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FEBRUARY 11, 2019

TO: MEMBERS OF THE SENATE STATE AFFAIRS COMMITTEE

Re: Senate Bill 1040

Honorable Senator:

The fiscal impact of Senate Bill 1040 is impossible to calculate. Will sales increase, driving up sales tax, liquor sales from the dispensary and beer and wine distributors? Why would sales outstrip the general increase in drinking population? Anybody can get a drink easily now. So, how does one justify the loss of equity and goodwill that would be suffered by current licenses? Assume that the business value including license for the average bar is what, at fair market value? The license average must be over $100,000. The business itself would be one and a half (1.5) times annual gross sales to three (3) times annual gross sales. Take an average statewide of business value of $400,000 times 1200 licensee businesses, more or less. That is $480,000,000, half a billion dollars. For perspective, the FY2018 State Budget was $3.65 billion. Based on what fiscal impact statement does it make sense to strip that value from Idaho businesses and families?

The argument will be that current licensees could move their license to other Cities or in the County. Imagine the Boise City Counsel allowing licenses from every small town in Idaho where there is no business. How many licenses can a market use?

Will a small reduction of 5% in the dispensary cost of purchase for liquor compensate the licensees? It is believed not.

Other than the many issues involving the unfairness and bad faith of government agreeing to and implementing a regulatory scheme, collecting fees and revenues from the liquor regulatory system, promoting investment by its citizens and then abandoning the model and promoting more competition unfairly, resulting in grave disruption to the marketplace and the system of governance at play for 65 years, while leaving grave unknowns to be exploited against the citizens, there are

compelling legal arguments involving what kind of society was designed by the people through the State Constitution and what values were demanded adhered to by its elected officials.

Art. III of the State Constitution. Sec. 1 grants legislative authority to the Legislature, not to Cities or Counties. Senate Bill 1040 provides that Cities and Counties shall have the "same" powers over alcohol as the state. This eliminates the supremacy of the State and abdicates the Legislature's responsibility to enforce the Constitutional mandate of Sec. 24, which makes it "The FIRST CONCERN of all good government is the virtue and sobriety of the people, and the purity of the home. The LEGISLATURE should further all wise and well directed efforts for the promotion of temperance and morality." Any responsible legislator must make this the highest priority as a matter of public policy. AN OPINION SHOULD BE SOUGHT FROM THE ATTORNEY GENERAL AS TO WHETHER THE BILL IS UNCONSTITUTIONAL AS AN UNLAWFUL DELEGATION OF POWER FROM THE LEGISLATURE TO THE COUNTIES AND CITIES. Sec. 25 prescribes the duties sworn to by each Legislator to "faithfully discharge the duties " prescribed. The highest duty is described in the Constitution.

Senate Bill 1040 is remarkably complicated and confusing. There are many questions. If the intention is to give restaurants liquor licenses, a simple measure could be pursued, though that concept is unfair to current licensees and only promotes special interests of those who want to get into the retail liquor sales marketplace with minimal cost and regulation. Under the present proposal, chaos would ensue. Ask ABC. Since Territorial times, Idaho citizens have had statutes to regulate the sale of alcohol, embodied in the State Constitution by the State's founders. It is put at risk haphazardly and irresponsibly, practically overnight, without careful review and comment by those familiar with the laws, (law enforcement), and by the Legislators themselves. Who has carefully read and sought counsel on Senate Bill 1040 and its ramifications? Another "study group" appointed by the Governor or the Legislature, as in the past, would likely be authorized with a select group of "shareholders," comprised of the hotels, restaurants, chamber of commerce, IACI, commercial real estate interests and those wanting to extend commercial activities selling alcohol from the purview and supervision of the Cities to the Counties.

The Idaho Supreme Court might well view unfavorably the delegation of authority to the county commissioners or city councils, which the Constitution so clearly intended to be the exclusive province of the Legislature in Sec. 26.

Please see the attached Technical Analysis.

Respectfully Submitted,

Brian Donesley

TO MEMBERS OF THE SENATE STATE AFFAIRS COMMITTEE
TECHNICAL ANALYSIS
SENATE BILL NO. 1040
Presented by Brian Donesley, Attorney

P.4. **Section 1. 23-217**
Five (5%) discount from the dispensary, not ten (10%).

P.5. **Section 2**
The first violation of sale to a minor is not a mandatory penalty. Subsequent violations are mandatory penalties. Also, (2) Gives the mayor discretion as the "responsible authority" to impose fines. What due process?

P.5 **Section 3**
Minors must "knowingly" misrepresent age to be guilty of an infraction or subsequent misdemeanor.

P.6. **Section 4**
"Interdicted" minors are allowed in a restaurant, eating establishment or lodging facility or any place where there is a bar, if the bar, described as "place," is separated.

"Theater" presenting a "live performance" may invite minors. But, the definition of "theater" references where artful events occur, which could include sexual content. See P.12, 23-604(8). Also, the definition for "live performances" is deleted. See P.11, 23-902(10).

Any brewery or winery, without food, may be attended by minors, without limitations. Likewise any person licensed to sell wine at retail, if the wine is sold by a licensed winery selling only its own product. These exceptions swallow the rule that minors are not allowed in a "place," which is where liquor, beer or wine is kept, prepared and served.

P.7. **Section 5. 23-605**
Eliminated are the words "intoxicated or apparently" intoxicated, substituted with "obviously intoxicated". A person actually intoxicated, or who appears to be intoxicated, are no longer referenced. The burden is made more difficult for enforcement, requiring that a person "obviously" be intoxicated for prosecution. What if a person is actually intoxicated, goes out onto the highway, causes harm and is subsequently determined to have been served in a licensed premise, and nobody had noticed that he/she was drunk? This loosens the standard of proof required by the State.

P.8. **Section 6**

Strict liability is provided for selling to a person under 21 years of age, without consideration for the possibility of fake identification.

Again, the words actually, "apparently or obviously intoxicated" are deleted. It is here that the "actually" issue arises. See above Section 5.

The restriction for sale to and "interdicted person" remains. But the definition is deleted at P.11, 23-902(6).

The penalties provided to a person under the age of 21 years who "knowingly misrepresents". Can it not be assumed that the underage person knows his/her age?

P.8. **Section 7. 23-617**

If "all of the licensees employees" are server trained, then there is a schedule requiring a "written warning" for the first two (2) violations. Only upon the third violation is there an administrative fine. Why remove the discretion for administrative penalties and lighten the responsibility of the licensee?

P.9. **Section 8**

How does this proposal "further regulate and control the sale and distribution within the State of alcoholic beverages"…. and serve to "ensure the entire control of the sale of liquor"? What authority is there for the Legislature to delegate its responsibilities to City councils and County commissions, pursuant to **Article III**, §§ 24 and 26 of the Idaho State Constitution, which requires the protection, health, welfare and safety of the people of the State of Idaho…for the purpose of promoting and encouraging temperance in the use of alcoholic beverages within the State of Idaho?

P10. **Section 9**

The definition of "Eating establishment" is vague. All that is required is a hood and equipment "capable of cooking complete meals" served "during the time" the establishment is open. Does this mean part of the time? All of the time?

Exclusions for luncheonettes, etc. are lumped in with "other similar uses" as not meeting the requirements.

The term "Interdicted person" is deleted.

The term "Live performance" is deleted. Refer above.

The term "Lodging facility" only requires overnight accommodations available to the general public. This would appear to apply to any overnight lodging, i.e. VRBO.

"Rules" may be promulgated by the director or by the City or County. Contradiction and confusion are inevitable.

The term "Theater" references "an art form," opening the door to First Amendment issues allowing minors to be upon the premises of such theater where liquor is sold.

The term "winery" requires only bottling of wine, and more than one (1) winery may be upon the same premises upon which minors may be allowed. This would allow an enterprising "winery" operator to buy wine in bulk, bottle it and sell it upon its establishment where children will be allowed to be present, essentially a "place" in which minors are otherwise not allowed.

P.12. **Section 11**
Again, a restriction on sales is limited to a person "obviously" intoxicated.

P.13. **Section 12**
So called "grandfather rights" purport to make State liquor licenses "freely transferrable throughout the State of Idaho wherever liquor by drink establishments are allowed." But Cities may not agree to have State licenses in their city, regulated pursuant to rulemaking requirements by the director, without being subject to City or County regulation. What conflicts shall arise? Cities and Counties are granted the "same" authority regarding regulation of so called "municipal licenses." State licenses from small towns may be sought to be transferred into more lucrative markets.

State licenses are subject to a much lesser annual fee payable to the State than are municipal licenses. Would State licenses be subject to license fees by both the State and a City or County?

P.13. **Section 13. 23-905**
Cities and Counties are authorized to issue licenses to "eating establishments and lodging facilities." The Legislature allocates rule making authority to Cities and Counties by ordinance "consistent with State Law." Required is "fair administration." There is no reference to the Idaho Administrative Procedures Act or any other due process procedural provisions.

P.13. **Section 14. 23-906**

A City or County has 60 days to hold an election up to the effective date of the Act. Default is to allow the sale of liquor in any city or county which does not timely conduct such election.

P.15. **Section 19. 23-910**
A State beer license is required to apply for a ~~City~~ license for the sale of liquor by the drink.

P.15. **Section 20. 23-911**
The City or County may do an investigation of any applicant. Any "false statement" is a felony. There's no reference to a knowledge requirement with respect to any such false statement to be a criminal act.

P.17. **Section 22. 23-913**
City councils and County commissioners may set initial license fees "not less than $3,000" per year. For State licenses, the license fees are substantially less and are capped at $750. There is no cap on City and County license fees. Resorts pay $25,000 as a one (1) time fee with renewals of $3,500 per year. The license fees for State licenses have not been increased.

P.20. **Section 26. 23-918**
Manufacturers, wholesalers and their financially interested parties "may hold an interest in a license premises," if the showing is made with respect to food on premises. This violates the traditional separation between manufacturers, wholesalers and retailers, originated in the Federal Alcohol Act after Prohibition as the "three-tiered system." The purpose was to keep the market from becoming vertically integrated, as it was during Prohibition under the Mob.

It serves the purpose of preserving the integrity of the system and the accountability for the various participants at the various levels within the manufacturing and distribution and sale of liquor.

P.22. **Section 29. 23-921**
Unlike City and County licenses, State administrative suspensions, revocations or refusals for State liquor licenses only are required to comply with the State Administrative Procedures Act.

P.23 **Section 30. 23-921A**
"Obscenity" upon a licensed premise requires a six (6) month suspension by "the director." Does this apply to City and County licenses? Or is "obscenity" to be allowed in city and county licensed premises?

P.24. **Section 32. 23-923**

Reference is to "liquor, excluding wine and beer" sold in State liquor stores. Does "liquor," otherwise undefined, include wine or beer? This is contradictory, and there is no clear definition of "liquor" in the proposal.

Section 47. 23-1304A

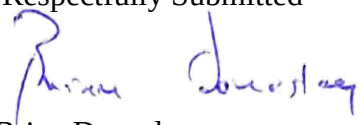
The elections reauthorize the sale of alcoholic beverages including liquor by the drink within Counties.

Takings

No person other than the licensee may exercise any of the privileges under a liquor license other than the licensee. Hence, that a liquor license is a "mere privilege." The Idaho courts have reached that conclusion in cases, though the issue has not been fully litigated under good facts, ie. a class action by current licensees of a change of law depriving them of their property interests in the licenses and/or their occupations, both of which implicate liberty and property interests under the First and Fourteenth Amendments to the US Constitution. US Supreme Court cases have held that government and citizens enter into contractual agreements where the citizens rely upon assurances from the government, essentially an estoppel or quasi-contract analysis of property rights.

The US Supreme Court has ruled that one's occupation/business must be totally destroyed, made totally infeasible, not just damaged, to sustain a takings argument against the government. This is firmly the law in zonings cases, where, for example, eminent domain is exercised by the government. Here, there are strong prevailing public policy expressly stated that would draw into question the public good served by the government actions, as well as challenges to unlawful delegation by the Legislature (Art. III of the Idaho Constitution) to so-called "municipalities", of which counties are not and cities are by statute only. This is very suspect constitutionally. Cities only exist as corporate entities under statute, while Counties are separate, constitutional entities. I argue that the delegation is illegal and an abrogation of Legislative duties in violation of the state public policies and basic governmental duties under the Constitution.

Respectfully Submitted



Brian Donesley
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