	**No**	**No**	**Yes**	**General Public**	**Yes**
SDD Resort	**No**	**No**	**Yes**	**General Public**	**No**
SDM	**Yes**	**Yes**	**No**	**General Public**	**No**

Note: Off-premises licensees may also sell up to 9 liters of spirits per month to an On-premises licensee if the proper permit has been obtained from BATF.

Local Approval

Ordinance and Zoning Compliance

Off-premises licenses (SDM and SDD) do not require approval of the local governing body. Because the Commission's rules require that licensed locations be in compliance with all appropriate state and local building, plumbing, zoning, fire, sanitation and health laws and ordinances, the Commission will notify you of any applications for a new license or a transfer of an existing license or location that are received.

The local governing body, or your designee (such as a building inspector or police agency), has **15 days** to notify the Commission of any instances of non-compliance. These must be outlined in detail indicating the specific laws or ordinances, and a copy of the applicable law or ordinance must be attached. If the Commission does not receive notification within 15 days, it will assume that the location complies with local laws and ordinances. MAC R436.1105 (3)

The chart below indicates local responsibility for investigation of off-premises licensed locations:

Summary of Local Approvals Required for Off-premises Licenses & Permits:

Type of Off-premises License:	*Local Legislative Approval?*	*Local Law Enforcement Investigation Required?*
SDD & SDD Resort	No	Yes
SDM	No	Yes
Type of Off-premises Permit:		
Sunday Sales - SDD	The county board of commissioners must have authorized the sale of liquor (distilled spirits) after 12:00 noon on Sunday. Beer and wine may be sold after noon on Sunday without special authorization from the MLCC — unless prohibited by local ordinances. *	
Direct Connection	No	Yes
Living Quarters	No	Yes
Off-premises Storage	No	Yes

* Any questions regarding local referenda on liquor issues should be referred to the Commission because of the complexity of the laws and relevant court decisions.

Ordinance Prohibiting Retail Sale of Alcoholic Beverages

In addition to the previously mentioned local and county options that may be exercised relative to the sale of alcoholic beverages, a city, township or village may adopt an ordinance which prohibits **all** retail sales of alcoholic beverages within their borders. **This ordinance may only be adopted if there are no existing licenses issued within the local governmental unit for the retail sale of alcoholic beverages.** This includes licenses for the retail sale of alcoholic beverages for consumption both on and off the premises.

This ordinance must be submitted to the electorate at the next general or special election that is held after the ordinance is adopted. However, the election may not be less than 45 days after the adoption of the ordinance.

In the event that the electorate affirms the ordinance, the Commission is prohibited from issuing a license for the retail sale of alcoholic beverages within that local governmental unit. Revocation of the ordinance by the electorate is effective on the date of the certification of the election results. The commission may then issue retail licenses for the sale of alcoholic beverages within the local governmental unit. MCL 436.2109

TEST YOURSELF: Off-premises Retail Licenses

Q. *We believe our city has increased in population since the last federal Census. Can we conduct a special population count to determine if we are entitled to an additional SDD license within the quota?*

A. **Yes. Under provisions of Act 279 of P.A. of 1909, as amended (Section 117.6 of the Michigan Compiled Laws) or under Section7 of Act 245 of P.A. of 1975 (MCL 141.907) the local unit of government may, by resolution, request a special state census of the unit. For more information, call the Bureau of Elections, Special Census unit at the Secretary of State (517) 373-2540.**

Q. *Our full-time charter township police department has neither the time, the funding, nor the expertise to conduct a local investigation for a liquor license that involves researching zoning ordinances, local health codes, and the other regulations that a licensee must comply with. How can we avoid doing this?*

A. **You cannot. If your township treasurer signs the affidavit providing your township with 55% of the liquor licensing fees for each retail licensee located in the township, you must assume responsibility for enforcement of the liquor laws including local investigations.**

This requirement is for the benefit of the township, not the Liquor Control Commission. In order to ease the demand on your police department, your township may want to set up a system to handle liquor matters. Most governmental units have a zoning and code enforcement team. You can have the premises inspected by the person responsible for these inspections, such as the building inspector or fire department.

Some smaller townships contract with the county sheriff for local law enforcement. If the township signed the required affidavit to receive the returnable license fees, then the Commission would mail the payment to the

township. Presumably, the township would then use the funds to help pay the county contract. You should be aware, however, that these fund expenditures are audited.

Q. *Our city council has approved a transfer of a license and conducted a local investigation. Does the Commission also conduct a separate investigation?*

A. Yes. The MLCC investigators conduct an extensive investigation of the applicant. Our investigation focuses on the applicant's background and financial status. Commission investigators also examine the proposed location to determine if it meets the legal requirements for a specific license. This could mean that even though a person has been approved at the local level, the application could be denied by the MLCC. However, the local governmental body should not conclude that this means that an applicant has something undesirable in his or her background: there are many reasons that a person may not meet licensing qualification standards.

In fact, local legislative approval is not required to transfer an off-premises license. You can make a recommendation and the Commission will consider it; however, the Commission is not bound to act according to a local recommendation as it is with on-premises license transfers.

Q. *Our village council has been advised that an applicant for a liquor license wants to turn a former laundromat into a take-out party store and obtain both an SDM and SDD license. Although we have no objection to licenses being issued to the applicant, we feel there may be some problems with the location. There is a pin-ball/electronic game shop next door that is frequented by teenagers. The concern of people in the community is that sales to minors will occur. Can we object to the license being issued?*

A. There are two issues involved in this question.
First, can the village council legally object to the license being issued?
Second, if the license is granted, are there automatically going to be problems with sales to minors?

Although the purpose of the local review is to determine whether there are any zoning or ordinance problems with the proposed licensed location, the Liquor Control Commission (under Rule 436.1105(2)(d)) may also consider the opinions of the local residents, local legislative body, or local law enforcement agency with regard to the proposed business. Therefore, the village council could choose to advise the MLCC of local concerns even though there are no violations of local ordinances or codes. The village can strengthen its objection by being as detailed as possible.

A local unit of government should not assume that a licensee will sell alcoholic beverages to minors simply because a nearby business caters to teenagers. However, if it appears that the licensee is violating the law, your local law enforcement agency should investigate the licensee.

As shown in the next chapter, your village may request revocation of a license if the licensee is determined to be responsible for violating the Liquor Control Code or the MLCC Rules on three occasions within one year. In addition to Commission action, the licensee may be subject to criminal action and also to possible civil action under Dram Shop statutes.

Objection To Renewal & Revocation of License

Local units of government have the right to **object to the renewal of an on-premises license,** and also may request that the MLCC **revoke an on-premises license.** Local governments may request that the MLCC **revoke an off-premises license,** but **may not object to renewal of an off-premises license.** These rights are accompanied by specific requirements that have evolved based on court decisions.

What licenses are subject to these actions?

Because local units of government are required to approve public on-premises licenses, they may also object to renewal or request revocation of Class C, A-Hotel, B-Hotel, Tavern, Class C Resort, A-Hotel Resort, B-Hotel Resort, Tavern Resort, and Micro Brewer licenses.

Local governments may also request revocation of off-premises SDD and SDM licenses in their jurisdiction when: **(1)** the Commission has determined that the licensee has violated the Liquor Control Code by selling or furnishing alcohol to a person under 21 years of age on at least three occasions within a calendar year, and **(2)** those violations did not involve the use of false or fraudulent identification by the person under 21 years of age MCL 436.1501(3).

If a local unit of government objects to renewal or requests revocation of an on-premises retail license, and the licensee also has an off-premises SDM license, the Commission will also hold a "show cause" hearing to determine if there is any reason that the SDM license should not be renewed or revoked at the same time because the business no longer meets the licensing qualification requirements.

Local governments may also request revocation of any permit held in conjunction with an on-premises license but must follow the rules of due process as outlined below.

Due Process

Regardless of whether the local unit of government wishes to object to a renewal or request revocation of a license or permit, the licensee is entitled to due process. In **Bundo v City of Walled Lake (395 Michigan 679 [1976]),** the Michigan Supreme Court held that the liquor licensee has a property interest in the license and, therefore, is entitled to due process protection.

The procedural safeguards that the courts deemed necessary regarding a decision by the local body to object to renewal of a license consist of **"rudimentary due process."** Courts have said this includes notice to the licensee of the proposed action and the reasons for the action, a hearing at which the licensee may present evidence, testify, and confront adverse witnesses, and a written statement of the findings. In **Roseland Inn, Inc. v Robert D. McClain and Township of Blackman and Liquor Control Commission (118 Michigan App [1982]),** the Court of Appeals held that a lack of standards and fair notification of the standards violates a licensee's right to due process. Therefore, local units of government should consider the following guidelines and standards when pursuing an objection to renewal or a request for revocation of a liquor license:

Guidelines and Standards

A. **Guidelines** - The local governmental unit must establish standards or guidelines stating what conditions will constitute a basis for requesting non-renewal or revocation of a license.

B. **Notification of Guidelines** - The local governmental unit must notify licensees of the guidelines and any subsequent changes.

C. **Notification of Hearing** - If the local governmental unit is objecting to renewal or requesting revocation of license, it must give the licensee timely written notice of the hearing, including:

1. Date and location of the hearing.
2. The proposed action that the local legislative body is considering taking.
3. The detailed reasons for the proposed action (i.e., citing specific standards or guidelines the licensee has not complied with).
4. The licensee's rights at the hearing, including the opportunity to defend by confronting adverse witnesses and by being allowed to present witnesses, evidence, and arguments.
5. The licensee's right to be represented by an attorney.

D. **Hearing** - At the local legislative body hearing, the licensee must be given an effective opportunity to defend by confronting any adverse witnesses, evidence, and arguments.

E. **Resolution and Statement of Findings** - After the hearing, the local legislative body must make a written statement of findings and adopt a resolution indicating the specific action requested.

Required Documentation

The local unit of government must send the following documents to the MLCC before the Commission can take any action regarding objection to renewal or revocation of a license:

A. A copy of the **standards or guidelines,** or a description of the guidelines established by the local governmental unit as to what would constitute a basis for objecting to renewal or to revoke the license. Please include the date of adoption and, when publishing in a newspaper, the name of the paper and date of publication.

B. A certified copy of the **notice** sent to the licensee.

C. A copy of the **proof of service** of the notice sent to the licensee in order to counter any questions as to whether the notice was indeed sent to the licensee by the local governmental unit.

D. A certified copy of the **resolution** adopted by the local governing body objecting to the renewal of the license or requesting that the license be revoked. If a separate statement of findings is made, then a certified copy of that document must also be included. The resolution should not include both an objection to renewal of the license and a request that the license be revoked. If such a resolution is received, the Commission will proceed with the objection to renewal only.

Because all retail licenses expire on April 30, if your legislative body is objecting to renewal of a license, the request and all substantiating documents (as outlined above) must be received by the MLCC **no later than March 31 to be in compliance with the law.**

Differences between Objecting to Renewal and License Revocation

! **Objecting to Renewal** - When the proper documentation is received, the MLCC will stop renewal of the license. The existing license expires on April 30, preventing the licensee from legally selling alcoholic beverages after that date. The license will remain in escrow for one year, and cannot be placed in operation or transferred to another person or corporation unless the local legislative body adopts a resolution approving the renewal.

After one year, the licensee may request an extension — but the request may or may not be approved by the Commission. If the extension is denied and the licensee does not request a hearing regarding the denial, the license is permanently canceled. If an extension is granted, the license remains in escrow for another year but cannot be placed in operation or transferred to another person unless the local legislative body adopts a resolution approving renewal.

There is no immediate effect on the local license quota as a result of objecting to renewal as long as the on-premises liquor license is held in escrow. It still counts toward the limited number of licenses available in the city, township or village. However, the local unit will not receive the 55% share of the licensing fee that it normally would have received had the license remained active.

Local legislative bodies may adopt a resolution approving the license renewal at any time. The licensee may then renew the license and resume operation.

! Revocation of a License - A resolution requesting revocation of a retail liquor license may be submitted at any time during the year. When proper documentation is received, the Commission is required by law to hold a hearing to consider the resolution. The local legislative body will be notified of the hearing, and a representative of the body or its legal counsel should attend. The sole purpose of this hearing is to determine if the licensee was afforded "rudimentary due process" as required by the courts. If it is found that due process was given the licensee, the license is immediately revoked by the MLCC. Revocation is a permanent action, and means that the licensee loses all ownership rights to the license.

The former licensee cannot transfer the revoked license. Also, the former licensee cannot apply for another liquor license for at least two years.

License revocation can also have an effect on the number of licenses available under the quota in the local governmental unit. If the city, township, or village is over the license quota (due to shrinkage in population), then revocation of a license means that one less license is available.

As long as the city is at quota or below, a new license becomes available when one is revoked.

TEST YOURSELF: Objection to Renewal or Revocation of a License

Q. *Our city council wants to object to the renewal of a license for a bar because of non-payment of taxes. Can we do that?*

A. **If your city council has developed standards or guidelines that state that non-payment of taxes is a reason that will be considered for objecting to renewal of a license, and if the other requirements of due process are followed, then your legislative body has complied with the requirements as far as the Liquor Control Commission is concerned. Remember that the city council must pass a resolution and have all of the required documents on file with the Commission no later than March 31. Following a review of the documents the Commission will determine whether or not it is appropriate to renew the license.**

Q. *What kinds of standards should be in the guidelines?*

A. **While the Commission does not presume to tell local governmental units what should be in their guidelines, some local units of government have inserted articles into their guidelines dealing with non-payment of taxes and other bills to the local governmental unit and articles dealing with excessive police calls, citizen complaints, and other nuisance-type problems. Others have incorporated certain violations of state laws into their guidelines.**

Q. *Our township board is reluctant to get involved in objecting to a renewal or requesting revocation of licenses. Are we required to pass guidelines and act on them?*

A. **No. The objection to renewal and revocation of license processes exist for those units of government that want to use them. You may find, however, that it is worthwhile to adopt guidelines now so that you do not have to react in a manner that could be construed as arbitrary or capricious should a problem develop in the future (retroactive application of your guidelines would not be legally binding).**

Q. *Our city council has decided to pass a resolution and we have followed all of the provisions outlined. Our problem is that we are unsure whether to object to the renewal of a license or go so far as to request a license revocation. What should we do?*

A. **The Commission does not advise local governmental units of the action they should take. The due process requirements for the licensee are the same regardless of whether the local government legislative body chooses to object to renewal of the license or decides to request revocation of the license. Remember that revocation is final, while objecting to renewal can be reversed if the licensee remedies the problem that prompted the action.**

Q. *Our charter township board has followed all of the guidelines shown here and requested a revocation of a Class C license. Can we assume that this will end our involvement?*

A. **No. In most instances, licensees will begin court actions against both the local unit of government and the Liquor Control Commission to enjoin the Commission from acting on the local legislative body's resolution, and to challenge the action of the local government. The Commission's role in the procedure is to determine whether the licensee was given "rudimentary due process" by the local unit of government. The Commission does not — and cannot — consider whether or not the reasons for the actions of the local governmental body are justifiable. This is up to the courts to decide.**
The Commission strongly recommends that if your local government is considering objecting to renewal or requesting revocation of a license, you consult your attorney before beginning the action. The local governmental unit should recognize that there may be substantial legal costs involved in requesting that the Commission not renew or revoke a license because litigation may take months or years to complete.

Q. *Our township board objected to the renewal of a Class C license for non-payment of local property taxes. All of our actions were reviewed by the Commission and the license was not renewed. Yesterday the licensee paid the taxes. What should we do now?*

A. **If you no longer object to renewal your local governing body must adopt a resolution approving the renewal before the license will be issued by the Commission.**

Q. *We have had problems with complaints about noise and crowds around a bar which sponsors Friday and Saturday dance contests. Our city council has considered asking the MLCC to revoke the dance and entertainment permits granted to the establishment. Is this possible to do without revoking their license?*

A. **Yes. Local Legislative actions may be limited to permits. Your city council can take action to ask the Commission to revoke specific permits granted to a licensee, but the same recommendations regarding due process and careful consideration of costs involved should be followed.**

Enforcement of Michigan Liquor Laws

This section is directed more specifically to local **law enforcement officials** who work with the Liquor Control Commission to ensure that the provisions of the Liquor Control Code are enforced. Because there are other publications which more thoroughly cover the Code and the Administrative Rules of the Commission, this section of the guide focuses on those areas where local law enforcement officials and private citizens have concerns about enforcement and jurisdiction.

Local Responsibility for E cement MCL 436.1201 (4)

The **primary responsibility** for enforcement of Michigan's liquor laws lies with local law enforcement agencies. This means that the local law enforcement officials who have jurisdiction within the township, village, city and county boundaries are responsible for primary enforcement of the liquor laws.

Funding for Local Enforcement MCL 436.1543

The Liquor Control Commission returns to local units of government 55% of the retail licensing fees received during the fiscal quarter. Each local unit of government is required to certify to the MLCC (using a form provided for that purpose) that the fees are being used for the enforcement of Michigan's liquor laws.

Failure to use the returnable license fees in the manner prescribed by the law — or failure to return the certification form — can result in the MLCC withholding the funds. The Michigan Treasury Department, Local Government Audit Division, may review how these funds are spent.

Liquor Control Commission Enforcement Investigators MCL 436.1201 (4)

The Liquor Control Commission's investigators have **concurrent responsibility** for enforcement of the liquor laws. However, this authority is limited to actions against liquor licensees. Investigators spend the majority of their time reviewing applicants for liquor licenses and doing routine inspections. However, they also do undercover surveillance work throughout the state. ***Because they are not armed, and are not vested with the power of arrest, MLCC investigators will always request local or state police support when laws are being broken by someone other than a licensee or in cases where the potential for violence exists.***

Upon request, the Commission will also provide technical investigative assistance to local law enforcement agencies to help with unusual or complex investigations of suspected liquor law violations.

State Police MCL 436.1201 (4)

The State Police have **concurrent jurisdiction** for enforcement of all of the state's liquor laws.

Right to Inspect Licensed Premises MCL 436.1217

Liquor licensees are required to make their licensed premises available for inspection and search by a Commission investigator or local law enforcement officer at any time during its regular business hours, or when the licensed premises are occupied by a licensee or an employee.

MLCC Jurisdiction MCL 436.1217

Because the Liquor Control Commission's jurisdiction is limited to **MLCC Licensees**, violations involving non-licensees are the responsibility of the county prosecutor and the local police agency. For example, the MLCC cannot take action at private parties unless minors are observed buying alcoholic beverages from a licensee. Action by the MLCC can be taken only against the licensee - not the unlicensed hosts or guests.

In cases involving **illegal drug sales** on the licensed premises, local, state and federal agents can seize the licensed premises and sell the property under the forfeiture proceedings of state and federal laws.

Citizen Complaints

Local law enforcement officials and the MLCC frequently receive complaints from citizens regarding suspected violations of the liquor laws. These complaints typically involve:

A. Sales to mino
B. Sales to intoxi d persons.
C. Violations of restrictions on the days and hours of operation.
D. Various illegal activities on the licensed premises such as gambling, drug dealing and prostitutic
E. Private parties for minors where alcoholic beverages are being furnished at non-licensed locatic (not MLCC jurisdiction).
F. Sales of alcoholic beverages to non-members in a licensed club.

Citizen complaints should be treated seriously. It is the experience of commission investigators that a good job of enforcement of the state's liquor laws serves to minimize a multitude of other social problems.

Semi-Annual Public Hearings

The Liquor Control Commission holds public hearings twice each calendar year for the purpose of taking complaints and receiving the views of the public regarding administration of the Liquor Control Code. MCL 436.1215

Responsibility for Licensing Activities

Investigation

As mentioned in the previous licensing chapters, the local law enforcement agency is also responsible for:

A. Conducting investigations of applicants in order to determine whether to recommend that the license (re and wholesale) be granted.
B. Fingerprinting the applicant and collecting the State Police processing fee (currently $15).
C. Providing information regarding whether the proposed business location meets local codes and ordinan This function may be conducted by various inspectors employed by the governmental unit or the county their reports being included in the law enforcement investigation report.

The Liquor Law Violation Administrative Process

The Violation Report

When law enforcement officers believe that a violation of Michigan's Liquor Code has occurred, they are authorized to write a Violation Report using the LC 600 form (forms provided by MLCC Enforcement). Violation Reports are sent to the MLCC where they are reviewed by an Assistant Attorney General (AAG) to determine whether the facts, as presented, indicate a violation of the Liquor Control Code or the Administrative Rules of the Commission.

If the AAG determines that there is insufficient evidence to support the charge, MLCC staff will request additional information from the concerned parties. If, based on the report (and subsequent information), the AAG still cannot find evidence that a specific section of the Code or Rules was violated, no further action will be taken.

If you write a Violation Report, you should be as specific as possible and try to answer any questions that you think may come up during the review by the AAG. ***Remember, the licensee will receive a copy of the Violation Report and all attachments that are with it.***

Violation Complaint

If the AAG finds sufficient evidence to show a violation has occurred, a formal Violation Complaint is issued. It is common practice for the AAG to file a separate charge for each section of the Liquor Control Code and Administrative Rules which was allegedly violated.

For example, if a law enforcement officer observes a bartender selling alcoholic beverage to someone under 21 and the person is also observed consuming the beverage, the AG will cite (1) a violation of the Liquor Code for the sale of the alcoholic beverage, and (2) a violation for allowing the person under 21 to consume.

Formal Hearings

The licensee is given the choice of acknowledging the complaint by mail and receiving a penalty from the MLCC without a hearing, or contesting the allegation by requesting a formal hearing to present evidence and testimony regarding the alleged violation. The licensee may be represented by an attorney. If the complaint was filed by a law enforcement official, the officer will receive a notice of the hearing and, as the complaining witness, must appear at the hearing.

Possible Actions Against Licensees under the Liquor Control Code

Administrative

After an acknowledgment or finding of a violation at a hearing, the Hearing Commissioner may suspend or revoke a license, assess a fine on some or all of the charges, order a transfer (forced sale) of the business ownership, or some combination of these penalties.

In those cases where the MLCC finds a licensee responsible for violations of selling or providing alcoholic beverages to minors or intoxicated persons on three occasions within any 24 month period, the MLCC is required to hold a hearing to suspend or revoke the license. This penalty is in addition to any imposed as the result of the individual hearings. MCL 436.1903

Criminal

The Liquor Control Code provides that licensees who violate that statute may also be charged with misdemeanors for those same violations. MCL 436.1909

Civil

Under Michigan law, a licensee may also be held liable in civil suits when the sale or furnishing of alcoholic beverages to a minor or intoxicated person is found to be the proximate cause of damage, injury or death of an innocent party. MCL 436.1801

Independent Criminal Complaint

At the same time as a liquor law violation is being pursued through the Liquor Control Commission administrative process, the law enforcement officer can obtain authorization for a complaint and warrant through the local prosecuting attorney for any criminal violations by a licensee or other individual.

Any prosecution on criminal charges is independent of MLCC actions. A finding of guilt or innocence in the criminal matter does not necessarily affect the MLCC's violation proceedings.

Training in Liquor Law

Training Classes

The MLCC works closely with community colleges, universities, police training academies, and in-service programs to provide training on Michigan's liquor laws. As time permits, the MLCC is willing to conduct special training sessions.

For more information on wh[redacted]ning sessions are available, or to req[redacted] special training session, call the MLCC Enforcement Division at (517) 322-1370.

Other MLCC Publications

A. ***The Michigan Liquor Control Code, Rules, and Related Laws Governing the Sale and Manufacture of Alcoholic Beverages.*** This publication contains the statutory language for the laws and rules governing alcoholic beverages. Due to its size, a printing cost of $5 is required. It is also available for download fr the MLCC website at www.cis.state.mi.us/lcc

B. ***Michigan's Liquor Laws and Rules- A Guide for Retail Licensees.*** This guidebook, written in conversational style, covers the laws and MLCC rules that historically have caused the most problems f retail licensees.

C. ***Law Enforcement Officers' Field Guide on the Liquor Control Code and Administrative Rules of the Commission.*** This pocket-sized reference manual provides excerpts from, and information on, Michigan liquor laws and rules, along with other material such as how to complete and file a Violation report. This booklet is designed specifically for use by law enforcement personnel in day-to-day activities. It is also available for download from the MLCC website.

Contact a MLCC Enforcement District Office (see last page) for information on obtaining a copy of any of these publications.

Law Enforcement Official Prohibited from Holding a Liquor License

Law enforcement officials are prohibited from having a direct or indirect interest in a liquor license in their jurisdiction. This means that if you are responsible in any way for the enforcement of criminal laws, you cannot rent, own a licensed establishment, or lease a building to a liquor licensee. Court cases have also extended this prohibition to local elected officials who may be responsible for law enforcement. If the Commission has any questions as to the individual's responsibility for law enforcement, the local govemmental charter is used to determine eligibility. MCL 436.1523

Test Yourself: Enforcement of Michigan Liquor Laws

Q. *I am a village constable. Am I responsible for enforcement of the liquor laws?*

A. **That depends on your responsibilities under the village charter. If you are authorized to bear arms and make arrests, then you are also responsible for enforcement of the liquor laws. If your position is more of an honorary position, then the township police or county sheriff will have the responsibility.**

Q. *As city officials, we sometimes receive letters or telephone complaints about local bars or night clubs. What should we do with citizen inquiries?*

A. **It is advisable to pass these complaints or reports on to your local law enforcement agency for investigation. You may also report the information you receive to the MLCC for investigation by the Commission's enforcement staff.**

Q. *Is training on the liquor laws available for our village police?*

A. **Yes. Contact the MLCC Enforcement Division in Lansing at (517) 322-1370 for training information.**

LIQUOR CONTROL COMMISSION OFFICES

Lansing — Michigan Liquor Control Commission
7150 Harris Drive, P.O. Box 30005
Lansing, Michigan 48909

General Information	(517) 322-1345	
Enforcement Division	(517) 322-1370	FAX (517) 322-1040
Financial Management	(517) 322-1382	FAX (517) 322-1016
Licensing	(517) 322-1400	FAX (517) 322-6137
Commission Office	(517) 322-1355	FAX (517) 322-5188

Farmington — Commission Office (248) 888-8840 FAX (248) 888-8844

Enforcement District Offices

Farmington (248) 888-8710 FAX (248) 888-8707
24155 Drake Road
Farmington, MI 48335

Escanaba (906) 786-5553 FAX (906) 786-3403
State Office Building
305 S. Ludington, 2nd floor
Escanaba, MI 49829

Gaylord (517) 732-6797 FAX (517) 732-5321
699-B S. Wisconsin
Gaylord, MI 49735

Grand Rapids (616) 447-2647 FAX (616) 447-2644
2942 Fuller, NE
Grand Rapids, MI 49505

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BRIAN DONESLEY ISB#2313
Attorney at Law
548 North Avenue H
Post Office Box 419
Boise, Idaho 83701-0419
Telephone (208) 343-3851
Facsimile (208) 343-4188

Attorney for Petitioner/Plaintiff
Daniel S. Fuchs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS,
Petitioner,

v.

STATE OF IDAHO, Department of Idaho State Police, Bureau of Alcohol Beverage Control,

Respondent.

DANIEL S. FUCHS,
Plaintiff,

v.

STATE OF IDAHO, Department of Idaho State Police, Bureau of Alcohol Beverage Control,

Defendant.

CASE NO. CV 2009-3914
(Consolidated with Case No. CV 2009-4185)

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

ORIGINAL

COMES NOW, Petitioner Daniel S. Fuchs ("Fuchs"), by and through his attorney of record, Brian Donesley, and submits the following Supplemental Memorandum in Opposition to Respondent State of Idaho, Department of Idaho State Police, Bureau of Alcohol Beverage Control's ("ISP") Motion to Dismiss for Failure to Exhaust Administrative Remedies:

I.
INTRODUCTION

This Court has permitted additional briefing regarding whether Fuchs has a "property interest" in his application for a Retail Alcohol Beverage License and in particular directing the parties' attention to a Sixth Circuit Court of Appeals case, *Wojcik v. City of Romulus*, 257 F. 3d 600 (6th Cir. 2001).

In *Wojcik*, the Sixth Circuit, following Michigan law, explained that a first-time liquor license applicant did not have a property interest in a liquor license. Michigan law, however, is vastly different than Idaho law. In Michigan, cities are given the initial decision whether to approve or deny a party's application for a first-time license. A city's decision is discretionary. According to a publication issued to local governments from the Michigan Liquor Control Commission, a city may approve a later applicant over a prior one or approve no one at all, waiting for a more favorable applicant to come along.[1] Moreover, while Michigan has a quota system, it is a flexible one, allowing a party to transfer an unused "escrowed license" from another city within the county to the city of his or her choosing. Consequently, there are no priority list rules, such as those in Idaho ensuring an applicant's place in line.

[1] *See, infra*, GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF LOCAL GOVERNMENTS UNDER THE LIQUOR CONTROL CODE, November 2000, pp. 3-4, State of Michigan, Liquor Control Commission. (**Exhibit 1** to Affidavit of Brian Donesley).

In Idaho, ISP is given the responsibility to issue liquor licenses. It is not a discretionary but ministerial obligation. If an applicant complies with all legal obligations under the Idaho Code and the Rules Governing Alcohol Beverage Control, a license must issue. Moreover, ISP promulgated rules, ensuring an applicant's position on a waiting list and giving additional property characteristics to the application such as the right of assignment by bequest.

The Idaho Supreme Court has held that a liquor license is a privilege and not a property right."[2] At the same time, however, it has held that a license has attributes of property and that a licensee is ensured due process protection by the Idaho Administrative Procedures Act. Furthermore, the Idaho Supreme Court repeatedly has held that a license applicant has procedural rights when an agency considers license eligibility requirements.

This Court need not determine whether a liquor license applicant has a property interest. The question here is much narrower. That is whether a license applicant's place in line, as set forth in the Rules Governing Alcohol Beverage Control, is a "substantive" or "vested" right. Idaho law provides that a statute or rule cannot be applied retroactively, if it affects a substantive or vested right. What determines whether a right is substantive or procedural is whether the statute or rule is mandatory or discretionary. ISP's rules governing priority lists are mandatory or contractual in nature. Once an applicant pays one–half the annual license fee, he is guaranteed a place in line. This is unlike the Michigan liquor licensing scheme, where local government units have unfettered discretion whether to approve or deny an application. Because Fuchs's place in line on the priority list is substantive, ISP cannot retroactively apply its rules removing his name from the priority lists without proper statutory authorization.

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[2] *Crazy Horse v. Pearce*, 98 Idaho 762, 765 (1977). As discussed, *infra*, the "archaic rights/privilege distinction no long has any applicability in the area of procedural due process." *Bundo v. City of Walled Lake*, 238 N.W. 2d 154 (1976) (*citing Board of Regents v. Roth*, 408 U.S. 564 (1972)).

And, this Court should deny ISP's Motion to Dismiss for Failure to Exhaust Administrative Remedies. There are no administrative remedies to exhaust. Rather, ISP's retroactive application of its rules is contrary to Idaho law. This Court should allow this action to proceed to Declaratory Judgment.

II.
IN MICHIGAN, CITIES HAVE DISCRETION WHETHER TO APPROVE A FIRST-TIME APPLICANT FOR A LIQUOR LICENSE

In *Wojcik v. City of Romulus*, 257 F. 3d 600, 610 (6th Cir. 2001), the Sixth Circuit Court of Appeals observed that "first time liquor license applicant was not entitled to procedural due process rights under Michigan law." The *Wojcik* court quoted a previous Sixth Circuit case, *Shamie v. City of Pontiac*, 620 F. 2d 118 (6th Cir. 1980) for its holding distinguishing a first-time application from an actual licensee:

> Under Michigan law an applicant for a liquor license, as distinguished from a license holder facing renewal or revocation proceedings, does not have a protected interest. The holder of a liquor license may well have a legitimate claim of entitlement to renewal. One applying for a liquor license has no such claim of entitlement. In the former case, there is a "property" interest; in the latter, there is none.

Wojcik v. City of Romulus, 257 F. 3d 600, 610 (6th Cir. 2001) (*quoting Shamie v. City of Pontiac*, 443 F. Supp. 679, 683 (E.D. Mich. 1977), *aff'd*, 620 F. 2d 118 (6th Cir. 1980)).

Shamie, and the Michigan cases and statutes that underlie it, clarify why applicants in Michigan do not have protected property interests: the decision to grant or deny a first-time application is wholly discretionary. A Michigan state statute, MCL 436.1501 (2), provides that the initial decision whether to approve or deny a liquor license rests with the local unit of government:

> ... An application for a license to sell alcoholic liquor for consumption on the premises, except in a city having a population of 750,000 or more, ***shall be approved by the local legislative body in which the applicant's place of business***

is located before the license is granted by the commission, except that in the case of an application for renewal of an existing license, if an objection to a renewal has not been filed with the commission by the local legislative body not less than 30 days before the date of expiration of the license, the approval of the local legislative body shall not be required ...

MCL 436.1501 (2) (emphasis added).

It is within the discretion of local unit of government to approve or deny an application. "[T]here is no statutory requirement that a local unit of government **must** approve any application or authorize issuing **all** or **any** licenses available under the quota." GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF LOCAL GOVERNMENTS UNDER THE LIQUOR CONTROL CODE, November 2000, pp. 3-4, State of Michigan, Liquor Control Commission. (Emphasis in original) (**Exhibit 1** to Affidavit of Brian Donesley).

There are no priority list rules in Michigan. A city may deny a prior applicant in favor of another applicant or approve none at all, waiting for a better applicant to come along. For example, in "Test Yourself: On-premises Retail Licenses," the MLCC posed the following hypothetical question:

Q There is an opening in the on-premises quota for our township. We have heard that a large restaurant is interested in a piece of prime property. Must we approve one of the applicants we currently have on file for the available license?

A. No. The local governmental unit can decide when and if it wants to approve issuance of the available license. If you prefer to wait until a later time, you may.

GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF LOCAL GOVERNMENTS UNDER THE LIQUOR CONTROL CODE at p.11. **(Exhibit 1)**.

Further, licenses may be transferred from one city within a county to another:

On-premises escrowed licenses issued under this subsection may be transferred subject to local legislative approval under section 501(2) to an applicant whose proposed operation is located within any local governmental unit in a county in which the escrowed license was located.

MCL 436.1531 (1).[3]

Because there are no priority lists in Michigan, there are no property rights to first-time applications. And, in reverse, since there are no rules, there is no argument that an applicant has a property right. Because the local government units have unfettered discretion whether to approve or deny applications, applicants have no expectation that a license may be approved.

In *Wojcik*, the Sixth Circuit Court of Appeals explained that unilateral expectations are insufficient to trigger due process protection:

> Unilateral expectations of a property interest are insufficient to trigger due process concerns. Instead, property interests "are created and their dimensions 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."

Wojcik, 257 F. 3d 600 at 609 (*quoting Parratt v. Taylor*, 451 U.S. 527, 529 n.1 (1981) (*quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

In *Shamie*, the applicant apparently conceded that Michigan law did not give him a protected interest in his application absent additional facts. The applicant argued that a city attorney's assurance that he would be told the basis for rejection gave him a protected interest. The Sixth Circuit disagreed, holding that the city attorney's "promise to tell [the first-time applicant] why his application might be rejected does not automatically confer upon him a 'property interest' protected by constitutional due process." *Shamie*, 620 F.2d at 120-121. In short, not only was the city without obligation to approve his application, it was not even required to provide the basis for its denial. It could have acted arbitrarily. It could have acted

[3] Michigan has a separate statutory scheme for off-premises licenses which, under Michigan law, may be issued to supermarkets, convenience stores and drug stores where alcoholic beverages, including liquor, are sold for consumption off the premises. *See* MCL 436.1111 (11). This Memorandum, and the Michigan and Sixth Circuit cases discussed herein, pertains only to on-premises licenses.

unreasonably. It could have approved a subsequent applicant or none at all, waiting for a more promising applicant to come along, based upon the sole discretion of the city.

Michigan has given local governments unfettered discretion whether to approve or deny a first time application for a liquor license. Consequently, the Sixth Circuit, in *Wojcik* and *Shamie* held that a first-time applicant has no property interest protected by constitutional due process. As is discussed, *infra*, Idaho law is the opposite.

III.
IN IDAHO, NEW LICENSE APPLICATIONS ARE GOVERNED BY PRIORITY LIST RULES

The Idaho Legislature has established a quota system, which limits the number of retail alcohol beverage licenses to one (1) license for each one thousand five-hundred (1,500) population of said city or fraction thereof, as established in the last census. I.C. § 23-903. ISP has promulgated rules establishing priority lists for each city in which the number of applicants exceeds the number of available licenses. IDAPA 11.05.01.013.01. These rules further dictate prioritization (first in time, first in right), how places in line are reserved, how these places in line may and may not be transferred, and what an applicant must do to obtain a license once he is notified that one has become available. IDAPA 11.05.01.013.01-05. ISP has no discretion but to apply these rules uniformly to each applicant on each list. Based on these rules, an applicant has a legitimate expectation or legal entitlement that, once he has secured a position on a priority list, he cannot be removed, unless he fails to comply with the statutes or rules. Furthermore, the applicant has a legitimate expectation or legal entitlement that he or she shall be notified, after waiting in turn, when a new license becomes available off the priority list. This legal expectation, based upon state law, is a substantive or vested right. ISP's retroactive application of its 2007 amendment to its IDAPA rules, removing multiple listings of Fuchs's name from five

priority lists violated this legal entitlement. This Court should deny ISP's Motion to Dismiss and permit this action to proceed to Declaratory Judgment.

ISP has promulgated rules establishing priority lists for each city in which the number of applicants exceeds the number of available licenses. IDAPA 11.05.01.013.01. Further, ISP has promulgated rules governing priority lists for incorporated city liquor licenses. IDAPA 11.05.01.013.01-05. IDAPA 11.05.01.013.01 sets forth the criteria governing the process an applicant must follow to be placed on a priority list and the manner in which applicants are given priority. Priority is given to the earliest application:

> The Alcohol Beverage Control Bureau maintains a priority list of applicants for those cities in which no incorporated city liquor license is available. A separate list is maintained for each city. A person, partnership, or corporation desiring to be placed on a priority list shall file a completed application for an incorporated city liquor license, accompanied by payment of one-half (1/2) of the annual license fee. Such application need not show any particular building or premises upon which the liquor is to be sold, nor that the applicant is the holder of any license to sell beer. ***Priority on the list is determined by the earliest application, each succeeding application is placed on the list in the order received***

IDAPA 11.05.01.013.01. (Emphasis added).

IDAPA 11.05.01.013.02 provides the manner in which ISP shall notify an applicant of an available license off a priority list and an applicant's obligations to respond to the notice:

> If the applicant does not notify the Alcohol Beverage Control Bureau in writing within ten (10) days of receipt of the notice of his intention to accept the license, the license is offered to the next applicant in priority. An applicant accepting the license shall have a period of one hundred eighty (180) days from the date of receipt of Notice of License Availability in which to complete all requirements necessary for the issuance of the license. Provided, however, that upon a showing of good cause the Director of the Idaho State Police may extend the time period in which to complete the necessary requirements for a period not to exceed ninety (90) days.

IDAPA 11.05.01.013.02.

IDAPA 11.05.01.013.03 governs an applicant's obligations once he has been notified of an available license:

> An applicant refusing a license offered under this rule or an applicant who fails to complete his application may have his name placed at the end of the priority list upon his request. Should the applicant holding first priority refuse or fail to accept the license or to complete the application within the time specified, the applicant shall be dropped from the priority list, the deposit refunded, and the license offered to the applicant appearing next on the list

IDAPA 11.05.01.013.03.

IDAPA 11.05.01.013.04 prohibits *inter vivos* transfers of priority list positions but specifically provides that a place in line may be inherited:

> An applicant for a place on an incorporated city liquor license priority list may not execute an inter vivos transfer or assignment of his place on the priority lists. For the purposes of this rule, "inter vivos transfer or assignment" means the substitution of any individual; partnership; corporation, including a wholly owned corporation; organization; association; or any other entity for the original applicant on the waiting list. An attempt to assign inter vivos a place on an incorporated city liquor license priority list shall result in the removal of the name of the applicant from the lists. An applicant, however, may assign his or her place on an alcoholic liquor license priority list by devise or bequest in a valid will. A place on an incorporated city liquor license priority list becomes part of an applicant's estate upon his or her death.
>
> IDAPA 11.05.01.013.04.

Once ISP notifies an applicant an available license, the ISP Director has ninety (90) days upon receipt of a liquor license application to investigate a liquor applicant and that if "such applicant is qualified to receive a license, that his premises are suitable for the carrying on of the business, and that the requirements of this act and the rules promulgated by the director are met and complied with, [the director] shall issue such license. . ." I.C. § 23-907. As the rules demonstrate, ISP has established precise criteria ensuring an applicant's place in line on a list if the applicant has paid one-half of an annual license fee and ensuring him a license if he is not otherwise disqualified during the investigation process. ISP has provided precise requirements

as to the applicant's obligations, once notified of an available license. And, ISP has provided the only manner in which that place in line may be transferred. Consequently, applicants have a legitimate expectation of entitlement that, if the applicant complies with the rules, the applicant shall be notified of an available license, in turn.

The Idaho Supreme Court has held that the due process requirements "apply not only to courts but to state administrative agencies charged with applying eligibility criteria for licenses." *Eacret v. Bonner County*, 139 Idaho 780, 784 (2004). It has so held in a variety of circumstances involving applicants for licenses or permits. In *Eacret*, the Court held that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution entitles an applicant to an impartial and disinterested tribunal. *Id.* In *Boise Tower Associates, LLC v. Hogland*, 147 Idaho 774 (2009), the Court held that building permit holder, regardless of whether having a property right, has a right to due process, including prompt administrative or judicial review of an interim suspension. In *Comer v. County of Twin Falls*, 130 Idaho 433 (1997), held was that due process requirements apply to proceedings of local land use boards, including decisions on applications for conditional land use permits. In *Rincover v. State Department of Finance*, 124 Idaho 920 (1994), held was that an applicant for registration of securities salesperson was entitled to due process safeguards before being deprived of opportunity to practice one's profession.

With respect to liquor licenses, the Idaho Supreme Court has explained in dicta that "[a]lthough a liquor license is a privilege and not a property right; the licensing procedure cannot be administered arbitrarily." *Crazy Horse, Inc. v. Pearce*, 98 Idaho 762, 765 (1977) (internal citations omitted).[4] It has "also held that a liquor license is a right of property as between a

[4] Significantly, the Michigan Supreme Court formerly had held that a liquor license was not a "property right" but a "privilege granted by the state." *Bundo v. City of Walled Lake*, 238 N.W. 2d 154 , 159 (1976). *See e.g. People v. Schafran*, 134 N.W. 29 (1912). However, the Michigan Supreme Court overruled *Schaffran* and similar Michigan cases in *Bundo*: "Those cases which have relied upon this doctrine of finding no property interests in liquor licenses

licensee and third persons in that it has 'attributes of value and assignability.'" *BHA Investments, Inc. v. State*, 138 Idaho 348, 355 (2003) (*quoting Weller v. Hopper*, 85 Idaho 386, 394 (1963)). The distinction between privileges and rights clearly is no longer applicable. *See Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) (the U.S. Supreme Court indicating that it had "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of due process rights.") Consistent with modern due process jurisprudence, an Idaho liquor licensee is afforded all the process protection provided under the Idaho Administrative Procedures Act. I.C. § 67-5254.[5] Given *Eacret, Boise Tower Associates,* and *Comer*, an applicant is entitled to due process protection.

Again, however, this Court need not determine whether an applicant has a "property interest." because the question here is much narrower. Mr. Fuchs is seeking a declaration from this Court that ISP cannot retroactively apply IDAPA11.05.01.013.04, removing all but one of his listings from priority lists in each of five Idaho cities. The Idaho Code provides that "[n]o part of these compiled laws is retroactive, unless expressly so declared." I.C. § 73-101. "An application is deemed retrospective if it affects substantive rights." *Myers v. Vermaas*, 114 Idaho 85, 87 (Ct. App. 1988). "Among the rights characterized as substantive are those which are 'contractual or vested' in nature." *Id.* (*Citing City of Garden City v. City of Boise,* 104 Idaho 512, 515 (1983)). "Statutes which do not 'create, enlarge, diminish or destroy contractual rights' are deemed to be remedial or procedural as opposed to substantive." *Id.*

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can no longer be followed for this purpose." *Bundo*, 238 N.W. 2d at 160. *See also Bisco's Inc. v. Mich. Liquor Control Com'n*, 238 N.W. 2d 166 (1976).

[5] 67-5254 (1) provides: "[a]n agency shall not revoke, suspend, modify, annul, withdraw or amend a license, or refuse to renew a license of a continuing nature when the licensee has made timely and sufficient application for renewal, unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of this chapter or other statute."

Myers demonstrates why IDAPA11.05.01.04 may not be applied retroactively. If a person files his application and waits his turn, he shall be notified when a new license becomes available. In *Myers,* the Idaho Court of Appeals held that a ***mandatory*** attorney fees statute could not be applied retroactively but that a ***discretionary*** statute could be so applied:

> When this classification scheme is applied to statutes authorizing ***discretionary*** awards of attorney fees, such statutes are generally held to be remedial or procedural. Consequently, they are given retroactive effect. . . . However, we think a different analysis is required for I.C. § 12-120. Unlike I.C. § § 12-121 and 61-617A, I.C. 12-120 provides for a ***mandatory,*** not discretionary award of attorney fees to the prevailing party in commercial litigation. The automatic nature of an award under I.C. § 12-120 makes it, in effect, an adjunct to the underlying commercial agreement between the parties. It establishes an entitlement. In this respect, an award under the statute is closely akin to other "contractual or vested" rights contained in the agreement itself.

Myers, 114 Idaho at 87 (emphasis in original).

Here, the IDAPA rules governing priority lists are not discretionary. "Priority on the list is determined by the earliest application, each succeeding application is placed on the list in the order received." IDAPA 11.05.01.01. "When an incorporated city liquor license becomes available, Alcohol Beverage Control offers it in writing to the applicant whose name first appears on the priority list." IDAPA11.05.01.02. "If the applicant does not notify the Alcohol Beverage Control Bureau in writing within ten (10) days of receipt of the notice of his intention to accept the license, the license is offered to the next applicant in priority." *Id.* Compare this compulsory language to Michigan's liquor laws, where a city has unfettered discretion whether to approve or deny a liquor license applicant and, if it wishes, may deny an application in favor of a subsequent application, or not approve one at all. MCL 436.1501 (2). *See also* GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF LOCAL GOVERNMENTS UNDER THE LIQUOR CONTROL CODE at p.11. **(Exhibit 1).** As with the mandatory attorney fees statute in *Myers,* which guarantees an

applicant his place in line on a priority list, IDAPA 11.05.01.013.01, "establishes an entitlement." *Myers*, 114 Idaho at 87.

This Court should deny ISP's Motion to Dismiss and allow this action to proceed to Declaratory Judgment.

IV.
THIS MATTER FALLS SQUARLY WITHIN THREE EXCEPTIONS TO THE EXHAUSTION DOCTRINE

ISP's attempt to retroactively apply its 2007 amendments to its priority list rules without notice to Mr. Fuchs or others is a matter properly before the Court, because of three exceptions to the exhaustion doctrine. First, it would be futile for this Court to remand the matter back to the agency, when it is clear a decision has already been made. Second, ISP provided no notice to Mr. Fuchs of its decision retroactively to apply the amendments, until after the decision had been made. Finally, the IAPA provides that parties seeking to challenge the validity or applicability of a rule may do so by filing a declaratory judgment action in district court.

In *Peterson v. City of Pocatello*, 117 Idaho 234 (Ct. App. 1990), the Idaho Court of Appeals set forth three exceptions to the exhaustion doctrine, two of which apply here:

> Illustrative of the circumstances which require an exception to the exhaustion doctrine include: **(1)** ***where resort to administrative procedures would be futile***; (2) where the aggrieved party is challenging the constitutionality of the agency's actions or of the agency itself; or ***(3) where the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise the administrative review procedures.*** *McConnell v. City of Seattle*, 44 Wash.App. 316, 722 P.2d 121, 124 (1986)

Peterson, 117 Idaho at 237 (emphasis added). *See also Grever v. Idaho Telephone Co.*, 94 Idaho 900, 903, 499 P.2d 1256, 1259 (1972).

First, resorting to administrative procedures would be futile in this case. There is no proceeding to which this Court could "remand."[6] There is no contested case or prior proceeding, because ISP made its decision retroactively to apply the amendments, and it carried the decision out, only notifying Mr. Fuchs and other applicants after the deed was done. There is no proceeding to which to "remand". Second, Fuchs had "no notice of the initial administrative decision or no opportunity to exercise the administrative review procedures." Fuchs was notified only after the decision was made by a letter that included a check refunding the money he had deposited to reserve his place in line.[7] ISP's actions fall squarely within *Peterson*'s exception to the exhaustion doctrine for parties given no notice the "initial agency decision." *Peterson*, 117 Idaho at 237.

Finally, the Idaho Supreme Court has explained that there is an additional exception to the exhaustion doctrine regarding agency rules:

> While the general rule is that a contestant must first exhaust administrative remedies before filing a complaint in district court, there is an exception for declaratory judgments regarding agency rules. The IAPA provides:
> "The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights of the petitioner ... a declaratory judgment may be rendered whether or not the petitioner has requested the agency to pass upon the validity or applicability of the rule in question."

Asarco Inc. v. State, 138 Idaho 719, 725 (2003) (*quoting* I.C. §§ 67-5278 (1), (3).

Here, Mr. Fuchs is challenging the validity of the retroactive application of an agency rule that has interfered with his legal rights and the legal rights of all applicants who had multiple listings on city priority lists. This challenge, attacking a broad agency action, expressly

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[6] "Remand" is defined as "[t]o send (a case or claim) back to the court or tribunal from which it came for some further action." BLACK'S LAW DICTIONARY, 8th Ed. (2004).

[7] *See* July 24, 2009 letter from Lt. Robert Clements to Daniel Fuchs; **Exhibit 1** to Affidavit of Daniel S. Fuchs, filed September 4, 2009.

authorized litigants to file a declaratory judgment action in district court under the Idaho Administrative Procedures Act, I.C. § 67-5278.

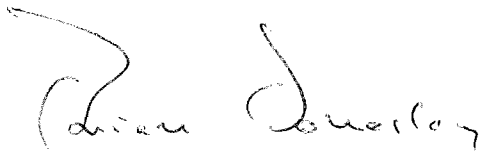
ISP argues that the 2007 amendment to IDAPA 11.05.01.013.04 was properly promulgated. But, Fuchs is not challenging the amendment as promulgated in 2007. Presumably, applicants who seek placement on priority lists after its effective date, March 6, 2007, "shall hold only one position at a time on each incorporated city priority list." However, ISP's July 24, 2009 letter, retroactively applying the 2007 rule amendment, was a new rule. In *Asarco*, the Idaho Supreme Court held that a DEQ pollutant standard known as a "TMDL" constituted an agency rule and the plaintiff mining companies properly "sought a declaratory judgment regarding the validity of the TMDL as a rule." *Asarco*, 138 Idaho at 725. Although DEQ had not promulgated the TMDL, it was still a rule, albeit an informal and invalid one, because it was "an expression of agency policy not previously expressed." *Asarco*, 138 Idaho at 724. Likewise, Mr. Fuchs is challenging agency action "not previously expressed." The July 24, 2009 letter implemented a new expression of policy. Nothing in IDAPA 11.05.01.013.04 suggests that the new rule was to be applied retroactively. ISP did not attempt to do so until 2009. This kind of informal rulemaking the Idaho Supreme Court rejected in *Asarco*. It is a matter properly before this Court.

There are no administrative remedies to exhaust. ISP made its initial decision retroactively to apply its 2007 amendments, without notice to Mr. Fuchs or any other similarly situated applicants. This Court should deny ISP's Motion to Dismiss for Failure to Exhaust Administrative Remedies and allow this action to proceed to Declaratory Judgment.

V.
CONCLUSION

In Michigan, local governments have unfettered discretion whether to approve or deny an application for a first-time liquor license. In Idaho, ISP has promulgated rules providing applicants' places in line on priority lists, whereby applicants shall be notified of new licenses as they become available. There is no discretion. ISP's administration of the lists, under the rules, is ministerial. Under Idaho law, statutes and rules cannot be applied retroactively, if they affect substantive or vested rights. Fuchs's place in line on the affected priority lists is a substantive, vested right.

This Court should deny ISP's Motion to Dismiss for Failure to Exhaust Administrative Remedies. There are no administrative remedies to exhaust. Rather, ISP's retroactive application of its rules is contrary to Idaho law. This Court should deny ISP's Motion and allow this action to proceed to Declaratory Judgment.



Brian Donesley
Attorney for Petitioner/Plaintiff Daniel S. Fuchs

CERTIFICATE OF SERVICE

On this 20th day of November, 2009, I hereby certify that I served the above document on the addressee indicated, by delivering the same to the following party by method indicated below:

Cheryl Meade, Deputy A.G.
Idaho State Police
700 S. Stratford Drive
Meridian, ID 83642-6202

[ ] U.S. Mail
[ ] Hand-Delivered
[ ] Overnight Mail
[X] Facsimile (884-7228)

Barbi McCary Crowell

148

LAWRENCE G. WASDEN
Attorney General

CHERYL E. MEADE
Deputy Attorney General
Idaho State Police
700 S. Stratford Dr.
Meridian, Idaho 83642
Telephone: (208) 884-7050
Facsimile: (208) 884-7228
Idaho State Bar No. 6200

Attorney for Respondent

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, Petitioner, v. STATE OF IDAHO, Department of State Police, Bureau of Alcohol Beverage Control, Respondent.	Case No. CV-2009-03914 RESPONDENT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

COMES NOW, Cheryl E. Meade, Deputy Attorney General for the Idaho State Police, Alcohol Beverage Control ("ABC") and hereby files its Supplemental Memorandum in Support of Motion to Dismiss, pursuant to the Court's direction given to counsel on November 2, 2009.

I. SUMMARY OF THE FACTS

1. Fuchs applied for numerous retail liquor by the drink licenses between June 2, 1994 and February 13, 1995, in Blaine, Idaho Falls and Twin Falls Counties, to wit; in Blaine County

Fuchs remains on the Bellevue, Idaho priority list once and was issued a refund for a second position on the list; Fuchs remains on the Hailey, Idaho priority list once and was issued a refund for a second and third position on the list; Fuchs remains on the Ketchum, Idaho priority list once and was issued a refund for a second and third position on the list; Fuchs remains on the Sun Valley, Idaho priority list once and was issued a refund for a second and third position on the list; Fuchs remains on the Idaho Falls, Idaho priority list once and was issued a refund for a second position on the list; Fuchs remains on the Twin Falls, Idaho priority list once and was issued a refund for a second, third, fourth, fifth, sixth, seventh and eighth position on the list.

2. On or about July 24, 2009, ABC, in accordance with IDAPA Rule 11.05.01.013.04, returned Fuchs' applications where his name appeared more than one time on each incorporated city priority list. Mr. Fuchs' money was returned to him for the numerous application fees he submitted. ABC, per its rule, allowed Fuchs to retain the highest place he held on each list mentioned above in paragraph number 1.

3. On November 2, 2009, the court directed the parties to file a memorandum addressing the opinion of a Sixth Circuit Court of Appeals case and any subsequent cases. *See, Wojcik v. Romulus*, 257 F.3d. 600 (2001).

II. ISSUES BEFORE THE COURT

A PETITION FOR DECLARATORY JUDGMENT SHOULD BE DENIED WHEN:

A. THERE IS NO CONSTITUTIONALLY PROTECTED PROPERTY INTEREST EXTENDED TO A LIQUOR LICENSE APPLICANT, WHOSE NAME APPEARS ON A PRIORITY LIST. NEITHER IDAHO'S LIQUOR ACT NOR ABC'S RULES PROVIDE FOR SUCH AND ANY EXPECTATION OF SUCH, ON THE PART OF THE APPLICANT IS UNILATERAL IN NATURE.

B. IF THERE IS NO CONSTITUTIONALLY PROTECTED PROPERTY INTEREST BETWEEN THE STATE OF IDAHO AND A LIQUOR

LICENSE APPLICANT, THEN NO SUBSTANTIVE RIGHTS ARE INFRINGED UPON AND THE STATE OF IDAHO CAN APPLY AN ADMINISTRATIVE RULE RETROACTIVELY IN ORDER TO CARRY OUT LEGISLATIVE INTENT TO DISCOURAGE SPECULATION IN LIQUOR LICENSING.

C. ALTERNATIVELY, IF THIS COURT FINDS THAT THE AGENCY'S ACTION GIVES RISE TO A CONTESTED CASE, THE APPLICANT HAS STILL FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES AND THE MATTER SHOULD BE REMANDED SO THAT A COMPLETE RECORD MAY BE DEVELOPED FOR THIS COURT'S REVIEW ON APPEAL.

APPLICABLE LAW AND ARGUMENT ON THE ISSUES

A. THERE IS NO CONSTITUTIONALLY PROTECTED PROPERTY INTEREST EXTENDED TO A LIQUOR LICENSE APPLICANT, WHOSE NAME APPEARS ON A PRIORITY LIST. NEITHER IDAHO'S LIQUOR ACT NOR ABC'S RULES PROVIDE FOR SUCH AND ANY EXPECTATION OF SUCH, ON THE PART OF THE APPLICANT IS UNILATERAL IN NATURE.

This Court invited counsel for both sides to submit additional briefing for a case handed down from the Sixth Circuit Court of Appeals, arising from the State of Michigan. However, in order to more effectively compare similarities and differences of Michigan's liquor law, a foundation of Idaho's laws and regulations is provided below.

IDAHO CODE § 23-901 declares the legislature's policy in the regulation and sale of alcoholic beverages by and through the state's liquor stores and the director of Idaho State Police. The director, along with the county commissioners and the councils of cities in the state of Idaho, are "empowered and authorized to grant licenses to persons qualified under this act . . . and under the rules promulgated by said director . . ."

Much like Michigan's code provisions, a duality in the granting of liquor licenses exists also in Idaho. The final decision, to issue a liquor license in Michigan, appears to rest with the state's liquor control commission. Municipalities in Michigan appear to play an initial role in the

permitting process. In Idaho, it appears the final authority in granting a liquor license is vested in the director of Idaho State Police. Likewise, a liquor license applicant in Idaho must also seek approval from the county and city where the license is to be placed. *See*, IDAHO CODE §§ 23-903, 23-916 and 23-1009.

IDAHO CODE §§ 23-905 and 23-910 covers the larger portion of requirements that an applicant must meet in order to be granted a liquor by the drink license from ABC. At any one of these points, the director (through ABC's delegated authority) could deem a premise unsuitable or an applicant unqualified.

Another relevant statute is IDAHO CODE § 23-907. It states in pertinent part,

> **If the director shall determine** that the contents of the application are true, [that the applicant's premises are suitable and that the requirements of this act and **the rules promulgated by the director are met]**, that such applicant is qualified to receive a license; otherwise the application shall be denied and the license fee, less the costs and expenses of investigation, are returned to the applicant. (emphasis added)

The placement of the word "if" before the director's determination creates a conditional clause bringing into question whether the contents of an application are true or not, or if an applicant may have met other requirements. What this means grammatically, is that the director must determine: 1) whether the contents of an application are true or not, 2) if an applicant qualifies by ABC's rules, and 3) if an applicant's premises are suitable.

While some elements may be answered more definitively, such as the truthfulness of the contents of an application, other elements may not be identified so easily. For example, a premise may not be suitable for a number of reasons. Some reasons include proximity to a church or school, does the premise have a history of numerous calls for service by law enforcement, what types of other businesses are close to the premises, and is there a residential

area in close proximity that will be impacted negatively. Reasons such as these may require the director to use discretion in deciding whether a license will be granted.

Even the word "determine" is defined as: "to establish or ascertain definitely, as after consideration, investigation, or calculation." *Dictionary.com* (December 2, 2009). As the language plainly states, the director's determination must be made prior to issuing a liquor license to an applicant. The director's determination is based upon an investigation and his further consideration of whether or not an applicant is qualified to receive a license. The legislature's use of the word "determine," lends extra support in symbolizing the amount of discretion the director has in approving liquor license applicants. To think otherwise would lead to an absurd contortion of the law, i.e. that anyone who applies for a liquor license is guaranteed to receive a liquor license, regardless of the statutory requirements. Clearly this is not the case.

When an application is denied by the director, then the applicant's license fee is returned minus any costs associated with an investigation. The requirement to return the application fee or a portion of it clearly demonstrates that any type of contractual relationship is absent. Furthermore, an applicant is on notice that an application can be denied. Therefore, there can be no expectation on the part of an applicant that a license is guaranteed.

Furthermore, in an instance such as this one, an applicant merely wishing to be placed on a waiting list may do so with a minimal investment. The only requirements to be placed on the waiting list are that one-half (1/2) of the application fee is paid at the time a two-page application is submitted. Additionally, persons such as Mr. Fuchs desiring only to be placed on the waiting list are not required to name or show any particular building or premises upon which liquor is to be sold nor are they required to show that they are the holder of a license to sell beer. IDAPA Rule 11.05.01.013.01 and IDAHO CODE § 23-910(5).

In fact, such persons are not even required to submit the lion's share of the application materials as required by IDAHO CODE § 23-905 until a person's name comes to the top of the waiting list. Therefore, up until this point, any effort in relation to time and expense on the part of said person to get their name on the waiting list is nominal at best.

IDAHO CODE § 23-932, provides additional evidence in the amount of discretion that the director has in liquor licensing. It states in relevant part,

> [D]irector shall be empowered and it is made his duty to prescribe . . . , the proof to be furnished and the conditions to be observed in the issuance of licenses . . . the conditions and qualifications necessary to obtain a license. . .

The language is plain in giving the director the discretion over the proof to be furnished and conditions an applicant is to observe in obtaining a liquor license. The director also has the discretion in prescribing the conditions and qualifications needed by an applicant to obtain a liquor license. Because the Idaho Legislature granted such expansive authority to the director of Idaho State Police, any other interpretation would lead to a distortion of the law. Surely, the legislature did not intend for liquor licenses to be issued to anyone and everyone who asked to be placed on the waiting list. Nor did the legislature intend that it be involved in the discretionary decisions of who obtains a liquor license. Any claims made by Mr. Fuchs that the director acts only in a ministerial capacity and has no discretion in the issuance of liquor licenses, is without merit.

Against this similar legal backdrop, the United States Court of Appeals, in the Sixth Circuit held,

> A first time (entertainment permit) applicant had no constitutionally cognizable property interest in said permit, where state law required approval of the permit by the state liquor commission and city; permitee was not entitled to any procedural or substantive due process rights." *Wojick v. City of Romulus* 257 F.3d 600, 610-612 (2001).

Wojick built its holding upon the foundation established in *Parratt v. Taylor*, 451 U.S. 527, 529 n. 1, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (*quoting Board of Regents v. Roth*, 408 U.S.564, 577, (1972)); *see also*, *Verba v. Ohio Casualty Insurance Co.*, 851 F.2d 811, 813 (6th Cir.1988),

> Even though individuals often claim property interests under various provisions of the Constitution, such interests are not created by the Constitution; nor may individuals manufacture a property interest. **Unilateral expectations of a property interest are insufficient to trigger due process concerns.** Instead, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. (emphasis added).

In *Roth*, the court stated where there was no state statute entitling an assistant professor to reemployment, or any other creation of a legitimate claim to such, there was no property interest in the position. Therefore, the assistant professor was not protected by the Fourteenth Amendment, and the University was not required to grant a hearing to this employee.

In order to get to the merits of a due process claim, the Supreme Court's analysis in *Roth* clearly shows that a cognizable property interest must be established first. This appears to be in contravention to the position taken by Mr. Fuchs.

In *Wojick*, the court also looked to another Michigan case for support of its ruling that first time applicants of entertainment permits have no rights giving rise to due process. *Shamie v. City of Pontiac*, 443 F. Supp. 679, 683 (E.D.Mich.1977), *aff'd in part*, 620 F.2d 118 (6th Cir. 1980) ("Where state law required approval of **state liquor commission and city** [U]nder Michigan law a first time applicant for a liquor license, as distinguished from a license holder facing renewal or revocation proceedings, does not have a protected interest.") (emphasis added).

While Idaho has never specifically addressed the issue of whether or not a liquor license applicant has an alleged property interest in a position on a municipal priority list, there are several Idaho cases that are germane to this limited discussion. They are as follows:

> *BHA Investments, Inc. v. State*, 138 Idaho 348, 354 (2003) (reaffirming the Idaho Supreme Court's previous holding, "that a liquor license is not a right of property, implying that it is not property in any constitutional sense.")
>
> *Crazy Horse, Inc. v. Pearce*, 98 Idaho 762, 765 (1977) ("A liquor license applicant can be denied a license because there is no constitutional guarantee [in] the *right* to compete in the retail liquor market.")(*citing*, *Gartland v. Talbott*, 72 Idaho 125,131 (1951) ("the selling of intoxicating liquor is a proper subject for control and regulation under the police power. It is likewise universally accepted that no one has an inherent or constitutional right to engage in a business of selling or dealing in intoxicating liquors.") (citations omitted)
>
> *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 215-16, (1951) 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.
>
> *Cf. Weller v. Hopper*, 85 Idaho 386, 394, (1963) ("a liquor license is a right of property as between a licensee and third persons in that it has "attributes of value and assignability.")

Idaho's high court has consistently ruled numerous times, over the span of 45 plus years, that a liquor licensee has no constitutional property right or interest in a liquor license as between a licensee and the state. ABC argues that a mere applicant could never expect to have more rights than a card carrying licensee and any such expectation would be completely and totally unilateral on the part of the applicant.

B. IF THERE IS NO CONSTITUTIONALLY PROTECTED PROPERTY INTEREST BETWEEN THE STATE OF IDAHO AND A LIQUOR LICENSE APPLICANT, THEN NO SUBSTANTIVE RIGHTS ARE INFRINGED UPON AND THE STATE OF IDAHO CAN APPLY AN ADMINISTRATIVE RULE RETROACTIVELY IN ORDER TO CARRY OUT LEGISLATIVE INTENT TO DISCOURAGE SPECULATION IN LIQUOR LICENSING.

Beginning with the enactment of the Idaho Administrative Procedures Act ("IDAPA") itself, the bill's authors, Michael S. Gilmore and Dale D. Goble, wrote a comprehensive explanation and analysis of how administrative rule writing and contested cases before state agencies was to be carried out. *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho Law Rev. 273, 367 (1993/1994).

According to IDAHO CODE § 67-5224(5)(a), "[a] rule which is final and effective may be applied retroactively, as provided in the rule." Gilmore and Goble go on to state that some of those occasions of when a rule may be applied retroactively, i.e. where the agency is correcting a mistake or where retroactivity is unlikely to pose constitutional problems. *Id.* at 303.

Idaho's high court has also examined the tension between prospective and retroactive application of statutes/rules. *See, City of Garden City v. City of Boise,* 104 Idaho 512, 515 (1983), (*citing Ohlinger v. U.S.*, 135 F. Supp. 40 (D.C. Idaho 1955), Remedial or procedural statutes which do not create, enlarge, diminish or destroy contractual or vested rights are generally held to operate retrospectively.") *See also, Floyd v. Board of Commissioners of Bonneville County,* 131 Idaho 234, 238 (1998), ("parties do not have a substantial vested right in a particular standard of review by a court.") *See also*, Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statues are to be Construed,* 3 Van.L. Rev. 395, 402 (1950), identifying the conflict between the canon that,

> [a] statute imposing a new penalty or forfeiture or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect;

And the countervailing rule that

> [r]emedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction. (citations omitted).

IDAPA rule 11.05.01.013.04 ("Rule .04") is the rule upon which the agency's action in this case turns. It provides in pertinent part,

> An applicant shall hold only one position at a time on each incorporated city priority list. An applicant must be able to demonstrate to the Director the ability to place an awarded license into actual use as required by Section 23-908(4), Idaho Code and these rules.

As noted by the limited agency record, ABC asserts that Rule .04 is purely a procedural rule and is remedial in nature. Rule .04 states that an applicant is required to show that the license will be put into actual use according to IDAHO CODE § 23-908. ABC directs the attention of this Court to the Statement of Purpose drafted when IDAHO CODE § 23-908 was moving through the legislature. Agency Record ("A.R.") 22, attached and incorporated herein. While we are not privy as to any nefarious acts associated with liquor licensing speculation, we do know this piece of legislation was not created in a vacuum. According to this document, the legislature surely must have felt the issue important enough that the state should control the speculation in liquor licensing.

As the record reflects Rule .04 was drafted in the summer of 2006. A.R. 2. It was disseminated to a working ad hoc group, consisting of community partners and interest groups, whose goal was to reform Idaho's liquor laws. ABC sought input from this group as part of its informal rule making process. A.R. 3 and 4. A second draft of the rule was composed based upon those suggestions. A.R. 6

The only change made to Rule .04 happened when the words "at a time" was inserted. The essence of the rule was left unchanged. A.R. 2 and 6. Rule .04 was sent out again to the same ad hoc group where a discussion of the rule took place. A.R. 8 and 9. Rule .04 was published in the Idaho Administrative Bulletin on October 4, 2006. A.R. 13. ABC's rule

changes went before the respective House and Senate subcommittees for commentary. A.R. 16, 17 and 19.

According to the testimony by ABC during the House presentation, the new licenses being issued were either not being used or they were being used illegally. A.R. 16, pg. 2. Comments, from certain members of the ad hoc group, about Rule .04 included testimony that they felt a change in this section was discriminatory and unnecessary. *Id.*, pg.3. The House voted to approve ABC's rules, but struck the rule addressing the allowance of a multi-purpose arena. *Id.*

ABC's Rules were also presented to the Senate subcommittee. A.R. 17 and 19. According to the testimony given by Brian Donesley, "Rule .013.04 issue was the waiting list." A.R. 17, pg. 2. Mr. Donesley explained to the committee that "[t]he priority list is first in time, first in line, and ISP's complaint is that persons have more than one place on the waiting list within a city. This rule change addresses that." *Id.* The subcommittee then rescheduled another time for additional testimony to be taken. *Id.* At the following meeting, Mr. Donesley spoke about Rule .04 stating there had been litigation 25 years earlier over the priority list. A.R. 19, pg. 4. However, it is unknown if ABC has been able to locate any documents to date evidencing this action. Like the House, the Senate subcommittee voted to approve ABC's rules as written, but moved to reject the multi-purpose arena rule. *Id.*, pg.7.

It is obvious that as Rule .04 was making its way through the rulemaking process, there was ample opportunity by the legislative subcommittees, to either change the rule or completely reject this rule in its entirety. However, knowing now that the legislature had previously sought to limit the speculation of liquor licenses, it is no surprise that the legislature passed Rule .04 as

it was written. It is clear that Rule .04 is remedial in nature as to correct the overpopulation of waiting lists by speculators.

As the testimony reflects, Rule .04 was drafted to correct a procedure that allowed the speculation of liquor licenses. Applicants' actions in submitting their names numerous times for each municipal priority list is in violation of IDAHO CODE § 23-908. Therefore, applicants should have no expectation of being able to maintain a position on a waiting list due to their unclean hands.

Furthermore, if one were to look at the context of the entirety of ABC's IDAPA rules addressing priority lists, the fundamental nature of this group of rules implicitly demonstrates only how ABC is to process applications as they are received. *See* IDAPA 11.05.01.013 *et seq.* There are no substantive or implied contract rights found in any of these rules. When the rules are read alongside the statutes discussed above, it is clear that a mere applicant on a waiting list has no property interest in a position on that list.

C. ALTERNATIVELY, IF THIS COURT FINDS THAT THE AGENCY'S ACTION GIVES RISE TO A CONTESTED CASE, THE APPLICANT HAS STILL FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES AND THE MATTER SHOULD BE REMANDED SO THAT A COMPLETE RECORD MAY BE DEVELOPED FOR THIS COURT'S REVIEW ON APPEAL.

As argued before, in ABC's Response to the Petitioner's Amended Petition for Judicial Review, IDAHO CODE § 23-933 provides the statutory mechanism to be applied in contested cases brought by ABC before the director. It states that such a procedure shall be in accordance with the provisions of the Idaho Administrative Procedures Act ("IAPA") found in Title 67, chapter 52, IDAHO CODE. *See also,* ABC's Response to the Petitioner's Amended Petition for Judicial Review.

IDAHO CODE § 67-5201(6) defines a contested case as "a proceeding that results in the issuance of an order." Additionally, IDAHO CODE § 67-5201(12) defines an order as "an agency action of particular applicability that determines the . . . privileges . . . of one or more specific persons." Finally, agency action is defined by IDAHO CODE § 67-5201(3) as "an agency's performance of, or failure to perform, any duty placed on it by law."

Mr. Fuchs claims that because ABC sent only a letter to him stating the action it was taking, i.e. removing him from various priority lists, that ABC did not issue a formal order giving him notice of the agency action. As a result, Mr. Fuchs asserts that because of the way ABC applied Rule .04 to his case, he should be able to seek relief directly to the district court. Such an assertion completely disregards the law stated above.

If this Court were to apply the doctrine of liberal construction, it would construe the IAPA's language, so as to give full legislative effect in this immediate action. The reasoning found in *American Falls Reservoir District No. 2, v. Idaho Department Of Water Resources*, 143 Idaho 862, 871-873 (2007) is likewise, proper in this instance. In *American Falls*, the Idaho Supreme Court held, "IDAHO CODE § 67-5278 . . . [provides] standing to challenge a rule, but does not eliminate the need for completion of administrative proceedings for an as applied challenge." *Cf. Lochsa Falls, LLC v. State*, 147 Idaho 232 (2009) (finding that if no administrative remedy for the agency action exists to contest an agency's action, then a party can seek declaratory relief without exhausting administrative remedies first).

Fuchs clearly failed to exhaust his administrative remedies in this matter as required by statute and case law. The absence of discovery and testimony taken before a hearing officer in a case such as this clearly violates the policy provisions set forth found in the *American Falls* opinion.

Unquestionably, ABC was performing a duty placed on it by Rule .04, which was to ensure that those who may be granted the privilege of selling alcohol be able to show that they could truly put a liquor license into actual use and were not just speculating in liquor licensing.

III. CONCLUSION

The terms and conditions under which a liquor license is granted are subject to the pleasure of the legislature. Most importantly, in the State of Idaho, a liquor license is a grant or permission under government 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. No property rights, as between the state and a licensee, have been established either in law or rule.

The Michigan cases above, clearly distinguishes the difference between a license holder and a license applicant in the State of Michigan. In Michigan, while a liquor licensee may have some protected interest in an already issued liquor license, an applicant for a liquor license, does **not** have a protected interest and does not have any entitlement in such.

ABC respectfully asks this court to find, that based upon Idaho's laws, regulations and case law, a liquor license applicant can have no expectation of having any property rights in a position on a waiting list and that Mr. Fuchs' petition be dismissed in its entirety per I.R.C.P. 12(b)(1) and/or 12(b)(6).

If this Court should find that Mr. Fuchs' has some protected interest in a position on a waiting list, then ABC respectfully requests that Mr. Fuchs' petition be dismissed for failure to

exhaust administrative remedies.

Dated this 7th day of December, 2009.

CHERYL E. MEADE
Deputy Attorney General
Idaho State Police

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December, 2009, I caused to be served a true and correct copy of the foregoing RESPONDENT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS by the U.S. Mail, first-class postage as follows to:

Brian Donesley, Esq.
Attorney at Law
548 North Avenue H
PO Box 419
Boise, ID 83701-0419

X U.S. Mail
___Hand Delivery
___Certified Mail, Return Receipt Requested
___Overnight Mail
___Facsimile: (208) 343-4188
___Statehouse Mail
___ Electronic Delivery

CHERYL E. MEADE
Deputy Attorney General

STATEMENT OF PURPOSE

RS 4883C2

The purpose of this bill is to discourage speculation in liquor licensing by requiring the original holder of the license to put it into use immediately upon its receipt and to continue its use for six consecutive months and by providing that the license will not be transferable for two years after its original issuance.

The bill further provides for payment to the state of a transfer fee of 10% of the purchase price of the liquor license, with some specific exemptions.

It specifies that the transfer of 25% of the stock of a corporation shall be presumed to be the transfer of the controlling interest of the corporation.

FISCAL IMPACT

Estimated revenue of $900,000 per year.

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BRIAN DONESLEY ISB#2313
Attorney at Law
548 North Avenue H
Post Office Box 419
Boise, Idaho 83701-0419
Telephone (208) 343-3851
Facsimile (208) 343-4188

Attorney for Petitioner/Plaintiff
Daniel S. Fuchs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, **Petitioner,** **v.** **STATE OF IDAHO,** Department of Idaho State Police, Bureau of Alcohol Beverage Control, **Respondent.**	**CASE NO. CV 2009-3914** **(Consolidated with Case No. CV 2009-4185)** **SUPPLEMENTAL REPLY MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**
DANIEL S. FUCHS, **Plaintiff,** **v.** **STATE OF IDAHO,** Department of Idaho State Police, Bureau of Alcohol Beverage Control, **Defendant.**	

COMES NOW, Petitioner Daniel S. Fuchs ("Fuchs"), by and through his attorney of record, Brian Donesley, and submits the following Supplemental Reply Memorandum in Opposition to Respondent State of Idaho, Department of Idaho State Police, Bureau of Alcohol Beverage Control's ("ISP") Motion to Dismiss for Failure to Exhaust Administrative Remedies:

I.
INTRODUCTION

This Court has permitted additional briefing, regarding whether Fuchs has a "property interest" in his application for a Retail Alcohol Beverage License. Fuchs filed his Supplemental Memorandum In Opposition To Respondent's Motion to Dismiss for Failure to Exhaust Administrative Remedies ("Fuchs' Supplemental Memorandum") on November 23, 2009. ISP filed Respondent's Supplemental Memorandum in Support of Motion to Dismiss ("ISP's Supplemental Memorandum") on December 7, 2009. Fuchs submits this Reply Memorandum because ISP has demonstrated in its briefing that there are no disputes as to any material facts and that no additional discovery or briefing is necessary.[1] This Court has all of the applicable facts and legal authority before it and may issue its ruling declaring that ISP may not retroactively apply IDAPA 11.05.01.013.04 in violation of I.C. § 73-101.

II.
ISP DOES NOT HAVE DISCRETION TO APPROVE OR DENY QUALIFIED LIQUOR LICENSE APPLICATIONS

In Michigan, local governmental units have unfettered discretion to decide whether to grant any particular first-time liquor license applicant the right to sell retail liquor for consumption on its premises. (Fuchs' Supplemental Memorandum at 4-7). In Idaho, by contrast,

[1] In ISP's Supplemental Memorandum has made several irrelevant factual assertions, citing the "Agency Record." (ISP's Supplemental Memorandum at 10). Fuchs assumes these facts to be true for the purposes of this briefing. As a practical matter, any facts beyond Mr. Fuchs' placement on the five city priority lists and the July 24, 2009 letter removing his name from the lists are irrelevant to these proceedings.

ISP promulgated IDAPA rules establishing a priority system, first in time, first in right, that guarantees that a liquor license applicant shall be notified of an available license if the applicant complies with specific requirements and waits in turn. IDAPA 11.05.01.01-5. (Fuchs' Supplemental Memorandum at 7-11). Moreover, once an applicant submits an application for a liquor license, the ISP Director has a must issue the license within ninety (90) days, if the applicant has demonstrated that he is qualified and no disqualifying circumstances exist. I.C. § 23-907. ISP has argued to the contrary, that it has complete discretion whether to approve or deny an application, similar to the discretion provided to Michigan cities and townships over first-time applicants. (Respondent's Supplemental Memorandum at 4-6). This is wrong. ISP's role in administering liquor license applications is purely ministerial.

In *Mickelson v. City of Rexburg*, 101 Idaho 305 (1980), the Idaho Supreme Court rejected a city's attempt to apply a 1940 beer licensing ordinance over a 1968 zoning ordinance so that it could deny a beer license to an otherwise qualified applicant. The Idaho Supreme Court held that the later ordinance controlled but, more importantly to this case, explained that if an applicant is qualified to receive the license, the license must issue:

> The record also indicates that Mickelson possessed all the other qualifications, and none of the disqualifications, set by statute and ordinance as prerequisites for the issuance of a license to operate a beer tavern. *The city council therefore had no discretion to deny him a license; its duty to issue the license was purely ministerial*, and the district court erred in not issuing its writ of mandate to compel the city council to perform its duty.

Mickelson, 101 Idaho at 308 (emphasis added).

While *Mickelson* involved a city's issuance of a beer license, ISP's role is likewise ministerial. Once ISP notifies an applicant an available license, the ISP Director has ninety (90) days upon receipt of a liquor license application to investigate a liquor applicant. If found that "such applicant is qualified to receive a license, that his premises are suitable for the carrying on

of the business, and that the requirements of this act and the rules promulgated by the director are met and complied with, [the director] shall issue such license. . ." I.C. § 23-907.

Further, ISP does not dispute that, under Idaho law, license applicants have due process rights. In *Eacret v. Bonner County*, 139 Idaho 780, 784 (2004), the Idaho Supreme Court explained that due process requirements "apply not only to courts but to state administrative agencies charged with applying eligibility criteria for licenses."[2] (Fuchs's Supplemental Memorandum at 10-11). Instead of addressing *Eacret* and the other Idaho cases providing due process protection to applicants, ISP continues to argue what it always argues: that a liquor license is a "privilege" and not a "property right." (Respondent's Supplemental Memorandum at 7-8). ISP's position misses the point. Both applicants and licensees have due process protection. Moreover, ISP's position is antiquated, having been dispensed with many years ago, when the United States Supreme Court "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of due process rights." *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

ISP established a set of rule governing priority lists. As a result, first-time applicants who place their name on these priority lists have a legal expectation, based upon state law, that, if they comply with the legal requirements set forth in the rules and statutes and wait their turn, they shall be notified of new license when it becomes available. Because there was no limitation on the number of times any particular applicant's name may appear on a priority list until 2007, those applicants who placed their names on lists before that date are entitled to each of their places in line.

[2] *See also, Boise Tower Associates, LLC v. Hogland*, 147 Idaho 774 (2009) and *Comer v. County of Twin Falls*, 130 Idaho 433 (1997).

III.
ABSENT EXPRESS AUTHORITY, ISP CANNOT RETROACTIVELY APPLY ITS RULES AFFECTING SUBSTANTIVE RIGHTS

It is established Idaho law that unless a statute expressly so provides, it cannot be applied retroactively, if it affects a substantive right. The Idaho Courts specifically have explained that a statute that affects a substantive right is one that affects rights which are "contractual or vested." *Myers v. Vermass*, 114 Idaho 85, 87 (1988). Statutes which do not "create, enlarge, diminish or destroy contractual or vested rights are deemed to be remedial or procedural, as opposed to substantive." *Id.* Without explaining any basis for its position, ISP argues that IDAPA 11.05.01.04 is a procedural or remedial rule and therefore it can be applied retroactively. This argument makes no sense. IDAPA 11.05.01.01 through .05 establish a priority list system. It creates or enlarges a substantive right, the right to a place in line on a priority list. IDAPA 11.05.01.04 cannot be applied retroactively.

ISP argues that it may apply its rules retroactively, based upon I.C. § 67-5224 (5) (a). (ISP's Supplemental Memorandum at 9). Not only was no "final" rule promulgated, this statute provides "[a] rule which is final and effective may be applied retroactively *as provided in the rule*." (Emphasis added). This statute does not apply on its face. I.C. § 67-5224 (5) (a) provides that retroactivity is permitted if the "final" rule itself provides. This is consistent with I.C. § 73-101, which states "[n]o part of these compiled laws is retroactive, unless expressly so declared."[3] Nothing in IDAPA 11.05.01.04 suggests any kind of retroactive application. ISP knows this. In fact, it did not even attempt retroactive application until two years after the rule was promulgated. That ISP would suggest that I.C. § 67-5224 (5) (a) supports its conduct demonstrates to what length it will go to justify its actions.

[3] It should be further noted that ISP takes I.C. § 67-5224 (5) (a) out of its context. The purpose of the statute was to address potential problems created by the time between the publication of a pending rule and its final adoption. The title of the statute makes that obvious: "Pending Rule -- Final Rule -- Effective Date."

Finally, ISP does not even address the mandatory/discretionary distinction that the *Myers* court uses to demonstrate the difference between substantive and procedural statutes. (Fuchs' Supplemental Memorandum at 12). Statutes that are mandatory affect substantive rights; statutes that are discretionary are procedural or remedial. *Myers*, 114 Idaho at 87. The IDAPA rules governing priority lists are mandatory and not discretionary. "Priority on the list is determined by the earliest application, each succeeding application is placed on the list in the order received." IDAPA 11.05.01.01. Moreover, IDAPA 11.05.01.01 creates a right because it establishes a priority system that had previously not existed. ISP's position that IDAPA 11.05.01.04 is a procedural rule is without merit.

This Court should deny ISP's Motion to Dismiss. Furthermore, because it has all of the necessary facts and legal authority before it, the Court should declare that ISP's attempt retroactively to apply IDAPA 11.05.01.04 is void and prohibited as a matter of law.

IV.
ISP DOES NOT CHALLENGE FUCH'S ARGUMENT THAT THIS CASE FALLS WITHIN THREE EXCEPTIONS TO THE EXHAUSTION DOCTRINE

There is no dispute that the general rule is that a party must first exhaust administrative remedies before resorting to district court. *American Falls Reservoir Dist. No. 2, v. Idaho Dept. of Water Resources*, 143 Idaho 862, 871-873 (2007). In his Supplemental Memorandum, Fuchs asserted three exceptions to that rule that apply here. (Fuchs' Supplemental Memorandum at 13-15). First, courts do not require exhaustion, when remand would be futile. *Peterson v. City of Pocatello*, 117 Idaho 234, 237 (Ct. App. 1990). Second, courts do not require remand when the agency provided the party no notice of its intended action, only informing him of it after the action was completed. *Id.* Finally, courts do not require exhaustion when the party is challenging the validity of a rule. *Asarco Inc. v. State*, 138 Idaho 719, 725 (2003); I.C. §§ 67-5278 (1), (3).

ISP ignores these exceptions. Instead, ISP does nothing more than reiterate the general rule that exhaustion is required. (ISP's Supplemental Memorandum at 12-13). ISP's failure even to respond to Fuchs' arguments is a tacit admission that these three exceptions apply. By failing to argue otherwise, ISP concedes that this case falls squarely within the three exceptions to the exhaustion doctrine.

Instead ISP argues that this Court should dismiss this action based upon exhaustion and return it to a non-existent hearing officer so that ISP may conduct discovery. (ISP's Supplemental Memorandum at 13, "the absence of discovery and testimony taken before a hearing officer in a case such as this clearly violates the policy provisions se forth found [sic] in the *American Falls* opinion.") ISP fails to demonstrate why such discovery would be necessary or beneficial. ISP already made its decision retroactively to apply IDAPA11.05.01.04. There is no hearing officer to which this Court may remand this matter, nor is there any reason to appoint one now. ISP has already made its decision.

This Court should deny ISP's Motion to Dismiss for Failure to Exhaust Administrative Remedies and hold that ISP is prohibited from retroactively applying IDAPA 11.05.01.04.

V.
CONCLUSION

Further, this Court has all of the material, undisputed facts before it and all of the pertinent legal authority. ISP violated Idaho law when it retroactively applied IDAPA 11.05.01.04, removing Fuchs' name and the names of other applicants from five city priority lists. This Court should declare ISP's retroactive application null and void and order ISP to restore each listing of Fuchs' name on each of the priority lists to the place they secured prior to

July 24, 2009. This Court should deny ISP's Motion to Dismiss.

DATED this 9th day of December, 2009.

Brian Donesley
Attorney for Petitioner/Plaintiff
Daniel S. Fuchs

CERTIFICATE OF SERVICE

On this 9th day of December, 2009, I hereby certify that I served the above document on the addressee indicated, by delivering the same to the following party by method indicated below:

Cheryl Meade, Deputy A.G.
Idaho State Police
700 S. Stratford Drive
Meridian, ID 83642-6202

[ ] U.S. Mail
[ ] Hand-Delivered
[ ] Overnight Mail
[X] Facsimile (884-7228)

Barbi McCary Crowell

148

BRIAN DONESLEY ISB#2313
Attorney at Law
548 North Avenue H
Post Office Box 419
Boise, Idaho 83701-0419
Telephone (208) 343-3851
Facsimile (208) 343-4188

Attorney for Petitioner/Plaintiff
Daniel S. Fuchs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS,
Petitioner,

v.

STATE OF IDAHO, Department of Idaho State Police, Bureau of Alcohol Beverage Control,

Respondent.

CASE NO. CV 2009-3914
(Consolidated with Case No. CV 2009-4185)

SECOND SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

DANIEL S. FUCHS,
Plaintiff,

v.

STATE OF IDAHO, Department of Idaho State Police, Bureau of Alcohol Beverage Control,

Defendant.

08 281

COMES NOW, Petitioner Daniel S. Fuchs ("Fuchs"), by and through his attorney of record, Brian Donesley, and submits the following Second Supplemental Memorandum in Opposition to Respondent State of Idaho, Department of Idaho State Police, Bureau of Alcohol Beverage Control's ("ISP") Motion to Dismiss for Failure to Exhaust Administrative Remedies:

"It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (*cited by State ex rel., Richardson v. Pierandozzi*, 117 Idaho 1, 5-6 (1989)).

I.
INTRODUCTION

This Court permitted additional briefing following oral argument, allowing, *inter alia*, Fuchs to address an Idaho Supreme Court decision ISP raised at argument, *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1 (1989). ISP argued that *Pierandozzi* held that ISP has such broad and unlimited authority under the Twenty-First Amendment that ISP rules supersede other Constitutional provisions or statutory authority. In fact, *Pierandozzi* holds that the Twenty-First Amendment gave the Idaho legislature, not ISP, a "broad sweep" of authority, and it also explained that all Constitutional provisions are on equal footing and that each "must be considered in light of the other." 117 Idaho at 5. As confirmation of this principle, *Pierandozzi* cited to *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), in which the U.S. Supreme Court struck down a Wisconsin liquor statute as being in violation of the Due Process Clause of the Fourteenth Amendment.

ISP's citation to *Pierandozzi* is an attempt to distract this Court from the sole issue involved in this case: whether ISP may retroactively apply a 2007 amendment to its priority list rules, IDAPA 11.05.01.01-5, contrary to the Idaho Code's express prohibition against retroactivity, I.C. § 73-101. This Court should prohibit it from doing so. This Court should deny ISP's Motion to Dismiss for Failure to Exhaust Administrative Remedies.

II.
PIERANDOZZI DID NOT GIVE ISP UNBRIDLED AUTHORITY

In its oral argument, ISP suggested that this matter is controlled by *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1 (1989). ISP argued that *Pierandozzi* provided ISP some kind of supreme authority that trumps other constitutional and statutory concerns. This is not true. In *Pierandozzi*, the Idaho Supreme Court explained that the "terms and conditions under which a liquor license is granted are subject to the pleasure of the legislature under the 'broad sweep' of authority granted to the states under the Twenty-First Amendment of the U.S. Constitution." 117 Idaho at 4 (emphasis added). Further, it reconciled one Constitutional provision, the First Amendment, with another, the Twenty-First Amendment, holding that the "Twenty First Amendment power over alcohol is broad enough to embrace state power to zone strong sexual stimuli away from places where liquor is served." *Id.* at 6. What matters to the present case, however, is that *Pierandozzi* explained that there was nothing in the Twenty-First Amendment that made it superior to any other Constitutional provision:

> [F]ar from declaring the Twenty-First Amendment alone to be the supreme law of the land, the [U.S. Supreme] Court recognized that each of the provisions in the Constitution "must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." ... [*California v. LaRue*, 409 U.S. 109 (1972)] should not be understood to stand for the proposition that the Twenty-First Amendment overrides the First Amendment, but rather for the notion that "the Twenty-First Amendment power over alcohol consumption is broad enough to embrace state power to zone strong sexual stimuli away from places where liquor is served."

Pierandozzi, 117 Idaho at 5.

To demonstrate that the Twenty-First Amendment does not pre-empt other constitutional provisions, *Pierandozzi* cited *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) in which the U.S. Supreme Court held to the contrary, striking down a state liquor statute that violated the Due Process clause by permitting officials to post names of suspected inebriates at liquor stores, without an opportunity of notice and hearing, subjecting them to stigma and ridicule:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

Constantineau, 400 U.S. at 437.[1]

While the Idaho Supreme Court has held that a liquor license is a privilege and not a property right,[2] there can be no dispute that a liquor licensee is afforded all the due process protections of any license holder under the IAPA, I.C. § 67-5254. *Northern Frontiers v. State ex rel., Cade*, 129 Idaho 437, 440 n. 3 (Ct. App. 1996) (agency actions involving liquor licenses "must be reviewable by courts of law, inasmuch as they affect property rights.") (*citing State v. Finch*, 79 Idaho 275, 280 (1957)). Furthermore, the Idaho courts have repeatedly held license or permit applicants are also entitled to due process rights during consideration of eligibility of a

[1] *Pierandozzi* also cites *Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (Twenty-First Amendment does not provide exception to anti-trust laws); *Craig v. Boren*, 429 U.S. 190 (1976) (Twenty-First Amendment does not override the Equal Protection Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Twenty-First Amendment does not pre-empt the Establishment Clause).

[2] *Crazy Horse v. Pearce*, 98 Idaho 762, 765 (1977) (Although a liquor license is a privilege and not a property right, licensing procedure cannot be "administered arbitrarily").

license or permit. *Eacret v. Bonner County*, 139 Idaho 780, 784 (2004); *Boise Tower Associates, LLC v. Hogland*, 147 Idaho 774 (2009).

Pierandozzi does not stand for any notion that the Twenty-First Amendment preempts other Constitutional provisions. Nor does it hold that the ISP has any kind of super-authority. This Court should reject ISP's attempt to override the Due Process Clause of the Fourteenth Amendment and deny its Motion to Dismiss for Failure to Exhaust Administrative Remedies.

III.
IDAPA 11.05.01.01 CREATED A SUBSTANTIVE RIGHT WHICH CANNOT BE AMENDED RETROACTIVELY

The Idaho Courts have specifically explained that a statute that affects a substantive right is one that affects rights which are "contractual or vested." *Myers v. Vermass*, 114 Idaho 85, 87 (1988). Statutes which do not "create, enlarge, diminish or destroy contractual or vested rights are deemed to be remedial or procedural, as opposed to substantive." *Id.* ISP's suggestion that its 2007 amendment to the rules was "remedial," that it is an attempt to discourage speculation in liquor licensing, misses the point. IDAPA 11.05.01.01-5 created a vested or contractual right to an applicant's place in line on the priority lists. The Idaho Legislature's prohibition against retroactive application of statutes should apply with even greater force to agency rules. I.C. § 73-101.

The only issue that is before this Court is whether ISP can retroactively apply 11.05.01.01-4, removing Fuchs's name from the priority lists. This is why ISP's suggestion that it must conduct "discovery" to determine whether Mr. Fuchs is qualified to be issued a license is without merit. That issue, whether Mr. Fuchs is qualified, is not ripe. Mr. Fuchs's then actual qualifications only become an issue once he has been notified of an available license off a list and he has made a timely application in response.

ISP's retroactive application of its 2007 amendment to its priority list rules violated I.C. § 73-101. This Court should deny ISP's Motion to Dismiss for Failure to Exhaust Administrative Remedies.

IV.
ISP HAS NO DISCRETION. IT MUST ISSUE LICENSES TO QUALIFIED APPLICANTS

ISP is required, pursuant to the Retail Sale of Liquor-by-the-Drink Act, I.C. § 23-901 *et seq.*, to issue licenses to applicants who possess all of the qualifications and none of the disqualifications of a liquor license. Once ISP has determined that an application is true, that the applicant possesses all of the qualifications and none of the disqualifications, and that the premises is suitable, the director may, in his discretion, issue the license. *Uptick Corp. v. Ahlin*, 103 Idaho 364, 369 (1982). If the ISP director abused his discretion and refused to issue a license to a qualified applicant, that applicant would have recourse in a court of law. *Northern Frontiers v. State ex rel., Cade*, 129 Idaho 437, 440 n. 3 (Ct. App. 1996).[3]

ISP is limited in its administration of liquor licensing by the Idaho Constitution, the Idaho Code, its own rules, and the oversight of the Idaho legislature. This Court should deny ISP's Motion to Dismiss for Failure to Exhaust Administrative Remedies.

V.
CONCLUSION

For the reasons stated above, this Court should deny ISP's Motion to Dismiss for Failure to Exhaust Administrative Remedies.

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[3] This is in stark contrast to Michigan where local government units have unfettered discretion to approve or deny first-time applications. At oral argument, ISP argued that Michigan and Idaho law are similar because ISP claimed that cities larger than 75,000 people do not have the right of first refusal over a first–time applicant. In fact, this is true only for cities larger than *750,000* people, *i.e.* Detroit. MCL 436.1501(2); U.S. Census Bureau. Regardless of the error, the two cases that discuss the rights of a first-time applicant, involve a city's denial of a first-time application. *See Wojcik v. City of Romulus*, 257 F. 3d 600, 610 (6th Cir. 2001); *Shamie v. City of Pontiac*, 620 F. 2d 118 (6th Cir. 1980).

DATED This 24 day of December, 2009.

Brian Donesley
Attorney for Petitioner/Plaintiff
Daniel S. Fuchs

CERTIFICATE OF SERVICE

On this 24 day of December, 2009, I hereby certify that I served the above document on the addressee indicated, by delivering the same to the following party by method indicated below:

Cheryl Meade, Deputy A.G.
Idaho State Police
700 S. Stratford Drive
Meridian, ID 83642-6202

[ ] U.S. Mail
[ ] Hand-Delivered
[ ] Overnight Mail
[X] Facsimile (884-7228)

Barbi McCary Crowell

LAWRENCE G. WASDEN
Attorney General

CHERYL E. MEADE
Deputy Attorney General
Idaho State Police
700 S. Stratford Drive
Meridian, Idaho 83642
Telephone: (208) 884-7050
Facsimile: (208) 884-7228
Idaho State Bar No. 6200

Attorney for Respondent

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, Petitioner, v. STATE OF IDAHO, Department of State Police, Bureau of Alcohol Beverage Control, Respondent.	Case No. CV-2009-03914 ALCOHOL BEVERAGE'S RESPONSE TO DANIEL S. FUCHS' (SECOND) SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO ABC'S MOTION TO DISMISS
Daniel S. Fuchs Plaintiff, v. STATE OF IDAHO, Department of State Police, Bureau of Alcohol Beverage Control, Defendant.	

COMES NOW, Cheryl E. Meade, Deputy Attorney General for the Idaho State Police, Alcohol Beverage Control ("ABC") and hereby responds to Daniel S. Fuchs' Supplemental Reply Memorandum in Opposition of ABC's Motion to Dismiss, pursuant to the Court's direction given to counsel on December 14, 2009.[1]

I. INTRODUCTION

Before the Court may even consider whether or not ABC may apply IDAPA Rule 11.05.01.013.04 as it was written, it is imperative that Mr. Fuchs be able to overcome a primary hurdle; whether or not he has enough of a property interest, as a mere applicant for a liquor license, to obtain standing.

Mr. Fuchs seeks to convince this Court that standing, or his lack thereof, is of little consequence in this matter. Mr. Fuchs makes several claims in his briefing, all of which are questionable when viewed in the proper context. ABC will attempt to address each assertion made by Mr. Fuchs, in the order presented and will incorporate its briefing on the Pierandozzi case as appropriate.

II. ABC's DISCRETIONARY AUTHORITY

Mr. Fuchs attempts to differentiate Michigan liquor licensing law from Idaho's. His further attempt to persuade this Court that the two U.S. District Court cases should not be similarly applied in this case is without a basis in law.

Mr. Fuchs attributes an inordinate amount of validity that a local governmental body, in the state of Michigan, is the ultimate decision maker in the granting of liquor licenses in that

[1] The Court directed ABC to respond to Mr. Fuchs' (Second) Supplemental Memorandum in Opposition To Respondent's Motion To Dismiss For Failure to Exhaust Administrative Remedies, dated December 9, 2009. The parties were also directed to submit additional, but limited, briefing for the case of *State, ex. rel. Richardson v. Pierandozzi*, 117 Idaho 1 (1989), by January 8, 2010.

state. Mr. Fuchs implies that all first-time liquor licenses, in Michigan, are granted exclusively by local governmental units. This is not so according to Mr. Fuchs' own exhibits. For example, Mr. Fuchs' Exhibit 1 states, "Local units of government . . . and the Michigan Liquor Control Commission ("MLCC") work together in both the licensing process and the enforcement of the state's liquor laws." pg. i. See also, pp. 3, 4, 10, and 21.[2]

Mr. Fuchs asserts that ISP established a priority system through its rules and therefore "guarantees that a liquor license applicant shall be notified of an available license if the applicant complies with specific requirements and waits in turn." (Fuchs' Reply at 3). Mr. Fuchs must be implying there is some guarantee to remain on the waiting list to begin with so that the future notification he refers to may be had. This assertion fails for two reasons.

First, in looking at the plain language of the rules, there are no written words of guarantee that an applicant's name shall remain on the list. In fact, besides the rule stating that an applicant shall hold only one position at a time on each incorporated city priority list, other rules provide an additional means to remove an applicant from a priority list.

Furthermore, there is no implied guarantee that an applicant's name shall remain on the list either. If anything, the fact that other rules exist that allow for the removal/disqualification of an applicant implies there really is no guarantee that an applicant has an interest in remaining on a municipal priority list.

Similar to the authority vested in ISP's Director, Michigan's Liquor Control Commission considers many of the same factors when granting new licenses to its applicants. While the list is

[2] Michigan's Liquor Control Code 436.1201(2) states, "Except as otherwise provided in this act, the commission shall have the sole right, power, and duty to control the alcoholic beverage traffic...within this state, including the . . . sale thereof. (1998)

actually more extensive, some of the more relevant factors the MLCC considers in granting a liquor license are set forth below:

> The commission shall consider all of the following factors in determining whether an applicant may be issued a license or permit
>
> (a) The applicant's management experience in the alcoholic liquor business.
> (b) The applicant's general management experience.
> (c) The applicant's general business reputation.
> **(d) The opinions of the local residents, local legislative body, or local law enforcement agency with regard to the proposed business.**
> (e) The applicant's moral character.
> (f) **The order in which the competing initial application forms are submitted to the commission**; however, this subdivision shall not apply to an application for a resort license authorized by section 531 of 1998 PA 58, MCL 436.1531. (emphasis added). Mich. Admin. Code r. 436.1105 rr. 5 (1979).[3]

See, *J&P Market, Inc.v. Liquor Control Com'n*, 199 Mich. App. 646, 652 (1993), ("Opinion of local authorities is only one factor to be considered in deciding whether to grant carryout license."); *T.D.N. Enterprises, Inc. v. Michigan Liquor Control Commission*, 90 Mich. App. 437, 440 (1979), (Commission found that four applicants for [1] available SDD [liquor] license all of whom, were all eligible and qualified equally, except as to priority in time of filing requests for license, did not act arbitrarily or capriciously nor did it abuse its discretion in awarding the license [based on applicants' priority].); *cf.*, *Semaan v. Liquor Control Commission*, 136 Mich. App. 243 (1984), *aff'd*, 425 Mich. App. 28 (1986).

As shown by the above, it is clear what degree of authority a local governmental entity has, in the state of Michigan, in the liquor licensing process. *See*, Mich. Const. art. IV, § 40; Mich. Comp. Laws § 436.1201 (1998), (setting forth the authority of the MLCC to regulate the possession and sale of alcoholic liquor) and; Mich. Comp. Laws § 436.1501 (1998), ("An application for a license to sell alcoholic liquor for consumption on the premises, except in a city having a population of 750,000 or more, shall be approved by the local legislative body in which

[3] Michigan Administrative Code, Rule 436.1105 at: http://www.michigan.gov/documents/dleg/AACS418.10101_493.120_297622_7.pdf document pp. 1484-1485; Adobe pdf pages 93-94.

the applicant's place of business is located **before** the license is granted by the commission . . .") (emphasis added).

Secondly, by Mr. Fuchs' own admission, an "applicant must comply with specific requirements set forth in the rules and statutes and wait their turn . . ." (Fuchs' Reply at p. 4). In this case, Mr. Fuchs held more than one position at a time on several incorporated municipal priority lists. He was listed two (2) times on the priority list for Bellevue, Idaho; three (3) times for Hailey, Idaho; three (3) times for Ketchum, Idaho; three (3) times for Sun Valley, Idaho; two (2) times for Idaho Falls; and nine (9) times for Twin Falls, Idaho. The fact that his name appeared for a total of twenty two (22) times on the named incorporated city priority lists constitutes a disqualifying event according to IDAPA Rule 11.05.01.013.04.

It should be noted that if Mr. Fuchs sought to obtain a similar type liquor license in the state of Michigan, the process in Michigan would be almost identical to Idaho's. For a side-by-side comparison, the table below briefly outlines the similarities and some differences between the licensing processes in both states:

IDAHO	MICHIGAN
One (on-premises) liquor license per 1,500 people in any municipality. I.C. §23-903.	One (Class C, on-premises) liquor license per 1,500 people or major fraction in any municipality (with a few exceptions for the MLCC to grant another limited number) MCL 436.1531 and 436.1533.
Applicant submits application (for on-premises, liquor license) with one-half of an annual fee (approx. $400.00) along with two-page application. IDAPA 11.05.01.013.01. No prior approvals from a county, city or planning and zoning permits are required to be submitted at this time.	Applicant submits "completed" application (for Class C, on-premises, liquor license) with fee ($600.00 to possibly $20,000.00). MCL 436.1525(1)(o). A completed application, means an application complete on its face and submitted with any applicable licensing fees as well as any other information, records, approval, security, or similar item required by law or rule from a local unit of government... Includes background checks, fingerprinting, submission of financial statements, insurance documents, place where alcohol is to be served. Mich. Admin. Code r. 436.1105.
Applicant placed on waiting list, in order received.	Applicant is placed on waiting list, in order

IDAPA 11.05.01.013.01.	received. Mich. Admin. Code r. 436.1105.
Newly issued license becomes available based upon increase in population. Applicant is notified to accept or decline offer and to produce all other application materials, such as fingerprint cards, background check, submission of financial statements. IDAPA §§ 11.05.01.013.02, 11.05.01.013.03 and 11.05.01.013.04. I.C. §23-905.	Enforcement investigates the applicant and makes recommendation to MLCC. MLCC also notifies local law enforcement for input and approval.
Enforcement investigates the applicant to ensure applicant is qualified.	Applicant gets approval, by resolution, from local governmental entity and submits it to MLCC.
Director (ABC) reviews all of the above and either grants or denies the license. I.C. § 23-907. Licensee also seeks local approval. I.C. § 23-933B.	MLCC reviews all of the above and either grants or denies the license. Mich. Admin. Code r. 436.1105 and MCL 436.1525(3).

As much as Mr. Fuchs would like to assert otherwise, one can see the similarities in the licensing process between the two states are striking.

Mr. Fuchs further relies on *Mickelsen v. City of Rexburg*, 101 Idaho 305, (1980), for the proposition that the issuance of a license to sell alcohol is purely a ministerial act, in which a city has no discretion in either accepting or rejecting the applicant. It should be noted that the Mickelsen Court clearly distinguished the amount of discretion a city has in licensing liquor as opposed to beer. *Id.* at 307.

Therein, the Court stated, "unlike the rather broad "local option" afforded local government in the case of liquor, the right to sell beer may not be denied by local government arbitrarily; and in fact local government may only place 'reasonable' restrictions on the sale of beer." *Id.* This authority for local agencies to control liquor licensing, to which the Mickelsen Court is referring, comes from IDAHO CODE § 23-933B. It states,

> The licensing authority of any county or incorporated municipality shall have and exercise the same power to revoke, suspend, or to refuse to grant or renewal of a retailer's license issued or issuable by it, as are granted to the director in this act ....

In this case, the application for the license in question is not only for beer but also for liquor. Therefore, Mr. Fuchs' assertions that a city or the director's liquor licensing authority is purely ministerial are laid bare. As noted above, the Mickelsen Court clearly recognized the existence of some kind of discretionary authority that local cities have in controlling liquor licensing. Idaho's beer licensing statute found in IDAHO CODE § 23-1010 mirrors much of the code provisions that ISP's director must follow for liquor licensing. It states in relevant part,

> (1) Every person who shall apply for a state license to sell beer at retail shall tender the license fee to, and file written application for license with, the director. The application shall be on a form prescribed by the director which shall require such information concerning the applicant, the premises for which license is sought and the business to be conducted thereon by the applicant as the director may deem necessary or advisable, and which shall **enable the director to determine that the applicant is eligible and has none of the disqualifications** for license, as provided for in this section. (emphasis added)

Mr. Fuchs' mischaracterizes ISP's position that "ISP does not dispute that license applicants have due process rights." Instead, Mr. Fuchs attempts to bypass the hurdle of determining if any Fourteenth Amendment property interests exist first for a mere applicant for a liquor license that would give rise to due process as set out in the *Board of Regents v. Roth*, 408 U.S. 564, 569-571 (1972). The court stated if there was no Fourteenth Amendment property interests found, university authorities would not be required to give the employee a hearing when they declined to renew that employee's contract. *Id.*

In order to support his position that he is entitled to due process as a liquor license applicant, Mr. Fuchs' insinuates that the Fourteenth Amendment trumps the Twenty-First Amendment. *See*, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), (finding, that a person has a fundamental interest in their name, that gives rise to due process); *but, cf. California v. LaRue*, 409 U.S. 109 (1972), (holding, in the narrow context of liquor licensing "the state has the power

to regulate nude and sexually explicit conduct in licensed establishments without offending the [First Amendment of] the Constitution")

LaRue was eventually disavowed by the U.S. Supreme Court in the case of, *44 Liquormart, Inc. v. State of Rhode Island*, 517 U.S. 484, 514-516 (1996). Therein the Court found,

> [A]part from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of "bacchanalian revelries" described in the *LaRue* opinion regardless of whether alcoholic beverages are involved.

As argued previously, it appears the *44 Liquormart* case has merely shifted the states' source of authority away from the Twenty-First Amendment to a state's police power, such authority to regulate liquor licensing is still intact.

Therefore, Mr. Fuchs' stance still fails for a couple of reasons. 1) Fuchs fails to acknowledge that in order to obtain due process to begin with, one must have a cognizable property interest first as set forth in *Board of Regents v. Roth, supra.* As ABC argued before, Mr. Fuchs does not have a fundamental property interest in a place on a waiting list as a mere applicant that would allow him the benefit of due process. (Respondent's Supplemental Memorandum in Support of Motion to Dismiss, pp. 3-8).

Secondly, Mr. Fuchs' position totally discounts the context of the issues and interests at stake according to *State, ex. rel. Richardson v. Pierandozzi*, 117 Idaho 1, 6 (1989) and the state's police powers to regulate liquor licensing. It is reasonable to assume, while the Twenty-First Amendment may apply narrowly in cases involving liquor licensing, the state's police power to regulate is also a factor to be considered. To accept Mr. Fuchs' position, even on such a narrow

issue, would clearly violate and do substantial harm to the Twenty-First Amendment and would undermine the state's authority to regulate liquor licensing.[4]

Mr. Fuchs' further allegations that the Director of ISP lacks the authority to control and regulate liquor licensing are unfounded. IDAHO CODE §§ 23-901 and 23-903 clearly provide the Director of ISP with a broad grant of authority to regulate and control the sale of liquor within Idaho's borders.

Furthermore, Mr. Fuchs' erroneously wishes to have this Court extend a blanket reliance on *Eacret v. Bonner County*, 139 Idaho 780, 784 (2004), in order to nullify the significance of the state's authority to regulate liquor licensing. Unlike a (planning and) zoning application for a land use permit, the business of selling intoxicating liquors is one which the legislature has the power to impose such conditions and restrictions as in its judgment may seem wise. To categorize a zoning application the same as an application for a liquor license would disregard the legislature's authority and intent to regulate an industry so unlike many others.

Two cases presenting somewhat similar issues before this Court are also found in the State of Michigan. While not controlling in Idaho, these cases established:

1) A city's resolution establishing priorities for [Class C liquor] license approval, in order to avoid the problem of speculatory use, was not in violation of the Fourteenth Amendment, *Jones v. City of Troy*, 405 F. Supp. 464 , 470-472 (E.D. Mich. 1975), and;

2) Where application for a license to sell liquor is made and before a license is granted an ordinance prohibiting saloons is passed, a writ of mandamus will not thereafter be granted to

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[4] ART. III SECTION 26. POWER AND AUTHORITY OVER INTOXICATING LIQUORS. From and after the thirty-first day of December in the year 1934, 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.

compel the issuance of a license. *Fuchs v. Common Council of Village of Grass Lake*, 166 Mich. 569 (1911).

ABC contends that a correct ruling would include a finding that a liquor license applicant does not have a property interest in either the application itself or a place on a priority list. Therefore, the issue of due process is not even reached according to *Board of Regents*. Thus, Mr. Fuchs is without a remedy and his action should be dismissed. To find otherwise, would be an error in the law.

III. RETROACTIVE APPLICATION OF IDAPA RULE 11.05.01.013.04

Mr. Fuchs' response adds nothing new to the position already offered by him. His reliance on *Myers v. Vermass*, 114 Idaho 85, 87 (1988) (that statutes that are mandatory affect substantive rights), fails to account for the exception found in case law in Idaho's liquor-licensing realm. i.e. no substantive right exists in a liquor license, as between the state and a licensee.

The Idaho Supreme Court has continually held that even a liquor licensee has no so-called property rights as between the licensee and the state. (Respondent's Supplemental Memorandum in Support of Motion to Dismiss, p. 8.) Therefore, any assertion by an applicant to have some form of due process afforded to them, because of substantive right, clearly lacks a basis in law.

Furthermore, any assertion that some type of contractual agreement between an applicant and the state exists is also without merit. Such an assertion would be considered completely unilateral on the part of the applicant. Even a bona fide-card-carrying licensee is subject to suspension or revocation of the license at any moment when a violation of the law is discovered.

The authority to take away such a privilege only further supports the existence of a unilateral relationship between a licensee and the state. A mere applicant cannot expect to be entitled to a more extensive remedy than what an actual licensee has.

Moreover, it is unclear how Mr. Fuchs can show that IDAPA Rule 11.05.01.013.04 is anything but substantively procedural and/or remedial in nature. As ABC argued previously, because no contractual or vested rights in an application exist in the first place, this rule does not create, enlarge, diminish or destroy any contractual or vested rights. (Respondent's Supplemental Memorandum in Support of Motion to Dismiss, pp.8-11.) The relevant IDAPA Rule(s) only instructs ABC in how to process the applications it receives. *Id.*

The intent of IDAPA Rule 11.05.01.013.04 was in fact to discourage the speculation of liquor licenses. *Id.* The rule was approved by legislative fiat. *Id.* Mr. Fuchs' name appeared twenty two (22) times on the municipal priority lists named above in only six Idaho cities. One must ask is he seeking relief with unclean hands?

IV. THE EXHAUSTION DOCTRINE

Again, Mr. Fuchs' appears to mischaracterize ABC's position of the exhaustion doctrine.[5] ABC reiterates that if no Fourteenth Amendment property interest exists, then this Court cannot reach the *exhaustion doctrine* as no administrative or judicial remedy exists and the petition for judicial review must be denied.

If, however, the Court finds that Mr. Fuchs has due process in an liquor license application that results in a contested case, then the *exhaustion doctrine* should be applied for

[5] Such assertion by Mr. Fuchs' may be due in part to the fact that briefing, previously directed by the Court, was to be submitted concurrently and not in responsive fashion as undertaken by Mr. Fuchs. Any implication asserted by Mr. Fuchs that ABC was non-responsive to his Supplemental Memorandum in Opposition To Respondent's Motion To Dismiss For Failure to Exhaust Administrative Remedies, and/or that ABC agreed with the same should be disregarded.

many reasons. While Mr. Fuchs asserts the three exceptions, he fails to meet the burden of showing of how remand would be futile. Just because he says it would be, doesn't necessarily make it so. In this case, remand for further proceedings is the more reasonable course of action on the grounds set forth below.

While Mr. Fuchs would like this Court to believe that discovery in a case such as this is unnecessary, he himself denied his involvement as a speculator in liquor licensing. IDAPA Rule 11.05.01.013.04 was promulgated to specifically eradicate the problems associated with the speculation of liquor licenses. ABC believes discovery is more essential now than before as this is an outstanding issue of fact that should be established.

Testimony, be it through deposition or through an administrative hearing, has not been taken. Again, other than the number of times that Mr. Fuchs' name appeared on the priority lists, such testimony could reveal the extent to which Mr. Fuchs is a liquor license speculator.

Testimony as to the purpose of IDAPA Rule 11.05.01.013.04 should also be taken so that either the administrative hearing officer or this Court can make a fully informed decision on the issue of the rule's remedial nature.

The Court only has in its possession a partial record. Therefore, any determination based upon an application of law to factual circumstances that may or may not support Mr. Fuchs' claims is made more difficult. Mr. Fuchs' assertion that remand would be futile is therefore without merit.

Additionally, Mr. Fuchs' assertion that he received no notice of the alleged agency's action is without merit as well. Mr. Fuchs was provided notice in two possible ways.

The first and more obvious notice occurred when Mr. Fuchs received the letter, along with his refund, stating that his name was being removed from the municipal priority lists.

It is apparent from the filing of the petition for judicial review that Mr. Fuchs enlisted the assistance of counsel to advise him on how he should proceed in this matter once he received that letter. Instead of seeking an immediate reconsideration or moving the case into an administrative appeals process, Mr. Fuchs decided to wait and try to bring his case before this Court instead.

Such action taken by Mr. Fuchs does not appear to be a qualifying situation that would allow him to circumvent the administrative process at this point. Especially in light of the holding(s) found in *American Falls Reservoir Dist. No.2, v. Idaho Dept. of Water Resources,* 143 Idaho 862 (2007).

The second and less obvious form of notice occurred when the IDAPA Rule was moving through the legislative approval process. Again, ABC believes that developing some testimony in this area would not only be reasonable, but would be extremely helpful to the decision maker.

Finally, Mr. Fuchs relies on the *Asarco Inc. v. State*, 138 Idaho 719 (2003) for the proposition that a court does not require exhaustion when the party is challenging the validity of a rule. It is arguable that Mr. Fuchs is not *per se* challenging the validity of IDAPA Rule 11.05.01.013.04. He is merely challenging the fact that it cannot be applied retroactively.

Nevertheless, IDAPA Rule 11.05.01.013.04 was in fact promulgated according to the Idaho Administrative Procedures Act and obtained legislative approval as required by law. The rule was promulgated to fulfill the legislature's purpose to curb the speculation of liquor licenses. Any issue with how ABC was to implement that purpose should have been addressed during the legislative rule-making proceedings and hearings.

Again ABC asserts that discovery and/or testimony could reveal much to establish the underlying facts upon which this case and the law may turn. Mr. Fuchs' assertions that discovery is unnecessary or not beneficial is clearly without merit.

V. SECTIONS III AND IV OF DANIEL S. FUCHS' (SECOND) SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES DATED: DECEMBER 24, 2009

ABC contends that Mr. Fuchs' most recent filing is incorrectly entitled as a "Second Supplemental Memorandum . . . ," and contains material and argument that is outside the scope of briefing directed by the Court on December 14, 2009.

Mr. Fuchs' briefing dated December 24, 2009, would be a more accurate characterization if it were entitled "Third Supplemental Memorandum . . ." While the Court allowed ABC to respond to Mr. Fuchs' previous and (Second) Supplemental Memorandum . . . , Mr. Fuchs was directed to limit his briefing to the *State, ex. rel. Richardson v. Pierandozzi* case in his December 24, 2009 submission to the Court. *See*, Footnote 1 above.

In reviewing that submission, ABC discovered that Mr. Fuchs has once again exceeded the Court's directives. ABC respectfully requests that the Court disregard Sections III and IV of Mr. Fuchs' most recent Supplemental Memorandum as they are outside the scope of this Court's December 14, 2009, directives.

VI. CONCLUSION

While Mr. Fuchs would like us to believe he has a legal remedy, this is not the case. Before reaching the relief he seeks, he must prove he has standing to obtain relief. As case law clearly indicates, he cannot provide any legal authority to support his claim that, as a mere applicant for a liquor license, he has a Fourteenth Amendment property interest on a priority list that would allow him due process.

Both Idaho and Michigan's liquor licensing regulations are similar in nature when it comes to obtaining a liquor license. Like Michigan, this Court should find that Mr. Fuchs has no such interest or standing as a mere applicant and therefore, any legal relief through due process is not available to him. If the Court makes such a finding, ISP respectfully requests that Mr. Fuchs Petition for Judicial Review be denied in its entirety.

In the alternative, if the Court finds that Mr. Fuchs has some type of property interest that would give rise to due process, then ABC would respectfully request that its Motion to Dismiss For Failure to Exhaust Administrative Remedies be granted, and that the matter be remanded for further proceedings.

Dated this 8 day of January 2010.

CHERYL E. MEADE
Deputy Attorney General
Idaho State Police

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January 2010, I caused to be served a true and correct copy of the foregoing ABC's RESPONSE TO DANIEL S. FUCHS' (SECOND) SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO ABC'S MOTION TO DISMISS by the U.S. Mail, first-class postage as follows to:

Brian Donesley, Esq.
Attorney at Law
548 North Avenue H
PO Box 419
Boise, ID 83701-0419

X U.S. Mail
___Hand Delivery
___Certified Mail, Return Receipt Requested
___Overnight Mail
___Facsimile: (208) 343-4188
___Statehouse Mail
___ Electronic Delivery

Cheryl E. Meade

CHERYL E. MEADE
Deputy Attorney General

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DISTRICT COURT
TWIN FALLS CO. IDAHO
FILED

2010 MAR -2 PM 4:56

BY_____ CLERK

_____ DEPUTY

BRIAN DONESLEY ISB#2313
Attorney at Law
548 North Avenue H
Post Office Box 419
Boise, Idaho 83701-0419
Telephone (208) 343-3851
Facsimile (208) 343-4188

Attorney for Petitioner/Plaintiff
Daniel S. Fuchs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, **Petitioner,** **v.** **STATE OF IDAHO**, Department of Idaho State Police, Bureau of Alcohol Beverage Control, **Respondent.**	**CASE NO. CV 2009-3914** **(Consolidated with Case No. CV 2009-4185)** **SUPPLEMENTAL MEMORANDUM RE: CONSOLIDATION ISSUES**
DANIEL S. FUCHS, **Plaintiff,** **v.** **STATE OF IDAHO**, Department of Idaho State Police, Bureau of Alcohol Beverage Control, **Defendant.**	

COMES NOW, Plaintiff/Petitioner Daniel S. Fuchs ("Fuchs"), by and through his attorney of record, Brian Donesley, and submits the following Supplemental Memorandum re: Consolidation Issues:

At the telephone conference of February 19, 2010, this Court expressed concern about the possible implications of the Idaho Supreme Court case, *Euclid Avenue Trust v. City of Boise,* 146 Idaho 306 (2008), on the consolidation of a Petition for Review case with the Declaratory Relief case. In *Euclid Avenue Trust,* the Idaho Supreme Court held that actions seeking civil damages or declaratory relief may not be combined with petitions for judicial review under the Idaho Administrative Procedures Act. In *Euclid Avenue Trust,* the plaintiff filed a pleading entitled "Complaint, Petition for Judicial Review and Request for Jury Trial." The fee category indicated on the pleading was that for a civil complaint more than $1,000. The Court observed that there had been an "increasing tendency, particularly in land use cases, for counsel to combine civil damage claims with their administrative appeal." 146 Idaho at 308. By its ruling in *Euclid Avenue Trust,* the Court put an end to that trend:

> The separation of civil actions and administrative appeals is supported by good policy underpinnings. After all, one proceeding is appellate in nature and the other is an original action. They are processed differently by our courts ... Thus we are constrained to hold that actions seeking civil damages or declaratory relief may not be combined with petitions for judicial review under IDAPA.
>
> *Euclid Avenue Trust,* 146 Idaho at 309.

Here, Fuchs did not combine a civil action and a petition for review in the same pleading. Instead, Fuchs filed separately a Petition for Review in Case No. CV 2009-3914 and a Complaint for Declaratory Relief in Case No. CV 2009-4185. There are two separate actions, two separate filing fees. Once the two separate actions were filed,

Fuchs moved for consolidation pursuant to Rule 42(a), I.R.C.P. ISP stipulated to consolidation. And this Court issued the Order of Consolidation on September 17, 2009.

Euclid Avenue Trust should have no impact on this matter. The Idaho Supreme Court long ago held that whenever it may expedite the business and further the interests of the litigants, at the same time minimizing the expense of the public and litigants alike, the order of consolidation should be entered. *Branom v. Smith Frozen Foods, Inc.* 83 Idaho 502 (1961). Both a petition for review and an action for declaratory relief were necessary actions, given that a state agency was involved and which had engaged in improper rulemaking. If Fuchs had not filed a timely petition for review, he risked forfeiting rights and remedies provided in the Idaho Administrative Code. An action for declaratory relief, however, is independently proper since I.C. § 67-5278 specifically authorizes such an action as an exception to the exhaustion requirement when a party is challenging the validity of a rule. *See, Asarco Inc. v. State*, 138 Idaho 719, 725 (2003).

It comports with sound judicial economy for this Court to retain both matters. The Court is able to sort out which procedures and remedies are proper for each action, while minimizing costs to litigants and the public by consolidation of the actions into one case.

DATED this 2 day of March, 2010.

Brian Donesley
Attorney for Petitioner/Plaintiff
Daniel S. Fuchs

CERTIFICATE OF SERVICE

On this 2nd day of March, 2010, I hereby certify that I served the above document on the addressee indicated, by delivering the same to the following party by method indicated below:

Cheryl Meade, Deputy A.G.
Idaho State Police
700 S. Stratford Drive
Meridian, ID 83642-6202

[ ] U.S. Mail
[ ] Hand-Delivered
[ ] Overnight Mail
[X] Facsimile (884-7228)

Barbi McCary Crowell

Barbi McCary Crowell

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, Petitioner, vs. STATE OF IDAHO, Department of State Police, Bureau of Alcohol Beverage Control, Respondent.	Case No. CV 2009-3914 CV 2009-4185 **MEMORANDUM DECISION AND ORDER DISMISSING PETITION FOR JUDICIAL REVIEW AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

THIS MATTER is before the court on the motion of the State of Idaho to dismiss the petitioner's claims for failure to exhaust administrative remedies. Oral argument was conducted on December 14, 2009, with Brian Donesley representing Daniel S. Fuchs and Cheryl E. Meade representing the State of Idaho, Department of State Police, Bureau of Alcohol Beverage Control. The parties filed supplemental briefing on December 24, 2009 and January 8, 2010. The matter was initially taken under

advisement on January 11, 2010. However, due to questions which arose regarding issues raised in the parties' briefing, the court held a status hearing on March 4, 2010. During the hearing the parties agreed to submit both of the above-numbered cases for determination by the court, as set forth below. Therefore, the court took both cases under advisement as of March 5, 2010.

The court has considered the briefing and pleadings of the parties, together with the oral arguments of counsel. Based thereon, and for the reasons stated herein, the court hereby GRANTS the state's motion to dismiss as to both cases.

I. BACKGROUND

There are two cases pending before this court regarding disputes between Mr. Daniel Fuchs (Fuchs) and the Idaho State Police, Alcohol Beverage Control. (ABC). Based upon the parties' stipulation, the court considers the state's motion to dismiss in each case.

A. Legal Posture.

Pursuant to Idaho Code §23-903, the Director of the Idaho State Police has been "empowered, authorized and directed by the Idaho Legislature to issue licenses to qualified applicants whereby the licensee is authorized to sell liquor at retail by the drink." The number of liquor licenses available throughout the state is finite; the licenses issued for any incorporated city shall not exceed one license for each one thousand five-hundred population. *Id.* ABC maintains a priority list of applicants for

those cities in which no city liquor license is available. A separate list is maintained for each city.

To obtain a place on such a list, a person or entity is required to file a completed application, accompanied by payment of one-half of the required annual license fee. Priority on the list is determined by a "first in time, first in right" system, with the earliest application having priority. Each succeeding application is placed on the list in the order it was received.

B. Factual Background.[1]

Between 1994 and 1995, Fuchs applied for and was placed on the incorporated city priority lists for each of the following cities: Twin Falls, Sun Valley, Ketchum, Hailey, Bellevue and Idaho Falls. Fuchs' name appears twenty-two times as a liquor license applicant on these cities' lists.

In 2006 the ABC began to promulgate administrative rules to be presented during the 2007 Idaho legislative session. As part of that process, ABC amended the rule regarding the number of times any applicant may place their name on the priority list for each incorporated city. *See* IDAPA Rule 11.05.01.013.04[2] (hereinafter the "Rule"). ABC followed the proper process for rule making and ultimately the Idaho Legislature

[1] The court's statement of facts is gleaned from the parties' briefing and factual statements in this case. There is no agency record filed with the court at this stage of the proceedings, although the state has attached several documents to its motion to dismiss. To the extent that neither party has moved to strike the other's factual recitations or affidavits, this court will rely upon such facts as accurate.

[2] The amended Rule provides: "An applicant shall hold only one position at a time on each incorporated city priority list. An applicant must be able to demonstrate to the Director the ability to place an awarded license into actual use as required by Section 23-908(4), Idaho Code and these rules."

passed the rule as written in January 2007. These rules were also published by the Director of the Idaho State Police (ISP) pursuant to Idaho Code §23-932. The rule contains no "grandfather" clause.

On or about July 24, 2009, the ISP sent a letter to Fuchs, informing him that it was removing all but one listing of his name from the priority lists for the above-referenced cities, citing the Rule and stating, "an applicant shall hold only one position at a time on each incorporated city list." The ISP also returned Fuchs' applications for each city where his name appeared more than one time on the priority list. Fuchs' application fees were likewise returned[3] to him at that time. Despite the removal of Fuchs' duplicate applications, Fuchs retained the highest place he held on each city's list as of July 24.

C. Procedural Posture.

Fuchs thereafter filed two legal proceedings with this court: 1) a Petition for Judicial Review(Case No. CV 2009-3914) (hereinafter referred to as the "Judicial Review"), filed August 19, 2009, pursuant to Title 67, Chapter 52 of the Idaho Code (the Administrative Procedure Act); and 2) a Complaint for Declaratory and Injunctive Relief[4] (Case No. CV 2009-4185), filed September 4, 2009 (hereinafter referred to as the

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[3] Fuchs attempted to tender the check to the court during argument on the state's motion to dismiss. The check was returned to counsel for the state.

[4] The court originally granted injunctive relief to Fuchs based upon a stipulation of the parties on November 5, 2009. The original order was later amended on January 5, 2010.

"DEC action."). Fuchs never sought administrative review before the ABC prior to filing these two cases.

ABC responded to the Judicial Review by filing a Response and Motion to Dismiss for Failure to Exhaust Administrative Remedies. ABC also filed a response to the complaint for declaratory relief.

The parties briefed the matter and the court granted oral argument, which was held on December 14, 2009. Both Fuchs and ABC thereafter filed supplemental briefing, with ABC's final Memorandum filed January 8, 2010. The court then took the matter under advisement on January 11, 2010.

In Fuchs' supplemental memoranda, he argues that this court should grant the relief he seeks in the DEC action. Neither party filed any motion for summary judgment in the DEC action, and ABC's response memoranda did not indicate a desire for this court to rule on the DEC action as part of the state's dispositive motion in the Judicial Review.

The court therefore sought clarification from the parties in a telephonic status hearing held March 4, 2010. The Idaho Supreme Court has held that due to the "confusion resulting from a conglomerated proceeding[,]" claims for judicial review and for declaratory judgment and/or damages should not be combined. *See Euclid Ave. Trust v. City of Boise*, 146 Idaho 306, 309, 193 P.3d 853, 856 (2008). Nevertheless, the court made the parties aware of this case, and each stated their position that the court

could consider the state's motion to dismiss as if made in both cases. Therefore, based upon the court's conclusion during the telephone conference, this court is ruling upon the state's motion to dismiss both the Judicial Review and the DEC action. The Court's concern for confusion referenced in *Euclid Ave.* is not an issue given the procedural posture of this case.

II. ANALYSIS

1. The Petition for Judicial Review Is Dismissed.

A. Introduction.

When a district court entertains a petition for judicial review, it does so in an appellate capacity. *Burns Holdings, LLC v. Madison County Bd. of County Com'rs*, ____ Idaho ___, ___, 214 P.3d 646, 648 (2009) (citing *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 588, 166 P.3d 374, 378 (2007); *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 284, 160 P.3d 438, 441 (2007)).

A party's right to appeal an administrative decision, i.e., to obtain judicial review, is governed by statute. *Cobbley v. City of Challis*, 143 Idaho 130, 133, 139 P.3d 732, 735 (2006) ("Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant."). Section 67-5270 allows judicial review for a "person aggrieved by final agency action . . . if the person complies with the requirements of sections 67-5271 through 67-5279, Idaho Code."

B. Standard of Review.

A motion filed in judicial review proceeding is processed "in the same manner as motions before the district court." I.R.C.P. 84(o). As noted above in footnote 1, this court has no agency record, although neither party has objected to the other's affidavits and/or filings. The court therefore relies upon those documents in analyzing the issues before the court. Neither party has contested the facts set forth in the documents filed with the court, *see Owsley v. Idaho Industrial Com'n*, 141 Idaho 129, 133 n.1, 106 P.3d 455, 459 n.1 (2005); therefore, this court applies the standard of a 12(b)(6) motion, construing any disputed facts, to the extent that there are any, in favor of Fuchs.

C. Fuchs' Petition for Judicial Review is Dismissed for Failure to Exhaust Administrative Remedies.

1. Judicial Review is only available as provided by statute.

Any party seeking judicial review must satisfy the principal requirement that they exhaust all administrative remedies required by the Administrative Procedure Act prior to seeking judicial review. *See* Idaho Code §67-5271 (2006). "[T]he exhaustion doctrine implicates subject matter jurisdiction because a 'district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted.' *Owsley v. Idaho Industrial Com'n*, 141 Idaho at 135, 106 P.3d at 461 (quoting *Fairway Development v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990)).

"Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. Absent a statutory exception, the exhaustion of an administrative remedy is a prerequisite for resort to the courts." *Pounds v. Denison*, 115 Idaho 381, 383, 766 P.2d 1262, 1264 (Ct. App. 1988). The Administrative Procedure Act thus "requires an exhaustion of the 'full gamut' of administrative remedies before judicial review may be sought." *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 237, 207 P.3d 963, 968 (2009). If a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted. *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004).

However, this doctrine is not absolute; under unusual circumstances a court may circumvent this rule, but only where the interests of justice so require or where the agency acts outside its authority. *Peterson v. City of Pocatello*, 117 Idaho 234, 236, 786 P.2d 1136, 1138 (Ct. App. 1990) (citations omitted).

There is no dispute here that Fuchs did nothing, prior to filing this administrative appeal, to exhaust the remedies[5] that he has before ABC. Pursuant to Idaho Code §23-932, ISP's director has sweeping authority to "make, promulgate and publish such rules and regulations" as the "director may deem necessary for carrying out the provisions of [the statute]." The director has the authority to establish "the proof to

[5] Those remedies are governed by the Idaho Rules of Administrative Procedure of the Attorney General, IDAPA 04.11.01 and IDAPA 11.05.01.003.

be furnished and the conditions to be observed in the issuance of licenses . . ." as well as "the conditions and qualifications necessary to obtain a license. . . ." *Id.* "Procedures for the suspension, revocation, or refusal to grant or renew licenses issued under this [Retail Sale of Liquor by the Drink] chapter shall be in accordance with the provisions of [the Administrative Procedure Act]" Idaho Code §23-933(1) (2009). As part of this comprehensive authority, the director has determined, with legislative approval, to limit potential applicants for liquor licenses to one application per incorporated city.

Fuchs does not dispute the director's authority to so rule; he disputes the validity of the rule as given retroactive application in his circumstances. The question here is a legal one: whether this court should exercise jurisdiction at this time, or require Fuchs to pursue his claims before the administrative body that is charged with authority to interpret and apply the rules and statutes that govern liquor licensing in the state of Idaho. This court concludes that Fuchs must return to the agency to state his initial claims and to make an adequate record for judicial review, if any, in the future.

2. *The exceptions to the general rule are not applicable here.*

As noted above, Idaho recognizes exceptions to the exhaustion of remedies rule where an agency acts without authority, or where the interests of justice otherwise require. This court concludes that these exceptions do not apply in this case.

a. <u>The ISP/ABC did not act without proper authority in adopting the Rule in question</u>.

There is no support for Fuchs' claim that the ISP/ABC acted outside the scope of their authority in adopting the rule in question. Indeed, Fuchs does not dispute the validity of the rule itself, he disputes its enforcement in a retroactive way.

The limited record before this court clearly establishes that the agency promulgated the rule as required by law, that the rule was published appropriately, and that the legislature passed the rule as now constituted. As noted above, the ISP's Director has extensive authority to "make, promulgate and publish such rules and regulations" as the "director may deem necessary for carrying out the provisions of" the statute. Idaho Code §23-932 (2009). As such, the rule was properly adopted and this exception to the exhaustion requirement does not apply.

b. The interests of justice do not require this court to consider Fuchs' claims before exhaustion of administrative remedies.

The Idaho Court of Appeals noted in *Peterson v. City of Pocatello, supra*, that the circumstances which require an exception to the exhaustion doctrine include: (1) where resort to administrative procedures would be futile; (2) where the aggrieved party is challenging the constitutionality of the agency's actions or of the agency itself; or (3) where the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise administrative review procedures. *See Peterson*, 117 Idaho at 236, 786 P.2d at 1138.

i. Futility.

This court concludes that return to the agency in this case would not be futile for Fuchs. Upon remand the agency, or its designated hearing officer, the applicability of the Rule to Fuchs' situation may be determined with establishment of a proper record.

The Director of the ISP is the administrative tribunal charged with enforcement of the provisions of Title 23, chapter 9, Idaho Code. By rule, the Director has delegated his authority for licensing establishments to ABC. IDAPA 11.05.01.011.02. The issue here is one which the specialization of ABC is particularly suited to manage. That fact-finder should be presented with the question whether there is some compelling reason for Fuchs' name to appear twenty-two times on priority lists in six Idaho cities, particularly in light of the statutory purpose "to deal with issues of licensees involved in alleged acts of hidden ownership, i.e. unlawful transfers of liquor licenses, in violation of I.C. §23-908(4)." *Affidavit of Robert Clements in Support of State's Response, etc.*, ¶10.

Moreover, ABC has specific jurisdiction for enforcement and determination of licensure issues. "An agency must be granted the authority to administer the statute before it [and it] is impliedly clothed with the power to construe the law." *Hamilton ex rel. Hamilton v. Reeder Flying Service,* 135 Idaho 568, 571, 21 P.3d 890, 893 (2001) (citing *J.R. Simplot Co.,* 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991)). "[G]reat weight should be given to an agency's interpretation of its own rules." *Angstman v. City of Boise,* 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996).

This court also accepts the legal proposition that the Rule's application is remedial. As such, additional facts should be established before a fact-finder to determine what extent, if any, the Rule should apply to Fuchs' situation. This is particularly the case since Fuchs applied for multiple licenses fifteen-plus years ago.

Finally, the *record* in the judicial review proceeding does not exist, other than as stated in footnote 1, above. An adequate record is obligatory for this court to provide appropriate judicial review. *See* I.R.C.P. 84(f)(3); *see also Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 36-37, 655 P.2d 926, 930 - 931 (1982) (in order for there to be effective judicial review of agency decisions, there must be a record of the proceedings and adequate findings of fact and conclusions of law).

This court cannot substitute its judicial judgment for administrative judgment. At this juncture there is no way to determine whether the administrative agency has applied the criteria prescribed by statute and by its own regulations or whether it acted arbitrarily or on an ad hoc basis. *See also South of Sunnyside Neighborhood League v. Board of Commissioners*, 280 Or. 3, 569 P.2d 1063, 1076-77 (1977) (quoted in *Workman Family Partnership*): "What is needed for adequate judicial review is a clear statement of what, specifically, the decisionmaking body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient."

ii. Applicants hold no vested rights for multiple places on the priority lists for each city; thus, Fuchs has no right to notice and no constitutional claim.

The court also concludes that Fuchs does not have a sufficient property interest in his position on the lists in question to raise a constitutional question, or a question of notice. Idaho's Supreme Court has held that 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." *Nampa Lodge No. 1389 v. Smylie* 71 Idaho 212, 215-216, 229 P.2d 991, 993 (1951). *See also BHA Investments, Inc. v. State*, 138 Idaho 348, 354-355, 63 P.3d 474, 480 - 481 (2003) (liquor license transfer fee does not amount to an unconstitutional taking, reaffirming *Nampa Lodge No. 1389*).

This court recognizes that the statutes/rules in question have been amended and updated since the Court's ruling in *Nampa Lodge 1389*. In fact, the Idaho Supreme Court has held that a liquor license is a right of property as between a licensee and third persons in that it has "attributes of value and assignability." *Weller v. Hopper*, 85 Idaho 386, 394, 379 P.2d 792, 797 (1963). However, these rights of assignability and value *in a licensee* do not give rise to a sufficient vested interest to grant Fuchs the relief he seeks here.

In the first place, this court concludes that being on a list is deserving of even lesser legal status than actually holding a license. *See Wojcik v. City of Romulus*, 257 F.3d 600 (6th Cir. 2001) (applying Michigan law, holding that one applying for a liquor license has no such claim of entitlement; as such, there is no 'property' interest in a place on the list).

Secondarily, while a statute will not generally be applied retroactively in the absence of clear legislative intent to that effect, I.C. § 73-101, it also is the rule in Idaho that retroactive legislation is only that which affects vested or already existing rights. *City of Garden City v. City of Boise*, 104 Idaho 512, 515, 660 P.2d 1355, 1358 (1983) (citing *Hidden Springs Trout Ranch, Inc., v. Allred*, 102 Idaho 623, 624, 636 P.2d 745, 746 (1981); *Buckalew v. City of Grangeville*, 100 Idaho 460, 600 P.2d 136 (1979)). Thus, remedial or procedural statutes which do not create, enlarge, diminish or destroy *contractual* or *vested rights* are generally held to operate retrospectively. *Id.* (citing *Ohlinger v. U.S.*, 135 F.Supp. 40 (D. Idaho 1955)). As the Idaho Supreme Court has stated:

> "A retrospective or retroactive law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." 82 C.J.S. *Statutes* § 407 (1999). "[I]n Idaho, a statute is not applied retroactively unless there is 'clear legislative intent to that effect.' " *Gailey v. Jerome County*, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987) (quoting *City of Garden City v. City of Boise*, 104 Idaho 512, 515, 660 P.2d 1355, 1358 (1983)). However, *in the absence of an express declaration of legislative intent, a statute, which is remedial or procedural in nature, and which does not create, enlarge, diminish, or destroy*

> *contractual or vested rights, is generally held not to be retroactive,* even though it was enacted subsequent to the events to which it applies. *Id.*

University of Utah Hosp. on Behalf of Harris v. Pence 104 Idaho 172, 174, 657 P.2d 469, 471 (1982) (emphasis added).

In this instance Fuchs has no vested rights. "[T]he selling of intoxicating liquor is a proper subject for control and regulation under the police power. It is likewise universally accepted that no one has an inherent or constitutional right to engage in a business of selling or dealing in intoxicating liquors." *Crazy Horse v. Pearce*, 98 Idaho 762, 765, 572 P.2d 865, 868 (1977) (citations omitted). The mere fact that the person holds a liquor license does not vest him with any property right that would entitle him to any damages by reason of the revocation or cancellation of such license. *Nims v. Gilmore*, 17 Idaho 609, 107 P. 79, 81 (1910). *See also, O'Connor v. City of Moscow*, 69 Idaho 37, 44, 202 P.2d 401, 405 (1949) (a license to operate a beer parlor does not confer any vested property right).

Therefore, Petitioner has no vested property right for being on the list. Thus, he has no right to notice and a hearing, and the agency action was not retroactive. Therefore, the exceptions to the statutory requirement of exhaustion are not established in this case. The Judicial Review is therefore DISMISSED.

2. The Complaint for Declaratory Relief is Dismissed.

As noted above, the Idaho Administrative Procedure Act provides that "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." I.C. § 67-5271 (2006). The doctrine of exhaustion requires that where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act. This doctrine is applicable not only to petitions for judicial review, but to actions for declaratory judgment as well. *See American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 871-872, 154 P.3d 433, 442-443 (2007); *Regan v. Kootenai County*, 140 Idaho 721, 724-725, 100 P.3d 615, 618-619 (2004). "If a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted." *Regan*, 140 Idaho at 724, 100 P.3d at 618.

The court concludes that the analysis set forth above regarding the Judicial Review is equally applicable to Fuchs' claims for declaratory and injunctive relief. As the Court noted in *Regan*:

> The Idaho Administrative Procedure Act provides that "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." I.C. § 67-5271. The doctrine of exhaustion requires that where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act. . . . No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. . . . Furthermore, the doctrine of exhaustion

> generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered. . . .

Id. (case citations omitted).

These considerations are applicable to Fuchs' declaratory judgment action for good reason. As the Court noted further, important policy concerns support the requirement for exhaustion of administrative remedies: :

> As we have previously recognized, important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative process established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body

Id. at 725, 100 P.3d at 619 (quoting *White v. Bannock County Commissioners*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003)).

These considerations are applicable to Fuchs' declaratory judgment action. As noted above, the ISP and particularly the ABC have the specialized function to review and determine a wide variety of issues surrounding liquor licensing in this state. It is that body's expertise to which this court defers in dismissing the declaratory judgment claim. "Actions for declaratory judgment are not intended as a substitute for a statutory procedure and such administrative remedies must be exhausted." *V-1 Oil Co. v. County of Bannock*, 97 Idaho 807, 810, 554 P.2d 1304, 1307 (1976) (citation omitted). "The courts are loath to interfere prematurely with administrative proceedings and thus they will

not, as a rule, assume jurisdiction of declaratory judgment proceedings until administrative remedies have been exhausted, except where the administrative remedy is not adequate." *Regan*, 140 Idaho at 725, 100 P.3d at 619 (quoting 22A Am. Jur.2d *Declaratory Judgments* § 83 (2003)). As noted above, the court finds the administrative remedy adequate in this case. *See supra*, p. 11-12.

The courts analyzing declaratory judgment actions have also recognized the same two exceptions set forth previously to the application of this rule, namely: 1) when the interests of justice so require; and 2) when an agency has acted outside its authority. *See American Falls Reservoir Dist. No. 2*, 143 Idaho at 872, 154 P.3d at 443; *Regan*, 140 Idaho at 726, 100 P.3d at 619.

The court has discussed both of these exceptions in detail previously in this opinion. *See supra*, pp. 9-15. The nature of Fuchs' constitutional claims do not change this analysis. *See American Falls Reservoir Dist. No. 2*, 143 Idaho at 871, 154 P.3d at 442 ("Although a district court has jurisdiction to decide constitutional issues, administrative remedies generally must be exhausted before constitutional claims are raised."). Thus, this court will not exercise jurisdiction over any constitutional claims stated by Fuchs in any greater detail than has already been addressed regarding notice and retroactivity. "[R]aising a constitutional challenge does not alleviate the necessity of establishing a complete administrative record." *Id.* Fuchs' declaratory judgment claims are therefore DISMISSED.

III. CONCLUSION

For the reasons set forth above, the court concludes that Fuchs has failed to exhaust his administrative remedies. Therefore, both the Judicial Review and the DEC action are DISMISSED without prejudice. Accordingly, the Order RE Preliminary Injunction issued on November 5, 2009 as amended on January 5, 2010 is likewise DISMISSED.

IT IS SO ORDERED.

Dated this 10th day of March, 2010.

G. RICHARD BEVAN
District Judge

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on the 11 day of March, 2010, a true and correct copy of the foregoing Order was mailed, postage paid, and/or hand-delivered to the following persons:

Brian Donesley
Attorney at Law
548 North Avenue H
P.O. Box 419
Boise, ID 83701-0419

Cheryl E. Meade
Deputy Attorney General
Idaho State Police
700 S. Stratford Drive
Meridian, ID 83642

Shaina Cooper
Deputy Clerk

BRIAN DONESLEY ISB#2313
Attorney at Law
548 North Avenue H
Post Office Box 419
Boise, Idaho 83701-0419
Telephone (208) 343-3851
Facsimile (208) 343-4188

Attorney for Petitioner/Plaintiff/Appellant
Daniel S. Fuchs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS,

Petitioner,

v.

STATE OF IDAHO, Department of Idaho State Police, Bureau of Alcohol Beverage Control,

Respondent.

DANIEL S. FUCHS,

Plaintiff,

v.

STATE OF IDAHO, Department of Idaho State Police, Bureau of Alcohol Beverage Control,

Defendant.

CASE NO. CV 2009-3914
(Consolidated with Case No. CV 2009-4185)

NOTICE OF APPEAL

10 328

ORIGINAL

TO: THE ABOVE NAMED RESPONDENT, ITS ATTORNEYS, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Daniel S. Fuchs, appeals against the above-named Respondent, Idaho State Police, Bureau of Alcohol Beverage Control, to the Idaho Supreme Court from the Memorandum Decision and Order Dismissing Petition for Judicial Review and Complaint for Declaratory and Injunctive Relief entered in the above entitled action on the 10th day of March, 2010, the Honorable G. Richard Bevan, District Judge, presiding.

2. Appellant has the right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 above is appealable under and pursuant to Rule 11 (a) (1) (2) and (f) I.A.R.

3. The appeal is based upon the July 24, 2009 notice from Respondent, Idaho State Police, Bureau of Alcohol Beverage Control, to Appellant that it was removing listings of his name from Retail Alcohol Beverage License Priority Lists for new issue licenses for the Idaho cities of Twin Falls, Sun Valley, Ketchum, Hailey and Bellevue.

a. This notice was in violation of Appellant's rights to due process of law guaranteed by the Fourth, Fifth and Fourteenth Amendment to the United States Constitution and arising under the law and statutes of the State of Idaho, specifically but not exclusively: the Idaho Constitution, Article I, § 17.

b. This notice was an administrative rule not formally promulgated in accordance with procedures specified in the Idaho Administrative Procedures Act, I.C. § 67-5201 *et seq.* Consequently, this notice was void and of no effect.

4. No order has been entered sealing all or any portion of the record.

5. (a) No reporter's transcript is requested.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.

- Motion for Consolidation: Rule 42(a), I.R.C.P., filed September 8, 2009;
- Petitioner's Motion for Order of Stay, I.R.C.P. 84(m), filed September 8, 2009;
- Affidavit of Robert Clements in Support of State's Response and Motion to Dismiss Petitioner's Amended Petition for Judicial Review filed September 10, 2009;
- Respondent's Response to Amended Petition for Judicial Review and Motion to Dismiss for Failure to Exhaust Administrative Remedies filed September 10, 2009;
- Order for Consolidation entered September 17, 2009;
- Memorandum in Opposition to Respondent's Motion to Dismiss for Failure to Exhaust Administrative Remedies filed September 21, 2009;
- Order re: Preliminary Injunction entered November 5, 2009;
- Affidavit of Brian Donesley in Support of Supplemental Memorandum in Opposition to Respondent's Motion to Dismiss for Failure to Exhaust Administrative Remedies filed on November 23, 2009;
- Supplemental Memorandum in Opposition to Respondent's Motion to Dismiss for Failure to Exhaust Administrative Remedies filed on November 23, 2009;
- Respondent's Supplemental Memorandum in Support of Motion to Dismiss filed on December 8, 2009;
- Supplemental Reply Memorandum in Opposition to Respondent's Motion to Dismiss for Failure to Exhaust Administrative Remedies filed on December 9, 2009;
- Second Supplemental Memorandum in Opposition to Respondent's Motion to Dismiss for Failure to Exhaust Administrative Remedies filed on December 24, 2009
- ABC's Response to Daniel S. Fuchs' (Second) Supplemental Memorandum in Opposition to ABC's Motion to Dismiss filed on January 11, 2010;
- Supplemental Memorandum re: Consolidation filed on March 3, 2010.

7. Appellant does not request additional documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court, other than those documents referenced above.

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

(b) That service has been made upon all parties required to be served pursuant to Rule 20 (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code).

DATED this 14th day of April, 2010.

Brian Donesley
Attorney for Appellant

CERTIFICATE OF SERVICE

On this 14th day of April, 2010, I hereby certify that I served the above document on the addressee indicated, by delivering the same to the following party by method indicated below:

Cheryl Meade, Deputy A.G.
Idaho State Police
700 S. Stratford Drive
Meridian, ID 83642-6202

[ ] U.S. Mail
[ ] Hand-Delivered
[ ] Overnight Mail
[X] Facsimile (884-7228)

Barbi McCary Crowell

LAWRENCE G. WASDEN
Attorney General

CHERYL E. MEADE
Deputy Attorney General
Idaho State Police
700 S. Stratford Drive
Meridian, Idaho 83642
Telephone: (208) 884-7050
Facsimile: (208) 884-7228
Idaho State Bar No. 6200

Attorney for Respondent

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS,

Appellant,

v.

STATE OF IDAHO, Department of State Police, Bureau of Alcohol Beverage Control,

Respondent.

Daniel S. Fuchs

Plaintiff,

v.

STATE OF IDAHO, Department of State Police, Bureau of Alcohol Beverage Control,

Defendant.

Case No. CV-2009-03914

ALCOHOL BEVERAGE'S REQUEST FOR DOCUMENTS TO BE INCLUDED IN THE CLERK'S RECORD
I.A.R. 28

COMES NOW, Cheryl E. Meade, Deputy Attorney General for the Idaho State Police, Alcohol Beverage Control ("ABC") and hereby requests that the standard record be prepared pursuant to I.A.R. 28 (b). Additionally, pursuant to I.A.R. 28(c) that the following documents be specifically included in the clerk's record:

1. Daniel Fuchs' Petition for Judicial Review, filed on August 19, 2009.
2. Daniel Fuchs' Amended Petition for Judicial Review, filed on August 20, 2009.
3. Court's Procedural Order Governing Judicial Review, issued by the District Court, filed on August 21, 2009.
4. Petitioner's (Daniel Fuchs') Statement of Issues for Judicial Review, filed on August 25, 2009.
5. Affidavit of Brian Donesley, filed on September 4, 2009.
6. Affidavit of Daniel S. Fuchs, filed on September 4, 2009.
7. Daniel Fuchs' Motion for Consolidation, filed on September 4, 2009.
8. Daniel Fuchs' Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, filed September 4, 2009.
9. Daniel Fuchs' Motion for Temporary Restraining Order and Preliminary Injunction, filed September 4, 2009.
10. Daniel Fuchs' Complaint for Declaratory Relief, filed September 4, 2009 (with Fuchs' Exhibits 1-2 attached).
11. Respondent's (ABC's) Response To Amended Petition for Judicial Review and Motion to Dismiss for Failure to Exhaust Administrative Remedies, filed September 8, 2009 (with ABC's Exhibits 1-21 and Affidavit of Robert Clements attached).

12. ABC's Response to Complaint for Declaratory and Injunctive Relief, filed September 10, 2009.
13. Defendant's (ABC's) Objection to Motion for Restraining Order and Preliminary Injunction, filed September 10, 2009.
14. Respondent's (ABC's) Supplemental Memorandum in Support of Motion to Dismiss, filed December 7, 2009 (with ABC Exhibit 22 attached).

Dated this 29 day of April 2010.

Stephanie A. Altig
for CHERYL E. MEADE
Deputy Attorney General
Idaho State Police

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of April, 2010, I caused to be served a true and correct copy of the foregoing ABC's REQUEST TO INCLUDE ADDITIONAL DOCUMENTS IN THE CLERK'S RECORD by the U.S. Mail, first-class postage as follows to:

Brian Donesley, Esq.
Attorney at Law
548 North Avenue H
PO Box 419
Boise, ID 83701-0419

___U.S. Mail
___Hand Delivery
___Certified Mail, Return Receipt Requested
___Overnight Mail
X Facsimile: (208) 343-4188
___Statehouse Mail
___ Electronic Delivery

Stephanie A. Altig
CHERYL E. MEADE
Deputy Attorney General

Daniel S. Fuchs vs. State of Idaho, Dept. of ID State Police, Bureau o

Date	Code	User		Judge
9/4/2009	NCOC	SCHULZ	New Case Filed-Other Claims	Randy J. Stoker
		SCHULZ	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Fuchs, Daniel S. (plaintiff) Receipt number: 9023905 Dated: 9/4/2009 Amount: $88.00 (Cash) For: Fuchs, Daniel S. (plaintiff)	Randy J. Stoker
	COMP	SCHULZ	Complaint For Declaratory And Injunctive Relief	Randy J. Stoker
	MOTN	SCHULZ	Motion For Temporary Restraining Order And Preliminary Injunction, I.R.C.P. 65 (a)	Randy J. Stoker
	MOTN	SCHULZ	Motion For Consolidation: Rule 42(a), I.R.C.P.	Randy J. Stoker
	AFFD	SCHULZ	Affidavit Of Daniel S. Fuchs	Randy J. Stoker
	AFFD	SCHULZ	Affidavit Of Brian Donesely	Randy J. Stoker
	MEMO	SCHULZ	Memorandum In Support Of Motion For Temporary Restraining Order And Preliminary Injunction	Randy J. Stoker
9/8/2009	APER	SCHULZ	Plaintiff: Fuchs, Daniel S. Appearance Brian N Donesley	Randy J. Stoker
	CESV	NIELSEN	Amended Certificate Of Service fax	Randy J. Stoker
9/10/2009		NIELSEN	ABC's Response to Complaint for Declaratory and Injunctive Relief	Randy J. Stoker
	OBJC	NIELSEN	Defendants' Objection to Plaintiff's Motion for Restraining Order and Preliminary Injunction and Stipulation to Consolidate Cases	Randy J. Stoker
9/14/2009	OBJC	NIELSEN	Defendants' Objection to Plaintiff's Motion for Restraning Order and Preliminary Injunction and Stipulation to Consolidate Cases	Randy J. Stoker
		NIELSEN	ABC's Response to Complaint for Declaratory and Injunctive Relief	Randy J. Stoker
9/17/2009	ORDR	COOPE	Order for Consolidation	Randy J. Stoker
9/21/2009	OBJC	NIELSEN	Petitioner's Objection to Respondent's Motion to Change Venue fax	Randy J. Stoker
	MEMO	NIELSEN	Memorandum in Opposition to Respondent's Motion to Dismiss for Failure to Exhaust Administrative Remedies fax	Randy J. Stoker
9/22/2009	CHJG	COOPE	Change Assigned Judge	G. Richard Bevan
		NIELSEN	Amended Certificate of Service fax	G. Richard Bevan
9/23/2009	OBJC	NIELSEN	Petitioner's Objection to Respondent's Motion to Change Venue	G. Richard Bevan
9/28/2009	REQU	NIELSEN	Request of Petitioner for Setting of Hearing fax	G. Richard Bevan

Daniel S. Fuchs vs. State of Idaho, Dept. of ID State Police, Bureau o

Date	Code	User		Judge
9/29/2009	REQU	NIELSEN	Request of Petitioner for Setting of Hearing	G. Richard Bevan
9/30/2009	HRSC	COOPE	Hearing Scheduled (Motion 11/02/2009 09:00 AM) for TRO, preliminary injunction and change venue	G. Richard Bevan
10/5/2009	NOHG	NIELSEN	Notice Of Hearing on Motions: 1. Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, I.R.C.P. 65(a) 2. Respondent's (Alternative) Motion to Change Venue	G. Richard Bevan
	NOSV	NIELSEN	Notice Of Service of Petitioner/Plaintiff's First Set of Interrogatories and Request for Production of Documents	G. Richard Bevan
10/28/2009	NOSV	NIELSEN	Notice Of Serving fax	G. Richard Bevan
11/2/2009	CMIN	COOPE	Court Minutes Hearing type: Motion Hearing date: 11/2/2009 Time: 1:02 pm Courtroom: Court reporter: Virginia Bailey Minutes Clerk: Sharie Cooper Tape Number:	G. Richard Bevan
	DCHH	COOPE	Hearing result for Motion held on 11/02/2009 09:00 AM: District Court Hearing Held Court Reporter: Virginia Bailey Number of Transcript Pages for this hearing estimated: for TRO, preliminary injunction and change venue	G. Richard Bevan
	HRSC	COOPE	Hearing Scheduled (Motion 12/14/2009 09:00 AM) Motion TRO, Prelim Injunc	G. Richard Bevan
	CONT	COOPE	Continued (Motion 12/14/2009 10:30 AM) to dismiss	G. Richard Bevan
11/5/2009	ORDR	COOPE	Order RE: Preliminary Injunction	G. Richard Bevan
12/7/2009	MEMO	COOPE	Respondent's Supplemental Memorandum in Support of Motion to Dismiss	G. Richard Bevan
12/10/2009	MISC	SCHORZMAN	Camera request from Times-News for 12.14.09 hearing GRANTED	G. Richard Bevan
12/14/2009	CMIN	COOPE	Court Minutes Hearing type: Motion to Dismiss Hearing date: 12/14/2009 Time: 10:39 AM Court reporter: Virginia Bailey Audio tape number: ct rm 1	G. Richard Bevan
	DCHH	COOPE	Hearing result for Motion held on 12/14/2009 10:30 AM: District Court Hearing Held Court Reporter: Virginia Bailey Number of Transcript Pages for this hearing estimated: to dismiss	G. Richard Bevan
2/12/2010	APER	COOPE	Defendant: State of Idaho, Dept. of ID State Police, Bureau o Appearance Cheryl E Meade	G. Richard Bevan

Daniel S. Fuchs vs. State of Idaho, Dept. of ID State Police, Bureau o

Date	Code	User		Judge
2/12/2010	HRSC	COOPE	Hearing Scheduled (Status 02/19/2010 08:30 AM)	G. Richard Bevan
2/19/2010	CMIN	COOPE	Court Minutes Hearing type: Status Hearing date: 2/19/2010 Time: 11:56 am Courtroom: District Courtroom #1 Court reporter: Virginia Bailey Minutes Clerk: Sharie Cooper Tape Number:	G. Richard Bevan
	DCHH	COOPE	Hearing result for Status held on 02/19/2010 08:30 AM: District Court Hearing Held Court Reporter: Virginia Bailey Number of Transcript Pages for this hearing estimated:	G. Richard Bevan
3/2/2010	HRSC	COOPE	Hearing Scheduled (Hearing Scheduled 03/04/2010 03:00 PM)	G. Richard Bevan
		COOPE	Notice Of Hearing	G. Richard Bevan
3/3/2010	LETT	COOPE	Letter from Brian Donesley	G. Richard Bevan
	MEMO	COOPE	Supplemental Memorandum RE: Consolidation Issues	G. Richard Bevan
3/4/2010	CMIN	COOPE	Court Minutes Hearing type: Status by Phone Hearing date: 3/4/2010 Time: 1:07 pm Courtroom: Court reporter: Virginia Bailey Minutes Clerk: Sharie Cooper Tape Number: Brian Donesley for Petitioner Cheryl Meade for Respondent	G. Richard Bevan
	DCHH	COOPE	Hearing result for Hearing Scheduled held on 03/04/2010 03:00 PM: District Court Hearing Hel Court Reporter: Number of Transcript Pages for this hearing estimated:	G. Richard Bevan
3/5/2010	ADVS	COOPE	Case Taken Under Advisement	G. Richard Bevan
3/10/2010	OPIN	COOPE	Memorandum Decision and Order Dismissing Petition for Judicial Review and Complaint for Declaratory and Injunctive Relief	G. Richard Bevan
	CDIS	COOPE	Civil Disposition/Judgment entered: entered for: State of Idaho, Dept. of ID State Police, Bureau o, Defendant; Fuchs, Daniel S., Plaintiff. Filing date: 3/10/2010	G. Richard Bevan
3/17/2010	SCND	AIKELE	Scanned	G. Richard Bevan
4/19/2010	NTOA	COOPE	Notice Of Appeal	G. Richard Bevan
	APSC	COOPE	Appealed To The Supreme Court	G. Richard Bevan
4/22/2010	CCOA	COOPE	Clerk's Certificate Of Appeal	G. Richard Bevan

Daniel S. Fuchs vs. State of Idaho, Dept. of ID State Police, Bureau o

Date	Code	User		Judge
4/29/2010	MISC	COOPE	Alcohol Beverage's Request for Documents to be Included in the Clerk's Record I.A.R. 28	G. Richard Bevan
4/30/2010	CCOA	COOPE	Amended Clerk's Certificate Of Appeal	G. Richard Bevan
5/6/2010	NOTC	COOPE	Petitioner/Plaintiff/Appellant's Notice of Non-Opposition to Request that Documents be Included in the Clerk's Record	G. Richard Bevan
5/12/2010	SCDF	COOPE	Supreme Court Document Filed- Document(s) Filed	G. Richard Bevan
	SCDF	COOPE	Supreme Court Document Filed- Clerk's Certificate Filed	G. Richard Bevan
	SCDF	COOPE	Supreme Court Document Filed- Clerk's Record Due Date Set	G. Richard Bevan
	CCOA	COOPE	Second Amended Clerk's Certificate Of Appeal	G. Richard Bevan

BRIAN DONESLEY ISB#2313
Attorney at Law
548 North Avenue H
Post Office Box 419
Boise, Idaho 83701-0419
Telephone (208) 343-3851
Facsimile (208) 343-4188

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS,
Plaintiff,

v.

STATE OF IDAHO, Department of Idaho State Police, Bureau of Alcohol Beverage Control,
Defendant.

CASE NO. CV-09-4185

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW the Plaintiff, Daniel S. Fuchs, by and through his attorney of record, Brian Donesley, and alleges and complains as follows:

I. PARTIES AND JURISDICTION

1. This action is brought pursuant to Idaho Code Section 10-1201, *et seq.*, Idaho Code § 67-5278, and 42 USC 1983 for deprivation of federal and state constitutionally protected rights, privileges and immunities without due process of law, contrary to Amendment 14 of the Constitution of the United States, Article I, § 13 of the Constitution of the State of Idaho, and other applicable law.

2. Plaintiff Daniel S. Fuchs is and at all times relevant has been a resident of Twin Falls, Twin Falls County, Idaho.

3. Defendant The State of Idaho, Department of Idaho State Police, is a governmental department of the State of Idaho, subject to suit, with constitutional and statutory responsibilities due and owing to its citizens pursuant to the Idaho Constitution and governing statutes, rules and regulations pertaining thereto and deriving from such authority. References to the Alcohol Beverage Control Bureau of Defendant The State of Idaho, Department of State Police (hereinafter: "ISP/ABC") include that administrative subdivision of The Idaho State Department of Idaho State Police.

4. Venue and jurisdiction are proper in Twin Falls County, Idaho, as Plaintiff resides in Twin Falls County, and this action pertains, in part, to Plaintiff's application for a State of Idaho retail alcohol beverage license for the sale of alcoholic beverages for the city of Twin Falls.

II. GENERAL ALLEGATIONS

5. Article III, § 26 of the Idaho Constitution provides that the Idaho Legislature has the full power and authority to regulate the sale of or liquor:

> From and after the thirty-first day of December in the year 1934, 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.

6. Pursuant to I.C. § 23-903, the Director of the Idaho State Police has been "empowered, authorized and directed by the Idaho Legislature to issue licenses to qualified applicants whereby the licensee is authorized to sell liquor at retail by the drink." Pursuant to I.C. § 23-903, the number of licenses so issued for any city shall not exceed one (1) license for each one thousand five-hundred (1,500) population of said city or fraction thereof, as established in the last census. Defendant ISP/ABC maintains a priority list of applicants for those cities in

which no incorporated city liquor license is available. A separate list is maintained for each city. A person desiring to be placed on a priority list is required to file a completed application for an incorporated city liquor license, accompanied by payment of one-half (1/2) of the annual license fee. Priority on the list is determined by the earliest application. Each succeeding application is placed on this list in the order received.

7. From June 3, 1994 to February 13, 1995, Plaintiff applied for and was placed on the incorporated city priority lists for liquor licenses for each of the following Idaho cities: Twin Falls; Sun Valley; Ketchum; Hailey; Idaho Falls; and Bellevue.

8. On March 6, 2007, Defendant ISP/ABC caused to be amended the rules governing alcohol beverage control. Among other things, ISP/ABC amended IDAPA 11.05.01.013.04, entitled "Limitations on Priority Lists," to include language, limiting the number of positions to one (1) only that any applicant may hold on any city priority list as follows:

> An applicant shall hold only one position at a time on each incorporated city priority list. An applicant must be able to demonstrate to the Director the ability to place an awarded license into actual use as required by Section 23-908(4), Idaho Code and these rules.

9. On July 24, 2009, Defendant ISP/ABC sent a letter to Plaintiff informing Plaintiff that it was removing all but one listing of his name from the priority lists for each of the above-referenced cities, citing IDAPA 11.01.013.04, stating that "an applicant shall hold only one position at a time on each incorporated city list." (Correspondence from Lt. R. Clements to Plaintiff D. Fuchs, dated July 24, 2009, a true and correct copy of which is attached as **Exhibit 1**). Defendant ISP/ABC summarily enclosed a check refunding Plaintiff's license application fees for the each of his priority applications which exceeded one (1) for each city named.

10. Plaintiff was entitled to notice and hearing of Defendant ISP/ABC's intention to apply IDAPA 11.05.01.013.04 retroactively to applicants holding more than one (1) position on each city priority list prior to March 6, 2007, the date the rule was amended. The Fourteenth Amendment to the U.S. Constitution mandates that "[n]o state shall make or enforce any law which shall abridge the privileges and immunities of citizens ... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." Article I, § 13 of the Idaho Constitution similarly states that "[n]o person shall be ... deprived of life, liberty or property without due process of law."

11. Aside from any unnecessary property right analysis, the Idaho Administrative Procedures Act, I.C. §§ 67-5201 *et seq.*, and the Idaho Rules of Administrative Procedure, IDAPA 04.11.01 *et seq.*, set forth procedural due process requirements for the State to follow, should it seek to deprive a person of a legally protected right, privilege or property interest. In particular, I.C. § 67-5240 states that a proceeding by an agency that "may result in the issuance of an order is a contested case" is governed by the provisions of the Idaho Administrative Procedures Act, unless otherwise provided by law. An "Order" means "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." I.C. § 67-5201 (12). Pursuant to the above-referenced and other applicable law, Plaintiff was entitled to notice and hearing before the order was issued and/or before the final agency action occurred which resulted in Plaintiff being removed from the priority lists.

12. Defendant ISP/ABC's July 24, 2009 letter was an unlawful "Order" as defined by I.C. § 67-5201 (12) and/or final agency action issued and implemented without notice or warning

to Plaintiff, done arbitrarily, capriciously or as an unreasonable exercise of police power, beyond the scope of the State's authority, in violation of already established law, including the U.S. Constitution, Amendment 14, the Idaho Constitution, Art. I, § 13, the Idaho Administrative Procedures Act, Idaho Code § 67-5201 *et seq.* and the Idaho Rules of Administrative Procedure, IDAPA 04.11.01 *et seq.*

13. Defendant ISP/ABC has continued to issue Notices of License Availability to applicants on the priority lists. On August 7, 2009, Nichole Harvey, an employee of Defendant ISP/ABC, sent Plaintiff a Notice of License Availability by certified mail informing Plaintiff that a new incorporated city alcohol beverage license to sell liquor by the drink had become available in the City of Twin Falls and that Plaintiff was priority applicant. (Correspondence from N. Harvey to D. Fuchs dated August 7, 2009, a true and correct copy of which is attached as **Exhibit 2**). Based upon information and belief, Defendant ISP/ABC has issued and continues to issue similar Notices of License Availability to other priority applicants on each of the priority lists from which Plaintiff's name has been removed. See Affidavit of Brian Donesley, filed herewith.

14. Plaintiff shall be irreparably harmed, if Defendant is not enjoined from continuing to notify applicants of the availability of licenses and/or issuing said licenses to other persons. Plaintiff's name was removed from the priority lists. Subsequent applicants may be notified. Some have already been notified of available licenses. This conduct excludes Plaintiff from his lawful placement on the lists and threatens Plaintiff with the loss of rights, privileges and immunities, without due process of law, including but not limited to, protected property and liberty interests pertaining to the liquor licenses and occupations to which he is entitled.

15. This matter is subject to the Court's temporary restraining order and/or preliminary injunction and such other declaratory and injunctive relief sought, inasmuch as issues pertain to matters which involve clearly established law, violations of rights which are threatening immediate, continuing and irremediable harms to Plaintiff for which there are no remedies at law, such as money damages, as any new business profits are speculative, and since any licenses to be issued are those which are attributable to Plaintiff having lost his position within a tightly regulated, statutory scheme of allocation of liquor licenses, the numbers of which are regulated by statute, and, further, involving a substantial likelihood of success on the merits by Plaintiff, as established by the filings before the Court.

III. DECLARATORY RELIEF (Count One) (IDAPA 11.05.01.013.04)

16. Plaintiff realleges and incorporates by reference paragraphs 1 through 15 as if fully set forth herein.

17. ISP/ABC's July 24, 2009 notice constituted a "final agency action," within the meaning of Idaho Code §67-5270 (2)..

18. Plaintiff is an interested person, whose rights, status or legal relations are affected by the Defendants' interpretation of the Title 23, Idaho Code, as well as by Defendants' promulgation and application of rules thereunder, including but not limited to IDAPA 11.05.013.04.

19. Defendant ISP/ABC's July 24, 2009 removal of Plaintiff from the above-referenced priority lists was an illegal, retroactive application of IDAPA 11.05.01.013.04, as amended, in violation of Idaho law, including but not limited to Amendment 14 of the U.S. Constitution, Art. I, § 13 of the Idaho State Constitution, the Idaho Administrative Procedures

Act, I.C. §§ 67-5201, *et seq.* I.C. § 73-101, the Idaho Rules of Administrative Procedure, IDAPA 04.11.01 *et seq.* and other applicable law.

20. Plaintiff seeks a declaration from this Court that Defendant's application of IDAPA 11.05.01.013.04, as applied to Plaintiff, exceeds and/or is outside the authority granted to ISP/ABC by the Idaho Legislature, and that Defendant's attempt to apply said rule retroactively is null and void.

IV. INJUNCTIVE RELIEF (Count Two)

21. Plaintiff realleges and incorporates the preceding paragraphs 1 through 20 as if fully set forth herein.

22. Defendant acted outside its administrative authority, when it applied IDAPA 11.05.01.013.04 to Plaintiff retroactively for applications filed prior to the effective date of the March 6, 2007 amendment that purported to limit applicants to only one position on a priority list for any Idaho city.

23. This Court is respectfully requested to exercise its jurisdiction over this action, to maintain the *status quo* before the unlawful actions of Defendant, enjoining Defendants from issuing notices of license availability and/or licenses to applicants on the priority lists for the cities of Twin Falls, Sun Valley, Ketchum, Hailey, Idaho Falls and Bellevue, Idaho, other than to Plaintiff, until further order of this Court.

V. VIOLATION OF DUE PROCESS (Count Three)

24. Plaintiff realleges and incorporates the preceding paragraphs 1 through 23 as if fully set forth herein.

25. Plaintiff is informed and believes and based upon that information and belief alleges that the law does not provide an adequate administrative remedy or other relief for the unlawful, retroactive application of the statutes, rules and regulations governing alcoholic beverages, as set forth in Title 23, Chapters 6, 7,8,9,10,11,12,13,14, and IDAPA 11.05.01 of the Rules Governing Alcohol Beverage Control *et seq.*. Defendant ISP/ABC's illegal and retroactive application of IDAPA 11.05.01.013.04 results in Plaintiff's denial of substantive and procedural due process rights arising pursuant to Amendment 14 of the Constitution of the United States, and Article. I, § 13 of Constitution of the State of Idaho, relating to Plaintiff's protected liberty and property interests.

VI. ATTORNEY FEES

26. Plaintiff has been required to retain the services of Brian Donesley, Attorney at Law, in order to prosecute this action and is entitled to reasonable attorney fees and costs of suit pursuant to I.C. §§ 12-117, 121, Rule 54(e), I.R.C.P., 42 USC 1983 and 1988 and other applicable law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

(a) Issue its temporary restraining order enjoining Defendants from issuing notices of license availability and/or licenses to any license applicants on the incorporated city priority list for the Idaho cities of Twin Falls, Sun Valley, Ketchum, Hailey, Idaho Falls and Bellevue, Idaho, other than to Plaintiff, until the motion for preliminary injunction may be heard;

(b) After hearing on the matter, issue its preliminary injunction enjoining Defendants from issuing notices of license availability and/or licenses to any license applicants on the incorporated city priority list for the cities of Twin Falls, Sun Valley, Ketchum, Hailey, Idaho Falls and Bellevue, Idaho, other than to Plaintiff, pending the final adjudication;

(c) Declare, adjudge and decree that IDAPA 11.05.01.013.04 is null and void and of no effect, as applied retroactively to Plaintiff, and that IDAPA 11.05.01.013.04 shall not further or again be applied retroactively;

(d) Declare, adjudge and decree that Plaintiff shall be reinstated to the same places Plaintiff held on the priority lists for the incorporated cities of Twin Falls, Sun Valley, Ketchum, Hailey, Idaho Falls and Bellevue, Idaho before Defendant ISP/ABC issued its July 24, 2009 letter and removed Plaintiffs name from said lists;

(e) Restore the *status quo* by ordering that ISP/ABC shall rescind any licenses issued to third party priority list applicants whose names appeared after Plaintiff's name on said priority lists before July 24, 2009, or the date of Plaintiff's removal from such lists and who were issued licenses that would not have been so issued but for the wrongful acts of Defendant ISP/ABC as alleged in doing so;

(f) Award to Plaintiff the costs of this action including reasonable attorney fees, in accordance with and pursuant to the provisions of law, including but not limited to Idaho Code §§12-117, and12-121; Rule 54, I.R.C.P.; 42 U.S.C. 1988; and,

(g) Award such other and further relief as the Court considers just and proper.

DATED this 3 day of September, 2009.

Brian Donesley

Brian Donesley
Attorney for Plaintiff Daniel S. Fuchs

Idaho State Police

Service since 1939

Colonel G. Jerry Russell
Director

July 24, 2009

C.L. "Butch" Otter
Governor

Daniel Fuchs
526 K Shoup Ave West
Twin Falls, ID 83301

Dear Mr. Fuchs;

We have recently reviewed the priority waiting list for incorporated city liquor licenses for the state of Idaho. The Idaho Administrative Procedures Act 11 Title 05 Chapter 01.013.04 discusses the limitations on the priority list specifically stating that "an applicant shall hold only one position at a time on each incorporated city priority list".

Daniel S. Fuchs appears on the priority list for the following cities; Twin Falls, Sun Valley, Ketchum, Hailey, Idaho Falls, and Bellevue numerous times. The fee for your priority applications, receipt numbers 7675, 7676, 7677, 7678, 7679, 7681, 7680, 7538, 7687, 7532, 7531, 7685, 7684, 7534, 7682, and 7692 for the above mentioned cities of dated June 2, 1994 – February 13, 1995 are being refunded based on the limitations described above. Enclosed is a check for the full amount of ($5,175.00). Please contact our office if you have any questions.

Sincerely,

Lt. Robert Clements
Bureau Chief
Alcohol Beverage Control Bureau
Idaho State Police

EXHIBIT 1

Idaho State Police

Service since 1939

Colonel G. Jerry Russell
Director

August 7, 2009

C.L. "Butch" Otter
Governor

Daniel S. Fuchs
526 "K" Sloup Ave West
Twin Falls, ID 83301

Re: Notice of License Availability, Certified Mail

Dear Mr. Fuchs:

You are hereby notified that a new Incorporated City alcohol beverage license to sell liquor by the drink has become available in the City of **Twin Falls** and you are a priority applicant.

To apply for the available liquor license, you must, within ten (10) days of receipt of this letter, notify this office in writing of your intent to proceed with the application process.

If you apply for the liquor by the drink license, you have one hundred and eighty (180) days from the date of receipt of this letter to submit a complete application which you verify you have completed all necessary requirements for the issuance of an annual license for the sale of liquor by the drink. Please note that it may take up to ninety (90) days to process your completed application. Failure to meet with all statutory requirements may result in a denial of the license.

Upon issuance of the license to sell liquor by the drink, you, the original licensee, must immediately begin sales of liquor by the drink at least eight (8) hours a day, six (6) days a week for six consecutive months. This liquor by the drink license cannot be transferred for a period of two years and is subject to annual renewal. Idaho code requires each newly issued liquor by the drink license to 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. [Idaho Code §23-908(4)]. All alcohol beverage licenses must be prominently displayed in a suitable premise where legitimate sales of alcoholic beverages by the drink take place.

If you fail to notify this office in writing within ten (10 days of the receipt of this letter, or to complete the application within the time described herein, your name will be removed from the priority list and your money will be refunded. Provided, however, that upon showing of good cause the Alcohol Beverage Control Bureau, Idaho State Police, may extend the time in which to complete the necessary requirements for a period not to exceed ninety (90) days.

An application is enclosed for your convenience.

Thank you for your time in this matter. We look forward to receiving your written response.

Sincerely,

Nichole Harvey
Management Assistant
Alcohol Beverage Control Bureau
Idaho State Police

P.O. Box 700, Meridian, Idaho 83680-0700

Enclosures

EQUAL OPPORTUNITY EMPLOYER

EXHIBIT 2

BRIAN DONESLEY ISB#2313
Attorney at Law
548 North Avenue H
Post Office Box 419
Boise, Idaho 83701-0419
Telephone (208) 343-3851
Facsimile (208) 343-4188

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, **Plaintiff,**	**CASE NO.** CV-09-4185
v.	**MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, I.R.C.P. 65 (a) *et seq.***
STATE OF IDAHO, Department of Idaho State Police, Bureau of Alcohol Beverage Control,	
Defendant.	

COMES NOW the Plaintiff, Daniel S. Fuchs, by and through his attorney of record, Brian Donesley, and hereby moves this Court for its Temporary Restraining Order and, following a hearing, for the Court's Preliminary Injunction enjoining Defendant Idaho State Police, Alcohol Beverage Control, from notifying third parties of the availability of retail alcohol beverage licenses, and from issuing any licenses to third parties from the priority lists for the cities of Twin Falls, Sun Valley, Ketchum, Hailey and Bellevue, Idaho, and from continuing any other administrative proceedings or actions pertaining to Defendant regarding the priority lists for these cities.

Plaintiff, contemporaneously, has filed his Complaint for Declaratory Judgment and Injunctive Relief, Memorandum in support of this Motion and supporting affidavits.

This Motion is brought to restore the *status quo* pertaining to the parties prior to ISP/ABC's removal of Plaintiff's name from the priority lists for these designated five (5) cities, pending the hearing of this motion for preliminary injunction.

The relief requested of the Court is as follows:

(1) The Court's temporary restraining order staying, suspending and postponing the notification to any third party of the availability of retail alcohol beverage licenses, and from issuing any licenses to third parties for the cities of Twin Falls, Sun Valley, Ketchum, Hailey and Bellevue, Idaho, and from continuing any other agency administrative proceedings or actions related to the priority lists;

(2) Expedited hearing on this motion for preliminary injunction, suspending and postponing Defendant's other administrative proceedings or actions related to the priority lists, based upon or related to the facts recited in the Complaint and Memorandum, and restoring the *status quo* pertaining to the parties prior to the Plaintiff's removal from the priority lists, pending final determination and resolution in this judicial action; and,

(3) Such other and further related relief and orders as justice may require to preserve Plaintiff's protected legal rights, privileges, immunities and property interests, based upon or related to the facts alleged in the Complaint and Memorandum.

This Motion is brought in accordance with Rule 65(a) *et seq.* of the Idaho Rules of Civil Procedure and is supported by the Complaint by Plaintiff, Memorandum in Support of Motion, Affidavit of Brian Donesley and Affidavit of Daniel S. Fuchs filed contemporaneously herewith and other filings in the Court records in this action.

Concurrently with this Motion, Plaintiff filed his Motion to Consolidate this case with *Fuchs v. State of Idaho, Department of Idaho State Police*, Case No. CV 2009-3914, upon Petition for Judicial Review. Plaintiff has moved the Court in the judicial review case to issue its stay prohibiting further agency action, until this matter may be adjudicated, or further order of the Court. Should the cases have been consolidated, before this Court's ruling on this present Motion for Temporary Restraining Order, the motions may be consolidated concurrently in the consolidated case.

DATED this 3 day of September, 2009.

Brian Donesley

Brian Donesley
Attorney for Plaintiff Daniel S. Fuchs

CERTIFICATE OF SERVICE

On this 4th day of September, 2009, I hereby certify that I served the above document on the addressee(s) indicated, by delivering the same to the following party(s) by method indicated below:

Lawrence G. Wasden, Attorney General Office of Attorney General 700 W. Jefferson Street P.O. Box 83720 Boise, ID 83720	[X] U.S. Mail [ ] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (334-2530)
Stephanie Altig, Deputy A.G. Idaho State Police 700 S. Stratford Drive Meridian, ID 83642-6202	[ ] U.S. Mail [X] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (884-7090)
Robert Clements Idaho State Police 700 S. Stratford Drive Meridian, ID 83642-6202	[ ] U.S. Mail [X] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (884-7096)

Tina Burke
Legal Assistant

BRIAN DONESLEY ISB#2313
Attorney at Law
548 North Avenue H
Post Office Box 419
Boise, Idaho 83701-0419
Telephone (208) 343-3851
Facsimile (208) 343-4188

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, **Plaintiff,**	**CASE NO.** CV-09-4185
v.	**AFFIDAVIT OF DANIEL S. FUCHS**
STATE OF IDAHO, Department of Idaho State Police, Bureau of Alcohol Beverage Control, **Defendant.**	

STATE OF IDAHO)
)ss.
County of)

DANIEL S. FUCHS, being first duly sworn on oath, deposes and says:

1. Affiant is the Plaintiff in the above-entitled action and has personal knowledge of the facts contained in this Affidavit.

2. Attached as Exhibit 1 is a true and correct copy of a letter Affiant received from Lt. Robert Clements, Bureau Chief of the Alcohol Beverage Control Bureau of the Defendant Idaho State Police dated July 24, 2009.

3. Attached as Exhibit 2 is a true and correct copy of a letter Affiant received from Nichole Harvey, Management Assistant of the Alcohol Beverage Control Bureau of the Defendant Idaho State Police on August 7, 2009.

4. Further, your Affiant sayeth naught.

DATED this 4 day of September, 2009.

Daniel S. Fuchs RPh

DANIEL S. FUCHS
Plaintiff

SUBSCRIBED AND SWORN to before me, this 4 day of September, 2009.

LILLIAN S. GOMEZ NOTARY PUBLIC STATE OF IDAHO

Lillian S Gomez

Notary Public for Idaho
Residing at: Twin Falls, Idaho
Commission expires: 03/02/2013

CERTIFICATE OF SERVICE

On this 4th day of September, 2009, I hereby certify that I served the above document on the addressee(s) indicated, by delivering the same to the following party(s) by method indicated below:

Lawrence G. Wasden, Attorney General Office of Attorney General 700 W. Jefferson Street P.O. Box 83720 Boise, ID 83720	[X] U.S. Mail [ ] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (334-2530)
Stephanie Altig, Deputy A.G. Idaho State Police 700 S. Stratford Drive Meridian, ID 83642-6202	[ ] U.S. Mail [X] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (884-7090)
Robert Clements Idaho State Police 700 S. Stratford Drive Meridian, ID 83642-6202	[ ] U.S. Mail [X] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (884-7096)

Tina Burke
Legal Assistant

Idaho State Police

Service since 1939

Colonel G. Jerry Russell
Director

July 24, 2009

C.L. "Butch" Otter
Governor

Daniel Fuchs
526 K Shoup Ave West
Twin Falls, ID 83301

Dear Mr. Fuchs;

We have recently reviewed the priority waiting list for incorporated city liquor licenses for the state of Idaho. The Idaho Administrative Procedures Act 11 Title 05 Chapter 01.013.04 discusses the limitations on the priority list specifically stating that "an applicant shall hold only one position at a time on each incorporated city priority list".

Daniel S. Fuchs appears on the priority list for the following cities; Twin Falls, Sun Valley, Ketchum, Hailey, Idaho Falls, and Bellevue numerous times. The fee for your priority applications, receipt numbers 7675, 7676, 7677, 7678, 7679, 7681, 7680, 7538, 7687, 7532, 7531, 7685, 7684, 7534, 7682, and 7692 for the above mentioned cities of dated June 2, 1994 – February 13, 1995 are being refunded based on the limitations described above. Enclosed is a check for the full amount of ($5,175.00). Please contact our office if you have any questions.

Sincerely,

Lt. Robert Clements
Bureau Chief
Alcohol Beverage Control Bureau
Idaho State Police

Idaho State Police

Service since 1939

Colonel G. Jerry Russell
Director

August 7, 2009

C.L. "Butch" Otter
Governor

Daniel S. Fuchs
526 "K" Shoup Ave West
Twin Falls, ID 83301

Re: Notice of License Availability, Certified Mail

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You are hereby notified that a new Incorporated City alcohol beverage license to sell liquor by the drink has become available in the City of **Twin Falls** and you are a priority applicant.

To apply for the available liquor license, you must, within ten (10) days of receipt of this letter, notify this office in writing of your intent to proceed with the application process.

If you apply for the liquor by the drink license, you have one hundred and eighty (180) days from the date of receipt of this letter to submit a complete application which you verify you have completed all necessary requirements for the issuance of an annual license for the sale of liquor by the drink. Please note that it may take up to ninety (90) days to process your completed application. Failure to meet with all statutory requirements may result in a denial of the license.

Upon issuance of the license to sell liquor by the drink, you, the original licensee, must immediately begin sales of liquor by the drink at least eight (8) hours a day, six (6) days a week for six consecutive months. This liquor by the drink license cannot be transferred for a period of two years and is subject to annual renewal. Idaho code requires each newly issued liquor by the drink license to 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. [Idaho Code §23-908(4)]. All alcohol beverage licenses must be prominently displayed in a suitable premise where legitimate sales of alcoholic beverages by the drink take place.

If you fail to notify this office in writing within ten (10 days of the receipt of this letter, or to complete the application within the time described herein, your name will be removed from the priority list and your money will be refunded. Provided, however, that upon showing of good cause the Alcohol Beverage Control Bureau, Idaho State Police, may extend the time in which to complete the necessary requirements for a period not to exceed ninety (90) days.

An application is enclosed for your convenience.

Thank you for your time in this matter. We look forward to receiving your written response.

Sincerely,

Nichole Harvey
Management Assistant
Alcohol Beverage Control Bureau
Idaho State Police

P.O. Box 700, Meridian, Idaho 83680-0700

enclosure

EQUAL OPPORTUNITY EMPLOYER

EXHIBIT 2 00359

BRIAN DONESLEY ISB#2313
Attorney at Law
548 North Avenue H
Post Office Box 419
Boise, Idaho 83701-0419
Telephone (208) 343-3851
Facsimile (208) 343-4188

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS,
Plaintiff,

v.

STATE OF IDAHO, Department of Idaho State Police, Bureau of Alcohol Beverage Control,

Defendant.

CASE NO. CV-09-4185

AFFIDAVIT OF BRIAN DONESELY

STATE OF IDAHO)
)ss.
County of Ada)

BRIAN DONESLEY, being first duly sworn on oath, deposes and says:

1. Affiant is attorney for Plaintiff in the above-referenced action and has personal knowledge of the facts contained in this Affidavit.

2. On September 3, 2009, Affiant was informed by Lt. Robert Clements, Bureau Chief, Alcohol Beverage Control of the Department of Idaho State Police that the Alcohol Beverage Control Bureau of Defendant of Idaho State Police was preparing to issue notices to applicants on the priority lists of some if not all of the cities from which Plaintiff Daniel Fuchs'

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name has been removed, that license positions held by Plaintiff Fuchs are now available to them. Lt. Clements suggested that, if Plaintiff intended to seek an injunction against the Idaho State Police, Alcohol Beverage Control or a stay of agency action, Plaintiff should do so as soon as possible and an injunction obtained, as the notices shall be issued forthwith, unless otherwise enjoined by a court of law. Affiant told Lt. Clements and Jenny Grunke, Deputy Attorney General for Idaho State Police, that the Complaint would be filed by no later than September 4, 2009.

3. Affiant hereby certifies, pursuant to I.R.C.P. 65 (b), that the following efforts have been made to give notice to Defendant State of Idaho, Department of Idaho State Police of Plaintiffs' intent to move for a temporary restraining order and preliminary injunction in this matter:

(a) I contacted met with Lt. Robert Clements, Bureau Chief, Alcohol Beverage Control Bureau, Idaho State Police and with Jenny Grunke, Deputy Attorney General, Idaho State Police, on September 3, 2009. I told them that, as attorney for Plaintiff, I was preparing to file a Complaint for Declaratory and Injunctive Relief, a Motion for Temporary Restraining Order and Preliminary Injunction and other filings at the soonest possible time with respect to the striking of Plaintiff Fuchs' name from the waiting lists for liquor licenses in the cities of Twin Falls, Ketchum, Hailey, Idaho Falls and Bellevue.

(b) Further, on this date, I sent by facsimile a copy of said Motion, the Memorandum in Support of the Motion for Temporary Restraining Order and Preliminary Injunction, the Complaint for Declaratory and Injunctive Relief, the Motion to Consolidate, the Affidavit of Daniel Fuchs and this Affidavit.

4. Further, Affiant sayeth naught.

DATED this 3 day of September, 2009.

Brian Donesley
Attorney for Plaintiff

SUBSCRIBED AND SWORN to before me, this 4th day of September, 2009.

JANET L. BURKE NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at: Boise, Idaho
Commission expires: 1/21/2018

CERTIFICATE OF SERVICE

On this 4th day of September, 2009, I hereby certify that I served the above document on the addressee(s) indicated, by delivering the same to the following party(s) by method indicated below:

Lawrence G. Wasden, Attorney General Office of Attorney General 700 W. Jefferson Street P.O. Box 83720 Boise, ID 83720	[X] U.S. Mail [ ] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (334-2530)
Stephanie Altig, Deputy A.G. Idaho State Police 700 S. Stratford Drive Meridian, ID 83642-6202	[ ] U.S. Mail [X] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (884-7090)
Robert Clements Idaho State Police 700 S. Stratford Drive Meridian, ID 83642-6202	[ ] U.S. Mail [X] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (884-7096)

Tina Burke
Legal Assistant

00 363

BRIAN DONESLEY ISB#2313
Attorney at Law
548 North Avenue H
Post Office Box 419
Boise, Idaho 83701-0419
Telephone (208) 343-3851
Facsimile (208) 343-4188

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, **Plaintiff,** v. **STATE OF IDAHO,** Department of Idaho State Police, Bureau of Alcohol Beverage Control, **Defendant.**	**CASE NO.** CV-09-4185 **MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

COMES NOW, Plaintiff Daniel S. Fuchs, by and through his attorney of record, Brian Donesley, and hereby submits the following Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction:

I. INTRODUCTION

This action involves Defendant Idaho State Police's duties and responsibilities to administer the issuance of retail alcohol beverage licenses in the State of Idaho. The Alcohol Beverage Control Bureau of Defendant Idaho State Police (hereinafter "ISP/ABC") maintains priority lists for incorporated cities. Plaintiff secured positions on priority lists by filing applications and paying fees for five Idaho cities between 1994 and 1995. In 2007, Defendant

ISP/ABC amended the rules governing alcohol beverage control, limiting applicants to one position only on any given priority list. On July 24, 2009, without notice or warning, ISP/ABC removed all but one of Plaintiff's places on the priority list for each Twin Falls, Ketchum, Hailey, Idaho Falls and Bellevue. Defendant ISP/ABC's action was an unlawful, retroactive application of an IDAPA rule, in violation of Plaintiff's due process rights and express prohibition in Idaho Code against retroactive application of law.

On August 19, 2009, Plaintiff filed his Petition for Judicial Review of ISP/ABC action in *Fuchs v. State of Idaho, Department of Idaho State Police*, Case No. 2009-3914. Concurrently with this Motion, Plaintiff filed a Complaint for Declaratory and Injunctive Relief and a Motion to Consolidate the Petition for Judicial Review with this action.

By this Motion, Plaintiff moves this Court to enjoin Defendant ISP/ABC from notifying any succeeding applicants on the respective priority lists or issuing licenses to any such applicants, until further order of the Court. Should this Court have consolidated the two cases, Plaintiff moves this Court, also, to stay agency action, pending resolution of this matter pursuant to I.R.C.P. 84 (m).

II.
STATEMENT OF FACTS

Pursuant to I.C. § 23-903, the Director of Defendant Idaho State Police has been "empowered, authorized and directed by the Idaho Legislature to issue licenses to qualified applicants whereby the licensee is authorized to sell liquor at retail by the drink." Pursuant to I.C. § 23-903, the number of licenses so issued for any city shall not exceed one (1) license for each one thousand five-hundred (1,500) population of said city or fraction thereof, as established in the last census. Defendant ISP/ABC maintains a priority list of applicants for those cities in which no incorporated city liquor license is available. A separate list is maintained for each city.

A person, partnership, or corporation desiring to be placed on a priority list is required to file a completed application for an incorporated city liquor license, accompanied by payment of one-half (1/2) of the required annual license fee. Priority on the list is determined by the earliest application. Each succeeding application is placed on this list in the order it was received.

Between June 3, 1994 and February 13, 1995, Plaintiff applied for and was placed on the incorporated city priority lists for the following Idaho cities: Twin Falls; Sun Valley; Ketchum, Hailey; Idaho Falls; and Bellevue.

On March 6, 2007, Defendant ISP/ABC amended the rules governing alcohol beverage control. Among other things, ISP/ABC amended IDAPA 11.05.01.013.04, "Limitations on Priority Lists," to include the following language, limiting the number of positions to one (1) only that any applicant may hold on any city priority list:

> An applicant shall hold only one position at a time on each incorporated city priority list. An applicant must be able to demonstrate to the Director the ability to place an awarded license into actual use as required by Section 23-908(4), Idaho Code and these rules.

On July 24, 2009, Defendant ISP/ABC sent a letter to Plaintiff, informing him that it was removing all but one listing of his name from the priority lists for the above-referenced cities, citing IDAPA 11.01.013.04, and stating that "an applicant shall hold only one position at a time on each incorporated city list." (Correspondence from Lt. R. Clements to D. Fuchs, dated July 24, 2009, a true and correct copy of which is attached as **Exhibit 1** to the Affidavit of Daniel S. Fuchs.) Defendant ISP/ABC summarily mailed to Plaintiff a check refunding Plaintiff's license application fees for all of his priority applications in Twin Falls, Sun Valley, Ketchum, Idaho Falls and Bellevue exceeding one (1).

Defendant ISP/ABC has continued to issue Notices of License Availability to applicants on the priority lists. On August 7, 2009, Nichole Harvey, an employee of Defendant ISP/ABC,

sent Plaintiff a Notice of License Availability by certified mail, informing Plaintiff that a new, incorporated city alcohol beverage license to sell liquor by the drink had become available in the City of Twin Falls and that Plaintiff was the priority applicant. (Correspondence from N. Harvey to D. Fuchs dated August 7, 2009, a true and correct copy of which is attached as **Exhibit** 2 to the Affidavit of Daniel S. Fuchs.) Based upon information and belief, Defendant ISP/ABC has issued and continues to issue similar Notices of License Availability to other priority applicants on each of the priority lists from which Plaintiff's name has been removed. In fact, Defendant ISP has informed Plaintiff's counsel that it intends to issue notices of availability to applicants on the affected priority lists in the near future.

> 2. On September 3, 2009, Affiant was informed by Lt. Robert Clements, Bureau Chief, Alcohol Beverage Control of the Department of Idaho State Police that the Alcohol Beverage Control Bureau of Defendant of Idaho State Police was preparing to issue notices to applicants on the priority lists of some if not all of the cities from which Plaintiff Daniel Fuchs' name has been removed, that license positions held by Plaintiff Fuchs are now available to them. Lt. Clements suggested that, if Plaintiff intended to seek an injunction against the Idaho State Police, Alcohol Beverage Control or a stay of agency action, Plaintiff should do so as soon as possible and an injunction obtained, as the notices shall be issued forthwith, unless otherwise enjoined by a court of law. Affiant told Lt. Clements and Jenny Grunke, Deputy Attorney General for Idaho State Police, that the Complaint would be filed by no later than September 4, 2009.
>
> Affidavit of Brian Donesley at ¶ 2.

Plaintiff shall be irreparably harmed, if Defendant is not enjoined from continuing to notify applicants of the availability of licenses or issuing said licenses to other persons. Plaintiff's name was removed from the priority lists; subsequent applicants shall be notified; and, others are believed already to have been notified of available licenses. Such conduct excludes Plaintiff from his lawful positions on the lists and threatens Plaintiff with the loss of rights, privileges and immunities, without due process of law, including but not limited to property and liberty interests pertaining to liquor licenses to which he is entitled.

III.
PLAINTIFF HAS MET THE REQUIREMENTS OF RULE 65 (b) AND (e) AND THIS COURT SHOULD ISSUE AN INJUNCTION RESTRAINING DEFENDANT FROM FURTHER AGENCY ACTION

Rule 65(e) of the Idaho Rules of Civil Procedure sets forth the grounds upon which the Court may grant a preliminary injunction. The granting or denying of a temporary injunction is left to the sound discretion of the trial court, based upon the circumstances of the particular case. Such exercise shall not be disturbed on appeal unless a clear abuse of discretion is shown. *Western Gas & Power of Idaho v. Nash,* 75 Idaho 327, 330-31, 272 P.2d 316 (1954). "An injunction is an equitable remedy issued under established principles which guide courts of equity." *Pacific Rivers Council v. Thomas,* 936 F.Supp. 738, 742 (D. Idaho, 1996). "The object of injunctive relief is to prevent injury, threatened and probable to result, unless interrupted," *Miller v. Ririe Joint School Dist. No. 252,* 132 Idaho 385, 973 P.2d 156 (1999) (*quoting Cazier v. Economy Cash Stores Inc.,* 71 Idaho, 178, 187 1951)).

Plaintiffs are entitled to an injunction, if they demonstrate that they are "likely to succeed on the merits of their claims and may suffer irreparable injury, or that serious questions exist on the merits and the balance of hardships tips in their favor." *Greater Yellowstone Coalition v. Reese,* 392 F.Supp.2d 1234, 1239 (D. Idaho 2005). The two tests are not separate but represent "a sliding scale in which the required probability of success on the merits decreases as the degree of harm increases." *Id. (Citing Self-Realization Fellowship Church v. Ananda,* 59 F.3d 902, 913 (9th Cir.1995)). If a plaintiff demonstrates a strong likelihood of success on the merits, then plaintiffs need "only to make a minimal showing of harm to justify the preliminary injunction." *Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094 (9th Cir. 2002). *See also Idaho Sporting Congress Inc. v. Alexander,* 222 F.3d 562, 565 (9th Cir. 2000) (the stronger the likelihood on the merits, the less burden is placed on plaintiffs to demonstrate irreparable harm).

Defendant ISP/ABC summarily removed Plaintiff's name from the priority lists, without warning, and without the opportunity to be heard and to object before the action was taken. Subsequently, Defendant ISP/ABC has continued to notify priority list applicants of the availability of new licenses. Plaintiff received such a notice. Affidavit of Daniel Fuchs. Plaintiff was entitled to notice and hearing before the order was issued which resulted in Plaintiff being removed from the priority lists. See I.C. §§ 67-5201(12), 5240. Notice and hearing are particularly important in this case, because Defendant ISP/ABC's actions were unlawful.

There can be no dispute that Defendant ISP/ABC's July 24, 2009 letter was a retroactive application of law. IDAPA 11.05.01.013.04 was amended in 2007, limiting applicants to only one position on any city priority list. Plaintiff applied for and was placed on the priority lists in 1994 and 1995. I.C. § 73-101 provides that "no part of these compiled laws is retroactive, unless expressly so declared." "In the absence of an express declaration of legislative intent that a statute apply retroactively, it will not be so applied." *State v. Daicel Chemical Industries, Ltd.* 141 Idaho 102, 105 (2005) (*quoting Gailey v. Jerome* County, 113 Idaho 430, 432 (1987)). "An application is deemed retrospective if it affects substantive rights." *Myers v. Vermaas*, 114 Idaho 85, 87 (Ct. App. 1988). "Among the rights characterized as substantive are those which are 'contractual or vested' in nature." *Id.* (Internal citations omitted). Plaintiff has shown likelihood of success on the merits of this case.

The second prong of the "sliding scale" test requires that Plaintiff demonstrate that he shall suffer irreparable harm, if the injunction is not granted. Plaintiff shall be irreparably harmed here, if Defendant ISP/ABC is not enjoined, because, if ISP/ABC continues to notify succeeding applicants of new licenses and/or issue new licenses, Plaintiff's rightful position on those lists shall be lost. Moreover, this situation is unique, in that the irreparable harm would not

be confined to Plaintiff. The rights and legal interests of subsequent applicants who rely on notices of license availability they receive or license they are issued may be affected. Licenses issued to them might be ordered rescinded, cancelled or revoked, in order to affect relief sought here by Plaintiff.

Defendant ISP/ABC may argue that Plaintiff should be required to await completion of agency action before seeking judicial relief. However, ISP/ABC offered Plaintiff no hearing or opportunity to challenge the retroactive application of IDAPA 11.05.01.013.04 in the first place. The July 24, 2009 letter was final agency action. An injunction is the proper remedy to prevent additional harm flowing from it. Wrongs which are the probable result of given means should be prevented, not awaited. *Cazier v. Economy Cash Stores,* 71 Idaho 178, 187, 228 P.2d 436, 441 (1951).

Defendant ISP/ABC may assert, without merit, that it is impermissible for this Court to interfere with its actions. "In the instances where exercise of the authority transgresses the bounds of reasonableness, or is arbitrary in result, to the point where there is... a deprivation of property without due process of law (Idaho Const. Art. 1, §13), an action would lie for... injunctive relief." *Johnston v. Boise City,* 87 Idaho 44, 52, 390 P.2d 291, 295 (1964). *See also, Fritchman v. Athey,* 36 Idaho 560, 211 P. 1080 (1922) ("Courts will not interfere by injunction with the exercise of discretion vested by law in administrative boards, but will, in proper cases, interfere with the action or threatened action by administrative boards outside their discretion and beyond their powers); *Bedke v. Quinn,* 154 F.Supp. 370, 372 (D. Idaho, 1957) ("[A] suit to enjoin a subordinate official, or to set aside action taken by him ... is authorized where the subordinate official exceeded his authority. His authority would be exceeded where he exercised authority granted him arbitrarily or capriciously, or where the subordinate employee exceeded

the statutory authority, either directly or under the guise of an *ultra vires* mandate of his superior").

Finally, injunctive relief is proper, because Plaintiff has no adequate remedy at law. "If threat of injury is real, an injunction may issue even though the injury, if it were to occur, could be measured only by speculation and conjecture; one reason to issue an injunction may be that damages, being immeasurable, will not provide a remedy at law." *Treasure Val. Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir. 1974), *cert. denied*, 95 S.Ct. 314, 419 U.S. 999, 42 L.Ed. 273. While Plaintiff shall suffer real and irreparable harm if Defendant ISP is not enjoined, it would be impossible to calculate damages. Any measure of loss of potential income from a lost license and prospective business conduct would be speculative in nature. The threat of harm is real and immediate, however. Defendant ISP has said that it intends to issue new notices of availability in the near future. *See* Affidavit of Brian Donesley at ¶ 2.

This Court should grant Plaintiff a temporary restraining order pending hearing and a preliminary injunction, enjoining Defendant ISP from notifying succeeding applicants on the affected priority lists of available licenses, or issuing retail alcohol beverage licenses until further Order of this Court.

IV.
I.R.C.P. RULE 84(m) PROVIDES FOR A STAY OF AGENCY ACTION DURING THE PENDENCY OF A PETITION FOR JUDICIAL REVIEW

Plaintiff filed his Petition for Judicial Review of Defendant ISP/ABC's final agency action on August 19, 2009 in *Fuchs v. State of Idaho, Dept. of Idaho State Police*, Case No. CV 2009-3914. Additionally, Plaintiff has filed his Motion to Consolidate the two cases, based upon the grounds and reasons of common issues of law and fact, and economy to the Court and the

parties, and that the interests of justice would best be served by consolidation of these cases which involve substantially common issues of law and fact between the same parties. Should this Court consolidate these cases, it may also stay, concurrently, the agency from further action, pursuant to powers granted to the Court in Judicial Review proceedings.

Idaho Rule of Civil Procedure 84(m) provides the Court with a basis to grant Plaintiff a stay of agency action pending the outcome of this proceeding:

> Unless otherwise provided by statute, the filing of a petition for judicial review with the district court does not automatically stay the proceedings and enforcement of the action of an agency that is subject to the petition. *Unless prohibited by statute, the agency may grant, or the reviewing court may order, a stay upon appropriate terms.*

Idaho Rule of Civil Procedure 84(m) (emphasis added).

An injunction or a stay of Defendant ISP/ABC prohibiting notifying succeeding applicants on the implicated priority lists shall prevent further harm to Plaintiff. And, Plaintiff's rights, privileges and legal interests attendant to his positions on the priority lists, hence the *status quo*, thereby would be preserved. A stay shall protect the right and legal interests of third parties, as well, because their places on the priority lists shall be preserved. Should Defendant ISP/ABC continue to notify succeeding applicants of the availability of new licenses, or issue licenses to them, such actions may be required to be undone. By contrast, there would be no harm to Defendant ISP/ABC, if enjoined. ISP/ABC has no substantive stake in whether licenses are issued.

This Court should issue enjoin Defendant ISP/ABC from notifying to any such succeeding applicants on the affected priority lists, or issuing retail alcohol beverage licenses. Concurrently, this Court should issue its stay order prohibiting Defendant ISP/ABC from taking

further agency action with respect to the affected priority lists, until this matter has been adjudicated.

V.
CONCLUSION

Plaintiff requests that this Court issue its Temporary Restraining Order, enjoining Defendant ISP/ABC from notifying succeeding applicants of available licenses or from issuing licenses in the cities of Twin Falls, Ketchum, Hailey, Idaho Falls and Bellevue, pending hearing. Plaintiff further requests that this Court issue a Preliminary Injunction so enjoining Defendant ISP/ABC, upon hearing of this Motion. Concurrently, if the case shall have been consolidated timely, Plaintiff moves this Court to stay Defendant ISP/ABC from further agency action during the pendency of the Petition for Judicial Review.

DATED this 3 day of September, 2009.

Brian Donesley
Attorney for Plaintiff Daniel S. Fuchs

CERTIFICATE OF SERVICE

On this 4th day of September, 2009, I hereby certify that I served the above document on the addressee(s) indicated, by delivering the same to the following party(s) by method indicated below:

Lawrence G. Wasden, Attorney General Office of Attorney General 700 W. Jefferson Street P.O. Box 83720 Boise, ID 83720	[X] U.S. Mail [ ] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (334-2530)
Stephanie Altig, Deputy A.G. Idaho State Police 700 S. Stratford Drive Meridian, ID 83642-6202	[ ] U.S. Mail [X] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (884-7090)
Robert Clements Idaho State Police 700 S. Stratford Drive Meridian, ID 83642-6202	[ ] U.S. Mail [X] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (884-7096)

Tina Burke
Legal Assistant

LAWRENCE G. WASDEN
Attorney General

CHERYL E. MEADE
Deputy Attorney General
Idaho State Police
700 S. Stratford Dr.
Meridian, Idaho 83680-0700
Telephone: (208) 884-7050
Facsimile: (208) 884-7228
Idaho State Bar No. 6200

Attorney for the Defendant

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

DANIEL S. FUCHS, Plaintiff, vs. THE STATE OF IDAHO, DEPARTMENT OF IDAHO STATE POLICE, BUREAU OF ALCOHOL BEVERAGE CONTROL, Defendant.	Case No. CV-09-4185 **ABC's RESPONSE TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Defendant, by and through its attorney, Cheryl E. Meade, Deputy Attorney General, hereby responds to and answers Plaintiff's Complaint For Relief and asserts its affirmative defenses.

I. DEFENDANT'S RESPONSE

Defendant denies each and every allegation contained in Plaintiff's Complaint except for those expressly admitted.

ORIGINAL

I. PARTIES AND JURISDICTION (paragraphs 1-4),

1. Plaintiff's paragraph 1 is a legal conclusion for which no response is required.

2. Defendant admits paragraph 2.

3. Defendant admits paragraph 3.

4. Defendant denies paragraph 4, in that venue is proper in Twin Falls County. Defendant's administrative office, containing all records and documents, along with numerous personnel, associated with this case are located in Meridian, Idaho. Venue is proper in Ada County for these reasons and should be moved accordingly.

II. GENERAL ALLEGATIONS (paragraphs 5-15)

5. Defendant admits paragraph 5.

6. Defendant admits paragraph 6 to the extent that current statute and IDAPA rules allow for. Otherwise Defendant denies any procedure that Plaintiff may or may not perceive as being correct.

7. Defendant admits paragraph 7.

8. Defendant admits paragraph 8 to the extent that current IDAPA Rule 11.05.01.013.04 states that "An applicant shall hold only one position at a time on each incorporated city priority list." Otherwise Defendant denies any procedure that Plaintiff may or may not perceive as being correct.

9. Defendant admits the first sentence of paragraph 9. Defendant denies the argumentative characterization of the second sentence of paragraph 9.

10. Defendant denies paragraph 10 to the extent that Plaintiff alleges he was entitled to notice and hearing. (Affirmative Defense --- Public notice and hearings of the rulemaking were

conducted at the time the rule was approved.) Defendant neither admits nor denies sentences 2 and 3, paragraph 10 as they are legal conclusions for which no response is required.

11. Defendant denies sentence 1, paragraph 11 to the extent that Plaintiff's characterization that a property right analysis is unnecessary. It appears that Plaintiff's Complaint is overly argumentative and is in fact arguing for a property right. Defendant denies there is any legal property right held by a mere applicant on a list of names to the extent that paragraph 11 alleges there seems to be. To the extent that Plaintiff is making legal conclusions as to the law, Defendant neither admits nor denies as no response is required. Defendant denies the final sentence of paragraph 11.

12. Defendant denies paragraph 12. To the extent that Plaintiff is making legal conclusions as to the law, Defendant neither admits nor denies as no response is required.

13. Defendant admits paragraph 13 to the extent that it is required by law to offer a retail-liquor-by-the-drink license to the next applicant on the list as that name appears.

14. Defendant denies paragraph 14 in its entirety.

15. Defendant denies paragraph 15 to the extent that Plaintiff will substantially succeed on the merits of this action. To the extent that Plaintiff is making legal conclusions as to the law, Defendant neither admits nor denies as no response is required.

III. DECLARATORY RELIEF (paragraphs 16-20)

16. Defendant reincorporates its answers in full from above, to Plaintiff's paragraphs 1through 15.

17. Defendant denies paragraph 17 to the extent that the July 24, 2009, letter to Plaintiff constituted a final agency action.

18. Defendant denies paragraph 18.

19. Defendant denies paragraph 19.

20. Defendant denies paragraph 20.

IV. INJUNCTIVE RELIEF (paragraphs 21-23)

21. Defendant reincorporates its answers in full from above to Plaintiff's paragraphs 1through 20.

22. Defendant denies paragraph 22.

23. Defendant denies paragraph 23 to the extent Plaintiff appears to be making a prayer for relief instead of asserting disputable facts or law.

V. VIOLATION OF DUE PROCESS (paragraphs 24-25)

24. Defendant reincorporates its answers in full from above to Plaintiff's paragraphs 1through 23.

25. Defendant denies paragraph 25.

VI. ATTORNEY FEES

26. Defendant denies that attorney fees should be awarded in this action.

II. DEFENDANT'S AFFIRMATIVE DEFENSES

27. Plaintiff has failed to state a claim upon which relief can be granted;

28. Plaintiff is not entitled to equitable relief because Plaintiff has an adequate remedy at law through the administrative process, without the requirement of the injunctive relief sought;

29. Plaintiff has failed to exhaust its administrative remedies;

30. This court lacks jurisdiction over Plaintiff's claims;

31. At all times, relevant to this cause, Defendant's actions were reasonable and proper under the laws of the United States and the state of Idaho;

31. At all times relevant to this cause, Defendants' actions were reasonable and proper under the laws of the United States and the State of Idaho;

32. Plaintiff is not entitled to injunctive or equitable relief to the extent that they have not suffered, and will not suffer, irreparable harm or injury;

34. Retroactive application of a rule clarifying procedure is allowable against the Plaintiff's application, when no privileges have yet been granted by the agency;

35. No contract rights exist between the agency and the applicant;

36. Plaintiff's claim is barred by unclean hands;

37. Plaintiff's claim is barred by waiver, estoppel or laches;

38. Venue is improper;

39. Defendant incorporates by reference any additional affirmative defenses that may be uncovered or made known during the investigation and discovery in this case, as well as those now made or those that might be added by amendment by any other defendant. Defendant specifically reserves the right to amend this answer to include any such affirmative defenses.

IV. DEFENDANT'S PRAYER FOR RELIEF

WHEREFORE, Defendant prays for relief as follows:

1. That the Court deny Plaintiff's Complaint for Declaratory and Injunctive Relief.

2. That Defendant has been required to retain the services of the Office of the Attorney General for the State of Idaho to defend them in this action and that Defendant should be awarded their costs and reasonable attorney fees pursuant to Idaho Code § 12-117 and other applicable Idaho laws; and

3. For such other relief as the Court may deem just and proper.

DATED this 10 day of September 2009.

CHERYL E. MEADE
Deputy Attorney General
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ABC's RESPONSE TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF was served on the following on this 10 day of September 2009 by the following method:

Brian Donelsey
Attorney at Law
P.O. Box 419
Boise, ID 83701-0419

- [ ] U.S. First Class Mail, Postage Prepaid
- [ ] U.S. Certified Mail, Postage Prepaid
- [ ] Federal Express
- [ ] Hand Delivery
- [ ] Facsimile
- [x] Electronic Mail

Lt. Robert Clements
Bureau Manger
Alcohol Beverage Control
P. O. Box 700
Meridian, Idaho 83680-0700
(208) 884-7060

- [ ] U.S. First Class Mail, Postage Prepaid
- [ ] U.S. Certified Mail, Postage Prepaid
- [ ] Federal Express
- [x] Hand Delivery
- [ ] Facsimile
- [ ] Electronic Mail

Susan Saint
Administrative Assistant

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CHERYL E. MEADE
Deputy Attorney General
Idaho State Police
700 S. Stratford Dr.
Meridian, ID 83642
Telephone: (208) 884-7050
Fax No. (208) 884-7228
Cheryl.meade@isp.idaho.gov

Attorneys for Defendant/Respondent

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, Plaintiff, vs. THE STATE OF IDAHO, DEPARTMENT OF IDAHO STATE POLICE, Bureau of Alcohol Beverage Control, Defendant.	Case No. CV 09-4185 **DEFENDANTS' OBJECTION TO PLAINTIFF'S MOTION FOR RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND STIPULATION TO CONSOLIDATE CASES**

Defendant, by and through its attorney of record, Cheryl E. Meade, Deputy Attorney General, and hereby objects to Plaintiff's Motion for Restraining Order and Preliminary Injunction. These objections are based upon the grounds and reasons set forth herein, and those reasons found in ABC's previous Response to Plaintiff's Petition for Judicial Review. See also Affidavit of Robert Clements, attached to Defendant's ("ABC") previous Response in Twin Falls County Court Case Number, CV-09-3914.

ORIGINAL

I. FACTS.

The facts relevant to the law that applies to this case appear to be undisputed and are set forth in full in ABC's Response to Fuch's Petition for Judicial Review, Civil Case Number, CV2009-3914 and are incorporated in full herein.

II. ANALYSIS.

"[T]he selling of intoxicating liquor is a proper subject for control and regulation under the police power. It is likewise universally accepted that no one has an inherent or constitutional right to engage in a business of selling or dealing in intoxicating liquors. (citations omitted)." *Crazy Horse*, 98 Idaho 762, 764-765, 572 P.2d 864, 867-868 (1977), citing *Gartland v. Talbott*, 72 Idaho 125, 131, 237 P.2d 1067 (1951). A liquor license does not create a contract between the state and the licensee; it is permission only, subject at all times to the control of the state, and may be revoked and terminated without the state in any way being obligated to the licensee for any damages that may result by reason of the state's action. In other words, a person has no vested right to sell liquor and a liquor license confers no property right when the state acts to annul or set aside such license. The mere fact that the person holds a liquor license does not vest him with any property right that would entitle him to any damages by reason of the revocation or cancellation of such license. *Nims v. Gilmore*, 17 Idaho 609, 107 P. 79, 81(1910). *See also, O'Connor v. City of Moscow*, 69 Idaho 37, 44, 202 P.2d 401, 405 (1949) (a license to operate a beer parlor does not confer any vested property right, yet if the city makes such businesses lawful by a permit or license, it cannot arbitrarily, capriciously, or unreasonably impair, interfere with, or eradicate the same); *State v. Meyers*, 85 Idaho 129, 376 P.2d 710, 711-712 (1962) (a license to sell beer is a privilege, not a property right, which the legislature may grant or withhold at its pleasure and according to standards and requisites laid down by the legislature); *Weller v. Hopper*, 85 Idaho 386, 379 P.2d 792 (1963), citing *Nampa Lodge No. 1389, etc. v.*

Smylie, 71 Idaho 212, 229 P.2d 991 (1961) (as between the State and the licensee, a liquor license is simply a 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).

Under Idaho law, the legislature has vested the Director of the Idaho State Police ("Director") with the authority to regulate liquor licensing and promulgate rules under the Director's supervision for the supervision and control of the sale of liquor by persons licensed to do so. Idaho Code § 23-901. The Director has delegated his authority to the Alcohol Beverage Control Bureau of the Idaho State Police ("ABC"). Therefore, all applications and inquiries concerning alcoholic beverage licenses must be directed to the Alcohol Beverage Control Bureau at P.O. Box 700, Meridian, Idaho 83680. IDAPA 11.05.01.011.02.

The Idaho legislature established a quota system for issuance of incorporated city liquor licenses. "No license shall be issued for the sale of liquor on any premises outside the incorporated limits of any city except as provided in this chapter and the number of licenses so issued for any city shall not exceed one (1) license for each one thousand five hundred (1,500) of population of said city or fraction thereof..." I.C. § 23-903. Only Fuchs' mere applications are at issue in this case, as no licenses have been approved for him for these applications.

The Idaho legislature obviously anticipated that there would be no rights associated with a retail-liquor-by-the drink- license because it further provided that "The director of the Idaho State police is hereby empowered, authorized, and directed to issue licenses to qualified applicants...but only in accordance with the rules promulgated by the director..." I.C. §23-903.

As for entry of a preliminary injunction, the standard for such remedy is established by Rule 65(e) of the Idaho Rules of Civil Procedure.

A preliminary injunction may be granted in the following cases:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

(2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.

(3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

(4) When it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of the defendant's property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.

Under paragraph (5) of Rule 64(e), a preliminary injunction may also be granted on the motion of the defendant upon filing a counterclaim, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.

As the Court will determine from the limited agency record before it, Plaintiff is not entitled to the relief he seeks, i.e. the reinstatement of his position on a priority list. Furthermore, he will not suffer the irreparable injury.

On the one hand, Fuchs has been refunded the portion of the application fee he submitted to be placed on the priority list(s), so he has not lost those funds. Any further claim by Fuchs' of irreparable loss is without merit. The additional losses Fuchs alludes to are too tenuous. One must assume that Fuchs would even qualify to hold the additional licenses he seeks; that he would find suitable premises for the 15 plus additional licenses; that he would also

implement the use of each of those licenses in accordance with all liquor laws; that he would not succumb to any future penalty of suspension or revocation against any of those licenses; and all for a period of two years before he could realize any potential earnings on his investment.

Fuchs argument that he is the holder of a threatened legal right to a place on a list, through a mere application is without merit. Idaho's courts have continually held that a liquor licensee has no property right in liquor licenses as between the licensee and the state. This appears to beg the question then, if a liquor licensee has no property right, surely an applicant has even less standing in this area of law. See, *Nims v. Gilmore*, 17 Idaho 609, 107 P. 79, 81(1910); *O'Connor v. City of Moscow*, 69 Idaho 37, 44, 202 P.2d 401, 405 (1949); *State v. Meyers*, 85 Idaho 129, 376 P.2d 710, 711-712 (1962); *Weller v. Hopper*, 85 Idaho 386, 379 P.2d 792 (1963), citing *Nampa Lodge No. 1389, etc. v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1961).

Finally, the limited record before this Court clearly indicates that no issue of fraud exists on the part of ABC. The IDAPA rule in question was manifestly promulgated and approved, according to the laws of the State of Idaho. See, Agency Record 21, copy of the Twin Falls Times News Publication, publishing the Notice of Rulemaking. Attached and incorporated herein. While Idaho does not appear to have any case law on point on the retroactive application of an administrative rule, there is case law that speaks to the retroactive application of a statute in such a manner.

Accordingly, Idaho courts have consistently ruled that "a statute that is procedural or remedial and does not create, enlarge, diminish or destroy contractual or vested rights is generally held not to be a retroactive statute, even though it was enacted a subsequent to the events to which it operates." See, Wheeler v. Dept. of Health and Welfare, 147 Idaho 257, 207 P. 3d 988, 993 (Idaho 2009).

Idaho further follows the legal principle that administrative rules and regulations are traditionally afforded the same effect of law as statutes. See, Huyett v. Idaho State University, 140 Idaho 904, 908, 104 P. 3d 946, 950 (Idaho 2004).

Had Fuchs disagreed with the rule as it was written, he had plenty of opportunity either by himself, or through his counsel to object or to seek and amendment to the rule at the time. According to the testimony presented by the agency before the legislature, at the time the rule was under consideration, the rule was being passed in order to deal with an overcrowding on the priority lists by investors and speculators who were not properly placing these licenses into the use intended by the legislature.

III. STIPULATION TO CONSOLIDATE CASES.

ABC hereby stipulates to consolidate the two cases, CV-09-3914 and CV-09-4185.

IV. UNAVAILABLE DATES FOR COUNSEL.

Unavailable dates for counsel for hearing are as follows:

September 17-24, 2009.

October 12-31, 2009.

Counsel respectfully requests that she be allowed to appear telephonically for this hearing.

V. CONCLUSION.

Fuchs cannot substantially prevail on the merits of this action because he has no property right to a place on a priority list. ABC substantially complied with an IDAPA procedural rule stating that an applicant shall hold only one position at a time on each incorporated city priority list. If this Court were to rule in such a manner, the clear intent of the

Therefore, Defendant respectfully requests that the Court deny Plaintiff's Motion for Restraining Order and Preliminary Injunction.

RESPECTFULLY SUBMITTED this 10 day of September 2009.

Cheryl E. Meade
Deputy Attorney General
Idaho State Police

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of September 2009, I caused to be served a true and correct copy of the foregoing DEFENDANTS' OBJECTION TO PLAINTIFF'S MOTION FOR RESTRAINING ORDER AND PRELIMINARY INJUNCTION by the U.S. Mail, first-class postage as follows to:

Brian Donesley, Esq.
Attorney at Law
548 North Avenue H
PO Box 419
Boise, ID 83701-0419

___U.S. Mail
___Hand Delivery
___Certified Mail, Return Receipt Requested
___Overnight Mail
___Facsimile: (208) 386-9428
___Statehouse Mail
_✓_Electronic Delivery

CHERYL E. MEADE
Deputy Attorney General

Idaho Newspaper Association Inc.

PMB 203 5120 W. Overland Rd. Boise. 83704 PH 208 375-0733

Affidavit of Publication

STATE OF IDAHO)

COUNTY OF ADA)

Bob C. Hall, being first duly sworn, deposes and says: That he is the Executive Director and the principal clerk of the Idaho Newspaper Association Inc., an Idaho corporation, and that, he is the duly authorized agent and representative of each of the newspapers hereinafter referred to and that he has completed the following publication assignment:

That upon the direction of the Office of Administrative Rules, Department of Administration of the State of Idaho, he caused the advertisement(s), copies of which are hereto attached and made part of this affidavit, to be placed during the weeks beginning Monday October 2, 2006 in each newspaper on the attached list which is also a part of this affidavit:

That all listed publications were in the format and readable appearance as shown by the attached sample advertisement and that all publications meet all requirements of Idaho Code and of the contract between Idaho Newspaper Association Inc. and the Office of Administrative Rules, Department of Administration, State of Idaho.

Signed:

Bob C. Hall, Principal Clerk
Idaho Newspaper Association Inc.

Subscribed and sworn to before me this 5 day of October, 2006.

07-27-2011
Notary Public for Idaho
Residing in Idaho

SHERRY L. LAWS NOTARY PUBLIC STATE OF IDAHO

Summary List of Newspapers Used & Ad Space Ordered For October 2006 Notice of Idaho Administrative Rules

City	NEWSPAPER NAME	COUNTY(S) COVERED	Ad Size	
AmericanFalls	Power County Press	Power	157.5	Col. Inches
Arco	Arco Advertiser	Butte	157.5	Col. Inches
Bonners Ferry	Bonners Ferry Herald	Boundary	157.5	Col. Inches
Challis	Challis Messenger	Custer	157.5	Col. Inches
Council	Council Record	Adams	157.5	Col. Inches
Driggs	Teton Valley News	Teton	157.5	Col. Inches
Emmett	Messenger-Index	Gem	157.5	Col. Inches
Gooding	Gooding Co.Leader	Camas, Gooding	157.5	Col. Inches
Grangeville	Idaho Co.FreePress	Idaho	157.5	Col. Inches
Homedale	Owyhee Avalanche	Owyhee	157.5	Col. Inches
Idaho City	Idaho World	Boise	157.5	Col. Inches
Jerome	North Side News	Jerome	157.5	Col. Inches
Ketchum	Mountain Express	Blaine	157.5	Col. Inches
Malad	Idaho Enterprise	Oneida	157.5	Col. Inches
McCall	C.Idaho Star/News	Valley	157.5	Col. Inches
Montpelier	News-Examiner	Bear Lake	157.5	Col. Inches
Mt. Home	Mountain Home News	Elmore	157.5	Col. Inches
Nez Perce	Clearwater Progress	Lewis	157.5	Col. Inches
Orofino	ClearwaterTribune	Clearwater	157.5	Col. Inches
Payette	Independent-Enterprise	Payette	157.5	Col. Inches
Preston	The Citizen	Franklin	157.5	Col. Inches
Rexburg	Standard Journal	Madison	157.5	Col. Inches
St. Anthony	Fremont Chronicle	Fremont	157.5	Col. Inches
Rigby	Jefferson Star	Jefferson	157.5	Col. Inches
Rupert	Minidoka County News	Minidoka	157.5	Col. Inches
St. Maries	Gazette/Record	Benewah	157.5	Col. Inches
Salmon	The Recorder-Herald	Lemhi	157.5	Col. Inches
Shoshone	Lincoln Co. Journal	Lincoln	157.5	Col. Inches
SodaSprings	Caribou County Sun	Caribou	157.5	Col. Inches
Weiser	Weiser Signal-American	Washington	157.5	Col. Inches
Boise	The Idaho Statesman	Ada	157.5	Col. Inches
Burley	South Idaho Press	Cassia	157.5	Col. Inches
CoeurdAlene	Coeur D'Alene Press	Kootenai	157.5	Col. Inches
Idaho Falls	Post-Register	Bonneville, Clark	157.5	Col. Inches
Kellogg	Shoshone News/Press	Shoshone	157.5	Col. Inches
Lewiston	Lewiston Tribune	Nez Perce	157.5	Col. Inches
Moscow	Daily News	Latah	157.5	Col. Inches
Nampa	The Press-Tribune	Canyon	157.5	Col. Inches
Pocatello	Idaho State Journal	Bannock	157.5	Col. Inches
Sandpoint	Sandpoint Daily Bee	Bonner	157.5	Col. Inches
Twin Falls	The Times-News	Twin Falls	157.5	Col. Inches
Blackfoot	The Morning News	Bingham	157.5	Col. Inches

State of Idaho
Department of Administration
Office of the Administrative Rules Coordinator

C.L. "BUTCH" OTTER
Governor
MIKE GWARTNEY
Director
DENNIS STEVENSON
Rules Coordinator

650 West State Street
P.O. Box 83720
Boise, ID 83720-0306
Telephone (208) 332-1820
FAX (208) 332-1896
http://adm.idaho.gov/adminrules/

CERTIFICATION

STATE OF IDAHO)
) SS.
County of Ada)

DENNIS R. STEVENSON, being first duly sworn, deposes and says:

That he is the Administrative Rules Coordinator for the State of Idaho in the Department of Administration and he is the official custodian of the administrative rules of the State of Idaho, and that to the best of his knowledge, the attachments hereto are true and correct copies of the Affidavit of Publication and the Summary List of Newspapers Used and Ad Space Ordered for October 2006 Notice of Administrative Rules as received from the Idaho Newspaper Association Inc., and as published pursuant to Title 67, Chapter 52, Idaho Code.

/s/ Dennis R. Stevenson

Dennis R. Stevenson,
Administrative Rules Coordinator
Office of the Administrative Rules Coordinator
Department of Administration
State of Idaho

Subscribed and sworn before me on this 10th day of September, 2009.

Diane Blume

DIANE BLUME NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
Expires: 9-6-13

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, Petitioner/Appellant, vs STATE OF IDAHO, DEPARTMENT OF IDAHO STATE POLICE, BUREAU OF ALCOHOL BEVERAGE CONTROL, Respondent. DANIEL FUCHS, Plaintiff/Appellant, vs. STATE OF IDAHO, DEPARTMENT OF IDAHO STATE POLICE, BUREAU OF ALCOHOL BEVERAGE CONTROL, Defendant/Respondent.	SUPREME COURT 37652-2010 DISTRICT COURT NO. CV 09-4185 CV 09-3914 CLERK'S CERTIFICATE

I, KRISTINA GLASCOCK, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, do hereby certify that the foregoing CLERK'S RECORD on Appeal in this cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents requested by Appellate Rule 28.

I do further certify that there are no exhibits, offered or admitted in the above-entitled cause.

WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 20th day of May, 2010.

KRISTINA GLASCOCK
Clerk of the District Court

Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DANIEL S. FUCHS, Petitioner/Appellant, vs STATE OF IDAHO, DEPARTMENT OF IDAHO STATE POLICE, BUREAU OF ALCOHOL BEVERAGE CONTROL, Respondent. DANIEL FUCHS, Plaintiff/Appellant, vs. STATE OF IDAHO, DEPARTMENT OF IDAHO STATE POLICE, BUREAU OF ALCOHOL BEVERAGE CONTROL, Defendant/Respondent.	SUPREME COURT 37652-2010 DISTRICT COURT NO. CV 09-4185 CV 09-3914 CERTIFICATE OF SERVICE

I, KRISTINA GLASCOCK, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, do hereby certify that I have personally served or mailed, by United States Mail, one copy of the CLERK'S RECORD to each of the Attorneys of Record in this cause as follows:

BRIAN DONESLEY
Attorney at Law
548 North Avenue H
P. O. Box 419
Boise, ID 83701-0419

ATTORNEY FOR APPELLANT

CHERYL MEADE
Deputy Attorney General
Idaho State Police
700 S. Stratford Dr.
Meridian, ID 83642

ATTORNEY FOR RESPONDENT

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said this 20th day of May, 2010.

KRISTINA GLASCOCK
Clerk of the District Court

Deputy Clerk