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JoLynn Drage, Clerk District Court Blaine County, Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

YANKEE D'S, LLC, Licensee, dba Zou 75, Petitioner, vs. IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL, Respondent.	Case No. CV-2011-0795

MEMORANDUM DECISION RE: PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION

On April 3, 2012, the petition for Judicial Review of Agency Action came on regularly for hearing. Petitioner, Yankee D's, was present and represented by Counsel, Brian Donesley. The respondent, Idaho State Police (ABC), was represented by Counsel, Jenny Grunke. After considering the briefs, agency record, and arguments of counsel, the matter was taken under advisement for a written decision.

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EXHIBIT E

I.

FACTS AND PROCEDURAL BACKGROUND

In 1973, Steven Clayton (Clayton) applied for a liquor license from Idaho State Police Alcohol Beverage Control (ABC). In 2002, Rob Cronin (Cronin) submitted an application for the business Zou 75 (an assumed business name), a restaurant which opened in Hailey that same year. Cronin is also president to the true business doing business as Zou 75, 75, Inc. Cronin is also the "manager" of R&B Ventures, the company that has a rental agreement with 75, Inc., later subleased to Yankee D's. In 2002, Cronin also applied for a beer and wine license. In 2006, ABC notified Clayton that a liquor license was available. In 2007, Clayton applied for a liquor license, first as himself, later to be transferred to Yankee D's. Clayton did not list any other parties as having a possible financial interest on his application. Clayton was also granted a waiver from I.C. § 23-913. During that same time, 75, Inc. and Yankee D's entered a sublease agreement for the location at which Zou 75 is located, 416 Main Street North, Hailey, ID. Yankee D's and 75, Inc. then entered into a management agreement, whereby Yankee D's made 75, Inc. the manager of Zou 75. In April of 2007, Yankee D's, dba Zou 75, was issued a liquor license. Renewal for these various licenses were submitted through 2008, until Cronin submitted a liquor license renewal to ABC on behalf of Yankee D's, saying he was a member, manager, and bona fide owner. He used 75, Inc.'s tax identification number on the application instead of Yankee D's number. In 2009, ABC issued an incident report for a false license and sent out an Administrative Violation Notice and a complaint for revocation of license. ABC issued another Administrative Violation Notice in 2010. The parties submitted the matter to the hearing officer on cross motions for summary judgment. In 2011, the hearing officer issued a decision in the

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matter, revoking Yankee D's liquor license. Yankee D's then filed a petition for judicial review and the Court issued a stay of the revocation pending the petition.

II.

STANDARD

"[J]udicial review of disputed issues of fact must be confined to the agency record." I.C. § 67-5277. "A strong presumption of validity favors an agency's actions." *Chisholm v. Idaho Department of Water Resources*, 142 Idaho 159, 162, 125 P.3d 515 (2005) (citing *Young Elec. Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 807, 25 P.3d 117 (2001)). Idaho Code § 67-5279 sets forth this Court's scope of review on appeal of agency decisions:

> (1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
> . . .
> (3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.
> . . .
> (4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.

Agency action is "capricious if it is done without a rational basis" and "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *American Lung Ass'n v. State, Dep't of Agriculture*, 142 Idaho 544, 547, 130 P.3d 1082 (2006). On judicial review of an agency decision, the Idaho Supreme Court has stated,

> '[t]he Court will defer to the agency's findings of fact unless those findings are clearly erroneous and unsupported by evidence in the record.' *Cooper*, 134 Idaho at 454, 4 P.3d at 566. 'This Court may not substitute its judgment for that of the agency as to the weight of the evidence on factual matters. I.C. § 67-5279(1).' *Id.*

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Alcohol Beverage Control v. Boyd, 148 Idaho 944, 947, 231 P.3d 1041 (2010).

"When conflicting evidence is presented the agency's findings must be sustained on appeal, as long as they are supported by substantial and competent evidence, regardless of whether [the reviewing court] might reach a different conclusion." *Chisholm,* 142 Idaho at 162.

III.

APPLICABLE LAW

1. Idaho Code § 23-910(5): Persons Not Qualified to be Licensed

> No license shall be issued to: A person who does not hold a retail beer license issued under the laws of the state of Idaho.

2. Idaho Code § 23-903: License to Sell Liquor

> The director of the Idaho state police is hereby empowered, authorized, and directed to issue licenses to qualified applicants, as herein provided, whereby the licensee shall be authorized and permitted to sell liquor by the drink at retail and, upon the issuance of such license, the licensee therein named shall be authorized to sell liquor at retail by the drink, but only in accordance with the rules promulgated by the director and the provisions of this chapter....

3. Idaho Code § 23-905(3): Application for Licenses-Penalty for False Statements

> In addition to setting forth the qualifications required by other provisions of this act, the application must show... The names and addresses of all persons who will have any financial interest in any business to be carried on in and upon the licensed premises, whether such interest results from open loans, mortgages, conditional sales contracts, silent partnerships, trusts or any other basis than open trade accounts incurred in the ordinary course of business, and the amounts of such interests.

4. Idaho Code § 23-933(1): Suspension, Revocation, and Refusal to Renew Licenses

> The director may suspend, revoke, or refuse to renew a license issued pursuant to the terms of this chapter for any violation of or failure to comply with the provisions of this chapter or rules and regulations promulgated by the director or the state tax commission pursuant to the terms and conditions of this chapter.

5. Idaho Code § 23-902(17): Definitions

> All other words and phrases used in this chapter, the definitions of which are not herein given, shall be given their ordinary and commonly understood and acceptable meanings.

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6. Idaho Code § 23-908(1) & (4): Form of License-Authority-Expiration-Limitations

> (1) Every license issued under the provisions of this chapter is separate and distinct and no person except the licensee therein named except as herein otherwise provided, shall exercise any of the privileges granted thereunder.
>
> (4) Each new license issued on or after July 1, 1980, shall be placed into actual use by the original licensee at the time of issuance and remain in use for at least six (6) consecutive months or be forfeited to the state and be eligible for issue to another person by the director after compliance with the provisions of section 23-907, Idaho Code. Such license shall not be transferable for a period of two (2) years from the date of original issuance, except as provided by subsection (5)(a), (b), (c), (d) or (e) of this section.

7. Idaho Code § 23-1010(2) & (6): License to Sell Beer at Retail-Application Procedure and Form-Showing of Eligibility for License and Disqualifications

> (2) The application shall affirmatively show:
> (a) That the applicant is the bona fide owner of the business which will be engaged in the sale of beer at retail and with respect to which license is sought;
>
> (6) If an applicant shall be unable to make any affirmative showing required in this section or if an application shall contain a false material statement, knowingly made, the same shall constitute a disqualification for license and license shall be refused. If license is received on any application containing a false material statement, knowingly made, such license shall be revoked. If at any time during the period for which license is issued a licensee becomes unable to make the affirmative showings required by this section, license shall be revoked, or, if disqualification can be removed, the license shall be suspended until the same shall be removed. The procedure to be followed upon refusal, revocation or suspension of license as herein provided for shall be in accordance with the procedure set forth in this act.

IV.

HEARING OFFICER'S DECISION

The hearing officer entered detailed findings of fact and conclusions of law in his decision to uphold the revocation of Yankee D's liquor license. This Court defers to the agency's findings of fact "unless those findings are clearly erroneous and unsupported by evidence in the record." *Cooper v. Bd. of Prof. Discipline of Idaho State Bd. Of Medicine*, 134 Idaho 449, 454, 4 P.3d 561 (2000). The petitioner, on judicial review, does not argue or claim that the hearing officer erred in his factual findings. Specifically, the petitioner does not argue that the facts, as

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determined by the hearing officer, are unsupported by substantial and competent evidence. The Court need not restate the factual findings of the hearing officer, as set forth in his decision, since they are not contested.

V.

ANALYSIS

A. **Substantial Right**

On judicial review, the petitioner has an affirmative obligation to prove or establish that a substantial right has been prejudiced as a result of the agency action. I.C. § 67-5279(4). "In addition to proving one of the enumerated statutory grounds for overturning an agency action, the challenging party must also show prejudice to a substantial right." *Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867, 870, 243 P.3d 1055 (2010). Most recently, in *Hawkins v. Bonneville County Board of Commissioners*, 151 Idaho 228, 254 P.3d 1224 (2011), the court stated that "...the petitioner must still show, not merely allege, real or potential prejudice to his or her substantial rights..." *Id.* at 1229.

The petitioner, in its opening brief (Appellant's Brief in support of Petition for Judicial Review), does not clearly state or articulate what substantial right may have been prejudice as a result of the agency decision, which is subject to judicial review. It is not until the petitioner filed its Reply Brief that the issue of substantial rights was first raised, which was in response to the respondent's argument that because the agency decision was supported by substantial and competent evidence, the petitioner's "substantial rights were not violated." Pursuant to I.R.C.P. 84(p), the briefs and memorandums are governed by the rules for appeal to the Supreme Court. Pursuant to the Court's Scheduling Order, the "organization and content of the briefs shall be governed by I.A.R. 35 and 36." (Procedural Order Governing Judicial Review of Agency Action

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by District Court, ¶ 8, October 3, 2011). I.A.R. Rule 35(a)(6) requires that the petitioner's brief shall contain "...the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities..." As noted above, the petitioner, herein, has not argued, nor has it cited any authorities in its opening brief regarding what its substantial rights are or how they may have been prejudiced. As a general rule, "[i]ssues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered..." and the courts "...will not consider arguments raised for the first time in the appellant's reply brief." *Suitts v. Nix,* 141 Idaho 706, 708, 117 P.3d 120 (2005). This principal equally applies to petitions for judicial review. The Supreme Court, in *Kirk-Hughes Development, LLC v. Kootenai County Board of Commissioners,* 149 Idaho 555, 557-58, 237 P.3d 652 (2010), stated:

> The party challenging the decision of the Board must not only demonstrate that the Board erred in a manner specified in I.C. § 67–5279(3) but must also show that its substantial rights have been prejudiced. The district court found that denial of the application by the Board did not prejudice Kirk–Hughes's substantial rights, and Kirk–Hughes failed to challenge this finding on appeal. The only claim by Kirk–Hughes that its rights have been prejudiced was written in a conclusory manner and located in the conclusion of its brief. Kirk–Hughes wrote: 'Substantial rights of [Kirk–Hughes] as a landowner have been prejudiced, and [Kirk–Hughes's] due process rights have been violated.' This statement is conclusory and without more, is insufficient. *Bingham v. Montane Res. Assoc.,* 133 Idaho 420, 427, 987 P.2d 1035, 1042 (1999) (stating that '[t]his Court will not consider issues cited on appeal that are not supported by propositions of law, authority or argument.'

(Some internal citations omitted).

Our courts, in limited circumstances, have allowed for the relaxing of the rule cited above "if the briefing addressed an issue through authority or argument"; however, the petitioner at no time referenced its substantial rights, other than arguing that ABC violated the petitioner's "fundamental due process rights." *Everhart v. Washington County Road and Bridge Department,* 130 Idaho 273, 274-75, 939 P.2d 849 (1997). The petitioner is correct that the court

in *Crazy Horse, Inc. v. Pearce,* 98 Idaho 762, 765, 572 P.2d 865 (1977), which was not a petition for judicial review, held that liquor "licensing procedure can not [sic] be administered arbitrarily." However, whether the agency acted "arbitrarily" in revoking the liquor license of the petitioner is a matter of review pursuant to I.C. § 67-5279(3)(e) ("...the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:... (e) arbitrary, capricious, or an abuse of discretion"). Under the A.P.A., the petitioner, in addition to the grounds for judicial review, has an affirmative duty to show how its substantial rights were prejudiced, which it failed to do in its opening brief. The decision in *Crazy Horse* does not assist the petitioner, since that action was a "petition for writ of mandate" and was not a petition for judicial review, as governed by I.C. § 67-5279. The court, therein, did not discuss or concern itself with the issue of the substantial rights of the petitioner.

The petitioner, in its reply brief, argued it has a fundamental right deriving from two sources, its due process rights and I.C. § 67-5254. Constitutional due process can either be substantive or procedural; however, as is discussed below, such due process rights are tied to the deprivation of life, liberty or property and as such "due process rights are substantial rights." *Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244 P.3d 174 (2010).[1] "Procedural due process requires that a party be provided with an opportunity to be heard at a meaningful time and in a meaningful manner." *Halvorson v. North Latah County Highway Dist.*, 151 Idaho 196, 254 P.3d 497, 505 (2011). "Due process also requires that parties be afforded a meaningful opportunity for judicial review." *Jasso v. Camas County*, 151 Idaho 790, 264 P.3d 897, 903 (2011). In *Jasso*, the court found that the agency's failure to provide a reasoned statement for its decision prejudiced the plaintiff's due process. *Id.* at 904. However, in *Jasso* the decision of the County

[1] However, *Eddins* is distinguishable in that it concerned a clearly established "property right," which is a substantive right, i.e. a constitutional right to continue a "non-conforming use."

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did impact property rights of the petitioner. The petitioner in this case has not alleged that the hearing officer failed to issue a decision or that the decision was inadequate to meet its procedural due process needs. And, regardless, "the requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property." *Fuchs v. State, Dept. of Idaho State Police, Bureau of Alcohol Beverage Control*, 152 Idaho 626, 272 P.3d 1257, 1262 (2012) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972)). "'Substantive due process' means 'that state action which deprives [a person] of life, liberty, or property must have a rational basis-that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.''" *Pace v. Hymas*, 111 Idaho 581, 586, 726 P.2d 693 (1986) (quoting *Jeffries v. Turkey Run Consol. School Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974)). It has not been argued that the petitioner has suffered a life or liberty loss, therefore, this Court presumes a property deprivation must be alleged. *Crazy Horse, Inc. v. Pearce*, 98 Idaho 762, 572 P.2d 865 (1977), specifically states that "a liquor license is a privilege and not a property right." *Id.* at 765.

"[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." *Fuchs*,272 P.3d at 1261-62 (quoting *Crazy Horse, Inc. v. Pearce*, 98 Idaho 762, 765, 572 P.2d 865 (1977)). In *Alcohol Beverage Control v. Boyd*, 148 Idaho 944, 947, 231 P.3d 1041 (2010), the Idaho Supreme Court stated, "[i]nstead of a protected property right, [a] liquor license is simply the grant or permission under governmental authority to the licensee to engage in the business of selling liquor. Such a license is a temporary permit to do that which would otherwise be unlawful; it is a privilege *rather than a natural right and is personal to the licensee; it is neither*

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a right of property nor a contract, or a contract right." (Emphasis added). The court, in *Boyd*, held that a liquor license is not a "protected property right" and that "...selling alcohol is not constitutionally protected conduct." As the petitioner has no life, liberty, or property interest in a liquor license, it can have no substantive due process rights in this matter.

This Court recognizes that the court in *Hawkins* observed that our courts have "...not attempted to articulate any universal rules to govern whether a petitioner's substantial rights are being violated under I.C. § 67-5279(4)" and that this "...is due to the fact that each procedural irregularity, legal error, and discretionary decision is different and can affect the petitioner in varying ways." *Hawkins v. Bonneville County Bd. Of Com'rs,* 151 Idaho 228, 254 P.3d 1224, 1228 (2001). For example, in land use decisions, which clearly involve "property rights," the participants are entitled to expect: (1) a "fair decision making process"; (2) "proceedings that are free from procedural defects that might reasonably have affected the final outcome"; (3) a "fair hearing before an impartial decision-maker; and (4) proper adjudication "by applying correct legal standards." *Hawkins,* 254 P.3d at 1228-229. The petitioner asserts that I.C. § 67-5254 guarantees licensees substantial rights, which states,

> (1) An 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.
>
> (2) When a licensee has made timely and sufficient application for the renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by a reviewing court.
>
> (3) This section does not preclude an agency from:
>
> (a) taking immediate action to protect the public interest in accordance with section 67-5247, Idaho Code; or

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(b) adopting rules, otherwise within the scope of its authority, pertaining to a class of licensees, including rules affecting the existing licenses of a class of licensees.

(Emphasis added). At best, this statute entitles those persons who have been issued a license by the State to notice and a hearing before a license can be revoked, suspended, modified, annulled, withdrawn, or amended. While all license holders may have a right to notice and a hearing that is not to say that all licenses grant to the licensee "substantial rights," beyond notice and a hearing. For example, a licensee may have substantial rights separate and apart from the license itself. As has been stated often by our courts, "[t]he right to practice a chosen profession is a valuable property right which cannot be deprived unless one is provided with the safeguards of due process." *Rincover v. State, Dept. of Finance, Securities Bureau,* 124 Idaho 920, 921, 866 P.2d 177 (1993) (securities salesperson license); *H&V Eng'g, Inc. v. Idaho State Bd. of Prof'l Eng'rs and Land Surveyors*, 113 Idaho 646, 649, 747 P.2d 55 (1988) (surveyor's license); *Tuma v. Bd. of Nursing*, 100, Idaho 74, 77, 593 P.2d 711 (1979) (nursing license). These cases are distinguishable from a "liquor license," as noted above, in that "...no one has an inherent or constitutional right to engage in a business of selling or dealing in intoxicating liquors." *Fuchs,* 272 P.3d at 1262.

The petitioner, herein, was provided notice of the alleged violations and was afforded and participated in a contested case/hearing. The hearing officer decided the contested case on summary judgment. There is no claim or argument by the petitioner that: (1) the hearing officer was biased or prejudiced; (2) the decision making process was not fair; (3) there were any procedural defects in the contested case that affected the final outcome; or (4) the hearing officer failed to apply the correct legal standard in deciding the contested case.

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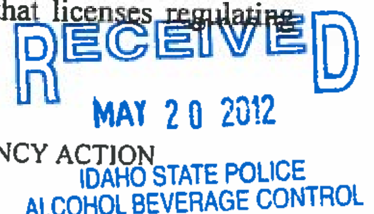
The agency can "revoke, suspend, modify, annul, withdraw, or amend a license" if it "first gives notice and an opportunity for an appropriate contested case." The agency clearly issued Administrative Violation Notices and the matter was heard in a contested case in front of a hearing officer. As the petitioner does not articulate how this statute provides it with substantial rights beyond what he was provided, this Court must conclude that the petitioner has failed to establish that its due process rights were violated and I.C. § 67-5254 does not provide the petitioner with substantial rights in this case beyond the right to notice, a hearing, and an order in writing with a reasoned statement of the underlying facts in the record supporting the decision. This is evidenced by the hearing officers Findings of Fact, Conclusions of Law and Preliminary Order which became final.

Lastly, the petitioner, in its reply brief, refers to *Northern Frontiers, Inc. v. State ex. Rel. Cade*, 129 Idaho 437, 926 P.2d 213 (Ct. App. 1996) in support of its claim that its substantial rights were prejudiced. This action concerned the judicial review of the director's revocation order of a liquor license, pursuant to I.C. § 23-1038. It was the claim of the petitioner that the "directors decision was not reached in conformity with the standards and procedures of the APA." *Id* at 438. The court recognized that due process requires that that an administrative decision of an agency be subject to judicial review and that,

> [t]he statutory scheme of the APA contemplates judicial review of a revocation order issued by an agency by requiring that the order resulting from a hearing be in writing and contain a reasoned statement of the underlying facts in the record supporting the decision.

Id. at 439. The court, in *Northern Frontiers*, did not discuss nor does it appear that the parties raised any issue of the petitioner's "substantial rights" relative to I.C. § 67-5279(4). The court, in a footnote (n. 3), did refer to a case concerning the Idaho Dredge Mining Protection Act (*State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957)), wherein, the court stated that licenses regulating



"certain pursuits or occupations" are "actions [that] must be reviewable by courts of law, inasmuch as they affect property rights." *Id.* at 280. It is true, as is noted above, that certain pursuits, businesses, and occupations are "protected property rights," but it is clear that our courts have consistently held that the retail sale of alcohol by the drink is not a protected right.

Zou 75 (75, Inc.) is a restaurant and, prior to 2007, it was engaged in the business of serving food to its customer. As part of that business, it had the privilege of serving beer and wine to its customers. In 2007, Zou 75 entered into an arrangement with Yankee D's to obtain the privilege of providing liquor by the drink to its customers, in addition to beer and wine. The action of ABC, in revoking Yankee D's liquor license, does not infringe upon the right of Zou 75 to continue its business as a restaurant and to continue to provide food and beer and wine to its customers.

This Court does not see that a substantial right of the petitioner has been prejudiced, thereby warranting further judicial review. However, for the sake of completeness and possible further review, the Court will address the merits raised in the petition for judicial review, as set forth below.

B. Subject Matter Jurisdiction

"Subject matter jurisdiction is the power to determine cases over a general type or class of dispute." *Bach v. Miller,* 144 Idaho 142, 145, 158 P.3d 305 (2007). In the agency's amended complaint, it asserted that the petitioner was in violation of I.C. §§ 23-905, 23-901(1) & (4), and 23-1010(2)(a). The petitioner asserts that the hearing officer did not have subject matter jurisdiction to hear and render a decision on the license revocation, because I.C. § 23-905, Application for Licenses-Penalty for False Statements, states, in relevant part,

> If any false statement is made in any part of said application, or any subsequent report, the applicant, or applicants, shall be deemed guilty of a felony and upon conviction

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> thereof shall be imprisoned in the state prison for not less than one (1) year nor more than five (5) years and fined not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000), or both such fine and imprisonment.

The petitioner argues that the hearing officer did not have subject matter jurisdiction to hear a felony, criminal matter and that the agency should have alleged a violation of I.C. § 23-1010(6), License to Sell Beer at Retail-Application Procedure and Form-Showing of Eligibility for License and Disqualifications, which states,

> If an applicant shall be unable to make any affirmative showing required in this section or if an application shall contain a false material statement, knowingly made, the same shall constitute a disqualification for license and license shall be refused. If license is received on any application containing a false material statement, knowingly made, such license shall be revoked. If at any time during the period for which license is issued a licensee becomes unable to make the affirmative showings required by this section, license shall be revoked, or, if disqualification can be removed, the license shall be suspended until the same shall be removed. The procedure to be followed upon refusal, revocation or suspension of license as herein provided for shall be in accordance with the procedure set forth in this act.

At issue in this case is the allegedly false application of the petitioner for a liquor license. The petitioner has not been charged with a criminal violation, including a felony. The hearing officer made no finding regarding a criminal matter.

I.C. § 23-933 states, in relevant part,

> (1) **The director may suspend, revoke, or refuse to renew a license issued pursuant to the terms of this chapter for any violation of or failure to comply with the provisions of this chapter** or rules and regulations promulgated by the director or the state tax commission pursuant to the terms and conditions of this chapter. Procedures for the suspension, revocation, or refusal to grant or renew licenses issued under this chapter shall be in accordance with the provisions of chapter 52, title 67, Idaho Code.

(Emphasis added). The chapter referenced in I.C. § 23-933, includes I.C. § 23-905, which is part of the Retail Sale of Liquor-by-the-Drink Act. "[T]he legislature painstakingly attempted to ensure that the department have complete control over who may own a liquor license, and that only persons who could be depended upon to advance the policies of the act were entitled to a

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license." *Uptick Corp. v. Ahlin*, 103 Idaho 364, 369, 647 P.2d 1236 (1982). If, in fact, the evidence supported the conclusion by clear and convincing evidence that the application was based on false statements, ABC had the authority by statute to revoke the liquor license. *Northern Frontiers*, 129 Idaho at 439. This Court finds the hearing officer did have subject matter jurisdiction, contrary to the argument of the petitioner.

C. Rulemaking & Right to Cure

The petitioner argues that the agency adopted a "totality of the circumstances test," which was an unreasonable exercise of its police power, was arbitrary and capricious, exceeded its statutory authority, and constituted improper rulemaking.

> While the power to make law lies exclusively within the province of the legislature, (Idaho Constitution, art. 3 §§ 1, 15) 'the legislature may constitutionally leave to administrative agencies the selection of the means and the time and place of the execution of the legislative purpose, and to that end may prescribe suitable rules and regulations.' *State v. Taylor*, 58 Idaho 656, 664, 78 P.2d 125, 128 (1938). Administrative agencies do this by enacting rules and regulations. However, while these rules and regulations may be given the 'force and effect of law,' they do not rise to the level of statutory law. Only the legislature can make law.

Mead v. Arnell, 117 Idaho 660, 664, 791 P.2d 410 (1990) (some internal citations omitted).

The interpretation of Chapter 9, Title 23 is within the province ISP (ABC) and "this court may defer to [ABC's] interpretation of the statutes so long as that interpretation is reasonable and not contrary to the express language of the statute." *Kuna Boxing Club, Inc. v. Idaho Lottery Commission*, 149 Idaho 94, 97, 233 P.3d 25 (2009). Since the legislature vested ABC with the administration of liquor licenses, it is certainly within the statutory authority of ABC to adopt rules that do not conflict with the statutory authorization and to interpret the statutes governing the issuance or revocation of such licenses. The claim that ABC acted in excess of its statutory authority in revoking Yankee D's liquor license fails as a matter of law.

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At oral argument, the petitioner acknowledged that the agency has the ability to interpret laws without engaging in formal rulemaking. It also acknowledged that if an administrative interpretation conflicted with the law, the law trumped the interpretation. The petitioner has gone to great lengths to demonstrate the agency's tolerance of management agreements prior to 2004. This Court notes that the petitioner did not obtain its license until 2007, well after any supposed change in the alleged administrative policy. It does not appear that any such policy was applied retroactively to the petitioner, as the respondent admitted that the agency simply did not have the resources to thoroughly evaluate every aspect of all applications prior to issuance of liquor licenses. As I.C. § 23-905 articulates, the applicant is required to be truthful in its application. Though *Uptick* stated, "[o]nly after investigation of the applicant and a determination that the contents of the application are true, that the applicant is qualified and that the premises are suitable, may the director, in his discretion, issue a license"; I.C. § 23-933 clearly provides the agency with the authority to revoke a license later found to be in violation of any section of this chapter. *Uptick*, 103 Idaho at 369. Because the agency did not catch any violation initially does not mean the petitioner is then immune from later inspection and realization of a violation.

The petitioner has also alleged the agency acted arbitrarily or capriciously. For the agency's actions to be arbitrary and capricious, this Court would have to find that its decisions were not support by "some evidence in the record." *See Burghart v. Carlin*, 151 Idaho 730, 264 P.3d 71, 74 (Ct. App. 2011). The agency record in this case is 3,508 pages long. The agency record contains the petitioner's initial application, the renewal applications, the lease agreements, and the management agreement. As is explained below, the agency record contains ample evidence that the petitioner violated Title 23, as it was never the bona fide owner of the business.

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engaging in the sale of alcohol, nor was its application accurate and complete. Additionally, there is evidence to show that the petitioner attempted to transfer its liquor license in violation of I.C. § 23-904(4). The petitioner has failed to establish that the agency acted arbitrarily or capriciously.

The petitioner argues that the agency engaged in improper rulemaking in instituting what it calls a "totality of the circumstances test." In *Asarco Inc. v. State*, 138 Idaho 719, 723, 69 P.3d 139 (2003), the Idaho Supreme Court specifically addressed what type of agency action is a rule, subject to formal rulemaking. It stated,

> [t]hus, under the statutory definition, an agency action is a rule if it (1) is a statement of general applicability and (2) implements, interprets, or prescribes existing law. Nonetheless, this definition of a rule is too broad to be workable. Under such a definition, virtually every agency action would constitute a rule requiring rulemaking procedures. Therefore, in order to provide further guidance in determining when agency action requires rulemaking, this Court adopts the reasoning of the district court and considers **the following characteristics of agency action indicative of a rule: (1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, *and* (6) is an interpretation of law or general policy.**

Id. (internal citation omitted) (emphasis added). There is no showing by the petitioner that the hearing officer, in his decision, adopted such a test, as asserted by the petitioner. As will be explained in greater detail in section "D" below, this Court does not believe the agency has adopted any new rule and is simply interpreting and implementing what Title 23 requires. ABC is not prescribing a legal standard or directive not otherwise provided for by the enabling statute; nor is it enacting a rule that operates only in future cases. To have a liquor license, an applicant must have a beer and wine license. I.C. § 23-910(5). To get a beer and wine license the applicant must be the bona fide owner of the business. I.C. § 23-1010(2)(a). No person except the licensee can exercise any of the privileges granted by the liquor license. I.C. § 23-908(1).

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Each new liquor license must be put into actual use by the licensee for six months after issuance and cannot be transferred to anyone else for two years. I.C. § 23-908(4). Additionally, the applicant for a liquor license must list all parties that have a financial interest in any business being carried on in the licensed premises. I.C. § 23-905(3). The agency does not need to engage in formal rule making to enforce these statutory provisions. It should also be noted, the agency's position prior to 2004, as articulated by the petitioner, was never adopted via formal rulemaking. The agency, from the perspective of the petitioner, seemed to operate in a manner that tolerated management agreements, regardless of their conflict with the statute. As this policy was never adopted via formal rulemaking, it is unclear to this Court why a deviation from it would require such a formality. Given that the petitioner has acknowledged that a statute trumps an administrative rule or policy, clearly a deviation from an administrative policy that seemed to run counter to the statute is valid. This Court does not take the position that for an agency to deviate from a policy running counter to the law that formal rulemaking is required. Clearly, the agency should always be interpreting statutes and implementing policy in conformance with the law. For the reasons articulated below, this Court does not believe the petitioner to have been in conformance with Title 23, does not believe the pre-2004 policy (as characterized by the petitioner) of ABC was in conformance with the statute, and does not believe formal rulemaking is required to correct that informal policy.

The petitioner additionally argues that I.C. § 23-1010(6) provides it a right to cure any deficiency in its application. I.C. § 23-1010(6), states, in relevant part, "[i]f at any time during the period for which license is issued a licensee becomes unable to make the affirmative showings required by this section, license shall be revoked, or, **if disqualification can be removed, the license shall be suspended until the same shall be removed.**" (Emphasis

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added). The statute requires a right to cure only if the disqualification can be removed. However, as will be discussed below, the disqualification in this case cannot be cured, as the petitioner was never the bona fide owner of Zou 75, never put the license into actual use, and failed to list all parties that had a financial interest in the license on its application. Additionally, the evidence shows that the petitioner attempted to transfer its liquor license without approval for financial gain, in violation of I.C. § 23-908(4), under the guise of a management agreement.

D. Statutory Interpretation

> The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction. *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009) (internal citations omitted).

State v. Schulz, 151 Idaho 863, 264 P.3d 970, 973 (2011).

> If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. Id. It is incumbent upon a court to give a statute an interpretation which will not render it a nullity. Constructions of a statute that would lead to an absurd result are disfavored.

State v. Decker, 152 Idaho 142, 267 P.3d 729, 732 (Ct. App. 2011).

Because the legislature has entrusted ABC with the administration of liquor licenses, "this court may defer to [ABC's] interpretation of the statutes so long as that interpretation is reasonable and not contrary to the express language of the statute." *Kuna Boxing Club, Inc. v. Idaho Lottery Commission*, 149 Idaho 94, 97, 233 P.3d 25 (2009). In *J.R. Simplot Co. v. Tax*

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Com'n, 120 Idaho 849, 820 P.2d 1206 (1991), the Idaho Supreme Court adopted a four prong test for determining the appropriate level of deference to be given to an agency's construction of a statute. This four prong test states that an agency's construction of a statute will be given great weight if: (1) the agency has been entrusted with the responsibility to administer the statute at issue; (2) the agency's construction of the statute is reasonable; (3) the statutory language at issue does not expressly treat the precise question at issue; and (4) any of the rationales underlying the rule of deference are present. *Id.* at 862.

While neither party argues the statutes are ambiguous, three terms are at issue in this case. The first of these terms is "bona fide owner." As articulated above, a beer and wine license may only be issued to a bona fide owner of a business and a beer and wine license is required to obtain a liquor license. I.C. §§ 23-910(5), 23-1010(2)(a). The term "bona fide owner" is in dispute in this case. I.C. § 23-902(17) states that all terms not defined in that statute are to be given their ordinary and commonly understood meaning. Black's Law Dictionary defines "bona fide" as "1. Made in good faith; without fraud or deceit. 2. Sincere; genuine." (9th ed. 2009).[2]

Webster's defines "genuine" as "*a*: actually having the reputed or apparent qualities or character *b*: actually produced by or proceeding from the alleged source or author *c*: sincerely and honestly felt or experienced." MERRIAM-WEBSTER DICTIONARY, *available at*: www.merriam-webster.com. Webster defines the verb "own" as "1 *a*: to have or hold as property *b*: to have power or mastery over 2: to acknowledge to be true, valid, or as claimed." *Id.* Therefore, this Court finds the common and ordinary meaning of "bona fide owner" to be the

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[2] "Bona fide" is defined as "[r]eal, actual, genuine, and not feigned." BLACK'S LAW DICTIONARY 177 (6th ed. 1990).

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actual person that has mastery over the restaurant, Zou 75. Yankee D's claims to be the bona fide owner of Zou 75.

This Court notes that Zou 75 has been opened for business since 2002, five years prior to the issuance of Yankee D's liquor license.[3] Until 2007, Zou 75 was owned by 75, Inc. and was run by Cronin. Cronin had his own beer and wine license for the premises. Cronin had filed with the Idaho Secretary of State to use the assumed business name, Zou 75. Since its opening in 2002, Zou 75 has been operated out of 416 N. Main Street, Hailey, ID. The premises were leased to 75, Inc., dba Zou 75, by R&B Ventures, effective July 1, 2002. Cronin signed the initial lease for both R&B Ventures and 75, Inc. Effective February 1, 2007, Cronin entered into a sublease from 75, Inc. to Yankee D's, of the same premises where Zou 75 was being operated. The rent was to be $2,500 per month and the sublease was for two years; to be effective on the same day, February 1, 2007, that 75, Inc. and Yankee D's entered into a management agreement, whereby all/most of the rights and obligations transferred to Yankee D's in the rental agreement were reversed. Essentially, the management agreement returns almost everything exactly as it was before the lease, except Yankee D's is technically the owner. However, 75, Inc., dba Zou 75, as the manager, is exclusively responsible for on-premises management of the sale and service of alcohol; while Yankee D's is to supply all of the necessary equipment for the restaurant, 75, Inc. had already supplied the same in the sublease agreement; 75, Inc. was responsible for all operating costs, including utilities, wages, salaries, payroll, and liability insurance, including dram shop liability; 75, Inc. was to pay all taxes; 75, Inc. indemnified Yankee D's against all liability; 75, Inc. was to give Yankee D's money to purchase alcohol; and 75, Inc. was to pay to Yankee D's monthly the exact same amount Yankee D's was to pay to 75, Inc. for rent, effectively canceling each other out. Therefore, Yankee D's was not actually

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exchanging any money for rent. 75, Inc., the manager, was to keep all proceeds from the business and since the rent they were to collect was the same as the fee they were to pay, they effectively exchanged no money with Yankee D's for the first six months. After that, discounting the rent Yankee D's was to pay to 75, Inc., 75, Inc. was to pay Yankee D's $500 per month from month seven to month thirteen and then $1000 a month after that until the end of the agreement. Clayton told ABC that while he had not been the owner of Zou 75 previously, he was the owner beginning in 2007. There is no evidence that Yankee D's or Clayton ever had any involvement with Zou 75, except to provide Zou 75 with the alcohol 75, Inc. paid for and to receive a monthly check from Zou 75 after the first six months, clearly for use of Yankee D's liquor license. Cronin was even sending in the liquor license renewal applications and, in 2008, used 75, Inc.'s sale tax identification number for Yankee D's. On January 30, 2007, Cronin, of 75, Inc., stated, as reported in the local newspaper, that Clayton had called him up "to note his good fortune in receiving a new (and rare) State of Idaho liquor license and needed a place to 'park' the license." (AR, Pg. 926). Cronin went on to say that he viewed "parking" it at Zou 75 for two years before he could buy it as an "investment." *Id.* "Cronin noted the nascent license will cost him $15,000 over its first two years, plus the attendant taxes. The eventual cost, Cronin said, may run above $200,000." *Id.* The City Council Minutes from January 30, 2007, reflect the same statements from Cronin, where he insisted Zou 75 was not up for sale. *Id.* at 930. Yankee D's intention to "park" its liquor license at Zou 75 for the requisite two years before it could sell it to Cronin, does not sound like the action of a bona fide owner, as intended by the statute. Indeed, I.C. § 23-908 states that only the licensee may exercise any of the privileges of the license.

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[3] Zou 75's history and owners are available for review on their website. *See* http://zou75.com/.

The petitioner argues that it was ABC policy, prior to 2004, to allow management agreements, such as the one in this case. The petitioner cites *Fischer v. Cooper*, 116 Idaho 374, 775 P.2d 1216 (1989), as an example of the validity of management agreements.[4] However, *Fischer*, like Title 23, states that "only named licensees may operate under the authority of the license." *Id.* at 377. The court in *Fischer*, found that the licensee could still be held liable under a dram shop suit, regardless of a management agreement. This Court is not prepared to deny that Yankee D's may very well be subject to suit in such a circumstance. Indeed, this Court would agree that "a licensee should not be entitled to the benefits of the enterprise, yet be relieved of the responsibilities by merely contracting them away." *Id.* at 378 (quoting *Alesna v. Legrue*, 614 P.2d 1387, 1391 (Alaska 1980)). This Court also will not claim that management agreements are invalid in all cases, as this Court is only to decide the case before it.[5] The issue is the validity of the management agreement in this case and *Fischer* in no way affirms the validity of 75, Inc. and Yankee D's management agreement. The petitioner also argues that as long as it was "responsible to ABC and the public" it was in compliance with ABC Policy.

There are several problems with the petitioner's arguments. First, as reflected in the management agreement, 75, Inc. indemnified Yankee D's of all liability and it was 75, Inc. that had to obtain insurance, presumably to be responsible to the public. Second, Yankee D's did not apply for a liquor license prior to 2004. Yankee D's applied in 2007, three years after this

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[4] This Court notes that *Fischer* is a case that held that dram shop liability can still apply to a licensee, despite relinquishment of operational control. As such, its applicability to this case is limited.

[5] "[O]ur object is simply to decide the case before us, and not to write a general treatise." *State v. Gutke*, 25 Idaho 737, 139 P. 346, 352 (1914) (quoting *Ex Parte Nielsen*, 131 U.S. 176, 190 (1889)). Issuing an opinion on a matter that has no practical effect on this case would require the Court to render an impermissible advisory opinion. *See State v. Manzanares*, No. 35703, 2012 WL 29344, *6 (Idaho Jan. 6, 2012). "This Court is not empowered to issue purely advisory opinions." *Taylor v. AIA Services Corp.*, 151 Idaho 552, 261 P.3d 829, 846 (2011) (quoting *MDS Invs., L.L.C. v. State*, 138 Idaho 456, 464-65, 65 P.3d 197 (2003)). This Court is not to issue an advisory opinion in an effort to avoid the issue in future cases. *See State v. Barclay*, 149 Idaho 6, 9, 232 P.3d 327 (2010). Advisory opinions are not permissible because judgment can only be rendered in a case where an actual or justiciable controversy exists. *See Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232 (2006).

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supposed policy change, so interpretations by ABC prior to 2004 had no relevance to the petitioner. Third, interpretations by ABC contrary to the statute are trumped by the statute. Title 23 says only a bona fide owner can obtain a license and only the licensee can exercise the privileges of the license. Yankee D's has produced no evidence to support its claim it was the bona fide owner of Zou 75 and, regardless, 75, Inc. as the "manager" of Zou 75 was the entity actually selling alcohol to customers. A bona fide owner does not "park" its liquor license at someone else's restaurant and does not operate their business in name only. The court, in *Uptick*, found judicial decisions from Arizona and Montana persuasive, which stated that the statutory language "presupposes that the person making application for a liquor license will be the true owner thereof and will not, in fact, be acting for another who is undisclosed." *Clark v. Tinnin*, 304 P.2d 947, 949 (Ariz. 1956); *Feurherm v. Schmaing*, 592 P.2d 924, 930 (Mont. 1979). It is clear from the evidence before the hearing officer that the true or bona fide owner of the premises that was to be engaged in the sale of liquor was 75, Inc. and not Yankee D's, LLC.

As cited above, I.C. § 23-908(4) requires that the *original licensee* place the license into *actual use* for at least six months. It was 75, Inc., and not Yankee D's, that placed the license into actual use. According to Webster Dictionary, "actual" means "not false or apparent." MERRIAM-WEBSTER DICTIONARY. "Use" is defined as "the act or practice of employing something." *Id.* Yankee D's, the "original licensee," never put the license into actual use. It was 75, Inc., dba Zou 75, that actually used the license. Indeed, Yankee D's use could certainly not be characterized as "not false." As this Court has found that Yankee D's was never the bona fide owner of Zou 75 and as the original licensee, it would be impossible for it to have put the license into actual use.

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I.C. § 23-908(4) also prevents any transfer of the license for two years from the date of issuance. The petitioner argues that it is impossible for it to have transferred its liquor license to 75, Inc., dba Zou 75, because a transfer requires approval by ABC. By this logic, a licensee could never violate that section of I.C. § 23-908(4), because no such thing as a transfer exists without permission of ABC and permission cannot be granted for two years. Webster Dictionary defines "transfer" as "to pass from one person, place, or situation to another." MERRIAM-WEBSTER DICTIONARY. Cronin's own statements to the Hailey City Council and the terms of the sublease and management agreements clearly reveal an attempt to transfer, without waiting two years and obtaining ABC approval. 75, Inc. was essentially renting the liquor license from Yankee D's, which becomes evident upon a close reading of both agreements. Cronin specifically acknowledged that Yankee D's intended to "park" the liquor license at Zou 75 until it could be sold in two years. Title 23 clearly intended to prevent any such actions.

Lastly, under the management agreement, 75, Inc. clearly had a financial interest in the sale of liquor. Under paragraph 6 of the Management Agreement, it states that the manager, 75, Inc., is to retain all gross revenues from the operation of the business, including from the sale of food and beverages. (AR, Pg. 650-51). The management agreement was effective February 1, 2007, but was signed on January 22-23, 2007. I.C. § 23-905 required Clayton, i.e. Yankee D's, to list all persons who had a financial interest in any business to be carried on in the licensed premises on the liquor license application. Clayton submitted that application on January 23, 2007. Clayton specifically checked "no" on his application when asked if anyone else had a financial interest in the business. (AR, Pg. 405). Clayton further stated that he was the only member of Yankee D's, LLC and that he was the only manager of the LLC. The Court would also note from the record,

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Clayton, and not Yankee D's, filed a Certificate of Assumed Name doing business as ZOU 75, which was the same dba previously filed by 75, Inc. In the July 2008 application for renewal of the liquor license for Yankee D's, Cronin listed himself as a member of the LLC. The circumstances surrounding the issuance and renewal of the liquor license for Yankee D's can only be understood as false, in violation of I.C. § 23-905.

E. Quasi-Estoppel

"Quasi-estoppel is properly applied when one party unconscionably asserts a position inconsistent with a previously taken position to the detriment of [the] other party." *Naranjo v. Idaho Dept. of Correction*, 151 Idaho 916, 265 P.3d 529 (Ct. App. 2011). To apply in this case, the petitioner would have to display that ABC had changed its position and that such a change was unconscionable. *Id.*

> The doctrine of quasi-estoppel applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Terrazas v. Blaine County ex rel. Bd. Of Com'rs, 147 Idaho 193, 200, 207 P.3d 169 (2009). The doctrine only applies when "...it would be unconscionable to allow a party to assert a right that is inconsistent with a prior position." *Sagewillow v. Idaho Dept. of Water Resources*, 138 Idaho 831, 845, 70 P.3d 669 (2003). Further, to invoke the doctrine of quasi-estoppel, the petitioner must show the party against whom it is sought to be applied has previously taken an inconsistent position, with knowledge of the facts and its rights, to the detriment of the party seeking application of the doctrine. *KTVB Inc. v. Boise City*, 94 Idaho 279, 282, 486 P.2d 992 (1971); *Herrmann v. Woodell*, 107 Idaho 916, 922, 693 P.2d 1118 (Ct. App. 1985). According to the petitioner, ABC took a different position regarding management agreements before 2004 than it

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did after 2004. In fact, the evidence in the record supports the finding that Clayton was well aware, at the time of his application, that ABC required that liquor licenses only be issued to those who were the bona fide owners of the business to be engaged in the sale of alcohol. The petitioner has not argued that ABC's position has changed since 2004. The evidence in the record, from the standpoint of ABC, is that when it initially issued the license, it did so under the belief, based on the representations of Clayton, that Yankee D's would be the owner of the business engaged in the sale of alcohol. The record reflects that on March 13, 2007, ABC sought information from Clayton as to his "financial interest in the restaurant Zou 75," documentation that Clayton was the "bona fide owner of Zou 75," and that ABC relied upon the information and representations of Clayton as to ownership of the restaurant. (AR, Pg. 455).

Therefore, it is unclear to this Court that any change was made immediately prior to, during, or after the petitioner's 2007 application. It is the petitioner's position that prior to 2004, ABC was turning a blind eye to management agreements and their implication on the licensee's role as the bona fide owner, putting the license into actual use for six months, and not transferring that license for two years. Surely, such a laissez-faire approach would advantage a licensee and a change in that position would be a disadvantage to the applicant. However, ABC is not in a position to apply Title 23 in a manner contrary to the plain language of the statute. This Court is not prepared to determine that all management agreements are invalid, but in this case, the management agreement in concert with the lease agreement was a thinly veiled attempt to rent out a liquor license, which was not yet available for valid transfer. This is clearly in conflict with the statute. This Court cannot say the licensee was induced to change its position or that it would be unconscionable to permit ABC to enforce the statute as written. As the

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petitioner has conceded, any interpretation of the law in conflict with the law is trumped by the plain language of Title 23.

It is true that Yankee D's liquor application was approved and it was issued a liquor license. This was in large part based on the representations of Clayton that he would be the "owner" of the business, i.e. ZOU 75, engaged in the sale of alcohol; when in reality, is was 75, Inc. that was the business engaged in the sale of alcohol. The petitioner cannot convincingly argue that the issuance of a liquor license somehow condoned any behavior in conflict with the law. As stated above, ABC has asserted that it simply does not have the resources to investigate every application fully. The applicant has a responsibility to fill out the application truthfully. Clearly, ABC had reservations about the application, as depicted in the additional correspondence between Davidson, Clayton, and Crockett. It was not until Cronin submitted the liquor license renewal for Yankee D's in 2008, listing himself as a member of Yankee D's and using 75, Inc.'s sales tax identification number, that ABC was alerted to a possible problem with the license. I.C. § 23-933 states that ABC "may suspend, revoke, or refuse to renew a license issued pursuant to the terms of this chapter for any violation of or failure to comply with the provisions of this chapter." Yankee D's was required to be in compliance with the law at all times, regardless of a lack of enforcement prior to 2004.

VI.

CONCLUSION

The petitioner failed to establish that the agency's decision prejudiced a substantial right and has otherwise failed to establish a violation of I.C. § 67-5279(3). For the reasons set forth above, the Findings of Fact, Conclusions of Law, and Preliminary Order RE: Motions for Summary Judgment, which became final by operation of law and the revocation of the liquor

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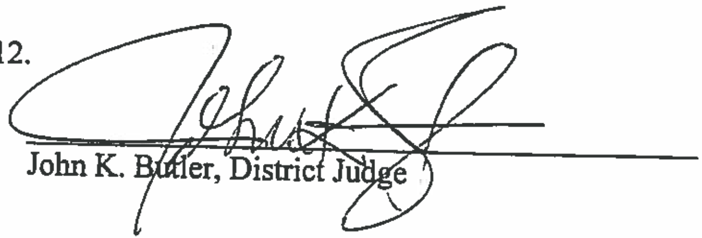
license issued to Yankee D's, LLC is hereby AFFIRMED. The Order of Stay of Administrative Proceedings Upon Judicial Review entered on October 3, 2011 is hereby VACATED. The matter is hereby REMANDED to the agency for further administrative proceedings, if any, consistent with this opinion.

IT IS SO ORDERED.

DATED this 1 day of May, 2012.



John K. Butler, District Judge

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CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 2 day of May, 2012, a true and correct copy of the foregoing was mailed, postage paid, and/or hand-delivered to the following persons:

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