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A CONTESTED MATTER BEFORE THE DIRECTOR  
OF THE IDAHO STATE POLICE

Last Chance, Inc.

Applicant,

v.

Idaho State Police, Alcohol Beverage Control,  
Respondent.

Case No. 07ABC-0004

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW &  
PRELIMINARY DECISION**

This matter, having been fully submitted to Peg M. Dougherty, the designated Hearing Officer for the Idaho State Police, and the determination made that oral argument was not necessary; the record of the case has been reviewed, the proof offered by the respective parties has been examined, the arguments advanced by the parties in their briefs have been considered and the undersigned hearing officer hereby renders the following Findings of Fact and Conclusions of Law.

**I.**

**ISSUE**

Whether the Idaho State Police Alcohol Beverage Control Bureau (ABC) rightfully denied the application for a new Incorporated City Liquor License (hereinafter "License") offered to the Applicant, Last Chance, Inc.

**II.**

**FINDINGS OF FACT**

1. In a letter dated September 5, 2006, Mr. and Mrs. Schott of Peter Schott's, Inc. (hereinafter "Schotts"), as a priority applicant, were notified by ABC of the availability of a new License. In a letter dated September 14, 2006, Peter Schott as President of Schotts, accepted the

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offer of the License indicating that he would complete the application and do “all things necessary to put the License into use in accordance with ISP rules and State statutes.”

2. Over the following six months Schotts completed the application process, and submitted its application materials indicating that Schotts would be the Licensee and the License would be placed at the business located at 249 S. 16<sup>th</sup> Street, Boise. According to the application materials the building at that location is owned by 16<sup>th</sup> Street Building, LLC and was leased to Arnell Jones and John Q. Hardy, Jr. The Lease Guarantor is House of Catfish and Ribs at the Connector (“House of Catfish”) with Patrice Thomas signing the lease on its behalf. An Assumed Business Name certificate for House of Catfish was included in the materials indicating Patrice and Chantrice Thomas as the individuals doing business as House of Catfish.

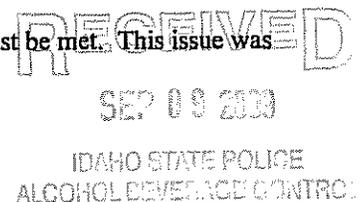
3. Included with Schotts’ application materials is an Agreement and Sublease entered into between Schotts, identified as “Licensee” and Patrice Thomas dba House of Catfish, identified as “Owner” in which Schotts hires Thomas dba House of Catfish to “provide the day-to-day administration, management and operation of the sale of liquor by the drink” at the leased premises.

4. On March 6, 2007, following submission of its application and supporting materials, Peter Schott met with ABC personnel to discuss Schotts’ License application and issues that ABC saw with regard to the ownership and management of House of Catfish, where the License was to be placed. During that meeting Peter Schott indicated that he had obtained five liquor licenses in the past, one of which was new. ABC explained that Schotts’ plan was equivalent to leasing the License to Thomas dba House of Catfish rather than placing it into use by Schotts, the applicant or original licensee, as required by statute. ABC specifically mentioned the Agreement and Sublease as problematic.

5. Upon completion of its application investigation, ABC, in a letter dated March 30, 2007, denied Schotts’ application on the basis that it did not meet the requirements for a license to sell liquor at retail by the drink and to sell beer at retail, specifically ABC found that Schotts did not affirmatively show that it was the bona fide owner of the business engaged to sell beer at retail.<sup>1</sup>

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<sup>1</sup> The hearing officer notes that the notice also states that suitable premises requirement must be met. This issue was not briefed by either party and thus has not been addressed in this decision.



6. Pursuant to a change in the Rules Governing ABC, effective March 8, 2007, ABC granted Schotts an extension of time to submit a complete application for the available license. Thus, Schotts was notified that the deadline for submission of any supplemental information related to its application was extended until July 3, 2007.<sup>2</sup> The notice specifically states that the application must affirmatively show that the applicant is the bona fide owner of the business which will be engaged in the sale of alcoholic beverages.

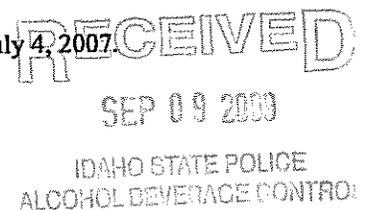
7. Subsequently, on June 28, 2007, ABC received new application materials from Peter Schott, requesting that the License be issued to Last Chance, Inc., doing business as City Grill at 199 N. 8<sup>th</sup> Street in Boise. The application indicates the License Proprietor to be Last Chance, Inc., Peter Schott, President. Last Chance, Inc. provided its corporation documents indicating that it was a new Subchapter S Corporation owned equally by shareholders Peter and Emily Schott. In the Application Financial Information, Idaho Independent Bank is listed as the bank for the business with Mitch Thomas and Christine Reed as persons authorized to sign on the account.

8. Other documents submitted by Last Chance, Inc. include the Articles of Organization for City Grill Concepts, LLC, showing Mitchell Thompson and Christine Reid as the managers and persons responsible for forming the LLC; an Assumed Business Name Certificate indicating City Grill as the assumed business name of Mitchell Thompson and Christine Reid; and a lease agreement between Charterhouse Boise Downtown Properties, LLC (Landlord); City Grill Concepts, LLC (Tenant) for 199 N. 8<sup>th</sup> Street signed on behalf of City Grill Concepts, LLC by Mitch Thompson and Christine Reid.

9. Also included with the application materials is an Agreement and Sublease between Last Chance, Inc. as Licensee and City Grill Concepts, LLC dba City Grill, Mitchell R. Thompson and Christine R. Reid ("City Grill") as Owner. This document is virtually the same as the agreement entered into between Schotts and House of Catfish. It provides that City Grill will be responsible for the day-to-day administration, management and operation of the sale of liquor by the drink at 199 N. 8<sup>th</sup> Street. Last Chance, Inc.'s responsibilities under the Agreement are primarily to maintain the License and purchase the liquor by the drink inventory. The Agreement also provides that Last Chance, Inc. sub-leases the restaurant and bar from City Grill

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<sup>2</sup> ABC notes in its brief that it's target date for expiration was between July 1, 2007 and July 4, 2007.



for the purpose of selling liquor by the drink. The rent to be calculated on the basis of a portion of net income, if any, from the sale of liquor by the drink.

10. In a letter dated July 18, 2007, ABC informed Last Chance, Inc. that it did not qualify for the License because Last Chance, Inc. did not sufficiently prove that it was the bona fide owner of the business to be licensed and it failed to provide a requested Certificate of Assumed Business Name showing that Last Chance, Inc. was in fact doing business as City Grill.

11. Following ABC's refusal to grant the License to Last Chance, Inc. it received a letter from Mitchell Thompson, requesting that ABC reconsider its decision. The letter explains that City Grill Concepts, LLC was created to provide clients with a fully designed and operational restaurant and bar with the financial liability and ownership of the "concept" left to the client. City Grill was its first project and Peter Schott's ability to provide the liquor license was a consideration of the client relationship that was formed by City Grill Concepts, LLC and Last Chance, Inc.

12. On August 15, 2007, ABC received the "Application" of Last Chance, Inc. contesting ABC's refusal to issue the License.

### III.

#### RELEVANT AUTHORITIES

A. The Idaho Liquor Act governs the regulation of the sale of alcoholic beverages including the sale of liquor by the drink and provides in pertinent part:

**Idaho Code §23-514. Nature of permit.** A permit shall be a personal privilege, subject to be denied, revoked or canceled for its abuse. It shall not constitute property; nor shall it be subject to attachment and execution; nor shall it be alienable or assignable. Every permit shall be issued in the name of the applicant and no person holding a permit shall allow any other person to use the same. The dispensary, if not satisfied of the integrity and good faith of an applicant for a permit, may refuse to issue the same, or may refuse to issue a renewal thereof.

**Idaho Code §23-902. Definitions.** ... (17) 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.

**Idaho Code §23-903. License to retail 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

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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.

**Idaho Code §23-908. Form of license – Authority ...** (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.

**Idaho Code §23-910. Persons not qualified to be licensed**

(5) A person who does not hold a retail beer license issued under the laws of the state of Idaho.

**Idaho Code §23-1001. Definitions**

(1) 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.

**Idaho Code §23-1010. License to sell beer at retail – Application procedure and form – Showing of eligibility for license and disqualifications. ...** (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. ...

(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

....

B. The administrative Rules Governing Alcohol Beverage Control provide in pertinent part:

**IDAPA 11.05.01.010. DEFINITIONS.**

**03. New Licenses.** For purposes of Section 23-908(4), Idaho Code, a “new license” is one that has become available as an additional license within a city’s limits under the quota system after July 1, 1980. The requirement of Section 23-908(4), Idaho Code, that a new license be placed into actual use by the licensee

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and remain in use for at least six (6) consecutive months is satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week. (3-8-07)

#### **IDAPA 11.05.01.013. PRIORITY LISTS.**

**02. Written Notification.** When an incorporated city liquor license becomes available Alcohol Beverage Control offers it in writing to the applicant whose name appears first on the priority list. 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. (3-8-07)

C. Contested cases under the Alcohol Beverage Control Bureau are governed by the rules of administrative procedure of the Attorney General, pertinent parts of which are set forth as follows:

**IDAPA 04.11.01.415. CHALLENGES TO STATUTES (RULE 415).** A hearing officer in a contested case has no authority to declare a statute unconstitutional. However, when a court of competent jurisdiction whose decisions are binding precedent in the state of Idaho has declared a statute unconstitutional, or when a federal authority has preempted a state statute or rule, and the hearing officer finds that the same state statute or rule or a substantively identical state statute or rule that would otherwise apply has been challenged in the proceeding before the hearing officer, then the hearing officer shall apply the precedent of the court or the preemptive action of the federal authority to the proceeding before the hearing officer and decide the proceeding before the hearing officer in accordance with the precedent of the court or the preemptive action of the federal authority. (7-1-93)

#### **IV.**

#### **DISCUSSION**

In the absence of a specific statute or promulgated rule, the general rule in administrative law is that the party that seeks to change the status quo bears the burden to establish that the action(s) taken are appropriate. *See generally* 2 K. Davis, Administrative Law Treatise, § 14.14 (1958). In this case, the Applicant, Last Chance, Inc., seeks to establish that it should be issued

the License at issue. As such, it bears the burden of proving by a preponderance of the evidence that ABC wrongfully refused to issue the License.

The license offered in this instance is one for the sale of liquor by the drink. Last Chance, Inc., as the applicant for the license must meet the requirements for both the sale of liquor by the drink and for the sale of beer at retail. *See* I.C. § 23-910(5). A license for the sale of beer can only be issued to the bona fide owner of the business applying for the license that will be engaged in the sale of beer. *See* I.C. §23-1010(2)(a). A license issued for the sale of liquor by the drink is issued to one person, which by definition includes a corporation such as Last Chance, Inc., and the privileges granted by the license can only be exercised by the person the license is granted to. *See* I.C. §23-908(1). It is these two requirements that ABC determined were not met by Last Chance, Inc.

An application for the sale of beer requires that the applicant must affirmatively show that it is “the bona fide owner of the business which will be engaged in the sale of beer at retail and with respect to which [the] license is sought.” I.C. § 23-1010(2)(a). The phrase “bona fide owner of the business” is not defined in the Idaho Liquor Act. The term “bona fide” is used throughout the Act, without definition, in reference to a bona fide golf course, bona fide overnight accommodations, bona fide chair lift, bona fide equestrian facility, bona fide members’ guests, bona fide club, bona fide convention center, and bona fide gondola. *See* I.C. § 23-903. The Act instructs that any words or phrases used in the Act and not defined are to be given their ordinary and commonly understood and acceptable meanings. I.C. §§ 23-902(17) & 23-1001(I).

Black’s law dictionary defines “bona fide” as:

In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation of pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc. Real, actual, genuine and not feigned.

Blacks Law Dictionary (West 6<sup>th</sup> Ed. 1999).

Applying this definition to the various uses in the Act, one can identify that the term “bona fide” means genuine, real, or true. For example, a genuine or real golf course would not be a miniature golf course. The same applies to the Act’s reference to “owner of the business”; the applicant must be the real or genuine owner of the business that will be selling the beer under the license.

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Based on the application materials submitted by Last Chance, Inc., ABC determined that it had not affirmatively shown that it was the genuine or real owner of the business that would be selling beer under the license. Last Chance, Inc. argues that it is the owner of the business and it planned to hire City Grill to provide day-to-day administration, management and operation of the sale of beer and liquor by the drink. The application submitted to ABC identifies Last Chance, Inc. as the applicant, doing business as City Grill. ABC Ex. P. The owners of Last Chance, Inc. are identified as Peter and Emily Schott. *Id.* "City Grill" is the assumed business name of City Grill Concepts, LLC which is owned by Mitchell Thompson and Christine Reid. ABC Ex. U.

The following pertinent provisions of the Agreement and Sublease entered into by Last Chance, Inc. and City Grill gives day-to-day administration, management and operation of the sale of liquor by the drink to City Grill:

Owner's (City Grill's) responsibilities and obligations under this Agreement shall include the following:

A. Promote, manage, and operate the sale of liquor by the drink at the Bar/Restaurant Facilities in a safe and responsible manner and in accordance with all applicable laws.

B. Ensure that the Bar/Restaurant Facilities are open for the sale of liquor by the drink to the general public no less than eight (8) hours per day, no fewer than six (6) days per week.

C. Comply with all statutes, regulations, and laws of the State of Idaho and all applicable city and county ordinances, regulations and laws applicable to the purchase and sale of liquor by the drink. [City Grill] shall immediately provide [Last Chance, Inc.] with notice should [City Grill] receive notice or have knowledge, of any violation or alleged violation of any such statute, regulation, or ordinance.

D. Maintain the Bar/Restaurant Facilities, supply all equipment, supplies and personal property (other than liquor by the drink inventory), and employ all persons necessary for the sale of liquor by the drink at the Bar/Restaurant Facilities.

E. Maintain, at all times during the term of this Agreement, separate books and records of liquor by the drink sales and report such information each calendar month and every Period ... to [Last Chance, Inc.]. [City Grill] acknowledges the requirement of [ABC] that there must be an accounting trial showing that [Last Chance, Inc.] directly receives into [Last Chance Inc.'s] own bank account, the gross profits for the sale of liquor by the drink, and agrees that said books and records shall be maintained accordingly.

...

G. Subject to the responsibility of [Last Chance, Inc.] ... to purchase, own and pay for the liquor by the drink inventory, [City Grill] shall otherwise maintain and manage an appropriate liquor by the drink inventory at the Bar/Restaurant Facilities.

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H. Provide an adequately trained staff for the sale of liquor by the drink at the Bar/Restaurant Facilities.

Agreement and Sublease, ABC Ex. S, pp.2-3.

The duties and obligations of Last Chance, Inc. as Licensee under the Agreement and Sublease include:

A. Maintain the liquor by the drink license, including processing annual renewal of licenses and payment, from Licensee's own bank account, of all license fees for liquor by the drink required by any government entity.

B. Pay, from Licensee's own bank account, all state sales, use, payroll, worker's compensation, federal, state or other taxes or obligations of Licensee arising pursuant to this Agreement.

C. Purchase and own, and pay for from Licensee's own bank account, the liquor by the drink inventory for sale under this Agreement at the Bar/Restaurant Facilities. [City Grill] will provide proof of any such inventory for sale as required by Licensee.

...

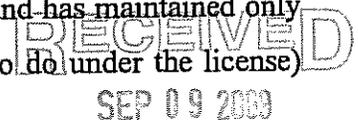
The compensation arrangement between Last Chance, Inc. and City Grill requires City Grill to submit all cash collected from the sale of liquor by the drink to Last Chance, Inc. which will deduct from the total its costs and expenses (with the exception of rent), and the cost of the liquor inventory. The remaining amount will be considered "Net Income." ABC Ex. S, p. 3, ¶ K & p. 4, ¶ A. Last Chance, Inc. then compensates City Grill in the following manner:

B. Licensee shall retain from Net Income the amount of One Thousand Two Hundred Fifty Dollars (\$1,250.00) per month. The balance of the Net Income, if any, shall be paid to [City Grill] (i) in compensation for services rendered by City Grill under this Agreement and (ii) as rent for the Bar/Restaurant Facilities under the sublease ... of this Agreement. If at any time the Net Income is insufficient to cover said \$1,250.00 monthly amount, [City Grill] shall pay Licensee the deficit amount upon demand.

*Id.* at p. 4.

Mitchell Thompson submitted a letter on behalf of City Grill Concepts, LLC stating that his and his partner's idea was for City Grill Concepts, LLC to design the business and to operate the business while turning over the financial liability and ownership of the "concept" to its client.

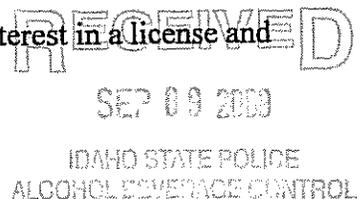
Last Chance, Inc. argues that it merely hired City Grill Concepts, LLC to provide management for the business; however, under its Agreement it has relinquished all decisions related to the actual sale of beer and liquor to City Grill Concepts, LLC and has maintained only the responsibilities for purchasing the liquor (as only it would be able to do under the license)



and reporting its sales. It claims to have subleased the premises but is only obligated to pay rent if liquor sales exceed \$1,250.00 after costs and expenses. City Grill is likewise compensated for its services provided to Last Chance, Inc. from the excess of liquor sales. The relationship presented by the Agreement and Sublease and the facts set forth by Last Chance, Inc. does not support a finding that Last Chance, Inc. is the real or genuine owner of the business where the beer will be sold.

Selling liquor by the drink is a privilege granted to a person or entity, in this case Last Chance, Inc., and that privilege can only be exercised by that person or entity. The application process is designed to make sure that licenses are being granted only to those who ABC trusts with the privileges that go along with licensure. A person wishing to obtain a liquor license must submit an application to ABC, setting forth the applicant's qualifications and statements and information relative to the premises where the liquor is to be sold. *See* I.C. §23-905. Only after investigation of the applicant and a determination that the contents of the application are true, that the applicant is qualified, and that the premises are suitable, may ABC, in its discretion, issue a license. *See* I.C. §23-907. This procedure "makes it clear that the legislature painstakingly attempted to ensure that [ABC] have complete control over who may own a liquor license, and that only persons who could be depended upon to advance the policies of the act were entitled to a license." *Uptick v. Ahlin*, 103 Idaho 364, 369, 647 P.2d, 1236, 1241 (1982).

It is well established that a liquor license is a privilege personal to the licensee. *See Nampa Lodge No. 1389 B.P.O.E. v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951); *and see McBride v. Hopper*, 84 Idaho 350, 372 P.2d 401 (1962). In *Uptick, supra*, the Court analyzed the personal nature of a liquor license in the context of a lease provision deeming that the liquor license was a "premises right" as opposed to a privilege granted to the licensee. In that case the owners of the premises argued that the original licensee intended to transfer the right to renew the license to the premises owners in the event that the original licensee ceased doing business at the premises. The Court held that "all rights in a liquor license are inseverable parts of a single legal interest which may not be transferred away at random or piecemeal." *Uptick*, 103 Idaho at 368 & 370, 647 P.2d at 1240 & 1242. The Court explained, "[t]he right to renew is included among the privileges appurtenant to a liquor license and is a privilege which is to be exercised exclusively by the named licensee. To hold otherwise would enable persons who have not subjected themselves to the scrutiny and approval of [ABC] to acquire an interest in a license and



circumvent the policy of the act that only qualified persons own licenses and exercise rights thereunder.” *Id.* at 369, 647 P.2d at 1241. While in the instant matter the argument is not that Last Chance, Inc. is seeking to formally transfer the License, the Agreement and Sublease it entered into with City Grill attempts to do that which the *Uptick* Court warns against, i.e., transfer random rights and privileges that are part of the License.

Such delegation of duties and responsibilities in effect attempts to transfer some of the rights and privileges of the liquor license. For example, the license authorizes the licensee to sell liquor by the drink (I.C. § 23-903), under the Agreement the sales are conducted, managed and accounted for by City Grill; the licensee is required to place the license into actual use for a period of six months which means the licensee has to make actual sales of liquor by the drink during at least eight hours per day, no fewer than six days per week (I.C. § 23-908(4) & IDAPA 11.05.01.010.03), under the Agreement City Grill is responsible for making sure the business is open for the requisite days and hours; and the licensee is charged with adhering to the statutes and regulations governing the sale of liquor by the drink but under the Agreement City Grill has the responsibility for complying with all statutes, regulations, and laws of the State of Idaho and all applicable city and county ordinances, regulations and laws applicable to the purchase and sale of liquor by the drink.

This arrangement between Last Chance, Inc. and City Grill is analogous to the arrangement in *Uptick*. Just as the *Uptick* Court was concerned that the agreement struck between the lessor and licensee giving the lessor the right to renew the liquor license, circumvented the scrutiny and approval process of ABC, the above-quoted provisions would allow City Grill to exercise the rights of a licensee without having submitted to the investigation of ABC, thus circumventing the policy of the legislature to only issue licenses to persons qualified under the act. I.C. § 23-901.

When viewing the entire relationship of Last Chance, Inc. and City Grill Concepts, LLC as a whole, it appears that Last Chance, Inc.’s role is to get the License while City Grill Concepts, LLC runs the business and pays Last Chance, Inc. for the use of the License. Such a relationship is in direct contradiction to the statute prohibiting transfer of the liquor license for two years from the date of issuance. Furthermore, in the context of the Idaho Liquor Act, the purpose of the Legislature as set forth in that Act, and the Legislative intent as interpreted by Idaho courts, the arrangement proposed between Last Chance, Inc. and City Grill Concepts, LLC

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appears to be an end run around that which the Legislature intended – requiring the original licensee to be the entity actually using the license upon its issuance.

Last Chance, Inc. has not produced evidence showing that it is more likely than not that it is the owner of the business which will be engaged in the sale of beer at retail or that it will be the entity exercising the privileges granted under a license to sell liquor by the drink.

## V.

### ATTORNEY FEES

Idaho Code Section 12-117 provides for the mandatory award of attorney's fees to prevailing parties in administrative hearings as follows:

Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

I.C. § 12-117(1).

An administrative tribunal is empowered under this statute to award fees to a litigant who prevails against an agency at the administrative level. *Stewart v. Department of Health and Welfare*, 115 Idaho 820, 771 P.2d 41 (1989). The Idaho Supreme Court has described the purpose of section 117 as follows:

We believe the purpose of that statute is two-fold: (1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never ha[ve] made.

*Bogner v. State Dep't of Rev. & Taxation*, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984).

A party is not entitled to attorney's fees if the issue is one of first impression in Idaho. *See Karel v. Department of Finance*, 144 Idaho 379, 162 P.3d 758 (2007) (finding because this was a matter of first impression in determining how the recordkeeping requirements should be applied, an award of fees under I.C. § 12-117 was denied), and *see SE/Z Const., L.L.C. v. Idaho State University*, 140 Idaho 8, 14, 89 P.3d 848, 854 (2004) (holding the facts gave rise to questions of first impression regarding application of Idaho's competitive bidding law, therefore the challenge brought by SE/Z was reasonably founded in fact and law). Attorney's fees are also

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inappropriate if Last Chance, Inc. presented a legitimate question to be addressed in this proceeding. *IHC Hospitals, Inc. v. Teton County*, 139 Idaho 188, 191-92, 75 P.3d 1198, 1201-02 (2003).

In attempting to obtain the License, Last Chance, Inc. failed to comply with the statutory requirement that it, as the original licensee, must be the bona fide owner of the business engaged in selling beer, and must be the only entity exercising the privileges granted by the License. As a result, ABC refused to grant it a liquor license. Therefore, ABC has prevailed in this matter and awarding attorney's fees would be appropriate if Last Chance, Inc. acted without a reasonable basis in fact or law. ABC recognizes that this is a case of first impression with regard to the challenge brought forth by Last Chance, Inc. As such, attorney fees pursuant to I.C. §12-117 are not warranted.

## VI.

### CONCLUSIONS OF LAW

1. ABC has subject matter jurisdiction over this proceeding and the hearing officer concludes that the Applicant's appeal was timely filed in this matter.
2. The promulgation of program rules involves a lengthy and rigorous process of public notification and legislative review. *See Idaho Code Section 67-5201 et seq.* Consequently, administrative hearing officers are imbued with limited jurisdiction which does not include the power or authority to invalidate federal or state statutes, rules or regulations. IDAPA 04.11.01.415. Rather, administrative hearing officers must develop the facts of the particular case and apply the promulgated rules, as those rules exist, to the facts of the matter.
3. The law places the burden of proof on the Applicant in this case to establish, by the preponderance of the evidence standard, facts supporting its contention that ABC.
4. The hearing officer concludes that the Applicant failed to meet its burden of showing that it is more likely than not that it is the owner of the business which will be engaged in the sale of beer at retail or that it will be the entity exercising the privileges granted under a license to sell liquor by the drink, such that ABC's refusal to grant the License at issue was inappropriate.
5. The hearing officer further concludes that attorney fees in this matter are not warranted as the question presented was one of first impression.

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## VII.

### PRELIMINARY DECISION

The weight of the evidence supports ABC's refusal to grant the liquor license to the Applicant, therefore; ABC's action is hereby **AFFIRMED**.

Pursuant to Idaho Code § 67-5243 this decision is a **PRELIMINARY ORDER**. It can and will become final without further action of the agency unless either party petitions for reconsideration before the hearing officer issuing this Preliminary Order or appeals to the Director of the Idaho State Police. Either party may file a motion for reconsideration of this Preliminary Order with the hearing officer issuing this Order within fourteen (14) days of the service date of this Order. The hearing officer issuing this Order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* I.C. § 67-5243(3).

Within fourteen (14) days after (a) the service date of this Preliminary Order, (b) the service date of the denial of a petition for reconsideration from this Preliminary Order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this Preliminary Order, any party may in writing appeal or take exceptions to any part of the Preliminary Order and file briefs in support of the party's position on any issue in the proceeding to the agency head (or designee of the agency head). Otherwise, this Preliminary Order will become a final order of the agency.

If any party appeals or takes exceptions to this Preliminary Order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the agency. Written briefs in support of or taking exceptions to the Preliminary Order shall be filed with the agency head (or designee). The agency head (or designee) may review the Preliminary Order on its own motion.

If the agency head (or designee) grants a petition to review the Preliminary Order, the agency head (or designee) shall allow all parties an opportunity to file briefs in support of or taking exceptions to the Preliminary Order and may schedule oral argument in the matter before issuing a final order. The agency head (or designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

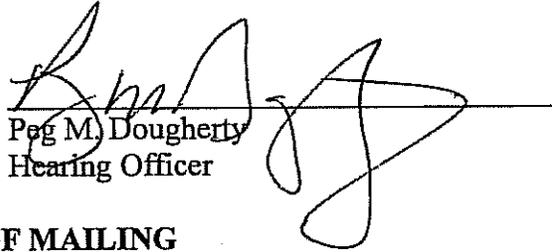
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SEP 09 2009

Pursuant to Idaho Code §§ 67-5270 and 67-5272, , if this Preliminary Order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: i. A hearing was held, ii. The final agency action was taken, iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or The real property or personal property that was the subject of the agency action is located.

This appeal must be filed within twenty-eight (28) days of this Preliminary Order becoming final. *See* Idaho Code § 67-5273,. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

IT IS SO ORDERED: January 22 2008.

  
Peg M. Dougherty  
Hearing Officer

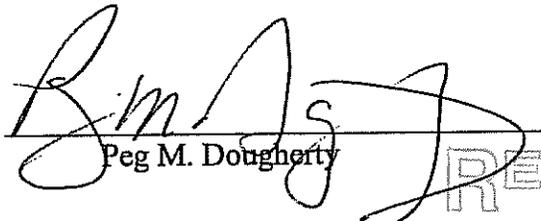
**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Preliminary Order was forwarded to the following parties by the method stated below on January 22 2008.

**Via FACSIMILE:**

Shane O. Bengoechea  
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Peg M. Dougherty  
**RECEIVED**  
SEP 09 2008

Peg M. Dougherty  
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Boise, ID 83701  
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Idaho State Bar #6043  
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A CONTESTED MATTER BEFORE THE DIRECTOR  
OF THE IDAHO STATE POLICE

Last Chance, Inc.

Applicant/Petitioner,

Case No. 07ABC-0004

v.

Idaho State Police, Alcohol Beverage Control,  
Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW &  
PRELIMINARY DECISION**

This matter, having been fully submitted to Peg M. Dougherty, the designated Hearing Officer for the Idaho State Police, and the determination made that oral argument was not necessary; the record of the case has been reviewed, the proof offered by the respective parties has been examined, the arguments advanced by the parties in their briefs have been considered and the undersigned hearing officer hereby renders the following Findings of Fact and Conclusions of Law.

**I.  
ISSUE**

Whether the Idaho State Police Alcohol Beverage Control Bureau (ABC) rightfully denied the application for a new Incorporated City Liquor License (hereinafter "License") offered to the Applicant, Last Chance, Inc.

**II.  
FINDINGS OF FACT**

1. In a letter dated September 5, 2006, Mr. and Mrs. Schott of Peter Schott's, Inc. (hereinafter "Schotts"), as a priority applicant, were notified by ABC of the availability of a new License. In a letter dated September 14, 2006, Peter Schott as President of Schotts, accepted the

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SEP 09 2006

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This appeal must be filed within twenty-eight (28) days of this Preliminary Order becoming final. *See* Idaho Code § 67-5273,. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

IT IS SO ORDERED: January \_\_, 2008.

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Peg M. Dougherty  
Hearing Officer

#### CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Preliminary Order was forwarded to the following parties by the method stated below on January \_\_, 2008.

**Via FACSIMILE:**

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Peg M. Dougherty

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